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# A Little Waste Goes a Long Way: The Recovery of Response Costs Under CERCLA

*Johnson v. James Langley Operating Co.*<sup>1</sup>

## I. INTRODUCTION

Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")<sup>2</sup> in 1980 in response to nationally publicized toxic waste problems.<sup>3</sup> CERCLA's purpose is to protect public health and the environment from the effects of releases or threatened releases of hazardous substances.<sup>4</sup> The statute's main goals are to provide the tools necessary for prompt and effective response to problems resulting from hazardous waste disposal and to force those responsible for creating harmful conditions to bear the

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1. 226 F.3d 957 (8th Cir. 2000).

2. Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified at 42 U.S.C. §§ 9601-9675 (1994)).

3. H.R. REP. NO. 96-1016, pt. 1, at 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6119-20. These toxic waste problems included Love Canal in New York and Times Beach in Missouri. *Id.*; *see also* John C. Cruden, *CERCLA Overview*, SE98 ALI-ABA 807, 808 (2000). From 1942 to 1953, the Love Canal property was a disposal site for approximately twenty-two thousand tons of chemical waste. Charles de Saillan, *Superfund Reauthorization: A More Modest Proposal*, 27 ENVTL. L. REP. 10201 (1997). Later, the property was the site of a residential neighborhood and public school. *Id.* In the 1970s, an oil recycler who was under contract with local towns and businesses sprayed dioxin-containing waste oil, as a dust suppression measure, onto local roads, parking lots, and soil in Times Beach, Missouri. *Hazardous Waste Cleanup*, 27 ENVTL. L. REP. 10475 (1997). The contaminated soil at this site was incinerated, and the site was completely remediated by July 1997. *Id.* The site is now the home of the 409-acre Route 66 State Park. *Id.*

4. H.R. REP. NO. 96-1016, pt. 1, at 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6119-20.

costs of remediation.<sup>5</sup> CERCLA allows private parties to recover response costs<sup>6</sup> when such costs are caused by the release or threatened release of hazardous substances and are necessary and consistent with the National Oil and Hazardous Substance Pollution Contingency Plan ("NCP").<sup>7</sup>

In *Johnson v. James Langley Operating Co.*,<sup>8</sup> the United States Court of Appeals for the Eighth Circuit held that plaintiffs, in order to impose liability on defendants, need not show that they incurred response costs by acting to contain a release that threatened public health or the environment.<sup>9</sup> By rejecting the Fifth Circuit's holding in *Amoco Oil Co. v. Borden, Inc.*,<sup>10</sup> the court created a circuit split. This Note argues that the Eighth Circuit's liberal interpretation of the plain language of CERCLA furthers the goals of the statute more than the Fifth Circuit's narrow interpretation. This Note also argues that because the *Johnson* court did not address the fact that the plaintiffs did not incur response costs until after the commencement of their lawsuit, the Eighth Circuit opened the door for landowners to seek recovery of response costs from potentially responsible parties when such landowners have not yet incurred such costs.

## II. FACTS AND HOLDING

In January 1998, Dunn L. Johnson, Grover Smith and others<sup>11</sup> (hereinafter collectively referred to as "Landowners," or separately as "Johnson" and

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5. H.R. REP. NO. 96-1016, pt. 1, at 1 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6119; *see also, e.g.*, *Town of New Windsor v. Tesa Tuck, Inc.*, 919 F. Supp. 662, 668 (S.D.N.Y. 1996) (generally stating CERCLA's goals); *United States v. Wallace*, 893 F. Supp. 627, 636 (N.D. Tex. 1995) ("The two primary, underlying policy concerns of CERCLA are (1) Congress' desire to equip the federal government with tools necessary for prompt and effective responses to hazardous waste disposal problems of national magnitude and (2) Congress' desire that those responsible for causing the problems thus identified bear the costs and responsibility for remedying the harmful conditions they created.").

6. For the definition of response costs, see *infra* notes 61-65 and accompanying text.

7. 42 U.S.C. § 9607(a)(4)(B) (1994). For an explanation of the National Oil and Hazardous Substance Pollution Contingency Plan ("NCP"), see *infra* notes 68-70 and accompanying text.

8. 226 F.3d 957 (8th Cir. 2000).

9. *Id.* at 962-63.

10. 889 F.2d 664 (5th Cir. 1989).

11. This case involves two actions that the district court consolidated for trial. *Johnson*, 226 F.3d at 959. In the first action, the plaintiffs included Johnson and a group of forty-four others with interests in real estate in Union County, Arkansas. *Id.* The plaintiffs in the second action included Smith and five others. *Id.*

“Smith”) filed suit against a group of individuals and entities that leased land for oil and gas production operations (hereinafter “Defendants”), alleging that Defendants’ operations caused Landowners’ properties to become contaminated with “radioactive scales, salt water, oil and grease, heavy metals and other hazardous substances.”<sup>12</sup> Landowners claimed entitlement to response costs under CERCLA.<sup>13</sup> These response costs consisted of site assessment costs incurred by Landowners after the commencement of the lawsuit.<sup>14</sup>

