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Holly Everett
University of Kentucky

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Federal Sovereign Immunity and CERCLA: When is the United States Liable for Costs?

HOLLY EVERETT*

In 1980 Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act[1] to respond to the problems associated with abandoned and inactive hazardous waste disposal sites.[2] Provisions for financing the cleanup of these sites were also included in this statute. Essentially, CERCLA places the financial responsibility for cleanup on those parties responsible for the hazardous waste site.[3] In 1986 CERCLA was reauthorized and amended to include the Hazardous Substance Superfund.[4] This fund finances the federal government's response to hazardous waste. Additionally, Congress directed the federal government to use Superfund money for response actions and to recover all response costs from all parties responsible for the waste site.[5]

A problem arises, though, when the United States is itself a responsible party. Sovereign immunity may prohibit an action against the United States. Indeed, the United States may not be sued without its consent.[6] Consent is given when the United States explicitly waives sovereign immunity.[7] The Supreme Court has said waivers of sovereign immunity must be "unequivocally ex-

* Senior staff member, JOURNAL OF NATURAL RESOURCES & ENVIRONMENTAL LAW; J.D., University of Kentucky, Class of 1994; B.A., University of Louisville, 1990.

[1] CERCLA §§ 101-405, 42 U.S.C. §§ 9601-9675 (1988).

[2] *See* H.R. REP No. 1016, 96th Cong., 2d Sess. 22 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6125.

[3] United States v. R.W. Meyer, Inc., 889 F.2d 1497, 1500 (6th Cir. 1989).

[4] Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499, 100 Stat. 1613 (1986) (codified as amended in scattered sections of 42 U.S.C.) [hereinafter SARA].

[5] 42 U.S.C. § 9607(a).

[6] United Liberty Life Ins. Co. v. Ryan, 985 F.2d 1320, 1325 (6th Cir. 1993).

[7] *Id.*

pressed" in the statutory text, construed in favor of the United States, and not enlarged beyond the language of the statute.[8]

Courts construing the waivers of sovereign immunity found in CERCLA have reached conflicting decisions. One court has reasoned that CERCLA's remedial purpose leads to an expansive reading of its provisions in order to avoid frustrating the legislative purpose.[9] However, all courts do not follow this rationale. Thus, interpretations of the same section often result in different conclusions. This note will examine several recent cases in light of the judiciary's interpretations of CERCLA waivers.

I. STATE ACTIONS AGAINST THE FEDERAL GOVERNMENT

Sovereign immunity may be waived under CERCLA section 120. In *United States v. Pennsylvania Department of Environmental Resources*,[10] a court considered whether a state can order the federal government to clean up a federal facility. The Pennsylvania Department of Environmental Resource (DER) tested soil located on the Navy Ships Parts Control Center and found contamination by polychlorinated biphenyls (PCBs). Subsequently, the state issued to the Navy Control Center a cleanup order which cited a waiver of sovereign immunity under CERCLA as authority.[11] Specifically, Pennsylvania relied on section 120(a)(4) of CERCLA which states:

> State laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States . . . . The preceding sentence shall not apply to the extent a State law would apply any standard or requirement to such facilities which is more stringent than the standards and requirements applicable to facilities which are not owned or operated by any such department, agency, or instrumentality.[12]

[8] United States v. Idaho, 113 S.Ct. 1893, 1896 (1993).

[9] *See* United States v. Carolina Transformer Co., 978 F.2d 832, 838 (4th Cir. 1992).

[10] United States v. Pennsylvania Dep't of Natural Resources, 778 F.Supp. 1328 (M.D. Pa. 1991).

[11] *Id.* at 1330. Pennsylvania relied on the following state laws: Pennsylvania Clean Streams Law, 35 PA. CONS. STAT. §§ 691.3, 691.301, 691.307, 691.401 (Purden 1977 & Supp. 1991-92) and Pennsylvania Solid Waste Management Act, 35 PA. CONS. STAT. §§ 6018.301, 6018.302, 6018.501, 6018.601 (Purden Pamphlet 1991-92).

