Furthering the Goals of CERCLA by Limiting State Agency Cleanup Liability: Stilloe V. Almy Brothers, Inc.

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I. Introduction

In Stilloe v. Almy Brothers, Inc. ("Stilloe II"), the District Court for the Northern District of New York confronted the issue of whether a state agency could be considered an "operator" under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), when its only connection to a hazardous waste site resulted from its remedial clean-up efforts. Stilloe II provides an example of how courts are furthering the goals of CERCLA to limit taxpayer liability for cleanups.

By enacting CERCLA, Congress sought to facilitate the expeditious cleanup of hazardous waste sites and to ensure that the ultimate financial burden would be placed on those responsible for the waste. Courts have struggled in reconciling these two goals where a state agency, responding to an emergency, causes additional environmental damage. The Stilloe II decision has struck a balance in favor of addressing the primary goal of cleaning up the environment, then ascertaining to whom and to what extent responsible parties may be liable. The district court recognized the need to limit state agency liability to accomplish the aforementioned goals.

In Stilloe II, the court held that a state agency was not considered an operator under CERCLA for releases that were caused by the agency's efforts to remediate a contaminated site. The court held that the agency lacked a sufficient nexus to the site because the New York Department of Environmental Conservation's

3. For a discussion of CERCLA's goals, see infra notes 28-29 and accompanying text.
4. For a discussion of the Stilloe II holding, see infra notes 8-9 and accompanying text.
6. For discussion of basis for Mr. Stilloe's action against the New York Department of Environmental Conservation ("DEC"), see infra notes 21-23 and accompanying text.
("DEC") only connection to the site resulted from its remedial clean-up efforts.7

This Note analyzes the district court's interpretation of the degree of involvement required to pronounce a state agency liable as an "operator" under CERCLA. As this Note will demonstrate, the Stilloe II court recognized the demand for drawing a distinction between activity indicative of an "operator" and activity undertaken by states in response to an emergency.8 Stilloe II moves the courts toward clarifying states' potential CERCLA liability under section 107.

II. FACTS

Mr. Stilloe, a property owner, brought an action against the DEC9 contending that during efforts to remove barrels containing hazardous substances,10 the DEC and its agents were grossly negli-


As emphasized in the Stilloe II opinion:
An individual may only be liable under 42 U.S.C. § 9607(a)(3) when the plaintiff can demonstrate some type of nexus between the allegedly responsible person and the owner of the hazardous substances. When the only connection between the entity allegedly responsible for the damage and the hazardous waste itself is the fact that the party in question was attempting to remediate the hazardous waste problems at the site, liability under this portion of the Act does not exist.


The district court also held that the DEC's motion for reconsideration was made within a reasonable time pursuant to Federal Rule 60(b), even though the motion was not made within a ten-day period required by local federal rule. Stilloe II, 782 F. Supp. at 732-33. The motion for reconsideration was granted in order to prevent manifest injustice based upon intervening change of controlling law. Id. at 733. The court further held that DEC was not liable for contribution under CERCLA.

8. For CERCLA § 107(d)(2) statutory language, see infra note 52.

9. DEC is a New York State agency "whose purpose is to coordinate and develop policies, planning and programming related to the environment of the state." Stilloe I, 759 F. Supp. at 99 (quoting N.Y. ENVTL. CONSERV. LAW, Art. 3).

10. CERCLA § 101(14) defines "hazardous substance" as
(A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C.A. § 6921] . . . (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C.A. § 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A)
gent in allowing one or more barrels to break open, allegedly causing hazardous waste contamination.\textsuperscript{11}

In 1988, DEC determined that certain barrels containing hazardous substances were being stored without proper authorization on property Mr. Stilloe planned to purchase.\textsuperscript{12} It was averred that the barrels were placed in an area next to the building in which Mr. Stilloe conducted his business.\textsuperscript{13} After DEC's determination, Mr. Stilloe purchased the property.\textsuperscript{14} Mr. Stilloe alleged, however, that before he purchased the property the previous property owner had moved barrels and debris stored at the site onto another property, the Almy property, which bordered the site and is accessed by a common driveway.\textsuperscript{15}

In 1989, DEC concluded that the site posed a threat to the environment and needed immediate cleanup.\textsuperscript{16} Thereafter, DEC assumed management of the site and moved the barrels from the Almy property to a point further back on a common driveway shared by Stilloe and Almy.\textsuperscript{17}

In response to DEC's action, Stilloe claimed that, in fact, DEC had conducted a preliminary cleanup of the spilled waste and contaminated soil and placed the hazardous substances in new barrels stored on the Stilloe and Almy properties.\textsuperscript{18} Stilloe alleged that DEC was therefore liable as an "operator" under CERCLA section 107(d) for releases of hazardous substances found to be the result of "intentional or grossly negligent misconduct"\textsuperscript{19} during a DEC re-

\textsuperscript{11} Through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

\textsuperscript{12} CERCLA § 10(14), 42 U.S.C. § 9601(14).

\textsuperscript{13} Stilloe I, 759 F. Supp. at 95. Mr. Stilloe also asserted claims against Mr. McMahon, the previous property owner, who allegedly moved barrels being stored at the site onto neighboring property and against Almy Brothers, Inc. ("Almy"), a neighboring property owner. \textit{Id.} at 97.