To support their CERCLA claim, Landowners relied on two reports prepared by Radiation Protection Resources, Inc., in August 1999.<sup>15</sup> In the first of these reports, author Edwin Cargill stated that four of the five sites tested within the boundaries of Johnson’s property did not display radiation above background levels.<sup>16</sup> The fifth site,<sup>17</sup> however, revealed elevated radiation levels.<sup>18</sup> In the second report, Cargill stated that nine of ten sites tested on the Smith property indicated only background levels of radiation, while the tenth showed elevated radiation levels.<sup>19</sup> Using a process described by A.L. Smith,<sup>20</sup> Landowners contended that their properties were contaminated with radioactive substances that CERCLA deems hazardous.<sup>21</sup>

Following discovery, Defendants moved for summary judgment on the CERCLA claim.<sup>22</sup> Defendants argued that Landowners failed to establish a prima facie case of liability under CERCLA because Landowners failed to show an incurrence of cleanup or removal costs due to hazardous substances.<sup>23</sup>

12. *Id.*

13. *Id.* Plaintiffs’ claims also included several state-law actions, which are not relevant to this Note. *Id.*

14. *Id.* Although the court does not state the specific nature of the response costs, the Author presumes the response costs to be those costs associated with the site assessment reports prepared by Radiation Protection Resources, Inc. See *infra* text accompanying notes 15-19.

15. *Johnson*, 226 F.3d at 959.

16. *Id.*

17. This site was an operating well. *Id.*

18. *Id.*

19. *Id.*

20. In a paper presented at the Seventeenth Annual Offshore Technology Conference in May 1985, Smith stated that water present in an oil and gas reservoir contains dissolved mineral salts, a small proportion of which may be naturally radioactive. *Id.* “[A]s the oil and gas are depleted through production, water is produced in the reservoir, resulting in the deposit of mineral scales containing measurable quantities of natural radioactivity into the oil production system.” *Id.*

21. *Id.* at 959-60.

22. *Id.* at 959. Defendants also moved for dismissal of the state claims. *Id.*

23. *Id.* In addition, Defendants argued that their crude oil operations were excluded

In September 1999, the United States District Court for the Western District of Arkansas, relying upon a decision from the Fifth Circuit,<sup>24</sup> concluded that, for Defendants to be held liable under CERCLA, Landowners needed to show that the levels of hazardous materials on the properties posed a threat to public health or the environment.<sup>25</sup> The district court said that Landowners could have accomplished this by showing that the materials were present in levels that violated applicable state or federal law.<sup>26</sup> Although the district court concluded that Landowners had failed to provide evidence that radioactive substances were present at such levels, it declined to grant summary judgment on the CERCLA claim.<sup>27</sup> The district court, instead, instructed Landowners to submit additional evidence that, at the very least, would raise a genuine issue of fact as to whether the release or threatened release of hazardous substances had caused the incurrence of response costs that were necessary and consistent with the NCP.<sup>28</sup>

In October 1999, the district court issued its second decision, in which it evaluated the additional evidence presented by both parties in response to the September ruling.<sup>29</sup> The district court determined that the substances Landowners contended were released<sup>30</sup> were hazardous substances under CERCLA.<sup>31</sup> The district court also reiterated its September ruling that, in order to recover response costs, Landowners must create a genuine issue of fact as to whether they incurred those costs by acting to contain a release threatening public health or the environment.<sup>32</sup> The district court concluded that Landowners failed to show

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from CERCLA under 42 U.S.C. § 9601(14). *Id.* This section specifically excludes petroleum, including crude oil, from the definition of hazardous substances. 42 U.S.C. § 9601(14) (1994).

24. *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664 (5th Cir. 1989).

25. *Johnson*, 226 F.3d at 960.

26. *Id.*

27. *Id.*

28. *Id.* The NCP is CERCLA's primary regulation. *See Union Pac. R.R. Co. v. Reilly Indus., Inc.*, 215 F.3d 830, 835 (8th Cir. 2000); *Cruden*, *supra* note 3, at 807. It is "comprised of EPA regulations that set forth procedures and standards for responding to releases of hazardous substances." *Union Pac.*, 215 F.3d at 835. For a more in-depth discussion of the NCP, see *infra* notes 68-70 and accompanying text. In addition to the court's denial of summary judgment on the CERCLA claim, the court denied Defendants' motion for summary judgment by virtue of CERCLA's petroleum exclusion and granted Defendants partial summary judgment on Landowners' personal injury claims. *Johnson*, 226 F.3d at 960.

29. *Id.*

30. Radium-226 and -228, cadmium, lead, and xylenes. *Id.*

31. *Id.* The court also ruled that the xylenes were subject to the petroleum exclusion. *Id.*

32. *Id.*

contamination in excess of applicable standards and granted Defendants summary judgment on the CERCLA claim.<sup>33</sup>

Landowners appealed the district court's decision, arguing that the court erred in adopting the standard established by the Fifth Circuit in *Amoco*.<sup>34</sup> The United States Court of Appeals for the Eighth Circuit reversed the decision of the district court and rejected the decision of the Fifth Circuit, to the extent that those decisions burdened Landowners with the costs of testing and sampling in response to a release or threatened release of hazardous substances.<sup>35</sup> The Eighth Circuit held that CERCLA's plain language does not incorporate any quantitative threshold for the imposition of liability.<sup>36</sup> Rather, for Landowners to be entitled to response costs, such costs must be caused by an actual or threatened release of hazardous substances, and must be necessary and consistent with the NCP.<sup>37</sup>

