1996

In the Matter of Bell Petroleum Services, Inc.: Reviewing Removal Actions under the Arbitrary and Capricious Standard of Review

Robert Loefflad

Follow this and additional works at: http://digitalcommons.law.villanova.edu/elj

Part of the Administrative Law Commons, and the Environmental Law Commons

Recommended Citation


Available at: http://digitalcommons.law.villanova.edu/elj/vol7/iss1/5

This Casenote is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Environmental Law Journal by an authorized editor of Villanova University Charles Widger School of Law Digital Repository. For more information, please contact Benjamin.Carson@law.villanova.edu.
IN THE MATTER OF BELL PETROLEUM SERVICES, INC.: REVIEWING REMOVAL ACTIONS UNDER THE ARBITRARY AND CAPRICIOUS STANDARD OF REVIEW

I. INTRODUCTION

In response to growing public apprehension concerning the adverse health and environmental effects of irresponsible waste disposal, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). CERCLA places the cost of environmental cleanup on the parties responsible for disposing hazardous wastes in violation of standards established by the Environmental Protection Agency (EPA). More importantly, CERCLA allows the government to initiate response measures immediately upon discovery of a release or threatened release of a hazardous substance. Response costs are initially paid

2. See CERCLA § 107, 42 U.S.C. § 9607. Under CERCLA, potentially responsible parties (PRPs) include:
   (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 . . . , and
   (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities . . . .
   Id. § 107(a), 42 U.S.C. § 9607(a).
3. CERCLA § 104(a)(1)(A), 42 U.S.C. § 9604(a)(1)(A). CERCLA § 104 authorizes the President to implement appropriate removal or remedial measures, consistent with the National Contingency Plan, “[w]henever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment . . . .” Id.
The term “hazardous substance” is defined under CERCLA § 101(14) and includes any substance deemed hazardous under other various federal statutes. CERCLA § 101(14), 42 U.S.C. § 9601(14); see New Jersey Dep’t of Envtl. Protection & Energy v. Glouster Envtl. Management Serv., Inc., 821 F. Supp. 999, 1005 (D.N.J. 1993). CERCLA § 102 also delegates to the Administrator of EPA the authority to designate additional hazardous substances. Id. Section 102 provides in part:
   The Administrator shall promulgate and revise as may be appropriate, regulations designating as hazardous substances, in addition to those referred to in section 9601(14) of this title, such elements, compounds, mixtures, solutions, and substances which, when released into the environment may present substantial danger to the public health or welfare or the environment . . . .
   CERCLA § 102, 42 U.S.C. § 9602.
from the Hazardous Substance Response Trust Fund (Superfund),\textsuperscript{4} but later may be recovered from the responsible parties.\textsuperscript{5}

Response actions under CERCLA include both short-term removal actions\textsuperscript{6} and permanent remedial actions.\textsuperscript{7} Removal actions are intended as interim measures to be implemented in response to an immediate threat to human health or the environment.\textsuperscript{8} In contrast, remedial actions are intended to effectuate permanent envi-

\begin{itemize}
\item \textsuperscript{4} Under the original CERCLA legislation, the Hazardous Substance Response Trust Fund was established under CERCLA § 131, 42 U.S.C. § 9631. When Congress amended CERCLA in 1986, the trust fund was reestablished under the Internal Revenue Code and retitled as the Hazardous Substance Superfund (Superfund). See 26 I.R.C. § 9507 (1988 & Supp. V 1993).
\item \textsuperscript{5} See CERCLA § 107, 42 U.S.C. § 9607. Under CERCLA, PRPs may be held liable for:
\begin{itemize}
\item \textsuperscript{A} all costs of removal or remedial action incurred by the United States Government or a State or an Indian Tribe not inconsistent with the national contingency plan;
\item \textsuperscript{B} any other necessary costs of response incurred by any other person consistent with the national contingency plan;
\item \textsuperscript{C} damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
\item \textsuperscript{D} the costs of any health assessment or health effects study carried out under section 9604(i) of this title.
\end{itemize}
\item \textsuperscript{6} CERCLA § 101(23), 42 U.S.C. § 9601(23). Section 101 defines removal actions as response mechanisms which are necessary for the abatement or prevention of a release or threatened release of a hazardous substance. \textit{Id.} Appropriate removal actions include "security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act." \textit{Id.} (citations omitted).
\item \textsuperscript{7} CERCLA § 101(24), 42 U.S.C. § 9601(24). CERCLA defines a remedial action as:
\begin{itemize}
\item \textsuperscript{T} hose actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of a hazardous substance so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment.
\end{itemize}
\item \textsuperscript{8} CERCLA § 101(23), 42 U.S.C. § 9601 (23); \textit{see also} United States Steel Supply, Inc. v. Alco Standard Corp., 96 Envtl. Rep. Cases (BNA) 1390 (N.D. Ill. 1992) (holding removal actions are only appropriate in emergency situations); Channel Master Satellite Sys. Inc. v. JFD Elec. Corp., 748 F. Supp. 373, 385 (E.D.N.C. 1990) (holding removal actions are reserved for limited situations in which rapid action is needed to prevent or contain threat to human health or environment); Versatile Metals, Inc. v. Union Corp., 693 F. Supp. 1563, 1577 (E.D. Pa. 1988) (holding removal actions may be implemented only in response to exigent circumstances).
\end{itemize}
environmental cleanup. pets Judicial review of both removal and remedial actions initiated by the government is limited to the administrative record. Furthermore, response actions must be upheld unless found to be "arbitrary and capricious or otherwise not in accordance with law." 11

In In Re Bell Petroleum Services, 12 the Fifth Circuit addressed the extent to which EPA removal actions are reviewable under the arbitrary and capricious standard. Based on the evidence in the administrative record, the court ruled that EPA's decision to construct an alternate water supply system was arbitrary and capricious. 14 This Note examines the statutory distinction between removal and remedial actions under CERCLA and discusses whether this distinction should have an effect on a reviewing court's analysis under the arbitrary and capricious standard of review. 15

Section II of this Note begins with a brief summary of the facts of Bell Petroleum. Section III presents an overview of CERCLA's legislative development, and evaluates relevant judicial interpretations effecting the authority of EPA to initiate response measures under the Act. Also, this section examines the extent to which EPA response action is subject to judicial review under the arbitrary and capricious standard. Lastly, this Note outlines the distinction between removal and remedial actions and explores the significance of this distinction in EPA initiated cost recovery actions.

9. CERCLA § 101(24), 42 U.S.C. § 9601(24); see also County Line Inv. Co. v. Tinney, 933 F.2d 1508, 1512 n.6 (10th Cir. 1991) (noting remedial actions, intended as permanent response measures, are distinguishable from removal actions which are designed for more limited purposes).

