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Natural Resource Damages Under CERCLA: The Emerging Champion of Environmental Enforcement

I. INTRODUCTION

"We shall never understand the natural environment until we see it as a living organism. Land can be healthy or sick, fertile or barren, rich or poor, lovingly nurtured or bled white. Our present attitudes and laws governing the ownership and use of land represent an abuse of the concept of private property In America today you can murder land for private profit. You can leave the corpse for all to see, and nobody calls the cops."¹

Public reaction to environmental catastrophes such as Love Canal² and the recent Exxon Valdez³ spill has contributed to the trend of environmental enforcement. This auspicious trend has triggered environmental progress in the legislature, the courts, and the agencies. At the forefront of environmental progress is the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).⁴ Over the past decade, CERCLA has provided the means for government entities and individuals to establish liability for hazardous substance releases. Moreover,

1. JOHN BARTLETT, FAMILIAR QUOTATIONS 875 (15th ed. 1980) (quoting PAUL BROOKS, THE PURSUIT OF WILDERNESS, ch. 1 (1971)).

2. From 1942 to 1953 in Niagara Falls, New York, the Hooker Chemical and Plastic Corporation dumped 43.6 million pounds of toxins into Love Canal. Metal drums containing the toxins eventually opened, allowing rain and snow to wash the toxins into the local community. Since 1978, 1030 families have moved out of the Love Canal area. Michael H. Brown, *A Toxic Ghost Town: Ten Years Later, Scientists are Still Assessing the Damage from Love Canal*, ATLANTIC MONTHLY, July 1989, at 23.

3. On March 12, 1989, the Exxon Valdez spilled 10.9 million gallons of crude oil into the waters of Alaska's Prince William Sound. The spill was the nation's largest to date and accounted for 93% of the year's lost oil. Matthew Brelis, *Study Shows 1989 was an Average Year for Oil Spills*, BOSTON GLOBE, Sept. 15, 1989, at 3.

4. 42 U.S.C. §§ 9601-9675 (1988 & Supp. II 1990), as amended by Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (1986). In November 1990, Congress reauthorized CERCLA for an additional three years without varying the SARA amendments. Pub. L. No. 101-507, 104 Stat. 1372-73 (1990).

Congress has created the Superfund⁵ to cover cleanup costs where the plaintiff cannot establish liability. Situated within CERCLA is the natural resource damages provision,⁶ the emerging champion of environmental enforcement and the dread of potentially responsible parties.⁷

The public has yet to determine the potential of CERCLA's natural resource damages provision. In addition, the public has not addressed the multitude of legal, legislative, economic, and environmental questions that CERCLA raises. For instance, how does one place a value on natural resources? Is it possible to quantify the damage the Exxon Valdez caused to natural resources when it released eleven million gallons of crude oil into the waters of Prince William Sound? Congress failed to define natural resource damages, and few economists have devoted time to the concept of valuing natural resources.⁸ Unfortunately, both parties have given the courts limited guidance in interpreting natural resource damages.⁹ Additionally, the courts have established little precedent for others to follow.

Traditionally, potential liability encourages positive behavior. In this instance, the threat of liability can provide the incentive for persons not to pollute. There is an abundance of potential natural resource damage actions¹⁰ to promote these incentives, yet there is a deficiency in the fil-

5. The Superfund is a congressionally enacted trust fund, mandated by CERCLA, which reimburses the government for the cleanup of abandoned hazardous waste disposal sites and funds the EPA's administrative and enforcement costs. 42 U.S.C. § 9631 (1988). See *infra* notes 32-33 and accompanying text. Many commonly refer to CERCLA as the Superfund. This Comment will use the terms CERCLA and the Superfund interchangeably.

6. 42 U.S.C. § 9607(a)(4)(C) (1988).

7. See *infra* note 44 for the definition of potentially responsible parties.

8. See Edward J. Yang, *Valuing Natural Resource Damages: Economics for CERCLA Lawyers*, 14 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10,311 (1984).

9. See *Ohio v. United States Dep't of the Interior*, 880 F.2d 432, 448 (D.C. Cir. 1989) (holding that limiting damages to the lesser of the cost of restoration or replacement was not consistent with the intent of Congress). See *infra* notes 98-113 and accompanying text for further discussion of the *Ohio* decision.

10. The Environmental Protection Agency (EPA) predicts that it will place 2000-2200 sites on the Superfund National Priority List (NPL) by the end of the decade. Other governmental agencies believe the EPA figures are underestimated. The Office of Technology Assessment predicts 10,000 sites while the General Accounting Office foresees the total reaching 4000. *Superfund Clean-up Costs Increasing Rapidly*, *FIN. TIMES LTD.*, Apr. 26, 1991.

The legislature has reserved the NPL to those hazardous waste sites that the EPA determines require immediate response. Various agencies identified numerous other sites for possible incorporation on the NPL. These sites, while not on the NPL, are often included on state priority lists. *Id.* Although a listing on the NPL indicates the environmental severity of the problem at a particular site, inclusion is not a requirement for bringing a cause of action for natural resource damages. See *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1045-47 (2d Cir. 1985) (finding that the

ing of natural resource damage claims.¹¹ Simultaneously, the public, for whom natural resources are held, bears the environmental cost of injury to the environment.¹² Moreover, the private sector lacks the recourse imperative to internalize this external cost.¹³ The SARA¹⁴ amendments added a citizen suit provision to the response cost section of CERCLA in an attempt to involve private plaintiffs.¹⁵ Likewise, Congress could provide a private citizen cause of action¹⁶ for natural resource damages. This would result in more natural resource damage claims, and consequently would instill a greater incentive to refrain from polluting.¹⁷

This Comment will address the problems inherent in CERCLA's natural resource damages provision. The purpose is to discuss the provision's powerful nature and to suggest ways to utilize that potential. This Comment first provides a historical overview of CERCLA.¹⁸ Next, this Com-

inclusion on the NPL is irrelevant to a party's liability).

11. Duane Woodard & Michael R. Hope, *Natural Resource Damage Litigation Under the Comprehensive Environmental Response, Compensation, and Liability Act*, 14 HARV. ENVTL. L. REV. 189, 190 (1990).

12. See Frank B. Cross, *Natural Resource Damage Valuation*, 42 VAND. L. REV. 269, 271 (1989).

13. Externalizing a cost is when a person benefits from his pollution of natural resources without paying for the resultant harms. Internalizing an external cost is when the party responsible for the natural resources damage is forced to bear the costs of the damage. *Id.*

14. See *supra* note 4 and accompanying text.

15. 42 U.S.C. § 9659 (1988).

16. This Comment will refer to a citizen suit and a private cause of action interchangeably. However, two types of citizen suits or private actions are discussed by this Comment. One is where a private citizen brings an action against violators of the law. The other is where a private citizen brings an action against the government for failing to carry out a statutorily mandated duty. Barry Breen, *Citizen Suits for Natural Resource Damages: Closing a Gap in Federal Environmental Law*, 24 WAKE FOREST L. REV. 851, 870 (1989) [hereinafter *Citizen Suits for Natural Resource Damages*]. Both causes of action allow citizens to recover, in the public interest, for damage to natural resources. *Id.*

17. Cross, *supra* note 12, at 339-40. Those delegated the authority to protect natural resources already perform broad governmental functions. These "public trustees" have other commitments that prevent the requisite attention essential to natural resource damages claims. Congress should provide a private right of action to complement this governmental function and to better serve the purpose of CERCLA. *Id.* See Woodard & Hope, *supra* note 11, at 214-15. Woodard and Hope argue that Congress need not establish a private cause of action under CERCLA, but that providing citizen groups with a cause of action when the public trustee does not perform his duty would provide an adequate compliance incentive. *Id.*

18. See *infra* notes 23-70 and accompanying text.

ment explains what natural resources are and discusses how to value them.¹⁹ Additionally, this Comment provides suggestions for making CERCLA more efficient in environmental regulation.²⁰ Specifically, it will focus on the potential for individuals and citizens to bring a citizen suit for natural resource damages.²¹ The Comment concludes by suggesting that Congress amend certain provisions of CERCLA to give the courts, regulating agencies, potentially responsible parties, and the public the incentive to prevent ecological harm consistent with CERCLA's enactment.²²

II. OVERVIEW OF CERCLA

A. Legislative History of CERCLA

In 1980, at the end of the Carter administration, Congress enacted CERCLA. The enactment helped to fill gaps left by previous environmental legislation. However, because of the hurried effort to pass the bill, the legislative history of CERCLA is sparse.²³

Legislators proposed different bills to the 96th Congress, all containing controversial provisions.²⁴ The 96th Congress finally enacted CERCLA from a combination of the bills.²⁵ The final version was a last-minute compromise which "embodie[d] those features of the Senate and House bills where there ha[d] been positive consensus" while "eliminat[ing] those provisions which were controversial."²⁶ The effect of this compromise was a complex statute lacking clarity and precision.²⁷ Since then,

19. See *infra* notes 71-119 and accompanying text.

20. See *infra* notes 120-221 and accompanying text.

21. See *infra* notes 157-221 and accompanying text.

22. See *infra* notes 222-25 and accompanying text.

23. 1A FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW § 4A.02, at 4A-51 (1990).

24. *Exxon Corp. v. Hunt*, 475 U.S. 355, 368 (1986) (citing 126 CONG. REC. 30,935 (1980) (statement of Sen. Stafford)).

25. *Id.* The House and Senate each considered different versions of CERCLA. The Senate made major modifications, such as eliminating provisions establishing a private right of action for personal injury and economic damage. The House altered its bill to conform to the Senate bill. *Id.*

26. 126 CONG. REC. 30,932 (1980) (statement of Sen. Randolph). See *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1039-40 (2d Cir. 1985). See generally 1A GRAD, *supra* note 23, at § 4A.02, 4A-51 to 4A-79 (providing a detailed discussion of congressional consideration given to Senate Bill 1480 and House Bills 85 and 7020).