\textsuperscript{14} Stilloe I, 759 F. Supp. at 97.

\textsuperscript{15} Id.

\textsuperscript{16} Id.

\textsuperscript{17} Both Mr. McMahon and Almy Brothers were defendants in this action. \textit{Id.}

\textsuperscript{18} The DEC designated the site as a Class 2 site under Art. 27, Title 13 of the New York Environmental Conservation Law. \textit{See} N.Y. ENVTL. CONSERV. LAW §§ 27-1301 - §§ 27-1321 (McKinney 1984). "With this classification, the DEC determined that the site in question posed a significant threat to the environment which required immediate action." Stilloe I, 759 F. Supp at 97 (footnote omitted).

\textsuperscript{19} Stilloe I, 759 F. Supp. at 98.

\textsuperscript{20} See CERCLA § 107(d)(2), 42 U.S.C § 9607(d)(2). Stilloe asserted three causes of action in an amended complaint. Stilloe I, 759 F. Supp. at 98. In the first claim, he sought response costs under CERCLA against all defendants. \textit{Id.} The
sponse to environmental hazards at the Stilloe/Almy Brothers property.\textsuperscript{20} The district court agreed that DEC qualified as an "operator" for purposes of CERCLA liability.\textsuperscript{21}

In 1992, DEC sought reconsideration or, in the alternative, certification of the court's 1991 order denying DEC's motion to dismiss claims and counter-claims against it for hazardous waste clean-up activity.\textsuperscript{22} The court order denied DEC's motion on the grounds that DEC may be liable as an "operator" within the meaning of CERCLA.\textsuperscript{23}

\begin{quote}
second claim was against McMahon, the previous property owner, for breach of contract. \textit{Id}. The third claim was directed at all defendants for a declaratory judgement from the Northern District Court of New York, pursuant the CERCLA § 113(g) (2) and § 107. \textit{Id}. Stilloe sought a "declaration from this court finding the defendants liable to Stilloe for all those response costs incurred by him in the future which are necessary and consistent with the national contingency plan developed to remediate the site at issue." \textit{Id}.

\textbullet\ 20. \textit{Stilloe II}, 782 F. Supp. at 782.


In addition to holding that DEC qualified as "a "person" under CERCLA, the district court also held that "an entity may only be liable under a CERCLA provision if the entity arranges for disposal, treatment, or transport of hazardous substances, and if plaintiff can demonstrate some type of nexus between allegedly responsible person and owner of hazardous substances." \textit{Id}. at 103-04 (emphasis added). See CERCLA § 107(a) (3), 42 U.S.C. § 9607(a) (3) (holding transporters of hazardous waste liable for cleanup costs). Furthermore, the court stated that liability does not arise under CERCLA when the only connection between person allegedly responsible for damage and hazardous waste itself is the fact that the party in question was attempting to remediate hazardous waste problems at site. 759 F. Supp. at 103-04 (citing CERCLA § 107(a) (3), 42 U.S.C. § 9607(a) (3)).

The court found that DEC qualified as an "operator" at the time it allegedly broke open barrels containing hazardous waste while moving them for purposes of CERCLA cleanup, despite the determination that it was responding to an emergency and was acting in response to immediate threats to the public health and environment. \textit{Stilloe I}, 759 F. Supp. at 103-04. See CERCLA § 107(a) (1), (2), 42 U.S.C. § 9607 (a) (1), (2). The court stated that DEC would not be shielded from liability for its actions concerning the hazardous waste site if the leakage that occurred during the cleanup of the property was found to have been the result of intentional or grossly negligent conduct on part of the Department. 759 F. Supp. at 103-04. See CERCLA § 107(d) (2), 42 U.S.C. § 9607(d) (2).

In \textit{Stilloe I}, the court limited DEC's liability to those actions which were "found to have been the result of either intentional or grossly negligent conduct . . . since its actions were in response to an emergency situation which existed at the site." \textit{Stilloe I}, 759 F. Supp. at 104 n.8.

\textbullet\ 22. \textit{Stilloe II}, 782 F. Supp. at 732-33. The certification sought was pursuant to 28 U.S.C. § 1292(b).

\textbullet\ 23. 782 F. Supp. at 732.
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III. Background

A. CERCLA

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act.\(^\text{24}\) CERCLA was established "to provide a federal mechanism for expeditiously cleaning up" hazardous waste sites.\(^\text{25}\) CERCLA's goal is to provide financing for both governmental and private responses, and place the ultimate financial burden upon those responsible for the waste.\(^\text{26}\)

A defendant is liable under CERCLA section 107(a) when (1) there is a facility,\(^\text{27}\) (2) from which a release\(^\text{28}\) or threatened release of any hazardous substance\(^\text{29}\) has occurred, (3) causing the plaintiff to incur response costs,\(^\text{30}\) and (4) the defendant falls within one of the four classes of "persons"\(^\text{31}\) subject to CERCLA liability.\(^\text{32}\)

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One commentator has noted that:
[t]he federal courts are required to efficiently interpret the statutory provisions found in CERCLA in such a way as to compel those deemed responsible for hazardous waste facilities to disgorge the necessary funds for their cleanup. Recent decisions by the Supreme Court and lower federal courts have established a trend toward expanding the definition of "owner and operator," in the absence of Congressional provisions limiting the scope of liability under the Act, for the purpose of generating funds for cleanup.