10. CERCLA § 113(j)(1), 42 U.S.C. § 9613(j)(1). This section provides:
In any judicial action under this chapter, judicial review of any issues concerning the adequacy of any response action taken or ordered by the President shall be limited to the administrative record. Otherwise applicable principles of administrative law shall govern whether any supplemental materials may be considered by the court.

Id.

11. CERCLA § 113(j)(2), 42 U.S.C. § 9613(j)(2). The language "otherwise not in accordance with law" is given effect by CERCLA § 104 which requires EPA action to be consistent with the National Contingency Plan (NCP). CERCLA § 104(a)(1), 42 U.S.C. § 9604(a)(1).

12. 3 F.3d 889 (5th Cir. 1993).

13. Bell Petroleum, 3 F.3d at 906. The court in Bell Petroleum also addressed whether a non-settling tort-feasor could be held jointly and severally liable where a reasonable method of apportionment could be demonstrated; however, this topic will not be discussed in this Note. Id. at 908.

14. Id. at 892.

15. For a discussion of the statutory distinction between removal and remedial actions, see infra notes 93-113 and accompanying text.
II. FACTS

The *Bell Petroleum* litigation arose from a Texas Water Commission investigation into reports of discolored drinking water at a site located near Odessa, Texas. 16 This investigation centered on a chromium-plating shop which operated continuously from 1971 to 1977. 17 In 1984, EPA declared the area a Superfund site 18 and subsequently entered into a cooperative agreement with the State of Texas to begin response measures. 19 Pursuant to the agreement, Texas conducted a Remedial Investigation and Feasibility Study (RI/FS) 20 which revealed that the area’s main water supply source contained harmful levels of chromium contamination. 21

16. *Bell Petroleum*, 3 F.3d at 892.

17. *Id.* at 903. The Texas Water Commission’s investigation revealed that the process of chromium plating produced excess waste water which was pumped out of the facility, and resulted in the contamination of local water supplies. *Id.*

Between 1971 and 1977, the chromium plating shop was managed by three successive operators. *Id.* The site was originally operated by its owner John Leigh. *Id.* Subsequently, Leigh transferred the assets of the shop to Western Pollution Control Corporation (Bell) who continued operating the shop under a lease with Leigh. *Id.* In 1976, Bell assigned its lease and sold its assets to the Sequa Corporation which continued to operate the chromium plating shop until its demise in late 1977. *Id.*

18. See CERCLA § 105, 42 U.S.C. § 9605. A Superfund site is a contaminated area listed on the National Priorities List (NPL). *Id.* NPL is a hazardous waste site ranking system which “assesses the relative degree of risk to human health and the environment posed by sites and facilities subject to review.” *Id.* § 105(c)(1), 42 U.S.C. § 9605(c)(1). The purpose of NPL is to identify those sites which pose the greatest threat to human health or the environment and to prioritize these sites according to the need for remedial action. See 40 C.F.R. § 300.425 (1994). Currently, EPA only considers sites listed on NPL as eligible for remedial response. *Id.*

19. *Bell Petroleum*, 3 F.3d at 892. CERCLA bases federal remedial action on the cooperative participation of state agencies. CERCLA § 104, 42 U.S.C. § 9604. Section 104 provides that, “[t]he President shall not provide any remedial actions pursuant to this section unless the State in which the release occurs first enters into a contract or cooperative agreement . . . .” *Id.* § 104(c)(3), 42 U.S.C. § 9604(c)(3); see also 40 C.F.R. §§ 300.180(d), 300.500-525 (1994) (providing the corresponding regulatory guidelines to effectuate Congress’ legislative mandate).


20. See 40 C.F.R. § 300.430(a)(2) (1994). The purpose of a Remedial Investigation and Feasibility Study (RI/FS) is to evaluate the extent of environmental damage and to develop appropriate remedial measures. *Id.* “Developing and conducting an RI/FS generally includes the following activities: project scoping, data collection, risk assessment, treatability studies, and analysis of alternatives.” *Id.*

21. *Id.* EPA has established a schedule of “listed hazardous substances” which are subject to CERCLA regulation. CERCLA § 102(a), 42 U.S.C. § 9602(a). This list includes chromium and chromium based compounds as regulated substances. *See* 40 C.F.R. § 302.4 (1994). Furthermore, Congress has explicitly mandated that high priority be given to contaminated water supplies. *See* CERCLA § 118, 42 U.S.C. § 9618 (“the President shall give a high priority to facilities where the re-
Texas subsequently conducted a "focused" feasibility study to determine whether an alternate water supply system should be installed until final remedial measures could be implemented.\textsuperscript{22} Based on the results of this study, EPA's Regional Administrator issued a Record of Decision (ROD) authorizing an extension of Odessa's water supply system to the contaminated area.\textsuperscript{23}

On review, the Fifth Circuit ruled that EPA's decision to construct the alternate water supply system was arbitrary and capricious in light of the evidence produced in the administrative record.\textsuperscript{24} In particular, the court cited EPA's failure to investigate whether anyone was actually drinking the contaminated water.\textsuperscript{25} According to the Fifth Circuit, such information would be essential to determine whether a removal action would "reduce any significant threat to public health."\textsuperscript{26}

III. BACKGROUND

A. CERCLA

Congress enacted CERCLA in response to several widely publicized environmental catastrophes.\textsuperscript{27} These incidents generally involved abandoned hazardous waste sites for which environmental lease of hazardous substances or pollutants or contaminants has resulted in the closing of drinking water wells or has contaminated a principal drinking water supply.

\textsuperscript{22} Bell Petroleum, 3 F.3d at 893; see also CERCLA § 101(23), 42 U.S.C. § 9601(23) (including construction of alternate water supply system in list of appropriate removal actions).

\textsuperscript{23} Bell Petroleum, 3 F.3d at 893.

\textsuperscript{24} Id. at 907. In so holding, the Fifth Circuit rejected the district court's application of a gross misconduct standard. \textit{Id.} To show that an EPA removal action is inconsistent with NCP criteria, a defendant is only required to demonstrate that EPA acted in an arbitrary and capricious manner. \textit{Id.}

\textsuperscript{25} Id. at 905. The majority opinion also relied on evidence showing that the commercial establishments most affected by the contamination were not permitted to utilize the alternate water supply system. \textit{Id.} Judge Parker, who concurred in part and dissented in part, noted that these businesses were given an option to be incorporated into the system if they were willing to bear their own costs. \textit{Id.} at 918.

\textsuperscript{26} Id. at 905. In contrast, Judge Parker argued that EPA's decision was amply supported by the administrative record which demonstrated that the site's chromium contamination exceeded the maximum concentration limit established by the Safe Drinking Water Act. \textit{Id.} CERCLA specifically authorizes SDWA's maximum concentration levels as an appropriate standard for agency decision-making. \textit{Id.} at 916 (citing CERCLA § 121(d)(2)(A), 42 U.S.C. § 9621(d)(2)(A)).

