

The Comprehensive Environmental Response, Compensation, and Liability Act: The Correct Paradigm of Strict Liability and the Problem of Individual Causation

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I.

INTRODUCTION

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, (“CERCLA”)¹ does not expressly impose strict liability. Rather, CERCLA provides generally in the definitional section that “the terms ‘liable’ or ‘liability’ under this subchapter shall be construed to be the standard of liability which obtains under section 1321 of Title 33,”² which is Section 311 of the Clean Water Act.³ As of the time of CERCLA’s enactment in 1980, federal courts had construed Section 311 of the Clean Water Act to impose “strict liability.”⁴ There-

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1. 42 U.S.C. §§ 9601-9675 (1995 & Supp. 1998). In 1986, Congress amended CERCLA through the Superfund Amendments and Reauthorization Act of 1986 (“SARA”), Pub.L. No. 99-499, 100 Stat. 1613 (1986). Congress subsequently amended CERCLA in 1996 through the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996. *See* Pub.L. No. 104-208, §§ 2501-2505, 110 Stat. 3009-3462 (1996). Congress recently added Section 127 to CERCLA pursuant to the Superfund Recycling Equity Act, a rider to H.R. 3194, the 2000 Consolidated Appropriation Act. *See* Pub.L. No. 106-113, 113 Stat. 1501A-598 (1999).

2. 42 U.S.C. § 9601(32) (1994).

3. 33 U.S.C. § 1321 (1994).

4. *United States v. LeBeouf Bros. Towing Co.*, 621 F.2d 787, 789 (5th Cir. 1980); *Steuart Transp. Co. v. Allied Towing Corp.*, 596 F.2d 609, 613 (4th Cir. 1979); *United States v. Tex-Tow, Inc.*, 589 F.2d 1310, 1313 (7th Cir. 1978); *Burgess v. M/V Tamano*, 564 F.2d 964, 982 (1st Cir. 1977); *United States v. Bear Marine Servs.*, 509 F. Supp. 710, 718 (E.D. La. 1980); *see also United States v. Dae Rim Fishery, Co.*, 794 F.2d 1392, 1394 (9th Cir. 1986).

fore, numerous federal courts have concluded that CERCLA also imposes "strict liability" on the four statutory categories of responsible persons for the costs and damages resulting from the release or threatened release of a hazardous substance from a vessel or facility into the environment.⁵ Courts and commentators, however, have failed to clarify that the concept of "strict liability" has different meanings in different contexts, and it is necessary to take into account the correct paradigm⁶ of strict liability to properly interpret CERCLA.

The term "strict liability" can refer either to strict liability for criminal offenses and civil public welfare offenses, or to strict liability in tort for "ultrahazardous" or abnormally dangerous activities.⁷ In the context of strict liability for criminal offenses and civil public welfare offenses, the definition of strict liability is limited to the concept of mens rea, or the mental element of a crime or infraction.⁸ Under this paradigm, strict liability applies to the commission of a prohibited act, regardless of the mental state of

5. *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 259-63 (3d Cir. 1992); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1080 (1st Cir. 1986); *United States v. Monsanto Co.*, 858 F.2d 160, 168-70 & n.17 (4th Cir. 1988); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1043, 1044, 1045 & n. 19 (2d Cir. 1985); *Premium Plastics v. LaSalle Nat. Bank*, 904 F. Supp. 809, 815 (N.D. Ill. 1995); *La.-Pac. Corp. v. Beazer Materials & Servs., Inc.*, 811 F. Supp. 1421, 1429 (E.D. Cal. 1993); *United States v. A & N Cleaners and Launderers*, 788 F. Supp. 1317, 1332 (S.D.N.Y. 1992); *Lincoln Props., Ltd. v. Higgins*, 823 F. Supp. 1528, 1533 (E.D. Cal. 1992); *United States v. Stringfellow*, 661 F. Supp. 1053, 1058, 1061 (C.D. Cal. 1987); *Chem. Leaham Tank Lines, Inc. v. The Aetna Cas. & Sur. Co.*, 788 F. Supp. 846, 849 (D.N.J. 1992), *aff'd*, 89 F.3d 976 (3d Cir. 1996); *see also* *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 514 (2d Cir. 1996), *cert. denied*, 524 U.S. 926 (1998); *Bulk Distrib. Ctrs., Inc. v. Monsanto Co.*, 589 F. Supp. 1437, 1441 (S.D. Fla. 1984).

6. Thomas S. Kuhn coined the term "paradigm" in *The Structure of Scientific Revolutions* to refer to a commonly accepted assumption that goes unquestioned in a scientific inquiry. *See generally* THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 11, 77, 85-86 (3d ed. 1996). According to Kuhn, a scientist operating under an incorrect paradigm may ignore data or explanations inconsistent with the paradigm until the evidence gradually undermines the prevailing paradigm resulting in a paradigm shift, or a scientific revolution. *Id.* at 85-86. Legal analysis similarly often proceeds on the basis of conceptual paradigms. *See* *People v. Kimbrel*, 120 Cal. App. 3d 869, 875 n.6, 174 Cal. Rptr. 816, 819 n.6 (1981).

7. A corollary of strict liability for ultrahazardous activity is strict products liability applicable to a product "reasonably certain to place life and limb in peril". *See, e.g.,* *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 389, 111 N.E. 1050, 1053 (1916). The manufacturer of such a product is liable regardless of negligence because "public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market." *Escola v. Coca Cola Bottling Co. of Fresno*, 24 Cal. 2d, 453, 462, 150 P.2d, 436, 441 (1944) (opinion concurring in judgment).

8. *See infra* notes 21-44 and accompanying text.

the defendant.⁹ Strict liability in tort for highly hazardous activities is similar to strict liability for criminal and public welfare offense because proof of a defendant's mental state, such as intent or negligence, is not required for liability. However, the tort concept of strict liability for ultrahazardous activity also encompasses important concepts of causation that make it a significantly different conceptual paradigm.¹⁰ Most importantly, the causation inquiry in the context of strict liability for ultrahazardous activity focuses on harm that flows from an instrumentality, as opposed to harm from the conduct of a specific individual defendant.¹¹ A defendant's liability is based on the defendant's relationship to the instrumentality, such as being the owner, operator or user.¹² In addition, a plaintiff establishing strict tort liability for ultrahazardous activity may recover damages for all harm that is caused by the dangerous instrumentality, as long as it is of the type that made the instrumentality ultrahazardous in the first place.¹³ A "proximate causation" analysis, to the extent applicable at all, does not include a requirement that harm was foreseeable based on a particular defendant's vantage point, as in negligence law.¹⁴ Strict liability for ultrahazardous activity also has a unique approach regarding intervening causes such as third parties and acts of God.¹⁵

Litigants have, on occasion, advanced the concept of strict liability as a basis to explain the nature of CERCLA causation, but some courts and commentators have mistakenly responded that strict liability only relates to mens rea and is irrelevant to causation.¹⁶ These courts and commentators have failed to clarify that CERCLA's liability structure is derived in large measure from the tort paradigm of strict liability for ultrahazardous activity, not from the criminal/civil public welfare offense paradigm, and have incorrectly conceptualized CERCLA causation in terms of the

9. *Id.*

10. *See infra* notes 45-79, 84-127 and accompanying text.

11. *See infra* notes 45-79 and accompanying text.

12. *See infra* notes 55-79 and accompanying text.

13. *See infra* notes 57-116 and accompanying text.

14. *See id.*

15. *See infra* notes 122-27 and accompanying text.

16. *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1051-52 (2d Cir. 1985); *Idaho v. Bunker Hill Co.*, 635 F. Supp. 665, 674 (D. Idaho 1986); Lynda J. Oswald, *New Directions in Joint and Several Liability under CERCLA*, 28 U.C. DAVIS L. REV. 299, 365 (1995).

activity of an individual defendant.¹⁷ Thus, rather than viewing the basis of liability as a relationship between the defendant and an instrumentality that causes harm (the CERCLA vessel or facility), some courts have required a showing that an individual defendant's acts caused harm in the form of cleanup costs or natural resource damages.¹⁸ Similarly, courts have attempted to introduce a requirement that a particular defendant caused foreseeable harm from that defendant's perspective as part of CERCLA's third party defense based on notions of "proximate causation".¹⁹ Other courts have introduced the notion that a particular defendant must have caused harm under a defense of zero apportionment in the context of joint and several liability.²⁰ Again, these courts have relied on the idea that an individual defendant must have caused harm, fundamentally misunderstanding the theoretical underpinnings of CERCLA causation: strict liability for ultrahazardous activity, which focuses on the harm caused by an instrumentality, not harm caused by an individual defendant.

This article will argue that issues of individual causation under CERCLA should be interpreted and resolved in light of the conceptual paradigm of strict liability for ultrahazardous activity. Section II explains the distinction between the two principal strict liability paradigms. Section III traces the legislative development of CERCLA, showing that the common law causation standards applicable to strict liability for ultrahazardous activity greatly influenced CERCLA's liability scheme. Section IV reviews and summarizes basic rules on CERCLA liability. Section

17. See *Acushnet Co. v. Mohasco Corp.*, 191 F.3d 69 (1st Cir. 1999); *United States v. Dico, Inc.*, 136 F.3d 572, 578 (8th Cir. 1998); *Dent v. Beazer Materials & Servs.*, 156 F.3d 523, 529 (4th Cir. 1998); *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 617 (7th Cir. 1998), *cert. denied*, 119 S.Ct. 871 (1999); *Licciardi v. Murphy Oil USA*, 111 F.3d 396, 398 (5th Cir. 1997); *Gopher Oil Co. v. Union Oil Co.*, 955 F.2d 519, 527 (8th Cir. 1992); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 668 (5th Cir. 1990); see also *United States v. Township of Brighton*, 153 F.3d 307, 317-18 (6th Cir. 1998); *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 720-21 (2d Cir. 1993); *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 268 (3d Cir. 1992).

18. *United States v. Dico, Inc.*, 136 F.3d 572, 578 (8th Cir. 1998); *Acushnet Co. v. Coaters, Inc.*, 937 F. Supp. 988, 992 (D. Mass. 1996), *aff'd*, 191 F.3d 69 (1st Cir. 1999); *United States v. Montrose Chem. Corp.*, 33 Env't Rep. Cas. (BNA) 1207 (C.D. Cal. 1991).

19. See, e.g., *United States v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1263, 1274 (E.D. Cal. 1997); *Lincoln Props., Ltd. v. Higgins*, 823 F. Supp. 1528, 1542 (E.D. Cal. 1992); *G.J. Leasing Co. v. Union Elec. Co.*, 854 F. Supp. 539, 566 (S.D. Ill. 1994).

20. See, e.g., *Township of Brighton*, 153 F.3d at 317-18; *Alcan Aluminum Corp.*, 990 F.2d at 722; *Alcan Aluminum Corp.*, 964 F.2d at 268.

V critiques judicial attempts to resolve issues of causation without reference to the correct paradigm of strict liability and argues that consideration of the proper paradigm achieves a more consistent and logical approach to interpreting individual causation issues under the statute.

II.

THE TWO PARADIGMS OF STRICT LIABILITY

A. *The Criminal Law/Public Welfare Offense Concept of Strict Liability*

Generally, a criminal offense consists of two elements: a prohibited act (*actus reus*) and a specified mental state (*mens rea*) such as intent, knowledge or recklessness.²¹ A strict liability criminal offense requires no proof of *mens rea*.²²

The criminal law concept of strict liability has deep roots in common law. Under ancient English law up to the Twelfth Century, *mens rea* was not a requirement for criminal liability, and criminal liability attached simply on the basis of commission of a prohibited act.²³ Thus, all criminal offenses were strict liability. By the Eighteenth Century, however, moral fault based on *mens rea* had become the main basis for distinguishing and aggravating criminal punishments.²⁴ A *mens rea* requirement for criminal liability reflects a "theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong."²⁵ Defining criminal offenses based on *mens rea* also reflects society's desire for retribution against morally wrongful behavior.²⁶ In addition,

21. *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 490 (E.D.N.Y. 1993).

22. *Id.* at 496-500.

23. *See id.* at 490 (citing II FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW*, 470-71 (2d ed. 1968); *see also* F. Sayre, *Mens Rea*, 45 Harv. L. Rev. 974, 975-80 (1932). Thus, criminal liability was imposed without regard to *mens rea* for the acts of one's "slaves, beasts and even their possessions". *Cordoba-Hincapie*, 825 F. Supp. at 490.

24. *See id.* at 491-92.

25. *See id.* at 493 (quoting Roscoe Pound, *Introduction*, in FRANCIS BOWES SAYRE, *A SELECTION OF CASES ON CRIMINAL LAW* xxxiv-xxxvii (1927)).

26. *See id.* at 492 (citing Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 Sup. Ct. Rev. 107, 109 (1962)). Retribution is a genuine human need, and recognizing retribution as a goal of criminal punishment forecloses revenge through self help. *See* OLIVER WENDELL HOLMES, *THE COMMON LAW* 41-42 (1881) ("If people would gratify the passion of revenge outside of the law, if the law did not help them, the law has no choice but to satisfy the craving itself, and thus avoid the greater evil of private retribution.").

a mens rea requirement furthers the criminal law goal of deterrence because wrongdoers in theory will weigh the threat of punishment when making a conscious choice to commit a crime.²⁷

Nonetheless, even as criminal law came to adopt a mens rea requirement to distinguish degrees of punishment for a prohibited act, important exceptions remained. For example, the criminal offenses of statutory rape, bigamy, misdemeanor-manslaughter and felony-murder remained in essence strict liability crimes requiring no proof of a particular defendant's state of mind.²⁸ Moreover, the unavailability of a mistake-of-law defense in some contexts can be viewed as a form of strict liability.²⁹ Finally, the criminalization of civil negligence is similar to imposing strict liability because a defendant is punished even if the defendant did not actually perceive a risk of harm from the prohibited act.³⁰ Criminalizing civil negligence punishes a defendant based on an absence of the mental element of due care.³¹

The most important exception to the general criminal law requirement for mens rea, however, is strict liability public welfare offenses. Public welfare offenses dispense with the requirement of proving mens rea. Commission of the prohibited act is sufficient for liability.³² Since the industrial revolution, public welfare offenses have become common in areas of public health and safety regulations, where the goal of strict compliance with the law to protect the public is deemed more important than punishing one with a guilty mind.³³ Thus, public welfare offenses typi-

27. *Cordoba-Hincapie*, 825 F. Supp. at 493.

28. *Id.* at 497-500.

29. *See id.* at 496-99.

30. *Id.* at 500. Criminal negligence is generally viewed as the same as civil recklessness. *Id.* The actor proceeds in the face of a perceived risk. *Id.*

31. *See id.*; see also Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 143-45 (1962); Anthony A. Cuomo, *Mens Rea and Status Criminality*, 40 S. CAL. L. REV. 463, 516 (1967).

32. *United States v. Dotterweich*, 320 U.S. 277, 280-81 (1943).

33. *United States v. Freed*, 401 U.S. 601, 607 (1971) ("The presence of a 'vicious will' or mens rea . . . was long a requirement of criminal responsibility. But the list of exceptions grew, especially in the expanding regulatory area involving activities affecting public health, safety, and welfare."); *United States v. Balint*, 258 U.S. 250, 252 (1922) ("Many instances of [strict liability] are to be found in regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes as in cases of mala in se."). Strict liability public welfare offenses became common in the middle of the Nineteenth Century and coincided with the heightened need for regulation of a more complex and highly industrialized society resulting from the industrial revolution. *See Morissette v. United States*, 342 U.S. 246, 253-60 (1952); *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 498-99

cally consist of violations of laws dealing with "dangerous foods, misbranded pharmaceuticals, toxic substances and the like."³⁴

Generally, strict liability public welfare offenses concern business activities that one would expect to be the subject of regulation.³⁵ Where "dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation."³⁶ The law places a heightened obligation on those engaged in the activity to find out what the law requires, and those who fail to conform their behavior to the requirements of the law do so at their own peril.³⁷ The tacit assumption is that one violating a public welfare provision did so knowingly to avoid the costs of compliance.³⁸ If the violation was not a knowing violation, then it was a failure to act in "responsible relation to a public danger."³⁹ "The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities."⁴⁰ Dispensing with proof of mens rea simply makes enforcement more swift and certain, and leads to more effective

(E.D.N.Y. 1993); *State v. Guest*, 583 P.2d 836, 837 (Alaska 1978); see also Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55, 67 (1933).

34. *United States v. Cordoba-Hincapie*, 825 F. Supp. at 508.

35. See *Liparota v. United States*, 471 U.S. 419, 432 (1985) (public-welfare offenses involve "conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety."); *United States v. Engler*, 806 F.2d 425, 435 (3d Cir. 1986) ("[d]ue process is not violated by the imposition of strict liability as part of a 'regulatory measure in the interest of public safety, which may well be premised on the theory that one would hardly be surprised to learn that [the prohibited conduct] is not an innocent act.'") (quoting *United States v. Freed*, 401 U.S. 601, 609 (1971)); *Government of Virgin Islands v. Rodriguez*, 423 F.2d 9, 12 (3d Cir. 1970) ("The government's increasing presence in a domain formerly considered private created a pressure for enforcement of administrative regulations by the use of criminal sanctions regardless whether there was evidence that the offender, often a corporation, acted with guilty knowledge.").

36. *United States v. Intern. Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971).

37. *Id.*

38. *Id.*; see also GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART*, 235 (2d ed. 1961) (Public-welfare offenses "presuppose a continuous activity, such as carrying on a business, so that (a) special skill and attention may reasonably be demanded, and (b) if the law is broken there will be a suspicion that it was a deliberate breach due to self-interest.").

39. *United States v. Dotterweich*, 320 U.S. 277, 280-81 (1943); *United States v. Park*, 421 U.S. 658, 673-74 (1975); see also *Morissette v. United States*, 342 U.S. 246, 259 (1952).

40. *Morissette*, 342 U.S. at 256.

compliance.⁴¹ Generally the penalties for public welfare offenses are light and carry no stigma,⁴² but courts have upheld felony strict liability criminal provisions.⁴³ Violations of federal environmental protection statutes and regulations are generally public welfare offenses subject to civil penalties.⁴⁴

B. *Strict Liability for Ultrahazardous Activity*

1. The Source of the Paradigm: *Rylands v. Fletcher*

The tort law doctrine of strict liability for ultrahazardous activity found its first expression in the English case of *Rylands v. Fletcher*.⁴⁵ In *Rylands v. Fletcher*, the defendant landowners hired a contractor to build a water reservoir on their property, but the contractor, without the knowledge of the owners, negligently built the reservoir over an area containing underground mine shafts.⁴⁶ When the contractor filled the reservoir with water, the ground subsided and water flowed into an abandoned mine shaft, ultimately flooding the plaintiff's ongoing coal mining operations.⁴⁷ Because the defendant owners were not aware of

41. *Dotterweich*, 320 U.S. 277 (1943); *United States v. Balint*, 258 U.S. 250, 251-52 (1922) (“[w]hile the general rule at common law was that the scienter was a necessary element in the indictment and proof of every crime . . . there has been a modification of this view in respect to prosecutions under statutes the purpose of which would be obstructed by such a requirement.”).

42. *Morissette*, 342 U.S. at 246, 256 (“penalties commonly are relatively small, and conviction does no grave damage to an offender’s reputation”); *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 496 (E.D.N.Y. 1993) (“Criminal liability has been permitted to attach without regard to fault in instances in which the actor’s conduct involves minor violations of the liquor laws, the pure food laws, the anti-narcotics laws, motor vehicle and traffic regulations, sanitary, building and factory laws and the like.”) (citing Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 78 (1933)).

43. *United States v. Engler*, 806 F.2d 425, 427, 433 (3d Cir. 1986).

44. *See, e.g.*, Section 16(a) of the Toxic Substances Control Act, 15 U.S.C. § 2615(a) (1994); Section 309 of The Clean Water Act, 33 U.S.C. § 1319 (1994); Sections 104B(d) and 105(a) of the Marine Protection, Research and Sanctuaries Act, 33 U.S.C. §§ 1414b(d), 1415(a) (1994); Section 11005(d) of the Solid Waste Disposal Act, 42 U.S.C. § 6992d(d) (1994); and Section 113(b) of the Clean Air Act, 42 U.S.C. § 7413(b) (1994). Criminal sanctions are also available for knowing violations. *See, e.g.*, Section 16(b) of the Toxic Substances Control Act, 15 U.S.C. § 2615(b) (1994); Section 309 of the Clean Water Act, 33 U.S.C. § 1319 (1994); Section 105(b) of the Marine Protection, Research and Sanctuaries Act, 33 U.S.C. § 1415(b) (1994); Section 11005(b) of the Solid Waste Disposal Act, 42 U.S.C. § 6992d(b) (1994); and Section 113(c) of the Clean Air Act, 42 U.S.C. § 7413(c) (1994).

45. *Fletcher*, L.R. 3 H.L. 330 (1868); *see The Clark-Aiken Co. v. Cromwell-Wright Co.*, 367 Mass. 70, 323 N.E.2d 876 (1975).

46. *Id.* at 73, 323 N.E.2d at 878.

47. *Id.*

the mine shaft prior to construction of the reservoir, the trial court found that they were not negligent and not liable.⁴⁸ The appellate court reversed, however, adopting a rule of strict liability.⁴⁹ The appellate court held that

the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes must keep it in at his peril, and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of vis major, or the act of God . . . The general rule, as above stated seems on principle just. The person whose grass or corn is eaten down by the escaping of cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works, is damnified [injured] without any fault of his own; and it seems but reasonable and just that the neighbor who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbor's, should be obliged.⁵⁰

On appeal, the House of Lords affirmed but emphasized a narrower rationale than that articulated by Justice Blackburn of the appellate court. Speaking for the House of Lords, Lord Cairns stated:

If the Defendants . . . had desired to use . . . (their land) for any purpose which I may term a nonnatural use . . . and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape . . . that which the Defendants were doing they were doing at their own peril; and, if in the course of their doing it, the evil arose . . . (escape and resulting injury) then or the consequence of that, in my opinion, the Defendants would be liable.⁵¹

48. *Id.* at 73, 323 N.E.2d at 878. Under English law at the time the owners could not be held vicariously liable for the acts of their contractors. *Id.* at 74 n.3, 323 N.E.2d at 878 n.3. Therefore, the trial court ruled in favor of the defendant land owners. *Id.* at 74, 323 N.E.2d at 878.

49. See *Fletcher v. Rylands*, L.R. 1 Ex. 265 (1866).

50. *Fletcher*, L.R. 1 Ex. at 279 (brackets added).

51. *Rylands v. Fletcher*, L.R. 3 H.L. at 399 (1868).

Although Lord Cairns expressly limited the doctrine to “non-natural uses” of one’s land he nonetheless stated that he “entirely concur[red]” with Justice Blackburn’s analysis.⁵²

2. The Concept of the Instrumentality

The Restatement of Torts first characterized the rule of strict liability enunciated in *Rylands v. Fletcher* as liability for the “miscarriage” of an “ultrahazardous activity.”⁵³ The Restatement (Second) of Torts, however, shifted the emphasis from “ultrahazardous” activities to “abnormally dangerous” activities and expanded the factors that courts should consider to determine whether an activity is abnormally hazardous.⁵⁴

Consistent with *Rylands v. Fletcher*, however, courts have come to conceptualize strict liability in terms of the placement or use by the defendant of an “instrumentality” that is likely to escape and cause damage.⁵⁵ If the instrumentality causes the type

52. *Id.* at 340.

53. RESTATEMENT OF TORTS § 519. Section 519 of the Restatement of Torts provided:

Except as stated in §§ 521-4, one who carries on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent the harm.

Section 520 of the Restatement of Torts provided:

An activity is ultrahazardous if it

- (a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and
- (b) is not a matter of common usage.

Id. § 20; see *Fortier v. Flambeau Plastics Co.*, 164 Wis. 2d 639, 673 n.17, 476 N.W.2d 593, 607 n.17 (Wis. App. 1991).

54. RESTATEMENT (SECOND) OF TORTS, § 519. As amended in the Restatement (Second) of Torts, Section 519 provides: “One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.” Restatement (Second) of Torts § 519. Section 520 set forth the following factors to be considered in determining whether an activity is abnormally dangerous or ultrahazardous:

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care;
- (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on; and
- (f) extent to which its value to the community is outweighed by its dangerous attributes.

RESTATEMENT (SECOND) OF TORTS § 520.

55. See *Bolivar v. R & H Oil and Gas Co., Inc.*, 789 F. Supp. 1374, 1383 (S.D. Miss. 1991) (blowout from reworking of oilwell; oilwell characterized as instrumen-

of harm that makes its use or maintenance risky, the defendant is strictly liable.⁵⁶ Thus, the causation analysis is not so much linked to the personal acts of the defendant, as it is to the instrumentality or the activity in which the instrumentality is used. This concept underlies the applications of strict liability at common law in a wide variety of situations, including the disposal or storage of hazardous substances.

For example, courts have uniformly held that the use of explosives is an ultrahazardous activity that is subject to strict liability.⁵⁷ By using explosives a defendant sets in motion a force that

tality that was abnormally dangerous); *Inland Steel v. Pequinot*, 608 N.E.2d 1378, 1385 (Ind. App. 1993) (noting that under *Rylands*, a person who chooses to use an abnormally dangerous instrumentality is strictly liable); *Clark-Aiken Co. v. Cromwell-Wright Co.*, 367 Mass. 70, 86 n. 17, 323 N.E.2d 876, 885 n. 17 (1975) (noting that strict liability for harm caused by escape of dangerous instrumentality has been law of Commonwealth since 1868); *Toy v. Atlantic Gulf & Pacific Co.*, 176 Md. 197, 212-13, 4 A.2d 757, 765 (1939) (“The basic concept underlying the rule is that a person who elects to keep or bring upon his land something which exposes the adjacent land or its owner or occupant to an added danger should be obliged to prevent its doing damage. So, it follows that if the escape be of oil, gas, electricity, explosives, sewage or water artificially accumulated and stored and damage is done to an adjacent property, the occupier is within the rule.”); *Caporale v. C.W. Blakeslee & Sons, Inc.*, 149 Conn. 79, 84, 175 A.2d 561, 563 (1961) (“To impose liability without fault, certain factors must be present: an instrumentality capable of producing harm . . .”); *see also* *Matter of Poling Transp. Corp.*, 784 F. Supp. 1045, 1049 (S.D.N.Y. 1992) (defendants “strictly liable for harm resulting from the storage and handling of gasoline, an inherently dangerous substance and ‘dangerous instrumentality,’ under N.Y. Environmental Conservation Law § 23-0101”).

56. *See* *McDonald v. Timex Corp.* 9 F. Supp.2d 120, 122 (D. Conn. 1998); *Indiana Harbor Belt R. Co. v. American Cyanamid Co.*, 662 F. Supp. 635, 645 (N.D. Ill. 1987), *rev'd on other grounds*, 916 F.2d 1174 (7th Cir. 1990); *Berg v. Reaction Motors Div., Thiokol Chem. Corp.*, 37 N.J. 396, 410, 181 A.2d 487, 494 (1962).

57. *See* *Ward v. H.B. Zachry Constr. Co.*, 570 F.2d 892, 896 (10th Cir. 1978); *Exner v. Sherman Power Constr. Co.*, 54 F.2d 510, 514 (2d Cir. 1931); *Hamilton v. Accu-Tek*, 935 F. Supp. 1307, 1323 (E.D.N.Y. 1996); *Britton v. Harrison Constr. Co.*, 87 F. Supp. 405, 407 (S.D. W.Va. 1948); *Correa v. Curbey*, 605 P.2d 458, 460 (Ariz. App. 1979); *Luthringer v. Moore*, 31 Cal.2d 489, 498-99, 190 P.2d 1, 7 (1948); *Colton v. Onderdonk*, 69 Cal. 155, 158, 10 P. 395, 397 (1886); *McKenna v. Pac. Elec. Rwy. Co.*, 104 Cal.App. 538, 543, 286 P. 445, 446 (1930); *Garden of the Gods Village*, 133 Colo. 286, 291, 294 P.2d 597, 600 (1956); *Whitman Hotel Corp. v. Elliott & Watrous Eng'g Co.*, 79 A.2d 591, 593-94 (Conn. 1951); *Green v. Ensign-Bickford Co.*, 595 A.2d 1383, 1386-87 (Conn. App. 1991); *Fitzsimons & Connell Co. v. Braun*, 199 Ill. 390, 396, 65 N.E. 249, 251 (1902); *Watson v. Miss. River Power Co.*, 174 Iowa 23, 24, 156 N.W. 188, 190 (1916); *Enos Coal Mining Co. v. Schuchart*, 188 N.E.2d 406, 410 (Ind. 1963); *Cent. Exploration Co. v. Gray*, 219 Miss. 757, 764, 70 So.2d 33, 36 (1954); *Bradford Glycerine Co. v. St. Mary's Woolen Mfg. Co.*, 60 Ohio St. 560, 568, 54 N.E. 528, 529 (1899); *Bedell v. Goulter*, 199 Or. 344, 261 P.2d 842, 844 (1953); *Hickey v. McCabe & Bihler*, 30 R.I. 346, 349, 75 A. 404, 408 (1910).

is difficult to control and capable of great destruction.⁵⁸ The potential hazards that make the use of explosives ultrahazardous include personal injury and property damage from falling debris or from ground concussions.⁵⁹ As long as the plaintiff's injury results from a recognized consequence of blasting, which renders blasting hazardous in the first place, the defendant will be held strictly liable for such damages.⁶⁰ No proximate cause in the sense of foreseeability of particular consequences is required, and courts have allowed recovery even if injury to a particular plaintiff was not foreseen.⁶¹

Because the instrumentality of explosives is inherently difficult to control, common law courts have extended strict liability to the storage of explosives.⁶² Additionally, courts have extended strict liability to the storage of flammable products such as petroleum in storage tanks,⁶³ as well as to the transporta-

58. See *Exner v. Sherman Power Construction Co.*, 54 F.2d 510, 514 (2d Cir. 1931) ("To be sure there is a greater likelihood of damage from blasting than from storage, but in each case the explosion arises from an act connected with a business conducted for profit and fraught with substantial risk and possibility of the gravest consequences."); *Brooks v. Ready Mix Concrete Co.*, 94 Ga.App. 791, 794, 96 S.E.2d 213, 215 (1956) ("one who sets in motion an agency which directly damages another's property, especially an agency of a dangerous nature, should suffer rather than an innocent property owner who has done nothing"); *Erbrich Products Co., Inc. v. Wills*, 509 N.E.2d 850, 857 (Ind. App. 1987) ("Unlike blasting operations or crop dusting where the chances of damage or injury are inevitable despite the amount of care taken, the manufacture of household bleach with chlorine gas does not encompass the same unavoidable mishaps.").

59. *Arawana Mills Co. v. United Techs. Corp.* 795 F. Supp. 1238, 1252 (D. Conn. 1992); *Warner v. Norfolk & W. Ry. Co.* 758 F. Supp. 370, 373 (W.D. Va. 1991); *Enos Coal Mining Co. v. Schuchart*, 243 Ind. 692, 188 N.E.2d 406, 410 (1963); *Philip Morris, Inc. v. Emerson*, 235 Va. 380, 406, 368 S.E.2d 268, 278 (1988).

60. See *Green v. Ensign-Bickford Co.*, 25 Conn. App. 479, 488, 595 A.2d 1383, 1388 (1991); *Great Lakes Dredging & Dock Co. v. Sea Gull Operating Corp.*, 460 So.2d 510, 513 (Fla. App. 1984); *Foster v. Preston Mill Co.*, 44 Wash.2d 440, 268 P.2d 645, 647 (1954).

61. See, e.g., *Garden of the Gods Vill. v. Hellman*, 294 P.2d 597, 600 (Colo. 1956) (en banc); *Hieber v. Cent. Ky. Traction Co.*, 140 S.W. 54, 56 (Ky. 1911); *Held v. Red Malcuit, Inc.*, 230 N.E.2d 674, 676 (Ohio C.P. 1967); *Gronn v. Rogers Constr. Inc.*, 350 P.2d 1086, 1088 (Or. 1960); *Madsen v. East Jordan Irrigation Co.*, 125 P.2d 794, 795 (Utah 1942); *Halpert v. Ingram & Greene, Inc.*, 333 N.Y.S.2d 913, 914-15 (N.Y. Civ. Ct. 1972).

62. See *Exner v. Sherman Power Constr.*, 54 F.2d 510, 514 (2d Cir. 1931); *Hamilton v. Accu-Tek*, 935 F. Supp. 1307, 1323 (E.D.N.Y. 1996); *Luthringer v. Moore*, 31 Cal.2d 489, 498-99, 190 P.2d 1, 7 (1948); *Cent. Exploration Co. v. Gray*, 219 Miss. 757, 70 So.2d 33, 36 (1954).

63. See *Lentz v. Mason*, 961 F. Supp. 709, 718 (D.N.J. 1997); *City of Northglenn v. Chevron U.S.A., Inc.*, 519 F. Supp. 515, 516 (D. Colo. 1981); *Zero Wholesale Gas Co. v. Stroud*, 264 Ark. 27, 30, 571 S.W.2d 74, 76 (1978); *Garcia v. Estate of Norton*, 183 Cal. App. 3d 413, 420, 228 Cal.Rptr. 108, 112 (1986); *Hartford Fire Ins. Co. v.*

tion of such materials in railroad cars or tanker cars over public roads.⁶⁴

Stored materials may be unstable due to their explosive nature, but artificially accumulated materials may also pose a hazard due to their mass and the difficulty of containing them, particularly in an area where great damage can result. Thus, as in *Rylands v. Fletcher*, courts have imposed strict liability for the escape of water from reservoirs and settling ponds.⁶⁵ Courts

Public Serv. Comm'n of Colo., 676 P.2d 25, 27 (Colo. App.1983); *Yommer v. McKenzie*, 255 Md. 220, 227, 257 A.2d 138, 141 (Md. 1969); *McLane v. Northwest Natural Gas Co.*, 255 Or. 324, 327, 467 P.2d 635, 637 (Or. 1970); *Foster v. City of Keyser*, 501 S.E.2d 165, 174 (W.Va. 1997). *But see* *Arlington Forest Assocs. v. Exxon Corp.*, 774 F. Supp. 387, 390 (E.D. Va. 1991)(storage and removal of gasoline from underground storage tank does not constitute an abnormally dangerous activity under Virginia law).

64. *See* *Nat'l Steel Serv. Cent. v. Gibbons*, 693 F.2d 817, 818-19 (8th Cir. 1982); *Chavez v. So. Pac. Transp. Co.*, 413 F. Supp. 1203, 1214 (E.D. Cal. 1976); *Matomco Oil Co., Inc. v. Arctic Mech., Inc.*, 796 P.2d 1336, 1341 (Alaska 1990); *Nat'l Steel Serv. Cent., Inc. v. Gibbons*, 319 N.W.2d 269, 270 (Iowa), *opinion following certification*, 693 F.2d 817 (8th Cir. 1982); *Siegler v. Kuhlman*, 81 Wash.2d 448, 456 502 P.2d 1181, 1185-86 (1972); *New Meadows Holding Co. by Raugust v. Wash. Water Power Co.*, 102 Wash.2d 495, 502, 687 P.2d 212, 217 (Wash. 1984); *see also* *Edwards v. Post Transp. Co.*, 228 Cal. App.3d 980, 985, 279 Cal.Rptr. 231, 233 (Cal. App. 1991) ("We deem none of these cases to establish, as a matter of law, that the storage, transportation and use of sulfuric acid in California is not an ultrahazardous activity. Since the concept of ultrahazardous depends upon time, place and circumstance, as discussed in the Restatement, we doubt that any fast and permanent classification will be possible."). *But see* *Indiana Harbor Belt R.R. Co. v. Am. Cyanamid Co.*, 916 F.2d 1174, 1176 (7th Cir. 1990) (refusing to construe state law to impose strict liability for transportation of hazardous chemical).

65. *See* *Garnet Ditch & Reservoir Co. v. Sampson*, 48 Colo. 285, 296, 110 P. 79, 83 (1910); *Cities Serv. Co. v. State*, 312 So. 2d 799, 803 (Fla. App. 1975); *Bunyak v. Clyde J. Yancey and Sons Dairy, Inc.*, 438 So. 2d 891, 895 (Fla. App. 1983); *The Clark-Aiken Co. v. Cromwell-Wright Co., Inc.*, 367 Mass. 70, 79, 323 N.E.2d 876, 881 (1975); *Wiltse v. City of Red Wing*, 109 N.W. 114, 115 (Minn. 1906); *Weaver Mercantile Co. v. Thurmond*, 68 W.Va. 530, 531, 70 S.E. 126, 127 (1911); *Wigal v. City of Parkersburg*, 81 S.E. 554, 558 (W. Va. 1914); *Evans v. Mutual Min.*, 199 W. Va. 526, 532, 485 S.E.2d 695, 701 (1997). Other courts, however, have refused to impose liability for bursting reservoirs on the grounds that the reservoir was appropriately located. *See* *Chicago & N.W. Ry. v. Tyler*, 482 F.2d 1007, 1009-10 (8th Cir. 1973); *Guy F. Atkinson Co., v. Merritt, Chapman & Scott Corp.*, 123 F. Supp. 720, 721-22 (N.D. Cal 1954); *Dye v. Burdick*, 262 Ark. 124, 140, 553 S.W.2d 833, 840 (1977); *see also* *Wade R. Habeeb, Annotation, Applicability of Rule of Strict or Absolute Liability to Overflow or Escape of Water Caused by Dam Failure*, 51 A.L.R. 3d 965 (1973 & Supp. 1991). Even where courts have found *Rylands* applicable to a reservoir, they have allowed defenses for Acts of God from flooding. *Ryan Gulch Reservoir Co. v. Swartz*, 234 P. 1059, 1062 (Colo. 1925); *Louisville & N.R. Co. v. Conn*, 179 S.W. 195, 198 (Ky. 1915); *Golden v. Amory*, 109 N.E.2d 131, 133 (Mass. 1952). Also, acts of third parties have excused liability. *Cohen v. Brockton Sav. Bank*, 71 N.E.2d 109, 110 (Mass. 1947); *Albig v. Municipal Auth.*, 502 A.2d 658, 664 (Pa. Super. 1985); *Wheatland Irrigation Dist. v. McGuire*, 537 P.2d 1128, 1140 (Wyo. 1975).

have also imposed strict liability for damages resulting from the escape of artificially accumulated animal waste from ranching and farming operations.⁶⁶ Similarly, courts have imposed strict liability for the accumulation and escape of drilling waters or wastes artificially brought to the surface and accumulated in oil and gas exploration.⁶⁷

Courts have also extended strict liability to pile driving,⁶⁸ which has the same concussive effect as blasting, as well as to launching rockets.⁶⁹ In addition, courts have imposed strict liability for the aerial release of pesticides⁷⁰ or the land-based release of fumigation gases⁷¹ due to the difficulty of directing and controlling the spread of such substances. Similarly, some courts have imposed strict liability for the escape of fire in connection with field clearing.⁷²

A wild animal can be viewed as an instrumentality that is inherently difficult to control and capable of causing great harm

66. See *Atkinson v. Herington Cattle Co., Inc.*, 200 Kan. 298, 307-08, 436 P.2d 816, 834-24 (1968); *Klassen v. Creamery Co.*, 160 Kan. 697, 705, 165 P.2d 601, 607 (1946); *Bunyak v. Clyde J. Yancey & Sons Dairy, Inc.*, 438 So.2d 891, 895 (Fla. App. 1983). Although some courts state that they are not imposing strict liability, they often reach the same result under a different name. See *id.* ("Though the liability imposed may travel under different names, the result, as a practical matter, is an application of the principles of strict liability.").

67. See *Berry v. Shell Petroleum Co.*, 140 Kan. 94, 98, 33 P.2d 953, 957 (1934); *Green v. Gen. Petroleum Corp.*, 205 Cal. 328, 335, 270 P. 952, 955 (1928); *Pensacola Gas Co. v. Pebley*, 25 Fla. 381, 387, 5 So. 593, 594 (1889). But see *Williams v. Amoco Prod. Co.*, 241 Kan. 102, 115, 734 P.2d 1113, 1123 (Kan. 1987) (drilling and operating natural gas wells in large natural gas oil field not abnormally dangerous activities or non-natural uses of land).

68. *Arawana Mills Co. v. United Techs. Corp.* 795 F. Supp. 1238, 1251 (D. Conn. 1992); *Caporale v. C.W. Blakeslee & Sons, Inc.*, 149 Conn. 79, 85, 175 A.2d 561, 563 (1961); *Hutchinson v. Capeletti Bros.*, 397 So. 2d 952, 953 (Fla. App. 1981); *Sachs v. Chiat*, 281 Minn. 540, 542, 162 N.W.2d 243, 245 (Minn. 1968). But see *In re Chicago Flood Litig.*, 1993 WL 278553, *14 (N.D. Ill. 1993) (stating that pile driving is not an abnormally dangerous activity).

69. *Smith v. Lockheed Propulsion Co.*, 247 Cal. App. 2d 774, 785, 56 Cal. Rptr. 128, 137 (1967); *Berg v. Reaction Motors Div.*, 37 N.J. 406, 411, 181 A.2d 487, 492 (N.J. 1962).

70. See *Langan v. Valicopters, Inc.*, 88 Wash. 855, 859, 567 P.2d 218, 222 (Wash. 1977); *Bella v. Auroa Air, Inc.*, 279 Or. 13, 23, 566 P.2d 489, 494-95 (Or. 1977); Purver, Jonathon, *Annotation, Liability for Injury Caused by Spraying or Dusting of Crops*, 37 A.L.R.3d 833, 847 (1971).