27. Both courts and commentators have criticized CERCLA because of its ambiguous and complicated language stemming from a hurried effort to enact the statute before the end of the Carter administration. Woodard & Hope, *supra* note 11, at 194. See *Artesian Water Co. v. Government of New Castle County*, 659 F. Supp. 1269, 1277 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3d Cir. 1988); *United States v. Shell Oil Co.*, 605 F. Supp. 1064, 1073 (D. Colo. 1985).

courts and commentators have painstakingly interpreted the statute. In 1986, Congress amended CERCLA in the Superfund Amendments and Reauthorization Act (SARA).²⁸ SARA provides some insight into the 1980 legislation, but Congress still must reassess CERCLA's effectiveness and modify it accordingly. Congress failed to make the requisite changes in November 1990, when it reauthorized CERCLA for an additional three years without altering the statute.²⁹

B. Structure of CERCLA

Despite CERCLA's complexity, it is clear the statute has two primary purposes: to clean up contaminated sites through "removal or remedial action,"³⁰ and to establish liability for natural resource damages.³¹ To subsidize these purposes, CERCLA established the Superfund. The Superfund, funded primarily through an excise tax, finances governmental action at hazardous waste sites requiring immediate response.³² Where the government cannot establish the liability of responsible parties, the Superfund provides the financial means for cleanup.³³

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

29. Kyle E. McSarrow et al., *A Decade of Superfund Litigation: CERCLA Case Law from 1981-1991*, 21 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,367, 10,367 (1991). See Pub. L. No. 101-507, 104 Stat. 1372-73 (1990).

30. 42 U.S.C. § 9607(a)(4)(A)-(B) (1988). CERCLA labels costs associated with removal or remedial action as "response costs." See *infra* notes 46-70 and accompanying text.

31. 42 U.S.C. § 9607(a)(4)(C).

32. See *Exxon Corp. v. Hunt*, 475 U.S. 355 (1986).

33. 42 U.S.C. § 9611(a) (1988 & Supp. II 1990). Section 9611(a) provides:

The President shall use the money in the Fund for the following purposes:

- (1) payment of governmental response costs incurred pursuant to section 9604 of this title, including costs incurred pursuant to the Intervention on the High Seas Act;
- (2) payment of any claim for necessary response costs incurred by any other person as a result of carrying out the national contingency plan established under section 1321(c) of title 33 and amended by section 9605 of this title: *Provided, however*, that such costs must be approved under said plan and certified by the responsible Federal official;
- (3) payment of any claim authorized by subsection (b) of this section [providing for reimbursement to the Federal and State Governments for damage to natural resources under their respective control] and finally decided pursuant to section 9612 of this title, including those costs set out in subsection 9612(c)(3) of this title [providing for recovery by Fund of interest, costs, and attorney's fees in action against any per-

CERCLA authorizes the government and other persons to recover the costs of response from responsible parties where liability is established.³⁴ Response cost actions are separate and distinct from natural resource damage claims. Response costs, CERCLA's term for cleanup costs, include the costs incurred from both "removal"³⁵ and "remedial" action.³⁶ Although CERCLA provides a citizen suit provision for response costs,³⁷ it has not provided a comparable provision for natural resource damages.³⁸

Natural resource damages, once sheltered within CERCLA, are now beginning to augment the role of response costs. Soon, natural resource damage actions may be the government's best weapon to compel compliance with environmental regulation.³⁹ CERCLA provides that potentially responsible parties are liable for "damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release."⁴⁰ Section 9607 of CERCLA restricts the recovery for natural resource damages to the federal government, state government, or Indian tribes.⁴¹ CERCLA authorizes the federal or state governments to act as trustee, to appoint a trustee, or to assess natural resource damages.⁴² Either the government or the public trustee may bring a cause of action to recover for injury to natural resources.⁴³ Congress expanded the common law public trust

son liable to the claimant or to the Fund]; and
(4) payment of costs specified under subsection (c) of this section [providing for research, restoration or replacement of natural resources, prevention of releases, equipment and overhead, and administrative costs].

The President shall not pay for any administrative costs or expenses out of the Fund unless such costs and expenses are reasonably necessary for and incidental to the implementation of this subchapter.

Id.

34. *Id.* § 9607(a). Section 9607(a)(4)(A) provides liability for "all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan." *Id.* § 9607(a)(4)(A). Section 9607(a)(4)(B) further provides liability for "any other necessary costs of response incurred by any other person consistent with the national contingency plan." *Id.* § 9607(a)(4)(B).

35. *See infra* note 53 and accompanying text.

36. *See infra* note 54 and accompanying text.

37. 42 U.S.C. § 9659.

38. *See infra* notes 157-221 and accompanying text.

39. Frank L. Amoroso & Linda R. Keenan, *Natural Resource Damage Recovery Actions: A Legal Tidal Wave Looming*, 17 WESTCHESTER B. J. 109, 110 (1990).

40. 42 U.S.C. § 9607(a)(4)(C).

41. *Id.* § 9607(f)(1).

42. *Id.* § 9607(f)(2).

43. *Id.* The trustee's finding of injury to natural resources receives the benefit of a

doctrine by providing that trustees could recover from potentially responsible parties⁴⁴ on behalf of the public resources.⁴⁵

III. RECOVERY UNDER CERCLA

A. Response Costs

Although this Comment does not focus on response costs, they are an integral part of CERCLA and warrant some discussion.⁴⁶ Response costs are those costs associated with the removal of hazardous waste and any other remedial costs associated with cleaning up a hazardous substance.⁴⁷ They are distinct from natural resource damages because response costs encompass recovery only for the cost of cleaning up the contamination. They do not incorporate the damage, present and future, done to the resource itself.⁴⁸

CERCLA's response cost provisions authorize the government to recover for "all costs of removal or remedial action . . . not inconsistent with

rebuttable presumption that the assessment is accurate, provided the trustee promulgates the action in compliance with the National Contingency Plan under section 9651. *Id.* § 9607(f)(2)(C).

44. Potentially responsible parties are defined as (1) the current owner and operator of a vessel or facility where a release of a hazardous substance occurred; (2) the past owner or operator of a vessel or facility at the time the release of a hazardous substance occurred; (3) any person responsible for generating the hazardous substance or any person responsible for arranging the disposal at the facility or incineration vessel; and (4) any person who transported the hazardous substance to the facility or vessel from which there is a release. *Id.* § 9607(a). See also Jane E. Lein & Kevin M. Ward, *Private Party Response Cost Recovery Under CERCLA*, 21 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10,322, 10,323 (1991).

45. Andrew J. Simons & James M. Wicks, *Natural Resources Damages Under CERCLA: Here They Come, Ready or Not*, 63 *ST. JOHN'S L. REV.* 801, 802 (1989). Under the public trust doctrine, the government is deemed to hold natural resources in trust for the public. This concept originated when the Supreme Court announced that the government held submerged lands under navigable waters in Lake Michigan in trust for the people, and thus a legislative conveyance was incompatible with the public trust. *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 452-53 (1892). See generally, Rhoda L. White, Comment, *Natural Resource Damages: Trusting the Trustees*, 27 *SAN DIEGO L. REV.* 407 (1990) (discussing in detail the role of the public trust in environmental regulation).

46. See 42 U.S.C. § 9607(a)(4)(A)-(B).

47. *Id.*

48. See *infra* notes 74-91 and accompanying text concerning the valuation of natural resources damages.

the national contingency plan."⁴⁹ Additionally, "any other person may" recover "any other necessary costs . . . consistent with the national contingency plan."⁵⁰ The party bringing the response cost action can recover from potentially responsible parties or from the Superfund itself.⁵¹

Although CERCLA does not define response costs, it does define removal and remedial actions.⁵² Removal actions entail short-term responses "necessary to monitor, assess, and abate the immediate effects of a contamination problem."⁵³ Remedial actions are generally "long-term cleanup solutions that are decided upon after a detailed administrative process."⁵⁴ The courts commonly label the following costs as "re-

49. 42 U.S.C. § 9607(a)(4)(A).

50. *Id.* § 9607(a)(4)(B). See *infra* notes 134-156 and accompanying text for a discussion of the distinction between government and private plaintiff recovery.

51. 42 U.S.C. § 9612(a), (c) (1988).

52. McSllarrow et al., *supra* note 29, at 10,395.

53. *Id.* CERCLA defines removal actions as

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. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604(b) [42 U.S.C. § 9604(b)] of this title, and any emergency assistance which may be provided under the Disaster Relief Act and Emergency Assistance Act.

42 U.S.C. § 9601(23) (1988).

54. McSllarrow et al., *supra* note 29, at 10,395-96. CERCLA defines remedial action as

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. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances or contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. The term includes the costs of permanent relocation of residents and businesses and community facilities where the President

sponse costs": Preliminary investigation and assessment of damages at hazardous waste sites;⁵⁵ removing, storing, and disposing hazardous waste;⁵⁶ alternative water supplies;⁵⁷ temporary relocation; and attorney's fees.⁵⁸ While past courts have allowed recovery for medical monitoring,⁵⁹ the current consensus is that these costs cannot be recovered under CERCLA because they are primarily personal and not related to public health.⁶⁰ Courts also have determined that CERCLA does not

determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or welfare; the term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials.

42 U.S.C. § 9601(24) (1988).

55. See *Tanglewood E. Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1575 (5th Cir. 1988) (finding that investigations and evaluations fall within the definition of removal actions); *Brewer v. Ravan*, 680 F. Supp. 1176, 1179 (M.D. Tenn. 1988) (declaring that "most courts agree" that response costs include "on-site testing and investigative costs").