[12] CERCLA § 120(a)(4), 42 U.S.C. § 9620(a)(4) (1988).

The United States challenged Pennsylvania's exercise of power under this section.

The United States argued section 120(a)(4) waives sovereign immunity only for state laws that are similar in purpose to CERCLA.[13] In effect these state laws would require specific, predetermined standards for cleanup of waste. The United States based this argument on the phrase "removal and remedial action" which it said should be construed in a technical sense.[14] According to the United States, Pennsylvania was proceeding under general environmental laws because they permit ad hoc judgments about the cleanup and the standards to be applied.[15] Furthermore, the United States asserted the laws were inconsistent with CERCLA's goal of comprehensive cleanup of waste sites because the state laws were limited to only one kind of pollution.[16] Hence, the United States claimed it had not waived sovereign immunity for these state laws.

Pennsylvania argued that the United States had read the phrase "removal and remedial action" too narrowly. It pointed to the CERCLA definitions of remove, removal, and remedial action which are very broad.[17] The state also noted that section 101(24) includes enforcement activities within the meaning of removal and

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[13] *Dep't of Natural Resources*, 778 F.Supp. at 1330.

[14] *Id.*

[15] *Id.*

[16] *Id.* at 1331.

[17] *Id.* The definition of remove and removal is found in 42 U.S.C. § 9601(23) which states:

> The terms "remove" or "removal" means the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release.

CERCLA § 101(23), 42 U.S.C. § 9601(23) (1988).

The definition of remedial action is found in 42 U.S.C. § 9601(24) which states:

> The terms "remedy" or "remedial action" means those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment.

42 U.S.C. § 9601(24).

remedial action. Thus the state argued the laws provided for these actions because they allow the DER to order polluters to clean up sites within the state.[18]

The court agreed with Pennsylvania and held section 120(a)(4) waived sovereign immunity. It found Congress must have known of the broad definitions for removal and remedial action when it chose the phrase "state laws concerning removal and remedial action."[19] Accordingly, Congress could not have meant to restrict the application of the section to state laws which contain predetermined, objective, and precise standards for deciding when violations occur under state law. To do this, Congress would have included language to that effect in section 120(a)(4).[20] Thus, the court held that CERCLA section 120(a)(4) waives sovereign immunity.[21]

Recently, however, the First Circuit rejected a state's attempt to recover civil damages from the United States under CERCLA section 120. In *State of Maine v. Department of Navy*,[22] Maine filed an action which claimed the United States Navy's shipyard in Kittery, Maine had not complied with Maine's hazardous waste laws.[23] The Navy responded to this action by agreeing to comply with state regulations. However, the Navy refused to pay the punitive fines imposed by state law for past noncompliance by claiming sovereign immunity.[24]

Like Pennsylvania, Maine argued section 120 waived sovereign immunity. The court of appeals, though, rejected this argument. The court noted CERCLA uses language different from RCRA, but held that the reasoning in *United States Department of Energy v. Ohio* was still dispositive.[25]

According to the court, section 120 does not waive sovereign immunity because: (1) the language is unclear, and (2) the legislative history of CERCLA offers nothing with which to distin-

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[18] *Dep't of Natural Resources*, 778 F. Supp. at 1331.

[19] *Id.* at 1332.

[20] *Id.*

[21] *Id.*

[22] State of Maine v. Department of Navy, 973 F.2d 1007 (1st Cir. 1992).

[23] *Id.* at 1009.