71. *Luthringer v. Moore*, 31 Cal.2d 489, 500, 190 P.2d 1, 8 (Cal. 1948); see also *Laterra By and Through Com. Nat. Bank v. Treaster*, 17 Kan. App.2d 714, 724, 844 P.2d 724, 731 (1992).

72. See *Koos v. Roth*, 293 Or. 670, 685, 652 P.2d 1255, 1265 (1982).

upon escape,⁷³ and courts have imposed strict liability for harboring wild animals.⁷⁴ Although domesticated dogs do not necessarily have the dangerous propensities of wild animals, some jurisdictions by statute have imposed strict liability on dog owners for injuries caused by their dogs.⁷⁵ Courts have noted that these statutes in essence make the dog owner an insurer of all those injured by the dog's conduct.⁷⁶ Because a dog may not necessarily have dangerous propensities, courts have sometimes refused to impose strict liability when a dog has contributed to an accident in a passive way, such as when the plaintiff tripped over a sleeping dog.⁷⁷ As long as the dog acted affirmatively, however, courts have applied the statute and held the owner liable regardless of whether the dog's contribution was minor.⁷⁸

73. See *Hill v. Rieth-Riley Constr. Co.*, 670 N.E.2d 940, 945 (Ind. App. 1996) ("The term 'inherently dangerous' is more properly applied to activities or instrumentalities which are, by their nature, always dangerous, i.e. blasting or wild animals.").

74. See *G.J. Leasing Co., v. Union Elec. Co.*, 54 F.3d 379, 386 (7th Cir. 1995); *Mealey v. Pittman*, 202 Ill. App. 3d 771, 778, 559 N.E.2d 1173, 1177 (1990); *Irvine v. Rare Feline Breeding Cent., Inc.*, 685 N.E.2d 120, 126 (Ind. App. 1997); *Hill v. Rieth-Riley Constr. Co.*, 670 N.E.2d 940, 945 (Ind. App. 1996).

75. See *Rutland v. Biel*, 277 So. 2d 807, 808 (Fla. App. 1973); *Bailey v. Bly*, 87 Ill. App. 2d 259, 260-61, 231 N.E.2d 8, 9 (1967); *Smith v. Jett Hill Farm, Inc.*, 61 Ohio Misc. 2d 338, 341, 579 N.E.2d 295, 297 (1989).

76. *Jones v. Utica Mut. Ins. Co.*, 463 So.2d 1153, 1157 (Fla. 1985).

77. See *Smith v. Jett Hill Farm, Inc.*, 61 Ohio Misc.2d 338, 341, 579 N.E.2d 295, 297 (1989); *Jones v. Utica Mut. Ins. Co.*, 463 So.2d at 1157; *Bailey v. Bly*, 87 Ill.App.2d 259, 261, 231 N.E.2d 8, 8 (1967). In *Bailey v. Bly*, for example, the plaintiff tripped over a dog passively lying on a porch step. *Id.* at 262, 231 N.E.2d at 9-10. Rejecting the application of strict liability, the *Bly* court explained:

Here the dog is not engaged in an attack and is not causing an injury which in any way relates to the fact of being a dog. On the contrary, the dog in this case, as shown by the deposition of the plaintiff, was an inert or passive force so far as it concerns the injuries of the plaintiff. We will not impute to the legislature an imposition of liability, absolute in all respects, when there is no factual or reasonable basis for such liability other than as a pure penalty for dog ownership.

That which is missing in this case is behavior or activity on the part of the dog which caused the injury to the plaintiff, although in reaching this conclusion we necessarily agree with the plaintiff that the statute is not necessarily limited to providing a remedy when a dog physically attacks a victim.

Id., 231 N.E.2d at 9-10.

78. See *Jones v. Utica Mut. Ins. Co.*, 463 So.2d 1153, 1157 (Fla. 1985); see also *Allstate Ins. Co. v. Greenstein*, 308 So.2d 561, 562 (Fla. App. 1975) (plaintiff crashed after swerving car to avoid dog running into street); *English v. Seachord*, 243 So.2d 193, 194-95 (Fla. App. 1971) (plaintiff frightened by a growling dog; jumped on top of a car, injuring back); *Brandeis v. Felcher*, 211 So.2d 606, 607 (Fla. 3d DCA) (frightened by two barking dogs, plaintiff hit by automobile after running into street). As the Supreme Court of Florida explained in *Jones v. Utica Mut. Ins. Co.*:

This 'affirmative act' requirement is a reasonable safeguard insofar as it forbids the imposition of liability in cases in which the animal is merely a passive instrumental-

Under all these fact patterns, the basic concept is the same: the defendant has placed on property or used an object that can easily escape control and cause damage. If the instrumentality does in fact escape control, the defendant is liable for all types of damages that make the instrumentality or activity abnormally hazardous. The defendant is held liable based on a relationship to the instrumentality such as being the owner, operator or user.⁷⁹

3. The Rationale for Strict Liability in Tort

The unique rules on causation in strict liability in tort stem from the remedial and compensatory purpose of strict liability in tort. While in the context of criminal offenses and civil public welfare offenses strict liability seeks to prohibit conduct, the main goal of strict liability for ultrahazardous activity, in contrast, is to compensate plaintiffs injured by lawful conduct. Courts have explained that activities subject to strict liability could be prohibited due to the high hazards posed, but society allows such activities only because they have countervailing value to society.⁸⁰ As a condition of allowing the activity to take place at all, however, society expects and demands that the activity "pay its own way" by compensating those who are inevitably injured.⁸¹

ity in a chain of events leading to injury. Even a strict liability statute should not reach that far. This interpretation is consistent with the general notion of proximate causation, since other factors would constitute superceding or overwhelming causes when the dog is merely passive or retreating.

463 So. 2d at 1157.

79. See *Inland Steel v. Pequignot*, 608 N.E.2d 1378, 1385 (Ind. App. 1993) (noting that under *Rylands* person who chooses to use an abnormally dangerous instrumentality is strictly liable); *Clark-Aiken Co. v. Cromwell-Wright Co.*, 367 Mass. 70, 86 n.17, 323 N.E.2d 876, 885 n. 17 (1975) (holding that strict liability for harm caused by escape of dangerous instrumentality has been law of Commonwealth since 1868); *Toy v. Atl. Gulf & Pac. Co.*, 176 Md. 197, 212-13, 4 A.2d 757 (1939) ("The basic concept underlying the rule is that a person who elects to keep or bring upon his land something which exposes the adjacent land or its owner or occupant to an added danger should be obliged to prevent its doing damage. So, it follows that if the escape be of oil, gas, electricity, explosives, sewage or water artificially accumulated and stored and damage is done to an adjacent property, the occupier is within the rule.").

80. *State Dept. of Env'tl Prot. v. Ventron Corp.*, 94 N.J. 473, 468 A.2d 150, 157 (1983); W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS* § 78, 555 (5th ed. 1984) (hereinafter *PROSSER AND KEETON*) ("Despite the social utility of the activity, that doctrine imposes liability on those who, for their own benefit, introduce an extraordinary risk of harm into the community.").

81. See *Berg v. Reaction Motors Div.*, 37 N.J. 396, 410, 181 A.2d 487, 494 (1962) ("an ultrahazardous activity which introduces an unusual danger into the community . . . should pay its own way in the event it actually causes damage"); see also *Laird v.*

In addition, by imposing liability on those who reap economic advantage from the activity or instrumentality, society ensures that the true costs of the activity will be distributed among those who benefit from the activity, because the costs of compensating injured parties will be factored into the price of the associated goods and services.⁸² Further, those who profit are generally in a better position to compensate the injured parties than the injured parties themselves.⁸³

4. The Inapplicability of Proximate Causation to the Strict Liability Paradigm

Although some courts have stated that proximate causation is a concept that applies to all tort claims,⁸⁴ other courts have clarified that the concept of proximate causation arose in the context of negligence law and does not necessarily apply to all claims, most notably to intentional wrongs.⁸⁵ To the extent some courts

Nelms, 406 U.S. 797, 804-05 (1972) (Stewart, dissenting). In *Laird*, Justice Stewart explained:

The law . . . imposes liability for harm caused by certain narrowly limited kinds of activities even though those activities are not prohibited and even though the actor may have exercised the utmost care. Such conduct is "tortious" not because the actor is necessarily blameworthy, but because society has made a judgment that while the conduct is so socially valuable that it should not be prohibited, it nevertheless carries such a high risk of harm to others, even in the absence of negligence, that one who engages in it should make good any harm caused to others thereby.

Id.

82. *United States v. Tex-Tow, Inc.*, 589 F.2d 1310, 1314-15 (7th Cir. 1978).

83. *See Kenney v. Scientific, Inc.*, 204 N.J. Super. 228, 247-48, 497 A.2d 1310, 1320-21 (Law Div. 1985).

84. *See Cleveland Bd. of Educ. v. Armstrong World Indus.*, 22 Ohio Misc. 2d 18, 24, 476 N.E.2d 397, 404 (1985).

85. *See Franklin v. United States*, 992 F.2d 1492, 1496 (10th Cir. 1993); *Aljassim v. S. S. S. Star*, 323 F. Supp. 918, 927 n.15 (S.D.N.Y. 1971); *Maryland v. Manor Real Estate & Trust*, 83 F. Supp. 91, 102 (D. Md. 1949); *Shades Ridge Holding Co. v. Cobbs, Allen & Hall Mortg. Co.*, 390 So.2d 601, 608-09 (Ala. 1980); *Helm v. K.O.G. Alarm Co.*, 4 Cal. App. 4th 194, 202, 5 Cal. Rptr. 2d 615, 619 (1992); *Van Bibber v. Norris*, 404 N.E.2d 1365, 1380 (Ind. 1980); *Abbott v. Forest Hill State Bank*, 60 Md. App. 447, 455, 483 A.2d 387, 391 (1984); *Seidel v. Greenberg*, 108 N.J. Super. 248, 260 A.2d 863, 871-73 (1969); *Derosier v. New England Tel. & Tel. Co.*, 81 N.H. 451, 464, 130 A. 145, 152 (1925); *Burckhardt v. Burckhardt*, 42 Ohio St. 474, 487 (1885); *see also Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 547-48 (1983) (Marshall, J., dissenting) ("Although many legal battles have been fought over the extent of tort liability for remote consequences of negligent conduct, it has always been assumed that the victim of an intentional tort can recover from the tortfeasor if he proves that the tortious conduct was a cause-in-fact of his injuries. An inquiry into proximate cause has traditionally been deemed unnecessary in suits against intentional tortfeasors.").

have stated that the concept of proximate cause applies to intentional torts, however, they have generally clarified that the requirement is not strict and intentional wrongdoers are deemed to have foreseen and intended the consequences of their actions.⁸⁶ Some courts have used the concept of "proximate causation" in the context of strict liability for ultrahazardous activity, but the reference is generally to harm caused by an instrumentality, not by the actions of an individual.⁸⁷

Moreover, use of the term "proximate causation" is problematic to begin with because courts are unable to define the concept precisely.⁸⁸ One court has explained that the word "proximate"

86. See *Phillips v. Smalley Maint. Servs., Inc.*, 711 F.2d 1524, 1537 (11th Cir. 1983); *Johnson v. Greer*, 477 F.2d 101, 106 (5th Cir. 1973); *Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris, Inc.*, 1998 WL 602033, *6 (N.D. Ohio 1998); *San Francisco v. Philip Morris, Inc.*, 957 F. Supp. 1130, 1141 (N.D. Cal. 1997); see also FOULER V. HARPER & FLEMING JAMES, JR., *THE LAW OF TORTS*, § 7.13 (1956) ("The problem of legal or proximate causation is of little difficulty in view of the general rule that all intended consequences are proximate.").

87. See *Cook v. Rockwell Intern. Corp.*, 181 F.R.D. 473, 486 (D. Colo. 1998) ("In Colorado, one who engages in abnormally dangerous activity is strictly liable for any damages proximately caused to other persons, land, or chattels by that activity."); *Evans v. Mutual Minn.*, 199 W.Va. 526, 532, 485 S.E.2d 695, 701 (W.Va. 1997) ("We have long held that 'where a person chooses to use an abnormally dangerous instrumentality he is strictly liable without a showing of negligence for any injury proximately caused by that instrumentality.'") (quoting *Peneschi v. Nat'l Steel Corp.*, 170 W. Va. 511, 515, 295 S.E.2d 1, 5 (1982)).

88. See *Sementilli v. Trinidad Corp.*, 155 F.3d 1130, 1135 n.1 (9th Cir. 1998) ("Much confusion surrounds the term 'proximate cause.'"); *Shawmut Bank v. Kress Assoc.*, 33 F.3d 1477, 1495 (9th Cir. 1993) ("The parties' and the district court's confusing use of the term proximate cause to describe the concept of cause in fact is understandable, given the state law context in which they were operating."); *Murray v. Fairbanks Morse*, 610 F.2d 149, 164 (3rd Cir. 1979) ("However, as with many tort principles, much confusion exists about the nature of causation."); *Wilson v. Formigoni*, 832 F. Supp. 1152, *1161 (N.D. Ill. 1993) ("Proximate cause has been analyzed in endless variation."); *Maupin v. Widling*, 192 Cal. App. 3d 568, 573 237 Cal. Rptr. 521, 524 (1987) ("The term 'proximate cause' does not fit within the confines of a clear definition . . . Judges, even learned ones, attorneys, and law students have struggled with the concept. It has not been any easier for jurors although they usually have the advantage of common sense."); *Akers v. Kelley Co.*, 173 Cal.App.3d 633, 658, 219 Cal.Rptr. 513, 528 (1985) (noting difficulty in concentrating on the topic of proximate cause for even an hour or two), *disapproved on other grounds*, *People v. Nesler*, 16 Cal. 4th 561, 582, 66 Cal. Rptr.2d 454, 468, 941 P.2d 87, 101 (1997); *State Comp. Ins. Fund v. Ind. Accident. Comm'n.*, 176 Cal.App.2d 10, 20, 1 Cal. Rptr. 73, 80 (1959) ("[t]he concept of proximate causation has given courts and commentators consummate difficulty and has in truth defied precise definition."); *Hartley v. State*, 103 Wash. 2d 768, 778, 698 P.2d 77, 82 (1985) ("Some confusion probably has been generated by the imprecise use of the term 'proximate cause' to encompass cause in fact and legal causation alone or in combination."); *Hostetler v. Ward*, 41 Wash. App. 343, 350 n.4, 704 P.2d 1193, 1198 n.4 (1985) (describing "proximate cause" as amorphous).

in the term “proximate cause” appears to have come “from Bacon’s maxim ‘In jure non remota causa, sed proxima, spectatur’ [In law the near cause, not the remote one, is looked to].”⁸⁹ Thus, courts have concluded that the word “proximate” suggests a temporal or spacial closeness and a proximate cause is a direct or immediate cause.⁹⁰ A cause that is too remote is not proximate.⁹¹ Other courts, however, have noted that the use of the word “proximate” is inapt because it places too much emphasis on temporal or physical closeness.⁹² To these courts, a proximate cause need not be an immediate cause.⁹³ A proximate cause may set in motion a succession of events in a chain reaction.⁹⁴ Therefore, the “proximate” cause need not be proximate at all in terms of time and space⁹⁵ and directness is not required for proximate causation.⁹⁶

Other courts have attempted to define proximate causation as a cause that produces a result in a natural and continuous sequence.⁹⁷ Even *Rylands v. Fletcher* noted that one who main-

89. *Wilson v. Formigoni*, 832 F. Supp. 1152, 1161 n.4 (N.D. Ill. 1993)(quoting Lord Chancellor Bacon, *MAXIMS OF THE LAW*, REG. 1.).

90. See *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 265-70 (1992) (noting that a plaintiff must show a “direct relation between the injury asserted and the injurious conduct alleged.”); *Big Seven Music Corp. v. Lennon*, 554 F.2d 504, 509 (2d Cir. 1977) (“[D]amages may be recovered only if there is a necessary, immediate and direct causal connection between the wrongdoing and the damages.”); *Hartley v. State*, 103 Wash. 2d 768, 778 698 P.2d 77, 83 (1985) (“Similarly, Washington Pattern Instruction 15.01 refers to proximate cause in its factual context as “a cause which in a direct sequence, unbroken by any new independent cause, produces the [injury] [event] complained of and without which such [injury] [event] would not have happened.”).

91. See *Rodriguez-Cirilo v. Garcia*, 115 F.3d 50, 52 (1st Cir. 1997); *Wilson v. Formigoni*, 832 F. Supp. at 1161; *Ford v. Jeffries*, 474 Pa. 588, 594-95, 379 A.2d 111, 114 (1977); see also *Holmes*, 503 U.S. at 287 (Scalia, J., concurring) (“Life is too short to pursue every human act to its most remote consequences; ‘for want of a nail a kingdom was lost’ is a commentary on fate, not the statement of a major cause of action against a blacksmith.”).

92. See *Jefferson Bank v. Progressive Cas. Ins. Co.*, 965 F.2d 1274, 1281 (3d Cir. 1992); *Maupin v. Widling*, 192 Cal. App. 3d 568, 574, 237 Cal. Rptr. 521, 525 (1987).

93. See *Jefferson Bank*, 965 F.2d at 1281.

94. See *Milwaukee R.R. Co. v. Kellogg*, 94 U.S. 469, 475 (1876); *Jefferson Bank* 965 F.2d at 1281.

95. See *Milwaukee R.R. Co.*, 94 U.S. at 475; *Bass v. Campagnone*, 838 F.2d 10, 12 (1st Cir. 1988); *E.J. Stewart, Inc. v. Aitken Prods., Inc.*, 607 F. Supp. 883, 889 (E.D. Pa. 1985).

96. *Mitchell v. Gonzales*, 54 Cal. 3d 1041, 1052, 819 P.2d 872, 878, 1 Cal. Rptr. 2d 913, 919 (1991)(noting that jurors should not focus “on the cause that is spatially or temporally close to the harm”).

97. See *Graham v. Amoco Oil Co.*, 21 F.3d 643, 648 (5th Cir. 1994); *In re Bendectin Litig.*, 857 F.2d 290, 313 (6th Cir. 1988); *Ente Nazionale Per L’Energia Electrica*

tains anything "likely to do mischief" is "prima facie answerable for all the damage which is the natural consequence of its escape."⁹⁸ Still, other courts have used the concept of "substantial cause" to define proximate cause in tort cases.⁹⁹ These courts have instructed juries that a proximate cause consists of a "substantial cause" simply because the term is easily understood.¹⁰⁰ The notion of a substantial cause, however, is not the same as the "sole cause."¹⁰¹ One cause may be legally responsible for harm even if another cause was more substantial.¹⁰² If there are two causes that are both sufficient to bring about the result, both

v. Baliwag Nav., Inc., 774 F.2d 648, 655 (4th Cir. 1985); *Olympic Towing Corp. v. Nebel Towing Co.*, 419 F.2d 230, 233 (5th Cir. 1969); *Howard v. Swagart*, 161 F.2d 651, 655 (D.C. Cir. 1947); *In re Lone Star Indus.* 882 F. Supp. 482, 489 (D. Md. 1995); *Hardison v. Bushnell*, 18 Cal. App. 4th 22, 26-27, 22 Cal. Rptr. 2d 106, 108 (1993); *Sutton v. Duplessis*, 584 So.2d 362, 365 (La. App. 1991); *Beale v. Jones*, 171 S.E.2d 851, 853 (Va. 1970); *Norfolk & W. Ry. Co. v. Whitehurst*, 99 S.E. 568, 569 (Va. 1919); *Hartley v. State*, 103 Wash. 2d 768, 778, 698 P.2d 77, 83 (1985).

98. See *supra* note 50 and accompanying text.

99. See *Shawmut Bank v. Kress Assocs.*, 33 F.3d 1477, 1495 (9th Cir. 1993); *In re Manguno*, 961 F.2d 533, 536 (5th Cir. 1992); *Jefferson Bank v. Progressive Cas. Ins. Co.*, 965 F.2d 1274, 1281 (3d Cir. 1992); *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 367 (3d Cir. 1990); *United States v. Pitt De Moines, Inc.*, 970 F. Supp. 1359, 1368 (N.D. Ill. 1997); *Miller v. Group Voyagers, Inc.*, 912 F. Supp. 164, 167 (E.D. Pa. 1996); *Markovich v. Bell Helicopter Textron, Inc.*, 805 F. Supp. 1231, 1238 (E.D. Pa. 1992); *Milwaukee Elec. Tool Corp. v. Super. Ct.*, 15 Cal. App. 4th 547, 563 n.4, 19 Cal. Rptr. 2d 24, 36 n.4 (1993); *Stewart v. Federated Dep't Stores, Inc.*, 234 Conn. 597, 606, 662 A.2d 753, 758-59 (1995).

100. See *Maupin v. Widling*, 192 Cal. App. 3d 568, 573 237 Cal. Rptr. 521, 524 (1987).

101. See *Cox v. Admin. U. S. Steel & Carnegie*, 17 F.3d 1386, 1399 (11th Cir. 1994) ("A proximate cause is not . . . the same thing as a sole cause."); *Tragarz v. Keene Corp.*, 980 F.2d 411, 424-25 (7th Cir. 1992) ("there can be more than one proximate cause of an injury.") (quoting *Lipke v. Celotex Corp.*, 153 Ill.App.3d 498, 505 N.E.2d 1213 (1987)); *In re Air Crash at Dallas/Fort Worth Airport*, 919 F.2d 1079, 1087 (5th Cir. 1991) ("That there may be more than one proximate cause of an event is such a principle of the Texas (and general) law of proximate cause . . ."); *In re Bendectin Litig.*, 857 F.2d 290, 313 (6th Cir. 1988) ("The term 'proximate cause' is defined as that which in a natural and continuous sequence produces an injury which would not have otherwise occurred. This does not mean that the law recognizes only one proximate cause of an injury. Thee [sic] may be more than one proximate cause. There may be other factors that operate at the same time, either independently or together, to cause an injury."); *Long v. Friesland*, 178 Ill. App. 3d 42, 55, 532 N.E.2d 914, 922 (Ill. App. 1988) ("Of course, there can be more than one act which creates the proximate cause of an injury.")

102. *Tragarz v. Keene Corp.*, 980 F.2d 411, 424-25 (7th Cir. 1992) ("Illinois courts in applying the substantial factor test do not seem concerned with which of the many contributing causes are most substantial. Rather, they seem concerned with whether each contributing cause, standing alone, is a substantial factor in causing the alleged injury. We derive this interpretation from Illinois cases . . . which emphasize that 'there can be more than one proximate cause of an injury.'") (quoting *Lipke v. Celotex Corp.*, 153 Ill.App.3d 498, 505 N.E.2d 1213 (1987)).

causes can be deemed legally responsible causes.¹⁰³ In addition, courts have held that when two or more causes coalesce to produce a result, but none alone would have caused the harm, all causes may be viewed as proximate causes, particularly if they are "related."¹⁰⁴ For example, in the context of common law claims relating to pollution and contamination from several sources, courts have dispensed with a requirement that the plaintiff identify precisely the contribution of each source, under a theory of joint and several liability, and have shifted the burden of proof to each defendant to show an absence of individual contribution.¹⁰⁵ Thus, substantial causation is not always required for proximate causation under common law.

Some courts have attempted to define proximate causation in terms of harm that is foreseeable.¹⁰⁶ These cases, however, are

103. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 282 (1989) ("Suppose two physical forces act upon and move an object, and suppose that either force acting alone would have moved the object. As the dissent would have it, neither physical force was a "cause" of the motion unless we can show that but for one or both of them, the object would not have moved; apparently both forces were simply "in the air" unless we can identify at least one of them as a but-for cause of the object's movement. *Ibid.* Events that are causally overdetermined, in other words, may not have any "cause" at all. This cannot be so."); *Hiltgen v. Sumrall*, 47 F.3d 695, 706 (5th Cir. 1995). As the *Hiltgen* court stated:

Where two or more tortfeasors may be responsible for the same injury, the law of proximate cause is overlapped by the law of concurrent tortfeasor liability. The basic premise of concurrent tortfeasor law is that, as alluded to above, an injury may have several concurrent proximate causes, including the actions of two or more tortfeasors, neither of whose action was sufficient in and of itself to produce the injury, who act, either together or independently, to produce it. Alabama law is clear that on such occasions, where the actions of two or more tortfeasors combine, concur or coalesce to produce an injury, each tortfeasor's act is considered to be the proximate cause of the injury. . . In other words, because the actions of each tortfeasor contributed, as a "cause of in fact," to produce the injury, no tortfeasor may assert that the actions of another tortfeasor, and not his own, caused the injury. The single exception to this rule is, as discussed above, where the unforeseen act of another tortfeasor, which was sufficient in and of itself to produce the injury, intervened between the time the first tortfeasor acted and the injury. . . .

Id.

104. See *In re Bendectin Litig.*, 857 F.2d 290, 313 (6th Cir. 1988); *Acushnet Co. v. Coaters, Inc.*, 972 F. Supp. 41, 51 (D. Mass. 1997); *Artesian Water Co. v. New Castle County*, 659 F. Supp. 1269, 1283 (D. Del. 1987); PROSSER & KEETON, § 41, at 267.

105. See *Michie v. Great Lakes Steel Div., Nat'l Steel Corp.*, 495 F.2d 213, 216-218 (6th Cir. 1974); *Velsicol Chem. Corp. v. Rowe*, 543 S.W.2d 337, 342 (Tenn. 1976); *Landers v. E. Tex. Salt Water Disposal Co.*, 151 Tex. 251, 256, 248 S.W.2d 731, 734 (1952); see also *Zands v. Nelson*, 797 F. Supp. 805, 815 (S.D. Cal. 1992).

106. See *Bartley v. Euclid, Inc.*, 158 F.3d 261, 272 (5th Cir. 1998); *Talkington v. Atria Reclamelucifers Fabrieken BV (Cricket BV)*, 152 F.3d 254, 264 (4th Cir. 1998); *Hiltgen v. Sumrall*, 47 F.3d 695, 706 (5th Cir. 1995); *Diduck v. Kaszycki & Sons Contr., Inc.*, 974 F.2d 270, 284 (2d Cir. 1992); *Purdy v. Commodity Futures Trading*

mostly in the context of negligence law, where foreseeability defines the scope of duty.¹⁰⁷ Nevertheless, the negligence law requirement of foreseeability only means that some harm must be foreseeable, and the precise manner in which the harm occurs need not be foreseeable.¹⁰⁸

On the other hand, many courts have freely acknowledged that a proximate cause determination is largely a matter of judicial policy based on the circumstances of each case and is simply a practical way for a court to cut off liability on an ad hoc basis when it appears that the imposition of liability is too extreme.¹⁰⁹ Therefore, courts have stated that the term "proximate cause" is inherently confusing and that the term "legal cause" is a more appropriate description of the role a proximate cause analysis plays in limiting liability based on judicial policy.¹¹⁰ Thus, proximate cause qua "legal cause" is "not a question of causation: it is simply a policy determination of whether or not the defendant should be held responsible . . ." ¹¹¹ Legal cause defines the scope of the legal duty.¹¹² To the extent proximate cause is little more than a policy judgment to define the outer limits of liability for a

Comm'n, 968 F.2d 510, 519 (5th Cir. 1992); *In re Air Crash at Dallas/Fort Worth Airport*, 919 F.2d 1079, 1085 (5th Cir. 1991); *Peckham v. Cont'l Cas. Ins. Co.*, 895 F.2d 830, 836 (1st Cir. 1990); *United States v. Pitt De Moines, Inc.*, 970 F. Supp. 1359, 1368 (N.D. Ill. 1997); *Sumner v. United States*, 794 F. Supp. 1358, 1368 (M.D. Tenn. 1992); *E.J. Stewart, Inc. v. Aitken Prod., Inc.*, 607 F. Supp. 883, 889 (E.D. Pa. 1985); *Ryder v. United States*, 513 F. Supp. 551, 562 (D. Mass. 1981); *Skinner v. Square D Co.*, 445 Mich. 153, 63, 516 N.W.2d 475, 479 (1994).

107. *See, e.g., Hines v. United States*, 60 F.3d 1442, 1449-50 (9th Cir. 1995).

108. *See Bartley v. Euclid, Inc.*, 158 F.3d 261, 272 (5th Cir. 1998); *Hiltgen v. Sumrall*, 47 F.3d 695, 706 (5th Cir. 1995); *E. I. Dupont De Nemours & Co. v. Wright*, 146 F.2d 765, 767 (6th Cir. 1944); *Johnson v. Kosmos Portland Cement*, 64 F.2d 193, 197 (6th Cir. 1933); *Herman v. Welland Chem., Ltd.*, 580 F. Supp. 823, 830 (M.D. Pa. 1984); *Hardison v. Bushnell*, 18 Cal. App. 4th 22, 27, 22 Cal. Rptr. 2d 106, 108 (1993); *Stewart v. Federated Dept. Stores, Inc.*, 234 Conn. 597, 606, 662 A.2d 753, 758 (1995); *Hoover v. Sackett*, 221 Pa.Super. 447, 451-52, 292 A.2d 461, 463-64 (1972).

109. *Exxon Co. U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 839 (1996); *Sementilli v. Trinidad Corp.*, 155 F.3d 1130, 1135 (9th Cir. 1998); *United States v. Needle*, 72 F.3d 1104, 1119 (3rd Cir. 1996); *Wilson v. Formigoni*, 832 F. Supp. 1152, 1161 (N.D. Ill. 1993); *E.J. Stewart, Inc. v. Aitken Products, Inc.*, 607 F. Supp. 883, 889 (E.D. Pa. 1985); *Herman v. Welland Chem., Ltd.*, 580 F. Supp. 823, 830 (M.D. Pa. 1984).

110. *Shawmut Bank, v. Kress Assocs.*, 33 F.3d 1477, 1495 (9th Cir. 1993); *Jefferson Bank v. Progressive Cas. Ins. Co.*, 965 F.2d 1274, 1281 (3d Cir. 1992).

111. *See Valdez v. J.D. Diffenbaugh Co.*, 51 Cal. App.3d 494, 509, 124 Cal. Rptr. 467, 477 (1975).

112. *See O.K. Sand & Gravel, Inc. v. Martin Marietta Techns., Inc.*, 36 F.3d 565, 573 (7th Cir. 1994); *Faucheaux v. Terrebone Consol. Gov't*, 615 So. 2d 289, 292 (La. 1993).

particular claim, courts must look to the policies of the particular statute or area of law involved.¹¹³

In the context of strict liability for ultrahazardous activity, the policy is to compensate victims for the inevitable consequences of a highly hazardous instrumentality. If such an injury results from use of the instrumentality, legal cause is satisfied.¹¹⁴ Any proximate cause analysis in a strict liability claim, to the extent applicable at all, should not include a component of foresight by a reasonable person in the shoes of the defendant. Under common law strict liability for ultrahazardous activity, ownership or control of the hazard-causing instrumentality is the basis for legal causation and liability.¹¹⁵ In this connection, common strict liability is similar in operation to *res ipsa loquitur*, which imposes liability based on an ability by a defendant to control an instrumentality that caused harm.¹¹⁶

113. *Sementilli v. Trinidad Corp.*, 155 F.3d 1130, 1135 (9th Cir. 1998); *Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris, Inc.*, 1998 WL 602033, *6 (N.D. Ohio 1998); *Laborers Local 17 Health & Ben. Fund v. Philip Morris, Inc.*, 7 F. Supp.2d 277, 285 (S.D.N.Y. 1998); *Shades Ridge Holding Co. v. Cobbs, Allen & Hall Mortgage Co.*, 390 So.2d 601, 611-12 (Ala. 1980).

114. *Bartley v. Euclid, Inc.*, 158 F.3d 261, 272 n.8 (5th Cir. 1998) ("Producing cause requires a lesser burden than proximate cause because it does not require foreseeability.") (*citing Purina Mills, Inc. v. Odell*, 948 S.W.2d 927, 935 (Tex. Civ. App.—Texarkana 1997)); *Wasylow v. Glock, Inc.*, 975 F. Supp. 370, 376 (D. Mass. 1996) ("The focus of the negligence inquiry is on the conduct of the defendant. . . *Wasylow* alleges breach of the implied warranty of merchantability in Counts III and IV. This cause of action stands on a different footing, focusing on the product rather than on the conduct of the manufacturer or the user."); *Sterling v. Velsicol Chem. Corp.*, 647 F. Supp. 303, 314 (W.D. Tenn. 1986) ("What is reasonably foreseeable in this context, however, is quite a different thing from the foreseeably unreasonable risk of harm that spells negligence. In the first place, we are no longer dealing with specific conduct but with the broad scope of a whole enterprise. Further, we are not looking for that which can and should reasonably be avoided, but with the more or less inevitable toll of a lawful enterprise. The foresight that should impel the prudent man to take precautions is not the same measure as that by which he should perceive the harm likely to flow from his long-run activity in spite of all reasonable precautions on his part") (*quoting Caldwell v. Ford Motor Co.*, 619 S.W.2d 534 (Tenn. App. 1981)); *Garcia v. Estate of Norton*, 183 Cal. App. 3d 413, 420, 228 Cal. Rptr. 108, 112 (1986) (noting that defendant need not have "actual knowledge of the true extent of the danger involved in proceeding with an ultrahazardous activity").

115. *United States v. Tex-Tow, Inc.*, 589 F.2d 1310, 1314-15 (7th Cir. 1978).

116. *Symons v. Mueller Co.* 526 F.2d 13, 18 (10th Cir. 1975) ("The doctrine of strict liability is in many facets akin to the doctrine of *res ipsa loquitur*, often recognized and applied by this Court on the basis of a presumption or inference of negligence upon a showing that the harm does not ordinarily occur in the absence of negligence and that the defendant was in control of the instrumentality which caused the injury").

Some courts or commentators, however, have suggested that at common law, a defendant must have had some perception of the risks that make an activity hazardous to be subject to strict liability.¹¹⁷ This would suggest that foreseeability plays a role in legal causation. The essence of strict liability, however, is that a plaintiff need not prove that a defendant acted intentionally or negligently.¹¹⁸ Thus, the correct view is that a plaintiff asserting a strict liability claim in tort need not prove that a defendant was aware of a specific risk.¹¹⁹ If courts become bogged down in an

117. See *Perez v. S. Pac. Transp. Co.*, 180 Ariz. 187, 189, 883 P.2d 424, 426 (Ariz. App. 1994); *Fortier v. Flambeau Plastics Co.*, 164 Wis.2d 639, 677 n.16, 476 N.W.2d 593, 608 n.16 (Wis. App. 1991); PROSSER AND KEETON, § 79 at 559 ("It is clear, first of all, that unless a statute requires it, strict liability will never be found unless the defendant is aware of the abnormally dangerous condition or activity, and has voluntarily engaged in or permitted it. Mere negligent failure to discover or prevent it is not enough. . . ."); James R. Zazzali & Frank P. Grad, *Hazardous Wastes: New Rights and Remedies? The Report and Recommendations of the Superfund Study Group*, 13 SETON HALL L. REV. 446, 462 (1983) ("The Restatement (Second) formula of strict liability, adopting an abnormally dangerous activity test, requires a balancing of numerous factors such as the utility of the activity, foreseeability of harm, and the appropriateness of the locale of the activity."); Ginsberg & Weiss, *Common Law Liability for Toxic Torts: A Phantom Remedy*, 9 HOFSTRA L. REV. 859, 918 (1981) (noting that both versions of Restatement include foreseeability requirement); Robert W. James, *Absolute Liability for Ultrahazardous Activities: An Appraisal of the Restatement Doctrine*, 37 CAL. L. REV. 269, 272-275 (1969) (Restatement impliedly requires foreseeability of risk; foreseeability of the risk is "a necessary element in any adequate absolute liability doctrine."); see also *Dvorak v. Matador Service, Inc.*, 223 Mont. 98, 106, 727 P.2d 1306, 1311 (Mont. 1986) ("Further, contrary to Dvorak's belief, the showing of proximate cause under strict liability is identical to that required for a prima facie showing of negligence. In other words, a defendant's liability can be cut off by a superseding intervening force.").

118. *Koger v. Ferrin*, 926 P.2d 680, 684-86 (Kan. App. 1996).

119. See *Zands v. Nelson*, 797 F. Supp. 805, 815 (S.D. Cal. 1992) ("In the negligence case, tortious conduct is the negligent act—the breach of a duty. Once a plaintiff proves a negligent act, the plaintiff can then recover on a theory of negligence by showing causation and damages. In the strict liability case, on the other hand, there is simply the act itself—engaging in the strict liability activity. Once the defendant has engaged in the act, plaintiffs will prevail in tort if harm results."); *Sterling v. Velsicol Chem. Corp.*, 647 F. Supp. 303, 314 (W.D. Tenn. 1986) ("What is reasonably foreseeable in this context, however, is quite a different thing from the foreseeably unreasonable risk of harm that spells negligence. In the first place, we are no longer dealing with specific conduct but with the broad scope of a whole enterprise. Further, we are not looking for that which can and should reasonably be avoided, but with the more or less inevitable toll of a lawful enterprise. The foresight that should impel the prudent man to take precautions is not the same measure as that by which he should perceive the harm likely to flow from his long-run activity in spite of all reasonable precautions on his part") (quoting *Caldwell v. Ford Motor Co.*, 619 S.W.2d 534 (Tenn. App. 1981)); *Garcia v. Estate of Norton*, 183 Cal. App. 3d 413, 420, 228 Cal. Rptr. 108, 112 (1986) (noting that defendant need not have "actual knowledge of the true extent of the danger involved in proceeding with an ultrahazardous activity").

analysis of the details of the use of the instrumentality, the analysis becomes one of negligence.¹²⁰ To show legal cause in the context of strict liability for ultrahazardous activity, it should only be necessary to show that the defendant voluntarily engaged in the conduct subject to strict liability.¹²¹

5. The Act of God/Third Party Defense

Common law courts generally have allowed for a tort causation defense based on an unforeseeable supervening cause.¹²² Similarly, courts have allowed a defense to strict liability for ultrahazardous activity based on a supervening force majeure or sometimes the actions of a third party individual.¹²³ *Rylands v. Fletcher* alluded to the concept of force majeure by noting that a “vis major” or an act of God that causes the instrumentality to escape control could be a defense to strict liability.¹²⁴ A force majeure is by definition unforeseen.¹²⁵ In the context of strict liability for ultrahazardous activity, the analysis generally focuses on a force totally beyond the control of the defendant that caused the instrumentality to escape control and go awry.¹²⁶ Because the actions of third party individuals, such as vandals, are generally foreseeable, many common law courts, and the Re-

120. See *Miller v. Civil Constructors, Inc.* 272 Ill.App.3d 263, 268, 651 N.E.2d 239, 243 (1995) (“The frequently stated standard of care applied in many jurisdictions concerning the use of firearms is the duty to exercise ordinary care commensurate with the peculiar circumstances of the case. Annot., 26 A.L.R.3d 561, 567 (1969). This is a negligence standard which is incompatible with the theory of strict liability.”). See also Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV. 963 (1981).

121. *Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co.*, 662 F. Supp. 635, 645 (N.D. Ill. 1987) (“One who engages in an abnormally dangerous activity is liable for all injury resulting from the activity, period, regardless of who was at fault.”), *rev’d on other grounds*, 916 F.2d 1174 (7th Cir. 1990); see also *United States v. Tex-Tow, Inc.*, 589 F.2d 1310, 1314-15 (7th Cir. 1978).

122. See *Dvorak v. Matador Serv., Inc.*, 223 Mont. 98, 106, 727 P.2d 1306, 1311 (1986) (“Further, contrary to Dvorak’s belief, the showing of proximate cause under strict liability is identical to that required for a prima facie showing of negligence. In other words, a defendant’s liability can be cut off by a superseding intervening force.”).

123. See *New Meadows Holding Co. v. Wash. Water & Power Co.*, 102 Wash.2d 495, 502, 687 P.2d 212, 216 (Wash. 1984) (“Furthermore, where there is the intervention of an ‘outside force beyond the control of the manufacturer, the owner, or the operator of the vehicle hauling [the gasoline]’, the rule of strict liability should not apply.”); *Siegler v. Kuhlman*, 502 P.2d 1181, 1181 (Rosellini, J., concurring).

124. See *supra* notes 51-52 and accompanying text.

125. See *United States v. Brooks-Callaway Co.*, 318 U.S. 120, 123-24, (1943); *Gulf Oil Corp. v. Fed. Energy Regulatory Comm’n*, 706 F.2d 444 (3d Cir. 1983).

126. See *Dvorak v. Matador Service, Inc.*, 223 Mont. at 106, 727 P.2d at 1311.

statement, came to reject as a defense to strict liability for ultrahazardous activity the supervening acts of a third party individual.¹²⁷ Under this view, the foreseeable presence of interfering third parties is part of what makes the instrumentality ultrahazardous in the first place. It should be noted that the burden of a defendant to show that an act of God or the act of a third party was not foreseen, however, in no way suggests that foreseeability is part of the plaintiff's burden of proof. The element of foreseeability, if allowed, is only relevant as an element of an affirmative defense.

6. Application of the Tort Paradigm to Hazardous Waste Storage and Disposal

The appropriateness and relevance of the paradigm of strict tort liability for ultrahazardous activity to CERCLA liability for hazardous substance releases is illustrated by the growing application of the theory by common law courts to the storage and disposal of hazardous substances. Many state courts and federal courts applying state law have come to the conclusion that the storage or disposal of hazardous substances is an abnormally hazardous activity giving rise to strict liability.¹²⁸ These courts have

127. See RESTATEMENT (SECOND) OF TORTS § 522, cmt. a; *Matomco Oil Co., v. Arctic Mech'l, Inc.*, 796 P.2d 1336, 1342 (Alaska 1990); *Siegler v. Kuhlman*, 81 Wash.2d 448, 459, 502 P.2d 1181, 1187 (Wash. 1972).