### III. LEGAL BACKGROUND

#### A. *An Introduction to CERCLA*

In 1980, Congress enacted CERCLA<sup>38</sup> in response to nationally publicized toxic waste problems, including Love Canal in New York and Times Beach in Missouri.<sup>39</sup> Congress reauthorized and amended CERCLA when it enacted the Superfund Amendments and Reauthorization Act of 1986.<sup>40</sup> "CERCLA substantially changed the legal machinery used to enforce environmental cleanup efforts"<sup>41</sup> and filled gaps left in an earlier statute, the Resource Conservation and Recovery Act of 1976.<sup>42</sup> CERCLA's purpose is to protect and preserve public health and the environment from the effects of releases or threatened releases of hazardous substances.<sup>43</sup> Two primary goals of CERCLA are (1) providing the

33. *Id.* at 961.

34. *Id.*

35. *Id.* at 962.

36. *Id.*

37. *Id.* at 963-64.

38. Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified at 42 U.S.C. §§ 9601-9675 (1994)).

39. See *supra* note 3 and accompanying text.

40. Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified in scattered sections of U.S.C.).

41. *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 667 (5th Cir. 1989).

42. H.R. REP. NO. 96-1016, pt. 1, at 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6119-20. The Resource Conservation and Recovery Act of 1976 can be found at Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified at 42 U.S.C. §§ 6901-6992k (1994)).

43. H.R. REP. NO. 96-1016, pt. 1, at 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6119-20. Section 9601(14) defines "hazardous substance" as:

tools necessary for prompt and effective response to problems resulting from hazardous waste disposal, and (2) forcing those responsible for creating harmful conditions to bear the costs of remediation.<sup>44</sup>

Because CERCLA aims to facilitate clean up, the statute imposes strict liability on a variety of parties—regardless of their culpability.<sup>45</sup> To establish CERCLA liability, a plaintiff must prove:

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(A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C. § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C. § 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C. § 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

42 U.S.C. § 9601(14) (1994).

44. See, e.g., H.R. REP. NO. 96-1016, pt. 1, at 1 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6119; *Town of New Windsor v. Tesa Tuck, Inc.*, 919 F. Supp. 662, 668 (S.D.N.Y. 1996); *United States v. Wallace*, 893 F. Supp. 627, 636 (N.D. Tex. 1995).

45. See 42 U.S.C. § 9607(a) (1994); *see also, e.g., Hydro-Mfg. Inc. v. Kayser-Roth Corp.*, 903 F. Supp. 273, 276 (D.R.I. 1995) (“The legislation is designed to impose strict liability on a variety of actors . . . irrespective of their culpability, because the aim of CERCLA is to facilitate repair and clean up.”). Section 9607(a) imposes liability upon:

- (1) the owner and operator of a vessel or a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
- (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance. . . .

42 U.S.C. § 9607(a) (1994).

(1) defendant is within one of four classes of covered persons enumerated by 42 U.S.C. § 9607(a)(1)[-](4); (2) a release or threatened release of a hazardous substance from a facility has occurred; (3) the release or threatened release caused plaintiff to incur response costs; and (4) those response costs were consistent with the National Contingency Plan (NCP), 40 CFR §§ 300.1.1105 (1999).<sup>46</sup>

The only defenses to liability are an act of God, an act of war, and an act or omission of a third party.<sup>47</sup>

### B. Timeliness of Filing Suit

CERCLA allows private parties who incurred necessary response costs consistent with the NCP to seek recovery from the party or parties who caused the offending condition.<sup>48</sup> To recover costs under this statute, however, a plaintiff actually must have incurred response costs.<sup>49</sup> In *Lewis v. General Electric Co.*,<sup>50</sup> the plaintiff conceded that she had not yet incurred such response costs.<sup>51</sup> Therefore, the court found premature the plaintiff's claim to recover response costs and dismissed it for failure to state a claim upon which relief could be granted.<sup>52</sup> The court stated that the plaintiff could reassert her claim if she incurred response costs at a later date.<sup>53</sup> Similarly, in *Weyerhaeuser Corp. v. Koppers Co.*,<sup>54</sup> the court held that, to prove a prima facie case of CERCLA liability, "the plaintiff must prove that it has incurred at least some costs which are in compliance and hence recoverable."<sup>55</sup> The court further said that it makes sense to impose a pleading requirement that a plaintiff must allege at least one type of

46. *Johnson v. James Langley Operating Co.*, 226 F.3d 957, 961-62 (8th Cir. 2000); *see also* 42 U.S.C. § 9607(a) (1994).

47. 42 U.S.C. § 9607(b) (1994).

48. 42 U.S.C. § 9607(a)(4)(B) (1994). For the statutory language, *see infra* note

65. For an in-depth discussion of response costs, *see infra* notes 61-96 and accompanying text. In addition, 42 U.S.C. § 9607(a)(4)(A) (1994) allows the United States, states, and Indian tribes to recover costs of removal and remediation that are not inconsistent with the NCP.

49. *Lewis v. General Elec. Co.*, 37 F. Supp. 2d 55, 62 (D. Mass. 1999) (citing 42 U.S.C. § 9607(a)(4), which states that the release must "have caused the incurrence of response costs").

50. 37 F. Supp. 2d 55 (D. Mass. 1999).

51. *Id.* at 62.