56. See *Allied Towing Corp. v. Great E. Petroleum Corp.*, 642 F. Supp. 1339 (E.D. Va. 1986).

57. See *United States v. Bell Petroleum Svcs., Inc.*, 734 F. Supp. 771, 778 (W.D. Tex. 1990) (allowing recovery for costs associated with providing alternative water supply); 42 U.S.C. § 9601(23)-(24).

58. See *General Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1417 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1390 (1991); Adam Babich & Kent E. Hanson, *Opportunities for Environmental Enforcement and Cost Recovery by Local Governments and Citizen Organizations*, 18 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10,165, 10,172 (1988) (arguing that attorney fees fall under enforcement costs). *But see* Kanad S. Virk, *General Electric Co. v. Litton Industrial Automation Systems, Inc.: Are Attorney Fees Recoverable in CERCLA Private Cost Recovery Actions?*, 75 *MINN. L. REV.* 1541, 1550-51 (1991) (suggesting that awarding attorney fees is contrary to Congress' intent). See generally Walter B. Russell III & Paul Thomas Gregory, *Note, Awards of Attorney's Fees in Environmental Litigation: Citizen Suits and the "Appropriate" Standard*, 18 *GA. L. REV.* 307 (1984).

59. See *Brewer v. Ravan*, 680 F. Supp. 1176, 1179 (M.D. Tenn. 1988) (stating costs of medical testing "to assess the effect of the release or discharge on public health or to identify potential public health problems presented by the release" are recoverable) (emphasis omitted); *Williams v. Allied Automotive*, 704 F. Supp. 782, 784 (N.D. Ohio 1988); *Lykins v. Westinghouse Elec.*, 27 *Env't Rep. Cas. (BNA)* 1590, 1594 (E.D. Ky. 1988).

60. *Werlein v. United States*, 746 F. Supp. 887, 904 (D. Minn. 1990). See also, *Lutz v. Chromatex*, 718 F. Supp. 413, 418 (M.D. Pa. 1989); *Coburn v. Sun Chem. Corp.*, 28 *Env't Rep. Cas. (BNA)* 1665, 1668 (E.D. Pa. 1988); *Wehner v. Syntex Corp.*, 681 F. Supp. 651, 653 (N.D. Cal. 1987).

authorize recovery for economic injury.⁶¹

Although there is no redress for personal injuries, CERCLA authorizes private citizens to bring actions to recover for response costs.⁶² The private plaintiff does not need prior governmental approval,⁶³ but must meet the traditional elements of standing.⁶⁴ This merely requires the private plaintiff to show that it incurred some costs in response to the release of a hazardous substance.⁶⁵ In such an action, the private plaintiff bears the burden of proving that the response costs incurred were consistent with the national contingency plan.⁶⁶

Recently, Congress added a citizen suit provision to CERCLA.⁶⁷ At first glance it appears as if private citizens can compel the cleanup of hazardous waste sites without incurring response costs or suffering injury. However, the government's duty to act under CERCLA is discretionary; therefore, it is unlikely that individuals can compel the cleanup of hazardous substances.⁶⁸ Citizens can use the section for challenging any substandard cleanup effort that the government or any other party attempts under CERCLA.⁶⁹ Considering the lack of action government agencies take, disallowing plaintiffs to compel cleanup rips the teeth out of any deterrent effect Congress intended with the citizen suit provision.⁷⁰

61. *Lutz*, 718 F. Supp. at 413, 416; *Wehner*, 681 F. Supp. at 651, 653.

62. 42 U.S.C. § 9607(a)(4)(B).

63. *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 892 (9th Cir. 1986).

64. *See Babich & Hanson*, *supra* note 58, at 10,169.

65. *Id.* (citing *Jones v. Inmont Corp.*, 584 F. Supp. 1425, 1430 (S.D. Ohio 1984)); *Pinole Point Properties, Inc. v. Bethlehem Steel Corp.*, 596 F. Supp. 283, 291 (N.D. Cal. 1984)).

66. In contrast, when a public trustee or the government brings a response cost claim, the defendant bears the burden of proving the costs were inconsistent with the National Contingency Plan. *See infra* notes 150-56 and accompanying text.

67. 42 U.S.C. § 9659(a). Section 9659 provides that any person may bring an action

(1) against any person . . . who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to this chapter . . . or

(2) against the President or any other officer of the United States . . . where there is alleged a failure of the President or of such other officer to perform any act or duty under this chapter . . . which is not discretionary with the President or such other officer.

Id. *See infra* note 194 for the usual citizen suit requirements.

68. Jeffrey M. Gaba & Mary E. Kelly, *The Citizen Suit Provision of CERCLA: A Sheep in Wolf's Clothing?*, 43 Sw. L.J. 929, 937-40 (1990). CERCLA does not require the cleanup of hazardous substances, nor does it prohibit their release. Rather, CERCLA merely authorizes action, at one's discretion, when potentially responsible parties release hazardous substances. *Id.* at 937.

69. *Id.* at 940.

70. *Id.* at 952.

B. *Natural Resource Damages*

While environmental awareness is increasing nationwide, the government has been deficient in filing natural resource damage claims.⁷¹ One reason for the deficiency is that Congress did not specifically define natural resources.⁷² CERCLA broadly defines natural resources as the following:

[L]and, 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, any foreign government, any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe.⁷³

1. Value of Natural Resources

Another deterrent to filing natural resource damage actions is the detailed task of placing a value on natural resources. The traditional valuation approach for natural resources was the lesser of replacement or restoration cost, or the diminution in value.⁷⁴ However, courts have determined that limiting natural resource damages to the lesser of restoration or replacement costs, or lost use value, is inconsistent with the intent of Congress.⁷⁵ Thus, the chore is finding a valuation method for natural resources that satisfies the courts, the agencies, and the economists.⁷⁶

71. Woodard & Hope, *supra* note 11, at 190.

72. *Id.* at 196.

73. 42 U.S.C. § 9601(16) (1988).

74. Woodard & Hope, *supra* note 11, at 196-97.

75. *Ohio v. United States Dep't of Interior*, 880 F.2d 432, 442 (D.C. Cir. 1989). Pursuant to section 9651(c), the President delegated to the DOI the task of "promulgat[ing] regulations for the assessment of damages for injury to, destruction of, or loss of natural resources." 42 U.S.C. § 9651(c)(1) (1988). This section also provides that "damages, including both direct and indirect injury, destruction, or loss shall take into consideration factors including, *but not limited to*, replacement value, use value, and ability of the ecosystem or resource to recover." *Id.* § 9651(c)(2) (1988) (emphasis added). Section 9607 further provides that damages to natural resources "shall *not be limited by* the sums which can be used to restore or replace such resources." 42 U.S.C. § 9607(f)(1) (1988) (emphasis added). See Amoroso & Keenan, *supra* note 39 at 112-13 (discussing the promulgation of Type A and Type B rules for assessing damages to natural resources).

76. Woodard & Hope, *supra* note 11, at 199 (noting that the term damages has different meanings in the legal field than in the field of economics).

While restoration or replacement costs may prove sufficient in some scenarios, there are other valuation techniques that may more accurately reflect the true injury to the resource. One such technique determines the diminution in the "value" of the natural resource as the measure of damages.⁷⁷ Use values and existence values help to determine the value of the damages.⁷⁸ These concepts offer tremendous potential to compel compliance with environmental regulation.⁷⁹

a. *Use values*

Use values determine the value of the natural resource to those using that resource.⁸⁰ Use value includes both the income from the use of the resource and the value that users place on the resource.⁸¹ If the resource has a market value, calculating use values is easy. However, difficulties arise in valuing a publicly owned resource with no market value. For example, a measure of the lost use value would be the reduction in the number of fish hatched at a privately owned hatchery after the re-

77. Barry Breen, *CERCLA's Natural Resource Damage Provisions: What Do We Know So Far?* 14 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10,304, 10,307 (1984). While there are several criticisms of using a restoration cost to value natural resource damages, the most common is that restoration of a resource often exceeds its actual value. See Cross, *supra* note 12, at 300; Yang, *supra* note 8, at 10,312.

78. See Cross, *supra* note 12, at 280-81. Cross also suggests the concept of intrinsic value which encompasses the idea that there is a value beyond the necessities of humans. He proposes that use and existence values fail to consider that natural resources have value independent of the value humans place on them. *Id.* at 293. It is doubtful, however, that any economist, ecologist, or court could place a monetary figure on such a value.

79. While this section focuses only on use and existence values, commentators recognize the existence of other values helpful in determining natural resource damages:

User values are the benefits individuals receive from direct use of a resource, including consumptive uses, such as fishing and hunting, and nonconsumptive uses, such as swimming and hiking;

Option value is derived from individuals' desire to preserve the option to use a natural resource, even if they are not currently using it;

Bequest value is derived from the wish to preserve resources for the use of future generations; and

Existence value is derived from the satisfaction of simply knowing that a resource exists, even if no use occurs.

Adam Babich & Kent E. Hanson, *Municipalities and Hazardous Substances: Cleanup, Cost Recovery and Damages Under CERCLA*, 29 *MUN. ATT'Y* 1, 2 (1988) (quoting R. Rowe & W. Schulze, *Natural Resource Damages in the Colorado Mountains: The Case of the Eagle Mine*, Proceedings of AERE Session on Assessment of Natural Resource Damages Under CERCLA, Allied Social Science Association's Meetings, Chicago, Ill. (Dec. 28-30, 1987)).