128. See *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1543 (10th Cir. 1992); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1051-52 (2d Cir. 1985); *N.J. Turnpike Auth. v. PPG Indus., Inc.*, 16 F. Supp.2d 460, 479 (D. N.J. 1998), *aff'd*, 197 F.3d 96 (3rd Cir. 1999); *Albahary v. Bristol, Conn.*, 963 F. Supp. 150, 155 (D. Conn. 1997); *Murray v. Bath Iron Works Corp.*, 867 F. Supp. 33, 48 (D. Maine 1994); *Schwartzman, Inc. v. Atchison, Topeka & Santa Fe Ry.*, 842 F. Supp. 475, 479 (D.N.M. 1993); *Hanlin Group v. Int'l Minerals & Chem. Corp.*, 759 F. Supp. 925, 933 (D. Me. 1990); *Allied Corp. v. Frola*, 730 F. Supp. 626, 633 (D.N.J. 1990); *United States v. Hooker Chem. & Plastics Corp.*, 722 F. Supp. 960, 966-67 (W.D.N.Y. 1989); *Amland Props. Corp. v. Aluminum Co.*, 711 F. Supp. 784, 807 (D.N.J. 1989); *Lutz v. Chromatex, Inc.*, 718 F. Supp. 413, 430 (M.D. Pa. 1989); *Sterling v. Velsicol Chem. Corp.*, 647 F. Supp. 303, 315-16 (W.D. Tenn. 1986); *Pensacola Gas Co. v. Pebley*, 25 Fla. 381, 390, 5 So. 593, 595 (1889); *Futura Realty v. Lone Star Bldg. Cents. (E.), Inc.*, 578 So.2d 363, 365 (Fla. App. 1991); *Bunyak v. Clyde J. Yancey & Sons Dairy, Inc.*, 438 So.2d 891, 893 (Fla. App. 1983); *Cities Serv. Co. v. State*, 312 So.2d 799, 803 (Fla. App. 1975); *Atkinson v. Herington Cattle Co.*, 200 Kan. 298, 307, 436 P.2d 816, 823 (1968); *Koger v. Ferrin*, 926 P.2d 680, 684-86 (Kan. App. 1996); *Polaroid Corp. v. Rollins Evt'l Servs. (NJ)*, 416 Mass. 684, 694, 624 N.E.2d 959, 966 (1993); *T & E Indus., Inc. v. Safety Light Corp.*, 123 N.J. 371, 393 587 A.2d 1249, 1260 (1991); *State Dept. of Evt'l Prot. v. Ventron Corp.*, 94 N.J. 473, 468 A.2d 150, 157 (1983); *Bahrle v. Exxon Corp.*, 279 N.J. Super. 5, 38, 652 A.2d 178, 194 (1995); *Prospect Indus. Corp. v. Singer Co.*, 238 N.J. Super. 394, 402-03, 569 A.2d 908, 911-12 (1989); *Kenney v. Scientific, Inc.*, 204 N.J. Super. 228, 247-48, 497 A.2d 1310 (Law Div. 1985); *City of*

emphasized the uncontrollable, migratory nature of hazardous substances, especially in the subsurface,¹²⁹ and have pointed to the particularly pernicious effects of hazardous substances on human health and the environment.¹³⁰

In the context of hazardous waste disposal, common law courts have noted that strict liability is justified because the storage and disposal of hazardous waste is capable of producing great harm in the form of ground and surface water contamination, irrespective of whether due care is used.¹³¹ Thus, courts have held that one who brings a source of pollution onto land has an absolute duty to see that it does not escape to neighboring parcels.¹³² Many of these courts have freely acknowledged that disposal of hazardous wastes is necessary in society, but have held that as between the innocent victims of contamination and those who have profited, those who have profited should pay.¹³³ Courts have also noted that those who have profited from the disposal are in a better position to pay for the cleanup.¹³⁴

Some courts and commentators have suggested that a plaintiff asserting a strict liability claim based on storage or disposal of a hazardous substance must prove that a defendant was aware of the hazards posed by a particular hazardous substance at the time.¹³⁵ Other courts have held that whether a hazardous substance is abnormally dangerous is a question of law.¹³⁶ To these

Bridgeton v. B.P. Oil, Inc., 146 N.J.Super. 169, 176-77, 369 A.2d 49, 53-54 (1976); Berg v. Reaction Motors Div., 37 N.J. 396, 410, 181 A.2d 487 (1962); Ravan v. Greenville Cty., 315 S.C. 447, 461, 434 S.E.2d 296, 305 (S.C. App. 1993).

129. Barnes v. Gen. Elec. Co., No. CV 930529354, 1995 WL 447904, *6 (Conn. Super. July 20, 1995); Kenney v. Scientific, Inc., 204 N.J. Super. 228, 247-48, 497 A.2d 1310, 1320 (Law Div. 1985).

130. Allied Corp. v. Frola, 730 F. Supp. 626, 633 (D.N.J. 1990)(finding that in light of known "pernicious" effects of carcinogens such as PCBs, disposal of by-products of petroleum recycling is abnormally dangerous activity).

131. See Barnes v. General Electric Co., 1995 WL 447904, *6.

132. See Klassen v. Cent. Kan. Coop. Creamery Ass'n, 160 Kan. 697, 705 165 P.2d 601, 607 (1946); Koger v. Ferrin, 926 P.2d 680, 684-86 (Kan. App. 1996); State Dept. of Env't'l Prot. v. Ventron Corp., 94 N.J. 473, 488, 468 A.2d 150, 157 (1983); Kenney v. Scientific, Inc., 204 N.J. Super. 228, 247-48, 497 A.2d 1310, 1320 (Law Div. 1985).

133. State Dep't of Env't'l Prot. v. Ventron Corp., 94 N.J. 473, 488, 468 A.2d 150, 157 (1983); Prosser & Keeton, § 78, at 555.

134. See Kenney v. Scientific, Inc., 204 N.J. Super. 228, 247-48, 497 A.2d 1310 (Law Div. 1985).

135. Fortier v. Flambeau Plastics Co., 164 Wis. 2d 639, 675-77, 476 N.W.2d 593, 608 (1991); Perez v. S. Pac. Transp. Co., 180 Ariz. 187, 189, 883 P.2d 424, 426 (Ariz. App. 1994).

136. See Erbrich Prods. Co. v. Wills, 509 N.E.2d 850, 857 (Ind. App. 1987); Ind. Harbor Belt R.R., 517 F. Supp. at 317; McLane v. Northwest Nat. Gas Co., 255 Or. 324, 467 P.2d 635, 637 (1970); RESTATEMENT (SECOND) OF TORTS, § 520, cmt. i

courts an inquiry into a particular defendant's state of mind or foreseeability of harm in a particular situation suggests a negligence analysis, not strict liability.¹³⁷ Accordingly, these courts have held that a plaintiff need not prove that a defendant was aware of specific risks relating to a particular chemical.¹³⁸ Nevertheless, the hazards posed by many chemicals, such as radium and mercury, are so obvious that courts have found in the alternative that defendants had constructive knowledge of the hazards.¹³⁹ Some courts have noted that extensive regulation of a chemical substance demonstrates that it is abnormally hazardous.¹⁴⁰

Other courts have drawn a distinction between disposal of hazardous substances and the manufacture or use of hazardous substances.¹⁴¹ If the contamination that ensued was within the scope of the risk of handling the substance, however, arguably the type of activity that caused the contamination should be irrelevant. For example, at least one court has held that a failure to control inadvertent leaking of chemical products to be used can give rise to strict liability to the same extent as affirmative acts of disposal of waste.¹⁴² Either way, harm to the environment, which makes the activity hazardous in the first place, results.

Other courts have refused to adopt a per se rule about storage of a particular substance and have required an analysis of where

(1977). *But see* Harper v. Regency Dev. Co., 399 So. 2d 248, 253 (Ala. 1981) (noting that a finding of liability guided by a consideration of the factors outlined in Restatement (Second) of Torts § 520 will normally be for the jury); Zero Wholesale Gas Co. v. Stroud, 264 Ark. 27, 571 S.W.2d 74, 76-77 (1978) (noting that jury must determine whether an activity is ultrahazardous); Matkovic v. Shell Oil Co., 218 Mont. 156, 159, 707 P.2d 2, 4 (1985) ("The definition of abnormally dangerous activity contained in § 520 should be given in conjunction with an instruction setting forth the principle of liability enunciated in § 519.").

137. T & E Indus., Inc. v. Safety Light Corp., 123 N.J. 371, 387, 587 A.2d 1249, 1257 (N.J. 1991).

138. *Id.*; Garcia v. Estate of Norton, 183 Cal. App. 3d 413, 420, 228 Cal. Rptr. 108, 112 (1986).

139. T & E Indus., Inc. v. Safety Light Corp., 123 N.J. 371, 387, 587 A.2d 1249, 1257 (N.J. 1991); *see also* Allied Corp. v. Frola, 730 F. Supp. 626, 633 (D.N.J. 1990) (noting that in light of known "pernicious" effects of carcinogens such as PCBs, disposal of by-products of petroleum recycling is abnormally dangerous activity).

140. Buggsi, Inc. v. Chevron U.S.A., Inc., 857 F. Supp. 1427, 1432-33 (D. Or. 1994); Koos v. Roth, 293 Or. 670, 682, 652 P.2d 1255 (1982); *see* T & E Indus., Inc. v. Safety Light Corp., 123 N.J. 371, 393, 587 A.2d 1249, 1259 (1991).

141. Richmond, Fredericksburg & Potomac R.R. Co. v. Davis Indus., Inc., 787 F. Supp. 572, 575 (E.D. Va. 1992).

142. *See* Prospect Indus. Corp. v. Singer Co., 569 A.2d 908, 910 (1989).

the particular substance is stored and the uses of the neighboring property.¹⁴³ Thus, courts have denied liability based on the fact that the storage of the hazardous substance is common, valuable to the community and carried out in an apparently appropriate location.¹⁴⁴ Some of these courts have suggested that incidental storage of hazardous substances by a business not predominantly devoted to waste disposal should not give rise to strict liability.¹⁴⁵ In contrast, other courts have held that if an activity involving a hazardous substance is truly ultrahazardous, the activity is not immunized from strict liability by taking place in an appropriate location or by a particular type of business.¹⁴⁶ Inappropriate storage of a hazardous substance, however, will certainly support the imposition of strict tort liability.¹⁴⁷ For example, courts have imposed strict liability for storage of hazardous substances in a residential area¹⁴⁸ or above a drinking water aquifer.¹⁴⁹

Some common law courts, however, have rejected altogether the application of strict liability to hazardous substance storage or disposal. Some of these courts have noted that strict liability is inappropriate in the context of disposal, storage or transporta-

143. *Sprankle v. Bower Ammonia & Chem. Co.*, 824 F.2d 409, 414 (5th Cir. 1987); *Davis Bros., Inc. v. Thornton Oil Co.*, 12 F. Supp. 2d 1333, 1338 (M.D. Ga. 1998); *Walker Drug Co. v. La Sal Oil Co.*, 902 P.2d 1229, 1233 (Utah 1995).

144. *Davis Bros., Inc. v. Thornton Oil Co.*, 12 F. Supp.2d at 1338; *Kelley v. R.G. Indus., Inc.*, 304 Md. 124, 133, 497 A.2d 1143, 1147 (1985).

145. *G.J. Leasing Co., Inc. v. Union Elec. Co.*, 854 F. Supp. 539, 568 (S.D. Ill. 1994); *Ganton Techs., Inc. v. Quadion Corp.*, 834 F. Supp. 1018, 1020 (N.D. Ill. 1993).

146. *Buggsi, Inc. v. Chevron U.S.A., Inc.*, 857 F. Supp. 1427, 1432 (D. Or. 1994) (“[A]n activity is not otherwise immune from strict liability because it is ‘appropriate’ in its place. . . . [A]n extraordinary risk does not become ordinary because it occurs in its own appropriate place.”) (quoting *Koos v. Roth*, 652 P.2d 1255 (Or. 1982)); *see also City of Northglenn v. Chevron U.S.A. Inc.*, 519 F. Supp. 515, 516 (D. Colo. 1981) (applying strict liability to the underground storage of several thousand gallons of gasoline in a suburban area and finding that the widespread use of gasoline did not diminish its inherently dangerous character).

147. *Daily v. Exxon Corp.*, 930 F. Supp. 1, 3 (D.D.C. 1996) (“Placement of underground storage tanks may be abnormally dangerous with respect to a surrounding residential area, but not with respect to the land of the very gas station on which they are situated.”); *accord Yommer v. McKenzie*, 257 A.2d 138, 140-41 (Md. 1969); *Rosenblatt v. Exxon Co.*, 335 Md. 58, 75, 642 A.2d 180, 187 (1994); *Exxon Corp. v. Yarema*, 516 A.2d 990, 1005 (Md. 1987); *McLane v. Northwest Nat. Gas Co.*, 467 P.2d 635, 638 (Or. 1970); *State Dep’t of Env’tl Prot. v. Arlington Warehouse*, 495 A.2d 882, 885 (N.J. App. Div. 1985); *Siegler v. Kuhlman*, 502 P.2d 1181, 1182, 1186 (Wash. 1972), *Zero Wholesale Gas Co. v. Stroud*, S.W.2d 74, 78 (Ark. 1978).

148. *City of Northglenn v. Chevron U.S.A. Inc.*, 519 F. Supp. 515, 516 (D. Colo. 1981); *Yommer v. McKenzie*, 255 Md. 228, 257 A.2d 138, 142 (Md. 1969).

149. *In re Tutu Wells Contamination Litig.*, 846 F. Supp. 1243, 1269-70 (D.V.I. 1993).

tion of hazardous substances because the risks can be eliminated by the exercise of reasonable care.¹⁵⁰ Some of these courts have also relied on the argument that the extensive regulation of the disposal, storage and transportation of hazardous substances minimizes the risk to manageable levels, diminishing the need for common law strict liability.¹⁵¹ Other courts have categorically held that the storage, transportation or disposal of hazardous substances is not abnormally hazardous.¹⁵² Often these courts, however, have relied on older state court precedent "prior to the modern environmental movement"¹⁵³ to reject the application of strict liability.¹⁵⁴

Although common law courts have disagreed about whether strict liability for ultrahazardous activity should apply to the disposal and storage of hazardous waste, CERCLA adopted strict liability by statute. To some extent, this statutory directive had the same effect as the state statutes imposing strict liability for injuries caused by dogs.¹⁵⁵ Even if an owner's dog in fact has no dangerous propensities, the statute treats the dog as a dangerous instrumentality and makes the owner an insurer.

The next section will show that CERCLA came to define and treat the CERCLA vessel and facility as a dangerous instrumen-

150. *Kowalski v. Goodyear Tire & Rubber Co.*, 841 F. Supp. 104, 109 (W.D.N.Y. 1994); *Greene v. Prod. Mfg. Corp.*, 842 F. Supp. 1321, 1327 (D. Kan. 1993); *In re Poling Transp. Corp.*, 784 F. Supp. 1045, 1049-50 (S.D.N.Y. 1992); *Amcast Indus. Corp. v. Detrex Corp.* 779 F. Supp. 1519, 1544 (N.D. Ind. 1991); *Arlington Forest Assocs. v. Exxon*, 774 F. Supp. 387, 392-93 (E.D. Va. 1991); *Hudson v. Peavey Oil Co.*, 566 P.2d 175, 177 (Or. 1977); *Philip Morris, Inc. v. Emerson*, 368 S.E.2d 268, 282 (Va. 1988); *New Meadows Holding Co. v. Wash. Water Power Co.*, 102 Wash.2d 495, 502, 687 P.2d 212, 216 (1984).

151. *Fortier v. Flambeau Plastics Co.*, 164 Wis. 2d 639, 675-77, 476 N.W.2d 593, 608 (1991); *Combustion Chems., Inc. v. Spires*, 433 S.E.2d 60, 62 (Ga. 1993).

152. *See Sprankle v. Bower Ammonia & Chem. Co.* 824 F.2d 409, 414 (5th Cir. 1987); *McDonald v. Timex Corp.* 9 F. Supp. 2d 120, 122 (D. Conn. 1998); *Bernbach v. Timex Corp.*, 989 F. Supp. 403, 407 (D. Conn. 1996); *Nielsen v. Sioux Tools, Inc.*, 870 F. Supp. 435, 442 (1994); *Arawana Mills Co. v. United Techs. Corp.*, 795 F. Supp. 1238, 1251 (D. Conn. 1992); *Arlington Forest Assocs. v. Exxon Corp.*, 774 F. Supp. 387, 393 (E.D. Va. 1991); *Thompson v. Mindis Metals, Inc.*, 692 So.2d 805, 806 (Ala. 1997); *750 Old Country Road Realty Corp. v. Exxon Corp.*, 229 A.D.2d 1034, 1034, 645 N.Y.S.2d 186, 187 (1996); *accord Barras v. Monsanto Co.*, 831 S.W.2d 859, 865 (Tex. 1992); *Grube v. Daun*, 570 N.W.2d 851, 857 (Wis. 1997); *Fortier v. Flambeau Plastics Co.*, 677, 476 N.W.2d 593, 608 (Wis. 1991).

153. *Allied Corp. v. Frola*, 730 F. Supp. 626, 633 (D.N.J. 1990) (finding that oil recycling is an abnormally dangerous activity and distinguishing a case that "predates the modern environmental movement").

154. *Ergon, Inc. v. Amoco Oil Co.*, 966 F. Supp. 577, 583 (W.D. Tenn. 1997); *Arawana Mills Co. v. United Techs. Corp.* 795 F. Supp. 1238, 1252 (D. Conn. 1992).

155. *See supra* notes 75-78 and accompanying text.

tality subject to strict liability for ultrahazardous activity. As demonstrated below, the proper paradigm to resolve issues of individual causation under CERCLA is the paradigm of strict liability for ultrahazardous activity. The common law concepts were translated directly into CERCLA's statutory framework.

III.

THE LEGISLATIVE DEVELOPMENT OF CERCLA AND THE INFLUENCE OF THE PARADIGM OF STRICT LIABILITY FOR ULTRAHAZARDOUS ACTIVITY

The development of the concept of strict liability for ultrahazardous activity played a substantial role in shaping the liability scheme of the Clean Water Act, which in turn greatly influenced the liability provisions of CERCLA. The Clean Water Act first came to treat the statutorily defined vessel and facility as an instrumentality to which strict liability attached. The Clean Water Act imposed cleanup liability on owners and operators of a vessel or facility regardless of personal causation. Just like *Rylands v. Fletcher*, the Clean Water Act focused on the harm caused by the instrumentality, not on the particular conduct of the owners and operators linked to the instrumentality. CERCLA borrowed this concept of causation from the Clean Water Act, but extended it substantially. Under CERCLA, the instrumentality came to include not only vessels and facilities, as defined under the Clean Water Act, but also geographic areas where hazardous substances had been deposited. CERCLA also extended liability not only to owners and operators, as under the Clean Water Act, but also to more indirect users of a facility, such as transporters and generators of hazardous waste. Finally, CERCLA imposed retroactive liability, with certain exceptions, on all those connected to the instrumentality, regardless of when the harm occurred. The legislative history of the Clean Water Act and CERCLA shows a clear reliance on the basic concepts that defined liability in *Rylands v. Fletcher*. For this reason, courts should consider the paradigm of strict liability for ultrahazardous activity to resolve questions of individual causation under CERCLA.

A. *Strict Liability for Cost Recovery under the Clean Water Act*

Beginning in the late 1960s, with growing worldwide consumption of oil and an increased need to transport imported oil in

large quantities, the oil industry began experiencing an increasing number of incidents of large oil spills and releases, such as the Torrey Canyon spill off the coast of England in 1967,¹⁵⁶ and the Santa Barbara, California oil platform blowout in 1969.¹⁵⁷ Largely in response to these two incidents, Congress enacted the Water Quality Improvement Act of 1970 (the "Clean Water Act").¹⁵⁸ As enacted in 1970, Section 311 of the Clean Water Act¹⁵⁹ granted the United States the authority to respond to discharges of oil on navigable waters and to recover cleanup costs for such spills.¹⁶⁰ In 1972, Congress amended the Clean Water

156. See LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND), ENVIRONMENT AND NATURAL RESOURCES POLICY DIVISION, CONG. RESEARCH SERV., LIBRARY OF CONG., FOR THE S. COMM. ON ENVIRONMENT AND PUBLIC WORKS, Vol. II 97th Cong., 2d Sess., at 942 (Comm. Print 1983) [hereinafter 2 SUPERFUND LEGIS. HIST.]. The S/T TORREY CANYON grounded off the coast of England on March 18, 1967. *In re Barracuda Tanker Corp.*, 409 F.2d 1013, 1013 (2d Cir. 1969). The tanker's cargo of 119,328 tons of crude oil spilled into the Atlantic Ocean and contaminated beaches in England and France. *Id.* The Royal Air Force bombed the supertanker to minimize environmental harm to the English coastline. *Id.* The United Kingdom of Great Britain and Northern Ireland, the Republic of France, and the States of Guernsey filed claims against the owner of the TORREY CANYON and the charterer. *Id.* The governments spent approximately \$15,000,000 to clean up the spill and the total claims were approximately \$25,000,000. 2 Superfund Legis. Hist., at 941-42. The defendants, however, filed a petition in the United States District Court for the Southern District of New York for limitation of liability pursuant to the Limitation Act of 1851, 46 U.S.C. §§ 183-189 (1994). *In re Barracuda Tanker Corp.*, 409 F.2d at 1013. The United States District Court for the Southern District of New York ultimately limited liability to the value of vessel and pending freight of \$50.00. *Id.* The court construed the statutory term "owner" broadly to effectuate the Congressional intent. *In re Barracuda Tanker Corp.*, 281 F. Supp. 232, 232 (S.D. N.Y. 1967); see *In re Complaint of Chesapeake Shipping, Inc.*, 778 F. Supp. 153, 156 (S.D.N.Y. 1991). The claimants appealed, and the defendants ultimately settled for about \$7,000,000. 2 SUPERFUND LEGIS. HIST., at 941-42.

157. *Id.* The Santa Barbara production platform blew up in January 1969, spilling 13,888 tons of oil. *Id.* The clean up costs were \$8.5 million. *Id.* The Santa Barbara spill gave rise to class actions by boat owners, beach front property owners, fishermen, hotels and motels, and nautical suppliers. *Id.* A federal court dismissed the claims by beach users and bird watchers. *Id.*

158. *Id.*

159. Section 311 was originally Section 11(b)(4) of the Water Quality Improvement Act of 1970, Pub.L. No. 91-224, 84 Stat. 91 (1970) which amended the Federal Water Pollution Control Act, ch. 758, 62 Stat. 1155 (1948). In 1972 Congress amended the Federal Water Pollution Control Act and renumbered Section 11(b)(4) as Section 311. See *United States v. Le Beouf Bros. Towing Co.*, 537 F.2d 149, 150 nn.2 & 4 (5th Cir. 1976).

160. 33 U.S.C. § 1161 (1994). The first federal statute specifically dealing with oil discharges was the Oil Pollution Act of 1924. See *Tug Ocean Prince, Inc. v. United States*, 584 F.2d 1151, 1161 (2d Cir. 1978). The Oil Pollution Act of 1924 protected coastal waters from oil discharges from vessels and imposed a negligence standard. *Id.* Congress amended the act in 1948, 1965 and 1966. *Id.* The Water Quality Im-

Act to strengthen the federal government's right to respond to oil spills as well as to hazardous substance releases.¹⁶¹

Section 311 of the Clean Water Act prohibited the discharge of oil and hazardous substances in harmful quantities from a vessel¹⁶² or an offshore facility¹⁶³ or an onshore facility¹⁶⁴ into navigable waters.¹⁶⁵ Thus, the Clean Water Act was a public welfare offense to the extent it imposed civil penalties for releases of a particular quantity of oil regardless of mens rea. Section 311(f) of the Clean Water Act, however, also imposed strict liability on an owner or operator of a vessel or facility from which oil or a hazardous substance was discharged in harmful quantities for the United States' actual cleanup costs and natural resource damages, unless the discharge was caused solely by an act of God, an act of war, negligence on the part of the United States Government, or an act or omission of a third party.¹⁶⁶ This was not a strict liability public welfare offense, but a civil strict liability claim in favor of the United States for damages and restitution.

Section 311(f) of the Clean Water Act limited liability to a dollar amount per ton of oil, depending on whether the source of the discharge was a vessel, an offshore facility or an onshore facility.¹⁶⁷ The legislative history of the Water Quality Improve-

provement Act of 1970, 33 U.S.C. § 1161 (1970) superseded the 1966 Act. *Id.* The Water Quality Improvement Act of 1970 established the policy to be "that there should be no discharges of oil . . . into or upon the waters of the contiguous zone." 33 U.S.C. § 1321 (1970). *Id.* The Federal Water Pollution Control Act of 1972, 33 U.S.C. § 1321, imposed a strict liability standard rather than a negligence standard and applied to hazardous substance releases as well as oil pollution. *Id.*

161. *See supra* note 160.

162. Section 311 of the Clean Water Act defined "vessel" as follows:

(3) "vessel" means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water other than a public vessel;

33 U.S.C. § 1321(a)(3) (1994).

163. Section 311 of the Clean Water Act defined "offshore facility" as follows:

(11) "offshore facility" means any facility of any kind located in, on, or under, any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a public vessel;

33 U.S.C. § 1321(a)(11) (1994).

164. Section 311 of the Clean Water Act defined "onshore facility" as follows:

(10) "onshore facility" means any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land within the United States other than submerged land;

33 U.S.C. § 1321(a)(10) (1994).

165. 33 U.S.C. § 1321(b)(3)(1994).

166. 33 U.S.C. § 1321(f)(1994).

167. *Id.*

ment Act of 1970 indicates that Congress adopted the limitation amounts in reference to the anticipated costs of an oil spill cleanup and the limited market for private insurance.¹⁶⁸ The Clean Water Act also required that each owner or operator of a vessel or facility transporting or handling oil take precautions to cover the limited liability by maintaining proof of insurance, bonding, or other financial ability in an amount equal to the statutory cap on liability.¹⁶⁹ If the defendant owner/operator could establish that the discharge was caused solely by a third party, the third party would be liable for the cleanup costs, but the

168. See *United States v Dixie Carriers, Inc.*, 627 F.2d 736, 738-42 (5th Cir 1980). The original Senate bill required proof of negligence for liability and contained no limitation on recovery. S. REP. NO. 91-351 (1969). The House of Representatives bill limited the government's recovery, even if the spill were willful. H.R. REP. NO. 91-127 (1969), *reprinted in* 91st Cong., 1st Sess., U.S. CODE CONG. & ADMIN. NEWS, at 2691 (1970). The enacted statute allowed only limited recovery under a strict liability theory but provided for unlimited recovery only upon proof of willful conduct represented a compromise. See H.R. CONF. REP. NO. 91-940 (1969), *reprinted in* 91st Cong., 1st Sess., U.S. CODE CONG. & ADMIN. NEWS, at 2712-28 (1970). As Congressman Cramer explained:

As the Members of this body will recall, the position of this body was that limitations of liability and imposition of liability should not be such as to preclude the possibility of recovery of cleanup costs from the discharger. We felt that the gauge of this liability should be whether or not insurance could be obtained to cover these events. Consequently, the House bill provided for limitations of liability for vessels based upon an evaluation of the world insurance market for this new type of risk. The Senate position was based upon figures for which we could find no substantiation in their hearings and which we were assured were completely uninsurable.

The conference was able to work out a compromise accepting the best features of both the House and the Senate positions. We arrived at a limitation of liability based on what we call strict liability. That is, regardless of fault and with certain very limited exceptions the discharger of oil will be liable. His limitation of liability would be \$100 per gross ton or \$14 million, whichever is higher (sic). This figure incidentally is twice the amount paid in the Torrey Canyon case. In the case of cleanup necessitated as a result of a willful spill or of a negligent spill, the benefits of limitations of liability would be removed and where the privity and knowledge of the owner of the vessel was involved he would be required to pay the full costs for cleanup.

116 CONG. REC. 9327 (1970); *see also* 115 CONG. REC. 9020 (1969); 115 CONG. REC. 9025 (1969) (remarks of Rep. Wright) (same). In the Senate, Senator Muskie observed that the limitation on liability was "an amount suggested by insurers as the insurable limit for this particular type of liability." 116 CONG. REC. 8982-83 (1970). Senator Cooper noted that the limitation on liability provision "draws a proper balance between the public interest and the ability of private enterprise to respond. I think it should be pointed out that the provision was adopted only after the most careful consideration and thorough study." 116 CONG. REC. 9003-04 (1970); *see also* 115 CONG. REC. 28,958 (1969) (remarks of Sen. Spong) ("Our objective was to protect the taxpayers from potential cleanup costs, without imposing liability in excess of reasonable risks.").

169. 33 U.S.C. § 1321(p)(1994).

owner/operator still had to reimburse the United States and pursue its rights against the third party.¹⁷⁰ If the owner/operator incurred costs for the cleanup of a release, the owner/operator was entitled to sue the United States in the Court of Claims for reimbursement, provided that it could establish the third party defense.¹⁷¹

Thus, in terms of the tort doctrine of strict liability for ultrahazardous activity, the Clean Water Act deemed the oil tanker (the “vessel”), or the pipeline or production platform (the “facility”), to be the instrumentality that posed risks of harm to society. As under common law strict liability for ultrahazardous activity, the owner and operator of the vessel or facility would be deemed insurers for all harm flowing from what made the activity hazardous in the first place: a release of oil or hazardous substance. The culprit for purposes of causation was the vessel or facility, and both the owner and operator would be liable regardless of whether their individual conduct caused the release. Just like in *Rylands v. Fletcher*, the owner of a vessel might not have personally engaged in any direct conduct causing a release but the act of ownership would be sufficient for strict liability.

In 1978 the United States Court of Appeals for the Seventh Circuit in *United States v. Tex-Tow, Inc.*¹⁷² confirmed that the conceptual model articulated in *Rylands v. Fletcher* is the correct approach to causation under the Clean Water Act. In *Tex-Tow*, the defendant barge operator was loading the barge with gasoline at a Mobile Oil Company dock on the Mississippi River.¹⁷³ As *Tex-Tow* filled the barge, the barge sank deeper into the water until an underwater steel piling that was part of the dock structure punctured the vessel, causing a release.¹⁷⁴ *Tex-Tow* was not negligent or otherwise at fault because it had no way of knowing about the piling and received no notice from Mobil about the piling.¹⁷⁵ *Tex-Tow* argued that “no liability may exist without causation.”¹⁷⁶ The Seventh Circuit agreed that “causa-

170. 33 U.S.C. § 1321(g)(1994).

171. 33 U.S.C. § 1321(i)(1994).

172. See *United States v. Tex-Tow, Inc.* 589 F.2d 1310 (7th Cir. 1978).

173. *Id.* at 1312.

174. *Id.*

175. *Id.*

176. *Id.* at 1313. *Tex-Tow* also argued that the third party defense should apply to the civil penalty provision. The *Tex-Tow* Court noted that Section 311 “holds owners or operators of discharging facilities liable for clean-up costs, subject to the defenses of act of God, act of War, negligence of the United States Government, or act or omission of a third party” but rejected the argument that the third party defense

tion is required even under a strict liability statute, however, *Tex-Tow* has conceded that the presence of its barge at the pier was a cause in fact. The only question is whether legal, or proximate, cause also exists.¹⁷⁷ *Tex-Tow* argued that its mere presence in the wrong place at the wrong time was not sufficient to make it a legal cause because it did not foresee the events.¹⁷⁸ The Seventh Circuit, however, held that by engaging in the ultrahazardous activity of transporting petroleum products in the first place, *Tex-Tow* had more than “mere presence” and was the legal cause:

Tex-Tow was engaged in the type of enterprise which will inevitably cause pollution and on which Congress has determined to shift the cost of pollution when the additional element of actual discharge is present. These two elements, actual pollution plus statistically foreseeable pollution attributable to a statutorily defined type of enterprise [namely an “owner or operator of any vessel, onshore facility or offshore facility” which pollutes navigable waters], together satisfy the requirement of cause in fact and legal cause. Foreseeability both creates legal responsibility and limits it. An enterprise such as *Tex-Tow* engaged in, the transport of oil, can foresee that spills will result despite all precautions and that some of these will result from the acts or omissions of third parties. Although a third party may be responsible for the immediate act or omission which “caused” the spill, *Tex-Tow* was engaged in the activity or enterprise which “caused” the spill.¹⁷⁹

Thus, the *Tex-Tow* court confirmed that the nature of causation under the strict liability provisions of the Clean Water Act is simply causation in fact stemming from the placement of a hazardous instrumentality (the vessel or facility) in a particular location. As long as the discharging vessel or facility causes pollution, the type of harm that makes the activity risky in the first place, strict liability attaches to owners and operators, regardless of personal fault or foreseeability of harm under specific circumstances. The interpretation of the *Tex-Tow* court is particularly important because it existed as of 1980 when CERCLA was enacted and Congress expressly provided that the terms “liable” or “liability” as used in CERCLA shall be construed to be

was available for civil penalties because the statute did not so provide. *Id.* at 1312. The Seventh Circuit also noted: “We will also assume for purposes of this opinion that *Tex-Tow* would have a third-party causation defense (on the basis of an act or omission by Mobil), if such a defense were available in the case of the civil penalty.” *Id.* at 1312.

177. *Id.* at 1313-14.

178. *Id.* at 1310.

179. *Id.* at 1314 (footnote in brackets).

the standard of liability under Section 311 of the Clean Water Act.¹⁸⁰ Nevertheless, the legislative history of CERCLA also clearly shows a reliance on the approach to causation associated with the paradigm of strict liability for ultrahazardous activity.

B. *Strict Liability and the Legislative Development of CERCLA*

The concept of a hazardous substance Superfund had its origins in legislation introduced in the 1970s to give further protection to the oil industry against claims by third parties for economic loss from oil spills. As of 1980, Section 311 of the Clean Water Act granted the United States a right to recover cleanup costs resulting from oil spills, but third parties suffering property damage or economic loss from oil spills had to resort to state law remedies, often common law negligence.¹⁸¹ Throughout the 1970s Congress focused attention on the problem of damages and economic loss from oil spills suffered by third parties because of continuing incidents such as the sinking of the *Argo Merchant* near Nantucket Island, the grounding of the *Amoco Cadiz* off the coast of France, and the *Campeche* oil spill in the Gulf of Mexico.¹⁸² Congress came to view existing common law as inadequate to protect such third parties for several reasons.¹⁸³ First, plaintiffs often had to prove negligence under common law and had to identify the source of the oil spill.¹⁸⁴ Also, claims based on releases from vessels were subject to the Limitations Act of 1851,¹⁸⁵ which allowed a vessel owner under certain cir-

180. 42 U.S.C. § 9601(32) (1994).

181. See 2 SUPERFUND LEGIS. HIST., *supra* note 156, at 942.

182. *Id.* The Liberian tanker *S. T. Argo Merchant* grounded approximately 25 miles southeast of Nantucket Island on December 15, 1976, releasing a cargo of 27,566 long tons of fuel oil. See *Complaint of Thebes Shipping Inc.*, 486 F. Supp. 436, 438 (S.D.N.Y. 1980). The tanker lingered for several days, broke in two and sank into the ocean. *Id.* On March 16, 1978, the tanker *Amoco Cadiz*, while under tow after having lost both an anchor and its hydraulic steering mechanism, went aground on rocks off the northwest coast of France. *In re Oil Spill by "Amoco Cadiz"* Off Coast of France on March 16, 1978., 471 F. Supp. 473, 474 (J.P.M.L. 1979). In rough water, the disabled ship broke apart on the rocks and disgorged its cargo of approximately 220,000 tons of crude oil, causing extensive environmental and economic loss. *Id.* In 1979, an oil rig blow-out in the Gulf of Campeche caused a release of over 140 million gallons of oil over the course of 10 months. *Sanders v. Parker Drilling Co.*, 911 F.2d 191, 213 (9th Cir. 1990) (citing *N.Y. TIMES*, June 17, 1980, at B7, col. 6.). The blow out released more than 12 times the amount of oil released by the *Exxon Valdez*. *Id.*

183. 2 SUPERFUND LEGIS. HIST., *supra* note 156, at 527, 942.

184. *Id.*

185. 46 U.S.C. § 183 (1994).

cumstances to limit liability to the value of the vessel and its cargo after the incident.¹⁸⁶ In the case of vessel collisions, groundings, or other circumstances which resulted in extensive oil spills, this value was often little or nothing since the vessel was destroyed and the cargo lost.¹⁸⁷ As a consequence many states enacted legislation concerning liability for oil spills.¹⁸⁸ This patchwork of laws contained sometimes conflicting provisions relating to oil pollution liability and compensation.¹⁸⁹ Congress therefore considered uniform legislation to provide for third party liability from oil spills and to provide limitations on the scope of liability to encourage the development of a private insurance market, just as it did under Section 311 of the Clean Water Act.

Congress had previously established funds for oil spill cleanups not only under Section 311 of the Clean Water Act,¹⁹⁰ but also under the Trans-Alaska Pipeline Authorization Act,¹⁹¹ the Outer Continental Shelf Amendments of 1978¹⁹² and the Deep Water Port Act of 1974.¹⁹³ What radically changed the course of the oil superfund legislation was the sudden public outcry in the late 1970s over the problem of abandoned toxic waste dumps, resulting from several well-publicized incidents such as Love Canal

186. 2 SUPERFUND LEGIS. HIST., *supra* note 156, at 942-43; LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND), ENVIRONMENT AND NATURAL RESOURCES POLICY DIVISION, CONG. RESEARCH SERV., LIBRARY OF CONG., FOR THE S. COMM. ON ENVIRONMENT AND PUBLIC WORKS, Vol. III 97th Cong., 2d Sess., at 71 (Comm. Print 1983) [hereinafter 3 SUPERFUND LEGIS. HIST.].

187. 2 SUPERFUND LEGIS. HIST. at 527, *supra* note 156, at 942-43; 3 SUPERFUND LEGIS. HIST., *supra* note 186, at 71.

188. 3 SUPERFUND LEGIS. HIST., *supra* note 187, at 71

189. *Id.*

190. 33 U.S.C. § 1331 (1994). Section 311 established a \$35 million revolving fund for cleanup of releases of oil and designated hazardous substances into navigable waters and restoration of natural resources. *Id.*

191. The Trans-Alaska Pipeline Authorization Act, 43 U.S.C. § 1651 (2000), established a \$100 million fund for damages, cleanup costs, restoration of natural resources, and economic loss, resulting from spills of oil transported through the pipeline. *Id.*

192. The Outer Continental Shelf Amendments of 1978 amended the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 (1994), to establish a \$200 million fund for damages, cleanup costs, property damage and loss of income and tax revenue, resulting from spills of oil produced on the Outer Continental Shelf. *Id.*

193. The Deep Water Port Act of 1974, 33 U.S.C. § 1502 (1994), established a \$100 million fund for damages resulting from oil pollution from vessels or facilities engaged in deepwater port operations. *Id.*

and Valley of the Drums.¹⁹⁴ Congress ultimately transformed the “superfund” proposed for the oil industry as a vehicle for self-insurance into a superfund financed mostly by taxes on the oil and petrochemical industry and directed at hazardous substance releases. Unlike the original legislation, the Superfund legislation that was ultimately enacted as CERCLA allowed the government to clean up hazardous waste sites and releases, and to seek recovery from responsible persons.

1. CERCLA’S Precursor Bills

The legislative history of CERCLA derives from four legislative proposals introduced in the 96th Congress: House of Representatives Bill 85, “The Oil Pollution Liability and Compensation Act”¹⁹⁵ (“H.R. 85”); House of Representatives Bill 7020, “The Hazardous Waste Containment Act of 1980”¹⁹⁶ (“H.R. 7020”); Senate Bill 1480, the “Environmental Emergency Response Act”¹⁹⁷ (“S. 1480”); and the Carter Administration’s bill introduced in the Senate as Senate Bill 1341, the “Oil, Hazardous Substances, and Hazardous Waste Response, Liability, and Compensation Act of 1979” (“S. 1341”).¹⁹⁸

194. 2 SUPERFUND LEGIS. HIST., *supra* note 156, at 527, 942-43; 3 SUPERFUND LEGIS. HIST., *supra* note 186, at 71; WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 682 (2d ed. 1994); Note, *Hazardous Waste and the Innocent Purchaser*, 38 U. FLA. L. REV. 253, 254-55 (1986). Love Canal was an area where chemical companies dumped more than 21,000 tons of hazardous waste. The area was later developed for residential use. The government relocated over 700 families and destroyed or boarded up the homes. See *United States v. Hooker Chem. & Plastics Corp.*, 680 F. Supp. 546, 549 (W.D.N.Y. 1988). The Valley of the Drums was a seven acre site near Louisville, Kentucky where EPA discovered 17,000 abandoned drums, six thousand of which were leaking toxic substances. *Nova Chems., Inc. v. GAF Corp.* 945 F. Supp. 1048, 1000 n.4 (E.D. Tenn 1996).

195. H.R. 85, 96th Cong., 1st Sess. (1979). H.R. 85 was introduced into the House of Representatives on January 15, 1979. *Uniroyal Chem. Co. v. Deltech Corp.*, 160 F.3d 238, 247 (5th Cir. 1998). H.R. 85 passed the House in 1979, but was tabled pending the next legislative session. See *Rhodes v. County of Darlington*, 833 F. Supp. 1163, 1174-75 (D.S.C. 1992).