[24] *Id.*

[25] *Id.* at 1010-11. In United States Dep't of Energy v. Ohio, 112 S.Ct. 1627 (1992), the Court held Congress did not waive sovereign immunity for civil fines imposed by a state for past violations of the Resource Conservation and Recovery Act ("RCRA").

guish *Department of Energy*.[26] Language waiving sovereign immunity must be "clear and unequivocal."[27] The language in CERCLA failed to meet this test because it could refer to prospective coercive fines, retrospective civil penalties, or both.[28] Furthermore, the Supreme Court's observation regarding section 6961 of RCRA applied to Maine's argument. In *Department of Energy* the court said:

> [T]he statute makes no mention of any mechanism for penalizing past violations, and this absence of any example of punitive fines is powerful evidence that congress had no intent to subject the United States to an enforcement mechanism that could deplete the federal fisc regardless of a responsible officer's willingness and capacity to comply in the future.[29]

The court of appeals also rejected Maine's effort to use the legislative history of CERCLA to argue legislators believed section 120 waived sovereign immunity. To do this, Maine relied on comments in a conference report.[30] These comments were not helpful to the court because they referred to both section 120 of CERCLA and section 6001 of RCRA, did not describe how CERCLA could or would differ from RCRA, and provided no mechanism for distinguishing *Department of Energy*.[31] Therefore, the court stated *Department of Energy* required it to hold that section 120 does not provide a clear and unequivocal waiver of sovereign immunity from civil penalties.[32]

II. Private Party Action Against the United States

A. EPA Regulatory Activity

Private parties have had mixed results in holding the federal government liable. For instance, in *United States v. Western Processing Co.*[33] the court found EPA regulatory activity will not subject the United States to liability. RSR Corp. filed a counter-

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[26] *Department of Navy*, 973 F.2d at 1011.

[27] *Id.*

[28] *Id.*

[29] *Id.* (referring to *Department of Energy*, 112 S. Ct. at 1640).

[30] *Department of Navy*, 973 F.2d at 1011 (referring to H.R. CONF. REP. NO. 962, 99th Cong., 2d Sess. (1986)).

[31] *Id.*

[32] *Id.*

[33] United States v. Western Processing Co., 761 F. Supp. 725 (W.D. Wash. 1991).

claim seeking contribution from the United States based on the Environmental Protection Agency's regulatory activity at the Western Processing Site.[34]

RSR argued section 107(d)(1) waived sovereign immunity. Section 107(d)(1) provides:

> [e]xcept as provided in paragraph (2), no person shall be liable under this subchapter for costs or damages as a result of actions taken or omitted in the course of rendering care, assistance, or advice in accordance with the National Contingency Plan ("NCP") or at the direction of an on-scene coordinator appointed under such plan, with respect to an incident creating a danger to public health or welfare or the environment as a result of any releases of a hazardous substance or the threat thereof. This paragraph shall not preclude liability for costs or damages as the result of negligence on the part of such person.[35]

RSR argued the United States is a person and is liable for negligence. As a result, the EPA should be subject to a separate suit for negligence.[36]

The United States asserted it had not waived sovereign immunity under section 120(a). This section states "each department, agency, and instrumentality of the United States . . . shall be subject to, and comply with, this chapter in the same manner and to the same extent . . . as any nongovernmental entity, including liability under section 9607 of this title."[37] Pursuant to section 120(a), government agencies which act as owners, operators, generators, or transporters will be expected to bear their share of CERCLA response costs.[38] The United States argued, however, that Congress did not intend to make EPA cleanup and regulatory activities grounds for contribution claims. Doing so would provide for a new defense whenever the United States initiated a cleanup action.[39]

First, the United States claimed it would violate the fundamental principle that "those who benefit financially from a commercial activity [should] internalize the health and environmental

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[34] *Id.* at 727.

[35] *Id.* at 729 (referring to CERCLA § 107, 42 U.S.C. § 9607 (1988)).

[36] *Western Processing*, 761 F. Supp. at 729.

[37] *Id.* at 728 (referring to 42 U.S.C. § 9620).