\textsuperscript{27} H.R. Rep. No. 1016, 96th Cong., 2d Sess., pt. 1, at 17-18 (1980), \textit{reprinted in} 1980 U.S.C.C.A.N. 6119, 6120-21. The Committee on Interstate and Foreign Commerce commissioned a subcommittee to investigate over a dozen abandoned hazardous waste sites. \textit{Id.} As a result of this investigation, the subcommittee produced a report detailing the scope and nature of the abandoned waste site problem. \textit{Id.} This report served as a catalyst for legislative intervention. \textit{Id.}
legislation, at the time, did not provide an adequate remedy. For instance, the Resource Conservation and Recovery Act (RCRA) provided sufficient mechanisms to clean up active hazardous waste sites, but failed to create adequate remedies to handle dormant waste sites. CERCLA's legislative history reflects Congress's intent to eliminate this "inactive hazardous waste site problem."

CERCLA ameliorates the deficiencies of prior environmental legislation by authorizing response measures immediately upon discovery of a release or threatened release of a hazardous substance. EPA may commence response activities by using funds from Superfund and later recovering costs from the responsible parties. Alternatively, EPA may compel responsible parties to implement remedial measures on their own.

In accordance with the Administrative Procedure Act (APA), CERCLA restricts litigation concerning an EPA response action to

The Love Canal incident is perhaps the most illustrious case among those investigated by the subcommittee. This incident involved the disposal of large amounts of chemical industrial waste by the Hooker Chemical Company. Residents of the Niagara Falls area were victims of increased "miscarriage and birth defect rates." Eventually, 230 families were evacuated from the area.

28. Id. at 6120.
   (1) The Act is prospective and applies to past sites only to the extent that they are posing an imminent hazard. Even there, the Act is of no help if a financially responsible owner of the site cannot be located.
   (2) RCRA does not authorize EPA and the Department of Justice to subpoena documents or persons suspected of illegal or inadequate hazardous waste disposal practices.
   (3) RCRA does not require people to reveal the existence and monitor possible pollution from inactive waste disposal sites.
   (4) RCRA provides inadequate funds for State hazardous waste programs.

   Id.
32. CERCLA § 104(a), 42 U.S.C. § 9604(a).
33. Id. § 107, 42 U.S.C. § 9607. For the definition of a potentially responsible party under CERCLA, see supra note 2.
34. See CERCLA § 106, 42 U.S.C. § 9606 (pertaining to abatement actions).
35. Administrative Procedure Act (APA) §§ 551-59, 701-06, 5 U.S.C. §§ 551-59, 701-06 (1994). Under the current version of APA, the standard of review applied to agency action is provided by 5 U.S.C. § 706. This section provides:
   To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —
review of the administrative record. 36 In the legislative history sup-

(2) hold unlawful and set aside agency action, findings and con-

clusions found to be —

(A) arbitrary, capricious, an abuse of discretion, or

otherwise not in accordance with law;

. . .

(E) unsupported by substantial evidence in a case sub-

ject to sections 556 and 557 of this title or otherwise

reviewed on the record of an agency hearing provided

by statute; or

. . .

In making the foregoing determinations, the court shall review

the whole record or those parts of it cited by a party, and due

account shall be taken of the rule of prejudicial error.


See also Roberts v. Morton, 549 F.2d 158, 160 (10th Cir. 1976) (holding that

review of agency action is limited "to the agency record or such portions of it

which the parties may cite, and additional evidence is not to be admitted."),

cert. denied, 434 U.S. 834 (1977); American Petroleum Inst. v. EPA, 540 F.2d 1029, 1029

(10th Cir. 1976) ("[t]he grounds upon which the agency acted must be clearly dis-

closed in, and sustained by, the record."), cert. denied, 430 U.S. 922 (1977); Harper

Oil Co. v. Federal Power Comm'n, 284 F.2d 137, 140 (10th Cir. 1960) ("where Con-

gress has delegated primary jurisdiction in a given field to an Administrative

body, the jurisdiction of a court in reviewing its proceedings is limited to determi-

nating whether there is in the record substantial evidence to support its findings and

conclusions.").

Warren County v. North Carolina, 528 F. Supp. 276, 288 (E.D.N.C. 1981) ("[j]udicial review of any agency action is to be confined to the record on

which the decision was made."); Littell v. Morton, 369 F. Supp. 411, 423 n.13 (D. Md. 1974) ("[r]eview of administrative decisions is limited to the record with no de

 novo review."); aff'd, 519 F.2d 1399 (4th Cir. 1975); South Dakota v. Volpe, 353 F.

Supp. 335, 338 (D.S.D. 1973) ("[i]t is a well recognized rule of law that judicial

review of an administrative decision is limited in scope. Such a review is confined to

a review of the record made at the administrative level."); Wheatley v. W.D.


that this Court is limited in its review to the record of the administrative

proceedings.").

36. CERCLA § 113(j), 42 U.S.C. § 9613(j). This section provides, in part, that

"judicial review of any issues concerning the adequacy of any response action taken

or ordered by the President shall be limited to the administrative record." Id. In


1992), aff'd, 11 F.3d 235 (1st Cir. 1993), the District Court of Massachusetts de-
scribed the administrative record as "the record that was before the agency at the

time it made the decision in issue." (citations omitted). The court further com-
mented that "[t]his record 'consists of all documents and materials directly or indi-
rectly considered by agency decision-makers.'" Id. (citing Towns of Norfolk &


1991)).

Courts have recognized a narrow exception to APA's requirement that a re-
viewing court's analysis be restricted to the administrative record. This exception

generally arises when the agency fails to compile an administrative record suffi-
cient for the purpose of review. See Asarco, Inc. v. EPA, 616 F.2d 1153, 1160 (9th

Cir. 1980) (permitting reviewing court to consider evidence outside the administra-
tive record "for background information . . . or for the limited purposes of ascer-
taining whether the agency considered all relevant factors or fully explicited its

course of conduct or grounds of decision."); United States v. Wastecontrol of Fl'a.,

Inc., 730 F. Supp. 401, 405 (M.D. Fla. 1989) ("If the defendant finds the record
plementing the Superfund Amendments and Reauthorization Act of 1986 (SARA), Congress expressed two policy reasons for this restriction. First, by limiting review to the administrative record, Congress ensures that the bases for EPA decisions are continuously available for public scrutiny. Second, by excluding extraneous information, reviewing courts are able to operate more efficiently.