196. 96th Cong., 2d Sess. (1980).

197. 96th Cong., 1st Sess. (1979).

198. See *Exxon Corp. v. Hunt*, 475 U.S. 355, 366 (1986); *Uniroyal Chem. Co. v. Deltech Corp.*, 160 F.3d 238, 247 (5th Cir. 1998); *California v. Montrose Chem. Corp.*, 104 F.3d 1507, 1520 (9th Cir. 1997); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1080 (1st Cir. 1986); *Rhodes v. County of Darlington*, 833 F. Supp. 1163, 1174-75 (D.S.C. 1992); see also LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND), ENVIRONMENT AND NATURAL RESOURCES POLICY DIVISION, CONG. RESEARCH SERV., LIBRARY OF CONG., FOR THE S. COMM. ON ENVIRONMENT AND PUBLIC WORKS, 97th Cong., 2d Sess. (Comm. Print 1983) [hereinafter 1

H.R. 85 was an amendment to the Clean Water Act regarding spills of oil and hazardous substances on navigable waters.¹⁹⁹ H.R. 7020 was an amendment to the Solid Waste Disposal Act,²⁰⁰ which dealt with releases from inactive, unpermitted hazardous waste sites.²⁰¹ The most direct ancestor of CERCLA, however, was S. 1480.²⁰² S. 1480 covered "all releases of hazardous chemicals into the environment, not merely spills or discharges from abandoned waste disposal sites."²⁰³ S. 1480, as originally drafted, was modeled closely on S. 1341, the Carter Administration's bill, but S. 1480 alone was reported to the Senate by the Committee on Environment and Public Works.²⁰⁴ By December 1980, after the presidential election, a lame duck Senate had under consideration H.R. 85 and H.R. 7020, which had both been passed by the House, and S. 1480, which had been favorably reported to the Senate from committee.²⁰⁵ "However, S. 1480 did not pass as

SUPERFUND LEGIS. HIST.]; Grad, A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ("SUPERFUND") ACT OF 1980, 8 COLUM. J. ENVTL. L. 1 (1982).

199. See *Rhodes v. County of Darlington*, 833 F. Supp. 1163, 1174-75 (D.S.C. 1992). H.R. 85, 96th Cong., 1st Sess., was introduced on in the House January 15, 1979, by Representative Biaggi. As introduced, H.R. 85 only applied to releases of oil from vessels or facilities on navigable water. After consideration in Committee, the bill was reported to the full House, see H.R. REP. NO. 96-172 (1979), but it was tabled pending the next legislative session. In the second session Representative Breaux introduced an amendment to H.R. 85 that added Title III, which dealt with releases of hazardous substances from vessels or facilities on navigable water. 126 CONG. REC. 26391 (1980). The bill as passed created two funds financed from taxes on petroleum and chemical feedstocks. One fund was to provide compensation for oil spills and the other for hazardous chemical spills in navigable waters; the bill did not cover hazardous substance releases on land. The bill entitled governments and individuals to recover damages for cleanup costs and certain economic losses, and imposed strict liability on owners and operators of vessels and other facilities. *Exxon Corp. v. Hunt*, 475 U.S. 355, 366 n.8 (1986).

200. 42 U.S.C. § 6901 (1994). The provisions of the 1965 Solid Waste Disposal Act, 79 Stat. 997, the Resource Recovery Act of 1970, 84 Stat. 1227, and the Resource Conservation and Recovery Act of 1976, 90 Stat. 2795, were codified in 1976 as the Solid Waste Disposal Act, 42 U.S.C. § 6901 *et seq.*

201. See *United States v. Aceto Agr. Chem. Corp.*, 872 F.2d 1373, 1380 (8th Cir. 1989).

202. See *Exxon Corp. v. Hunt*, 475 U.S. 355, 366 n.9 (1986) ("lineal ancestor of Superfund"); *United States v. Northeastern Pharmaceutical & Chem. Co., Inc.*, 810 F.2d 726, 737 (8th Cir. 1987) ("[t]he liability provisions of CERCLA were derived largely from the original Senate bill, S. 1480.") (citation omitted).

203. See *Uniroyal Chem. Co. v. Deltech Corp.*, 160 F.3d 238, 247 (5th Cir. 1998) (quoting 125 Cong. Rec. S9173 (1979) (comments of Senator Culver, co-sponsor of S. 1480)).

204. See *Exxon Corp. v. Hunt*, 475 U.S. 355, 366 (1986); *Rhodes v. County of Darlington*, 833 F. Supp. 1163, 1174-75 (D.S.C. 1992).

205. *Exxon Corp. v. Hunt*, 475 U.S. at 366.

reported. Rather, on November 24, 1980, among the last days of a lame-duck Congress, the Senate introduced Amendment No. 2631, 'in the nature of substitute for S. 1480,' which constitutes the compromise bill that was enacted as CERCLA."²⁰⁶ Amendment No. 2631 to S. 1480 was intended to be "a combination of the best of [H.R. 85, H.R. 7020, and S. 1480]."²⁰⁷ Because S. 1480, as amended, contained a revenue measure which had to originate in the House, the Senate substituted the language of S. 1480 into H.R. 7020 and sent it to the House on November 24, 1980.²⁰⁸ On December 3, 1980, the House passed the substituted form of H.R. 7020, after very limited debate, and under a suspension of the rules that allowed for no amendments.²⁰⁹ President Carter signed CERCLA into law on December 11, 1980.²¹⁰

206. *Continental Title Co. v. Peoples Gas Light & Coke Co.*, 959 F. Supp. 893, 897 (N.D. Ill. 1997) (citing CONG. REC., Nov. 24, 1980, S14929-15009, reprinted in 1 SUPERFUND LEGIS. HIST., *supra* note 199, at 560-775).

207. *Exxon Corp. v. Hunt*, 475 U.S. at 366 (citing 126 Cong. Rec. 30935 (1980) (remarks of Sen. Stafford)). "In addressing the Senate, Senator Randolph compared the new bill with H.R. 7020 and H.R. 85. He explained that H.R. 7020 was considered too narrow because it addressed only hazardous waste sites while H.R. 85, with its focus on oil spills and hazardous substances on navigable waters, was also insufficient." *Uniroyal Chem. Co. v. Deltech Corp.*, 160 F.3d 238, 247 (5th Cir. 1998).

208. *Uniroyal Chem. Co.*, 160 F.3d at 247 ("The legislative act of substituting S. 1480 into H.R. 7020, and then passing H.R. 7020, apparently occurred because S. 1480 contained tax provisions and, as a revenue bill, was required by the Constitution to originate in the House."); *The Ninth Ave. Remedial Group v. Fiberbond Corp.*, 946 F. Supp. 651, 657-58 (N.D. Ind. 1996) (Senate Amendment No. 2631, which substituted H.R. 7020 and was then enacted as CERCLA").

209. *Uniroyal Chem. Co.*, 160 F.3d at 247 ("It was considered and passed, after very limited debate, under a suspension of the rules, in a situation which allowed for no amendments. Faced with a complicated bill on a take it-or-leave it basis, the House took it, groaning all the way.") (citing Grad, A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ("SUPERFUND") ACT OF 1980, 8 COLUM. J. ENVTL. L. 1 (1982)).

210. *Id.* The absence of committee reports on the final legislation stems from the fact that CERCLA was a last minute compromise. As the Supreme Court explained in *Exxon Corp. v. Hunt*, 475 U.S. 355 (1986):

The explanation for the absence of committee reports and for the brief remarks on the floor lies in the fact that the compromise legislation that became Superfund was introduced as a floor amendment in the Senate in the waning days of the lame-duck session of the 96th Congress. The lineal ancestor of Superfund, S. 1480, was reported out of Committee on November 18, 1980—after the national elections had changed the political complexion by assuring the Republicans control of the Presidency and of the Senate in 1981. In the aftermath of the November elections, S. 1480, along with three other bills, became the subject of an 11th-hour compromise forged primarily in the Senate.

Id. at 366 n.5.

Due to the haste with which the compromise version of CERCLA was patched together in late 1980, some of the provisions do not fit together precisely and are difficult to construe.²¹¹ Many courts have expressed great frustration at the lack of clear legislative history, in the form of committee reports or extended debate, to clarify the meaning of certain statutory terms.²¹² Nevertheless, an examination of the provisions in the competing precursors to CERCLA and a review of what was included and excluded in the final compromise have helped courts understand the legislative intent behind CERCLA.²¹³ That legislative development sheds great light on issues relating to the role of individual causation in CERCLA's liability scheme.

Each of these precursor bills lends support to the idea that strict liability for ultrahazardous activity is the proper paradigm for analyzing questions of individual causation under CERCLA. The precursor bills originally drew a distinction between Clean Water Act vessels and facilities (*e.g.*, vessels or pipelines containing oil) and Solid Waste Disposal Act²¹⁴ facilities (*e.g.*, land based hazardous waste dumps). The bills originally treated only the Clean Water Act facilities as being subject to *Rylands v. Fletcher* type strict liability; that is, only owners and operators of Clean Water Act vessels or facilities were strictly liable regardless of individual causation. For the Solid Waste Disposal Act type facilities (toxic waste dumps), the bills initially required a showing of individual causation. As the legislation progressed, however, the concept of *Rylands v. Fletcher* strict liability was

211. *United States v. Mottolo*, 605 F. Supp. 898, 902 (D.N.H. 1985) ("CERCLA has acquired a well-deserved notoriety for vaguely-drafted provisions . . ."); *United States v. Price*, 577 F. Supp. 1103, 1109 (D.N.J. 1983) ([CERCLA was] "inadequately drafted"); *United States v. Wade*, 577 F. Supp. 1326, 1331 (E.D. Pa. 1983) ([CERCLA] "leaves much to be desired from a syntactical standpoint. . .").

212. *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1040 (2d Cir. 1985) (noting that CERCLA is "an eleventh hour compromise" with inadequate legislative history); *Chem. Waste Mgmt, Inc. v. Armstrong World Indus.*, 669 F. Supp. 1285, 1290 n. 6 (E.D. Pa. 1987) ("CERCLA's legislative history is sparse and generally uninformative" and "last-minute additions and deletions to the statute render its legislative history of little practical use."); *United States v. Mottolo*, 605 F. Supp. 898, 902 (D.N.H. 1985) ("CERCLA has acquired a well-deserved notoriety for . . . an indefinite, if not contradictory, legislative history.").

213. *See Exxon Corp. v. Hunt*, 475 U.S. 355, 366 (1986); *Uniroyal Chem. Co. v. Deltech Corp.*, 160 F.3d 238, 247 (5th Cir. 1998); *California v. Montrose Chem. Corp.*, 104 F.3d 1507, 1520 (9th Cir. 1997); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1080 (1st Cir. 1986); *Rhodes v. County of Darlington*, 833 F. Supp. 1163, 1174-75 (D.S.C. 1992).

214. *See supra* note 200.

extended to all vessels and facilities, even hazardous waste dumps. Thus, CERCLA came to impose strict liability on the owners, operators and users of such facilities based on a connection to the facility, regardless of individual causation. It is the failure of courts and commentators to have understood this critical distinction that has led to confusion in resolving issues of individual causation under CERCLA.

a. H.R. 85

H.R. 85 was introduced on January 11, 1979 and attempted to establish a comprehensive system of liability and compensation for oil-spill damage and removal costs.²¹⁵ H.R. 85 expressly imposed strict and joint and several liability on the owner and operator of a vessel or facility that was the source of oil pollution or which posed a threat of oil pollution on navigable waters.²¹⁶ H.R. 85, like the Clean Water Act, generally defined a "facility" as a structure or group of structures used to transport or handle oil.²¹⁷ Thus, as with Section 311 of the Clean Water Act, the conceptual basis of H.R. 85's liability provision was very similar to *Rylands v. Fletcher*. The owner and operator of an instrumentality in the form of a vessel or a facility containing large quantities of oil, just like the water reservoir in *Rylands v. Fletcher*, could be held liable for any release or threatened release from the instrumentality.

To protect the oil industry, however, H.R. 85 contained limits on liability that varied depending on the size of the vessel or the type of facility and the relative risk of a discharge of oil from the

215. See 2 SUPERFUND LEGIS. HIST., *supra* note 156, at 474.

216. *Id.* at 491. Section 104(a) provided:

(a) Subject to the provisions of subsections (b), (c), (d), and (e), the owner and operator of a vessel other than a public vessel, or of a facility, that is the source of oil pollution, or poses a threat of oil pollution in circumstances that justify the incurrence of the type of costs described in section 101(aa)(1) of this title, shall be jointly, severally, and strictly liable for all damages for which a claim may be asserted under section 103.

Id.

217. Section 101(i) defined "facility" as "a structure, or group of structures (other than a vessel or vessels) used for the purpose of transporting, drilling for, producing, processing, storing, transferring, or otherwise handling oil." *Id.* at 476. An "onshore facility", defined in Section 101(j), was "any facility other than an offshore facility, located in, on, or under any land within the United States." *Id.* An "offshore facility", defined in Section 101(k) was "any facility located in, on, or under the navigable waters, or if the facility is subject to the jurisdiction of the United States, the high seas." *Id.* at 475.

vessel or facility.²¹⁸ H.R. 85 limited the liability of owners and operators unless the incident²¹⁹ was caused primarily by willful misconduct or gross negligence, by a violation of safety, construction, or operating standards or regulations of the Federal Government, or if the owner or operator failed or refused to provide all reasonable cooperation and assistance requested by the responsible Federal official in furtherance of cleanup activities.²²⁰ Like the Clean Water Act, H.R. 85 required owners and operators to maintain insurance up to the limits of liability established in the statute and imposed civil penalties for a failure to do so.²²¹ The proposed legislation also contained a third party defense under which an owner or operator could escape liability if it could establish that a party other than an employee, agent or one in privity of contract with the owner or operator, was the "primary" cause of the incident.²²² The requirement in H.R. 85 that the third party not be in a contractual relationship appears to have stemmed from the case law under the Clean Water Act holding that an entity in contractual privity is not considered a separate third party.²²³

218. *Id.* at 493.

219. Section 101(d) defined "incident" as "any occurrence or series of occurrence, involving one or more vessels, facilities, or any combination thereof, which causes, or poses an imminent threat of, oil pollution." *Id.* at 475.

220. *Id.* at 491-92.

221. 2 Superfund Legis. Hist. *supra* note 156, at 497-98, 513.

222. Section 104(e) contained the third party defense, and provided:

- (e) There shall be no liability under subsection (a)—
- (1) where the incident is caused primarily—
 - (A) by an act of war, hostilities, civil war, or insurrection; or
 - (B) by a natural phenomenon of an exceptional, inevitable, and irresistible character, which could not have been prevented or avoided by the exercise of due care or foresight;
 - (2) to the extent that the incident is caused by an act or omission of a person other than—
 - (A) the claimant,
 - (B) the owner or operator,
 - (C) an employee or agent of the claimant, the owner, or the operator, or
 - (D) one whose act or omission occurs in connection with a contractual relationship with the claimant, the owner, or the operator;
 - (3) as to a particular claimant, where the incident or economic loss is caused, in whole or in part, by the gross negligence or willful misconduct of that claimant; or
 - (4) as to a particular claimant, the extent that the incident or economic loss is caused by the negligence of that claimant.

Id. at 493-94.

223. *See infra* notes 440-45 and accompanying text.

While Section 311 of the Clean Water Act allowed for recovery of cleanup costs for oil spills, it did not allow for compensation of injured third parties. H.R. 85 therefore created a \$200,000,000 "superfund"²²⁴ to compensate any claimant for damages and economic loss,²²⁵ including cleanup costs,²²⁶ removal costs,²²⁷ and natural resource damages²²⁸ from the oil pollution on navigable waters. Any person suffering damages or economic loss, including an owner or operator of the offending vessel or facility, could seek compensation from the fund. However, the owner or operator had to first establish a statutory defense or limitation of liability.²²⁹

Although H.R. 85 as originally proposed only applied to oil spills, its proponents came to include within the coverage of the bill hazardous substance releases on navigable waters. In 1972 Congress had expanded coverage of Section 311 of the Clean Water Act to include designated hazardous substances,²³⁰ but EPA was unable to promulgate regulations to implement the hazardous substances program until 1978.²³¹ After a successful court challenge by industry, and further amendments to the Clean Water Act in 1977, EPA promulgated final regulations in August 1979.²³² Because of the delay in implementing the Clean Water Act hazardous substance release program, the proponents of H.R. 85 added Title III to its final draft to deal with hazardous substance releases.²³³ Congress had become aware of the need to address hazardous substance spills after conducting hearings in the Fall of 1979 and Spring of 1980 and in response to the Love Canal incident. Title III addressed hazardous substance releases on navigable waters in the same manner as oil spills under Title I.²³⁴ Title III, however, created a separate fund to be used for hazardous substance spills and was an amendment to Section 311 of the Clean Water Act.²³⁵ It provided that the hazardous substance fund could only be used for removal costs for hazardous

224. 2 Superfund Legis. Hist., *supra* note 156, at 482.

225. *Id.* at 486-87.

226. *Id.* at 479.

227. *Id.* at 481.

228. *Id.* at 481-82.

229. *Id.* at 487.

230. *Id.*

231. *Id.* at 942.

232. *Id.*

233. *See id.* at 1061.

234. *See id.* at 942.

235. *See id.* at 1061.

substance spills.²³⁶ Like the provisions dealing with oil spill liability, the provisions of Title III also contained limitations on liability and a procedure for compensation from the fund.²³⁷ The final draft of H.R. 85 also contained a third party defense providing that a third party did not include an employee or agent of the claimant, the owner, or the operator, or one whose act or omission occurs in connection with a contractual relationship with the claimant, the owner, or the operator.²³⁸

b. H.R. 7020

H.R. 7020 was a proposed amendment to the Solid Waste Disposal Act²³⁹ to deal with the problem of unpermitted hazardous waste disposal sites that had resulted in dangerous releases or which could in the future result in dangerous releases of hazardous waste.²⁴⁰ H.R. 7020 attempted to establish a program to locate inactive hazardous waste sites and to contain releases with modern containment technology.²⁴¹ Because H.R. 85 applied to releases of oil on navigable waters, H.R. 7020 exempted releases onto navigable waters.²⁴² Thus, the provisions of H.R. 85 and H.R. 7020 dovetailed.

H.R. 7020 required each owner or operator of any inactive hazardous waste site as of the effective date of the Act to provide detailed information about the nature of the site to state or federal officials.²⁴³ Each person who owned an inactive hazardous waste site was also required to monitor the condition of the site and report any releases into the environment and supply the monitoring data to EPA and appropriate State and local authorities.²⁴⁴ Based on the reported data, both the states and the federal government were to establish priorities among the various inactive hazardous waste sites and to designate "top priority sites."²⁴⁵ H.R. 7020 authorized EPA to respond with emergency response actions to releases or substantial threats of releases of hazardous waste from inactive hazardous waste sites posing a risk

236. *Id.* at 1073.

237. *Id.* at 1063-65.

238. *Id.* at 1061.

239. *See supra* note 200.

240. 2 Superfund Legis. Hist., *supra* note 156, at 4-5; 392-93.

241. *Id.*

242. *Id.* at 6, 394.

243. *Id.* at 8-10, 395.

244. *Id.* at 16, 405-06.

245. *Id.* at 15-16, 404-05.

to public health or the environment and to order responsible persons²⁴⁶ to take action to abate the endangerment to public health or the environment.²⁴⁷

H.R. 7020, as first drafted, prohibited releases of hazardous waste unless the disposal site was properly permitted.²⁴⁸ H.R. 7020 authorized civil penalties for such unlawful releases.²⁴⁹ The final version of H.R. 7020, however, deleted the prohibition against releases and only allowed penalties for violation of an order to perform response actions issued by EPA.²⁵⁰ Thus, the legislation started out as a public welfare offense, but became more remedial and compensatory in character.

H.R. 7020 expressly imposed strict and joint and several liability on those who caused or contributed to a release or a threatened release.²⁵¹ It also empowered courts to apportion liability among owners and operators and generators and transporters of hazardous waste based on their individual causation.²⁵² An owner or operator could limit liability by showing that only a portion of the total costs, damages, and losses were attributable to hazardous waste treated, stored, or disposed of during the period of ownership or operation, and a generator or transporter could limit liability by showing that only a portion of the total costs, damages, and losses were attributable its hazardous

246. Section 3041(b) originally defined "Responsible Party" as follows:

As used in this section, the term 'responsible party' means with respect to any inactive hazardous waste site, any person who—

- (1) as of November 1, 1979, owned or operated the site,
- (2) owned or operated such site at the time during which it was utilized for the treatment, storage, or disposal of any unregulated hazardous waste, or
- (3) generated, either at the site or elsewhere, any unregulated hazardous waste treated, stored, or disposed of at such site.

Id. at 22. The final draft deleted from the definition the person who owned or operated the site as of November 1, 1979 and required that a generator have disposed of a substantial amount of waste. The final draft defined responsible person as:

any person who—

- (1) owned or operated such site at the time during which it was utilized for the treatment, storage, or disposal of any hazardous waste, or
- (2) generated or disposed of, either at the site or elsewhere, a substantial portion of the hazardous waste treated, stored, or disposed of at such site which waste is posing an unreasonable risk of harm to public health or the environment.

Id. at 412-13.

247. *Id.* at 17-18, 36-37.

248. *Id.* at 35-36.

249. *Id.* at 36-38, 436-47.

250. *Id.*

251. *Id.* at 38-39.

252. *Id.* at 22-23, 39.

waste.²⁵³ Thus, H.R. 7020 relied heavily on concepts of individual causation.²⁵⁴

Many in Congress, however, tried to diminish the role of individual causation in the liability provisions of H.R. 7020. For example, Congressman Gore introduced amendments to H.R. 7020 (the "Gore Amendments"), which were ultimately adopted in the final version.²⁵⁵ According to Congressman Gore, his amendments sought to limit the scope of the third party defense to make it more consistent with common law.²⁵⁶ Congressman Gore argued that a provision in the reported bill allowing for a defense based on due care in the selection of a waste hauler was inconsistent with common law rules on strict liability for abnormally dangerous/ultrahazardous activities and the common law on vicarious liability for hiring an independent contractor to perform an inherently dangerous activity.²⁵⁷ In support of the proposed amendment, Congressman Gore offered a detailed analysis of the concept of strict liability as expressed in *Rylands v. Fletcher* and argued that strict liability should apply to the handling, generation, and disposal of hazardous waste.²⁵⁸

Congressman Gore argued that courts had extended the doctrine of *Rylands v. Fletcher* to many areas of activity and that the trial court in *New Jersey v. Ventron Corporation* had recently decided that the concept of strict liability for ultrahazardous activity applied to the disposal of a hazardous waste.²⁵⁹ Gore presciently

253. *Id.* at 439-41.

254. As explained by the House Interstate and Foreign Commerce Committee, this language required a causal nexus between a generator and the release causing the incurrence of response costs:

The Committee intends that the usual common law principles of causation, including those of proximate causation, should govern the determination of whether a defendant "caused or contributed" to a release or threatened release. . . . Thus, for instance, the mere act of generation or transportation of hazardous waste, or the mere existence of a generator's or transporter's waste in a site with respect to which cleanup costs are incurred would not, in and of itself, result in liability under section 3071. The Committee intends that for liability to attach under this section, the plaintiff must demonstrate a causal or contributory nexus between the acts of the defendant and the conditions which necessitated response action under section 3041.

H.R. REP. NO. 96-1016, at 33-34 (1980), reprinted in 1980 U.S.C.C.A.N. 6119, 6136-37.

255. *Id.* at 302.

256. *Id.*

257. *Id.*

258. *Id.* at 290.

259. See 3 SUPERFUND LEGIS. HIST., *supra* note 186, at 290-91. As Congressman Gore explained:

argued that it was only a matter of time before other common law courts adopted this approach.²⁶⁰ The Supreme Court of New Jersey later affirmed the trial court on this ground.²⁶¹ Congressman Gore also argued that the test for strict liability as articulated in the Restatement (Second) of Torts would support application of strict liability to hazardous waste disposal, explaining that even if the risk of harmful disposal were small, the magnitude of harm from hazardous waste disposal can be large, and that environmental devastation can occur even with the exercise of reasonable care in hazardous waste disposal.²⁶² Gore acknowledged that hazardous waste disposal is a necessary evil, but argued that under the theory of strict liability for ultrahazardous activities society only permits such dangerous activities on the condition that they pay their way, acting as insurers against the harm that renders the activities hazardous in the first place.²⁶³

Although Section 3071(a) of the version of H.R. 7020 reported from committee appeared to impose a duty on generators to exercise due care, Gore argued that imposing such a requirement was actually more restrictive than common law.²⁶⁴ Gore argued that merely engaging in an ultrahazardous activity, without regard to the foreseeability of particular consequences, was sufficient under common law strict liability, which would otherwise

In the more than 100 years since *Rylands* the law of strict liability has progressed and expanded tremendously. Today, numerous activities have been held to constitute abnormally dangerous-ultra-hazardous activities for which strict liability will be imposed. Most of these are far less dangerous than the handling, generation, and disposal of hazardous waste. Such activities include the handling and shipping of explosives, blasting, quarrying, handling of nuclear materials, aerial spraying of pesticides, fumigation, sonic booms, handling oxygen, testing rocket fuels, storage of natural gas in populated areas, the operation of a gasoline station so as to affect families' wells, pile driving, and transportation of hazardous chemicals. See Prosser, *Law of Torts* 512-16 (1971). Undoubtedly, as litigation involving hazardous waste develops, courts will add the generation and disposal of such wastes to the list of ultrahazardous activities. Indicative of this is the recent case of *New Jersey v. Ventron Corporation*, Nos. C-2996-75 and C-1110-78 (Superior Court of New Jersey, Chancery Division, Bergen County, Aug. 29, 1979), a case cited by the Justice Department in its correspondence and its testimony before the Committee on Ways and Means, in which a mercury processing operation was held strictly liable for damages caused by a release of mercury from its plant.

Id. at 292.

260. See *Shawmut Bank v. Kress Assocs.*, 33 F.3d 1477, 1495 (1993); *Jefferson Bank v. Progressive Cas. Ins. Co.*, 965 F.2d 1274, 1281 (1992).

261. *State Dept. of Env't'l Prot. v. Ventron Corp.*, 94 N.J. 473, 468 A.2d 150, 157 (1983).

262. 3 Superfund Legis. Hist., *supra* note 186, at 293.

263. *Id.* at 293.

264. *Id.*

be applicable.²⁶⁵ Gore also argued that under common law, a principal cannot escape liability by hiring an independent contractor to perform an ultrahazardous activity.²⁶⁶ Gore objected to any statutory liability provision narrower than common law that would encourage parties to in effect contract away their dirty work.²⁶⁷

Congressman Gore also objected to the third party defense as drafted in the reported bill because the concept of a defense for acts or omissions of a third party did not necessarily apply to a strict liability claim at common law.²⁶⁸ As a compromise, Gore proposed a third party defense which allowed the defense only if the defendant had no contractual relationship with the third party solely responsible for the release. Gore explained that the requirement of having no contractual relationship with the third party, directly or indirectly, required that the defendant have no connection of any kind to the polluter.²⁶⁹ Gore further explained that his proposed amendment did not fully reflect common law, but he offered it as a compromise.²⁷⁰ The House ultimately adopted the amendments in the final version of H.R. 7020.²⁷¹

Although Gore relied on *Rylands v. Fletcher* to narrow the defenses to liability in H.R. 7020, the bill that ultimately passed was

265. *Id.*

266. *Id.* at 294-95.

267. *Id.*

268. 3 Superfund Legis. Hist., *supra* note 186, at 349.

269. 2 Superfund Legis. Hist., *supra* note 156, at 350. As Congressman Gore stated:

My amendment moves H.R. 7020 closer to the common law in several ways. First, the amendment removes the ability of and incentive for a defendant to contract away liability. The amendment would insure that the common law rules of both strict and vicarious liability remain intact in cases in which a defendant seeks to shift the responsibility for costs resulting from his ultra-hazardous activity to others with whom he is involved in a business relationship. My amendment would restrict the application of the third party defense to situations where the third party is not an employee or agent of the defendant, or where the third party's act or omission does not occur in connection with a contractual relationship. *Second, the amendment would permit a defendant to escape liability for damages caused by the act or omission of a third party who has no connection whatsoever with the defendant and which act or omission is unforeseeable.* Although this is still counter to the common law, it has a basis in reason. Finally, with regard to foreseeable acts by third parties, the amendment requires that a defendant demonstrate that he acted with due care in order to escape liability. This insures that the defendant will not escape liability if he acted negligently, even if the damage caused is the result of an act of an unrelated third party.

Id. (emphasis added).

270. *Id.*

271. *Id.* at 295, 345.

not completely faithful to the concept of strict liability as articulated in *Rylands v. Fletcher*. H.R. 7020, for example, still required a showing that each defendant “caused or contributed” to a release. What is significant in the legislative development of CERCLA, however, is that a similar provision in the draft Senate bill was deleted in the final bill, and the liability structure instead came to mirror that in H.R. 85, which focused more on the harm caused by an instrumentality. The significance of the provisions of H.R. 7020 that emphasized individual causation is that they never became part of CERCLA.

c. S. 1341

Although S. 1341 was never reported from committee, it represented the starting point for the legislation in the Senate that is the most direct ancestor of CERCLA, S. 1480, and therefore warrants consideration. In 1979, the Carter Administration introduced in the Senate S. 1431, known as the “Oil, Hazardous Substances, and Hazardous Waste Response, Liability, and Compensation Act of 1979.”²⁷² Like H.R. 85, the Carter Administration’s bill was a proposed amendment of the Federal Water Pollution Control Act to deal with releases from vessels and facilities, but it also sought to amend the Solid Waste Disposal Act to deal with releases from uncontrolled hazardous waste sites.²⁷³ The Carter Administration’s proposal to deal with uncontrolled hazardous waste sites stemmed largely from the Administration’s experience with Love Canal.²⁷⁴ Section 604 provided that “the owner and operator of a vessel, other than a public vessel, or of an onshore facility or an offshore facility, which is the source of pollution, or which poses a threat of pollution in circumstances where removal costs are incurred, would be jointly, severally, and strictly liable²⁷⁵ for all damages resulting from pollution or the threat thereof”²⁷⁶ Section 604 also provided that

272. The Administration’s proposal was also introduced in the House of Representatives as H.R. 4566 and H.R. 4571. 3 SUPERFUND LEGIS. HIST., *supra* note 186, at 31.

273. 3 SUPERFUND LEGIS. HIST., *supra* note 186, at 31.

274. *Id.* at 25.

275. Section 601(ii) Act defined “strict liability” or “strictly liable” as “liability for the release of oil or a hazardous substance as defined in this title regardless of negligence, knowledge, good faith, intent, surrounding circumstances, degree of care, or any reasonable precautions.” *Id.* at 31.

276. *Id.* at 39.

the owner and operator of an uncontrolled hazardous waste disposal site, if they caused or contributed or are causing or contributing to any release, or to the conditions which produce any such release, of a hazardous substance as defined in section 601(o)(3) of this title from such site, or the threat thereof where the costs described in subsection (d) of section 607 of this title are incurred, and any other person who caused or contributed or is causing or contributing to such incident, including but not limited to prior owners, lessees, and generators, transporters, or disposers of such hazardous substances, shall be jointly, severally, and strictly liable for all costs for which a claim may be asserted under that subsection.²⁷⁷

Thus, the Carter Administration bill drew a distinction between owners and operators of Clean Water Act vessels and facilities and owners and operators of waste disposal sites. A plaintiff still had to prove that the individual owner or operator of a hazardous waste site caused or contributed to a release, but such a requirement did not apply to a vessel or facility. The Carter Administration's bill, therefore, did not completely apply the concept of strict liability to a hazardous waste site, because mere ownership of such an instrumentality, as in *Rylands v. Fletcher*, was not sufficient for liability.

Section 604 provided for a defense based on an act of God²⁷⁸ or an act of war, but did not refer to acts of third parties.²⁷⁹ Thus, to this extent, the Carter Administration's proposal was more consistent with *Rylands v. Fletcher* and common law strict liability, which generally did not recognize a third party defense.

277. *Id.*

278. Section 601(a) defined "act of God" as "an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight." *Id.* at 27.

279. 3 SUPERFUND LEGIS. HIST., *supra* note 186, at 41. The defense provided:

(d) There shall be no liability under subsection (a) or subsection (b) of this section where an owner, operator, guarantor, or other liable person can prove that—

- (1) the pollution or release or threat thereof is caused solely by an act of God or an act of war;
- (2) as to a particular claimant the economic loss is caused, in whole or in part, by the gross negligence or willful misconduct of that claimant; or
- (3) as to a particular claimant to the extent that the economic loss is caused by the negligence of that claimant. Provided, however, that nothing contained in this subsection shall be construed or interpreted to limit or deny any claim presented by or on behalf of any authorized agency of the United States Government arising out of such agency's response to pollution or to a release or threat thereof pursuant to this title.

d. S. 1480

Like S. 1341, S. 1480 began as an amendment to Section 311 of the Clean Water Act and to the Solid Waste Disposal Act. While S. 1341 prohibited releases other than disposals at permitted hazardous waste disposal facilities, S. 1480, as originally drafted, prohibited the release and disposal of hazardous substances into the environment generally.²⁸⁰ S. 1480, required notification of the occurrence of releases from vessels and facilities, as defined in the Clean Water Act,²⁸¹ as well as notification of the existence of unpermitted hazardous waste disposal sites.²⁸² The failure to provide notification could result in the imposition of civil penalties, or in the case of a waste disposal facility, the forfeiture of defenses and any limitation of liability provided by any other statute such as the Clean Water Act.²⁸³

As originally drafted, S. 1480 imposed liability for cleanup costs on the same categories of responsible persons as S. 1341.²⁸⁴ S. 1480 expressly imposed strict and joint and several liability on the owner or operator of a vessel or an onshore or offshore facility from which a hazardous substance was discharged, released, or disposed of in violation of the Act and on any other person who caused or contributed or was causing or contributing to the discharge, release, or disposal, including prior owners, lessees, and generators, transporters, or disposers.²⁸⁵ Although S. 1480 incorporated by reference the Clean Water Act's definition of owner and operator, the Clean Water Act's definition contemplated ownership or operation of what was essentially the source

280. *Id.* at 32; *see also* 1 SUPERFUND LEGIS. HIST., *supra* note 198, at 162.

281. S. 1480 defined the terms "owner or operator", "remove" or "removal", "onshore facility", and "offshore facility" as having the same meaning as set forth in the Clean Water Act. *Id.* at 155-56.

282. *Id.* at 163.

283. *Id.*

284. 3 SUPERFUND LEGIS. HIST., *supra* note 187, at 168-69. Section 4 provided in part:

(a) Except where the person liable under this subsection can prove that a discharge, release, or disposal was caused solely by (i) an act of God or (ii) an act of war, and notwithstanding any other provision or rule of law, the owner or operator of a vessel or an onshore or offshore facility from which a hazardous substance is discharged, released, or disposed of in violation of section 3(a) of this Act, including any release excluded from the definition of "discharge" under section 311(a)(2) of the Clean Water Act, and any other person who caused or contributed or is causing or contributing to such discharge, release, or disposal, including but not limited to prior owners, lessees, and generators, transporters, or disposers of such hazardous substances, shall be jointly, severally, and strictly liable for— . . .

285. *Id.*

of a release, which would not necessarily include the geographic area contaminated by the release.²⁸⁶ As originally drafted, however, S. 1480 made clear that the owner and operator of an abandoned hazardous waste site was also an owner or operator for purposes of liability.²⁸⁷ Although S. 1480 stated that liability was strict, it also provided that generators and transporters who knew or had reason to know that a transfer of hazardous substances would result in a release would be deemed to have caused or contributed to the release,²⁸⁸ suggesting that if they had no reason to know they would not be liable.

After S. 1480 was first introduced, it went through several important revisions in committee.²⁸⁹ The revised S. 1480 applied not only to uncontrolled hazardous substance disposal sites, but also to facilities, geographic areas and to releases of hazardous substances from vessels and facilities.²⁹⁰ Thus, the redrafted statute diminished the distinction between releases from Clean Water Act onshore and offshore facilities, and releases from hazardous waste disposal sites regulated under the Solid Waste Disposal Act. Consistent with this approach, the redrafted bill defined "facility" as follows:

(9) in addition to the meaning under section 311(a) of the Clean Water Act, the term "facility" includes any facility on submerged land and any site or area where a hazardous substance has been

286. See *supra* notes 156-66 and accompanying text.

287. 1 SUPERFUND LEGIS. HIST., *supra* note 198, at 161. Section 2(15) provided:

(15) in the case of any abandoned onshore or offshore facility or hazardous substance disposal site, the term "owner or operator" shall include the person who owned or operated such facility or site immediately prior to such abandonment or at the time of any discharge, release, or disposal of a hazardous substance . . .

Id. at 161.

288. Section 4 provided in part:

(f) Any generator or transporter of any hazardous substance who knew or had reason to know that a discharge, release, or disposal of such hazardous substance could reasonably be anticipated to result from the transfer of such substance to the owner or operator of the facility which was the source of a discharge, release, or disposal subject to liability under this section shall be deemed to be a person who caused or contributed to such discharge, release, or disposal.

Id. at 172.

289. Two staff working drafts dated February 1, 1980 and June 2, 1980 reflect the changes. See *id.* at 193, 245.

290. Sec. 2.(a) provided in part: "It is the intent of the Congress that this Act shall apply to hazardous substance disposal sites, facilities, and areas and to releases of hazardous substances from vessels and facilities (including rolling stock) into the navigable waters, groundwater, or air, or onto land." *Id.* at 246.

deposited, stored, disposed of, or placed or otherwise come to be located;²⁹¹

Thus, the redrafted version of S. 1480 deemed the facility to be an instrumentality posing a risk of release, whether it was a Clean Water Act type facility or a geographic area such as a landfill.

The liability provisions evolved in the drafting process as well. The first draft of S. 1480 imposed liability on the owners and operators of a vessel or onshore or offshore facility from which there was a release as well as any other person who "caused or contributed" to the discharge, release or disposal, including, but not limited to, prior owners, lessees, and generators, transporters, or disposers of such hazardous substances.²⁹² The second redraft, however, eliminated the requirement of proving individual causation. As revised in committee, S. 1480 imposed liability on categories of responsible persons without regard to individual causation: the owner and operator, the prior owner or operator at the time of disposal, the arranger, and the transporter.²⁹³ Thus, the Senate Bill completely eliminated the relevance of indi-

291. *Id.* at 250-51.

292. See 1 SUPERFUND LEGIS. HIST. *supra* note 198, at 169.

293. Section 4 provided in part:

Sec. 4. (a) Except where the person liable under this subsection can prove that a discharge, release, or disposal was caused solely by . . . an act of God or . . . an act of war, and notwithstanding any other provision or rule of law—

- (i) the owner or operator of a vessel or an onshore or offshore facility,
- (ii) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances are disposed of,
- (iii) any person who by contract, agreement, or otherwise arranged for disposal, treatment, or transport for disposal or treatment by any other party or entity of hazardous substances owned or possessed by such person, at facilities or sites owned or operated by such other party or entity and containing such hazardous substances, and

(iv) any person who accepts any hazardous substances for transport to disposal or treatment facilities or sites selected by such person,

from which a hazardous substance is discharged, released, or disposed of . . . or from which any pollutant or contaminant is released resulting in action under section 3(c)(1) of this Act, . . . shall be jointly, severally, and strictly liable for—

(1)(A) all costs of removal, or remedial action incurred by the United States Government or a State, and

(B) any other costs or expenses incurred by any person to remove a hazardous substance as the terms "remove" or "removal" are defined in section 311(a)(8) of the Clean Water Act; and (2) all damages for economic loss or loss due to personal injury or loss of natural resources resulting from such a discharge, release, or disposal, including

(A) any injury to, destruction of, or loss of any real or personal property, including relocation costs;

(B) any loss of use of real or personal property;

vidual causation to liability and linked all users of the vessel or facility with the owners and operators. Most significantly, the bill eliminated the prohibition against releases and expressly stated in Section 3(a)(1) that "the manufacture, use, transportation, treatment, storage, disposal, and release of hazardous substances are ultrahazardous activities."²⁹⁴ Thus, the bill was transformed from a public welfare offense to remedial legislation with the predominant purpose to define who should pay for a cleanup.

The Report of the Committee on Environment and Public Works that accompanied S. 1480 made clear that the theoretical basis for S. 1480 was strict liability as articulated in *Rylands v. Fletcher*.²⁹⁵ As reported, S. 1480 expressly provided that liability was strict, and joint and several.²⁹⁶ The report noted that the strict liability provisions would help assure hazardous substances are handled with the utmost care because generators would have no hope of establishing a defense based on the actions of a third

(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;

(F) all out-of-pocket medical expenses, including rehabilitation costs or burial expenses, due to personal injury; and

(G) any direct or indirect loss of tax, royalty, rental, or net profits share revenue by the Federal Government or any State or political subdivision thereof, for a period of not to exceed one year.

1 SUPERFUND LEGIS. HIST., *supra* note 198, at 266-69.

294. *See id.*

295. *Id.* at 340.

296. *See* 1 SUPERFUND LEGIS. HIST., *supra* note 198, at 305. Section 4 of the reported bill provided:

- (1) the owner or operator of a vessel or a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility or site at which such hazardous substances are disposed of,
- (3) any person who by contract, agreement, or otherwise arranged for disposal, treatment, or transport for disposal or treatment by any other party or entity of hazardous substances owned or possessed by such person, at facilities or sites owned or operated by such other party or entity and containing such hazardous substances, and
- (4) any person who accepts any hazardous substances for transport to disposal or treatment facilities or sites selected by such person, from which a hazardous substance is discharged, released, or disposed of or from which any pollutant or contaminant is released resulting in action under section 3(c)(1) of the Act, shall be jointly, severally, and strictly liable for all removal costs and specified damages.