27. "Facility" is defined under CERCLA 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; but does not include any consumer product in consumer use or any vessel[.]

CERCLA § 101(9), 42 U.S.C. § 9601(9).
28. CERCLA § 101(22) defines "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment . . . ." 42 U.S.C. § 9601(22).
29. For the CERCLA definition of "hazardous substance," see supra note 10.
31. For an explanation of the types of persons subject to CERCLA liability, see infra note 33.
The four classes of persons recognized in CERCLA section 107 include: (1) current owners or operators of the hazardous substance facility, (2) owners or operators of the facility at the time of disposal, (3) persons who arranged for treatment or disposal of hazardous substances at the facility and (4) persons who transported hazardous substances for treatment and disposal at the facility. The scope of this Note encompasses only the courts' struggle with proper classification of a state agency as an "operator." Difficulty arises when attempting to ascertain the circumstances that would lead a state agency to be classified as an "operator." CERCLA defines an "owner or operator" as the following:

(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 facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delin-
quency, abandonment, or similar means to a unit of state or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand. 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.35

Of the four categories of potentially responsible parties ("PRPs") identified in section 107,36 "operator" creates the most ambiguity.37 The question of who Congress intended to qualify as an "operator" under CERCLA has required judicial clarification.38 The majority of courts agree that CERCLA's definition of "operator" sheds little light on how liability is determined.39 The courts' interpretations of the "operator" definition, however, have been of little help. The courts have failed to identify at what point the involvement or control becomes so pervasive as to warrant the imposition of CERCLA liability.40 Further, the CERCLA section 101(20) definition of "operator" incorporates exceptions as to who may qualify as an "operator."41 The legislature's explanation in section 101(20), however, does not make it apparent who is included.

36. For the four categories of PRPs, see text accompanying supra note 34.
37. It has been said that "[p]erhaps the least understood category of liability under [CERCLA] is that of 'operator' liability." See Williamson & McCann, supra note 32, at 409 (footnotes omitted).
38. Furthermore, "[T]here is little 'operator' legislative history and that which does exist, again, is circular: An operator is a person carrying out operational functions for the owner of the facility pursuant to an appropriate agreement." Williamson & McCann, supra note 32, at 412 (footnote omitted) (emphasis added).
39. See Olsen, supra note 27, at 190 (footnote omitted).
40. See infra notes 57-82 and accompanying text. For a discussion of cases finding that a government entity was or could be liable as an operator under CERCLA, see Williamson & McCann, supra note 32, at 419-437.
41. CERCLA § 101(20)(D) states that:

[T]he term "owner or operator" does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a state or local government shall be subject to the provisions of this Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 107.

Despite the ambiguity surrounding CERCLA, the question of who may qualify as an "operator" ultimately becomes an issue of control. Generally, "an operator is one who exercised control over the activities at a facility that's caused or contributed to the release of hazardous substances." A distinction may be warranted when the entity involved is the state or a state agency. However, although there may be considerations unique to states, the control analysis applied to a state is identical to that applied to nongovernmental PRPs. More specifically, courts examine whether the state has exercised control over employment decisions, finances, and especially the disposal and treatment of hazardous substances, as indicators of liability. State agencies and local governments are increasingly involved in federal hazardous waste law by virtue of

42. Williamson & McCann, supra note 32, at 409. One commentator has noted that:

[T]he courts have focused on the degree of control exercised by a party for purposes of deciding operator liability. For example, in Edward Hines Lumber Co. v. Vulcan Materials Co., 861 F.2d 155 (7th Cir. 1988), the court did not hold a company liable a company that designed a manufacturing facility and trained its workers, concluding that the company did not exercise sufficient control over the manufacturing facility's operations.


Another commentator has noted that "[t]he majority of courts continue to look for evidence of the PRP's actual control over management decisions concerning hiring and supervision of employees and the disposal and treatment of waste as primary indicators of active operation or participation." Olsen, supra note 27, at 195 (footnote omitted).

43. See Williamson & McCann, supra note 32, at 410. These two authors have conveyed the idea that:

The problem of determining whether a participating entity is an operator is compounded when that other entity is the state. Very few courts have faced the question of when, and whether a state may be liable as an operator under CERCLA, and those that have addressed the issue have reached differing conclusions.

Id. (footnote omitted).

Considerations may be different when a state or state agency is involved because their interests are distinctive from those of a corporation or private entity. States are afforded an exemption from liability when they are responding to an emergency. See CERCLA § 107(d)(2), 42 U.S.C. § 9607 (d)(2).

44. Two commentators have discussed what appears to be some reluctance by courts to apply this same definition when evaluating potential operator liability for a state or governmental entity. "Although Congress gave no hint that different principles of operator liability should apply to states as opposed to private parties, courts have struggled (unnecessarily) to define a new and separate definition of state operator liability." Williamson & McCann, supra note 32, at 418-19.