CERCLA also provides that response costs are recoverable only to the extent that they are not inconsistent with the National Contingency Plan (NCP). The NCP embodies EPA's regulatory scheme for investigating hazardous waste sites and developing subsequent response actions. In actions initiated by EPA, the defendant bears the burden of proving that response actions are inconsistent with NCP requirements. To meet this burden the defendant or believes that further information must be disclosed, the defendant may file a motion requesting that the Court supplement the administrative record or permit discovery on a narrow issue.

The exception is further supported by decisions under APA. See Public Power Council v. Johnson, 674 F.2d 791, 793-94 (9th Cir. 1982) (commenting that "[w]hen there is 'such a failure to explain administrative action as to frustrate effective judicial review,' the court may 'obtain from the agency, either through affidavits or testimony, such additional explanations of the reasons for the agency decision as may prove necessary.'") (citing Camp v. Pitts, 411 U.S. 138, 143 (1973)); National Treasury Employees Union v. Hove, 840 F. Supp. 165, 168 (D.D.C. 1994) (ruling that a "court may consider evidence outside the administrative record . . . as a means of requiring an agency to explicate its own reasoning when the record is unclear."), aff'd sub nom, National Treasury Employees Union v. Helfer, 53 F.3d at 1289 (D.C. Cir. 1995); City of Reading v. Austin, 816 F. Supp. 351, 361 (E.D. Pa. 1993) ("[o]ne exception to the general rule permits a court to go outside of the record to consider background evidence clarifying the information before the agency at the time of decision.") (citations omitted); Waltham, 786 F. Supp. at 117 (D. Mass. 1992) (ruling that a court may consider external evidence "'tending to show significant impacts or realistic alternatives that the responsible officials ignored.'") (citations omitted).


39. Id. at 2921.


41. See 40 C.F.R. § 300 (1994); Bell Petroleum, 3 F.3d at 894.

42. United States v. Northeastern Pharmaceutical & Chem. Co., (NEPACCO), 810 F.2d 726, 747 (8th Cir. 1986); see also United States v. R.W. Meyer, Inc., 889 F.2d 1497, 1508 (6th Cir. 1989) (ruling that defendant in governmet initiated response action "bears the burden of demonstrating that the costs sought under CERCLA's liability provisions are inconsistent with the NCP."). cert. denied, 494 U.S. 1057 (1990). Conversely, in actions brought by private parties to recover response costs, the plaintiff bears the burden of demonstrating that response measures conform to NCP criteria. NEPACCO, 810 F.2d at 747.
fendant must show that EPA acted arbitrarily or capriciously in implementing a response measure.43

B. The Arbitrary and Capricious Standard of Review

Judicial review of agency action is guided by a two-pronged analysis.44 A reviewing court must first determine whether explicit statutory language precludes agency discretion.45 If Congress has directly spoken to the issue, agency action must comply with Congress’s legislative scheme.46 Conversely, if Congress fails to address a particular issue, a reviewing court’s analysis shifts to whether the agency’s decision is “based on a permissible construction of the statute.”47 In the absence of clear legislative guidance, a court must give effect to an agency’s reasonable interpretation of Congress’s legislative intent.48

43. CERCLA § 113(j)(2), 42 U.S.C. § 9613(j)(2); see Motor Vehicle Mfrs. Ass’n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983). In State Farm, the Supreme Court offered the following commentary on the application of the arbitrary and capricious standard of review:

Normally an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. at 43. Other federal court decisions have offered similar descriptions of the arbitrary and capricious standard. See Board of County Comm’rs of County of Adams v. Isaac, 18 F.3d 1492, 1497 (10th Cir. 1994) (“[a]n agency acted arbitrarily and capriciously if it relied on factors deemed irrelevant by Congress, failed to consider important aspects of the problem, presented an implausible explanation or one contrary to the evidence.”); Mount Evans Co. v. Madigan, 14 F.3d 1444, 1453 (10th Cir. 1994) (ruling that judicial review under arbitrary and capricious standard is narrow and that agency’s decision will be upheld if it was reasonable in light of a fair consideration of the relevant factors).

Mobil Oil Corp. v. Department of Energy, 610 F.2d 796, 801 (Temp. Emer. Ct. App. 1979) (ruling that the appropriate inquiry under the arbitrary and capricious standard of review is whether the agency’s “decision was based on a consideration of the relevant factors, whether there has been a clear error of judgment and whether there is a rational basis for the conclusions approved by the administrative body.”) (quoting Texaco, Inc. v. FEA, 531 F.2d 1071, 1076-77 (Temp. Emer. Ct. App. 1976), cert. denied, 426 U.S. 941 (1976), cert. denied, 466 U.S. 937 (1980)).


45. Chevron, 467 U.S. at 842; see also ILCO, 996 F.2d at 1130 (“If Congress has clearly and directly spoken to the precise question at issue, effect must be given to the expressed intent of Congress.”) (citing Chevron, 467 U.S. at 842-45).

46. Chevron, 467 U.S. at 842; ILCO, 996 F.2d at 1130.

47. Chevron, 467 U.S. at 843; ILCO, 996 F.2d at 1130; Western Oil & Gas Ass’n v. EPA, 767 F.2d 603 (9th Cir. 1985) (applying Chevron criteria to EPA interpretation of Clean Air Act (CAA)).

48. Chevron, 467 U.S. at 843; ILCO, 996 F.2d at 1130.
In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the United States Supreme Court approved EPA’s construction of an ambiguous provision of the Clean Air Act (CAA).49 CAA directed EPA to establish regulations requiring states to adopt a permitting program for “new or modified major stationary sources’ of air pollution.”50 Under the promulgated regulations, EPA allowed industrial plants to qualify several pollution emitting devices within a single “bubble.”51 The issue before the Court was whether this construction was a permissible interpretation of the term “stationary source.”52

In reversing the Court of Appeals for the District of Columbia Circuit, the Supreme Court noted that neither CAA nor its legislative history offered a clear definition of the term “stationary source.”53 In circumstances where legislative guidance is ambiguous, the Court held that a reviewing court must afford considerable discretion to an agency’s reasonable interpretation of the statute.54 The Court commented that where Congress’s legislative framework leaves gaps to be filled by agency regulations, such regulations should be upheld unless found to be “arbitrary, capricious, or manifestly contrary to the statute.”55 Based on this analysis, the Court ruled that EPA’s “bubble” scheme was consistent with a permissible interpretation of CAA.56

The United States Supreme Court concluded differently in *Motor Vehicle Manufacturers Ass’n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*57 In *State Farm*, the Court evaluated