52. *Id.*

53. *Id.*

54. 771 F. Supp. 1406 (D. Md. 1991).

55. *Id.* at 1414.



response cost cognizable under CERCLA to establish a *prima facie* case.<sup>56</sup> Finally, in *Colorado v. Asarco, Inc.*,<sup>57</sup> the court said that the similar language of Section 9607(a)(4)(A)<sup>58</sup> had been interpreted to require a plaintiff to “begin the cost of the clean-up and incur some expenses before it [could] initiate an action.”<sup>59</sup> In *Asarco*, Colorado’s pleading that it had incurred costs of sampling and analytical services was sufficient to justify the filing of its lawsuit.<sup>60</sup>

### C. Response Costs

One of CERCLA’s key provisions permits both governmental and private parties to recover from responsible parties the costs incurred in cleaning up and responding to hazardous substances.<sup>61</sup> Although the definition of “response costs” does not appear in CERCLA’s definitions section,<sup>62</sup> the statute defines “response” as including removal actions.<sup>63</sup> “Removal,” in turn, includes “such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances.”<sup>64</sup> CERCLA allows private parties to recover such response costs<sup>65</sup> when two conditions are met. First, the response costs must be

56. *Id.*

57. 616 F. Supp. 822 (D. Colo. 1985).

58. *See infra* note 65.

59. *Asarco*, 616 F. Supp. at 829 (citing *United States v. Price*, 577 F. Supp. 1103, 1110 (D.N.J. 1983)).

60. *Id.*; *see also* *Weyerhaeuser Corp. v. Koppers Co.*, 771 F. Supp. 1406, 1414 (D. Md. 1991) (stating that courts consistently have held that investigative costs incurred prior to the lawsuit are sufficient to bring suit).

61. *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 667 (5th Cir. 1989).

62. *Avnet, Inc. v. Allied-Signal, Inc.*, 825 F. Supp. 1132, 1137 (D.R.I. 1992).

63. 42 U.S.C. § 9601(25) (1994).

64. 42 U.S.C. § 9601(23) (1994).

65. As stated in the text accompanying note 62, the definition of “response costs” is not found in 42 U.S.C. § 9601. Section 9607(a)(4), however, indicates that response costs include:

(A) 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;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

42 U.S.C. § 9607(a)(4)(A)-(D) (1994).

caused by an actual release or a threatened release of hazardous substances.<sup>66</sup> Second, the response costs must be necessary and consistent with the NCP.<sup>67</sup> The NCP is CERCLA's primary regulation<sup>68</sup> and is "comprised of EPA regulations that set forth procedures and standards for responding to releases of hazardous substances."<sup>69</sup> Like CERCLA, the NCP was designed to promote cost-effective measures to protect public health and the environment.<sup>70</sup>

Courts consistently have held that CERCLA should be construed liberally in order to effectuate its remedial goals.<sup>71</sup> When determining if response costs are recoverable, courts agree that CERCLA's plain language does not incorporate any quantitative threshold into its definition of hazardous substances.<sup>72</sup> In *Amoco Oil Co. v. Borden, Inc.*,<sup>73</sup> the Fifth Circuit concurred that CERCLA's plain language fails to impose any quantitative requirement for hazardous substances.<sup>74</sup> However, the *Amoco* court found that a threshold for liability was suggested by the requirement that a release or threatened release "cause[s] the incurrence of response costs."<sup>75</sup> According to the *Amoco* court, to justify the incurrence of response costs, "one necessarily must have acted to contain a release threatening

66. 42 U.S.C. § 9607(a)(4) (1994).

67. 42 U.S.C. § 9607(a)(4)(B) (1994).

68. See Cruden, *supra* note 3, at 807; see also *Union Pac. R.R. Co. v. Reilly Indus., Inc.*, 215 F.3d 830, 835 (8th Cir. 2000). The NCP is codified at 40 C.F.R. Part 300 (2001).

69. *Union Pac.*, 215 F.3d at 835.

70. *Id.*

71. See, e.g., *Town of New Windsor v. Tesa Tuck, Inc.*, 919 F. Supp. 662, 668 (S.D.N.Y. 1996).

72. See, e.g., *A&W Smelter & Refiners, Inc. v. Clinton*, 146 F.3d 1107, 1110 (9th Cir. 1998); *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 720 (2d Cir. 1993); *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 260-63 (3d Cir. 1992); *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1199-1201 (2d Cir. 1992); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 669 (5th Cir. 1989).

73. 889 F.2d 664 (5th Cir. 1989). *Amoco* sought response costs, including site investigation, from *Borden*, from which *Amoco* had purchased "as-is" a 114-acre tract of land. *Id.* at 666. This land, allegedly unbeknownst to *Amoco*, contained a thirty-five-acre pile of inactive phosphogypsum. *Id.* Some of the waste contained more than five hundred times the background level of radiation. *Id.* This level of radiation exceeded the limits set by the Inactive Tailings Standards. *Id.* at 666, 671. Under the Uranium Mill Tailings Radiation Control Act, the Environmental Protection Agency ("EPA") promulgated the Inactive Tailings Standards, codified at 40 C.F.R. § 192.00-.43 (2001), to determine hazardous radionuclide levels. *Id.* at 667.

74. *Id.* at 670.