[38] *Id.*

[39] *Id.* at 729.

costs of that activity into the costs of doing business."[40] Second, CERCLA calls for strict liability subject only to specific, enumerated defenses. Third, Congress rejected an amendment that would have created a defense for government misconduct and negligence.[41] Fourth, the last sentence in section 107(d) merely explains CERCLA has not occupied the field to the exclusion of tort claims.[42] Furthermore, the United States argued interpreting section 120(a) to waive sovereign immunity when the EPA carries out its duties would be inconsistent with the strict construction in favor of the United States on sovereign immunity issues.[43]

The court found the EPA does not become a liable owner or operator when it carries out its duties. It agreed with the United States that Congress intended for potentially responsible parties to assume costs of cleanup as part of the cost of business.[44] Making the EPA liable would "muddle the rationale underlying the statutory scheme."[45] In carrying out its duties, the court said the EPA is not behaving like a federal agency which generates its own waste and transports it to the site.[46] Moreover, the court agreed that the last sentence in section 107 is more meaningful as a statement on preemption.[47] Accordingly, the court found CERCLA does not waive sovereign immunity for contribution claims based on EPA regulatory activities.[48]

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[40] *Id.*

[41] *Western Processing*, 761 F. Supp. at 729.

[42] *Id.*

[43] *Id.* at 728.

[44] *Id.* at 729.

[45] *Id.*

[46] *Western Processing*, 761 F. Supp. at 729.

[47] *Id.*

[48] *Id.* at 729-30; *see also* United States v. Atlas Minerals & Chem., Inc., 797 F. Supp. 411 (E.D. Pa. 1992). In *Atlas Minerals*, the E.P.A. began an initial clean-up operation of a hazardous waste site owned by the defendant. After expending over $1 million dollars, they halted the clean-up activity and brought suit for recovery of those initial expenses and to force the defendant to finish the job. The defendant counter-claimed against the E.P.A. because their negligent cleaning efforts actually intensified the environmental damage for which Atlas was liable, allegedly by $15 million dollars.

Citing *Western Processing*, the court stated that challenges to E.P.A. response and remedial actions were barred. The court further stated that section 120(a) only applies as a waiver when the government acts as a private party in creating the waste.

B. Government as Operator

As *Western Processing* noted sovereign immunity is waived when the government is an owner or operator. In *FMC Corp. v. United States Department of Commerce*,[49] the court considered when the United States meets the test for being an owner or operator. FMC owned and operated a facility in Virginia from 1963 to 1976.[50] FMC sought indemnification from the United States for some portion of its cost of removal and response.[51]

Its claim against the United States was based on the operation of a rayon manufacturing facility at the site by the War Production Board from 1942 to 1945.[52] FMC said the United States was liable as an owner, operator, or arranger under section 107 of CERCLA.[53]

The court made the following findings of fact: (1) the chairman of the War Production Board characterized rayon cord production as "one of the most critical in the entire production program;"[54] (2) the facility, then owned by American Viscose Corp., was required by the United States to produce one-third of the cord needed by the nation; (3) the War Production Board ordered American Viscose to convert and expand the facility to produce more high tenacity rayon each year;[55] (4) the Board set the production levels which were in effect until revoked by the Board;[56] (5) the United States leased equipment and machinery to the facility and arranged and oversaw the design and installation of government equipment at the facility;[57] (6) the United States directed army officers and others to report to the plant to ensure an

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[49] FMC Corp. v. United States Dep't of Commerce, 786 F. Supp., 471 (E.D. Pa. 1992) *aff'd*, 10 F.3d 987 (1993), *and reh'g granted*, No. 92-1945, 1994 WL 52831 (3rd Cir. Feb. 23, 1994).

[50] *Id.* at 472. The site had been on the National Priority List since 1986.

[51] *Id.*

[52] *Id.* During World War II, the United States suffered a loss of its crude rubber supply. In order to manufacture tires and other war items, the United States needed a rubber substitute. The best substitute was high tenacity rayon tire cord which was produced at the Virginia facility. FMC presented evidence that the United States managed and controlled the facility during World War II and owned facilities and equipment at the plant. The manufacturing process involved the treatment of hazardous materials, and disposal of the materials necessarily followed.

[53] *Id.*

[54] *FMC Corp.*, 786 F. Supp. at 475.

[55] *Id.* at 476-77.

[56] *Id.* at 477.