---

50. Id. at 840.
51. Id.
52. Id.
53. Id. at 842. Commenting on the Court of Appeals decision, the Court remarked, “The basic legal error of the Court of Appeals was to adopt a static judicial definition of the term ‘stationary source’ when it had decided that Congress itself had not commanded that definition.” *Id.*
54. *Chevron*, 467 U.S. at 844; *ILCO*, 996 F.2d at 1126. In *ILCO*, the Eleventh Circuit addressed the issue of “whether lead parts, which have been reclaimed from spent car and truck batteries for recycling purposes, are exempt from regulation under RCRA.” *Id.* at 1130. Because the term “hazardous wastes” could be reasonably interpreted to include materials collected for recycling purposes, the Eleventh Circuit found that EPA’s decision to regulate reclaimed battery parts was based on a permissible construction of RCRA. *Id.* at 1132. To support its decision the court commented, “We have found nothing in the language of the statute, and ILCO has brought forth nothing from the legislative history to show that EPA’s policy choice is not one Congress would have sanctioned.” *Id.*
55. *Chevron*, 467 U.S. at 844 (footnote omitted).
56. *Id.* at 866.
the National Traffic and Motor Vehicle Safety Act of 1966 (NTMVSA) which required the Secretary of Transportation to issue regulations which would improve traffic safety and reduce accident fatalities. Under the Act, all actions taken by the Secretary were to be reviewed in accordance with APA.

The central issue in State Farm was whether the Secretary's repeal of a regulation requiring passive restraint systems to be implemented in all automobiles manufactured after September 1982, was arbitrary and capricious within the meaning of APA. The Court acknowledged that the "'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." The Court, however, stressed that agency decision-making is not completely unrestrained and that an agency must provide a substantial basis for its decision.

Since the analyses conducted by the National Highway Traffic Safety Administration (NHTSA) provided an inadequate foundation for rescinding the passive restraint system requirement, the Supreme Court held that the Agency's decision was arbitrary and capricious. In so holding, the Court did not question NHTSA's broad discretionary powers to determine appropriate traffic safety regulations, but challenged the agency's disregard of its administra-


59. Id. at 33-34 (citations omitted). For a discussion of APA, see supra note 35 and accompanying text.

60. State Farm, 463 U.S. at 46-58. Under authority delegated by the Secretary of Transportation, the National Highway Traffic Safety Administration (NHTSA) promulgated Modified Standard 208 in 1977. Id. at 37. This standard required automobile manufacturers to incorporate passive restraint systems (automatic seatbelts or airbags) into the design of automobiles produced after September 1982. Id. NHTSA initially anticipated that 60% of newly manufactured automobiles would be equipped with airbags and the remaining 40% with automatic seatbelts. Id. at 38. NHTSA subsequently discovered that the automobile industry intended to produce 99% of all automobiles with automatic seatbelts. Id. Because the detachability of automatic seatbelts counteracted any potential traffic safety benefits, NHTSA determined that the objectives of Modified Standard 208 could not be achieved and therefore should be repealed. Id. at 38-39.

61. Id. at 43; see also Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (Court commented, in its discussion of the arbitrary and capricious standard of review that, "[a]lthough this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one.").

62. State Farm, 463 U.S. at 43 ("the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'") (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

63. Id. at 46-50.

64. Id. at 46.
tive duties.\textsuperscript{65} By failing to supply a "reasoned analysis" for its decision, NHTSA disregarded APA guidelines and violated specific mandates of NTMVSA.\textsuperscript{66}

C. The Cost Effectiveness Issue

The paradigm case concerning EPA cost recovery under CERCLA is \textit{United States v. Northeastern Pharmaceutical \\& Chemical Co. (NEPACCO)}.\textsuperscript{67} In \textit{NEPACCO}, the appellant's production of a chemical disinfectant created various waste byproducts.\textsuperscript{68} A portion of the byproducts was stored in fifty-five gallon drums which were later transported to a local farm and deposited in an underground trench.\textsuperscript{69} Acting on an anonymous tip, EPA investigated the farm and discovered "'alarmingly' high concentrations of dioxin, TCP and toluene."\textsuperscript{70} EPA initially implemented a temporary removal measure by placing a cap over the trench to prevent contamination of the surrounding soil and groundwater.\textsuperscript{71} Later, EPA conducted a second removal action, extracting the fifty-five gallon drums from the trench and placing the disinterred wastes in a specially designed concrete bunker.\textsuperscript{72}

On appeal, the defendants challenged the district court's holding that "all costs that are not inconsistent with the NCP are conclusively presumed to be reasonable."\textsuperscript{73} In rejecting the defendant's argument, the Eighth Circuit explained that because "CERCLA does not refer to 'all reasonable costs' but simply to 'all costs,'"

\begin{footnotesize}
\textsuperscript{65} Id. at 48. The Court criticized NHTSA's failure to properly consider adoption of an airbags-only option. The Court commented, "'[T]here are no findings and no analysis here to justify the choice made, no indication of the basis on which the [agency] exercised its expert discretion.'" \textit{Id.} (quoting \textit{Burlington Truck Lines}, 371 U.S. at 167).

\textsuperscript{66} Id. at 57.

\textsuperscript{67} 810 F.2d 726 (8th Cir. 1986), \textit{cert. denied}, 484 U.S. 848 (1987).

\textsuperscript{68} Id. at 729-30.

\textsuperscript{69} Id. at 730. \textit{NEPACCO} disposed of wastes in two manners. Most waste materials were temporarily stored in holding tanks and subsequently disposed of by professional waste haulers. \textit{Id.} Alternatively, the wastes were stored in 55 gallon drums which were later placed in trenches on a nearby farm. \textit{NEPACCO} addressed only the latter method of disposal. \textit{Id.}

\textsuperscript{70} Id.

\textsuperscript{71} Id.

\textsuperscript{72} \textit{NEPACCO}, 810 F.2d at 730. While the Eighth Circuit does not specifically characterize EPA's response as a removal action, the court noted that "no plan for permanent disposal has been developed, and the site will continue to require testing and monitoring in the future." \textit{Id.}

\textsuperscript{73} Id. at 747.
\end{footnotesize}
EPA's response costs are subject to a presumption of validity. The court conceded, however, that the appropriateness of response costs is closely linked to whether EPA's selection of a particular response measure is consistent with NCP criteria. If EPA had acted arbitrarily or capriciously in proceeding with the removal efforts at the NEPACCO site, cost recovery would have been denied.

In *United States v. R.W. Meyer,* the Sixth Circuit ruled that EPA's failure to conduct competitive bidding prior to implement-

74. *Id.* at 748 (emphasis omitted). The defendants also questioned the district court's allocation of the burden of proof. *Id.* at 747. Due to EPA's responsibility to assemble sufficient information to justify a response action, the defendants argued that EPA must establish compliance with NCP criteria. *Id.* To wit, "Appellants note that the information and facts necessary to establish consistency with the NCP are matters within the possession of the government." *See also* William J. Frielman, *Judicial Review Under the Superfund Amendments: Will Parties Have Meaningful Input to the Remedy Selection Process?*, 14 COLUM. J. ENVTL. L. 187, 191 (arguing that since the administrative record is largely composed of documents submitted by the Agency, EPA is able to control materials available for review).

