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Johnson v. James Langley Operating Company: Must Innocent Parties Foot the Bill Simply to Have a Little Peace of Mind

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JOHNSON V. JAMES LANGLEY OPERATING COMPANY: MUST INNOCENT PARTIES FOOT THE BILL SIMPLY TO HAVE A LITTLE PEACE OF MIND?

I. INTRODUCTION

"Owners of sites contaminated by hazardous waste, neighbors of such sites, and other private parties may be faced with enormous costs associated with environmental cleanups, regardless of whether they had any direct involvement in the waste disposal activities."¹ In an effort to prescribe a method for establishing liability and apportioning cleanup costs for hazardous waste sites, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).² Although the enactment of CERCLA arose from an aggressive initiative into a virtually unregulated area, it remains highly inconsistent, redundant, and vague.³ Additionally, the legislative history accompanying CERCLA provides no guidance for interpreting the various statutory gaps.⁴ Consequently, courts must fill in the statutory inadequacies left by Congress.⁵


⁴. See id. at 772 (stating legislative history of CERCLA contains sparse explanations with fragmented and unclear language). Due to the pressure to approve CERCLA before the end of its term, Congress enacted CERCLA without the extensive review and debating procedures usually employed in the legislative process. See Theodore Waugh, CERCLA's Retroactivity: Has the Door Been Opened for a Reevaluation of Whether CERCLA Applies to Preenactment Activities?, 14 J. NAT. RESOURCES & ENVTL. L. 31, 48-9 (1998-1999). In fact, "[m]embers of Congress objected to the haste in which the bill was enacted." Id. at 49 n.99 (citing legislative history of CERCLA). The recorded legislative history that exists, however, provides an incomplete indication of the legislature's deliberations because much of the legislative discussion occurred off the record. See id. at 49.

⁵. See Fox, supra note 8, at 772 (explaining courts are full of lawsuits attempting to decipher CERCLA).
In *Johnson v. James Langley Operating Co.*, the United States Court of Appeals for the Eighth Circuit explored the liability of gas and oil production operators for CERCLA response costs incurred by nearby real estate owners in testing and sampling their property. The Eighth Circuit analyzed the statutory language of CERCLA to determine whether the costs incurred by the real estate owners constituted actual response costs, and if so, whether they were recoverable under CERCLA.

The most controversial difference of opinion regarding the interpretation of CERCLA liability hinges on whether a threshold level of liability can be implied through either the "causation of incurred response" requirement or the definition of the term "necessary" as applied to incurring response costs. If a threshold level of liability attaches to the causation or necessity elements of CERCLA liability, plaintiffs will have to prove that defendants' contamination of their property reached a certain threshold level in addition to the five existing CERCLA liability requirements. In *Johnson*, the Eighth Circuit determined that plaintiffs met all the CERCLA requirements for establishing liability for response costs, except for the controversial "necessary" requirement. The *Johnson* court adopted two new criteria for the "necessary" requirement to test the validity of the facts plaintiffs presented, namely scientific validity and fiscal reasonableness.

This Note addresses the requirements set forth in CERCLA for establishing liability for response costs. Section II of this Note sets