[57] *Id.* at 478.

adequate work force for production;[58] (7) while United States personnel were at the facility, a large amount of highly visible waste disposal activity took place;[59] and (8) the United States knew or should have known the disposal or treatment of hazardous substances was inherent in the manufacture of rayon.[60] Based on these findings and others, the court concluded the United States was an operator within the meaning of section 107(a)(2), hazardous waste was disposed of while the United States was an operator, and a release or threatened release occurred at the facility within the meaning of section 107(a)(4).[61] The United States, therefore, was jointly and severally liable for costs incurred by FMC.[62]

Other district courts, however, have ruled sovereign immunity applies only to facilities currently owned by the United States. In *Rospatch Jessco Corp. v. Chrysler Corp.*,[63] the court considered whether the United States Air Force could be held liable for contamination of a site it owned and operated from 1951 to 1954. The United States argued section 120(a)(4) does not waive sovereign immunity for sites previously owned by the United States.[64]

To interpret the statute the court first looked at the language in section 120(a)(4).[65] It found that the first sentence was ambiguous, but that the second sentence helped to decide the issue.[66] The court said:

> [T]he second sentence expressly distinguishes federal facilities with "facilities which *are* not owned or operated by any such department, agency, or instrumentality." In other words, the comparison is casted in the present tense, suggesting that the reference to "facilities owned or operated by the United States" in the first sentence should be construed in the present tense as well.[67]

The legislative history does not indicate Congress intended to permit the United States to be sued regardless of whether it currently

[58] *Id.* at 480.
[59] *FMC Corp.*, 786 F. Supp. at 484.
[60] *Id.* at 485.
[61] *Id.* at 486.
[62] *Id.*at 486-87.
[63] Rospatch Jessco Corp. v. Chrysler Corp., 829 F. Supp. 224 (W.D. Mich. 1993).
[64] *Id.* at 227.
[65] *Id.* (referring to 42 U.S.C. § 9620(a)(4) (1988)).
[66] *Id.* at 228.
[67] *Id.* (alteration in original).

owns or operates the facility.[68] Moreover, the language throughout section 120 referring to federal facilities is cast in the present tense.[69] Therefore, the court held the United States cannot be sued unless it is the current operator.[70]

C. *Recovering Attorney Fees*

Courts have been divided on whether private parties can recover attorney fees. A district court recently considered this issue in light of the split in the circuits.[71] In *Chesapeake and Potomac Telephone Co. v. Peck Iron & Metal Co.*,[72] C & P asked for attorney's fees and costs of litigation as necessary "response costs" under CERCLA.[73] Before the court could consider the question of sovereign immunity, it had to decide if parties could recover attorney fees and costs.

One defendant, Pocket Money Recycling Company, Inc., argued C & P could not recover these costs and fees because they are not provided for in CERCLA.[74] C & P relied on section 101(25) to argue otherwise. Section 101(25) says: "The terms 'respond' or 'response' means (sic) remove, removal, remedy, and remedial action; all such terms (including the terms 'removal' and 'remedial action') include *enforcement activities* related thereto."[75] C & P thus argued the cost of response that may be recovered by a private party and the costs of removal and remedial action that may be recovered by the United States both include the costs of enforcement activities.[76] Pocket Money con-

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[68] *Id.*

[69] *Id.*

[70] *Id.*; *see also* Redland Soccer Club, Inc. v. Department of Army, 801 F. Supp. 1432 (M.D. Pa. 1992). *But see* Tenaya Assoc. Ltd. Partnership v. United States Forest Service, No. CV-F-92-5375 REC (E.D. Cal. May 18, 1993).

[71] Two judicial circuits have reached different results. *Compare* General Elec. v. Litton Indus. Automation Sys. Inc., 920 F.2d 1415 (8th cir. 1990) (allowing recovery of attorney fees) *with* Stanton Road Assoc. v. Lohrey Enter., 984 F.2d 1015 (9th Cir. 1993) (citing the "American Rule" denying recovery of attorney fees unless Congress explicitly authorizes courts to award such fees).