The Eighth Circuit, however, rejected this argument holding that the plain language of CERCLA manifests an intent to place the burden of proof on defendants to demonstrate inconsistency with NCP. *NEPACCO,* 810 F.2d at 747. To support its holding, the Eighth Circuit relied on a statutory distinction between cost recovery actions brought by the government and actions brought by private parties. *Id.* The court noted that CERCLA § 107(a)(4)(A) allows the government to "recover all costs of removal or remedial action . . . not inconsistent with the NCP." *Id.* (quoting CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A)).

In contrast, CERCLA § 107(a)(4)(B) permits private parties to recover "any other necessary costs of response . . . consistent with the [NCP]." *NEPACCO,* 810 F.2d at 747 (quoting CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A)). Based on this distinction, the court concluded that Congress intended to allocate the burden of proof more favorably to the plaintiff in government-initiated actions, and more favorably to defendants in actions brought by private parties. *Id.*

*See also* United States v. Ward, 618 F. Supp. 884, 899 (E.D.N.C. 1985). In *Ward,* the District Court for the Eastern District of North Carolina found that CERCLA's separate treatment of government and private party claims "implies that government actions . . . are presumed to be consistent with the NCP unless otherwise shown, while actions of private parties are not entitled to the benefit of this presumption." *Id.*

75. *NEPACCO,* 810 F.2d at 748. The Eighth Circuit noted that in establishing NCP, EPA was directed by Congress to incorporate the "'national hazardous substance response plan,' " which included provisions relating to the cost effectiveness of remedial actions. *Id.* Therefore, the Eighth Circuit determined that under NCP, "[c]onsideration of whether particular action is 'necessary' is . . . factored into the 'cost-effective' equation." *Id.* In other words, NCP regulations governing the choice of a particular response measure implicitly anticipate the cost-effectiveness issue. *Id.*


ing a removal action was not arbitrary and capricious. An investigation of defendant’s property, conducted by the Michigan Department of Natural Resources, revealed that improper waste disposal had caused hazardous substances to contaminate the city of Cadillac’s sewage treatment system. As a result, EPA concluded that the site demanded an immediate removal measure to ensure the safety of the surrounding communities.

EPA subsequently brought suit to recover the costs of the removal effort. The defendant challenged the recoverability of these costs based upon EPA’s failure to conduct competitive bidding in accordance with government procurement procedures. The Sixth Circuit ruled, however, that EPA “must organize its response efforts in accordance with the severity of the danger posed.” Since the contaminated site posed an immediate threat to health, the court concluded that EPA was justified in foregoing competitive bidding.

In a more recent case, United States v. Hardage, the Tenth Circuit specifically addressed the effect of CERCLA’s cost effectiveness requirement under section 105(a)(7). In Hardage, the court upheld the district court’s grant of summary judgment despite appellant’s argument that EPA response costs were excessive and unreasonable. The court commented that inconsistency with NCP is not determined by the reasonableness of costs, but by whether EPA acted arbitrarily or capriciously in choosing a particular response measure. As expressed by the court, “[t]he NCP regulates choice of response actions, not costs.”

78. Id. at 1508.
79. Id. at 1498-99. The defendant owned property which was leased to Northernaire Electroplating Company. As a result of Northernaire’s manufacturing activities, large quantities of toxic substances were stored on defendant’s property. Id.
80. Id. at 1499. This investigation was prompted by a report that a small child had suffered chemical burns while playing on the property. Id. at 1498.
81. R.W. Meyer, 889 F.2d at 1499.
83. R.W. Meyer, 889 F.2d at 1508. EPA produced evidence that a response measure was necessary within six months. Id. Ordinarily, the competitive bidding process can take anywhere from nine to twelve months. Id.
86. Hardage, 982 F.2d at 1440.
87. Id. at 1444.
88. Id.
89. Id.
Accordingly, the Tenth Circuit rejected the appellant's argument that section 105(a)(7) of CERCLA requires NCP regulations to guarantee the reasonableness of individual costs. To demonstrate inconsistency with NCP requirements, the defendants must show that EPA acted arbitrarily and capriciously by failing to consider cost when choosing a particular response action. A showing that individual costs were excessive or unreasonable is not sufficient to demonstrate that EPA's selection of a response measure was arbitrary and capricious.

D. The Distinction Between Removal and Remedial Actions

CERCLA distinguishes between two types of response actions — removal actions and remedial actions. Removal actions are intended as temporary measures which may be implemented in response to an immediate threat to human health or the environment. Removal actions are limited to emergency situations which require a speedy response; therefore, CERCLA does not command, and correspondingly EPA has not promulgated, extensive procedural regulations governing the proper execution of a removal action. The scant legislative history accompanying the

90. Hardage, 982 F.2d at 1443. The court noted that only remedial actions are required to be cost effective. Id. at 1444. CERCLA contains no reciprocal provision pertaining to removal actions. Id.

91. Id.

92. Id.


95. See Versatile Metals v. Union Corp., 693 F. Supp. 1563, 1577 (E.D. Pa. 1988). In Versatile Metals, the District Court for the Eastern District of Pennsylvania noted that "[r]emoval actions are not subject to the lengthy procedural requirements of the NCP since they are taken in response to an immediate threat." Id. Therefore, the NCP does not require EPA to conduct a full RI/FS before implementing a removal action. Id.; see also Channel Master Satellite, 748 F. Supp. at 386 ("Depending on urgency of response (emphasis omitted), removal actions may be taken without preparation of [an RI/FS].") (citing EPA Guidance Document for Cleanup Surface Impoundment Sites).

Nevertheless, the NCP does require EPA to conduct a preliminary removal site evaluation of the contaminated area to determine the exigency of the potential threat. 40 C.F.R. § 300.415 (1994). Factors to consider in determining an appropriate removal action include in part:

(i) Actual or potential exposure to nearby human populations, animals, or the food chain from hazardous substances or pollutants or contaminants;
(ii) Actual or potential contamination of drinking water supplies or sensitive ecosystems;
Superfund Amendments and Reauthorization Act of 1986 (SARA) indicates that Congress intended, through the limited circumstances in which removal actions may be implemented, to leave the manner in which removal actions are administered to EPA's discretion.  