Id. at 338.

party contractor.²⁹⁷ Consistent with this idea, S. 1480 only allowed a causation defense based on an act of God or an act of war, but not on the acts of a third party.²⁹⁸

The report noted the imposition of strict liability in a number of contexts, and recognized that federal statutes relied on strict liability as well.²⁹⁹ The report explained that the purpose of strict

297. 1 SUPERFUND LEGIS. HIST., *supra* note 198, at 338. As the report stated: S. 1480 provides incentives to all involved with hazardous substances to assure that such substances are handled with the utmost of care. Consistent with the concept of strict liability, persons can not escape liability by “contracting away” their responsibility or by alleging that the incident was caused by the act or omission of a third party. The only exception to this liability scheme arises where the person can prove that the discharge, release, or disposal was caused solely by an act of God or an act of war. This liability scheme essentially codifies the common law liability standard applicable in cases involving hazardous substances and materials. This liability standard is intended to induce potentially liable persons to voluntarily mitigate damages rather than simply rely on the government to abate hazards.

Id.

298. 1 SUPERFUND LEGIS. HIST., *supra* note 198, at 338.

299. *Id.* at 338. As the Report stated:

The general rule is that to hold the person factually responsible for damage to another liable, a victim must show “fault” or negligence. But for abnormally dangerous activities, the law imposes a rule of strict liability, under which the victim is not required to show that the person who injured him was guilty of moral misconduct. The rule of strict liability applies to “abnormally dangerous” activities, and a variety of other fields as well. The most notable of these other areas is products liability, but also included are intentional torts (such as trespass, assault, battery, and intentional infliction of mental distress). In addition, the Congress and State legislatures have codified the rule of strict liability in a variety of other fields as well. These include oil pollution, nuclear incidents, and spills of hazardous substances, S. 1480 extends the statutory affirmation of strict liability found in these specialized statutes to hazardous substance incidents generally. S. 1480 declares the manufacture, use, transportation and disposal of hazardous substances to be abnormally dangerous activities for the purposes of this Act and, therefore, subject to a rule of strict liability. For some types of these abnormally dangerous activities, there are specific exclusions from the strict liability regime of S. 1480. In those areas, the Fund or injured third parties must rely on common law or other statutes for recovery. Strict liability has been imposed either judicially or legislatively for a variety of activities. At one time strict liability (or “no fault” liability) was the prevailing way of allocating loss. One reason for imposing strict liability was laid out in 1866 in the English case of *Rylands v. Fletcher*—

We think the true rule of law is that the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so is *prima facie* answerable for all the damage which is the natural consequence of its escape.

The rule of *Rylands v. Fletcher*—strict liability for ultra-hazardous activities—has been accepted and applied throughout the United States, under one name or another. Incidents to which it has been applied include the transportation of hazardous substances; the spraying of hazardous substances; the emission of noxious gases; the impoundment of slimes; and the keeping of explosives and flammables. One other major area where a strict liability regime applies is products liability, where manufacturers and sellers are held strictly liable for damages caused by a

liability is to assure that the true costs of a product are borne by the persons creating the risks rather than innocent victims, and that strict liability provides an incentive to eliminate risks.³⁰⁰ The

product sold in a "defective" condition. The "defect" may include a failure to warn of the dangers associated with the product, even where the warnings would not have reached the ultimate consumer. An illustrative application of the rule was the tragic poisoning of a New Mexico family. In that case, the "consumers" of the product were the children of a janitor who had obtained feed corn from a granary. The corn was fed to the families' hogs, which were slaughtered and eaten. The grain—intended to be used as seed, not food—had been treated with an organic mercury compound to prevent loss due to spoilage or disease. The children were stricken by organic mercury poisoning and suffered permanent, irreversible loss of sight, speech, and hearing. The court held that failure to warn of the specific consequences of ingestion of the mercury compound constituted a defect, although under the facts of the case this information would not have been communicated to the father, much less the children.

Id. at 339-40.

300. 1 SUPERFUND LEGIS. HIST., *supra* note 198, at 340. As the report stated:

Strict liability is applied to these and other cases for a variety of reasons. Chief among these are questions of fairness and equity. One additional purpose of S. 1480's strict liability scheme is to assure that the costs of injuries resulting from defective or hazardous substances are borne by the persons who create such risks rather than by the injured parties who are powerless to protect themselves. Most risks are not inevitable. On the contrary, many can be minimized or eliminated altogether through the exercise of greater care. By holding the factually responsible person liable, S. 1480 encourages that person—whether a generator, transporter or disposer of hazardous substances—to eliminate as many risks as possible. But some risks cannot be eliminated. The question then is whether the loss should fall on the victim or the person who created the risk. The issue is really one of fundamental fairness. The approach of S. 1480 was well expressed in *Green v. General Petroleum Company* (a 1928 California case) where the court held oil drilling in a residential area to be an ultra-hazardous activity for which strict liability should be invoked:

Where one, in the conduct and maintenance of an enterprise lawful and proper in itself, deliberately does an act under known conditions, and, with knowledge that injury may result to another, proceeds, and injury is done to the other as the direct and proximate consequence of the act, however carefully done, the one who does the act should, in all fairness, be required to compensate the other for the damage done.

In some of these cases the choice is not between an innocent victim and a careless defendant, but between two blameless parties. In such cases the costs should be borne by the one of the two innocent parties whose acts instigated or made the harm possible. The advantage of this approach is not only that it is fair, but that it will cause the economy to operate better. Strict liability is, in effect, a method of allocating resources through choice in the market place. The most desirable system of loss distribution is one in which the prices of goods accurately reflect their full costs to society. This therefore requires, first, that the cost of injuries be borne by the activities which caused them, whether or not fault is involved, because, either way, the injury is a real cost of these activities. Second, it requires that among the several parties engaged in an enterprise the loss be placed on the party which is most likely to cause the burden to be reflected in the price of whatever the enterprise sells.

Two benefits flow from imposing strict liability in this manner:

report noted that several other federal remedial statutes adopted a strict liability scheme, including Section 311 of the Clean Water Act, the Outer Continental Shelf Lands Act, the Price-Anderson Act, the Trans-Alaska Pipeline Safety Act, and the Deep Water Port Act.³⁰¹ The report also explained that S. 1480 attempted to fill voids in federal strict liability statutes designed to compensate victims of hazardous substance releases.³⁰²

The Senate committee's final report on November 18, 1980, S. 1480 defined "facility" as follows:

(1) the adverse impact of any particular misfortune is lessened by spreading its cost over a greater population and over a larger time period; and

(2) social and economic resources are more efficiently allocated when the actual costs of goods and services (including the losses they entail) are reflected in their prices to the consumer.

Id. at 340-41.

301. 1 SUPERFUND LEGIS. HIST., *supra* note 198, at 340. As the report stated: Section 311 of the Federal Water Pollution Control Act establishes a revolving fund to finance the Federal cleanup of spills into navigable waters of oil or designated hazardous substances. The response includes restoration of natural resources. Although the fund is maintained through appropriations, dischargers are strictly, jointly and severally liable for all costs incurred during cleanup. Section 311 does not, however, include third party damages. . . . Unlike section 311 of the FWPCA, the Outer Continental Shelf Lands Act Amendments of 1978 create fund and liability schemes designed specifically to compensate third parties for damages caused by oil production on the Outer Continental Shelf (OCS). . . . The Price-Anderson Act amended the Atomic Energy Act to add the equivalent of a Federal liability and compensation scheme for damages caused by those serious "nuclear incidents" designated by the Nuclear Regulatory Commission as "extraordinary nuclear occurrences" The coverage is broad, as a "nuclear incident" may potentially include "any occurrence . . . causing . . . damage . . . arising out of . . . the radioactive, toxic, explosive or other hazardous properties . . ." of nuclear materials. The Price-Anderson Act imposes strict liability for all offsite public damages caused by an extraordinary nuclear occurrence. . . . The Trans-Alaska Pipeline Safety Act (TAPS) establishes a liability and compensation mechanism comparable to that of the Outer Continental Shelf Lands Act. The law imposes a strict liability on those handling Alaskan oil for damages caused if it is spilled. The regime applies not only to ruptures of the pipeline, but accidents involving a release of pipeline oil at United States ports or other such terminals. . . . As in the OCS Act, a fund is available to compensate third parties if the spiller either cannot or will not. The Fund may then sue the spiller as a subrogee. The liability standard remains one of strict liability whether the plaintiff is the fund or the original injured party. . . . The OCS Lands Act pattern is also replicated in the Deepwater Port Act: the spiller of deepwater port oil is strictly liable, but a Fund is available to compensate parties if the responsible party cannot or will not.

Id. at 341-43.

302. 1 LEGIS. HIST., *supra* note 198, at 340. As the report stated:

S. 1480 represents an attempt to fill voids left by a variety of other Federal strict liability statutes which respond to and compensate the victims of hazardous substance releases. Most of these statutes are single purpose, concerned only with a narrow class of victims or a narrow class of substances.

Id. at 341.

(9) "facility" means (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works); well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located;³⁰³

This definition is identical to the current version in CERCLA.

In addition, as finally reported from committee, S. 1480 eliminated the reference to "onshore" and "offshore" facilities with respect to liability for owners and operators.³⁰⁴ The only part of the final bill that continued to refer to onshore or offshore facilities was the section requiring that an owner or operator of a vessel, or an onshore or offshore facility, report a release of a reportable quantity of a hazardous substance.³⁰⁵ Therefore, the final draft treated all facilities as instrumentalities and imposed liability on all owners, operators and users.

303. 1 SUPERFUND LEGIS. HIST., *supra* note 198, at 467-68.

304. *Id.* at 485.

305. Section 3 of the final draft of S. 1480 provided in part:

(3)(A) Any person (including, for purposes of this subparagraph, any agency or department of the United States government) in charge of a vessel or any public vessel owned by the United States or a State or political subdivision thereof or an offshore or an onshore facility shall, as soon as such person has knowledge of any discharge, release or disposal of a hazardous substance from such vessel or facility other than a federally permitted release, immediately notify the appropriate agency of the United States Government of such discharge, release or disposal.

(B) Any person—

(i) in charge of a vessel from which a hazardous substance (other than as defined in section 2(b)(13)(G) of this Act) is discharged or released, other than a federally permitted release, into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or

(ii) in charge of a vessel from which a hazardous substance (other than as defined in section 2(b)(13)(G) of this Act) is discharged or released, other than a federally permitted release, which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Fishery Conservation and Management Act of 1976), and who is otherwise subject to the jurisdiction of the United States at the time of the release, or

(iii) in charge of an onshore facility or an offshore facility from or at which a hazardous substance (other than as defined in section 2(b)(13)(G) of this Act) is discharged, released, or disposed of other than a federally permitted release,

who fails to notify immediately the appropriate agency of the United States Government as soon as he has knowledge of such release shall, upon conviction, be fined not more than \$10,000 or imprisoned for not more than one year, or both.

1 SUPERFUND LEGIS. HIST., *supra* note 198, at 476-77.

e. The Final Compromise Legislation: CERCLA as Enacted

As enacted in 1980, Section 107 of CERCLA provided that the following categories of persons linked to a vessel or facility would be liable: (1) the owner or operator³⁰⁶ of a vessel or a facility; (2) the owner or operator of a facility during the time of disposal or treatment of hazardous substances; (3) those who arranged for disposal or treatment or for transport for disposal or treatment of a hazardous substance by another person or entity and a facility owned or operated by another person; and (4) those who accepted a hazardous substance for transport for disposal or treatment.³⁰⁷ Section 107 allowed recovery from responsible persons for response costs and damages.³⁰⁸ CERCLA also provided for a third party defense, identical to that in H.R. 7020, if the release, or threat of release, and the resulting dam-

306. Section 101(20)(A) defined "owner or operator" as

(i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any abandoned facility, any person who owned, operated, or otherwise controlled activities at such facility immediately prior to such abandonment. Such term does not include a person, who without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility;

1 SUPERFUND LEGIS. HIST., *supra* note 186, at 5.

307. Section 107 provided:

Sec. 107. (a) Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

- (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 owned or operated by an other 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 or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for— . . .

Id. at 17-21.

308. Section 107 imposed liability on responsible persons for:

- (A) all costs of removal or remedial action incurred by the United States Government or a State 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; and
- (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.

1 SUPERFUND LEGIS. HIST., *supra* note 186, at 17-21.

ages³⁰⁹ were caused solely by an act of God³¹⁰, an act of war, or an act of a third party not in a contractual relationship with the defendant.³¹¹ Moreover, the final version stated that liability was "subject only to the defenses set forth in subsection (b) of this section," which was the third party defense.³¹²

Section 107 also established limitations on liability for specified facilities, as well as a limitation of \$50 million for any un-

309. Section 101(6) defined "damages" as "damages for injury or loss of natural resources as set forth in section 107(a) or 111(b) of this Act;" *Id.* at 3.

310. Section 101 defined "act of God" as

an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight;

1 SUPERFUND LEGIS. HIST., *supra* note 186, at 3.

311. Section 107(b) provided:

(b) There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant, if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

1 SUPERFUND LEGIS. HIST., *supra* note 186, at 17-21.

312. The third party defense provided:

(b) There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant, if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

Id. at 603-04.

specified facility.³¹³ Otherwise, Section 107 would impose liability for all governmental costs not inconsistent with the National Contingency Plan.³¹⁴

313. Section 107 provided:

(c)(1) Except as provided in paragraph (2) of this subsection, the liability under this section of an owner or operator or other responsible person for each release of a hazardous substance or incident involving release of a hazardous substance shall not exceed—

(A) for any vessel which carries any hazardous substance as cargo or residue, \$300 per gross ton, or \$5,000,000, whichever is greater;

(B) for any other vessel, \$300 per gross ton, or \$500,000, whichever is greater;

(C) for any motor vehicle, aircraft, pipeline (as defined in the Hazardous Liquid Pipeline Safety Act of 1979), or rolling stock, \$50,000,000 or such lesser amount as the President shall establish by regulation, but in no event less than \$8,000,000. Such regulations shall take into account the size, type, location, storage, and handling capacity and other matters relating to the likelihood of release in each such class and to the economic impact of such limits on each such class; or

(D) for any facility other than those specified in subparagraph (C) of this paragraph, the total of all costs of response plus \$50,000,000 for any damages under this title.

(2) Notwithstanding the limitations in paragraph (1) of this subsection, the liability of an owner or operator or other responsible person under this section shall be the full and total costs of response and damages, if (A) the release or threat of release of a hazardous substance was the result of (i) willful misconduct or willful negligence within the privity or knowledge of such person, or (ii) a violation (within the privity or knowledge of such person) of applicable safety, construction, or operating standards or regulations; or (B) such person fails or refuses to provide all reasonable cooperation and assistance requested by a responsible public official in connection with response activities under the National Contingency Plan.

1 SUPERFUND LEGIS. HIST., *supra* note 186, at 17-21.

314. *Id.* The National Contingency Plan, 40 C.F.R. §§ 300.1-920. (2000), sets forth procedures and standards for responding to releases or threatened releases of hazardous substances. *State of Ohio v. U.S. E.P.A.*, 997 F.2d 1520, 1525 (D.C. Cir. 1993); 40 C.F.R. § 300.1 (2000). The National Contingency Plan first came into existence in 1968, long before the enactment of CERCLA, as an informal inter-agency plan designed to coordinate federal response actions in environmental disasters such as oil spills. *State of Ohio*, 997 F.2d 1520 at 1525. In 1970, Congress incorporated the National Contingency Plan by reference into the Clean Water Act and directed the President to publish it. *Id.* As enacted in 1980, CERCLA authorized federal response actions "consistent with the national contingency plan," 42 U.S.C. § 9604(a)(1), and directed the President to revise the National Contingency Plan in accordance with CERCLA. 42 U.S.C. § 9605(a) (1994). The President delegated this responsibility to EPA, and EPA has revised the National Contingency Plan several times. *See* 55 Fed.Reg. 8666 (1990); 50 Fed.Reg. 47,912 (1985); 47 Fed.Reg. 31,180 (1982). "The NCP . . . is a rule that presents . . . [a] general plan or framework for responding to hazardous substances releases. The NCP is not intended to provide complex and detailed site-specific decisionmaking criteria." 50 F.R. 47,912, 47,920 (1985). The NCP reflects a distinction between removal actions and remedial actions and sets forth separate sets of procedural provisions for each. *Hatco Corp. v. W.R. Grace & Co. Conn.*, 849 F. Supp. 931, 961 (D.N.J. 1994); *Commonwealth of*

IV.

JUDICIAL INTERPRETATION OF THE ELEMENTS OF A
CERCLA CLAIM

Since the enactment of CERCLA, courts have had a number of opportunities to construe the provisions of the Act. These decisions have generally reflected the intent of Congress that the liability provisions be interpreted broadly. Courts have construed Section 107(a) of CERCLA³¹⁵ to hold that a governmental or tribal plaintiff need only prove that a "release" or "threatened release" of a "hazardous substance" at or from a vessel or facility has caused the incurrence of costs of removal or remedial action, natural resource damages, or health assessment costs and that the defendant falls within at least one of the four classes of covered persons described in Section 107(a) of CERCLA.³¹⁶

Although Section 107(a) of CERCLA expressly imposes liability on the owner and operator of a vessel or facility from which there "is" a release, courts have made clear that a release in the past can be sufficient for liability.³¹⁷ Thus, consistent with CER-

Massachusetts v. Blackstone Valley Elec. Co., 867 F. Supp. 78, 83 (D. Mass. 1992). For example, the National Contingency Plan provides that EPA must consider various factors before determining take appropriate removal actions to respond to a release or threat of release. 40 C.F.R. § 300.415(b)(1) (2000). The National Contingency Plan then provides numerous examples of the types of response actions that are appropriate, such as removal of highly contaminated soils from drainage areas to reduce the spread of contamination and the removal of drums that may contain hazardous substances to reduce the likelihood of leakage. 40 C.F.R. § 300.415(b)(5) (2000). The National Contingency Plan also details procedures for studying environmental contamination and provides procedures for public participation. 40 C.F.R. § 300.415(b) (2000). Because Section 107(a) grants a governmental or tribal plaintiff the right to recover all response costs "not inconsistent with the national contingency plan", courts have held that a defendant bears the burden of proving that costs are inconsistent with the National Contingency Plan. See *Idaho v. Hanna Mining Co.*, 882 F.2d 392, 396 (9th Cir. 1989); *In re Acushnet River & New Bedford Harbor Proceedings re: alleged PCB Pollution*, 716 F. Supp. 676, 687 n.19 (D. Mass. 1989).

315. 42 U.S.C. § 9607(a) (1994).

316. See *Cose v. Getty Oil Co.*, 4 F.3d 700, 703-04 (9th Cir. 1993); *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1340 n.4 (9th Cir. 1992); *3550 Stevens Creek Assoc. v. Barclays Bank*, 915 F.2d 1355, 1358 (9th Cir. 1990); *Ascon Prop. Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1152-53 (9th Cir. 1989); *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1378-79 (8th Cir. 1989); *United States v. Iron Mountain Mines, Inc.*, 812 F. Supp. 1528, 1536-37 (E.D. Cal. 1992).

317. *3550 Stevens Creek Assoc. v. Barclays Bank*, 915 F.2d 1355, 1359 (9th Cir. 1990) ("there must have been a release"); *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1152 (9th Cir. 1989) (noting that plaintiff must prove release "has occurred").

CLA's retroactive liability scheme,³¹⁸ courts often state that a plaintiff must prove there "has been" a release,³¹⁹ that there "was" a release³²⁰ or that a release "occurred."³²¹ Although Section 107(a) of CERCLA refers only to releases or threatened releases "from" a vessel or facility, courts have also made clear that the release or threatened release may also be "at" a facility for CERCLA liability to attach.³²² A property owner may not contaminate his or her own property and escape liability simply because an off-site release has not yet occurred.³²³

Courts have also interpreted CERCLA to hold that an arranger or transporter is liable under CERCLA regardless of the quantity of hazardous substances disposed of at a facility.³²⁴ Moreover, a CERCLA plaintiff does not have to fingerprint haz-

318. See *United States v. Olin Corp.*, 107 F.3d 1506, 1514 (11th Cir. 1997); *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726, 732-33 (8th Cir. 1986); *In re Acushnet River & New Bedford Harbor Proceedings*, 716 F. Supp. 676, 678 n.3 (D. Mass. 1989).

319. *United States v. Rohm & Haas Co.*, 939 F. Supp. 1142, 1148 (D.N.J. 1996); *United States v. M/V Santa Clara I*, 887 F. Supp. 825, 838 (D.S.C. 1995); *Lincoln Props., Ltd. v. Higgins*, 823 F. Supp. 1528, 1536 (E.D. Cal. 1992); *Westwood Pharm., Inc. v. Nat'l Fuel Gas Distrib. Corp.*, 737 F. Supp. 1272, 1285 (W.D.N.Y. 1990); *Colorado v. Idarado Mining Co.*, 707 F. Supp. 1227, 1230 (D. Colo. 1989), *amended*, 735 F. Supp. 368 (D. Colo. 1990); *rev'd on other grounds*, 916 F.2d 1486 (10th Cir. 1990); *Artesian Water Co. v. New Castle County*, 605 F. Supp. 1348, 1352 (D. Del. 1985).

320. *Env'tl. Transp. Sys., Inc. v. ENSCO, Inc.*, 969 F.2d 503, 506 (7th Cir. 1992); *Lentz v. Mason*, 961 F. Supp. 709, 714 (D. N.J. 1997); *Cooper Indus. Inc. v. Agway, Inc.*, 956 F. Supp. 240, 243 (N.D.N.Y. 1997); *Idylwoods Assoc. v. Mader Capital, Inc.*, 956 F. Supp. 410, 412 (W.D.N.Y. 1997); *Mathews v. Dow Chem. Co.*, 947 F. Supp. 1517, 1523 (D. Colo. 1996); *Laidlaw Waste Sys., Inc. v. Mallinckrodt, Inc.*, 925 F. Supp. 624, 629 (E.D. Mo. 1996); *Boeing v. Cascade Co.*, 920 F. Supp. 1121, 1132 (D. Ore. 1996); *Prisco v. New York*, 902 F. Supp. 374, 385 (S.D.N.Y. 1995); *Yellow Freight System, Inc. v. ACF Indus, Inc.*, 909 F. Supp. 1290, 1296 (E.D. Mo. 1995); *Douglas County v. Gould, Inc.*, 871 F. Supp. 1242, 1244 (D. Neb. 1994).

321. *Farmland Indus., Inc. v. Colo. & E. R.R. Co.*, 922 F. Supp. 437, 440 (D. Colo. 1996); *United States v. Poly-Carb, Inc.*, 951 F. Supp. 1518, 1522 (D. Nev. 1996).

322. See *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1340 n.4 (9th Cir. 1992) (release at facility); *United States v. Mottolo*, 695 F. Supp. 615, 623 (D.N.H. 1988) (noting CERCLA does not require plaintiffs to establish the existence of off-site pollution because such a requirement would mean "that polluting one's property is acceptable"); *United States v. Iron Mountain Mines*, 812 F. Supp. 1528, 1536-37 (E.D. Cal. 1992) (noting that a release at a facility is sufficient for Section 107 liability).

323. *Id.*

324. See *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 720 (2d Cir. 1993); *United States v. Alcan Aluminum Corp.*, 964 F. 2d 252, 259-63 (3d Cir. 1992); *B.F. Goodrich Co. v. Murtha*, 958 F. 2d 1192, 1200-01 (2d Cir. 1992); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 669 (5th Cir. 1989); *La.-Pac. Corp. v. Asarco, Inc.*, 735 F. Supp. 358, 361 (W.D. Wash. 1990); *United States v. W. Processing Co.*, 734 F. Supp. 930, 936 (W.D. Wash. 1990).

ardous substances to particular defendants.³²⁵ The statute expressly requires only a showing that the facility be one "containing such hazardous substances."³²⁶ Thus, a plaintiff can establish a prima facie case of CERCLA generator liability by simply showing that hazardous substances similar to those contained in a generator defendant's waste were present at the site.³²⁷ Also, there is no need to link response costs to a particular defendant's hazardous substance.³²⁸

Just as courts have taken a broad view of the liability provisions of CERCLA, they have also narrowly construed the express statutory defense. Courts have held that a defendant bears the burden of proving each element of the express third party defense in Section 107(b)(3) of CERCLA.³²⁹ "A defendant's failure to meet its burden on any one of the required elements precludes the application of the defense."³³⁰ The first element of the defense requires an identification of the "sole cause" of the

325. See *Kalamazoo River Study Group v. Rockwell Intern.*, 3 F. Supp.2d 799, 804 (W.D. Mich. 1998) ("This Court agrees that in a multi-generator context such as this, Plaintiff cannot be required to trace or fingerprint the waste from each PRP."); *Massachusetts v. Blackstone Valley Elec. Co.*, 808 F. Supp. 912, 915 (D. Mass. 1992) (noting that plaintiff need not "match the waste found to each defendant as if it were matching fingerprints"); *New York City v. Exxon Corp.*, 744 F. Supp. 474, 480 n. 10 (S.D.N.Y. 1990) (same); *United States v. Stringfellow*, 661 F. Supp. 1053, 1059 (C.D. Cal. 1987) (granting partial summary judgment of liability against 15 liable parties because "the government has incurred costs in response to the release," without inquiry into link between incurred costs and each defendant's activities). "Congress knew of the synergistic and migratory capacities of leaking chemical waste, and the technological infeasibility of tracing improperly disposed waste to its source. . . . 'To require a plaintiff under CERCLA to 'fingerprint' wastes is to eviscerate the statute.'" *United States v. Monsanto Co.*, 858 F.2d 160, 170 (4th Cir. 1988) (quoting *United States v. Wade*, 577 F. Supp. 1326, 1332 (E.D. Pa. 1983)). If hazardous substances like those disposed of by a defendant are found at a facility, that is enough for liability. *United States v. Wade*, 577 F. Supp. 1326, 1333 (E.D. Pa. 1983). Moreover, in cases of off-site contamination, if hazardous substances are found outside the facility, they deemed to have come from the facility. See *Artesian Water Co. v. New Castle County*, 659 F. Supp. 1269, 1282 (D. Del. 1987).

326. 42 U.S.C. § 9607(a)(3) (1994).

327. See *United States v. Monsanto*, 858 F.2d 160, 169 n. 15 (4th Cir. 1988); *Violet v. Picillo*, 648 F. Supp. 1283, 1292 (D.R.I. 1986); *United States v. Wade*, 577 F. Supp. 1326, 1333 (E.D. Pa. 1983).

328. *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 721 (2d Cir. 1993) ("What is *not* required is that the government show that a specific defendant's waste caused incurrence of clean-up costs.").

329. See *Foster v. United States*, 922 F. Supp. 642, 654 (D.D.C. 1996); *United States v. A & N Cleaners & Launderers, Inc.*, 854 F. Supp. 229, 239 (S.D.N.Y. 1994); *Chatham Steel Corp. v. Brown*, 858 F. Supp. 1130, 1154-55 & n.18 (N.D. Fla. 1994).

330. *A & N Cleaners & Launderers, Inc.*, 854 F. Supp. at 239 (citing *In re Sterling Steel Treating, Inc.*, 94 B.R. 924,929 (Bankr. E.D. Mich 1988)).

release or threatened release. Because a defendant has the burden to prove each element of the defense, a defendant must prove who or what was the “sole cause” of the release to show that this cause was totally unrelated to the defendant.³³¹ Proving the “sole cause” of the release is a very high standard since the plaintiff need not introduce any evidence of causation of a release.³³² If a defendant cannot prove who or what was the sole cause of the release where multiple causes were possible, a defendant does not meet its burden.³³³ Thus, if a defendant concedes that a related party “may have” caused the release, the

331. See *United States v. A & N Cleaners & Launderers*, 854 F. Supp. at 229, 243 (noting that defendants “bear burden of showing that totally unrelated party is sole cause of release”); *United States v. Md. Sand, Gravel & Stone*, 39 Env’t. Rep. Cases 1761, 1771 (D. Md. 1994) (noting that defendants must demonstrate that totally unrelated third party is sole cause); *United States v. Shell Oil Co.*, 841 F. Supp. 962, 973 (C.D. Cal. 1993) (noting that defense available “only where totally unrelated party is sole cause”) (quoting *United States v. Stringfellow*, 661 F. Supp. 1053, 1061 (C.D. Cal. 1987)); *Kelly v. Thomas Solvent Co.*, 727 F. Supp. 1532, 1540 (W.D. Mich 1989) (noting that third party must be sole cause of release and concomitant harm); *United States v. Marisol, Inc.*, 725 F. Supp. 833, 838-39 (M.D. Pa. 1989) (alleging that third party was proximate cause of release insufficient as a matter of law); *O’Neil v. Picillo*, 682 F. Supp. 706, 728 (D.R.I. 1986) (“[T]hird-party defense ‘essentially serve[s] to shift the burden of proof of causation to the defendants.’”) (quoting *Violet v. Picillo*, 648 F. Supp. 1283, 1293 (D.R.I. 1986)); *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 235 (W.D. Mo. 1985) (noting that defense must first establish that release was caused “solely by an act or omission of an unrelated party”); see also 126 Cong. Rec. 26,783 (1980) (statement of Rep. Gore) (third party defense “would permit a defendant to escape liability for damages caused by the act or omission of a third party who has no connection whatsoever with the defendant.”).

332. See *United States v. Poly-Carb, Inc.*, 951 F. Supp. 1518, 1530 (D. Nev. 1996) (citing *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 265 (3d Cir. 1992)).

333. See *Acme Printing Ink Co. v. Menard, Inc.*, 870 F. Supp. 1465, 1480-81 (E.D. Wis. 1994) (noting that because defendant’s agent may have caused release, defendant failed to meet burden of proof of sole cause), *motion for reconsideration granted on other grounds*, 891 F. Supp. 1289 (E.D. Wis. 1995); *United States v. Wedzeb Enter., Inc.*, 809 F. Supp. 646, 653 (S.D. Ind. 1992) (noting that defense not available where multiple causes of release possible and defendant does not prove sole cause); *United States v. Fairchild Indus., Inc.*, 766 F. Supp. 405, 411 (D. Md. 1991) (“The detailed provisions of subsection (b)(3) demonstrate that Congress did not intend there to be a general third-party defense; instead, a party must allege and prove a specific set of facts: that the third party was the sole cause of the release.”); *Washington v. Time Oil Co.*, 687 F. Supp. 529 (W.D. Wash. 1988) (holding that summary judgment granted to plaintiff; defendant could not prove that subsidiary or sub-lessee did not cause some contamination); *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 235 (W.D. Mo. 1985) (noting that defense must first establish that release was caused solely by an act or omission of an unrelated party); accord *United States v. Stringfellow*, 661 F. Supp. 1053, 1061 (C.D. Cal. 1987) (noting that defendants must prove totally unrelated party was sole cause).

defense is not satisfied.³³⁴ If it is equally likely that a release was caused by either a related party or a totally unrelated party, the defense is not satisfied.³³⁵ The defense shifts the burden of proof of "sole" causation to the defendant.³³⁶

Because Section 107(a) of CERCLA states that liability is "subject only to the defenses set forth in subsection (b) of this section [the third party defense] . . .,"³³⁷ courts have not allowed defenses beyond those expressly set forth in subsection (b).³³⁸ For example, courts do not permit common law affirmative defenses such as contributory negligence, laches, waiver or estoppel.³³⁹ Although not express affirmative defenses, matters such as inconsistency with the National Contingency Plan or definitional exclusions are deemed statutory exemptions, on which a defendant traditionally bears the burden of proof.³⁴⁰

Numerous courts have recognized that to facilitate the imposition of liability for cleanup costs, CERCLA does not require proof that a particular defendant's conduct led to a release or a threatened release of a hazardous substance.³⁴¹ Courts reaching

334. *See* *Acme Printing Co. v. Menard, Inc.*, 870 F. Supp. 1465, 1480-81 (E.D. Wis. 1994) (noting that because defendant's agent may have caused release, defendant failed to meet burden of proof of sole cause), *motion for reconsideration granted on other grounds*, 891 F. Supp. 1289 (E.D. Wis. 1995).

335. *See* *O'Neil v. Picillo*, 682 F. Supp. 706, 728 (D.R.I. 1988) ("[I]t is equally likely that either the licensed disposers or a subcontractor of the disposers deposited the waste at the site."); *United States v. A & N Cleaners & Launderers*, 854 F. Supp. 229, 243 (noting that equally likely that lessee's waste was contaminated as not, therefore defendant lessor did not meet burden of showing release caused by totally unrelated party); *United States v. Wedzeb Enter. Inc.*, 809 F. Supp. 646, 653 (S.D. Ind. 1992) (noting that where multiple causes defense not available).

336. *A & N Cleaners & Launderers*, 854 F. Supp. at 239 (noting that defense shifts burden of proof on sole causation); *O'Neil v. Picillo*, 682 F. Supp. 706, 728 (D.R.I. 1988) ("[T]hird-party defense 'essentially serv[es] to shift the burden of proof of causation to the defendants'") (*quoting* *Violet v. Picillo*, 648 F. Supp. 1283, 1293 (D.R.I. 1986)) (same).

337. 42 U.S.C. § 9607(a)(1994).

338. *See* *Town of Munster, Ind. v. Shermin-Williams Co., Inc.*, 27 F.3d 1268, 1271 (7th Cir. 1994); *Velsicol Chem. Co. v. Eneco, Inc.*, 9 F.3d 524, 530 (6th Cir. 1993).

339. *Id.*

340. *See* *Idaho v. Hanna Mining Co.*, 882 F.2d 392, 396 (9th Cir. 1989); *In re Acushnet River & New Bedford Harbor Proceedings*, 716 F. Supp. 676, 687 n.19 (D. Mass. 1989); *see also* *United States v. First City Nat'l Bank*, 386 U.S. 361, 366 (1967).

341. *Goodrich v. Betkoski*, 99 F.3d 505, 516-17 (2d Cir. 1996); *Ohio v. United States Dept. of the Interior*, 880 F.2d 432, 471 (D.C. Cir. 1989); *United States v. Monsanto Co.*, 858 F.2d 160, 170 (4th Cir. 1988); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146, 1152-54 (1st Cir. 1989), *clarified*, 901 F.2d 3 (1st Cir. 1990); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044, & n.17 (2d Cir. 1985); *United States v. Pretty Prods., Inc.*, 780 F. Supp. 1488, 1499 & n.14 (S.D. Ohio 1991); *United States v. Stringfellow*, 661 F. Supp. 1053, 1060-63 (C.D. Cal. 1987).

this conclusion have relied on the fact that before enacting CERCLA in 1980 Congress initially considered including language in the liability provisions that required proof that a defendant's acts caused or contributed to the release or threatened release which in turn caused the response costs. Congress, however, intentionally deleted this language, thereby eliminating any requirement for a CERCLA plaintiff to show causation on the part of a particular defendant as an element of liability.³⁴²

After reviewing the legislative history of CERCLA, a number of courts have concluded that CERCLA places the burden of disproving causation on the defendant.³⁴³ Further, courts have held that the absence of causation can only be a defense to a CERCLA claim if it conforms to one of the exclusive statutory causation-based defenses contained in Section 107(b) of CERCLA.³⁴⁴

342. See *Dedham Water Co.*, 889 F.2d at 1152-54; *Shore Realty Corp.*, 759 F.2d at 1044, & n.17; *United States v. Wade*, 577 F. Supp. 1326, 1333-34 (E.D. Pa. 1983).

343. See *Ohio v. United States Dept. of the Interior*, 880 F.2d 432, 471 (D.C. Cir. 1989) (noting that Section 107's imposition of liability on the four enumerated classes of responsible parties does not require in all cases that the defendant have in fact caused the release); *United States v. Monsanto Co.*, 858 F.2d 160, 168-70 & n.17 (4th Cir. 1988) (noting that owners liable regardless of participation in disposal activities); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1043, 1044, 1045 & n. 19 (2d Cir. 1985) (“[S]ection 9607(a)(1) unequivocally imposes strict liability on the current owner of a facility from which there is a release or a threat of release without regard to causation.”); *Premium Plastics v. LaSalle Nat. Bank*, 904 F. Supp. 809, 815 (N.D. Ill. 1995) (noting that no proof needed that defendants caused release); *La-Pac Corp. v. Beazer Materials & Servs. Inc.*, 811 F. Supp. 1421, 1429 (E.D. Cal. 1993) (noting that where there has been a release, no causation need be shown, only that defendant is in one of four classes of liable parties); *United States v. A & N Cleaners & Launderers*, 788 F. Supp. 1317, 1332 (S.D.N.Y. 1992) (noting that mere ownership of property sufficient to impose liability, regardless of any control or lack of control of disposal); *United States v. Stringfellow*, 661 F. Supp. 1053, 1058, 1061 (C.D. Cal. 1987) (traditional causation not element).

344. 42 U.S.C. § 9607(b) (1994); *B.F. Goodrich*, 99 F.3d at 516-17 (“the trial court’s reading of CERCLA [to allow a causation defense] is inconsistent with the Act’s language, which provides only the four already recited causation-related defenses. 42 U.S.C. § 9607(b). The canon of construction that says ‘expressio unius est exclusio alterius’ cautions against creating additional exceptions to complex statutory enactments.”); *Westfarm Assoc. Ltd. v. Wash. Suburban Sanitary Comm’n.*, 66 F.3d 669, 682 (4th Cir. 1995) (“CERCLA provides ‘a limited affirmative defense based on the complete absence of causation’”) (citation and quotation omitted); *Town of Munster v. Sherwin Williams Co.*, 27 F.3d 1268, 1272 (7th Cir. 1994) (“While the statute does not define the term, we read the defenses enumerated in § 107(b) as addressing the causation element of the underlying tort and negating the plaintiff’s prima facie showing of liability.”); *Velsicol Chem. Co. v. Enenco, Inc.*, 9 F.3d 524, 530 (6th Cir. 1993) (“By its terms, then, section 107 liability is only barred by a limited number of enumerated causation-based affirmative defenses. The clear language of section 107(a)(b), 42 U.S.C. § 9607(a) and (b), manifests the congressional intent to foreclose any non-enumerated defenses to liability.”); *Monsanto Co.*, 858

Thus, the only causation requirement for a Section 107 claim is the express requirement that some release or threatened release from a vessel or a facility (even if the release is not directly connected to a particular defendant) caused the incurrence of some response costs or natural resource damages.³⁴⁵ Courts do not require a CERCLA plaintiff to link the conduct of a particular defendant to response costs or damages.³⁴⁶

The underlying rationale for rejection of an individual causation requirement, however, is one that courts have not adequately articulated. Courts have not adequately understood or explained that the conceptual framework for CERCLA's liability scheme is common law strict liability for ultrahazardous instrumentalities. In fact, some courts have rejected the idea that strict liability has any relationship to causation.³⁴⁷ As a consequence, either out of misunderstanding the proper paradigm of strict liability or hostility to CERCLA's broad liability scheme, some courts have attempted to analyze CERCLA in terms of individual causation. As discussed below, however, this approach is

F.2d at 170 (noting that liability is subject only to the causation-based affirmative defenses set forth in CERCLA § 107(b). "Congress has, therefore, allocated the burden of disproving causation to the defendant who profited from the generation and inexpensive disposal of hazardous waste."); *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 799 F.2d 1312, 1316 (9th Cir. 1986) (noting that nonliability must be based on one of the exclusive defenses); *Adhesives Research, Inc. v. Am. Inks & Coatings Corp.*, 931 F. Supp. 1231, 1232 (M.D. Pa. 1996) (noting that defenses limited by statute; otherwise, liability imposed without regard to causation); *United States v. Rohm & Haas*, 939 F. Supp. 1142, 1152 (D.N.J. 1996) (noting that defenses based on complete absence of causation); *Lincoln Prop., Ltd. v. Higgins*, 823 F. Supp. 1528, 1537 (E.D. Cal. 1992) (noting that limited causation based defenses in Section 9607(b)); *United States v. Nat'l Bank of Commonwealth*, 1990 W.L. 357792 (W.D. Pa. 1990) (noting that alleged "nexus" requirement is nothing more than a causation argument and, if applied, might render the defenses provided in 42 U.S.C. § 9607(b) superfluous).

345. *B.F. Goodrich*, 99 F.3d at 514; *Ohio v. U.S. Dept. of the Interior*, 880 F.2d at 471; *Dedham Water Co.*, 889 F.2d at 1152-54; *Arizona v. Motorola*, 805 F. Supp. 742, 746 (D. Ariz. 1992); *Pretty Products*, 780 F. Supp. at 1499; *United States v. Stringfellow*, 661 F. Supp. 1053, 1059-60 (C.D. Cal. 1987); *Wade*, 577 F. Supp. at 1333-34.

346. *Ohio v. United States Dept. of the Interior*, 880 F.2d at 471 (Section 107's imposition of liability on the four enumerated classes of responsible parties does not require in all cases that the defendant have in fact caused the release.); *Pretty Products*, 780 F. Supp. at 1499 ("[S]ection 9607(a)(1) unequivocally imposes strict liability on the current owner of a facility from which there is a release or threat of release, without regard to causation"); *Motorola*, 805 F. Supp. at 746 (noting that issue is whether release or threatened release causes response costs, not whether defendant's waste caused response costs).