75. *Id.*

public health or the environment."<sup>76</sup> Conceding that it was entering new territory, the *Amoco* court held that:

[w]hile not the exclusive means of justifying response costs, . . . a plaintiff who has incurred response costs meets the liability requirement as a matter of law if it is shown that any release violates, or any threatened release is likely to violate, any applicable state or federal standard, including the most stringent.<sup>77</sup>

The Fifth Circuit applied its *Amoco* holding in *Licciardi v. Murphy Oil U.S.A., Inc.*<sup>78</sup> In *Licciardi*, the plaintiffs sought response costs—the costs of hiring a number of environmental testing and consulting firms to assess their property—incurred due to the release of a “black tarry substance”<sup>79</sup> from the defendant’s refinery.<sup>80</sup> The district court determined that the level of lead concentration in the soil exceeded background levels and awarded the Licciardis their response costs.<sup>81</sup> The Fifth Circuit, however, found that the district court’s reference to “background level” was not the proper legal standard.<sup>82</sup> In addition, the court found that the drinking water standard and the toxic concentration leaching procedure standard were not applicable standards for the alleged release.<sup>83</sup> As a result, the court held that the Licciardis’ response costs were not justified because the above-background lead levels did not violate any applicable legal standard.<sup>84</sup>

The First,<sup>85</sup> Third,<sup>86</sup> and Ninth<sup>87</sup> Circuits criticized the approach taken by the Fifth Circuit in *Amoco*. Because the outcomes of these cases were based on different issues, however, the courts did not go so far as to *hold* that the Fifth Circuit’s approach was incorrect.<sup>88</sup> In *United States v. Alcan Aluminum Corp.*,<sup>89</sup>

76. *Id.*

77. *Id.*

78. 111 F.3d 396 (5th Cir. 1997).

79. Presumptively, this “black tarry substance” was refinery sludge, found by the district court to have come from the defendant’s refinery, that contained lead in above-background levels. *See id.* at 397-98.

80. *Id.* at 397.

81. *Id.* at 397-98.

82. *Id.* at 398.

83. *Id.* at 398-99.

84. *Id.* at 399.

85. *Acushnet Co. v. Mohasco Corp.*, 191 F.3d 69 (1st Cir. 1999).

86. *United States v. Alcan Aluminum Corp.*, 964 F.2d 252 (3d Cir. 1992).

87. *A&W Smelter & Refiners, Inc. v. Clinton*, 46 F.3d 1107 (9th Cir. 1998).

88. In *Alcan*, a contribution case, the court determined that CERCLA contained no quantitative threshold for the term “hazardous substance.” *Alcan*, 964 F.2d at 260. The

the Third Circuit explained that CERCLA is plain on its face and courts need not resort to legislative history to uncover its meaning.<sup>90</sup> Nevertheless, the *Alcan* court said that the legislative history is “barren of any remarks directly revealing Congress’ intent vis-a-vis a threshold requirement on the definition of hazardous substances.”<sup>91</sup> Importantly, the available legislative history indicates that Congress created the statute to force all polluters to pay for their pollution.<sup>92</sup> The *Alcan* court concluded that it “is difficult to imagine that Congress intended to impose a quantitative requirement on the definition of hazardous substances and thereby permit a polluter to add to the total pollution but avoid liability because the amount of its own pollution was minimal.”<sup>93</sup>

Seemingly following the reasoning of the *Alcan* court, the First and Ninth Circuits agreed that the Fifth Circuit, by requiring that pollution pose a threat to the public or the environment, read too much into the word “causes” in Section 9607(a)(4).<sup>94</sup> According to the Ninth Circuit, which decided *A&W Smelter & Refiners, Inc. v. Clinton*,<sup>95</sup> the Fifth Circuit “imposed a minimum level requirement through the back door.”<sup>96</sup>

#### IV. THE INSTANT DECISION

In *Johnson v. James Langley Operating Co.*, a case of first impression in the Eighth Circuit, the court addressed whether private parties’ response costs under

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court did not discuss this threshold with regard to releases that “cause the incurrence of response costs,” the language that the *Amoco* court found determinative. *Id.* at 264; see *Amoco Oil Co. v. Borden*, 889 F.2d 664, 670 (5th Cir. 1989).

The *Acushnet* court, while addressing whether an otherwise responsible party may escape CERCLA contribution, discussed whether CERCLA liability attaches upon the release of any quantity of hazardous substances. *Acushnet*, 191 F.3d at 78 n.9 In so doing, the court criticized the far-reaching approach taken by the Fifth Circuit. *Id.*

In denying summary judgment in favor of the EPA, the *Smelter* court discussed the lack of a minimum-level requirement in CERCLA’s definition of hazardous wastes. *Smelter*, 146 F.3d at 1110. In dicta, the court criticized the Fifth Circuit’s imposition of a minimum-level requirement through a strained reading of the causation requirement. *Id.*

89. 964 F.2d 252 (3d Cir. 1992).

90. *Id.* at 260.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Acushnet Co. v. Mohasco Corp.*, 191 F.3d 69, 78 n.9 (1st Cir. 1999); *A&W Smelter & Refiners, Inc. v. Clinton*, 146 F.3d 1107, 1110 (9th Cir. 1998).

95. 146 F.3d 1107 (9th Cir. 1998).

96. *Id.* at 1110.