45. Id.
their "owning or operating" facilities that receive hazardous waste.\(^{46}\) Under CERCLA section 107, states who are "owners or operators" of a landfill that releases hazardous substances are considered "persons" subject to liability for clean-up costs and natural resource damage.\(^{47}\) Accordingly, state entities like DEC fall within CERCLA's liability scheme.\(^{48}\)

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\(^{47}\) See Berman & Howard, *supra* note 47, at 373. CERCLA § 101(21) defines "person" as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. § 9601(21).

One commentator has emphasized that:

States were not originally subject to section 107(a) liability because the Eleventh Amendment's guarantee of sovereign immunity acted as a constitutional bar to such liability. After SARA was enacted in 1986 however, many courts recognized that the plain language of these amendments clearly expressed Congressional intent to abrogate this sovereign immunity defense.


Other authors have suggested that "[m]ost cases analyzing state operator liability have focused on whether the state's actions were 'regulatory' in nature. While pure regulatory conduct typically should not give rise to CERCLA liability . . . the proper analysis . . . centers on the state's specific acts of control . . ." Williamson & McCann, *supra* note 32, at 410 (footnote omitted).

In *Pennsylvania v. Union Gas Co.*, the Supreme Court of the United States was asked to decide whether a state which contributed to the release of hazardous substances into the local environment could be held liable in a private action for its proportionate share of the clean-up costs. 491 U.S. 1, 5 (1989). The state was held liable under § 107(a) as an "owner or operator" since the Supreme Court ruled that CERCLA is to be construed to include the state if its activities meet the criteria for operator control. *Id.* at 1.

\(^{48}\) See Berman & Howard, *supra* note 47, at 373. It is important to note that the imposition of CERCLA liability does not violate the sovereign immunity of states under the 11th amendment. *See Union Gas*, 491 U.S. 1. In *New York v. City of Johnstown, N.Y.*, 701 F. Supp. 33 (N.D.N.Y. 1988), the court held that the State was not a "person" subject to contribution under CERCLA where there was no nexus. *Id.* at 36-38. The court also held that by bringing a CERCLA lawsuit, the state waived its sovereign immunity to state-law based compulsory counterclaims against it. *Id.*
B. Defenses Under CERCLA

Defendants in a CERCLA liability suit, including state agencies, may assert several defenses to liability claims. In order to support a claim against liability, a PRP must prove that one of the three affirmative defenses available under section 107(b) applies to that PRP. CERCLA section 107(b) provides that a person shall not be liable as an operator if it can be established by a preponderance of the evidence that the release or threat of release of a hazardous substance and the resultant damages were caused solely by (1) an act of God; (2) an act of war; (3) or an act or omission of a third party other than an employee or agent of the defendant or one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant; (4) or any combination of the foregoing three defenses.

Invoking a section 107(b) defense, however, is not the only way to escape liability. Emergency situations may arise that warrant immediate attention. For example, section 107(d) exempts states from liability for actions taken in response to an emergency created from a release or threatened release unless the damages are the

49. Although a CERCLA defendant is responsible for cleanup costs, he may “bring suit against any other responsible parties to recover their pro-rated share of this liability.” Dragan, supra note 30, at 543 (footnote omitted).

50. CERCLA § 107(b), 42 U.S.C. § 9607(b). If a defendant cannot prove the availability of a defense, “he will be forced to take responsibility for the cleanup of a hazardous waste site.” Dragan, supra note 22, at 542-43 (footnote omitted).

51. Specifically, CERCLA section 107(b) provides:
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 (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), 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.
CERCLA § 107(b), 42 U.S.C. § 9607(b).
result of gross negligence.\textsuperscript{52} Other defendants have argued that their activities were merely regulatory and were, therefore, immune from liability.\textsuperscript{53}

In the event that the above defenses are unsuccessful, however, section 113 offers assistance by permitting contribution from other liable parties.\textsuperscript{54} Thus, a liable CERCLA defendant may institute an action to recover a percentage of the clean-up costs from other responsible parties for the conditions at a particular waste site.\textsuperscript{55}

C. Judicial Application of CERCLA to State Clean-up Activity

Courts have found state agencies to be liable as operators. However, the extent to which an agency must become involved before being labeled as an "operator" is difficult to determine.\textsuperscript{56} Only a few courts have confronted this issue.\textsuperscript{57}

In \textit{CPC International, Inc. v. Aerojet-General Corp.},\textsuperscript{58} the Michigan Department of Natural Resources ("MDNR") became aware of the

\textsuperscript{52} CERCLA § 107(d)(2) provides:
No State or local government shall be liable under this subchapter for costs or damages as a result of actions taken in response to an emergency created by the release or threatened release of a hazardous substance generated by or from a facility owned by another person. This paragraph shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the State or local government. For the purposes of the preceding sentence, reckless, willful, or wanton misconduct shall constitute gross negligence.


\textsuperscript{54} 42 U.S.C. § 9613(f)(1). CERCLA section 113(f)(1) provides:
Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. 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 of this title.

\textit{Id.}

\textsuperscript{55} See Dragani, \textit{supra} note 26, at 543.

\textsuperscript{56} See Williamson & McCann, \textit{supra} note 32, at 410.