80. See Yang, *supra* note 8, at 10,312.

81. *Id.*

lease of a hazardous substance.⁸² However, the same calculation becomes much more complicated when computing the use value damage to free public access resources, such as rivers and oceans, where no records indicate the number of users or the quantity of production.⁸³

b. Nonuse values

Certain values fall outside the use value concept because the measurement of worth is not based on the resource's use but on its existence.⁸⁴ These existence values, or nonuse values, are calculated by determining the amount an individual would pay to maintain a natural resource although the individual might never use it.⁸⁵ One can comprehend this value by considering what the general public is willing to pay to preserve endangered species or national parks although it might never make use of those resources.⁸⁶ While nonuse values do exist, there is substantial controversy surrounding the measurement of this value.⁸⁷ To determine how much individuals value the preservation of a natural resource, one must incorporate the attitudes of individuals and not merely observe their behavior.⁸⁸ Unlike the calculation of use values, where behavior is

82. See *State Dep't of Fisheries v. Gillette*, 621 P.2d 764, 768 (Wash. Ct. App. 1980) (determining the market value of fish in a fish hatchery).

83. Woodard & Hope, *supra* note 11, at 200.

84. See Cross, *supra* note 12, at 285.

85. *Id.* Cross categorizes existence values into 3 subparts: option, vicarious, and intertemporal values. Option value is the value of retaining the resource so that the individual has the option of using it in the future. *Id.* Cf. Hope & Woodard, *supra* note 11, at 200 (placing option value within the concept of use value). Vicarious value is the amount nonusers are willing to pay to protect a resource merely because they value its preservation. Cross, *supra* note 12, at 286-87. Lastly, existence value contains intertemporal value, which is the value from knowing that offspring may be able to use the resource. *Id.* at 288. See *supra* note 79 for other values used in assessing natural resource damages.

86. See Cross, *supra* note 12, at 287-88. People are willing, for instance, to pay to prevent destruction of Lake Erie and to preserve visibility at the Grand Canyon, while never intending to use the natural resources or products derived therefrom. *Id.* at 287 n.85 (citing Talhelm, *Unrevealed Extramarket Values: Values Outside the Normal Range of Consumer Choices*, in *MANAGING AIR QUALITY AND SCENIC RESOURCES AT NATIONAL PARKS AND WILDERNESS AREAS* 255, 275 (R. Rowe & L. Chestnut eds., 1983)).

87. See Woodard & Hope, *supra* note 11, at 201-02. Woodard and Hope note that the economist can use a contingent valuation technique to determine use and nonuse values. This technique requires a public survey to determine how much the public at large is willing to pay for the restoration of an injured natural resource. *Id.*

88. See Cross, *supra* note 12, at 289.

determinative, individuals need not put their money where their mouths are to determine existence values.⁸⁹ Individuals likely exaggerate the true nonuse value they have for a particular resource.⁹⁰ The countervailing concern is that many hazardous substance releases cause damage to unpopular resources whose existence the individual marginally values.⁹¹ For example, preserving a type of grass is unlikely to evoke much concern in the eyes of the average individual, although it has great scientific and ecological value.

The value of natural resources exceeds that of restoration and replacement cost. Whether Congress intended the inclusion of use and nonuse values in the calculation of damages is the topic of recent controversy. The next section briefly discusses this controversy and the progress made in quantifying natural resource damages.

2. Damage Assessments

The Department of the Interior (DOI) has the task of "promulgat[ing] regulations for the assessment of damages for injury to, destruction of, or loss of natural resources . . ."⁹² Different regulations govern damage assessment, depending upon the magnitude of the contamination.⁹³ Type A rules proffer a simplified version of damage assessment and apply where the hazardous release is minor.⁹⁴ Type B rules are pertinent in determining damage assessment where the release is of major consequence.⁹⁵ CERCLA establishes a rebuttable presumption as to accuracy

89. *Id.*

90. *Id.*

91. *Id.* at 291-92.

92. 42 U.S.C. § 9651(c)(1).

93. Frank L. Amoroso & Linda R. Keenan, *Damage Claims; Liability for Restoration is Looming*, NAT'L L.J., Feb. 4, 1991, at 19, 23. [hereinafter *Liability for Restoration*].

94. 42 U.S.C. § 9651(c)(2). See Amoroso & Keenan, *supra* note 39, at 112; Cross, *supra* note 12, at 275.

95. 42 U.S.C. § 9651(c)(2). See Amoroso & Keenan, *supra* note 39, at 112; Cross, *supra* note 12, at 275. Type B regulations establish four phases in assessing damages to natural resources. *Ohio v. United States Dep't of the Interior*, 880 F.2d 432, 440 (D.C. Cir. 1989). First, the "preassessment phase" involves the trustee's determination of whether a release affected the natural resource. Secondly, Type B regulations set forth an assessment strategy where further action is required. This step is the "assessment plan phase." The third step, the "assessment phase," involves the trustee determining whether there was an injury in fact, quantifying the actual injury to the natural resource, and assessing the cost of damages to the natural resource. Lastly, the trustee, in the "post-assessment phase," prepares a report of the damage assessment which demands payment of the damages from the responsible party. *Id.* If the responsible party fails to pay, CERCLA authorizes the trustee to bring a cause of action in federal court. *Liability for Restoration*, *supra* note 93, at 23.

when a party calculates damage assessments consistent with the applicable rule.⁹⁶ In 1989, the District of Columbia Circuit upheld Type A regulations as a valid way to assess damages.⁹⁷ However, in *Ohio v. United States Department of the Interior*,⁹⁸ the same court found Type B regulations inadequate.⁹⁹ The court found the method of quantifying damages under Type B regulations inconsistent with congressional intent.¹⁰⁰

Congress intended the natural resource damage provision of CERCLA to empower public trustees to recover damages exceeding those traditionally recoverable at common law.¹⁰¹ Section 9607(f)(1) states that "the measure of damages shall not be limited by the sums which can be used to restore or replace such resources."¹⁰² Likewise, section 9651(c)(2) provides that the measurement of damages "shall take into consideration factors including, but not limited to, replacement value, use value, and ability of the ecosystem or resource to recover."¹⁰³ Furthermore, specific discussion during the SARA amendment proposal suggests that Congress intended restoration costs as the minimum recovery for natural resource damages under CERCLA.¹⁰⁴

96. 42 U.S.C. § 9607 (f)(2)(C) (1988).

97. *Colorado v. United States Dep't of the Interior*, 880 F.2d 481 (D.C. Cir. 1989).

98. 880 F.2d 432 (D.C. Cir. 1989).

99. *Id.* at 459.

100. *Id.* at 448. See *infra* notes 108-13 and accompanying text for the court's reasoning.

101. Breen, *supra* note 77, at 10,309. Traditionally, the lesser of the restoration cost, or lost value, was the measure for damages to real property. See David A. McKay, Note, *CERCLA's Natural Resource Damage Provisions: A Comprehensive and Innovative Approach to Protecting the Environment*, 45 WASH. & LEE L. REV. 1417, 1438-44 (1988) (discussing the complexity of damage assessments under CERCLA).

102. 42 U.S.C. § 9607(f)(1).

103. 42 U.S.C. § 9651(c)(2).

104. See Breen, *supra* note 77, at 10,307; Woodard & Hope, *supra* note 11, at 203-04. Woodard and Hope believe that the Congressional debate demonstrates the intent of Congress to expand on common law recovery, not merely codify it. *Id.* at 204. Senator Baucus, a member of the Senate Committee on Environment and Public Works commented:

Certainly, the rules to date strongly discourage natural resource damages claims from ever being brought and would severely reduce recoverable damages in those few cases where they were sought

. . . CERCLA . . . establish[es] natural resource replacement or restoration as the minimum measure of damage. The requirement in the DOI proposals that "the authorized official shall select the lesser of (i) restoration or replacement costs, or (ii) diminution of use values as the measure of damages" is an unreasonable construction of . . . the . . . Superfund, with no

Despite the language in sections 9607(f)(1) and 9651(c)(2), the DOI promulgated restrictive regulations that limited damages recoverable for injury to natural resources to the lesser of the restoration cost or the use value diminution.¹⁰⁵ In *Ohio v. United States Department of the Interior*,¹⁰⁶ the court addressed whether this traditional measure of damages, set forth in the DOI regulations, is consistent with congressional intent for natural resource damage recovery.¹⁰⁷ The court rejected the DOI regulations and found that section 9607(f)(1) of CERCLA "evinces a clear congressional intent to make restoration costs the basic measure of damages."¹⁰⁸ The court found that in the majority of cases, the cost of restoration will exceed the lost use value.¹⁰⁹ Under the DOI's "lesser of" regulation, recovery would be limited to the lost use value and would not cover restoration costs. However, the court granted the DOI some deference in damage calculations.¹¹⁰ It acknowledged that CERCLA does not always require complete recovery of restoration costs.¹¹¹ Rather, where restoration of the resources is not feasible or the restoration costs far exceed the resources' societal value, exemption from paying full restoration costs might be appropriate.¹¹² However, where the public trustee formulates a reasonable economic process for assessing damages that generates a higher amount than the restoration cost, that amount should be recoverable.¹¹³

The court of appeals decision apparently has finalized the controversy over quantifying damages for injury to natural resources.¹¹⁴ However, the DOI has yet to release its modification of the rules in compliance

basis in law

. . . Trustees must have the option to use those market and nonmarket methods of valuation that, in the trustees' judgment, most accurately evaluate injury to natural resources and compensate the public for its losses. The unduly narrow definition of injury under Interior Department rules threatens present legal interpretation and might erode even common law.

Id. at 204 n.72 (quoting 132 CONG. REC. S14,930-31 (daily ed. Oct. 3, 1986)).

105. *Ohio v. United States Dep't of the Interior*, 880 F.2d 432, 442 (D.C. Cir. 1989).

106. 880 F.2d 432 (D.C. Cir. 1989).

107. *Id.* at 441.

108. *Id.* at 448.

109. *Id.* at 441.

110. *Id.* at 443-44 n.7.