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6. 226 F.3d 957 (8th Cir. 2000).
7. See id. at 957-58. For a further discussion of the facts of *Johnson*, see infra notes 18-31 and accompanying text.
8. See generally *Johnson*, 226 F.3d 957 (analyzing plaintiffs' argument to Eighth Circuit that district court erred by finding that costs plaintiffs' incurred were not related to cleanup or removal of hazardous substances).
9. See Fox, *supra* note 3, at 777 (observing "necessary" and "causation" elements provide most controversy). For a discussion of the "causation" and "necessary" elements of CERCLA, see infra notes 47-81 and accompanying text.
10. See generally Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209 (3d Cir. 1993); see also Amoco Oil Co. v. Borden, Inc., 889 F.2d 664 (5th Cir. 1989).
11. See *Johnson*, 226 F.3d at 964. The Eighth Circuit also failed to test whether the parties met the National Contingency Plan [hereinafter NCP] requirement during their CERCLA liability analysis. See id. at 962-64. For a further discussion of the Eighth Circuit's failure to address the NCP requirement of CERCLA, see infra notes 136-43 and accompanying text.
12. See id. at 964 (remanding case to district court for application of new criteria). Concluding the facts plaintiffs presented were insufficient to enter a judgment, the *Johnson* court remanded the case to the lower court for a determination of whether plaintiffs' procedures in obtaining the testing results were scientifically valid and fiscally reasonable. See id.
forth the facts of Johnson.\textsuperscript{13} Section III provides a background and history of the statutory language of CERCLA liability for response costs and various case law interpretations.\textsuperscript{14} Section IV presents a narrative analysis of the Johnson court’s decision.\textsuperscript{15} Section V provides a critical analysis of the Johnson decision.\textsuperscript{16} This Note concludes with Section VI, discussing the impact Johnson will have upon future decisions regarding CERCLA liability for response costs.\textsuperscript{17}

II. Facts

In January 1998, real estate owners in Union County, Arkansas (plaintiffs), brought suit against oil and gas lessees (defendants), under CERCLA to recover response costs incurred by plaintiffs.\textsuperscript{18} Defendants leased the property in the Smackover Oil Field from plaintiffs for the purpose of oil production.\textsuperscript{19} Plaintiffs claimed that defendants’ oil and gas production activities contaminated their properties with radioactive scales, salt water, oil and grease, heavy metals, and other hazardous substances.\textsuperscript{20} Plaintiffs filed suit

\textsuperscript{13} For a discussion of the facts of Johnson, see infra notes 18-31 and accompanying text.

\textsuperscript{14} For a discussion of the background history of liability for response costs under CERCLA, see infra notes 32-90 and accompanying text.

\textsuperscript{15} For a discussion of the Eighth Circuit’s decision in Johnson, see infra notes 90-103 and accompanying text.

\textsuperscript{16} For a discussion of how the Eighth Circuit came to its decision in Johnson, see infra notes 104-51 and accompanying text.

\textsuperscript{17} For a further discussion of Johnson’s impact on future decisions regarding response cost liability under CERCLA, see infra notes 152-61 and accompanying text.

\textsuperscript{18} See Johnson v. James Langley Operating Co., 226 F.3d 954, 959 (8th Cir. 2000). Originally, two sets of plaintiffs brought similar claims against the same defendant. See id. The Johnson court, however, consolidated these cases for trial. See id. Dunn Johnson and a group of forty-four other real estate owners from Union County, Arkansas, filed the complaint against the oil and gas production operators, simultaneously with the commencement of a similar action by Grover Smith and five additional plaintiffs. See id. In addition to these plaintiffs, the Johnson court consolidated another case from Union County involving alleged contamination with the Johnson and Smith cases for trial. See Johnson v. James Langley Co., Nos. 98-1007, 98-1008, 1999 U.S. Dist. LEXIS 22295, at *3 n.1 (W.D. Ark. Sept. 16, 1999) [hereinafter Johnson I]. The district court, however, dismissed this third case without prejudice on September 13, 1999. See id. Therefore, the Johnson and Smith groups were comprised of plaintiffs in the appeal to the Eighth Circuit Court of Appeals. See Johnson, 226 F.3d at 959.

\textsuperscript{19} See Johnson I, 1999 U.S. Dist. LEXIS 22295, at *6. “Facts . . . such as the dates of production, the terms of the leaseholds, the exact locations and quantitative levels of all of the alleged contaminants and hazardous substances present on the property, and the nature of the personal injuries claimed by each plaintiff have not been provided to the Court.” Id. at *6 n.2.