CERCLA are justified and recoverable only when the release threatened public health or the environment.<sup>97</sup> The court held that Landowners could recover their assessment costs when hazardous substances were released, even if the quantity of such release was not in excess of any applicable legal standard.<sup>98</sup>

First, the court noted the elements that must be proved by a plaintiff to establish CERCLA liability.<sup>99</sup> The court then explained that “the thrust of defendants’ *Amoco* argument is that CERCLA plaintiffs’ response costs are justified and recoverable only where the release threatened public health or the environment.”<sup>100</sup> Next, the court outlined the Fifth Circuit’s decision in *Amoco*.<sup>101</sup> According to the court, “the Fifth Circuit held that CERCLA response costs are caused by a release or threatened release—and thus may be recovered in a CERCLA action—only where such costs are justified by proof that a release threatened public health or the environment.”<sup>102</sup> The court noted that the Fifth Circuit “specifically rejected the argument that liability automatically attaches upon the release of any quantity of a hazardous substance.”<sup>103</sup> The court recognized that the Fifth Circuit did not identify a minimum requirement; however, the Fifth Circuit said that showing that a release violates any applicable state or federal standard would meet the liability requirement.<sup>104</sup>

The court then explained the Fifth Circuit’s subsequent decision in *Licciardi*, in which the Fifth Circuit concluded that the plaintiffs’ evidence of elevated lead levels failed to show that the release posed a threat to the public or the environment.<sup>105</sup> In *Licciardi*, the plaintiffs had shown hazardous substances above background levels, but not in excess of any legally applicable or relevant and appropriate requirement.<sup>106</sup>

97. *Johnson v. James Langley Operating Co.*, 226 F.3d 957, 962 (8th Cir. 2000).

98. *Id.*

99. *Id.* at 961-62. These elements are:

(1) [D]efendant is within one of four classes of covered persons enumerated by 42 U.S.C. § 9607(a)(1)(4); (2) a release or threatened release of a hazardous substance from a facility has occurred; (3) the release or threatened release caused plaintiff to incur response costs; and (4) those response costs were consistent with the National Contingency Plan (NCP), 40 CFR §§ 300.1-.1105 (1999).

*Id.*

100. *Id.* at 962.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

The court disagreed with the Fifth Circuit's *Amoco* and *Licciardi* decisions "to the extent that they saddle [landowners] with the costs of testing and sampling in response to a release or threat of a release of hazardous substances."<sup>107</sup> The court explained that CERCLA plainly contemplates liability for site assessment and that its plain language does not incorporate any quantitative threshold into its definition of hazardous substances.<sup>108</sup> The court further explained that imposing a minimum-release level would go against Congress's policy decision that the threat posed by hazardous substances does not depend upon a minimum concentration.<sup>109</sup> The court recognized that the statute has internal limitations to ensure that response costs are justified and that private recovery actions for expenses incurred in site evaluation "do not become a vehicle for wholly speculative testing."<sup>110</sup>

The first of these limitations is that response costs must be caused by an actual release or threatened release.<sup>111</sup> Plaintiffs may not recover when the release or threatened release involves only excluded substances, including petroleum.<sup>112</sup> The court then addressed Defendants' contention that the response costs at issue were not caused by a release, asserting that Landowners failed to commence site assessment until after filing suit.<sup>113</sup> The court rejected this assertion, finding that the response costs were not transformed into litigation costs merely by their timing with respect to Landowners' initiation of this action.<sup>114</sup>

The second limitation is that response costs be "necessary" and consistent with the NCP to be recoverable by private parties.<sup>115</sup> For the costs to be necessary, parties must have an objectively reasonable belief that the defendants' release or threatened release of hazardous substances would contaminate their property.<sup>116</sup> Testing methods that are scientifically deficient or unduly costly are not "necessary."<sup>117</sup> The court held that, because CERCLA contains its own limitations to ensure that response costs are justified and necessary, Landowners were not required to show that they incurred costs by acting to contain releases that threatened public health or the environment.<sup>118</sup>

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107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 963.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 963-64.

116. *Id.* at 964.

117. *Id.*

118. *Id.* at 962-63.

## V. COMMENT

A. *Timeliness of Filing Suit*

In *Johnson*, the Eighth Circuit allowed Landowners to continue with their lawsuit seeking CERCLA response costs, even though Landowners had not incurred response costs prior to bringing suit.<sup>119</sup> Instead, the Landowners hired an environmental consultant to assess their properties more than one year after filing suit.<sup>120</sup> Although it did not specifically address this issue, the court, possibly inadvertently, opened the door for private parties to file suit against potentially responsible parties for response costs that they have not yet incurred.

CERCLA's language requires landowners to incur response costs before filing suit.<sup>121</sup> In addition, courts consistently have interpreted the statutory language to require a plaintiff to incur actual expenses prior to initiating a legal action.<sup>122</sup>

In *Johnson*, however, Landowners did not incur their response costs prior to filing their suit to recover such costs from Defendants.<sup>123</sup> It is unclear from the Eighth Circuit's opinion whether Defendants argued that the district court should dismiss for failure to state a claim upon which relief could be granted. If Defendants failed to make this argument, then the court may have been justified in ignoring this issue. It is also possible that the court did not see the point in dismissing the claim because the response costs had been incurred by the time the case went to trial.<sup>124</sup> Regardless, it is noteworthy that Landowners were not seeking a declaratory judgment for recovery of future response costs. Landowners, in fact, claimed entitlement to response costs under CERCLA when no response costs had been incurred.<sup>125</sup> By allowing this action without specifically addressing the timeliness issue, the Eighth Circuit opened the door for landowners within the circuit to file claims for CERCLA response costs when they have not yet incurred such costs. If this result is one the court intended, it is a

119. *See id.* at 959.