111. *Id.*

112. *Id.* See Amoroso & Keenan, *supra* note 39, at 114; Frederick R. Anderson, *Natural Resource Damages, Superfund, and the Courts*, 16 B.C. ENVTL. AFF. L. REV. 405, 446 (1989); Cross, *supra* note 12, at 301, 329; Breen, *supra* note 77, at 10,309-10; see also, *Puerto Rico v. S.S. Zoe Colocotroni*, 628 F.2d 652, 675-77 (1st Cir. 1980) (holding that restoration cost of six million dollars was "disproportionately expensive").

113. Breen, *supra* note 77, at 10,309.

114. See Woodard & Hope, *supra* note 11, at 206.

with the court's decision. Natural resource damages currently "include the cost of restoration, rehabilitation, replacement or acquisition of the equivalent to the damaged resources and the value of the lost use of that resource in the interim until restoration and the reasonable cost of assessment by the trustees."¹¹⁵ However, damages to natural resources should also include future use values—not merely those in the interim—and lost nonuse values.¹¹⁶ While many scenarios could conceivably result in outrageous damage calculations, CERCLA contains a limitation of fifty million dollars for natural resource damages.¹¹⁷ Thus, Congress should set forth a specific definition of natural resource damages that includes the costs and values to be used in assessing damages.¹¹⁸ A specific definition will enable public trustees to better understand their cause of action and will provide the incentive to use the natural resource damage provision of CERCLA.¹¹⁹

IV. PROVIDING FOR A MORE EFFICIENT CERCLA

A. Government Resources Versus Private Resources

CERCLA's natural resource damages liability section provides recovery for damage to those resources "within the State or belonging to, managed by, controlled by, or appertaining to such State and to any Indian tribe . . . or belonging to a member of such tribe if such resources are subject to a trust restriction on alienation."¹²⁰ This definition apparently excludes private property from its definition of natural resources.¹²¹ Ac-

115. *Liability for Restoration*, *supra* note 93, at 19.

116. *Ohio v. United States Dep't of the Interior*, 880 F.2d. 432, 464 (D.C. Cir. 1989). The court stated that nonuse values such as "[o]ption and existence values . . . reflect utility derived by humans from a resource . . . [and] ought to be included in a damage assessment." *Id.* See also Woodard & Hope, *supra* note 11, at 207. See generally Cross, *supra* note 12 (proposing different measures of valuation to achieve environmental goals).

117. 42 U.S.C. § 9607(c)(2). This limitation will not apply when (a) the release resulted from the willful misconduct or willful negligence within the privity or knowledge of the responsible party; (b) a violation of safety, construction, or operating standards was the primary cause of the release; or (c) the responsible party fails or refuses to cooperate with the public trustee regarding response activities. *Id.*

118. See Woodard & Hope, *supra* note 11, at 207.

119. *Id.* Not only will larger recovery amounts provide the trustee with the incentive to initiate an action, but the threat of increased liability also discourages potentially responsible parties from polluting. See *supra* notes 10-17 and accompanying text.

120. 42 U.S.C. § 9607(f)(1).

121. William Hamel, *Superfund's Stealth Weapon; the Coming Battle Over Natural*

cordingly, courts have interpreted CERCLA as permitting recovery for injury to natural resources on government land only.¹²²

There is some debate as to whether injury to private property involving some government nexus should qualify for natural resource damages actions. The District of Columbia Circuit refused to accept a broad construction of the statute that would have included all resources that exist "within [a] State."¹²³ However, the court declared that a construction excluding all privately owned property, regardless of government entanglement, ignores the terms "managed by, held in trust by, appertaining to, or otherwise controlled by" the government.¹²⁴ The court remanded the case to the DOI for clarification of the land/government nexus requirement, which would ultimately qualify property for natural resource damages actions.¹²⁵

Despite DOI's interpretation excluding privately owned resources, some commentators suggest that the statute's explicit language authorizes a trustee to initiate an action for injury to *any* natural resources "within the [state] borders," not just publicly owned resources.¹²⁶ However, others contend that the restrictive language of the statute requires the existence of some government involvement.¹²⁷ Excluding purely private resources from the confines of CERCLA prevents the potential for double recovery and maintains state causes of action.¹²⁸ That is, since owners of private resources have common law causes of action to recover for damages to their property,¹²⁹ allowing the government to bring a cause of action for these damages effectively eliminates any common law

Resources, LEGAL TIMES, Dec. 16, 1991, at 34.

122. Breen, *supra* note 77, at 10,305-06. Breen places resources into four categories: (1) resources that the government owns; (2) resources included within the public trust; (3) resources that the government directly regulates to protect the environment; and (4) resources that the government does not directly regulate, but which the government has constitutional authority to regulate. *Id.* at 10,305. According to Breen, those resources in category four will not qualify for natural resource damages action unless the provisions are construed to include all resources within the government's geographic jurisdiction. *Id.* at 10,306.

123. *Ohio v. United States Dep't of the Interior*, 880 F.2d. 432, 459 (D.C. Cir. 1989).

124. *Id.* at 461.

125. *Id.*

126. Woodard & Hope, *supra* note 11, at 207-08. "The disparity between the specific language of the state and DOI's interpretation is striking to say the least." *Id.* at 208. See also, Note, *Developments in the Law—Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1566 (1986).

127. See Cross, *supra* note 12, at 274 n.14.

128. Edward W. Warren & John A. Zackrisson, *Natural Resources Damages Provisions Of CERCLA*, 1 NAT. RESOURCES ENVT. 18, 20 (1985).

129. *Id.* Causes of actions under trespass, negligence, public and private nuisance, and strict liability exist for injury to private natural resources. Cross, *supra* note 12, at 274 n.15.

recovery due to duplicative liability.¹³⁰ While the consensus is that natural resource damages claims require public ownership, the extent of government involvement "will probably have to await judicial interpretation, further legislative elaboration, or at least regulatory definition."¹³¹

B. Potential Plaintiffs

If natural resources are to be defended, federal and state governments must act as "trustees" for the public's interest in bringing a cause of action.¹³² CERCLA authorizes these public trustees to assess natural resource damages and to pursue actions providing recovery for injury to natural resources.¹³³

130. Warren & Zackrisson, *supra* note 128, at 20. However, instead of distinguishing between private property and public property, CERCLA could differentiate private damages from public damages, thereby permitting natural resource damage actions where private property is concerned. See *Developments in the Law-Toxic Waste Litigation*, *supra* note 126, at 1572.

131. Breen, *supra* note 77, at 10,306. A trustee could plausibly bring an action for natural resource damages involving a destroyed private resource where government acquisition of the resource through condemnation, a tax sale, or gift occurs after the injury. Amoroso & Keenan, *supra* note 39, at 122.

132. Simons & Wicks, *supra* note 45, at 802. See also Anderson, *supra* note 112, at 411; Erik D. Olson, *Natural Resource Damages in the Wake of the Ohio and Colorado Decisions: Where do we go from here?*, 19 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,551, 10,553-54 (1989). Cf. *Sierra Club v. Morton*, 405 U.S. 727 (1972) (Douglas, J., dissenting). While natural resources have no standing, Justice Douglas argued that

[c]ontemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation Inanimate objects are sometimes parties in litigation. A ship has a legal personality, a fiction found useful for maritime purposes. The corporation soul—a creature of ecclesiastical law—is an acceptable adversary and large fortunes ride on its cases

So it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life. The river, for example, is the living symbol of all the life it sustains or nourishes—fish, aquatic insects, water ouzels, otter, fisher, deer, elk, bear, and all other animals, including man, who are dependent on it or who enjoy it for its sight, its sound, or its life. The river as plaintiff speaks for the ecological unit of life that is part of it.

Id. at 741-43.

133. 42 U.S.C. § 9607 (f)(2).

1. Local Municipalities as Trustees

One controversial issue is whether local municipalities may bring a natural resource damage action.¹³⁴ The controversy arises in part from section 9607(f)(1) which states that "liability shall be to the United States Government and to any State for natural resources within the State or belonging to . . . such State."¹³⁵ Two district court rulings have given "state" a broad interpretation, holding that local governments may act as trustees and recover for injury to natural resources they control or own.¹³⁶ In *Mayor of Boonton v. Drew Chemical Co.*,¹³⁷ the court reasoned that it would be inconsistent to include within the definition of natural resources those resources controlled by local governments, and yet not permit local governments to begin an action.¹³⁸ Likewise, the court in *City of New York v. Exxon Corp.*¹³⁹ concluded that preventing local governments from bringing actions does not further the broad purpose of CERCLA.¹⁴⁰

Significantly, both decisions occurred prior to the 1986 SARA passage. Congress had the latitude to amend during the Superfund reauthorization, but left the relevant language of CERCLA intact.¹⁴¹ Apparently, Congress did not perceive eliminating local municipalities from bringing natural resource damage actions as imperative.¹⁴²

While some considered the issue resolved, two post-SARA district

134. See generally Joseph J. Maraziti Jr., *Local Governments: Opportunities to Recover for Natural Resource Damages*, 17 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 10,036 (1987).

135. 42 U.S.C. § 9607 (f)(1).

136. *City of New York v. Exxon Corp.*, 633 F. Supp. 609 (S.D.N.Y. 1986); *Mayor of Boonton v. Drew Chem. Co.*, 621 F. Supp. 663 (D.N.J. 1985). The preceding courts found it persuasive that the definition of natural resources includes "such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States . . . any State or local government." 42 U.S.C. § 9601(16) (emphasis added).

137. 621 F. Supp. 663 (D.N.J. 1985).

138. *Id.* at 666.

139. 633 F. Supp. 609 (S.D.N.Y. 1986).

140. *Id.* at 619.