\textsuperscript{57} For discussion on "control," see \textit{supra} notes 42-45.


CPC brought an action under CERCLA seeking to recover its response costs (estimated at $4.5 million). CPC sued Cordova/California, Aerojet-General, and MDNR. CPC alleged that MDNR's activities at the site qualified it as an "operator" under CERCLA. CPC also alleged that its agreement with Cordova/California involving the disposal of phosgene and the operation of the purge wells subjected MDNR to liability under the
existence of contamination on a site, which included purge wells. MDNR requested and received funds from the Michigan Legislature to operate the purge wells and to provide an alternate water supply for local residents. MDNR failed, however, to operate the wells or to spend the majority of the funds for the alternative water supply. Finally, MDNR complied, but only after the court required it to do so under a stipulation of settlement entered by the court. MDNR’s failure to operate the purge wells caused an increase in the contamination of local groundwater. Furthermore, MDNR knew of the contamination yet still failed to fulfill its responsibility and operate the purge wells.

In order to avoid classification as an operator, MDNR argued that its role was merely regulatory. The court found, however, that MDNR’s association was not merely regulatory in nature. Since MDNR was actively involved in removing waste from the site and operating the purge wells, it qualified as an operator under CERCLA.

In United States v. Azrael, a case factually similar to Stilloe II, the State of Maryland requested the assistance of the Environmental

CERCLA section relating to persons who arrange for disposal or treatment of hazardous substances at a site. MDNR moved pursuant to rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the complaint against it for failure to state a claim upon which relief can be granted.

Williamson & McCann, supra note 32, at 424 (footnotes omitted).

60. Id.
61. Id.
63. Aerojet, 731 F. Supp. at 786.
64. Id.
65. Id.
66. Id. at 788 (citing United States v. Dart Industries, Inc., 847 F.2d 144, 146 (4th Cir. 1988). In Dart Indus., the court of appeals held that the agency was not an owner or operator within the meaning of CERCLA. Id. The Aerojet court noted that the “most commonly adopted yardstick for determining whether a party is an owner-operator under CERCLA is the degree of control that party is able to exert over the activity causing the pollution.” 731 F. Supp. at 788.
68. Id. See supra text accompanying note 40. In Aerojet the court explained that “where a party assumes control of an activity and then fails to perform, that party should bear the responsibility for any pollution which results[.]” Stilloe I, 759 F. Supp. at 103 (citing Aerojet, 731 F. Supp. at 788) (emphasis omitted).
69. 765 F. Supp. 1239 (D. Md. 1991). The factual circumstances in Azrael are very similar to those in Stilloe II. In Azrael, both the United States and the State of Maryland became involved in a clean up effort to persuade the owners to clean up the site; that effort failed. Id. at 734 (citing Azrael, 765 F. Supp. at 1241). The United States and Maryland brought an action pursuant to CERCLA against the owners to recover costs incurred in cleaning up the site. 782 F. Supp. at 733 (cit-
Protection Agency ("EPA") in securing the cleanup of a site.\(^70\) Thereafter, EPA conducted response actions at the site pursuant to its clean-up authority under CERCLA.\(^71\) Maryland entered into a State Superfund Contract.\(^72\) Maryland and United States then brought an action to recover clean-up costs under CERCLA.\(^73\) The defendants filed counter-claims for contribution. On a motion to dismiss the counter-claims, the court addressed the issue of "whether Congress intended the Government and states to be potentially liable under Section 107(a) of CERCLA when EPA and the states carry out their statutory responsibilities under CERCLA and state law to clean up hazardous waste sites."\(^74\) In granting the motion to dismiss, the District Court held that the United States and Maryland were immune from claims based on activities of the contractors they hired to clean up the site.\(^75\)

In *United States v. Western Processing Co., Inc.*,\(^76\) RSR Corporation sought contribution from EPA alleging that EPA acted recklessly, willfully, and negligently at the time it closed the site, undertook to stabilize it, and conducted the preliminary clean up, therefore causing significant contamination of the Western Processing site.\(^77\) In *Western Processing*, the district court articulated Congress's intent that:

> processing decision... is binding in *Stilloe II*.

In response to counter-claims asserted by the defendants, both the United States and Maryland moved to dismiss on grounds that the counter-claims were barred by the doctrine of sovereign immunity. *Stilloe II*, 782 F. Supp. at 733 (citing *Azrael*, 765 F. Supp. at 1242). Likewise in *Stilloe II*, the DEC alleged that the counter-claims were barred by the doctrine of sovereign immunity. *Stilloe II*, 782 F. Supp. at 734.

The *Azrael* court held that the United States and Maryland were immune from claims for contribution based on activities of contractors which they hired to clean up the site. *Azrael*, 765 F. Supp. at 1246.

70. *Id.* at 1241.

71. *Id.*

72. *Id.* The State Superfund Contract was entered into pursuant to section 104 of CERCLA under which the EPA and the State agreed to jointly fund remediation of the site. *Id.* (footnote omitted).


75. *Azrael*, 765 F. Supp. at 1243-44.