Conversely, remedial actions are intended to achieve permanent environmental cleanup.  The purpose of a remedial action is not merely to detain an immediate threat to human health or the environment, but to realize complete environmental cleanup.  Since the scope of remedial actions is broader than removal actions, remedial actions are subject to a wider array of procedural requirements.  For example, to initiate a remedial action, NCP requires EPA to qualify the contaminated site for placement on the National Priorities List (NPL).  Then, EPA must conduct an RI/
FS to determine the extent of environmental damage and to develop an appropriate remedial response.\textsuperscript{101}

To date, no appellate court has comprehensively addressed the distinction between removal and remedial actions under CERCLA;\textsuperscript{102} however, the consensus among the district courts suggests that this distinction may have a dispositive effect on whether response costs are recoverable.\textsuperscript{103} For example, in \textit{Versatile Metals, Inc. v. Union Corp.},\textsuperscript{104} the District Court for the Eastern District of Pennsylvania held that removal actions may be implemented only under exigent circumstances and that all other response measures must meet the stringent statutory and regulatory requirements pertaining to remedial actions.\textsuperscript{105}

In \textit{Versatile Metals}, the plaintiff alleged that six months after entering a lease agreement with the defendant, evidence of toxic contamination was discovered on the leased property.\textsuperscript{106} After notification of the site's contamination, the defendant initiated a private party response action in cooperation with EPA.\textsuperscript{107} In response to the plaintiff's suit for breach of contractual warranties, the defendant counterclaimed seeking to recover all response costs

\begin{itemize}
  \item \textsuperscript{101} 40 C.F.R. § 300.430(a)(2).
  \item \textsuperscript{102} See Tinney, 933 F.2d at 1512 n.6. In Tinney, the Tenth Circuit offered a cursory analysis of the remedial/removal action distinction. \textit{Id.} The court noted that a remedial action is intended to effectuate permanent environmental cleanup, whereas a removal action is designed as an "interim response to particular site conditions that is governed by more limited and flexible NCP requirements." \textit{Id.; Shore Realty, 759 F.2d at 1040} (noting that CERCLA distinguishes between two types of response measures: "remedial actions - generally long-term or permanent containment or disposal programs - and removal efforts - typically short-term cleanup arrangements.").
  \item \textsuperscript{103} See Amland, 711 F. Supp. at 795. In Amland, the District Court of New Jersey commented that "[t]he distinction between these actions is of no small importance, for whereas removal actions need only comply with the relatively simple NCP requirements set forth at 40 C.F.R. § 300.65 ...., remedial actions must comport with the 'more detailed procedural and substantive provisions of the NCP' as set forth at 40 C.F.R. § 300.68." \textit{Id.; Versatile Metals, 693 F. Supp. at 1576} ("The distinction between remedial and removal actions is crucial in certain cases where the failure to fulfill the more detailed procedural and substantive provisions of the NCP with regard to 'remedial' actions becomes a barrier to recovery of response costs.").
  \item \textsuperscript{104} 693 F. Supp. 1563 (E.D. Pa. 1988).
  \item \textsuperscript{105} \textit{Id.} at 1577.
  \item \textsuperscript{106} \textit{Id.} at 1567.
  \item \textsuperscript{107} \textit{Id.} at 1571.
\end{itemize}
associated with the cleanup of contamination caused during the plaintiff’s occupancy of the property.108

Since removal actions are held to a more lenient set of procedural requirements than remedial actions,109 the defendant attempted to characterize its response efforts as a removal action.110 The district court, however, rejected this argument and held that removal actions are only appropriate in circumstances involving an immediate threat to human health or the environment.111 “Removal actions are short-term, immediate response actions, and are limited to situations which pass the ‘threshold’ for removal actions . . . .”112 In the absence of an immediate threat, any response action taken must conform to the rigid regulatory scheme applicable to remedial actions.113

IV. Narrative Analysis

In *Bell Petroleum*, the Fifth Circuit addressed whether an EPA decision to implement an alternate water supply system was arbitrary and capricious.114 EPA argued that even unreasonable or excessive removal costs are recoverable under CERCLA if the implemented action is not otherwise inconsistent with NCP.115 This argument was based on a statutory distinction between removal and remedial actions under CERCLA. According to CER-
CLA section 121(b), remedial actions are to be cost effective; however, no such requirement is imposed on removal actions.

Relying on this distinction, the district court ruled that removal costs could be recovered "so long as they were not the product of 'gross misconduct' by the agency." The Fifth Circuit rejected this conclusion, finding no statutory basis for a "gross misconduct" standard. The court ruled that the relevant inquiry is whether EPA acted arbitrarily and capriciously in implementing a particular response measure.

Since the administrative record provided insufficient evidence supporting EPA's decision to construct the alternate water supply system, the Fifth Circuit concluded that EPA's decision was arbitrary and capricious. Although EPA surveys revealed that a nearby aquifer contained chromium concentrations in excess of the maximum standards established by the Safe Drinking Water Act (SDWA), the court held that such evidence is not determinative absent a showing that the contaminated water was actually being consumed. As a result of EPA's failure to provide sufficient evi-
dence that the alternate water supply system would significantly reduce any public health threat, the Fifth Circuit reversed the district court’s decision and denied EPA cost recovery.\textsuperscript{124}

In his dissenting opinion, Judge Parker argued that EPA’s technical expertise should be afforded deference.\textsuperscript{125} Relying on the Supreme Court’s decisions in \textit{Chevron} and \textit{State Farm}, Judge Parker concluded that “courts are not to second-guess the scientific judgments of the EPA.”\textsuperscript{126} The dissent further commented that “the agency’s decision need only be reasonable in light of the facts reflected in the administrative record and under the applicable statute(s) and regulations; it need not be the ‘best’ or ‘most reasonable’ decision.”\textsuperscript{127} Also, Judge Parker disagreed with the majority’s cursory treatment of the SDWA’s maximum concentration limits.\textsuperscript{128} Since CERCLA defines a “drinking water supply” broadly, Judge Parker argued that SDWA standards should have been given greater weight.\textsuperscript{129}

V. CRITICAL ANALYSIS

The Fifth Circuit’s decision in \textit{Bell Petroleum} represents a rare instance in which EPA response costs have been denied under the arbitrary and capricious standard of review. Since the arbitrary and capricious standard is to be construed narrowly and a reviewing court may not substitute its judgment for a reasonable agency determination, most EPA response actions will be upheld by a reviewing court.\textsuperscript{130} EPA, however, is bound to comply with the substantive

lead to absurd [sic] and costly results that could drain the Fund and jeopardize the national cleanup effort.