347. See, e.g., *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 n.17 (2d Cir. 1985).

wrong and leads to interpretations inconsistent with the basic structure of the statute.

V.
IMPROPER JUDICIAL RELIANCE ON CONCEPTS OF
INDIVIDUAL CAUSATION IN INTERPRETING
CERCLA LIABILITY

A. *Individual Causation as an Element of a Cost Recovery Claim*

In *Acushnet Co. v. Coaters, Inc.*,³⁴⁸ the United States District Court for the District of Massachusetts incorrectly adopted an individual causation requirement in a CERCLA case. In *Acushnet*, a group of defendants entered into a consent decree with the United States to perform a remedial action at a former waste disposal pit listed on the National Priorities List (“NPL”)³⁴⁹ as the Sullivan’s Ledge Superfund Site.³⁵⁰ The settling parties then sued several parties that did not settle with the United States, including the New England Telephone and Telegraph Company (“NETT”).³⁵¹ In response to NETT’s summary judgment motion, the plaintiffs offered evidence showing that NETT disposed of utility pole butts containing Polycyclic Aromatic Hydrocarbons (“PAHs”) at the Site, and that PAHs, a listed hazardous substance, were detected in soil at the Sullivan’s Ledge Site.³⁵² NETT, however, argued that there was no evidence that its utility pole butts had actually leached hazardous substances, or that any possible releases from NETT’s particular

348. *Acushnet Co. v. Coaters Inc.*, 937 F. Supp. 988 (D. Mass. 1996).

349. The NPL is a list of priority sites or releases and is required by Section 105 of CERCLA, 42 U.S.C. § 9605(8) (1994). EPA has codified the NPL at 40 C.F.R. Part 300, Appendix B (2000). The NCP prohibits EPA from spending money from the Superfund for remedial action, as opposed to emergency removal actions, unless a Site or release is first listed on the NPL. 40 C.F.R. § 300.425(b)(1)(2000).

350. *Acushnet Co.*, 937 F. Supp. at 989. The Sullivan’s Ledge Superfund Site was a former quarry in New Bedford, Massachusetts used for the disposal of hazardous and industrial waste from the 1930’s until 1973. *Id.* EPA listed the Sullivan’s Ledge Site on the National Priorities List in 1984 based on the presence of hazardous substances in the soil at the Site, in the soil of adjacent properties, and in adjacent water courses. *Id.* at 989-90.

351. *Id.* at 990.

352. *Id.* The utility poles were treated with creosote, which contained Polycyclic Aromatic Hydrocarbons, a listed hazardous substance under CERCLA. *Id.*; 40 C.F.R. § 302.4 (2000).

pole butts could have caused the plaintiffs to incur response costs.³⁵³

The United States District Court for the District of Massachusetts entered summary judgment in favor of NETT, holding that CERCLA requires proof that an individual defendant's release caused response costs.³⁵⁴ The trial court found no significance in the fact that the early drafts of CERCLA contained express "caused or contributed" requirements, but that the final legislation did not.³⁵⁵ The trial court noted that the requirement was deleted because it was too obvious to include.³⁵⁶ The trial court also rejected arguments based on the nature of causation in common law strict liability claims.³⁵⁷ The trial court explained that strict liability for abnormally dangerous activities or products "[does] not dispense with the requirements of cause in fact and proximate cause – elements traditionally part of every tort action."³⁵⁸ The court explained that the risk that makes hazardous waste disposal a hazard is contamination from a particular defendant's waste, and that "[e]ntirely compatible with common law precedents is an interpretation of CERCLA as having established a regime of strict liability under which ordinarily a defendant will be held accountable for any pollution caused by its waste"³⁵⁹ The trial court also rejected the idea that CERCLA's third party defense shifts the burden of disproving causation to the defendant.³⁶⁰ The trial court found that it was illogical to require a defendant to take precautions and exercise due care against the activities of another generator's dumping activity and

353. *Acushnet*, 937 F. Supp. at 991. Although the quarry was contaminated with PAHs and EPA's proposed remedy was to address soil contaminated with PAHs, EPA had not detected PAHs in elevated levels in any areas outside the quarry. The Site was also contaminated with many other hazardous substances, including polychlorinated biphenyls ("PCBs"), which had migrated offsite. *Id.* NETT's utility poles did not contain PCBs, and had no connection to the PCB contamination in and around the Site. *Id.* NETT offered expert testimony that the PAHs in utility pole butts could not have leached into the soil to levels greater than the pre-existing background levels, that elevated levels of PAHs in the soil at the Site must have been caused by waste other than utility pole butts, and that any contribution of PAHs from utility poles could not have created any actionable risk or contributed to the incurrence of response costs. *Id.* at 991.

354. *Id.* at 993.

355. *Id.* at 996.

356. *Id.*

357. *Id.* at 1000-01.

358. *Id.* at 1000.

359. *Id.*

360. *Id.* at 995.

to impose liability on a defendant for “not exercising due care over waste that had been produced by another and disposed of by another.”³⁶¹ “In order for NETT to meet the requirements of § 107(b)(3), as Plaintiffs propose to read it, NETT would have had to police which entities were dumping waste into the Site and control every action taken at the Site to ensure that proper precautions were being taken.”³⁶² Moreover, the *Acushnet* trial court noted that the defenses for acts of God, acts of war and acts of third parties were available under common law, but individual causation was still an element of common law claims.³⁶³ Finally, the *Acushnet* trial court concluded that NETT proved that its waste in isolation could not have caused any response costs, even though it had no burden to do so.³⁶⁴

On appeal, the United States Court of Appeals for the First Circuit affirmed.³⁶⁵ The First Circuit held that “to the extent that the court’s ruling may be interpreted to incorporate into CERCLA a causation standard that would require a polluter’s waste to meet a minimum quantitative threshold, we disagree. Never-

361. *Id.* See *infra* notes 374 and 450 and accompanying text.

362. *Id.*

363. As the court explained:

Moreover, in their argument regarding the exceptions to liability contained in § 107(b), the Plaintiffs failed to take into account the fact that exceptions such as these are not unique to CERCLA. In fact, exceptions to liability for acts of God, war, or unrelated third parties are characteristically part of common-law formulations of strict liability, as explained in Part X below. It is thus unlikely that the “defenses” have a special meaning and impact on causation under CERCLA when the same “defenses” do not have such an effect on a common-law claim.

Id. at 995-96.

364. *Id.* at 999. As the trial court stated:

The First Circuit has not yet decided a case in which a party has invoked this burden-shifting framework. I conclude that I need not address this issue, or address in detail a possible conflict among circuits, because in any event, I conclude that it is unlikely that the First Circuit will impose a burden-shifting framework such as Plaintiffs propose. What Plaintiffs propose is both a more sweeping elimination of causation as an element of the legal test for liability and an extension to actions brought by private parties, of a rule thus far developed only for actions brought by the government for recovery of its response costs. Moreover, even if a burden were placed on NETT to prove that its waste did not or could not have caused the Plaintiffs’ incurrence of response costs, NETT has proffered evidence sufficient to meet that burden. In their evidentiary submissions in response to NETT’s motion, Plaintiffs have not challenged NETT’s proffered submissions of allegedly undisputed facts. Rather, Plaintiffs have argued that only the first-half of the Third Circuit’s burden shifting framework should be used—effectively eliminating entirely the causation element that remains as part of the completion of the burden-shifting framework.

Id.

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

theless, we conclude that the record was insufficient to permit a meaningful equitable allocation of remediation costs against any of these defendants under [Section] 9613(f)."³⁶⁶ The First Circuit explained that a court, in evaluating contribution claims under § 9613(f), is free to allocate responsibility according to any combination of equitable factors it deems appropriate and that under "an appropriate set of circumstances, a tortfeasor's fair share of the response costs may even be zero."³⁶⁷ Affirming summary judgment, the First Circuit noted that the plaintiff's failure to show that the NETT caused any harm

is no different than asking a plaintiff to proffer some evidence as to damages where a defendant has claimed in summary judgment papers that the plaintiff has, in fact, suffered no compensable harm. Given the Sullivan's Ledge Group's failure to meet its burden in this regard, the trial court properly entered judgement for NETT.³⁶⁸

366. *Id.* at 72. Section 9613(f)(1) of CERCLA provides:

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a), during or following any civil action under section 9606 or under section 9607(a). Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 or section 9607.

42 U.S.C. § 9613(f)(1). One important goal of CERCLA is "the equitable allocation of cleanup costs among all potentially responsible persons ("PRPs")." In re Hemingway Transport, Inc., 993 F.2d 915, 921 (1st Cir. 1993). CERCLA accomplishes such equitable allocation by "authorizing PRPs subjected to pending or completed EPA enforcement actions under 42 U.S.C. §§ 9606 and 9607(a)(4)(A) to initiate private actions for full or partial contribution from nonsettling PRPs by way of impleader or an independent action." *Id.*; 42 U.S.C. § 9613(f). "Thus, targeted PRPs, relying on the ultimate financial accountability of more 'culpable' PRPs, are encouraged to initiate prompt response efforts, at their own expense, in cooperation with the EPA." *Hemingway Transport, Inc.*, 993 F.2d at 915; In re Dant & Russell, Inc., 951 F.2d 246, 248 (9th Cir. 1991); see also H.R.Rep. No. 253, 99th Cong., 1st Sess. 80, reprinted in 1986 U.S.C.C.A.N. 2835 ("Private parties may be more willing to assume the financial responsibility for some or all of the cleanup if they are assured that they can seek contribution from others."); 42 U.S.C. § 9613(f)(2) (CERCLA defendants who settle with government are immune from subsequent contribution claims).

367. *Acushnet Co. v. Mohasco Corp.*, 191 F.3d at 78 (citing *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 616 (7th Cir. 1998), cert. denied, 67 U.S.L.W. 3457 (U.S. Jan. 19, 1999) (No.98-784); *O'Neil v. Picillo*, 883 F.2d 176, 183 (1st Cir. 1989)). See *id.*

368. *Id.* at 80.

Although the First Circuit held that CERCLA liability is not dependant on release of a particular quantity of hazardous substances, the Court also noted:

It might, of course make sense to say that a defendant's release did not "cause" the incurrence of response costs when the monies were expended for purposes wholly unrelated to responding to environmental contamination. And we suppose it may even be accurate to say that a generator or transporter of waste did not cause a plaintiff to incur remediation costs when that person did not actually cause any alleged contamination, see *United States v. Dico, Inc.*, 136 F.3d 572, 578 (8th Cir. 1998), or perhaps even where clean up efforts were directed at cleaning up toxins other than those attributed to the defendant.³⁶⁹

Both the First Circuit and the trial court failed to properly analyze CERCLA causation in light of the paradigm of strict liability because they both framed the issue of causation in terms of individual causation. The First Circuit was correct to reaffirm the basic rule that there is no de minimis defense to liability under CERCLA.³⁷⁰ The statute contains no such requirement and numerous courts had held previously that an arranger such as NETT is liable under CERCLA regardless of the quantity of hazardous substances disposed of at a facility.³⁷¹ The First Circuit erred, however, in suggesting that a defendant should not be held liable because its waste did not cause the incurrence of response costs. The statute is structured so that response costs need only be incurred because of a release or threatened release of any hazardous substance at or from a facility, not a particular defendant's hazardous substance. For that reasons, numerous courts have held that a CERCLA plaintiff does not have to fingerprint hazardous substances at a landfill to particular defendants³⁷² or link response costs to a particular defendant's hazardous substance.³⁷³ The First Circuit failed to understand that the reason for this rule is that CERCLA deems the facility, in this case a disposal pit, to be the hazardous instrumentality and simply inquires whether a release or a threatened release of hazardous substances from that instrumentality caused the incurrence of response costs or damages. CERCLA defendants are

369. *Id.* at 77.

370. See *United States v. New Castle County*, 769 F. Supp. 591, 594 (D. Del. 1991) (quoting *United States v. Wade*, 577 F. Supp. 1326, 1339-41 (E.D. Pa. 1983)).

371. See *supra* note 324.

372. See *supra* note 325.

373. *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 721 (2d Cir. 1993).

liable not because they individually caused contamination, but because they used the facility, just as an owner is liable simply for owning it.

Ultimately, the First Circuit ducked the issue of individual causation by holding that the trial court was within its right to allocate a zero share of liability to NETT under Section 113(f) of CERCLA, which allows for such allocation in the context of a contribution claim. The problem with the First Circuit's analysis is that the trial court did not reach the issue of equitable allocation under Section 113(f). The trial court found that NETT was not liable under the statute because its waste, even though present at the site, did not cause response costs. The First Circuit should have reversed the trial court and remanded for an equitable allocation based on evidence presented at trial. The First Circuit also should have corrected the trial court's erroneous analysis.

The fundamental error made by the trial court was to focus on the waste in the hands of each generator as being the hazardous instrumentality. While a plaintiff asserting a common law claim for strict liability could certainly advance such a theory, CERCLA itself defines the vessel or facility as the instrumentality that must cause harm. Just as the landowners in *Rylands v. Fletcher* were held liable for placement of a reservoir on land, the users of a hazardous waste dump by statute are made responsible for releases or threatened releases from the waste dump that they used. The statute defines the hazardous instrumentality and specifies that those linked to it are responsible. By construing CERCLA to impose liability for harm caused by each generator's waste, the trial court ignored the structure of the statute.

Moreover, the trial court's analysis of the third party defense was incorrect. The *Acushnet* trial court improperly focused on the statutory requirements that a defendant take precautions against acts or omissions of a third party and exercise due care with respect to the hazardous substance involved.³⁷⁴ These two requirements come into play only after the defendant has first shown that someone else with no contractual connection to the defendant was the exclusive cause of the release or threatened release. In the case of a landfill or a disposal pit, a generator has a contract with the operator of the dump to use that dump. This contract alone should exclude a generator in a landfill case from

374. See 42 U.S.C. § 9607(b)(3) (1994).

reliance on the third party defense. Even if no contract existed with the operator, however, the fact that many generators contributed to the contamination at the landfill precludes any of them from showing that the other parties are the sole cause of the release or threatened release. If the contaminants are commingled and leaching from the landfill, no party may establish that the others are the sole cause.

In addition, the fact that one generator of waste cannot control the hazardous substances of another generator does not render illogical the statutory requirements of taking precautions against the act or omission of a third party and exercising due care with respect to the hazardous substances involved. The two requirements obviously apply primarily in the context of a party that can in fact take such precautions and exercise due care, such as the owner or operator of a vessel or facility. For example, if an owner or operator of a facility leaves a drum of hazardous substances at a plant site and a vandal enters the property, causing the drum to spill, the act of a third party was the sole cause of the release. However, if the owner or operator failed to take precautions against third party vandals, such as proper fencing or security, or failed to exercise due care with respect to the spilled substances, such as by allowing school children to walk through the plant on the way to school, the owner/operator might not be able to meet the additional requirements of the defense. Thus, the fact that a generator cannot take precautions or exercise due care with respect to a landfill it neither owns or controls does not render the statutory language meaningless. The requirements do not necessarily fit all situations, and the structure of the third party defense does not suggest that individual causation is an element of a liability claim against a generator.

Significantly, the *Acushnet* trial court utterly failed to adequately respond to the plaintiffs' argument that the third party defense requires the defendant to prove who or what was the sole cause of the release or threatened release.³⁷⁵ It cannot be disputed that the defense requires a defendant to prove that some unrelated third party was the sole cause of the release and that the defendant was not involved in any way.³⁷⁶ If a plaintiff were first required to prove that the defendant caused the release, even in part, the defense would never be used at all. It is

375. See *supra* notes 331-36 and accompanying text.

376. *Id.*

thus illogical to require a plaintiff to prove the very fact which a defendant must then disprove. The plaintiff and the defendant cannot both have the burden of proof on the same issue. The statute imposes no duty on a plaintiff to prove that a defendant caused or contributed to a release or that a defendant's waste caused response costs.

Finally, the trial court's analysis of proximate causation was in error. CERCLA contains no express "proximate causation" standard. To the extent the concept of proximate cause applies at all in the context of strict liability, it simply would relate to whether the harm was of the type that made the instrumentality hazardous in the first place.³⁷⁷ Under CERCLA the instrumentality is the vessel or the facility. For example, CERCLA defines the term facility to include landfills because landfills pose a risk of contamination in the form of a release or threatened release of a hazardous substance. Any release or threatened release of a hazardous substance represents a fruition of the risk and establishes the necessary legal causation.

The First Circuit erred in affirming the *Acushnet* district court decision without clarifying that CERCLA causation does not require a showing of individual causation of a release and resulting response costs. The fact that the First Circuit thoroughly misunderstood the nature of causation under CERCLA is illustrated by the court's favorable citation to *United States v. Dico*,³⁷⁸ another recent case that incorrectly interpreted the nature of the causation inquiry under CERCLA.

In *United States v. Dico* the United States Court of Appeals for the Eighth Circuit misconstrued the causation requirement of CERCLA by imposing a burden of proving individual causation. In *Dico*, EPA determined that the public water supply for Des Moines, Iowa was contaminated with trichlorethylene ("TCE") and other hazardous substances, and listed a nearby geographic area, including Dico's plant, as the Des Moines TCE Site on the National Priorities List.³⁷⁹ Thus, Dico was liable as the owner and operator of a portion of a facility listed on the National Priorities List. Like other businesses in the area, Dico and its predecessors had used TCE to degrease equipment.³⁸⁰ EPA divided the Site into several operable units ("OUs") for administrative

377. See *supra* notes 114-16 and accompanying text.

378. *United States v. Dico, Inc.*, 136 F.3d 572 (8th Cir. 1998).

379. *Dico, Inc.*, 136 F.3d at 574-75.

380. *Id.* at 575.

convenience to organize response actions.³⁸¹ Two of the operable units related to Dico's plant. OU-1 was a discrete plume of TCE contamination that began upgradient to Dico's property and flowed under Dico's property toward the municipal water supply.³⁸² OU-2 consisted of soil contamination on Dico's property.³⁸³ EPA issued a unilateral order to Dico to capture and treat the contaminated groundwater that was being released from the facility at the area of Dico's plant.³⁸⁴ The United States then filed an action to recover response costs from "Dico—and only Dico".³⁸⁵ These costs, however, were limited in the complaint to costs incurred in connection with the groundwater underneath Dico's property, OU-1.³⁸⁶

The United States District Court for the Southern District of Iowa granted summary judgment to the United States for response costs, including indirect and oversight costs, in the amount of \$4,378,110.66.³⁸⁷ On appeal, Dico conceded that it was an owner or operator of its plant at a time when TCE was released, but argued that "a third requirement before strict liability attaches: notwithstanding a release, the 'plaintiff must establish a causal nexus between that release and the incurrence of response costs,' although 'the degree of connection' required is open to some debate."³⁸⁸ Although the District Court had relied on the fact that Dico did not dispute that the United States had incurred some response costs as a result of a release of TCE from the facility generally,³⁸⁹ the Eighth Circuit reversed because Dico disputed whether it had caused any contamination of the ground-

381. *Id.* at 575, 578-79.

382. *Id.* at 578.

383. *Id.* at 579.

384. *Id.* at 575.

385. *Id.*

386. *Id.* at 579.

387. *See United States v. Dico, Inc.*, 979 F. Supp. 1255, 1263-1264 (S.D. Iowa 1997).

388. *Id.* (citing *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 935 n.8 (8th Cir. 1995)). The *Dico* court erroneously stated that the United States had to prove that its costs were consistent with the National Contingency Plan. *Id.* As the Court noted:

There is a fourth element that must be proved as well: "that the costs [sought to be recovered by the EPA] were necessary and consistent with the national contingency plan." *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 935 n.8 (8th Cir. 1995). This is not an issue that needs to be addressed in this appeal.

Id. at 578 n.3. For a governmental or tribal plaintiff Section 107 places the burden of proof on the defendant to show inconsistency with the National Contingency Plan. *See supra* note 314.

389. *United States v. Dico, Inc.*, 979 F. Supp. at 1259.

water under its plant.³⁹⁰ The Eighth Circuit remanded the case to determine whether the United States could prove that soil contamination at the plant showed that Dico contaminated the groundwater under its plant.³⁹¹ The Eighth Circuit held that summary judgment was not appropriate because the detection of contamination in the soils underneath Dico's property was not continuous and Dico disputed the accuracy of EPA's sampling results.³⁹² The Eighth Circuit thus squarely placed the burden on

390. *Dico, Inc.*, 136 F.3d at 578. As the Eighth Circuit stated:

Although Dico may have conceded that its operations over the years could have caused soil contamination at the site, we see nothing in the record to support the proposition that Dico admitted that any such soil contamination caused the groundwater contamination at OU-1, which in turn caused the EPA to incur response costs. In fact, as we read the record, Dico consistently has denied responsibility for groundwater contamination at OU-1, even while conceding the possibility that it is liable for soil contamination within the site. As the United States acknowledges, "Operable Unit 1 ('OU-1'), which is the focus of this litigation, was separately delineated to deal with the groundwater contamination, and Operable Unit 2 ('OU-2'), also known as the South Area Source Control Operable Unit, was designated to address releases to the groundwater from the soil at Dico's property—which comprises a portion of the Site."

Id. (quoting Appellant's Brief at 6). The government admitted that "[t]he EPA in this lawsuit is seeking only to recover its expenses regarding OU-1, and not OU-2." *Id.* (quoting Appellant's Brief at 6 n.7). The Eighth Circuit therefore concluded that "[a]ny response costs the EPA might have incurred in relation to OU-2 or any other operable unit within the site, and therefore evidence of Dico's alleged admissions regarding soil contamination within the site, are of no consequence." 136 F.3d at 578.

391. *Id.* at 579. As the Eighth Circuit stated:

It remains to be determined whether Dico has raised a genuine issue of material fact on the question of whether the TCE disposal for which Dico is potentially responsible, soil contamination within the site, is the source of the groundwater contamination at OU-1. Because the District Court determined that Dico admitted liability for some of the EPA's OU-1 response costs (which we now hold was error), the court did not address the question. After reviewing the record before us, we conclude that Dico has carried its burden and that summary judgment was inappropriate in this case.

Id.

392. As the court stated:

There is some evidence in the record that the highest concentrations of TCE groundwater contamination are directly beneath Dico's property. This certainly is circumstantial evidence that it was Dico's actions that caused the contamination at OU-1. But Dico submitted evidence that none of the EPA's numerous soil borings from the area establishes a continuous line of contamination from the soil surface, through fill and native soils, to the groundwater. Further, Dico asserts and has submitted evidence in support of the assertion that, to the extent the record may be said to include evidence of continuous borings that do show a direct line from Dico property to the water table, the methodology employed in the sampling and the testing of those borings is open to serious challenge. The EPA answers that there are other ways for the TCE contamination to have migrated to the groundwater other than straight down through the soil. But the EPA's hypothesis that

the government to prove the connection between a release on Dico's soil and the underlying groundwater contamination:

We conclude that the United States, as plaintiff seeking a monetary recovery of considerable magnitude, should be put to its proof on its claim that Dico's disposal of hazardous materials caused groundwater contamination that led to the response costs that the EPA incurred in connection with OU-1. Dico's evidence raises a genuine issue of material fact for resolution at trial.³⁹³

Dico also asserted that it was entitled to the third party defense and apportionment as to the groundwater plume under its property, and the Eighth Circuit remanded for fact finding on these defenses as well.³⁹⁴

The Eighth Circuit erred in the *Dico* case because it failed to frame the analysis in terms of the proper instrumentality for purposes of CERCLA causation: the geographic area that included Dico's plant. CERCLA's broad definition of "facility"³⁹⁵ includes not only a geographic area that is the source of a release

this may be what happened at the Des Moines TCE Site is unsupported by record evidence, and therefore does not resolve the fact question of whether that is what actually happened at the site in the years before groundwater contamination was discovered.

Id.

393. *Id.*

394. *Id.* As the Court stated:

Finally, Dico contends that it was entitled to the statutory defense set forth in 42 U.S.C. § 9607(b)(3)(1994) because the release of hazardous substances at issue and the resultant damages "were caused solely by . . . an act or omission of a third party" not connected with Dico. The company argues that, with regard to costs related to the so-called north plume of contamination at the site, located north of and up-gradient from Dico's property, "Dico is an innocent third party" because that "contamination was caused solely by sources other than Dico." Brief of Appellant at 29. Dico reiterates that it is not responsible for the groundwater contamination "at all." *Id.* But even if it is, Dico claims, "the North Plume is a separate and distinct plume whose harm is capable of reasonable divisibility and apportionment," *id.* at 31, and as a matter of law Dico should not be responsible for that part of the EPA's response costs that are not attributable to Dico releases. Because we have held that the case should be remanded for trial on the question of Dico's liability, we need not and do not address the question of Dico's liability, we need not and do not address this fact-dependent argument. It should be resolved at trial.

Id.

395. Section 101(9) of CERCLA, defines a "facility" as:

(A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located . . .

42 U.S.C. § 9601(9).

or threatened release such as a "landfill," a "pit," or a "lagoon,"³⁹⁶ but also a general geographic area where a hazardous substance "has come to be located" by passive spreading such as groundwater migration, surface runoff or wind dispersal, or by active human channeling or direction.³⁹⁷ Moreover, the scope of a geographic facility need not be limited by the fiction of property lines because releases and migration of hazardous substances do not respect man-made ownership lines.³⁹⁸ Thus, EPA need not designate on the NPL one facility per owner or otherwise prove that one owner owns an entire facility to establish liability under Section 107 of CERCLA.³⁹⁹ In fact, CERCLA expressly contemplates that there can be more than one owner of a facility.⁴⁰⁰ With respect to challenging EPA's decision to treat

396. See *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146, 1148, 1154 (1st Cir. 1989) (noting the area that was source of water contamination), *clarified*, 901 F.2d 3 (1st Cir. 1990); *NutraSweet Co. v. X-L Eng'g Corp.*, 933 F. Supp. 1409, 1415 (N.D. Ill. 1996) (noting that hazardous substances released on property migrated to and contaminated neighboring property as a result of groundwater flow; both facilities or locations where contaminants were spread were the source of contamination); *United States v. A & N Cleaners & Launderers, Inc.*, 854 F. Supp. 229, 231-32, 240-43 (S.D.N.Y. 1994) (noting that purchaser of property that was source of groundwater contamination liable; no innocent owner defense); *United States v. Bliss*, 667 F. Supp. 1298, 1303, 1309 (E.D. Mo. 1987) (noting that defendant liable under 107(a)(1) because he owned trucks from which hazardous waste was sprayed onto the ground and defendant liable under § 107(a)(2) because he owned the property where hazardous wastes were disposed of); see *Artesian Water Co. v. Government of New Castle County*, 659 F. Supp. 1269, 1280-84 (D. Del. 1987) (noting that defendant liable under § 107(a)(1) because it owned landfill from which hazardous waste leached into aquifer); see also *United States v. CDMG Realty Co.*, 96 F.3d 706 (3d Cir. 1996) (noting that CERCLA release contemplates gradual spreading of contamination such as leaching of contaminants at landfill).

397. *NutraSweet Co.*, 933 F. Supp. at 1415, 1417-18 & n.3, 1420 (noting that hazardous substances released at property migrated to and contaminated neighboring property as a result of groundwater flow; source of contamination was facility or both properties were facility); *Mead Corp. v. United States*, 1994 WL 733567, *3 (S.D. Ohio 1994) (noting that entire contaminated aquifer that extended over a wide area was a facility); *United States v. Ward*, 618 F. Supp. 884, 892, 895 (E.D.N.C. 1985) (210 miles of road contaminated by active spraying); *United States v. Metate Asbestos Corp.*, 584 F. Supp. 1143, 1148-49 (D. Ariz. 1984) (wind dispersal of asbestos at mobile home park).

398. See *United States v. Rohm & Haas*, 2 F.3d 1265, 1279 (3rd Cir. 1993) ("A current owner of a facility may be liable under § 107 without regard to whether it is the sole owner or one of several owners."); *accord S. Pac. Transp. Co. v. Voluntary Purchasing Groups, Inc.*, 1997 WL 457510, *8 (N.D. Tex. 1997); *Clear Lake Props. v. Rockwell Intern. Corp.*, 959 F. Supp. 763, 768 (S.D. Tex. 1997); *United States v. Shell Oil Co.*, 841 F. Supp. 962, 970 (C.D. Cal. 1987).

399. *Ohio v. United States EPA*, 997 F.2d at 1549; *Rohm & Haas*, 2 F.3d at 1268.

400. See 42 U.S.C. § 9608(b)(4) (1994). Section 108(b)(4) dealing with financial responsibility states:

one geographic area as a facility, to the extent EPA has by regulation listed a particular area as one facility on the National Priorities List and a defendant has not appealed such a rulemaking to the United States Court of Appeals for the District of Columbia Circuit with 90 days of the listing or notice that the area has been listed, then the defendant is precluded by Section 113(a) of CERCLA⁴⁰¹ from disputing the scope of the facility in a subsequent cost recovery action in district court.⁴⁰² Therefore, in the *Dico* case, the Eighth Circuit should have treated the geographic area listed by EPA on the NPL, including Dico's plant, as a facility for purposes of CERCLA causation. Dico's liability stemmed not from the fact that it caused a particular release, but from the fact that it was an owner or operator of the facility from which there was a release or a threatened release of a hazardous substance. As one of the owners of the facility, Dico was just as liable as the owners of the water reservoir in *Rylands v. Fletcher*. By focusing on whether Dico itself individually caused the contamination to be present in the groundwater, the Eighth Circuit improperly imposed an individual causation requirement. In fact, the Eighth Circuit contradicted prior Eighth Circuit precedent holding that individual defendants need not cause the incurring of response costs to be liable under CERCLA.⁴⁰³

What may have confused the Eighth Circuit was that the United States limited its claim against Dico to OU-1 costs (i.e., for the costs of remediating the groundwater).⁴⁰⁴ This did not mean, however, that OU-1 was somehow a separate facility from OU-2, the contaminated soils at the plant. The fact that EPA was

Where a facility is owned or operated by more than one person, evidence of financial responsibility covering the facility may be established and maintained by one of the owners or operators, or, in consolidated form, by or on behalf of two or more owners or operators. When evidence of financial responsibility is established in a consolidated form, the proportional share of each participant shall be shown. The evidence shall be accompanied by a statement authorizing the applicant to act for and in behalf of each participant in submitting and maintaining the evidence of financial responsibility.

Id.

401. 42 U.S.C. § 9613(a) (1994).

402. *United States v. Taylor*, 31 E.R.C. 1197, 1199 (M.D.N.C. 1989); *United States v. Ottati & Goss*, 694 F. Supp. 977, 984 (D. N.H. 1988), *aff'd in part and vacated in part*, 900 F.2d 429 (1st Cir. 1990).

403. *Farmland Indus., Inc. v. Morrison-Quirk Grain Corp.*, 987 F.2d 1335, 1340 (8th Cir. 1993) ("Satisfaction of this [causation] element required merely a determination that the United States had, in fact, incurred response costs, and involved no judgment as to causation.").

404. *Id.* at 578.

first recovering response costs with respect to the contaminated groundwater did not mean that the instrumentality for purposes of liability was anything other than the geographic area listed on the NPL.

While Dico admitted that it was the source of the OU-2 soil contamination at its plant, it denied that it caused any groundwater contamination underneath its plant, arguing that all the groundwater contamination was caused by upgradient businesses.⁴⁰⁵ *Dico* in effect was attempting to articulate a third party defense under Section 107(b)(3) of CERCLA. If Dico could have established that an upgradient operator was the *sole* cause of the contamination and that Dico had no contractual relationship with the upgradient operator, *i.e.*, no lease of the upgradient property to that operator, then Dico possibly could have established the third party defense, as long as Dico also established that it exercised due care with respect to the hazardous substance involved and took precautions against the activities of the third party. This is the only manner in which issues of individual causation can be litigated under CERCLA's liability structure.

B. *Special Rules on Causation for Natural Resource Damages Claims*

Some courts and commentators have suggested that there is a different standard of causation applicable to natural resource damage claims under Section 107(a) of CERCLA, as opposed to cost recovery claims under Section 107(a) of CERCLA.⁴⁰⁶ These courts and commentators have argued that an individual causa-

405. *Id.* at 578-579.

406. *See, e.g.*, *United States v. Montrose Chem. Corp.*, 33 Env't Rep. Cas. (BNA) 1207 (C.D. Cal. 1991) ("To prevail on any claim for release seeking to recover damages for alleged injury to natural resources under CERCLA § 107(a)(4)(C), 42 U.S.C. § 9607(a)(4)(C), plaintiffs must show that a defendant's release of a hazardous substance was the sole or substantially contributing cause of each alleged injury to natural resources."); Robert F. Copple, *Natural Resource Damages Causation, Fault, and the Baseline Concept: A Quandary in Environmental Decisionmaking*, 26 Env't'l L. Rep. (Env't'l L. Inst.) 10457 (1996) ("The public trustee must prove as an integral component of its prima facie case that the release of a hazardous substance attributable to the PRP is the cause in fact and the legal cause of the resulting injury to the natural resource"); *see also* *Ohio v. United States Dep't of the Interior*, 830 F.2d 432, 472 (D.C. Cir. 1989), ("In sum, while we agree with petitioners that Congress expressed dissatisfaction with the common law as a norm in several areas of damage assessment, we conclude that CERCLA is at best ambiguous on the question of whether the causation-of-injury standard under § 107(a)(4)(C) must be less demanding than that of the common law. Consequently, we uphold Interior's plausi-

tion standard applies to natural resource damage claims.⁴⁰⁷ An analysis of natural resource damage liability in light of the paradigm of strict liability for ultrahazardous activity, as well as the express language of the statute, however, shows that natural resource damage claims do not require a special showing of individual causation.

Section 107(a)(4)(c) of CERCLA provides that the four categories of responsible persons 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.”⁴⁰⁸ CERCLA thus makes clear that natural resource damages must result from a release of a hazardous substance from a vessel or a facility.⁴⁰⁹ CERCLA, however, also makes clear that the same four categories of responsible persons are liable for “all costs of removal or remedial action” incurred by the United States, a State or an Indian tribe.⁴¹⁰ “Remove” or “removal” means the “cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of a threat of release of hazardous substances into the environment . . .,”⁴¹¹ and “remedy” or “remedial action” mean “actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release”⁴¹² Thus, costs

ble reading of CERCLA as adopting traditional causation standards in this context.”) (footnote omitted).

407. *See id.*

408. 42 U.S.C. § 9607(a)(4)(C)(1994). In addition, “There shall be no recovery under the authority of subparagraph (C) of subsection (a) where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before the enactment of this Act.” 42 U.S.C. § 9607(f)(2000). Finally, Section 112(d), 42 U.S.C. § 9612(d)(1994), provides: “No money in the Fund may be used under subsection (c) (1) and (2) of this section, nor for the payment of any claim under subsection (b) of this section, where the injury, destruction, or loss of natural resources and the release of a hazardous substance from which such damages resulted have occurred wholly before the enactment of this Act.”

409. 42 U.S.C. § 9607(f)(1)(C)(1994) (“There shall be no recovery under the authority of subparagraph (C) of subsection (a) where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before the enactment of this Act.”); 42 U.S.C. § 9612(d)(1994) (“No money in the Fund may be used under subsection (c) (1) and (2) of this section, nor for the payment of any claim under subsection (b) of this section, where the injury, destruction, or loss of natural resources and the release of a hazardous substance from which such damages resulted have occurred wholly before the enactment of this Act.”).

410. 42 U.S.C. § 9607(a) (1994).

411. 42 U.S.C. § 9601(23) (1994).

412. 42 U.S.C. § 9601(24) (1994).

of a removal and remedial action by definition must be caused by some release or threat of release. The statute also expressly states that the vessel or facility necessary for liability must be one "from which there is a release, or a threatened release which causes the incurrence of response costs . . ." ⁴¹³ The only distinction between natural resource damages and response costs is that a threatened release may be the basis for a response cost claim, whereas a natural resource damage claim requires an actual release. ⁴¹⁴

Because the basic elements of liability for both types of claims are the same, ⁴¹⁵ they should be construed to have the same meaning. With respect to response costs, courts construing the elements of liability, as set forth in Section 107(a), have concluded that the language does not require a plaintiff to link a defendant to a specific release. ⁴¹⁶ If this is true for response costs, it must also be true for natural resource damages because the elements of liability are the same. Based on the paradigm of strict liability for ultrahazardous activity, both types of claims focus on the harm caused by an instrumentality in the form of a vessel or a facility, and impose liability on those linked to that vessel or facility. Thus, even a current owner can be held liable

413. Section 107(a) of CERCLA references a vessel or facility "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). Courts have construed the phrase "which causes the incurrence of response costs" to modify both release and threatened release. *See, e.g.,* Mid Valley Bank v. N. Valley Bank, 764 F. Supp. 1377, 1387-88 (E.D. Cal 1991). The statute, however, may have been intended simply to emphasize that a threatened release must result in response costs, in contrast to an actual release causing response costs or natural resource damages.

414. In addition, the statute makes clear that for natural resource damages claims, the release and damages must have occurred after the enactment of CERCLA. 42 U.S.C. § 9607(f)(1)(C)(1994) ("There shall be no recovery under the authority of subparagraph (C) of subsection (a) where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before the enactment of this Act."); 42 U.S.C. § 9612(d)(1994) ("No money in the Fund may be used under subsection (c)(1) and (2) of this section, nor for the payment of any claim under subsection (b) of this section, where the injury, destruction, or loss of natural resources and the release of a hazardous substance from which such damages resulted have occurred wholly before the enactment of this Act.").

415. *See* United States v. Mottolo, 1992 WL 674737, *8 (D.N.H. 1982). ("Once a defendant is found to be a liable party under CERCLA, it is liable for each of the types of damages listed in the statute. Included among the statutory damages are injuries to natural resources.") (citation omitted).

416. *See supra* notes 342-47 and accompanying text.

for natural resource damages caused by releases prior to its ownership and control.⁴¹⁷

The structure of the third party defense also confirms that individual causation is not necessary for natural resource damage claims. Section 107(b)(3) of CERCLA provides the exclusive defense for liability for both response costs and natural resource damages. Section 107(b)(3) provides in part that a defendant must prove that the “release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by — (1) an act of God; (2) an act of war; (3) an act or

417. See *Idaho v. Hanna Mining Co.*, 882 F.2d 392 (9th Cir. 1989). In *Hanna Mining Co.*, the United States Court of Appeals for the Ninth Circuit made clear that even a current owner of a facility can be held liable for past natural resource damages, holding that a recent purchaser of a mine could be held liable for natural resource damages that had occurred in the past during the ownership of predecessors. *Id.* at 395. In *Hanna Mining Co.*, the defendants purchased the Blackbird Mine in 1967 after various companies had operated the mine from 1917 to 1967. As part of a pilot program to reopen the mine, the defendants constructed a waste water treatment plant and obtained a permit from the United States Forest Service for full-scale operation after issuance of an environmental impact statement. In 1982, the defendants ceased all activities at the mine having never undertaken full-scale operations. The defendants, however, continued to operate the federally permitted waste water treatment plant. The State of Idaho then filed a natural resource damage action under CERCLA against the defendants for past damages to aquatic life and wildlife. *Id.* at 393-94. The issue on appeal was whether 42 U.S.C. § 9607(f), Section 107(f) of CERCLA, barred the State’s claim against the current owners for historic natural resource damages. This Section of CERCLA provides that a party shall not be liable for damages to natural resources “specifically identified as an irreversible and irretrievable commitment of natural resources in an environmental impact statement . . . and the decision to grant a permit or license authorizes such commitment of natural resources . . .” 42 U.S.C. § 9607(f). The current owners argued that the environmental impact statement associated with the Forest Service permit exempted them from all liability for past releases. The United States Court of Appeals for the Ninth Circuit rejected this argument, holding that the current owners could be held liable for historic natural resource damages caused by releases from prior operators:

The statute and legislative history do not contemplate excusing liability for past activities. Under the statute, liability is excused for damages arising from a newly permitted project. In this case, the damages arise from the pre-1967 mining activities. The permits were issued for a proposed reopening of the Blackbird mine that was never implemented.

Liability arising from past activities is not automatically extinguished by an authorization in an EIS for a new project. CERCLA explicitly imposes liability on current owners for hazardous substances dumped by previous owners. The EIS process is not a means for absolving an otherwise liable entity from responsibility for damages arising from past activities. . . the EIS exception does not apply to past or historic injury that has already occurred *or* is ongoing because of that historic conduct.

Hanna Mining Co., 882 F.2d at 395.

omission of a third party"⁴¹⁸ In the context of cost recovery, courts have concluded that the third party defense would be superfluous if the plaintiff first had to prove that a defendant caused a release.⁴¹⁹ Once a plaintiff has met this alleged burden to prove that a defendant caused a release, the defendant would never be in a position to prove the contrary. Again, both the plaintiff and the defendant cannot have the burden of proof on the same issue. The same must be true for natural resource damage claims. It is illogical under the structure of the statute to require a plaintiff to prove that a defendant caused a particular release.

It should be noted that the Department of the Interior has promulgated regulations for the purpose of conducting natural resource damage assessments, which require an analysis of whether a particular type of release caused injury to natural resources.⁴²⁰ Some commentators have interpreted the regulations to require proof that a particular defendant caused an injury.⁴²¹ The Department of Interior regulations, however, contain no express requirement of linking an injury to a defendant and simply establish standards by which a plaintiff may obtain a presump-

418. 42 U.S.C. § 9607(b)(3) (1994).