76. 761 F. Supp. 725 (W.D. Wash. 1991) (dismissing a CERCLA counter-claim based on the Environmental Protection Agency's clean-up activities). Although the *Western Processing* decision was not binding on the *Stilloe II* court, its reasoning is persuasive.

77. *Id.* at 727. The *Stilloe II* court relied on *Western Processing* for the same reasons they relied on *Azrael*. *Stilloe II*, 782 F. Supp. at 735. "Although *Western Processing* involved the EPA, rather than a state environmental agency, its reasoning is applicable to the present case." *Id.*
First, those who benefit financially from a commercial activity must internalize the health and environmental costs as costs of doing business; second, liability is strict, subject only to specific, enumerated defenses; and third, Congress specifically considered and rejected an amendment proposed by Senator Helms that would have added government misconduct and negligence as a separate defense to CERCLA liability.78

The court thus held that EPA was not acting in the capacity of owner or operator as it performed its regulatory functions, such a result would contradict the statutory scheme of CERCLA.79

Azrael and Western Processing support giving states protection when they non-negligently clean up a contaminated site.80 Azrael and Western Processing also affirm state liability when the state was grossly negligent in its activities.81 Aerojet, Azrael, and Western Processing reinforce CERCLA’s broad legislative objectives but remind us that statutes have not only ends but also limits.82

IV. Analysis

A. Narrative Analysis

In Stilloe II,83 the District Court for the Northern District of New York examined the issue of whether a state agency could be considered an “operator” for purposes of CERCLA liability when its only connection to a hazardous waste site resulted from its remedial clean-up efforts during an emergency.84 In its first decision in 1989 (Stilloe I), the court relied on CPC International, Inc. v. Aerojet-General Corp.85 to hold that DEC was an operator of the site at the time it

78. Western Processing, 761 F. Supp. at 729. Furthermore, “Section 107(d), concerning liability for negligence, is not an authorization for litigation against the United States, but merely clarifies Congress’ intent that the CERCLA remedial scheme not be viewed as occupying the field to the exclusion of tort claims.” Western Processing, 761 F. Supp. at 729.

79. Western Processing, 761 F. Supp. at 731. It follows that the EPA’s regulatory activities did not render it subject to action for contribution. Id.


81. For discussion of the gross negligence exception, see supra notes 52 and accompanying text.

82. United States v. New Castle County, 727 F. Supp. 854, 870 (citing Edward Hines Lumber Co. v. Vulcan Materials Co., 861 F.2d 155, 157 (7th Cir. 1988)). For discussion on limits to state liability, see supra notes 52-55 and accompanying text.

83. 782 F. Supp. 731.

84. Id.

85. 731 F. Supp. at 788.
broke open the barrels containing the hazardous waste.86 However, when resolving the DEC's motion for reconsideration, the Stilloe II court de-emphasized the Aerojet case because of the factual dissimilarities.87 The court found that DEC's activities were sufficiently different from those of the MDNR in Aerojet to render that decision inapposite.88 Unlike DEC in Stilloe II, the MDNR had a contractual relationship with the owner of the property which established a nexus between the two parties.89 Furthermore, there were no allegations that DEC took control of the site for reasons other than performance of its statutory responsibility to clean up the site.90 The court asserted that Aerojet did not support the allegation that DEC was an operator within the meaning of CERCLA.91

Instead, the court looked to two other district court cases to support its analysis:92 United States v. Azrael93 and United States v. Western Processing Co., Inc.94 In Azrael, the court held that when a state's only connection to the site is its performance of clean-up activities, the state is exempt from liability.95 These exemptions demonstrate that Congress did not intend to subject states and the federal government to liability under section 107 for their actions during cleanups.96

87. Stilloe II, 782 F. Supp. at 733.
88. Id.
89. Id.
90. Id.
91. Stilloe II, 782 F. Supp. at 733.
92. See id. at 733-35. The district court realized it was not bound by the holding in Azrael or Western Processing but found factual similarities between the two cases and the reasoning persuasive, especially in light of their thorough discussion of the legislative framework and purposes of CERCLA. Id.
93. 765 F. Supp. 1239. For a discussion of Azrael, see supra notes 69-75. The Stilloe II court discussed Azrael as follows:

[F]inally, the court held that to include the Government or a state within the scope of section 107 when its only connection to the site is its performance of its clean-up activities would be inconsistent with Congress' intent to address complaints such as these counter-claims as defenses to a cost recovery action under section 107(d). . . [The court stated that] [s]ection 107(d)(2) expressly exempts all states and local governments from CERCLA liability resulting from actions taken in response to an emergency created by a threatened or actual release from a hazardous waste site owned by another. Thus, the court concluded that these exemptions demonstrated Congress' intent not to subject states to liability under section 107 for their actions during clean-up.

95. Azrael, 765 F. Supp. at 1246. The court underscored the express exemption afforded to all states under 107(d)(2). Id. (emphasis added).
96. One court commented in its opinion that:
Like 'Azrael, Western Processing' is factually similar to Stilloe. Unlike Stilloe, however, Western Processing involved EPA. EPA's predicament was akin to that of DEC in Stilloe II. Both EPA and DEC were accused of being negligent during the cleanup of the contaminated sites. Notwithstanding, the Western Processing court found that:

EPA's regulatory activities do not render it an owner/operator under CERCLA. The impropriety and illogic of construing the statute to contemplate that the negligence or misfeasance of the EPA would cast it as a potentially liable owner, operator, transporter, or generator has already been discussed. The EPA was not acting in any of those capacities as it carried out its regulatory functions, and it requires contorted reasoning to conclude otherwise.