141. Simons & Wicks, *supra* note 45, at 808-09. The House proposed an amended version which would have expressly excluded municipalities from the definition of "state." However, these proposals were left out of the final enactment. *Id.* See H.R. REP. NO. 962, 99th Cong., 2d Sess. 185 (1986); see also *Town of Bedford v. Raytheon Co.*, 755 F. Supp. 469, 474-75 (D. Mass. 1991) (discussing the legislative history of the SARA amendments).

142. See Maraziti, *supra* note 134, at 10,038. Maraziti contends that congressional refusal to eliminate local governments from natural resource damage trusteeships effectually endorses the right of local governments to act as trustees. *Id.*

court decisions denied local government attempts to recover for damages to natural resources.¹⁴³ In *Werlein v. United States*,¹⁴⁴ the court held that CERCLA permits only state recovery, and that the statute precludes recovery by local governments.¹⁴⁵ Likewise, in *Town of Bedford v. Raytheon*,¹⁴⁶ the court found that the plain language of CERCLA does not encompass municipalities within the definition of "state."¹⁴⁷ Rather, section 9601(21) explicitly includes municipalities within the definition of "person."¹⁴⁸ While a political subdivision of a state may not initiate a natural resource damage action, these municipalities may seek appointment as a public trustee and pursue a natural resource damage action.¹⁴⁹

The state/person distinction is particularly significant to actions under CERCLA other than those for natural resource damages.¹⁵⁰ In an action to recover response costs, CERCLA places less of a burden on "[s]tates" while placing more of a burden on "other persons."¹⁵¹ Section

143. *Werlein v. United States*, 746 F. Supp. 887, 910 (D. Minn. 1990); *Bedford*, 755 F. Supp. at 470.

144. 746 F. Supp. 887 (D. Minn. 1990). In *Werlein*, the plaintiffs alleged that the defendants released chemicals, primarily trichloroethylene, thereby polluting the plaintiffs' water supply. *Id.* at 890. The plaintiffs sought relief under federal statutes including CERCLA, the Resource Conservation and Recovery Act, and the Clean Water Act. The plaintiffs also proceeded under two state statutes: the Minnesota Environmental Response and Liability Act and the Minnesota Environmental Rights Act. Furthermore, the plaintiffs filed common law claims including nuisance, trespass, battery, and intentional and negligent infliction of emotional distress. *Id.*

145. *Id.* at 910.

146. 755 F. Supp. 469 (D. Mass. 1991). Bedford alleged that the defendants released hazardous substances that tainted the town's supply of drinking water. The town sought damages for injury to an aquifer, since it was the town's primary source of potable water. *Id.* at 469.

147. *Id.* at 470.

148. *Id.* at 471. Section 9601(21) defines "person" to include individuals, corporations, associations, municipalities, commissions, and political subdivisions of states. 42 U.S.C. § 9601(21) (1988).

149. *Bedford*, 755 F. Supp. at 472. The *Bedford* court stated *Drew Chemical and Exxon* were distinguishable because in the Superfund Amendments and Reauthorization Act, Congress "provided express means for states to bring natural resource damage actions by permitting the states to designate 'natural resource trustees.'" *Id.* No longer did "state" need to include local governments in order for municipalities to bring a natural resource damage action. *Id.* Rather, "municipalities may now, under appropriate circumstances, seek designation of a municipal representative to pursue natural resource damages claims on behalf of or as a 'natural resource trustee.'" *Id.*

150. Babich & Hanson, *supra* note 58, at 10,168-69.

151. *United States v. Northeastern Pharmaceutical and Chem. Co.*, 810 F.2d 726, 747

9607(a)(4)(A) states that liability shall be for "all costs of removal or remedial action incurred by the United States Government or a *State* or an Indian tribe *not inconsistent* with the national contingency plan."¹⁵²

Accordingly, a local government treated as a state need only show that it incurred costs responding to a release or threatened release.¹⁵³ In such a case, the defendant has the burden of showing the costs were inconsistent with the national contingency plan.¹⁵⁴ However, under section 9607(a)(4)(B), liability includes "any other *necessary* costs of response incurred by any *other person consistent with* the national contingency plan."¹⁵⁵ Thus, municipalities coming within the definition of "any other person" have the greater burden to prove the response costs were "necessary" and "consistent" with the national contingency plan.¹⁵⁶

2. Allowing for a Private Cause of Action

Legislative history indicates that Congress rejected a private right of action for natural resource damages in the final concessions before the enactment of CERCLA.¹⁵⁷ Proposed versions of CERCLA initially contained a private cause of action for natural resource damages.¹⁵⁸ Considerable controversy over this issue resulted in Senators Stafford and

(8th Cir. 1985). See *Bedford*, 755 F. Supp. at 470.

152. 42 U.S.C. § 9607(a)(4)(A) (emphasis added).

153. Babich & Hanson, *supra* note 58, at 10,169.

154. *New York v. Shore Realty Corp.*, 648 F. Supp. 255, 263 (E.D.N.Y. 1986). See also *Northeastern Pharmaceutical*, 810 F.2d at 747 (stating that "not inconsistent" is not the same as "consistent"); *United States v. Ward*, 618 F. Supp. 884, 899 (E.D.N.C. 1985).

155. 42 U.S.C. § 9607(a)(4)(B) (emphasis added).

156. *Northeastern Pharmaceutical*, 810 F.2d at 747. See also Virk, *supra* note 58 at 1551 (suggesting that Congress intended to limit the measure of recovery to private plaintiffs).

To establish a prima facie case, a private plaintiff must prove that (1) the defendant is classified within a category of potentially responsible parties; (2) there was a release or threatened release of hazardous waste from a facility; (3) the release or threatened release caused the plaintiff to incur response costs; (4) the response costs were necessary; and (5) the response costs were consistent with the national contingency plan at the time the plaintiff incurred the costs. *Artesian Water Co. v. Government of New Castle County*, 659 F. Supp. 1269, 1278-79, 1294 (D. Del. 1987), *aff'd on other grounds*, 851 F.2d 643 (3d Cir. 1988). See also *Stevens Creek Assocs. v. Barclays Bank of Cal.*, 915 F.2d 1355, 1358 (9th Cir. 1990); *Lutz v. Chromatex, Inc.*, 718 F. Supp. 413, 417 (M.D. Pa. 1989); *McSiarrow et al.*, *supra* note 29, at 10,388-89; *Lein & Ward*, *supra* note 44, at 10, 322-23. See *supra* note 44 for the categories of potentially responsible parties.

157. *Warren & Zackrison*, *supra* note 128, at 20.

158. *Woodard & Hope*, *supra* note 11, at 212. Senate Bill 1480 and House Bill 85 allowed individuals to bring private causes of action for natural resource damages. *Id.*

Randolf eliminating the private right to make the enactment of CERCLA ostensible.¹⁵⁹ Section 9607(f)(1) reflects the absence of a private cause of action by empowering only states and appointed trustees to initiate actions for natural resource damages.¹⁶⁰ In *United States v. Southeastern Pennsylvania Transportation Authority*,¹⁶¹ the court held that no private right of action exists for natural resource damages, thereby underscoring the absence of a private right.¹⁶²

159. Woodard & Hope, *supra* note 11, at 212-13. Insurance companies, fearing immeasurable liability, were influential in lobbying against this proposal. Senator Cannon, chairman of the Senate Committee on Commerce, Science, and Transportation, argued that the proposal was not feasible due to the extensive risks. Many senators noted that the resultant compromise enabled CERCLA to be legislated with success. *Id.* See generally H. NEEDHAM & M. MENEFFEE, SUPERFUND: A LEGISLATIVE HISTORY: THE EVOLUTION OF SELECTED SECTIONS OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (1983) (providing an illustrative evaluation of the legislative history of CERCLA).

160. 42 U.S.C. § 9607(f)(1). CERCLA, as originally proposed under Senate Bill 1480, provided liability for:

- (C) any injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss;
- (D) any loss of use of any natural resources, without regard to the ownership or management of such resources;
- (E) any loss of income or profits or impairment of earning capacity resulting from personal injury or from injury to or destruction of real or personal property or natural resources, without regard to the ownership of such property or resources

S. 1480, 96th Cong., 2d Sess. § 4(a)(2) (1980).

The phrase "without regard to the ownership" in sections (D) and (E) indicates a private cause of action. Breen, *supra* note 77, at 10,308. The compromise, excluding sections (D) and (E) from CERCLA, left section (C) as the controlling liability section. *Id.* Breen contends that what the statute does not say illustrates the fact that no private cause of action exists for natural resource damages. *Id.*

However, it can also be argued that the excluded language "without regard to ownership" references the distinction between privately owned and publicly owned property, not necessarily the private right of action. Perhaps the elimination of sections (D) and (E) was only an attempt to exclude purely private property from the confines of natural resource damages. If so, it might be plausible to consider whether a private right of action exists as to publicly owned property from step one, or from when the trustee fails to expedite natural resource damage actions.

161. 24 Env'tl. Rep. Cas. (BNA) 1860 (E.D. Pa. 1986).

162. *Id.* at 1865. The court determined that statutory interpretation must not ignore certain words as insignificant. *Id.* (citing *Bell v. United States*, 754 F. 2d 490, 491 (3d Cir. 1985)). The court found that interpreting section 9607 as containing a private cause of action would not give full effect to section 9607(f) and, thus, would be "contrary to the clear language of the statute." *Id.* Section 9607(f) states that "liability

a. *Problems with the present statutory scheme*

CERCLA has not provided the environmental protection Congress anticipated, nor have trustees used the natural resource damages provisions to their fullest potential.¹⁶³ Although CERCLA has contained the natural resource damages provision since its 1980 enactment, no court has ever issued a judgment for damages to natural resources.¹⁶⁴ One reason for the lack of action is that the concept of natural resource damages is relatively new. Few people recognize its significance; only now are natural resource damages gaining understanding.¹⁶⁵ A second reason for the lack of action is that the DOI damage assessment regulations undervalue natural resources.¹⁶⁶ Third, some criticize the public trustees for the delay,¹⁶⁷ and others accuse potentially responsible parties of "foot-dragging."¹⁶⁸ Finally, the response costs provision under section 9607(a)(4)(B), authorizing a private cause of action, is insufficient to encourage the private sector to bring cleanup suits.¹⁶⁹ In addition, this provision alone cannot adequately discourage potential polluters from improperly disposing of hazardous wastes.