419. See *supra* notes 343-44 and accompanying text.

420. 43 C.F.R. § 11.62(f)(3) (2000); *Ohio v. United States Dep't of the Interior*, 880 F.2d 432 (D.C. Cir. 1989). Section 301(c) of CERCLA, 42 U.S.C. § 9651(c), required the President, through the Department of the Interior, to promulgate regulations establishing standards for studying natural resource damages and identifying "best available procedures" to determine the amount of such damages. *Id.* Under the Department of the Interior's damage assessment regulations a plaintiff may establish a rebuttable presumption of causation. 43 C.F.R. § 11.10 (2000). The regulations require proof of two elements to establish a rebuttable presumption of causation: (1) acceptance criteria showing that certain injuries are caused by a particular hazardous substance, for example, based on commonly documented responses, laboratory and field studies, and statistical analysis, and (2) a pathway showing a connection between a particular defendant's release and the injury. See 43 C.F.R. §§ 11.62, 11.63; *Ohio v. United States Dep't of the Interior*, 880 F.2d at 468-70. A plaintiff's failure to establish these two elements, however, only affects the availability of a rebuttable presumption and does not define what proof is required under the statute. *Id.* at 472. Further, the Department of the Interior's regulations do not require that a plaintiff link injuries to specific releases or spills and allow damage assessments of injuries caused by cumulative releases. See 51 Fed. Reg. 27706 (Aug. 1, 1986).

421. See, e.g., Robert F. Copple, *The New Economic Efficiency in Natural Resource Damage Assessments*, 66 U. COLO. L. REV. 675, 684-89 (1995); Robert F. Copple, *Natural Resource Damages Causation, Fault, and the Baseline Concept: A Quandary in Environmental Decisionmaking*, 26 ENVTL. L. REP. 10457 (1996).

tion of causation.⁴²² Thus, even if the regulations imposed a requirement of proving individual causation, a plaintiff asserting a natural resource damage claim could elect not to take advantage of the regulation's presumption of causation and could rely on the plain language of the statute to establish liability.⁴²³

Some courts and commentators arguing that natural resource damage claims are subject to an individual causation standard have relied on dicta in *Idaho v. Bunker Hill Co.*⁴²⁴ to support the argument that CERCLA requires linking natural resource damages to a defendant.⁴²⁵ *Idaho v. Bunker Hill Co.*, however, provides no clear support for this proposition. In *Idaho v. Bunker Hill Co.* the United States District Court for the District of Idaho construed Section 107(f) of CERCLA,⁴²⁶ which provides that there shall be no natural resource damage recovery where the damages and the release from which such damages resulted occurred wholly before the enactment of CERCLA in 1980.⁴²⁷ The *Bunker Hill* court held that damages occurring after 1980 are not barred, even if the release occurred before 1980.⁴²⁸ The State of Idaho made the argument that because CERCLA is a strict liability statute, proof of causation is not necessary.⁴²⁹ In response, the *Bunker Hill* court stated in dicta:

Where the State's analysis goes astray is rooted in its misconception of the rule of causation under the CERCLA statute. The

422. See *Ohio v. United States Dep't of the Interior*, 880 F.2d at 472. The Department of the Interior's regulations do not require that a plaintiff link injuries to specific releases or spills and allow damage assessments of injuries caused by cumulative releases. See 51 Fed. Reg. 27706 (Aug. 1, 1986).

423. *Id.*

424. *Idaho v. Bunker Hill*, 635 F. Supp. 665 (D. Idaho 1986).

425. See *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146 (1st Cir. 1989) (stating that in a natural resource damage case there must be a connection between the defendant and the damages to the natural resources, while in a cost recovery case there must be a connection between the defendant and the response costs incurred) (relying on *Idaho v. Bunker Hill*, 635 F. Supp. 665 (D. Idaho 1986)); John Copeland Naggle, *CERCLA, Causation and Responsibility*, 78 MINN. L. REV 1493, 1544 (1994) (same); Robert L. Glicksman, *Pollution of the Federal Lands IV: Liability for Hazardous Waste Disposal*, 12 UCLA J. ENVT. L. & POL'Y, 233, 343 & n. 312 (1994) (same); Note, *Judicial Review of Natural Resource Damage Assessments under CERCLA: Implications of the Right of Trial by Jury*, 70 N.Y.U. L. REV 352, 396 n.30 (1995) (same); James D. Barnette & Adam P. Stochak, *A Primer on Natural Resource Damages under CERCLA*, 6 INSIDE LITIGATION 8, 9 (1992) (same); Julie Mendel, *CERCLA Section 107: An Examination of Causation*, 40 WASH. J. URB. & CONTEMP. LAW, 83, 101 (1991) (same).

426. 42 U.S.C. § 9607(f) (1994).

427. 635 F. Supp. at 674.

428. *Id.* at 674-75.

429. *Id.*

plaintiff has argued that since there is admittedly strict liability under the statute, there is no need for causation. However, strict liability does not abrogate the necessity of showing causation, but merely displaces any necessity for showing some degree of culpability by the actor. In other words, under strict liability, the mental state of the defendant is irrelevant, but the damage for which recovery is sought must still be causally linked to the act of the defendant. . . Also, the use in Section 107(f) of the word "resulted" ties the damages to the releases. The proof must include a causal link between releases and post-enactment damages which flowed therefrom.⁴³⁰

To the extent the *Bunker Hill* court understood the State of Idaho to have based its strict liability argument on strict liability for criminal/public welfare offenses, the *Bunker Hill* court was correct to state that strict liability only refers to mens rea. To the extent the State of Idaho was attempting to articulate that strict liability for ultrahazardous activity is the appropriate paradigm to use in analyzing CERCLA causation and that mere ownership of the instrumentality is sufficient for causation and liability, the *Bunker Hill* court erred by suggesting that damages must be causally linked to the individual acts of the defendant. Under strict liability for ultrahazardous activity, merely owning the instrumentality is sufficient for causation and liability. Nevertheless, the Court's commentary on common law was by no means an analysis of what CERCLA required. The *Bunker Hill* court clearly explained that the only requirement CERCLA imposes is that damages result from a release from a vessel or facility. Defendants are liable based on their relationship to that instrumentality, not based on individual causation.⁴³¹

Several courts and commentators have interpreted this language in Section 107(a)(4)(C) to mean liability is imposed for "damages for injury to, destruction of, or loss of natural resources . . . resulting from such a release."⁴³² The apparent sig-

430. *Id.* at 674 (citations omitted).

431. In any case, the three years later, in *Idaho v. Hanna Mining Co.*, 882 F.2d 392 (9th Cir. 1989), the United States Court of Appeals for the Ninth Circuit made clear that even a current owner of a facility can be held liable for past natural resource damages, holding that a recent purchaser of a mine could be held liable for natural resource damages that had occurred in the past during the ownership of predecessors. *Id.* at 395.

432. Ohio v. United States Dep't of the Interior, 880 F.2d 432, 471 n.54 (D.C. Cir. 1989); Jason R. Bentley, *Examining the Role of Potentially Responsible Parties in Assessing Natural Resource Damages*, 23 VT. L. REV. 431, 436 (1998); William D. Brighton, *Natural Resource Damages Under the Comprehensive Environmental Re-*

nificance of this interpretation is that it allows for the conclusion that natural resource damages must be caused by a specific historical release, as opposed to any release.⁴³³ In order to reach this reading of the statute, however, it is necessary to place a nonexistent comma within the statutory language as follows: “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.” Without the presumed comma, the phrase “resulting from such a release” can only logically modify the language to which it is directly attached; that is, the language about reasonable assessment costs. Under this reading, the phrase “reasonable costs of assessing such injury, destruction, or loss resulting from such a release” simply means that natural resource damages include the reasonable costs of assessing the impact of the hazardous substance in question.

Moreover, an implicit assumption of the interpretation based on the nonexistent comma is that “such a release” somehow means “said release,” thereby tying a specific release to specific damages. In fact “such a release” is more logically interpreted to mean a “release of that kind” not “said release.” This conclusion is supported by the fact that Section 107(a)(4)(C) of CERCLA uses “such” in the phrase “including the reasonable costs of assessing such injury, destruction, or loss” to mean “said.” Therefore, to the extent “such” means “said,” the phrase “such a” in the same sentence must convey a different thought, namely a release “of that kind.” In fact, courts have interpreted the phrase “such hazardous substance” in Section 107(a)(3) to mean hazard-

sponse, Compensation, and Liability Act, 1599, 1608 (ALI-ABA 1997), available in WESTLAW, SB91 ALI-ABA 1599.

433. *Ohio v. United States Dep’t of the Interior*, 880 F.2d at 470 (“[t]here is little evidence . . . that Congress specifically intended to ease the standard of proof for showing that a particular spill caused a particular biological injury.”); *United States v. Allied Chem. Corp.*, 587 F. Supp. 1205, 1207 (N.D. Cal. 1984) (noting that superfund designed to pay costs of responding to release and for damages caused to natural resources by such release); Gordon Johnson, *Natural Resource Damages Under CERCLA, OPA and CWA*, 333, 334 (ALI-ABA 1998), available in WESTLAW, SD28 ALI-ABA 333 (CERCLA liability for natural resource damages follows from “injury, destruction or loss of natural resources resulting from a release of a hazardous substance” CERCLA §107(a)(4)(C)”; William D. Brighton, *Natural Resource Damages Under the Comprehensive Environmental Response, Compensation, and Liability Act, 1599, 1608 (ALI-ABA 1997), available in WESTLAW, SB91 ALI-ABA 1599 (CERCLA provides for damages for resource injury, destruction, or loss “resulting from” a release of a hazardous substance. 42 U.S.C. § 9607(a)(4)(C))*).

ous substances "of that kind."⁴³⁴ Reading "such a release" to mean a release of that kind is entirely consistent with the idea that "resulting from such a release" refers to reasonable assessment costs because an assessment of natural resource damages generally can only proceed based on the toxicological properties of a particular hazardous substance or a class of hazardous substances. Thus, a scientific assessment must focus on a particular category of releases, not a specific release on a particular day, and on the effect the hazardous substance or types of hazardous substances generally can have on natural resources, such as a particular species or habitat. In fact, injury to natural resources can result from the accumulation of numerous small releases. In this context, an assessment may be undertaken based on an accumulation of releases, not for each individual release.⁴³⁵ Generally, the mere presence of hazardous substances in the environment is sufficient to show that a release occurred.⁴³⁶ A plaintiff asserting a natural resource damage claim need not identify the date and time of each release and the individual impact of each release to prove the basic elements of liability. Courts should therefore construe liability for natural resource damages in a manner consistent with the basic paradigm that underlies CERCLA liability. A defendant is not liable based on individual causation, but based on a relationship to an instrumentality.

C. *The Third Party Defense and Individual Proximate Causation*

Another problem of individual causation that courts have struggled with is the requirement in CERCLA's third party defense that a defendant must prove that the "release or threat of

434. See *United States v. Monsanto Co.*, 858 F.2d 160, 165 (4th Cir. 1988); *City of New York v. Exxon Corp.*, 766 F. Supp. 177, 191 (S.D.N.Y. 1991).

435. In this context, it should be noted that numerous releases from several distinct vessels or facilities can contribute to cause one common injury. Common law rules on joint and several liability already deal with this situation and provide that once a plaintiff has proven a contribution by a defendant, the burden of proof shifts to a defendant to show the absence of causation. Courts have adopted this rule in the context of contamination from numerous sources. In the context of a natural resource damage claim where releases have occurred from several facilities, a plaintiff likewise should only need to show a contribution from each facility to establish joint and several liability. See *In Re Acushnet River & New Bedford Harbor Proceedings*, 722 F. Supp. 893, 897 n. 8 (D. Mass. 1989).

436. See *Mid Valley Bank v. N. Valley Bank*, 764 F. Supp. 1377, 1387 (E.D. Cal. 1991); *United States v. Hardage*, 761 F. Supp. 1501, 1510 (W.D. Okla. 1990); *United States v. Mottolo*, 695 F. Supp. 615, 623 (D.N.H. 1988); *Washington v. Time Oil Co.*, 687 F. Supp. 529, 532 (W.D. Wash. 1988).

release of a hazardous substance and the damages resulting therefrom were caused *solely* by — (1) an act of God; (2) an act of war; (3) an act or omission of a third party . . .”⁴³⁷ Because CERCLA liability stems from harm caused by an instrumentality in the form of a vessel or a facility, arguably the mere presence of the vessel or facility will always in some way contribute to the release or threatened release, and the owner or operator of that vessel or facility would also be a cause in fact of the release or threatened release. In other words, but for the presence of the vessel or facility, the release would not have occurred. If, for example, a vessel were present on navigable waters, and an act of God in the form of a hurricane caused a release of hazardous substances, the hurricane arguably would not qualify as the sole cause of the release because the presence of the vessel alone was a cause in fact. If strict “but for” causation were sufficient to eliminate the element of sole causation, the defense would appear never to be available to owners and operators based on the normal business activity of owning or operating the vessel or facility. The only solution to this paradox is to draw some distinction between the nature of the causation that is required as between a defendant and the unrelated sole cause or causes.

Courts construing the third party defense under the Clean Water Act also came to grapple with the problem of sole causation.⁴³⁸ Examination of the case law under the Clean Water Act is instructive. It should be noted that the statutory provisions relating to the defense in the two statutes are different, but many elements of the third party defense in Section 107(b)(3) of CERCLA⁴³⁹ appear to have their origin in case law construing the third party defense under the Clean Water Act.⁴⁴⁰ For example, the Clean Water Act third party defense has no express exception for persons in contractual relationships with a defendant, but courts construing the Clean Water Act came to hold that any party in a contractual relationship with an owner or operator was not really a “third party” because the owner/operator retains

437. 42 U.S.C. § 9607(b)(3) (1994) (Emphasis added).

438. *S. Pac. Transp. Co. v. United States*, 13 Cl.Ct. 402 (Ct.Cl. 1987); *Cities Serv. Pipe Line Co. v. United States*, 742 F.2d 626, 627 (Fed. Cir. 1984); *Travelers Indem. Co. v. United States*, 230 Ct.Cl. 867, 868 (Ct.Cl. 1982); *Union Petroleum Corp. v. United States*, 651 F.2d 734, 745 (Ct. Cl. 1981).

439. 42 U.S.C. § 9607(b)(3) (1994).

440. 33 U.S.C. § 1321(f),(g) (1994).

control and remains responsible for the third party's conduct.⁴⁴¹ Thus, courts held that a defendant cannot meet the defense if any employee or independent contractor performing services for the vessel or facility caused the spill⁴⁴² or if a wholly owned subsidiary caused the spill.⁴⁴³ Otherwise stated, the third party had to have been a complete stranger to the vessel or facility.⁴⁴⁴ Courts allowed the defense, for example, if a vandal were the immediate cause of a spill,⁴⁴⁵ or in the case of another vessel which suddenly collided with the defendant's docked vessel.⁴⁴⁶ CERCLA in ef-

441. See *United States v. W. of Eng. Ship Owner's Mut. Prot. & Indem. Ass'n*, 872 F.2d 1192, 1199 n.13 (5th Cir. 1989). As the Fifth circuit stated in *W. of England Ship Owner's Mut. Prot. & Indem. Ass'n*:

The legislative history indicates that an owner or operator will be exempt from liability under section 1321(f)(1) when the discharge is beyond his control. Senate Comm. Report, S. Rep. No. 351, 91st Cong., 1st Sess. 5-6 (1969), reprinted in III EPA Compilation 1328-29 (1973). Although the Senate Report used the phrases "no control" and "beyond the control of" to refer specifically to an act of war and an act of God, the phrases give some guidance to the word "caused" and to the exceptions as a whole. The Senate Report further defined "beyond the control of," when referring to an act of God, by stating "[a]nother area which the committee believed to be beyond the control of an owner or operator would be any discharge caused solely by an act of God about which the owner could have no foreknowledge, could make no plans to avoid, or could not predict." *Id.* at 6. This language—"no foreknowledge," "make no plans to avoid," and "could not predict"—supports the use of foreseeability as a means of setting the parameters of the term "caused" as used in section 1321(f)(1).

Id.

442. *United States v. LeBeouf Bros. Towing Co.*, 621 F.2d 787, 789 (5th Cir.); *Burgess v. M/V Tamano*, 564 F.2d 964, 981-82 (1st Cir. 1977); *In Re Oriental Republic of Uruguay*, 821 F. Supp. 928, 932 (D. Del. 1992).

443. *Tanker Hygrade No. 18, Inc. v. United States*, 526 F.2d 805 (Ct. Cl. 1975).

444. *Burgess v. M/V Tamano*, 564 F.2d at 981-82.

445. *Id.* at 981-82 (The first three exceptions, "(A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government," (which, individually or collectively, must be solely responsible) are manifestly addressed to actions entirely outside the ship, or in the case of actors, to strangers. We read the final exception, "(D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent," correspondingly.). See also, *Travelers Indem. Co. v. United States*, 230 Ct.Cl. 867 (Ct.Cl. 1982); *Atlantic Richfield Co. v. United States*, 1 Ct.Cl. 261 (Ct.Cl. 1982); *Chicago, Milwaukee, St. Paul & Pac. R.R. Co. v. United States*, 575 F.2d 839, 840 (Ct.Cl. 1978) (noting that criminals were immediate cause of spill from plant storage tank); *Proctor Wholesale Co. v. United States*, 215 Ct.Cl. 1049 (Ct.Cl. 1978) (vandals caused spill); *City of Pawtucket v. United States*, 211 Ct. Cl. 324 (Ct.Cl. 1976).

446. See *United States v. W. of Eng. Ship Owner's Mutual Prot. & Indem. Assoc.*, 872 F.2d 1192, 1198 & n.12 (5th Cir. 1989). As the Fifth circuit stated in *West of England Ship Owner's Mutual Protection & Indemnity Association*:

This statement [that more than "but for" causation is necessary for the defendants to be liable] is supported by the legislative history. The Senate Committee Report gave a hypothetical example of a discharge which would be caused solely by an act of a third party. "Among such acts would be a discharge caused when a vessel

fect codified the Clean Water Act case law by providing that the third party had to be “other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by common carrier by rail). . .”⁴⁴⁷

In addition, several early cases construing the Clean Water Act held that even in the case of third party vandals, a defendant must still show the exercise of due care and precautions against vandalism to show sole causation because acts of third parties are generally foreseeable even in low crime areas.⁴⁴⁸ This is entirely consistent with the strict liability notion that an instrumentality is hazardous because it can easily escape control for any variety of reasons, including interference by vandals. Courts construing the Clean Water Act came to hold that if a human force was the cause of the release, the defendant had to show that the release could not have been prevented by precautions.⁴⁴⁹ Consistent with this case law, CERCLA Section 107(b)(3) came to require

collided with another vessel which was secured to a dock.” Senate Comm.Report, S.Rep. No. 351, 91st Cong., 1st Sess. 6 (1969), reprinted in III EPA Compilation 1329 (1973). If only a “but for” causation was required under section 1321(f)(1)(D), then the hypothetical example would be rendered nugatory because the decision to secure the vessel to the particular dock would be a “but for” cause.

Id.

447. 42 U.S.C. § 9607(b)(3) (1994). Consistent with the idea expressed in legislative history of the third party defense that a third party had to be totally unrelated, some courts construing CERCLA’s statutory phrase “in connection with” suggested that a deed transferring contaminated property from a polluter was “in connection with a contractual relationship.” See, e.g., *New York v. Shore Realty*, 759 F.2d 1032, 1049 n.23 (2d Cir. 1985); *United States v. Md. Bank & Trust Co.*, 632 F. Supp. 573 (D. Md. 1986); *United States v. Mirable*, 15 Env’tl. L. Rep. 20,994 (E.D. Pa. Sept. 4, 1985). The issue of owner liability “became controversial as a result of several cases in which apparently ‘innocent’ landowners were held liable for response costs greatly in excess of the value of the land.” *United States v. Shell Oil Co.*, 841 F. Supp. 962, 972 (C.D. Cal. 1993). Congress, therefore, settled the controversy in the 1986 SARA amendments. See *id.* The 1986 SARA amendments added Section 101(35) of CERCLA, 42 U.S.C. § 7601(35), which confirmed that a “contractual relationship” includes a deed, unless the purchaser can prove certain additional elements such as a lack of knowledge of the contamination. *Id.*

448. *S. Pac. Transp. Co. v. United States*, 13 Cl.Ct. 402 (Ct. Cl. 1987); See also *Travelers Ins. Co. v. United States*, 2 Cl.Ct. 758 (Ct.Cl. 1983); *Atl. Richfield Co.*, 1 Cl.Ct. at 263. As the Court of Claims has noted, “Obviously, conditions being unfortunately what they are today, vandals must always be expected.” *Travelers Indemnity Co.*, 230 Ct.Cl. at 869. Therefore, doing “nothing whatsoever” to prevent vandalism is an inadequate response as a matter of law. *Chicago, Milwaukee*, 575 F.2d at 159; *Proctor Wholesale Co.*, 215 Cl.Ct. at 1051.

449. *S. Pac. Transp. Co. v. United States*, 13 Cl.Ct. 402 (Ct. Cl. 1987)

that a defendant must also establish that "he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions . . ." to establish the defense.⁴⁵⁰

Courts construing the legislative history of the Clean Water Act also concluded that the defense is available only when the release caused by an outside force was completely beyond the control of the owner/operator.⁴⁵¹ These courts relied on the fact that a force majeure, such as an act of God, is by definition unforeseeable and beyond prevention.⁴⁵² Similarly, Section 107(b)(3) of CERCLA came to require that a defendant must also establish "that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances . . ."⁴⁵³ This provision can be interpreted as an obligation to use care in anticipation of potential acts of God or war because the obligation to take precautions is only expressly in reference to acts or omissions of third parties. To the extent a force majeure is inherently unforeseeable,⁴⁵⁴ however, it may not make sense to require due care with respect to an unforeseeable event. Therefore, the due care provision can be viewed as imposing an obligation to use due care in relation to a release that has already occurred. Thus, to preserve the defense, a defendant must act responsibly once a third party, an act of God or an act of war solely causes a release.

CERCLA's use of the word "omission" in the phrase "act or omission" of a third party suggests that the conduct of the third party must be wrongful. After all, an omission can only exist in

450. 42 U.S.C. § 9607(b)(3) (1994).

451. *Liberian Poplar Transports, Inc. v. United States*, 26 Cl.Ct. 223, 226 (Ct.Cl. 1992) ("Whether the crew did or did not actually anticipate the storm is beside the point. If the crew had monitored the radio for weather conditions, they clearly *could* have anticipated and taken precautions against the storm"); *see also* *United States v. W. of England Ship Owner's Mut. Prot. & Indem. Ass'n*, 872 F.2d 1192, 1199 n.13 (5th Cir. 1989) ("The legislative history of the Water Quality Improvement Act of 1970 provides: '[O]nly those acts about which the owner could have had no foreknowledge, could have made no plans to avoid, or could not predict. . . . Thus, grave natural disasters which could not be anticipated in the design, location, or operation of the facility or vessel . . . would be outside the scope of the owner's or operator's responsibility.' Conf. Rep. No. 940, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Admin. News at 2712, 2722").

452. *Id.*

453. 42 U.S.C. § 9607(b)(3) (1994).

454. *See* *United States v. Brooks-Callaway Co.*, 318 U.S. 120, 123-24 (1943); *Gulf Oil Corp. v. Fed. Energy Reg. Comm'n*, 706 F.2d 444, 452 (3d Cir. 1983).

relation to a duty to act. The Clean Water Act defense, however, expressly provides that the act or omission of the third party need not be negligent to qualify as the sole cause.⁴⁵⁵ The defense is available “without regard to whether any such act or omission was or was not negligent.”⁴⁵⁶ One significant difference between the third party defense of the Clean Water Act and CERCLA is that the CERCLA does not contain this exception, suggesting perhaps that one way to distinguish the causation of the defendant and the third party is that the defendant must prove that the third party’s conduct was somehow wrongful.

In fact, some courts construing the third party defense under the Clean Water Act attempted to solve the statutory paradox by holding that a defendant contributed to the release if the defendant was negligent.⁴⁵⁷ Other courts, however, qualified that while “affirmative acts” need not be negligent,⁴⁵⁸ omissions to act must have been wrongful in light of a legal duty to act.⁴⁵⁹ Other courts, however, rejected the idea that a defendant’s omission must be linked to fault because Clean Water Act liability is strict and strict liability requires no proof of fault.⁴⁶⁰ Thus, to these courts, a showing of fault or breach of legal duty would not be required to show that a defendant’s omission caused a re-

455. 33 U.S.C. § 1321(g) (1994) (“[A]n act or omission of a third party without regard to whether any such act or omission was or was not negligent.”).

456. *Id.*

457. *Cities Serv. Pipe Line Co. v. United States*, 742 F.2d 626, 627-28 (Fed. Cir. 1984); *United States v. Bear Marines Servs.*, 509 F. Supp. 710 (E.D. La. 1980).

458. *Cities Serv. Pipe Line Co. v. United States*, 742 F.2d 626, 627 (Fed. Cir. 1984); *Reliance Ins. Co. v. United States*, 677 F.2d 844, 848-49 (Ct. Cl. 1982). In this sense the analysis is very similar to the common law courts construing the statutes imposing strict liability for injuries caused by dogs. The courts came to conclude that the passive conduct of a animal is not the cause of an injury.

459. *Reliance*, 677 F.2d at 847; *Chicago, Milwaukee, St. Paul and Pac. R.R. Co. v. United States*, 575 F.2d 839 (Ct. Cl. 1978); *Proctor Wholesale Co v. United States*, 578 F.2d 1388, 1051 (Ct.Cl. 1978).

460. *Kyoei Kaiun Kaisha, Ltd. v. M/V Bering Trader*, 795 F. Supp. 1054, 1056. (W.D. Wash. 1991) (“Congress intended its strict liability system to make owners or operators liable if their actions contributed in any way to an accident, without regard to whether or not their actions were negligent. Only in situations where the accident was completely beyond the control of the polluting vessel would they be excused from liability.”); *United States v. Nat’l Wood Preservers*, 1986 WL 12761, at *4 (E.D. Pa. Nov. 7, 1986) (“Defendants invoking the sole cause exception must show that their conduct, however slight, was not a contributing cause of the discharge. This conduct may involve an affirmative act or a failure to act. Moreover, defendants must not be engaged in the activity or enterprise that made such a discharge possible.”) (citations omitted).

lease.⁴⁶¹ Perhaps because the Clean Water Act expressly states that the negligence vel non of the third party is irrelevant, some courts came to focus the inquiry on the defendant's conduct. The problem with this approach, however, is that the nature of the defendant's conduct sufficient for liability is already defined by the statute. Merely owning or operating the instrumentality is sufficient for liability and causation.⁴⁶² To impose additional causation requirements based on fault rewrites the liability standard. For that reason, other courts construing the Clean Water Act third party defense would not allow a defendant to establish the defense by showing an absence of its own negligence.⁴⁶³

Other courts construing the Clean Water Act's third party defense attempted to solve the paradox by holding that a defendant's insubstantial conduct would not be deemed a cause of a release.⁴⁶⁴ This formulation is consistent with the idea that a proximate cause is a "substantial" cause,⁴⁶⁵ but the phrase "caused solely by" has nothing to do with proximate cause.⁴⁶⁶ In fact, there can be more than one proximate cause.⁴⁶⁷ Also, any notion of insubstantiality contradicts the common law notion that several insubstantial causes can be jointly and severally liable for cumulatively contributing to a common harm.⁴⁶⁸ Several cases construing the Clean Water Act defense have noted that the sole cause must be a direct or immediate cause of the release.⁴⁶⁹

461. *United States v. W. of Eng. Ship Owner's Mut. Prot. & Indem. Ass'n*, 872 F.2d 1192, 1199 n.13 (5th Cir. 1989); *Kyoei Kaiun Kaisha Ltd. v. M/V Bering Trader*, 795 F. Supp. 1054, 1056 (W.D. Wash. 1991).

462. *United States v. Tex-Tow, Inc.*, 589 F.2d 1310, 1314 (7th Cir. 1978).

463. *United States v. W. of Eng. Ship Owner's Mut. Prot. & Indem. Ass'n*, 872 F.2d 1192, 1199 n.13 (5th Cir. 1989); *Kyoei Kaiun Kaisha Ltd. v. M/V Bering Trader*, 795 F. Supp. 1054, 1056 (W.D. Wash. 1991).

464. *United States v. W. of Eng. Ship Owner's Mut. Prot. & Indem. Ass'n*, 1987 WL 17320 (E.D. La. Sept. 15, 1987).

465. See *supra* notes 101-105 and accompanying text.

466. *Id.*

467. *Id.*

468. *Id.*

469. *United States v. W. of Eng. Ship Owner's Mutual Prot. & Indem. Ass'n*, 872 F.2d 1192, 1199 n.15 (5th Cir. 1989) ("We are not here presented with, and we do not address, a situation in which a discharge is a direct but unforeseeable consequence of the defendants' conduct, see *Prosser & Keeton, supra*, at § 42, which was apparently the situation presented to the Court of Claims in *Reliance Ins. Co. v. United States*, 677 F.2d 844 (Ct.Cl. 1982)"); *S. Pac. Transp. Co. v. United States*, 13 Cl. Ct. 402 (Ct.Cl. 1987) ("Where a vandal is the immediate cause of a spill, recovery must be denied "if the claimant does not prove that reasonable actions had been taken to prevent or forestall such intervention by a third party. . . . Thus, where the immediate cause of a spill is an act of God, an act of war, Government negligence or the act of a third party, it is worth the social cost to litigate the issue of whether or not the

These cases suggest a solution to the paradox that focuses on the actions of the third party or other force and not the acts of the defendant. Requiring that the sole cause be the immediate cause of the release or threat of release is also consistent with the conceptual framework of strict liability for ultrahazardous activity because it contemplates a force that causes the instrumentality to escape control. *Rylands v. Fletcher* itself introduced the idea that a force majeure (“an act of God or a *viz major*”) can provide a defense if it was the immediate cause of the damage. Thus, under this formulation, merely storing oil in an oil tanker would not necessarily be an immediate cause of a release, if the tanker were moored and another vessel rammed into it. However, an operator running its own tanker aground would be the immediate cause and would not qualify for the defense.⁴⁷⁰

discharger was negligent in not taking reasonable precautions to prevent the discharge. In those instances, strict liability does not apply, but rather the discharger bears the burden of proof to show that it took all reasonable precautions”) (citations omitted); *Union Petroleum Corp. v. United States*, 651 F.2d 734, 745 (Ct.Cl. 1981) (“This provision has been construed to require not only that the discharge be the immediate result of the act or omission of a third party, but also that plaintiff must not by act or omission have contributed. . . the parties here agree that unknown vandals committing criminal acts were the immediate cause of the Union spill. The focus thus turns to plaintiff’s precautionary measures against vandalism. The standard to be applied is one of ‘reasonable care.’”); *Chicago, Milwaukee, St. Paul and Pac. R.R. Co. v. United States*, 575 F.2d 839 (Ct. Cl. 1978); *United States v. Nat’l Wood Preservers*, 1986 W.L. 12761, * 4 (E.D. Pa. 1986) (“Thus, even when a third party is the immediate cause of a harmful discharge, courts must determine whether the defendant could foresee the possibility of the discharge”); *See also United States v. Tex-Tow, Inc.*, 589 F.2d 1310, 1314 (7th Cir. 1978) (noting that third party was immediate cause of release, but that third party defense not available in penalty case). An example of a third party defense suggested in the legislative history of the Clean Water Act is consistent with this analysis: an owner/operator is entitled to the third party defense if another vessel collides with the docked vessel of the owner/operator. *United States v. W. of Eng. Ship Owner’s Mut. Prot. & Indem. Ass’n.*, 872 F.2d 1192, 1199 n. 13 (5th Cir. 1989) (“The legislative history of the Water Quality Improvement Act of 1970 provides: ‘[O]nly those acts about which the owner could have had no foreknowledge, could have made no plans to avoid, or could not predict. . . Thus, grave natural disasters which could not be anticipated in the design, location, or operation of the facility or vessel . . . would be outside the scope of the owner’s or operator’s responsibility.’” Conf. Rep. No. 940, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Admin. News at 2712, 2722”). *But see Reliance Ins. Co. v. United States*, 677 F.2d 844 (Ct.Cl. 1982) (“Defendant endeavors to persuade us that we should read “caused solely by” to mean the immediate cause of the spill. While such an interpretation may be plausible under the particular facts of this case, its obvious emphasis on considerations of timing suggests a purely mechanical administration that could, in certain situations, lead to anomalous and unjust result.”).

470. *S. Pac. Transp. Co. v. United States*, 13 Cl.Ct. 402, 1794 (Ct.Cl. 1987); *Union Petroleum Corp. v. United States*, 651 F.2d 734, 745 (Ct. Cl. 1981); *Chicago, Milwaukee, St. Paul & Pac. R.R. Co. v. United States*, 575 F.2d 839 (Ct. Cl. 1978).

Courts interpreting the third party defense under CERCLA have also strived to find a way to interpret the statutory third party defense to allow a defendant to assert the defense in the context of normal business activities.⁴⁷¹ Relying on Clean Water Act case law, courts interpreting CERCLA have attempted to graft notions of "proximate causation" onto CERCLA's third party defense, interpreting "caused solely by" to mean "proximately caused solely by."⁴⁷² Moreover, construing proximate cause to mean foreseeability, courts have suggested that a defendant can qualify for the third party defense if it did not foresee the release caused by its activities.⁴⁷³ In this sense a defendant can still assert the defense if it was the owner or operator of the vessel or facility, and thus a cause of a release in the sense of being responsible for the presence of the hazardous instrumentality in the first place.⁴⁷⁴

The use of the term "proximate cause" to suggest that harm from the individual acts of a defendant must have been foreseeable, however, is blatantly inconsistent with CERCLA's strict liability structure. The idea of foreseeability suggests that proof of

471. See *Lincoln Props., Ltd. v. Higgins*, 823 F. Supp. 1528, 1543 (E.D. Cal. 1992) ("To hold the County liable for its 'normal' activities in owning and maintaining the sewer line and wells would be an anomalous result.").

472. *United States v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1263, 1274 (E.D. Cal. 1997); *Lincoln Props., Ltd. v. Higgins*, 823 F. Supp. 1528, 1542 (E.D. Cal. 1992); *G.J. Leasing Co. v. Union Elec. Co.*, 854 F. Supp. 539, 566 (S.D. Ill. 1994).

473. *United States v. Iron Mountain Mines, Inc.*, 987 F. Supp. at 1274 ("The act of permitting miners to enter and mine lands owned by the United States is too indirect to constitute the proximate cause of the AMD [acid mine drainage] at the two parcels on the Iron Mountain mine"); *Lincoln Props., Ltd. v. Higgins*, 823 F. Supp. at 1542 (Under this proximate cause standard, the County has established that any releases or threats of release from County facilities were "caused solely by" third parties. Even assuming that PCE leaked from the County-owned sewer line, there is no evidence of a conduct by the County that contributed to the releases. In fact, the County took reasonable precautions to prevent releases of hazardous substances. The releases were not foreseeable. Similarly, to the extent that there is a threat that PCE will be released from the wells, the County's conduct was "so indirect and insubstantial" that it has been displaced as a causative element. The County may be a "but for" cause of releases or threatened releases. But for the wells there may be no threat that PCE will be released into Zone "C", the deepest of the water zones. Similarly, but for the sewer leaks, some PCE may not have been released into the soil and groundwater. But there is no evidence that the County could or should have foreseen the release.) (citations omitted); *G.J. Leasing Co. v. Union Elec. Co.*, 854 F. Supp. at 566 ("Sarnelli and Slay's violations of law are not foreseeable acts. Accordingly, U.E. is entitled to the presumption that the removal of equipment from its facility would be coordinated in accordance with applicable regulations.").

474. See *Lincoln Props., Ltd.*, 823 F. Supp. at 1542 ("To hold the county liable for its 'normal' activities in owning and maintaining the sewer line and wells would be an anomalous result.")

a defendant's mental state is necessary, but the most basic characteristic of strict liability is that fault in the sense of negligence, recklessness or intent, need not be proven.⁴⁷⁵ Also, even under common law, the definition of proximate cause differs depending on the nature of the claim,⁴⁷⁶ and while the concept of foreseeability may be appropriate in the context of negligence law, it is not necessarily appropriate in the context of strict liability for ultrahazardous activity.⁴⁷⁷ In the context of strict liability for ultrahazardous activity, there is no individual causation requirement other than owning or operating or using the instrumentality.⁴⁷⁸ To the extent proximate cause has any application to strict liability for ultrahazardous activity, it is satisfied if the harm was within the scope of what makes the instrumentality hazardous.⁴⁷⁹ In the context of CERCLA, for example, releases of hazardous substances make CERCLA vessels and facilities hazardous. The fact that a release or threat of release occurred shows legal causation. There is no room in the statutory scheme for notions of foreseeability based on the individual fault or individual causation by a defendant.⁴⁸⁰

Although the case law under the Clean Water Act is not uniform, it is highly relevant to CERCLA in light of CERCLA's provision that the definitions of "liable" and "liability" have the same meaning as under the Clean Water Act.⁴⁸¹ Following the case law under the Clean Water Act, the act of God, act of war or act of a third party must be the immediate cause of the release. If the defendant cannot explain how the release occurred, to show the sole immediate cause, the defendant will not establish the defense. Also, the immediate cause of the release must have been totally beyond the control or avoidance of the defendant. Even if a third party, or other force, caused the instrumentality to

475. See *supra* note 296.

476. See notes 108-68.

477. See *supra* notes 47-49.

478. *United States v. Tex-Tow*, 589 F.2d 1310 (7th Cir. 1978); *Zands v. Nelson*, 797 F. Supp. 805, 815 (S.D. Cal. 1992). In *Zands* the court stated:

On the other hand, it could be argued that merely engaging in the strict liability activity is the tortious act. Indeed, this interpretation recognizes that it is awkward to alter the characterization of an act depending upon later events. The act itself gives rise to liability in tort, and actually is the equivalent of the breach of duty described as a negligent act in a negligence case.

Id.

479. See *supra* notes 60-61 and 114-16.

480. *United States v. Tex-Tow*, 589 F.2d 1310 (7th Cir. 1978); *Zands v. Nelson*, 797 F. Supp. 805, 815 (S.D. Cal. 1992).

481. 42 U.S.C. § 9601 (1994).

escape control, resulting in a release or threat of release, the defendant must still show that there were no measures that could have been taken to prevent the impact of this force and that it took reasonable steps once the release occurred. Thus, a defendant cannot establish the defense simply by showing that it did not foresee the release in the context of its normal business activity. The approach based on the concept of the sole, immediate cause of a release is consistent with the strict liability nature of CERCLA's liability structure because it focuses on the harm caused by an instrumentality and the relationship of the various parties to the instrumentality.

D. *Apportioning a Zero Share Based on Individual Causation*

Section 107(a) of CERCLA expressly provides that liability is subject only to the causation based defenses set forth in Section 107(b).⁴⁸² The statute, however, does not expressly define whether CERCLA liability is joint and several or merely several. Early drafts of CERCLA contained express provisions imposing joint and several liability and allowing for apportionment among jointly liable defendants,⁴⁸³ but the version of CERCLA ultimately enacted by Congress in 1980 contained no such express provisions.⁴⁸⁴ In *United States v. Chem-Dyne Corp.*,⁴⁸⁵ the United States District Court for the Southern District of Ohio concluded that Congress rejected express provisions on apportionment and joint and several liability "to avoid a mandatory legislative standard application in all situations which might produce inequitable results in some cases."⁴⁸⁶ The *Chem-Dyne* court also concluded that "the term was omitted in order to have the scope of liability determined under common law principles, where a court performing case-by-case evaluation of the complex factual scenarios associated with multiple-generator waste sites will assess the propriety of applying joint and several liability on an individual basis."⁴⁸⁷ Accordingly, the *Chem-Dyne* court held that imposition of joint and several liability should be determined as a matter of federal common law guided by the princi-

482. 42 U.S.C. § 9607 (1994).

483. See *supra* notes 252-53 and accompanying text.

484. See *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 268 (3rd Cir. 1992).

485. *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 808 (S.D. Ohio 1983).

486. *Id.* at 808.

487. *Id.* at 805-08.

ples set forth in the Restatement (Second) of Torts, specifically Sections 433A and 881.⁴⁸⁸

It is questionable whether the Congress that enacted CERCLA in 1980 had any intent to fashion rules of apportionment based on individual causation because the liability structure of CERCLA focused on harm caused by the instrumentality. Express provisions relating to apportionment were deleted from the early drafts of CERCLA, just as were provisions imposing a standard of individual causation for liability. Nevertheless, in the legislative history to the 1986 Superfund Amendments and Reauthorization Act,⁴⁸⁹ Congress expressly endorsed the *Chem-Dyne* court's approach of following the Restatement (Second) of Torts.⁴⁹⁰ As a consequence, several courts have held that the 1986 Congress intended that a uniform rule of federal common law be adopted based on the Restatement approach.⁴⁹¹

488. *Id.* at 810.

489. *See supra* note 1.

490. Pub.L. No. 99-499, 100 Stat. 1613 (1986); *Monsanto Co.*, 858 F.2d at 171 n. 23 (“[T]he approach taken in *Chem-Dyne*, was subsequently confirmed as correct by Congress in its consideration of SARA’s contribution provisions.”)(citing H.R.Rep. No. 253(I), 99th Cong.2d Sess., 79-80 (1985), reprinted in 1986 U.S. Code Cong. & Admin. News at 2835, 2861-62).