Applying the Western Processing analysis, the Stilloe II court reached the same conclusion. The court opined that DEC does not raise its status to that of "operator" when acting solely in a statutory capacity to clean up contaminated sites. Neither Stilloe nor Almy Brothers alleged that DEC had other objectives. DEC took over management of the property pursuant to its statutory duty to clean up the hazardous waste site. Although, DEC's "manage-

[M]any courts, including the Fourth Circuit, have recognized that states and the Government enjoy special protections when engaged in regulatory activities under CERCLA. In New York v. Johnstown, 701 F. Supp. 33 (N.D.N.Y. 1988) defendants asserted a counter-claim against the State of New York arising from the state's attempts to remediate a hazardous waste problem. The court declined to find that the state was one who "arranged" for the disposal or treatment of hazardous substances under Section 107(a)(3) because the state had no nexus to the site other than its cleanup efforts.

Azrael, 765 F. Supp. at 1244 (citing Johnstown, 701 F.Supp. at 36). See also United States v. Dart Industries, 847 F.2d 144, 146 (4th Cir. 1988) (refusing to find state environmental agency to be "owner or operator" under CERCLA by allowing use of site for disposal of hazardous waste).

97. 761 F. Supp. 725.

98. For a discussion of allegations made against EPA in Western Processing, see supra notes 76-9 and accompanying text.

99. In Stilloe II, the court emphasized that although Western Processing involved the EPA, rather than a state environmental agency, its reasoning was applicable. Stilloe II, 782 F. Supp. at 735.

100. Western Processing, 761 F. Supp. at 731.


103. Id.
ment” of the site resembled the degree of control necessary to create a nexus, DEC did not actually have a sufficient nexus to the site because it only engaged in those activities for the purpose of remedial cleanup. Therefore, the court held DEC could not qualify as an “operator” according to CERCLA.

B. Critical Analysis

Stilloe II clarified state liability in emergency clean-up situations, but failed to fully define when a state can be held liable as an operator. Unlike the DEC in Stilloe II, the MDNR in Aerojet engaged in a “hands on” activity resulting from a contractual legal obligation to operate purge wells at the site. In Stilloe II, however, the DEC’s activities did not arise out of a contractual obligation, but were purely remedial and were undertaken after operation, delivery, and/or active disposal of the hazardous substances by the defendants had ceased.

Although Aerojet is factually distinguishable from Stilloe II, the district court failed to appreciate the guidance offered in the Aerojet decision. Aerojet illustrates some activities that would support a finding that the state agency had a sufficient nexus, thus qualifying it as an operator. Aerojet provides a direction in determining the degree of control necessary before the label of “operator” may attach. Aerojet’s discussion is valuable because it offers more instruction than any of the prior cases.

A closer examination of legislative history, congressional intent, and public policy under which CERCLA was created will eliminate some of the difficulty in interpreting how states fall under the liability scheme of section 107(d)(2). In responding to emergency situations, the state’s role in cleaning up hazardous waste is germane to understanding the policy against holding states lia-

104. Id. For a discussion of state control and sufficiency of nexus relationship, see supra notes 42-48.

105. Id.


107. Id.

108. For a discussion of the Aerojet holding, see supra notes 66-68.

109. Id.

110. For a discussion of Aerojet, see supra notes 58-68 and accompanying text.

111. For statutory language of CERCLA § 107(d)(2), see supra note 52 and accompanying text.
ble.\textsuperscript{112} The \textit{Stilloe II} court added clarity in regard to emergency responses by emphasizing the gross negligence exception.\textsuperscript{113}

In enacting CERCLA, Congress realized the demand for increased state and public involvement.\textsuperscript{114} Congress intended that the public, the states, EPA and the PRPs, have significant roles in the implementation of CERCLA.\textsuperscript{115} Hence, the type of activity undertaken in \textit{Stilloe II} by the DEC is one contemplated role. While the \textit{Stilloe II} court explained that DEC's activities did not amount to a sufficient nexus, it failed to identify what involvement would be sufficient. Under the facts presented in \textit{Stilloe II}, the court was unable to precisely define what creates a sufficient nexus between the PRP and the site.\textsuperscript{116} The court merely confirmed that a release resulting from an emergency cleanup was not the type of activity that subjects a state agency to liability. The \textit{Stilloe II} court does not adequately explain and explore the policy background of why states are not to be found liable when they are responding to emergency clean-up situations.