Incorporating a private right of action into the natural resource damages section would accommodate some of the above concerns.¹⁷⁰ Without natural resource damages, it might be more cost effective for a potentially responsible party to pollute, rather than treat the product prior to disposal. Because individuals often fail to recognize their ethical obligation to natural resources, it is necessary to provide economic incentives

shall be to the United States government and any state." 42 U.S.C. § 9607(f) (1988).

163. Woodard & Hope, *supra* note 11, at 214. *See also*, Anderson, *supra* note 112, at 415-16; Cross, *supra* note 12, at 339-40.

164. *Liability for Restoration*, *supra* note 93, at 19.

165. Howard Kenison, et al., *State Actions For Natural Resource Damages: Enforcement of the Public Trust*, 17 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,434, 10,434-35 (1987).

166. Olson, *supra* note 132, at 10,552. *See supra* notes 74-91 and accompanying text for the methods used in valuing natural resources.

167. Cross, *supra* note 12, at 339-40. Cross does not necessarily place the blame on the trustees, but rather on CERCLA for requiring the designation of trustees who already perform an abundance of government functions. *See supra* note 17.

168. Woodard & Hope, *supra* note 11, at 214. Woodard and Hope find other probable reasons for the lack of natural resource damage filings and suggest several solutions. These include (1) a specific definition of natural resource damages clarifying the aptness of non-use values in damage assessments; (2) the disposal of the DOI regulations for damage calculations; and (3) a provision allowing citizen groups to bring a cause of action. *Id.* at 215.

169. *See* 42 U.S.C. § 9607.

170. *See* Cross, *supra* note 12, at 339. Cross suggests that a private marketplace, responsible for protecting natural resources, is a necessary supplement to imperfect government regulation. *Id.*

to reduce pollution and encourage efficient behavior.¹⁷¹ "Granting recovery for natural resource damages creates just such an incentive for nondamaging behavior."¹⁷²

The citizen suit is the most efficient private enforcement mechanism to encourage environmental compliance. There are two types of plausible citizen suits that Congress should consider: (1) Private-citizen actions against others for violations of the law, and (2) private-citizen actions against the government for failing to carry out a statutorily mandated duty.¹⁷³ While the latter ensures that public trustees execute their fiduciary duty,¹⁷⁴ the former is more pertinent in allowing private citizens to bring an action for natural resource damages.¹⁷⁵ As "private attorneys general," individual citizens and citizen groups can ensure the protection of the public interest.¹⁷⁶

171. See ALDO LEOPOLD, *The Land Ethic in A SAND COUNTY ALMANAC* 230 (1948).

172. Cross, *supra* note 12, at 340. This is consistent with traditional penalties under our common law system. While restitution is an important quality in damage awards, some argue that a cause of action exists (in any legal arena) primarily to deter potentially harmful acts and to encourage societal betterment. See, e.g., *id.* at 340 n.383 (concluding that strict liability in tort encourages private behavior); accord *United States v. Calandra*, 414 U.S. 338, 348 (1974) (noting that the exclusionary rule was created for its deterrent effect on Fourth Amendment violations).

173. *Citizen Suits for Natural Resource Damages*, *supra* note 16, at 870.

174. See Anderson, *supra* note 112, at 414. Anderson draws an analogy between beneficiaries who mishandle funds and public trustees who fail to sufficiently pursue natural resource damage actions. *Id.* The government holds natural resources in trust for the public. The public trustees are appointed to act for the public interest. See *supra* notes 42-45 and accompanying text. It follows that if private citizens cannot initiate actions for natural resource damages, they should be able to compel a public trustee to do so. CERCLA's citizen suit provision, while primarily used for response cost actions, may provide the avenue to pursue such a cause of action. *Id.* (citing 42 U.S.C. § 9659).

175. *Citizen Suits for Natural Resource Damages*, *supra* note 16, at 870.

176. See Olson, *supra* note 132, at 10,557 ("[O]nly with citizens looking over the polluter's and the government's shoulders can we be assured of environmental restoration."); David R. Hodas, *Private Actions for Public Nuisance: Common Law Citizen Suits for Relief From Environmental Harm*, 16 *ECOLOGY L.Q.* 883, 891 (1989) ("[T]he public interest will be best guarded if private citizens are given access to courts on matters of public concern."). Hodas notes that other areas of law, such as securities law, allow for a private cause of action to complement government enforcement. *Id.* at 890 n.50. As evidenced from section 10(b) of the Securities Exchange Act, he contends that the ramifications of a private cause of action do not include an overload of lawsuits. *Id.*

b. *Few problems with private citizen actions*

It is evident that Congress recognized problems surrounding a private cause of action, and thus did not intend for natural resource damages to encompass private actions.¹⁷⁷ However, the skepticism regarding private citizen actions might be unfounded in light of the potential benefits these actions offer CERCLA's overall objective.¹⁷⁸

One controversy in the congressional debates over CERCLA surrounded the concerns for unlimited liability upon potentially responsible parties which might create uninsurable risks.¹⁷⁹ Accordingly, if there is a hazardous substance release, private parties are limited to common law tort actions to redress their injuries.¹⁸⁰ However, these tort actions might not sufficiently redress the injuries to the resource.¹⁸¹ Other opponents of providing a citizen cause of action argue that the cost of litigating a natural resource damage action far exceeds the finances of most private citizens.¹⁸² Thus, even if CERCLA authorized citizens to initiate natural resource damages claims, the cost might discourage even those with the best intentions.¹⁸³

The government holds natural resources in trust for the public interest.¹⁸⁴ A danger exists that citizen suits might allow private individuals to institute natural resource damages actions to further their own, rather than the public's, interests.¹⁸⁵ But CERCLA safeguards against this by limiting recovery to the government or the appointed trustee.¹⁸⁶ CERCLA further mandates that the government or trustees shall use the amounts recovered "only to restore, replace, or acquire the equivalent of

177. Warren & Zackrisson, *supra* note 128, at 20.

178. See *infra* notes 201-14 and accompanying text.

179. Woodard & Hope, *supra* note 11 at 212-13.

180. Kenison et al., *supra* note 165, at 10,450.

181. *Id.*

182. *Id.* at 10,450-51. The potentially responsible parties are often large corporations that can afford long and drawn out court expenses. Moreover, plaintiffs must assess damages and litigate highly technical issues. This contributes to the immense costs of a natural resource damages suit and suggests the impracticability of allowing for a private cause of action. *Id.* But see *infra* notes 215-19 and accompanying text for possible solutions.

183. Kenison et al., *supra* note 165, at 10,450.

184. See *supra* notes 42-45 and accompanying text.

185. Kenison et al., *supra* note 165, at 10,450-51. But see *Citizen Suits for Natural Resource Damages*, *supra* note 16 at 870 (drawing a distinction between private citizens seeking compensation for the public interest and private plaintiffs bringing individual tort actions). See *infra* notes 220-21 and accompanying text for a possible solution.

186. 42 U.S.C. § 9607(f)(1).

such natural resources.¹⁸⁷ There is no guarantee that a private litigant will use the recovery to restore or replace the damaged natural resource.¹⁸⁸ Moreover, because CERCLA prohibits double recovery for natural resource damages,¹⁸⁹ the statute may bar the government from bringing an action, subsequent to a private litigant, unless it can prove a separate injury.¹⁹⁰ This result conflicts with CERCLA's purpose of authorizing public trustees to recover because their financial and technical support enables them to pursue a natural resource damages claim most effectively. Unfortunately, isolating the private sector from government activity rarely results in the efficient protection of the public interest.

c. Enhancing CERCLA with private citizen actions

Legislatures enact citizen suits primarily to give citizens enforcement power when the government fails to act; to advocate uncompelled compliance with laws; and to encourage law enforcement by the government and the responsible agencies.¹⁹¹ CERCLA, as it stands today, does not adequately meet these goals. Congress has empowered private citizens to sue for response costs under CERCLA¹⁹² and has included citizen suits in many other environmental laws.¹⁹³ If Congress sincerely intends CERCLA to effectively alleviate the environmental woes of our society, then Congress should provide a citizen suit provision for natural resource damages actions.¹⁹⁴

187. *Id.*

188. Kenison et al., *supra* note 165, at 10,450-51.

189. 42 U.S.C. § 9607(f)(1).

190. Kenison et al., *supra* note 165, at 10,450-51.

191. Babich & Hanson, *supra* note 58, at 10,166.

192. 42 U.S.C. § 9659.

193. *Citizen Suits for Natural Resource Damages*, *supra* note 16 at 871 (citing Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws Part III*, 14 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10,407 (1984)). Breen sets forth an updated list of federal environmental laws recognizing citizen suits. *Id.* This list includes the Clean Air Act, 42 U.S.C. § 7604 (1988 & Supp. II 1990); Water Pollution Prevention and Control Act, 33 U.S.C. § 1365 (1988); MPRSA, 33 U.S.C. § 1415(g) (1988); Noise Control Act, 42 U.S.C. § 4911 (1988); Endangered Species Act, 16 U.S.C. § 1540(g) (1988); Deepwater Ports Act, 33 U.S.C. § 1515 (1988); Resource Conservation and Recovery Act, 42 U.S.C. § 6972 (1988); Safe Drinking Water Act, 42 U.S.C. § 300j-8 (1988); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270 (1988); CERCLA, 42 U.S.C. § 9659; Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11046 (1988); and Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(a) (1988).