120. *Id.*

121. 42 U.S.C. § 9607(a)(4)(B) (1994). According to this section, response costs include "any other necessary costs of response incurred by any other person consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B) (1994) (emphasis added).

122. *See supra* notes 49-60 and accompanying text.

123. *See Johnson*, 226 F.3d at 959.

124. This is an assumption made by the Author based on the date of the district court's ruling in September 1999. It is noteworthy, however, that courts generally do not extend jurisdiction, after the institution of a lawsuit, simply because the jurisdictional threshold was subsequently satisfied. *See infra* note 126.

125. *See Johnson*, 226 F.3d at 959.

clear deviation from the language of the statute and rulings of other courts. If this result is not one the court intended, the court should clarify its position specifically in a future opinion so that the law is made clear.<sup>126</sup>

### B. Response Costs

In *Johnson*, the court held that CERCLA's plain language does not incorporate any quantitative threshold for the imposition of liability.<sup>127</sup> Rather, for Landowners to be entitled to response costs, these costs must be caused by an actual or threatened release of hazardous substances, and they must be necessary and consistent with the NCP.<sup>128</sup> In so holding, the court rejected previous decisions of the Fifth Circuit,<sup>129</sup> holding that plaintiffs must show they incurred costs by acting to contain a release that threatened public health or the environment. This circuit split likely will result in confusion as to how CERCLA's plain language should be interpreted in the future. However, future courts can relieve this confusion by following and upholding the Eighth Circuit's liberal interpretation of the statute, which furthers the policy goals of CERCLA more than the Fifth Circuit's strict interpretation.

Courts have determined whether plaintiffs can recover CERCLA response costs in four situations. The first situation exists when unnecessary site assessment<sup>130</sup> reveals no defined hazardous substances.<sup>131</sup> In this situation, it is clear from CERCLA's plain language that landowners cannot impose liability for

126. In *Trimble v. ASARCO, Inc.*, decided only two months after *Johnson*, the Eighth Circuit again addressed the timeliness issue. *Trimble v. ASARCO, Inc.*, 232 F.3d 946 (8th Cir. 2000). In *Trimble*, the plaintiffs brought a class action against ASARCO, alleging that ASARCO's smelting and refining operations had contaminated their properties. *Id.* at 950. The United States District Court for the District of Nebraska held that it lacked subject matter jurisdiction over the plaintiffs' CERCLA claim because the plaintiffs had failed to allege that they had incurred response costs consistent with the NCP. *Id.* at 950-51. The Eighth Circuit converted this motion to dismiss for lack of subject matter jurisdiction into a motion to dismiss for failure to state a claim and upheld the district court's ruling because the plaintiffs had not established a key element for their CERCLA claim—the incurrence of response costs. *Id.* It is noteworthy that the *Trimble* court did not cite *Johnson* in its discussion of this timeliness issue.

127. *Johnson*, 226 F.3d at 962.

128. *Id.*

129. *Licciardi v. Murphy Oil U.S.A., Inc.*, 111 F.3d 396 (5th Cir. 1997); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664 (5th Cir. 1989).

130. Response costs are necessary only when the recovering parties had an objectively reasonable belief that the defendant's release or threatened release of hazardous substances would contaminate their properties. *Johnson*, 226 F.3d at 964.

131. For the definition of hazardous substances, see *supra* note 43.



response costs on other parties.<sup>132</sup> The second situation exists when landowners with either an objectionably reasonable belief for investigation or simply an irrational fear discover hazardous substances in quantities that surely will pose a public health hazard. In this situation, plaintiffs may recover their response costs from all responsible parties.<sup>133</sup>

The other two situations exist when the landowners have an objectively reasonable belief that the defendant's activities contaminated their properties. The two situations that result are: (1) the site assessment reveals no defined hazardous substances, and (2) the site assessment reveals small quantities of hazardous substances. In both situations, the Fifth Circuit would not allow plaintiffs to recover their response costs because the hazardous substances did not exist in levels exceeding an applicable legal standard.<sup>134</sup> The Eighth Circuit, however, would allow recovery in both situations.<sup>135</sup>

Evaluating this "middle ground," the *Amoco* court held that "[w]hile not the exclusive means of justifying response costs, . . . a plaintiff who has incurred response costs meets the liability requirement . . . if it is shown that *any release violates*, or any threatened release is likely to violate, *any* applicable state or federal standard. . . ."<sup>136</sup> In so holding, the Fifth Circuit narrowly construed a statute that the courts consistently have said should be construed liberally in order

132. 42 U.S.C. § 9607(a) (1994); *see also* Southern Pac. Transp. Co. v. California, 790 F. Supp. 983, 984 (C.D. Cal. 1991) ("Before CERCLA liability may be imposed, it must first be demonstrated that a hazardous substance, as defined under CERCLA, is involved.").