[72] Chesapeake & Potomac Tel. Co. v. Peck Iron & Metal Co., 826 F. Supp. 961 (E.D. Va. 1993).

[73] *Id.* at 962.

[74] *Id.* Pocket Money relied on the "American Rule" under which a party cannot recover attorneys' fees unless they are provided for by contract or statute, *id.*

[75] *Id.* at 963 (alteration in the original).

[76] *Id.*

tended that a potentially responsible private party cannot perform enforcement activities as the government would.[77]

The court found that CERCLA does allow a private party to perform enforcement activities because section 107(a)(4)(b) allows " 'any . . . person' other than 'the United States Government or a State or an Indian tribe' to recover 'costs of response. . . .' "[78] As noted in section 101(25), costs of response includes costs of enforcement activities.[79] According to the court, Congress would have restricted enforcement activities to the government through the definitions if it did not intend for private parties to perform enforcement activities.[80] In addition to the clear language in CERCLA, the court relied on the purpose of CERCLA. The remedial purpose of CERCLA calls upon private parties to participate in cleanup and recovery actions. The court said:

> [P]rivate parties which initiate cleanup of contaminated sites and sue their confederates in pollution for contribution, 'enforce' the statute under any reasonable construction of that term. . . . To deny private parties the benefit of the language in CERCLA entitling them to fees and costs expended to draw other polluters into cleanup efforts would create an economic disincentive for responsible parties to take the very action which CERCLA plainly seeks to encourage.[81]

CERCLA expressly states private parties can recover costs of enforcement activities in response cost actions.

Having disposed of this issue, the court then turned to whether language in CERCLA waives sovereign immunity for fees and costs. The court noted it did not need to look to other sources because the language in CERCLA is clear.[82] It relied on section 120(a)(1) which says:

> [E]ach department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedur-

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[77] *Chesapeake*, 826 F. Supp. at 963.

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.* at 964; *see also* General Electric v. Litton Indus. Automation Sys. Inc., 920 F.2d 1415, 1422 (8th Cir. 1990) (holding that a private party recovery action can be an enforcement activity within the meaning of the statute).

[82] *Chesapeake*, 826 F. Supp. at 965.

> ally and substantively, as any nongovernmental entity, including liability under 9607 of this title.[83]

The court concluded the government was held liable to the same extent as nongovernmental entities under section 107.[84] Accordingly, private parties can recover attorney fees and litigation costs against the United States.

CONCLUSION

Conflicting decisions regarding waivers of sovereign immunity leave litigants in a state of flux. Interpretations of section 120, for example, have sent different messages to the states.[85] The result will be more fighting over which jurisdiction should pay and how much. In a time of scarce resources, the federal and state government will obviously endeavor to hold onto their money.

States and private parties should take note of the requirement that the government be an owner or operator to incur liability. EPA regulatory activity apparently will not give rise to a cause of action based on government ownership or operation. Counterclaims naming the EPA, therefore, will not be successful.[86] Moreover, litigants may not be able to sue the United States unless it is the current owner or operator. On the other hand, private parties can benefit greatly with the ability to recover attorney fees. Given the cost of litigation, however, the United States could be stretched thin financially.

Each of these cases reveals the importance of careful statutory construction. What seems clear to one court often is not clear to another. Furthermore, the legislative history has not been very helpful to courts construing CERCLA. Congress should provide legislative history for CERCLA that is not mixed with other environmental statutes. Because a waiver of sovereign immunity can mean the depletion of federal resources, it is important for Congress to clarify the extent of the waivers in CERCLA. The reauthorization of CERCLA this year provides an opportunity to do that.

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[83] *Id.* (referring to 42 U.S.C. § 9620(a)(1) (1988)).

[84] *Id.*

[85] *See supra* part I discussing state actions against the federal government.

[86] *See supra* note 48 discussing the holding in United States v. Atlas Minerals & Chem., Inc., 797 F. Supp. 411 (E.D. Pa. 1992).