491. *Redwing Carriers, Inc. v. Saraland Aparts.*, 94 F.3d 1489, 1513 (11th Cir. 1996) (“Recognizing Congress’ intent that ‘traditional and evolving common law principles’ should define the scope of liability under CERCLA, courts have looked to the Restatement (Second) Torts, particularly § 433A, for guidance.”) (citation omitted.); *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 268 n.26 (3d Cir. 1993) (“By adhering to the rules set forth in the Restatement, we also further common law that governs CERCLA’s interstices.”); *O’Neil v. Picillo*, 883 F.2d 176, 178 (1st Cir. 1989) (“It is by now well settled that Congress intended that the federal courts develop a uniform approach governing the use of joint and several liability in CERCLA actions. The rule adopted by the majority of courts, and the one we adopt, is based on the Restatement (Second) of Torts . . .”); *Washington v. United States*, 922 F. Supp. 421, 425 (W.D. Wash. 1996) (*Chem-Dyne* approvingly cited by legislative history of SARA amendments); *Bancamerica Com. Corp. v. Trinity Indus.*, 900 F. Supp. 1427, 1471 (D. Kan. 1995) (Congress explicitly recognized and endorsed the *Chem-Dyne* approach in the legislative history to SARA); *Akzo Coatings, Inc. v. Aigner Corp.* 881 F. Supp. 1202, 1210 (N.D. Ind. 1994) (“Courts have applied the principles enunciated in the Restatement (Second) of Torts in determining whether the costs of remediating environmental harm at a site should be apportioned.”); *Allied Corp. v. Acme Solvents Reclaiming, Inc.*, 691 F. Supp. 1100, 1116 (N.D. Ill. 1988) (“There is some indication that Congress, too, has blessed the rule enunciated in *Chem-Dyne*. Though the amendments under SARA are silent on the scope of liability under Section 107, the House did comment on the issue. In its report the House stated that it ‘fully subscribes to the reasoning of the court in the seminal case of *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983), which established a uniform federal rule allowing for joint and several liability in appropriate CERCLA cases.”).

Under Section 433A of the Restatement (Second) of Torts, joint tortfeasors are held jointly and severally liable unless each defendant can show that: (1) it caused a completely distinct harm, or (2) there is a reasonable basis for apportioning each defendant's contribution to an indivisible harm.⁴⁹² The question of whether a single harm is reasonably capable of being apportioned is a question of law, but once a defendant has articulated a legally sufficient method to apportion a single harm, the defendant bears the burden of proving facts which satisfy the articulated method of apportionment.⁴⁹³

Some courts, however, have attempted to use the Restatement test to introduce a personal causation requirement into CERCLA as an element of liability. According to these courts, a defendant can obtain a zero share of liability under the guise of apportionment based on an absence of individual causation. The leading case in this area is *United States v. Alcan Aluminum Corp.*⁴⁹⁴

In *Alcan*, the United States sought to recover costs incurred in connection with a release of hazardous oily substances into the Susquehanna River from a disposal site known as the Butler Tunnel.⁴⁹⁵ Large quantities of waste oil and other hazardous substances, including waste oil from Alcan, had been dumped in the Tunnel through a borehole.⁴⁹⁶ After many years of dumping, the hazardous substances began leaking into the river, and the United States incurred costs containing the release. The United

492. See *Matter of Bell Petroleum Servs., Inc.*, 3 F.3d 889, 895 (5th Cir. 1993); *United States v. Monsanto Co.*, 858 F.2d 160, 165 (4th Cir. 1988).

493. See *Bell Petroleum*, 3 F.3d at 896; *O'Neil v. Picillo*, 883 F.2d 176, 179 (1st Cir. 1989) (as a practical matter defendants rarely escape joint and several liability); *accord Alcan Aluminum Corp. v. U.S., et. al.*, 964 F.2d 252, 269, *vacated and remanded* (3rd Cir. 1992) (substantial burden).

494. *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 266 (3d Cir. 1992).

495. *Id.* at 255-56. The Butler Tunnel Site was a network of underground mines and tunnels bordering the Susquehanna River. The Butler Tunnel was a 7,500 foot tunnel that drained mine workings and fed directly into the Susquehanna River. Hi-Way Auto Service permitted various liquid waste transport companies to dump over 2 million gallons of waste oil through a borehole above the tunnel. On occasion, Alcan's oily waste was commingled with the waste of other recycling facilities before being disposed of through the Borehole. Alcan's waste contained fragments of aluminum ingots, which also contained copper, chromium, cadmium, lead and zinc, which are all hazardous substances under CERCLA. Although Alcan attempted to filter the metals out of the waste oil, some fragments remained. 32,500-37,500 gallons of Alcan's waste oil was disposed of at Butler Tunnel. *Id.* at 256.

496. *Id.* at 266. EPA incurred response costs when approximately 100,000 gallons of water contaminated with wastes disposed of through the borehole substances were released into the Susquehanna River. *Id.* at 257.

States settled with nineteen defendants, but Alcan refused to settle, thereby facing potential liability for a relatively large share of the remaining costs.⁴⁹⁷ The United States District Court for the Eastern District of Pennsylvania entered summary judgment against Alcan, rejecting Alcan's argument that it was not liable because the hazardous substances in its waste oil were below naturally occurring background levels and because the trace quantities of metal compounds in its oil were immobile.⁴⁹⁸ On appeal, the United States Court of Appeals for the Third Circuit confirmed that Alcan's emulsion constituted a "hazardous substance" even though it contained low levels of metals.⁴⁹⁹ The Third Circuit Court also rejected the argument that the government had to prove that a release of Alcan's waste caused response costs.⁵⁰⁰ The *Alcan* Court, however, was torn between

497. The trial court held that Alcan was liable for \$473,790.18 in response costs, although the total response costs amounted to \$1,302,290.18. "Thus, although Alcan comprised only 5% of the defendant pool, it was required by the court to absorb over 36% of the costs." *Id.* at 271.

498. *Id.* at 266.

499. The *Alcan* Court rejected the idea that CERCLA requires a minimum quantity. The court noted that "the statute does not, on its face, impose any quantitative requirement or concentration level on the definition of 'hazardous substances'." Rather, the substance under consideration must simply fall within one of the designated categories." Relying on the legislative history's reference to requiring the polluter to pay, the Court noted that it was "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." The Court also relied on case law holding that CERCLA liability does not depend on the existence of a threshold quantity of a hazardous substance. (citing *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d at 669; *Eagle-Picher Indus., Inc. v. United States*, 759 F.2d 922, 927 (D.C. Cir. 1985); *City of New York v. Exxon Corp.*, 744 F. Supp. 474, 483 (S.D.N.Y. 1990); *United States v. W. Processing Co.*, 734 F. Supp. 930, 936 (W.D. Wash. 1990); *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 238 (W.D. Mo. 1985); *United States v. Carollawn Co.*, 21 *Env't'l L. Rep.* 20696, 2126 (D.S.C. 1984); *United States v. Wade*, 577 F. Supp. 1326, 1340 (E.D. Pa. 1983)). The Court concluded that Section 101(14) of CERCLA defined a hazardous substance to include "any toxic pollutant listed under section 1317(a) of Title 33 [the Clean Water Act]." 42 U.S.C. § 9601(14), and that the compounds contained in Alcan's waste oil were listed as hazardous substances under the Clean Water Act. (citing 40 C.F.R. § 401.15). *Id.* at 260.

500. Alcan argued that CERCLA required "the Government to prove that Alcan's emulsion caused or contributed to the release or the Government's incurrence of response costs." The *Alcan* court, however, rejected this argument because the "statute does not, on its face, require the plaintiff to prove that the generator's hazardous substances themselves caused the release or caused the incurrence of response costs; rather, it requires the plaintiff to prove that the release or threatened release caused the incurrence of response costs, and that the defendant is a generator of hazardous substances at the facility." *Id.* at 264. The *Alcan* court also found support for this proposition in the legislative history:

the perceived unfairness of imposing CERCLA liability on a small contributor⁵⁰¹ and the problem faced by the government of having to respond to contamination that results from the small contributions of many generators.⁵⁰² The Third Circuit, therefore, altered the structure of the statute through apportionment,

It appears that the early House of Representatives' version of CERCLA imposed liability upon those persons who "caused or contributed to the release or threatened release." H.R. 7020, 96th Cong., 2d Sess. § 3071(a)(D), 126 Cong.Rec. 26,779. However, the version ultimately passed by Congress deleted the causation requirement and instead imposed liability upon a class of responsible persons without regard to whether the person specifically caused or contributed to the release and the resultant response costs. See 126 Cong.Rec. 31,981-82. Moreover, Congress added three limited defenses to liability based on causation which are contained in 42 U.S.C. § 9607(b): acts of God, acts of war, and acts or omissions of a contractually unrelated third party when the defendant exercised due care and took appropriate responses. Imputing a specific causation requirement would render these defenses superfluous.

Id. at 264-65. Further, the Alcan court noted that "virtually every court that has considered this question has held that a CERCLA plaintiff need not establish a direct causal connection between the defendant's hazardous substances and the release or the plaintiff's incurrence of response costs." *Id.* (citing *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985); *United States v. Monsanto Co.*, 858 F.2d 160, 160 (4th Cir. 1988); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146, 1152-54 (1st Cir. 1989); *United States v. Bliss*, 667 F. Supp. 1298, 1309 (E.D. Mo. 1987); *United States v. Wade*, 577 F. Supp. 1326, 1333 (D.C.Pa. 1983)). As the Court concluded:

Decisions rejecting a causation requirement between the defendant's waste and the release or the incurrence of response costs are well-reasoned, consistent with the plain language of the statute and consistent with the legislative history of CERCLA. Accordingly, we reject Alcan's argument that the Government must prove that Alcan's emulsion deposited in the Borehole caused the release or caused the Government to incur response costs. Rather, the Government must simply prove that the defendant's hazardous substances were deposited at the site from which there was a release and that the release caused the incurrence of response costs.

Id. at 264-65.

501. The Alcan Court seemed to agree that this definition of "hazardous substances" effectively renders everything in the universe hazardous, including, for example, federally approved drinking water. When this definition is read in conjunction with the rule that specific causation is not required, CERCLA seemingly would impose liability on every generator of hazardous waste, although that generator could not, on its own, have caused any environmental harm. *Id.*

502. *Id.* The Alcan court noted that Dean Prosser's hornbook highlighted the paradox of liability where acts harmless in themselves together cause damage, observing:

A very troublesome question arises where the acts of each of two or more parties, standing alone, would not be wrongful, but together they cause harm to the plaintiff. If several defendants independently pollute a stream, the impurities traceable to each may be negligible and harmless, but all together may render the water entirely unfit for use. The difficulty lies in the fact that each defendant alone would have committed no tort. There would have been no negligence, and no nuisance, since the individual use of the stream would have been a reasonable use, and no harm would have resulted.

holding that a defendant could escape liability by showing the absence of personal causation.⁵⁰³

The *Alcan* court explained that under the Restatement a tortfeasor who caused a distinct harm was entitled to an “affirmative defense” that it was liable only for that harm.⁵⁰⁴ The Third

Id. (quoting WILLIAM L. PROSSER, LAW OF TORTS, § 52, at 322 (4th ed. 1971)). The *Alcan* court was sympathetic to the argument of the government:

that individual defendants must be held responsible for environmental injury brought about by the actions of multiple defendants, even if no single defendant itself could have produced the harm, for otherwise “each defendant in a multi-defendant case could avoid liability by relying on the low concentrations of hazardous substances in its waste, while the plaintiff is left with the substantial clean-up costs associated with the defendant’s accumulated wastes.” Government’s Br. at 32. The Government reasons that this strong public interest in forcing polluters in the multi-generator context to pay outweighs a defendant’s interest in avoiding liability even if that defendant has not acted in an environmentally unsound fashion when its actions are viewed without regard to the actions of others. The court in *United States v. Western Processing Co.*, adopting the position advanced by the Government in this case, observed:

it is entirely possible for a hazardous waste facility to be comprised of entirely small amounts from many contributors. If each PRP could make [*Alcan*’s] argument, i.e., that its particular contribution did not warrant remediation and thus that it should not be liable for any costs, no party would be liable, despite the fact that the site, as a whole, needed to be cleaned up and the government incurred costs in doing so.

United States v. W. Processing Co., Inc., 734 F. Supp. 930, 937 (W.D.Wash. 1990)(emphasis in original).

Id. at 268-69.

503. *Id.* As the Court stated:

We find some merit in the arguments advanced by both the Government and *Alcan*. Accordingly, in our view, the common law principles of joint and several liability provide the only means to achieve the proper balance between *Alcan*’s and the Government’s conflicting interests and to infuse fairness into the statutory scheme without distorting its plain meaning or disregarding congressional intent.

504. *Id.* As the Court stated:

Section 433A of the Restatement provides that, when two or more joint tortfeasors acting independently cause a distinct or single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the harm that the individual tortfeasor has caused. It states,

- (1) Damages for harm are to be apportioned among two or more causes where
 - (a) there are distinct harms, or
 - (b) there is a reasonable basis for determining the contribution of each cause to a single harm.
- (2) Damages for any other harm cannot be apportioned among two or more causes.

Similarly, section 881 sets forth the affirmative defense based upon the divisibility of harm rule in section 433A:

If two or more persons, acting independently, tortiously cause distinct harms or a single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the total harm that he has himself caused.

Id. at 268.

Circuit also explained that in cases of a single indivisible harm, each tortfeasor is liable for the entire harm absent a reasonable basis for apportionment.⁵⁰⁵ The Third Circuit further stated that the Restatement provided an example of a reasonable basis for apportionment based on the quantity of contamination contributed by each of several polluters to a body of water.⁵⁰⁶ Therefore, the Third Circuit added a new defense to the statute based on an absence of individual causation:

In sum, on remand, the district court must permit Alcan to attempt to prove that the harm is divisible and that the damages are capable of some reasonable apportionment. We note that the Government need not prove that Alcan's emulsion caused the release or the response costs. On the other hand, if Alcan proves that the emulsion did not or could not, when mixed with other hazardous wastes, contribute to the release and the resultant response costs, then Alcan should not be responsible for any response costs. In this sense, our result thus injects causation into the equation but, as we have already pointed out, places the burden of proof on the defendant instead of the plaintiff. We think that this result is consistent with the statutory scheme and yet recognizes that there must be some reason for the imposition of CERCLA liability. Our result seems particularly appropriate in light of the expansive meaning of "hazardous substance".⁵⁰⁷

Although the *Alcan* Court stated that a defendant could prove that it was not liable for any costs based on the absence of per-

505. *Id.* at 268-69. As the Court stated:

However, where joint tortfeasors cause a single and indivisible harm for which there is no reasonable basis for division according to the contribution of each, each tortfeasor is subject to liability for the entire harm. Section 875 recites:

Each of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm.

Obviously, of critical importance in this analysis is whether a harm is divisible and reasonably capable of apportionment, or indivisible, thereby subjecting the tortfeasor to potentially far-reaching liability.

506. *Id.* As the *Alcan* Court stated:

Interestingly, the drafters of the Restatement found that joint pollution of water is typically subject to the divisibility rule. They write:

There are other kinds of harm which, while not so clearly marked out as severable into distinct parts, are still capable of division upon a reasonable and rational basis, and of fair apportionment among the causes responsible. . . . Such apportionment is commonly made in cases of private nuisance, where the pollution of a stream . . . has interfered with the plaintiff's use and enjoyment of his land.

Section 433 A, Comment d (emphasis supplied). *See, e.g., Somerset Villa, Inc. v. Lee's Summit*, 436 S.W.2d 658 (Mo. 1968).

507. *Alcan Aluminum Corp.*, 964 F.2d at 270-71.

sonal causation, it inconsistently noted that this was not a matter relating to liability:

Our conclusions on this point are completely consistent with our previous discussion on causation, as there we were concerned with the Government's burden in demonstrating liability in the first instance. Here we are dealing with Alcan's effort to avoid liability otherwise established.⁵⁰⁸

In effect, the Third Circuit suggested that a CERCLA defendant would still be liable, but liable for nothing, under the new apportionment defense.

In *United States v. Alcan Aluminum Corp.*,⁵⁰⁹ the Second Circuit considered the same arguments raised by Alcan in the Pennsylvania litigation but came to a slightly different result. In the Second Circuit case, Alcan arranged for disposal of waste oil at a waste disposal and treatment center in New York.⁵¹⁰ From 1977 to 1987, the United States and the State of New York spent over \$12 million on remedial action at the site.⁵¹¹ The United States entered into a consent decree with 82 defendants, recovering \$9.1 million or 74 percent of the total response costs and the governments sued Alcan, the only recalcitrant, for the \$3.2 million of unrecovered costs.⁵¹² The United States District Court for the Northern District of New York granted summary judgment in favor of the governments, holding Alcan jointly and severally liable for cleanup of the site.⁵¹³ On appeal, the Second Circuit agreed with the reasoning of the Third Circuit, but attempted to limit the scope of the holding.

Although the Second Circuit expressed sympathy with Alcan about the breadth of CERCLA liability, the Second Circuit also expressed a desire to avoid situations where "each potential defendant in a multi-defendant CERCLA case would be able to escape liability simply by relying on the low concentration of hazardous substances in its wastes, and the government would be left to absorb the clean-up costs. Several courts have already held such was not the aim of Congress."⁵¹⁴ The Second Circuit

508. *Id.*

509. *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 721 (2d Cir. 1993).

510. *Id.* The waste oil, like that in the other Alcan litigation, consisted of water, mineral oil, and aluminum ingot shavings containing lead, copper, chromium, zinc, and cadmium compounds.

511. *Id.*

512. *Id.*

513. *United States v. Alcan Aluminum Corp.*, 755 F. Supp. 531 (N.D.N.Y. 1991).

514. *Id.*

explained that as between relatively small contributors, like Alcan, and innocent taxpayers, Congress chose to place the burden of paying for the cleanup on those connected to the site:

In passing CERCLA Congress faced the unenviable choice of enacting a legislative scheme that would be somewhat unfair to generators of hazardous substances or one that would unfairly burden the taxpaying public. The financial burdens of toxic clean-up had been vastly underestimated—in 1980 when CERCLA was enacted \$1.8 billion was thought to be enough. In 1986 when the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub.L. No. 99-499, 100 Stat. 1613 (1986), was passed, \$100 billion was held to be needed. It may well be more today. It is of course the public-at-large that is already bearing the economic brunt of this enormous national problem. There may be unfairness in the legislative plan, but we think Congress imposed responsibility on generators of hazardous substances advisedly. And, even were it not advisedly, we still must take this statute as it is.⁵¹⁵

Like the Third Circuit, however, the Second Circuit concluded that the tension in the statute between fairness to small contributors and innocent taxpayers could be resolved by apportionment.⁵¹⁶ The Second Circuit reiterated that what “is not required is that the government show that a specific defendant’s waste caused incurrence of clean-up costs.”⁵¹⁷ The Second Circuit also reaffirmed that there are only three causation-based defenses that would be superfluous if a plaintiff had to prove causation by an individual defendant.⁵¹⁸ The Second Circuit, however, ex-

515. *Id.* at 716-17.

516. *Id.* As the Court stated:

Having assessed CERCLA’s plain meaning, its legislative history, and the case law construing it, we think the tension may be resolved by allowing a responsible party, like Alcan, to pay nothing if it can demonstrate that its pollutants, when mixed with other hazardous wastes, did not contribute to the release or the resulting response costs. In this respect we essentially adopt the Third Circuit’s reasoning in *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 267-71 (3d Cir. 1992) (*Alcan-Butler*). This approach is not intended to provide an escape hatch for CERCLA defendants; rather, it will permit such a defendant to avoid liability only when its pollutants contribute no more than background contamination.

517. *Id.*

518. *Id.* As the Second Circuit explained:

As earlier noted, there are “only” three defenses to imposition of liability on a generator: an act of God, an act of war, and an act or omission of a third party. 42 U.S.C. § 9607(b)(2000). In *State of New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985), we held that the owner of a facility was liable under CERCLA without a finding of causation of the release because “including a causation requirement makes superfluous the affirmative defenses provided in section 9607(b).” *Id.* Our reading drew additional support from CERCLA’s legislative history, from which we concluded that “Congress specifically rejected including a causation re-

plained that courts had added a gloss to CERCLA to “limit” liability based on common law concepts of divisibility.⁵¹⁹ Nonetheless, the Second Circuit also suggested that apportionment is a defense or a means to “escape liability.”⁵²⁰ The Second Circuit acknowledged that it was reintroducing individual causation into the statute where it had previously been barred, but noted that the exception applied only to the limited circumstances of the case:

In so ruling we candidly admit that causation is being brought back into the case—through the backdoor, after being denied entry at

quirement” in this section. *Id.* Other circuits have reached the same conclusion. See *Alcan Aluminum Corp.*, 964 F.2d at 265; *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146, 1152-54 (1st Cir. 1989); *United States v. Monsanto Co.*, 858 F.2d 160, 170 (4th Cir. 1988). Hence, it seems plain that, in addition to imposing a strict liability scheme, CERCLA does away with a causation requirement.

519. *United States v. Alcan Aluminum Corp.*, 755 F. Supp. 531 (N.D.N.Y. 1991). As the Court stated:

Having rejected Alcan’s proffered defenses to liability, one would suppose there is no limit to the scope of CERCLA liability. To avoid such a harsh result courts have added a common law gloss onto the statutory framework. They have at once adopted a scheme of joint and several liability but at the same time have limited somewhat the availability of such liability against multiple defendants charged with adding hazardous substances to a Superfund site. See, e.g., *O’Neil v. Picillo*, 883 F.2d 176, 178-79 (1st Cir. 1989); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 808 (S.D. Ohio 1983). The Restatement (Second) of Torts § 433A (1965) has been relied upon in determining whether a party should be held jointly and severally liable, for the entire cost of remediating environmental harm at the site. See, e.g., *Alcan Aluminum Corp.*, 964 F.2d at 268-69; *O’Neil*, 883 F.2d at 178; *Monsanto*, 858 F.2d at 171-73; see also, *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1506-08 (6th Cir. 1989). Under § 433A of the Restatement where two or more joint tortfeasors act independently and cause a distinct or single harm, for which there is a reasonable basis for division according to the contribution of each, then each is liable for damages only for its own portion of the harm. In other words, the damages are apportioned. But where each tortfeasor causes a single indivisible harm, then damages are not apportioned and each is liable in damages for the entire harm.

520. *Id.* As the Court stated:

Based on these common law principles, Alcan may escape any liability for response costs if it either succeeds in proving that its oil emulsion, when mixed with other hazardous wastes, did not contribute to the release and the clean-up costs that followed, or contributed at most to only a divisible portion of the harm. See, *Alcan Aluminum Corp.*, 964 F.2d at 270. Alcan as the polluter bears the ultimate burden of establishing a reasonable basis for apportioning liability. See, *Monsanto*, 858 F.2d at 172; *Chem-Dyne Corp.*, 572 F. Supp. at 810. The government has no burden of proof with respect to what caused the release of hazardous waste and triggered response costs. It is the defendant that bears that burden. To defeat the government’s motion for summary judgment on the issue of divisibility, Alcan need only show that there are genuine issues of material fact regarding a reasonable basis for apportionment of liability. As other courts have noted, apportionment itself is an intensely factual determination. See, e.g., *Chem-Dyne Corp.*, 572 F. Supp. at 811.

the frontdoor — at the apportionment stage. We hasten to add nonetheless that causation — with the burden on defendant — is reintroduced only to permit a defendant to escape payment where its pollutants did not contribute more than background contamination and also cannot concentrate. To state this standard in other words, we adopt a special exception to the usual absence of a causation requirement, but the exception is applicable only to claims, like Alcan's, where background levels are not exceeded. And, we recognize this limited exception only in the absence of any EPA thresholds.⁵²¹

The Second Circuit then concluded that there were sufficient factual issues to warrant remand to the district court.⁵²²

Following the lead of the Third Circuit in *Alcan*, some recent courts have expressed a willingness to allow a nonstatutory defense of zero apportionment based on an absence of individual causation.⁵²³ Courts following the Third Circuit's approach in

521. *Id.*

522. *Id.* at 722-23. As the Court explained:

Alcan declares that the response actions at PAS were attributable to substances such as PCB's, nitro benzene, phenol, dichloroethone, toluene, and benzene. It contends that no soil contamination due to heavy metals was found there, and insists that the metallic constituents of its oil emulsion are insoluble compounds, submitting an affidavit supporting this theory of divisibility. The government submitted a declaration stating that metal contaminants like those found in Alcan's waste emulsion were present in environmental media at PAS, that the commingling of metallic and organic hazardous substances resulted in indivisible harm, and that though some forms of lead, cadmium and chromium are insoluble, they may chemically react with other substances and become water-soluble. These differing contentions supported by expert affidavits raise sufficient questions of fact to preclude the granting of summary judgment on the divisibility issue.

523. See *United States v. Township of Brighton*, 153 F.3d 307, 318 n.14 (6th Cir. 1998) ("This is because defendants who can show that the harm is divisible, and that they are not responsible for any of the harm, have effectively fixed their own share of the damages at zero. No causation means no liability, despite § 9607(a)'s strict liability scheme. . . This possible anomaly in CERCLA corresponds to one in the Restatement. Under the standard Restatement scheme—non-strict liability—the burden is initially on the plaintiff to prove that the defendant is responsible for the harm. Any defendant who can winnow his share of the blame down to zero presumably will do so at this initial causation stage, and avoid the divisibility exercise altogether. See *Bell*, 3 F.3d at 901. This anomaly is not a result of our analysis, however. Rather, it can be attributed to Congress's intent to incorporate the Restatement into CERCLA via the analysis of *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983); see H.R.Rep. No. 99-253(I), 99th Cong., 1st Sess. 74, reprinted in 1986 U.S.C.C.A.N. 2835, 2856 ('fully subscrib[ing]' to *Chem-Dyne* rule."); *Dent v. Beazer Materials and Servs., Inc.*, 156 F.3d 523, 531 (4th Cir. 1998) ("Neither did the district court err in finding that the fertilizer constituents, for whose disposal Conoco and Agrico were potentially liable persons, had caused no harm requiring remediation. The only fertilizer-related hazardous substance identified in the evidence at trial was lead. There was credible evidence that it was in quantities too low to re-

Alcan have not properly reconciled CERCLA's strict liability approach to causation with the idea of apportionment. The Restatement test for apportionment can be harmonized with CERCLA's strict liability causation structure, although with some difficulty.

In the first place it should be noted that the Restatement test arose in the context of non-strict liability tort law, where a plaintiff must prove that an individual contributed to the harm.⁵²⁴ Under the Restatement test, if a defendant caused zero harm, it would never be liable in the first place and would never be required to prove apportionment.⁵²⁵ Thus, the concept of apportionment under common law tort principles, is a method of *limiting* liability. It is not a complete defense; a defendant will still be liable for something. A similar approach should be employed under CERCLA. Several courts have in fact suggested that avoidance of joint and several liability is a means of limiting liability and is not the basis for a complete defense.⁵²⁶ By appor-

quire CERCLA remediation; indeed, there was evidence that efforts to remove the quantities of lead involved would be environmentally counter-productive. (JA 579-81.); *United States v. Rohm & Haas Co.*, 2 F.3d 1265, 1280 (3d Cir. 1993) (stating that case may arise where zero share apportioned, but because defendant could not establish that it was not source of contamination under third party defense, no need to reach question).

524. *See United States v. Township of Brighton*, 153 F.3d 307, 318 n.14 (6th Cir. 1998).

525. *Id.*

526. *See Matter of Bell Petroleum*, 3 F.3d 889, 896 (5th Cir. 1993) (noting that apportionment under Restatement only limits liability; does not operate as complete defense); *United States v. Northern Plating Co.*, 670 F. Supp. 742, 748 (W.D. Mich. 1987) (stating that apportionment of zero based on lack of any causation conflicts with third party defense) (adopting reasoning of district court); *Weyerhaeuser Co. v. Koppers Co.*, 771 F. Supp. 1420, 1425-26 (D. Md. 1991) (stating that apportionment is not a substitute for third party defense); *accord United States v. Pretty Products*, 780 F. Supp. 1488, 1499 & n.14 (S.D. Ohio 1991) (allowing defendant to avoid liability because of plaintiff's failure to prove causation is inconsistent with third party defense); *Lincoln Props., Ltd. v. Higgins*, 823 F. Supp. 1528, 1536-37 (E.D. Cal. 1992) (stating that CERCLA definition should not be applied to amount to end-run around third party defense); *United States v. Fairchild Indus., Inc.*, 766 F. Supp. 405, 411 (D. Md. 1991) (stating that "defenses" that are almost the same as third party defense not allowed); *cf. Rohm & Haas Co.*, 2 F.3d 1265, 1280 (3d Cir. 1993) (stating that case may arise where zero share apportioned, but because defendant could not establish that it was not source of contamination under third party defense, no need to reach question.). *But see United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 268 (3rd Cir. 1992) (stating that defendant may limit as well as avoid liability through apportionment). Although the Second Circuit followed the Third Circuit to hold that a defendant may avoid liability through apportionment, *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 721-22 (2d Cir. 1993), the Second Circuit subsequently called this position into doubt. *See Goodrich v.*

tioning harm, a defendant limits its liability but still remains liable for some portion of the harm.⁵²⁷ In this sense apportionment should not be deemed a "defense" to liability. Only liable defendants may apportion harm among themselves and must pay for some share. Such an approach would be more consonant with the statute's command that liability is subject only to the defenses set forth in Section 107(b)(3), which does not list apportionment.

Courts applying apportionment to CERCLA claims must also recognize that apportionment does not always work between different categories of liable parties.⁵²⁸ For example, in the case of generator liability, actively dumping hazardous wastes at a location allows for an individual causation analysis because the dumping directly leads to harm in the form of contamination. The *Chem-Dyne* case itself dealt with a large multi-generator site, and arguably the apportionment analysis should be limited to this type of case. In addition, operators of a facility may be deemed to have caused contamination by conducting operations that cause contamination or by allowing generators and transporters to dispose of hazardous substances at the site.⁵²⁹ Where the analysis breaks down, however, is in the case of owner liability, which invokes the correct paradigm of strict liability. Just as

Betkoski, 99 F.3d 505, 516-17 (2d Cir. 1996), *cert. denied*, 524 U.S. 926 (1998). In *Betkoski*, the Second Circuit rejected a reading of CERCLA that would require a minimum amount of hazardous substances to be released for liability, noting:

In *Alcan*, we held that proof that a defendant's waste did not release listed hazardous substances is only relevant to the issue of apportionment of damages, not to the issue of liability. *Alcan*, 990 F.2d at 722. Independent releasability is not required to establish liability; a defendant otherwise liable may show "nonreleasability" in order to *mitigate its share of damages*. It follows logically that a defendant who disposes of hazardous substances that are not independently releasable may still be held liable, even though that defendant may not be required to pay damages when the cost apportionment phase of the litigation is reached.

Id. (emphasis added). The *Betkoski* Court also cautioned that requiring a minimum amount of hazardous substances for CERCLA liability would conflict with CERCLA's exclusive causation-based defenses. *Id.* This is precisely the reason other courts have held that apportionment does not provide a "defense," but only a limitation of liability.

527. See *Washington v. United States*, 922 F. Supp. 421, 429-30 (W. D. Wash. 1996) (finding that defendants may limit liability based on harm each caused); *United States v. Fidelcor Bus. Credit Corp.*, 1993 WL 276933 (E.D. Pa 1993) (noting that divisibility is a limitation of liability).

528. See *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1507-08 (6th Cir. 1989) (rejecting apportionment between operator and owner); *Weyerhaeuser Co. v. Koppers Co.*, 771 F. Supp. 1420, 1425-26 (D. Md. 1991) (suggesting that apportionment inappropriate among different categories of responsible parties).

529. See *Matter of Bell Petroleum*, 3 F.3d at 896.

the owners were held liable in *Rylands v. Fletcher*, current owners of CERCLA facilities may be held liable even if they did not individually cause environmental harm.⁵³⁰ By definition a current owner is one that purchased the facility after disposal took place because only an owner that owned after the time of disposal can qualify for the innocent owner corollary to the third party defense added to CERCLA in 1986.⁵³¹ To allow a current owner a zero share of liability because it did not cause any harm would amount to an elimination of current owner liability.⁵³² The only way to harmonize the Restatement test with CERCLA is to construe the test as requiring an admission by a defendant that it caused some harm, even in the case of a current owner. Thus, an owner who leased property to an operator must be linked to the harm caused by the instrumentality during the time the lessee operated the facility, and cannot argue a lack of personal causation.⁵³³ In addition, a current owner, as opposed to an owner at the time of disposal, must take responsibility for all past and present contamination related to the parcel.⁵³⁴ Otherwise, current owners would never be liable, because by definition disposal occurred during a past owner's tenure.⁵³⁵

530. See *Templeton Coal Co. v. Shalala*, 882 F. Supp. 799, 824 n.13 (S.D. Ind. 1995) (current owners liable regardless of when or how property became contaminated); *Atl. Richfield Co. v. Blosenski*, 847 F. Supp. 1261, 1287 (E.D. Pa. 1994) (noting that mere ownership is basis for liability); *Westwood Pharm., Inc. v. National Fuel Gas Distrib. Corp.*, 767 F. Supp. 456, 460 (W.D.N.Y. 1991) (no need to prove release at time of prior owner's tenure), *affirmed*, 964 F.2d 85 (2d Cir. 1995); *City of Phoenix v. Garbage Servs. Co.*, 827 F. Supp. 600, 603-04 (D. Ariz. 1993) (noting that current owners liable regardless of when property became contaminated); *Allied Princess Bay Co. No. 2 v. Atochem North America, Inc.*, 855 F. Supp. 595, 603 (E.D.N.Y. 1993) (noting that there was no need to prove release at time of prior owner's tenure); *United States v. Union Gas Co.*, 35 Env't Rep. Cas. (BNA) 1750, 1755 (E.D. Pa. 1992) (noting that current owner liable regardless of whether disposal or release occurred during period of ownership); *City of Philadelphia v. Stepan Chem. Co.*, 18 Env't'l L. Rep. 20,133 (E.D. Pa. 1987) ("Congress included within the coverage of CERCLA persons who simply have an ownership interest in property where hazardous substances are found.").

531. 42 U.S.C. § 9601(35)(A). See *supra* note 447.

532. See *R.W. Meyer, Inc.*, 889 F.2d at 1507-08.

533. See *id.* (rejecting apportionment between operator and owner); *Weyerhaeuser*, 771 F. Supp. at 1425-26 (suggesting that apportionment inappropriate among different categories of responsible parties).

534. See *R.W. Meyer, Inc.*, 889 F.2d at 1507-08 (rejecting apportionment between operator and owner); *Weyerhaeuser*, 771 F. Supp. at 1425-26 (suggesting that apportionment inappropriate among different categories of responsible parties).

535. 42 U.S.C. § 9607(a)(1)(2)(2000) (distinction between owner/operator at time of disposal and current owner/operator).

Nevertheless, zero apportionment cannot be harmonized with CERCLA's strict liability structure because of the exclusive third party defense. The Third Circuit's zero apportionment defense is flagrantly inconsistent with the express provisions of the third party defense, which contains requirements over and above a mere showing of no individual causation. For example, to allow a current owner, or any defendant for that matter, a zero share of liability based on the simple showing of no individual causation would eviscerate the additional requirements of third party defense of showing due care with respect to the hazardous substances concerned and adequate precautions against the conduct of third parties.⁵³⁶ A mere showing of no causation is not enough under the third party defense, and it should not be enough under an unauthorized defense of zero apportionment. A defendant should still meet the requirements of the third party defense to be entitled to a zero share of liability.

Apportionment based on individual causation is not easily squared with CERCLA's strict liability approach to causation, but apportionment can be allowed to simply limit liability where a defendant admits to or can show its own individual causation. Otherwise, statements in the legislative history of the 1986 SARA amendments approving the notion of apportionment should not override the statutory structure of CERCLA's causation standard, which focuses not on harm caused by an individual defendant, but on harm caused by an instrumentality to which all defendants are linked.

VI. CONCLUSION

Although courts and commentators have recognized that CERCLA imposes "strict liability," they have often failed to properly understand the meaning and consequences of "strict liability." The paradigm of strict liability that is most relevant to CERCLA is strict liability for ultrahazardous activity as expressed long ago in *Rylands v. Fletcher*. Under strict liability for ultrahazardous activity, the focus of the causation analysis is an instrumentality and the defendant is held liable based on a relationship to that instrumentality. Individual fault or causation need not be shown. In the context of CERCLA, the instrumen-

536. See *R.W. Meyer, Inc.*, 889 F.2d at 1507-08.

tality is the vessel or facility. A defendant is liable because it qualifies as an owner, operator or user of the vessel or facility.

Only by analyzing CERCLA causation in reference to an ultrahazardous instrumentality can courts and commentators properly resolve issues relating to CERCLA causation. An analysis based on the proper strict liability paradigm does not allow a requirement that a plaintiff prove that defendants caused a release that led to response costs. Even in the context of natural resource damages, CERCLA's focus remains on the instrumentality in the form of the vessel or facility. Just like a claim for response costs, each of the four categories of responsible persons is liable for natural resource damages regardless of the lack of individual causation.

Moreover, any defense based on causation should take place in the context of the exclusive third party defense, which requires a defendant to prove that the sole cause of the release was a totally unrelated party or a force of nature that unavoidably caused the instrumentality to escape control. A defense of zero liability based on apportionment is beyond the scope of the statute and inconsistent with the correct paradigm of strict liability. Apportionment should be used by defendants only to limit liability not to escape liability altogether. Finally, using negligence law concepts of foreseeability to analyze the third party defense is incorrect and inconsistent with the strict liability concepts that influenced CERCLA's third party defense. The third party defense should be limited to very narrow circumstances where a complete stranger or force of nature is shown to be the sole and immediate cause of a release or threatened release. In the face of unexplained contamination, CERCLA responsible persons should be held liable.

The purpose of analyzing CERCLA liability in terms of individual causation appears to be based on the view that CERCLA's "legal deck is stacked" in favor of the government and is unfair.⁵³⁷ These courts, however, have failed to grasp that Congress fully intended the liability provisions of CERCLA to be broad.⁵³⁸ Courts should not mold the law according to their own

537. In *Matter of Bell Petroleum Serv., Inc.*, 3 F.3d 889, 902 n.13 (5th Cir. 1993).

538. *Am. Tel. & Tel. Co. v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 590 (9th Cir. 1996); *Acme Printing Ink Co. v. Menard, Inc.*, 891 F. Supp. 1289, 1297 (E.D. Wis. 1995); *United States v. Shell Oil*, 841 F. Supp. 962, 970 (C.D. Cal. 1993); *Soo Line R. Co. v. B.J. Carney & Co.*, 797 F. Supp. 1472, 1484 (D. Minn. 1992.); *Stanley Works v. Snydergeneral Corp.*, 781 F. Supp. 659, 663 (E.D. Cal. 1990).

views of policy but rather should apply the law as it is written.⁵³⁹ Courts should be faithful to the plain language of CERCLA and Congress' clearly expressed intent on causation⁵⁴⁰ and should reject efforts to analyze CERCLA liability in terms of concepts of individual causation that do not fit.

Unfairness can result when the broad net of CERCLA liability snares minor contributors, forcing them to help pay some or all of the often massive costs of a CERCLA cleanup.⁵⁴¹ However, any perceived unfairness of imposing liability on those connected with a CERCLA facility pales in comparison to the unfairness of forcing completely innocent taxpayers to shoulder the costs of cleanup or, more importantly, the unfairness of exposing innocent citizens to the threats posed by exposure to hazardous substance releases and abandoned toxic waste sites.⁵⁴² CERCLA was designed to clean up releases and contaminated facilities, and courts should interpret it correctly to achieve its goals.

539. *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 259 (W.D. Mo. 1985); *United States v. Price*, 577 F. Supp. 1103, 1114 (D.N.J. 1983); *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135 (E.D. Pa. 1982); *See also* *La.-Pac. Corp. v. Beazer Materials & Servs., Inc.*, 842 F. Supp. 1243, 1254 (E.D. Cal. 1994) (noting deck stacked in favor of government, but applying law as written).

540. *See* *S. Pac. Transp. Co. v. Voluntary Purchasing Groups, Inc.*, 1997 WL 457510, *8 (N.D. Tex. 1997); *Clear Lake Props.*, 959 F. Supp. at 768; *Akzo Coatings Inc. v. Aigner Corp.*, 960 F. Supp. 1354, 1359 (N.D. Ind. 1996); *La.-Pac. Corp. v. Beazer Materials & Servs., Inc.*, 811 F. Supp. 1421, 1431 (E.D. Cal. 1993); *United States v. Fairchild Indus., Inc.*, 766 F. Supp. 405, 411 (D. Md. 1991).

541. *See* *United States v. A & N Cleaners & Launderers, Inc.*, 854 F. Supp. 229, 240 (S.D.N.Y. 1994); *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 716-17 (2d Cir. 1993); *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1204 (2d Cir. 1992); *City of New York v. Exxon Corp.*, 744 F. Supp. 474, 485 (S.D.N.Y. 1990); *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1377 (8th Cir. 1989); *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 259 (W.D. Mo. 1985); *United States v. Price*, 577 F. Supp. 1103, 1114 (D. N.J. 1983).

542. *See* *United States v. Alcan Aluminum Co.*, 990 F.2d 711, 716-17 (1993); *A & N Cleaners and Launderers, Inc.*, 854 F. Supp. at 240; *United States v. Witco Corp.* 865 F. Supp. 245, 247 (E.D. Pa. 1994); *In re Hemingway Transport, Inc.*, 73 B.R. 494, 498 (D. Mass. 1987); *Price*, 577 F. Supp. at 1114 ("Though strict liability may impose harsh results on certain defendants, it is the most equitable solution in view of the alternative — forcing those who bear no responsibility for causing the damage, the tax payers, to shoulder the full cost of the clean up.").