133. *See generally* Elf Atochem North America, Inc. v. United States, 868 F. Supp. 707 (E.D. Pa. 1994) (The government owned facilities that emitted three waste streams: "1) hydrochloric acid plus organics piped from an [ ] absorber to the waste pond, 2) black sulfuric acid plus organics piped from a [ ] reactor to the waste pond, and 3) reddish sulfuric acid plus organics including DDT particles and unreacted monochlorobenzenes from a sight box in a [ ] reactor to the waste pond."); *HRW Sys., Inc. v. Washington Gas Light Co.*, 823 F. Supp. 318 (D. Md. 1993) (Coal-tar and other hazardous substances, including polynuclear aromatic hydrocarbons and light aromatics, were present below the ground. "Long term exposure to either of these components has been linked to increased risk of cancer."); *Rhodes v. County of Darlington*, 833 F. Supp. 1163 (D.S.C. 1992) (Plaintiffs showed a release of benzene in unacceptable levels.).

134. *See Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 671 (5th Cir. 1989).

135. *See Johnson*, 226 F.3d at 962.

136. *Amoco*, 889 F.2d at 671 (emphasis added).

to effectuate its goals.<sup>137</sup> In essence, the Fifth Circuit imposed a minimum threshold “through the back door.”<sup>138</sup>

CERCLA was enacted with the primary purpose of protecting and preserving the environment from the effects of releases of hazardous substances.<sup>139</sup> Legislative history indicates that Congress created the statute to force all polluters to pay for their pollution.<sup>140</sup> The most effective way to accomplish this goal is to hold polluters liable, regardless of the quantitative concentration of hazardous substances. Therefore, the *Amoco* court misinterpreted the purpose of CERCLA by imposing a minimum-threshold requirement.

Another goal of CERCLA is the discovery—through site assessment and testing—of hazardous substances.<sup>141</sup> At the same time, it is not in society’s best interest to encourage wholly speculative testing. The *Amoco* court specifically rejected the argument that CERCLA liability attaches upon the release of any quantity of hazardous substances because “adherence to that view would permit CERCLA’s reach to exceed its statutory purposes by holding parties liable who have not posed any threat to the public or the environment.”<sup>142</sup> As the *Johnson* court recognized, however, CERCLA’s language contains internal mechanisms that prevent wholly speculative testing.<sup>143</sup> First, response costs must be caused by an actual or threatened release of hazardous substances.<sup>144</sup> This requires, without the imposition of a quantitative minimum, a showing that there was a release of a hazardous substance or that such a release was threatened. Second, CERCLA requires that response costs be necessary and consistent with the NCP.<sup>145</sup> Response costs are “necessary” only when the recovering parties have an objectively reasonable belief that the defendant’s release or threatened release of hazardous substances would contaminate their properties.<sup>146</sup> The *Johnson* court

137. See, e.g., *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 258 (3d Cir. 1992); *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1198 (2d Cir. 1992); 3550 *Steven Creek Assocs. v. Barclays Bank of California*, 915 F.2d 1355, 1365 n.5 (9th Cir. 1990), *cert. denied*, 500 U.S. 917 (1991); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986).

138. *A&W Smelter & Refiners, Inc. v. Clinton*, 146 F.3d 1107, 1110 (9th Cir. 1998).

139. H.R. REP. NO. 96-1016, pt. 1, at 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6119-20.

140. *Alcan*, 964 F.2d at 260.

141. *HRW Sys., Inc. v. Washington Gas Light Co.*, 823 F. Supp. 318, 345 (D. Md. 1993).

142. *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 670 (5th Cir. 1989).

143. *Johnson v. James Langley Operating Co.*, 226 F.3d 957, 963 (8th Cir. 2000).

144. 42 U.S.C. 9607(a)(4) (1994).

145. 42 U.S.C. 9607(a)(4)(B) (1994).

146. *Johnson*, 226 F.3d at 964.

noted that scientifically deficient or unduly costly testing procedures cannot be necessary.<sup>147</sup> As a result, the worries of the *Amoco* court lack justification because CERCLA's own language prevents abuse by private parties in recovery actions.

The holdings of *Amoco* and *Johnson* create a circuit split. In addition to creating confusion as to how CERCLA will be interpreted by other circuits, these decisions mandate that the recovery of response costs under CERCLA will depend upon jurisdiction. It is unlikely that this result is one Congress intended. Because national uniformity in the application of CERCLA is crucial in effectuating Congress's goal of protecting public health and the environment, the Supreme Court should address the split presented by *Amoco* and *Johnson*. Future courts that address this issue should realize that unlike the *Amoco* court, the *Johnson* court followed the traditionally accepted policies that no quantitative standard should be imposed on CERCLA and that the statute should be interpreted liberally to effectuate its remedial goals.

## VI. CONCLUSION

In *Johnson v. James Langley Operating Co.*, the Eighth Circuit refused to follow the Fifth Circuit's holding that, in order to recover response costs, plaintiffs must show that the contamination posed a threat to public health or the environment. Instead, the court allowed plaintiffs to recover response costs when hazardous substances, not in excess of any applicable standard, existed on their property. In so doing, the court furthered CERCLA's primary remedial purpose of protecting public health and the environment without imposing minimum-concentration requirements. However, because the court did not specifically address the timeliness of the plaintiffs' incurrence of response costs, the court opened the door for plaintiffs to seek recovery of response costs that they have yet to incur.

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147. *Id.*