The history behind CERCLA "suggests that Congress was concerned about cooperative federalism - balancing the state and federal roles in dealing with the hazardous waste problem."\textsuperscript{117} Apparently, Congress not only wanted the states to become actively involved in cleanup of hazardous waste sites, but also understood

\begin{itemize}
  \item 112. For statutory language of CERCLA § 107(d)(2), see \textit{supra} note 52 and accompanying text. The \textit{Stilloe II} court emphasized Congress's intent not to hold states liable when they are responding to emergency clean-up situations.
  Congress took a number of steps in SARA to facilitate increased public and state participation. First, it added new CERCLA Section 117, which requires the EPA to make early disclosure of its proposed remedial action plans, to solicit public input, and to explain any changes in the response action. Technical assistance grants were authorized to facilitate more meaningful public participation in the remedy selection process. Second, Congress added a new provision authorizing citizen suits to enjoin violations of CERCLA requirements or to compel the EPA to do its job, and expressly authorized intervention by persons significantly affected by the issues in CERCLA litigation. Finally, Congress gave the states a major role in the remedy selection process under Section 121. Id. at 12-93 - 12-94.
  \item 115. \textit{See} Cooke, \textit{supra} note 114, at 12-94.
  \item 116. The \textit{Stilloe II} court decided that DEC's response to an emergency cleanup did not amount to the type of involvement meant to be covered by CERCLA; thus, there was an insufficient nexus. \textit{See generally} \textit{Stilloe II}, 782 F. Supp. 731.
  \item 117. Cooke, \textit{supra} note 114, § 12.03[4][g] at 12-37.
\end{itemize}
that "the task was too large to be borne solely by the federal government."118

Congress desired that the states and EPA act as partners in their clean-up efforts.119 Moreover, Congress intended CERCLA to furnish a "basic federal cleanup program, while leaving [the] states free to implement their own more ambitious or complementary programs. . . ."120 This decision furthers these goals by encouraging expeditious cleanups in emergency situations.

In conclusion, the district court did not suggest that Stilloe was without a remedy or that a state agency may never qualify as an "operator" for purposes of CERCLA.121 On the contrary, the Stilloe court merely found no CERCLA claims available to the plaintiffs, but underscored the possibility of a state tort claim.122 The clarification forwarded in Stilloe II eliminates the potential for using CERCLA as a vehicle to lump all environmental clean-up claims together by suggesting the possibility that alternate and more appropriate remedies are available.

V. IMPACT

From the outset, trying to refine and interpret CERCLA has been an ambitious endeavor because of the statute's poorly drafted provisions.123 Nevertheless, Stilloe v. Almy Brothers, Inc. furnishes another piece of the puzzle. Although it is almost impossible for a state agency to discern what degree of involvement in an activity will result in its being labeled as an "operator,"124 it can be assured that it will ordinarily not be held liable for a release occurring during an emergency cleanup.125

118. Id. An example of how Congress wanted the states to become actively involved in cleanup is that "CERCLA mandates that federal authorities consult with the states before taking any remedial action, and authorizes reimbursement of state response costs by the Fund." Id. at 12-37 - 12-38 (footnotes omitted).

119. Id. at 12-38.

120. Id.

121. Stilloe II, 782 F.Supp. at 796.

122. Id. In its opinion, the Stilloe II court highlighted that Stilloe as well as Almy Brothers may very well have claims against DEC, but they are not CERCLA claims. Id. "Rather, any claims that they might have against DEC for its handling of the clean-up effort are state law tort claims which section 107(d)(2) specifically does not preclude." Id.

123. For a discussion of the inherent ambiguity of CERCLA, see supra notes 35-40.

124. For the CERCLA definition of "operator," see text accompanying supra note 35.

125. For statutory language of CERCLA section 107(d)(2), see supra note 52. It is only when the state agency responds negligently that it will be liable. See CERCLA § 107(d)(2), 42 U.S.C. § 9607(d)(2).
The *Stilloe II* decision\(^{126}\) illustrates a positive use of the obscure directives in CERCLA as construed by other courts.\(^{127}\) *Stilloe II* helps to clear up the ambiguity inherent in CERCLA and may inspire other courts to work towards accomplishing Congress's intent.\(^{128}\) In defining boundaries of liability, the legislative purpose of prompt cleanups will be facilitated. As evidenced in *Stilloe II*, state environmental agencies can carry out their statutory clean-up obligations without the fear of repercussions under CERCLA.\(^{129}\) *Stilloe II* properly places clean-up costs on the polluter not the entity trying to remedy the hazardous situation.

Courts have yet to identify which activities create a sufficient nexus that would result in an agency being labeled an operator.\(^{130}\) It may be impractical to attempt to enumerate all the possible activities, but more directives would enable the state agency to ascertain when the role of "operator" has been undertaken. CERCLA's aim is to have responsible parties pay for the harm they caused to the environment, not to punish those who are trying to restore it. *Stilloe II* upholds the true intent of CERCLA without sacrificing its purpose.

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126. For a discussion of the *Stilloe II* holding, see *supra* note 7 and accompanying text.

127. For discussion of how CERCLA § 107 has been applied by courts, see *supra* notes 56-82.

128. For discussion of Congressional intent underlying CERCLA, see *supra* notes 24-26 and accompanying text.

129. See *supra* note 52. CERCLA section 107(d)(2) protects the states when they are responding to an emergency. CERCLA § 107(d)(2), 42 U.S.C. § 9607(d)(2).

130. Perhaps the *Stilloe II* court's reinforcement that an emergency clean-up does not amount to a sufficient nexus will pave the way for other courts to expand on what does create a nexus.