194. The general requirements of citizen suits in other environmental laws will ade-

Although today's executive branch suggests it is environmentally aware,¹⁹⁵ political leaders often discourage enforcement of environmental laws.¹⁹⁶ This was most evident during the Reagan administration where policies were restrictive and often hostile to environmental legislation.¹⁹⁷

Both the Environmental Protection Agency and the Department of the Interior received budget cuts that hampered environmental efforts.¹⁹⁸ The increase in the federal deficit and the current state of the economy indicates that those responsible for environmental compliance will continue to receive inadequate funding.¹⁹⁹ Finally, the current enforcement agencies often compete over litigation rights, creating tension between those accountable for CERCLA's efficient operation.²⁰⁰

Allowing private citizens to bring suit would bolster government action that at times appears stagnant.²⁰¹ Additionally, private-citizen natural resource damages claims, unlike those the government initiates, would not depend on federal funding.²⁰² These programs, which do not increase the federal deficit and which operate independently of federal funds, will withstand the economic and political storm and effectively enforce CERCLA.²⁰³

quately suffice for natural resource damages. The typical requirements are:

"[a]ny person" can sue "any person" to enforce the "requirements" of the statute Jurisdiction is usually in the federal district court for the district where the violation occurred. Generally, before filing suit, the citizen-plaintiff must provide 60 days notice to the defendant, the federal government, and, under some statutes, the state government. If these government authorities are diligently prosecuting on their own, a citizen suit is barred, though then the citizen-plaintiff can intervene by right if the enforcement action is ongoing in federal court. If the citizen-plaintiff prevails, the usual remedy available is injunctive relief, but four statutes (FWPCA § 505, Resource Conservation and Recovery Act § 7002, CERCLA § 310, and Emergency Planning and Community Right-to-Know Act § 326) also authorize the assessment of civil penalties to be paid into the federal treasury. Once the citizen suit is over, courts are authorized to award costs and attorneys and witness fees to any party.

Citizen Suits for Natural Resource Damages, *supra* note 16 at 872.

195. *Liability for Restoration*, *supra* note 93, at 22.

196. *Citizen Suits for Natural Resource Damages*, *supra* note 16 at 874.

197. Woodard & Hope, *supra* note 11, at 205.

198. *Id.*

199. *Citizen Suits for Natural Resource Damages*, *supra* note 16, at 875. Breen suggests that public trustees responsible for natural resource damage actions are the most ineffective of any party responsible for environmental enforcement.

200. *See Citizen Suits for Natural Resource Damages*, *supra* note 16 at 861, 864 (discussing the undermining of CERCLA due to the EPA and DOI's lack of action).

201. *See supra* note 163 and accompanying text.

202. *Citizen Suits for Natural Resource Damages*, *supra* note 16, at 876.

203. *Id.* at 877.

The deterrent effect on pollution is one of the most promising derivatives of allowing private citizens to bring suit for natural resource damages.²⁰⁴ The concern of excessive liability to potentially responsible parties and their insurers is misplaced.²⁰⁵ "With citizen suits, polluters' substantive liability would not be expanded at all; only the likelihood that the liability will be enforced is increased."²⁰⁶ Accordingly, successful citizen suits will inspire potentially responsible parties to internalize the cost of their pollution by modifying the current structure of their operation to comply with environmental legislation.²⁰⁷

Moreover, CERCLA's framework is suitable for adopting a citizen suit provision for natural resource damages actions without repealing existing legislation.²⁰⁸ The integration would be simple, the modification merely procedural.²⁰⁹ Congress could import an appropriate framework from citizen suit provisions in other federal legislation.²¹⁰ The general requirements of citizen suit provisions ensure that government efforts in bringing natural resource damage actions are not hampered.²¹¹ First, a private citizen can only bring an action where the government is not diligently pursuing an action.²¹² Second, the private citizen must provide the government with sixty days' notice.²¹³ Thus, the government or public trustee is allowed ample time to initiate an action if it so chooses.²¹⁴

While repealing existing legislation is not a prerequisite to adopting a citizen suit provision, the legislature would have to amend CERCLA to

204. See Cross, *supra* note 12, at 339-40; *Citizen Suits for Natural Resource Damages*, *supra* note 16, at 875. While Congress' purpose in enacting CERCLA's natural resource damages provision was to establish liability for injury to natural resources, CERCLA would best serve society if it induced individuals not to pollute in the first place. See *supra* notes 170-72 and accompanying text.

205. See *supra* notes 179-81 and accompanying text.

206. *Citizen Suits for Natural Resource Damages*, *supra* note 16, at 854.

207. *Id.* at 875. This would be consistent with CERCLA's purpose of ensuring that responsible parties pay for the injury they cause. See Cross, *supra* note 12, at 271 (citations omitted).

208. *Citizen Suits for Natural Resource Damages*, *supra* note 16, at 877.

209. *Id.*

210. *Id.* at 854. Breen proposes that the simplicity of adopting a citizen suit provision is of extreme importance. Compared to other environmental proposals, such as enacting a tax on pollution, society will not be in a worse situation even if the citizen suit provision fails. *Id.* at 877.

211. See *supra* note 194 for these general requirements.

212. *Citizen Suits for Natural Resource Damages*, *supra* note 16 at 877.

213. *Id.*

214. *Id.*

some extent.²¹⁵ The costs for natural resource damage assessments and litigation far exceed the financial resources of most private citizens and citizen groups.²¹⁶ Congress could amend the natural resource damage section so that citizen-plaintiffs can recover these costs prior to the damage assessment.²¹⁷ If the citizen-plaintiff could establish liability, the responsible party would have to finance the damage assessment.²¹⁸ The plaintiff could later recover attorney fees and other costs of litigation.²¹⁹ Additionally, Congress would have to amend section 9607(f)(1) to require that private plaintiffs use any recovery, less the cost of damage assessments and litigation, to restore or replace the damaged natural resource.²²⁰ Congress could accomplish this objective by requiring the plaintiff to turn the damage award over to the public trustee or the appropriate government agency.²²¹ When the private plaintiff is a more effective trustee than the appointed public trustee, Congress might want to allow the private plaintiff to manage the restoration and replacement of the natural resources. By requiring the private plaintiff to submit a restoration and replacement plan for court approval, Congress can adequately safeguard this alternative.

V. CONCLUSION

The 1990s should see an abundance of environmental enforcement claims. The number of hazardous waste sites that federal agencies identify for inclusion on the National Priority List continues to increase.²²² As

215. *Id.* at 878.

216. *Id.* at 879.

217. *Id.* See also Woodard & Hope, *supra* note 11, at 214.

218. *Citizen Suits for Natural Resource Damages*, *supra* note 16, at 879.

219. Under the American Rule, each party must pay his own attorney fees unless there is specific statutory language providing otherwise. *Alyeska Pipeline Co. v. Wildermess Soc'y*, 421 U.S. 240, 267-71 (1970); see *Arcambel v. Wiseman*, 3 U.S. 306 (1796) (establishing the American Rule). However, Congress could provide specific statutory authority to recover attorney fees, thereby encouraging private plaintiffs to initiate actions. If Congress refuses, the private plaintiff might seek recovery under the private attorney general theory. Recently the Eighth Circuit held that private plaintiffs may recover attorney fees under CERCLA for response cost actions. *General Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1417 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1697 (1991). *But see T & E Indus. v. Safety Light Corp.*, 680 F. Supp. 696 (D.N.J. 1988); *Virk*, *supra* note 58 (claiming that the Eighth Circuit's decision ignores congressional intent and statutory language in awarding attorney fees in a response cost action). See generally *Russell & Gregory*, *supra* note 58.

220. *Citizen Suits for Natural Resource Damages*, *supra* note 16 at 879. See also Woodard & Hope, *supra* note 11, at 214.

221. *Citizen Suits for Natural Resource Damages*, *supra* note 16 at 879. See also Woodard & Hope, *supra* note 11, at 214.

222. *Superfund Clean-up Costs Increasing Rapidly*, FIN. TIMES LTD., Apr. 26, 1991, at 4. In 1990, federal agencies found 31,904 sites that could potentially end up on the

the public and environmental lawyers begin to understand natural resource damages, actions for natural resource damages should soon gain prominence in CERCLA litigation.²²³

Once understood, it is difficult to visualize a more effective cause of action to deter pollution and restore natural resources. However, Congress must make the requisite changes to CERCLA to encourage the pursuit of natural resource damage claims. The courts have seen little litigation in the area of natural resource damages. The complexity of the statute and the lack of administrative interpretation or case law discourages agencies and trustees from initiating actions.

Congress needs to clarify the scope of natural resource damages. A definition of natural resources should identify the relevant values in assessing damages. These values should include nonuse as well as use values. Additionally, Congress should amend CERCLA to encompass all property, regardless of title of ownership. This would be consistent with explicit statutory language²²⁴ and the public trust doctrine.²²⁵ Lastly, Congress should amend CERCLA to allow citizens to initiate a natural resource damages cause of action. This would effectively and efficiently encourage voluntary environmental compliance as well as increase the number of recoveries for natural resource damages.

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NPL. The NPL only included 1236 of these sites and of those only 29 had been cleaned up. *Id.* Additionally, these numbers only refer to federal sites and do not include those sites that individual states have classified as contaminated. *Id.* See *supra* note 10 for further discussion of the NPL.

223. Lawyers and public nonprofit entities should begin to focus on CERCLA's potential to restore natural resources instead of being satisfied with recovering response costs.

224. See *supra* note 126 and accompanying text.

225. See *supra* note 45.