\textsuperscript{124} \textit{Bell Petroleum}, 3 F.3d at 906.
\textsuperscript{125} \textit{Id.} at 918.
\textsuperscript{127} \textit{Id.} at 915.
\textsuperscript{128} \textit{Id.} at 917.
\textsuperscript{129} \textit{Bell Petroleum}, 3 F.3d at 916; see CERCLA § 101, 42 U.S.C. § 9601. CERCLA defines a drinking water supply as “any raw or finished water source that is or may be used by a public water system (as defined in the Safe Drinking Water Act . . .) or as drinking water by one or more individuals.” (citation omitted). \textit{Id.}
\textsuperscript{130} \textit{See Overton Park}, 401 U.S. at 416 (“The court is not empowered to substitute its judgment for that of the agency.”); \textit{State Farm}, 463 U.S. at 43; \textit{American Petroleum, Inst. v. EPA}, 661 F.2d 340, 348 (5th Cir. 1981).
requirements of NCP. Consequently, EPA must compile a sufficient administrative record supporting its decision to implement a response action. A reviewing court is not obligated to rely merely on EPA's scientific expertise. An agency entrusted with broad regulatory powers has an affirmative duty to demonstrate on the administrative record "why it has exercised its discretion in a given manner."

Based on the analysis above, the Fifth Circuit correctly avoided addressing the cost-effectiveness issue raised by EPA. Since the administrative record did not contain evidence justifying a removal action, the issue of whether the alternate water supply was implemented in a cost effective manner was moot. Ultimately, the Fifth Circuit did not rely on EPA's failure to pursue cost effective measures, but on EPA's inability to demonstrate that the contaminated water supply posed a potentially adverse health risk.

To justify a removal action, NCP requires that the contaminated site pose an immediate threat to human health or the environment. In government initiated actions to recover response costs, the burden is on the defendant to show that the contaminated site did not pose an immediate threat; nevertheless, EPA remains responsible for compiling a sufficient administrative record supporting its decision. Therefore, EPA is ultimately responsible for meeting a threshold requirement to maintain its claim.

While Congress exempted removal actions from the stringent procedural requirements applied to remedial actions under CERCLA, Congress did not intend to allow EPA to implement re-

131. CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4) (providing that the EPA may recover response costs to the extent not inconsistent with NCP); see also Hardage, 982 F.2d at 1442 (holding that EPA action is arbitrary and capricious only where shown to be inconsistent with NCP).


133. State Farm, 463 U.S. at 48.

134. See Bell Petroleum, 3 F.3d at 907 n.26. The Fifth Circuit offers no opinion on whether EPA may "recover unreasonable, unnecessary, or excessive costs." Id. at 906 ("on the basis of the administrative record, it appears that the AWS did not even reduce, much less eliminate, any public health threat.").

135. See 40 C.F.R. § 300.410(f)(2) (providing for termination of removal site evaluation in absence of immediate threat of harm). For a further discussion of removal and remedial actions, see supra notes 93-113 and accompanying text.

136. See R.W. Meyer, 889 F.2d at 1508; NEPACCO, 810 F.2d at 747; Gurley, 788 F. Supp. at 1473.

137. See Versatile Metals, 693 F. Supp at 1577 (holding that EPA may implement a removal action only if the contaminated site meets the threshold requirements for a removal action).

moval actions indiscriminately. Removal actions are reserved for those limited circumstances in which a contaminated site poses an immediate threat to human health or the environment. It would be contrary to Congressional intent to encourage ineffective removal actions by allowing cost recovery where no emergency situation exists. Absent a threat to public health, EPA should concentrate its scientific expertise and limited financial resources on developing and implementing a permanent remedial solution.

VI. IMPACT

The influence of *Bell Petroleum* on future cost recovery litigation in the removal action context cannot be readily ascertained. Since defendants bear the burden of proving that EPA response actions are inconsistent with NCP, most courts show considerable deference to EPA decision-making. In the absence of proof that EPA acted arbitrarily and capriciously in implementing a particular response action, courts must allow cost recovery. Though the arbitrary and capricious standard of review is firmly rooted in established principles of administrative law, its exact contours vary among the courts. This problem is compounded in the context of environmental law because CERCLA limits review of EPA decisions to the administrative record.

140. For a discussion of the appropriate circumstances justifying a removal action, see *supra* notes 94-96 and accompanying text.

141. *See 40 C.F.R. § 300.410(f)(3) (requiring termination of a removal site evaluation in the absence of an “imminent and substantial danger to public health or welfare of the United States.”).


143. *Ward,* 618 F. Supp. at 900. The District Court for the Eastern District of North Carolina applied a deferential analysis to EPA response actions. *Id.* The court noted that CERCLA provides liability for response costs except those inconsistent with NCP criteria. *Id.* “This language requires deference by this court to the judgment of agency professionals.” *Id.; NEPACCO,* 810 F.2d at 748 (“Because determining the appropriate removal and remedial action involves specialized knowledge and expertise, the choice of a particular cleanup method is a matter within the discretion of the EPA.”).

144. *NEPACCO,* 810 F.2d at 748. In *NEPACCO,* the Eighth Circuit ruled that “all costs” incurred by the government that are not inconsistent with the NCP are conclusively presumed to be reasonable.” *Id.; see also Ward,* 618 F. Supp. at 901. In *Ward,* the court acknowledged the defendant’s right to challenge EPA response costs, but ruled that “defendants must show that EPA’s action was arbitrary and capricious . . . before the court will find such a decision to be inconsistent with the NCP.” *Id.*

response action but EPA fails to compile an adequate administrative record.\textsuperscript{146} The Fifth Circuit's response in \textit{Bell Petroleum} indicates that failure to compile a sufficient administrative record is, in itself, inconsistent with NCP requirements and fully justifies denial of EPA cost recovery.\textsuperscript{147}

In most circumstances it is likely that a reviewing court will find that EPA compiled a sufficient administrative record to support cost recovery. In \textit{Bell Petroleum}, however, the Fifth Circuit has sent a clear message to EPA to be more selective in implementing costly response actions. Since removal actions are intended only for emergency situations, the Fifth Circuit held that cost recovery should be denied where an imminent threat to human health or the environment does not exist.\textsuperscript{148}

\textit{Robert Loefflad}

\textsuperscript{146} \textit{In re Bell Petroleum}, 3 F.3d at 905. Adhering strictly to CERCLA's requirement that review be limited to the administrative record, the Fifth Circuit strongly asserted that "[w]e will not accept EPA's post-hoc rationalizations in justification of its decision, nor will we attempt to supply a basis for its decision that is not supported by the administrative record." \textit{Id.}

\textsuperscript{147} \textit{Id.} at 907. EPA's failure to supply a sufficient administrative record in compliance with NCP requirements rendered its decision arbitrary and capricious. \textit{Id.} "Accordingly, the EPA is not entitled to recover the costs of designing and constructing the AWS." \textit{Id.}

\textsuperscript{148} \textit{Id.} at 906. "Thus, on the basis of the administrative record, it appears that the AWS did not even reduce, much less eliminate, any public health threat. No technical expertise is necessary to discern that the EPA's implementation of the AWS [alternate water system] was arbitrary and capricious, as well as a waste of money." \textit{Id.} (footnote omitted).