\textsuperscript{20} See id. at *6 (alleging defendants’ oil production operations released contaminants on plaintiffs’ property).
against defendants seeking to impose liability upon defendants for the contamination of their land and to recover response costs. 21

As evidence in support of their claims, plaintiffs produced two environmental assessment reports describing their property and a seminar paper describing how oil and gas production leads to radioactivity. 22 The results of the first report showed elevated radiation levels on one of the five sites and radiation levels below background levels on the other four sites. 23 The second report showed nine of the ten surveyed sites had background levels of radiation and the tenth site had elevated radiation levels. 24 The seminar paper described in detail the process by which oil and gas production activities of defendants contaminated plaintiffs’ property with radioactive substances. 25 Plaintiffs claimed that Radium-226 and -228, cad-

21. See id. at *4. Plaintiffs filed suit to claim response costs and sought a declaratory judgment under CERCLA in addition to various other claims not pertaining to CERCLA regulation. See id.

22. See Johnson, 226 F.3d at 959. Edwin Cargill of Radiation Protection Resources, Inc. prepared the environmental assessment reports on August 4, 1999, while A.L. Smith presented the seminar paper “in May 1985 at the 17th Annual Offshore Technology Conference in Houston, Texas.” Id. In the first report, Cargill surveyed five sites on plaintiff Johnson’s property. See id. In the second report, Cargill surveyed ten sites on the property of plaintiff Smith. See id.

23. See id. An operating well from plaintiff Johnson’s property showed elevated radiation levels. See id. The contamination was found inside and around the pump base of the unidentified well. See Johnson I, 1999 U.S. Dist. LEXIS 22295, at *8. Cargill found the area of contamination to be approximately ten meters by four meters to a depth of thirty centimeters. See id. Cargill reported “approximately 435 cubic feet of TERM contaminated soil in this area.” Id. “TERM is an acronym for ‘technologically enhanced radioactive material.’” Johnson v. James Langley Operating Co., 98-1007, 98-1008, 1999 U.S. Dist. LEXIS 22296, at *8 n.4 (W.D. Ark. Oct. 12, 1999) [hereinafter Johnson II]. TERM is a radioactive ubiquitous substance that may be found in nature. See id. at *8.

24. See Johnson, 226 F.3d at 959. Plaintiff Smith’s property comprised all ten survey sites. See id. The tested sites included six well locations and four pits and spillage areas. See Johnson I, 1999 U.S. Dist. LEXIS 22295, at *9. The survey uncovered elevated levels of TERM in one of the pits that contained subsurface contamination extending to a depth of forty-five centimeters. See id. at *9-*10. Background levels measure “radiation arising from sources that occur naturally in the environment and which generally may be accepted as a safe level.” Johnson II, 1999 U.S. Dist. LEXIS 22296, at *8. Concentrations above background levels usually present a potential health hazard. See id. at *9-*10.

25. See Johnson, 226 F.3d at 959. Smith notes in his paper that “water present in a reservoir of oil and gas contains dissolved mineral salts, a small proportion of which may be naturally radioactive.” Id. “According to Smith, as the oil and gas are depleted through production, water is produced in the reservoir, resulting in the deposit into the oil production system of mineral scales that contain measurable quantities of natural radioactivity.” Id. For a further discussion of Smith’s paper, see supra note 24 and accompanying text.
mium, lead and xylenes resulted in the elevated radioactivity levels.\textsuperscript{26}

Defendants argued that plaintiffs lacked support for their contention that they had incurred costs related to cleanup or removal of hazardous substances pursuant to CERCLA.\textsuperscript{27} Following discovery, defendants moved for summary judgment.\textsuperscript{28} The District Court for the Western District of Arkansas granted defendants' summary judgment motion in part and plaintiffs appealed.\textsuperscript{29} On appeal, plaintiffs argued that because the response costs they incurred were justified and they should not be held liable for the expense.\textsuperscript{30}

The Eighth Circuit analyzed CERCLA and reversed the district court's grant of summary judgment for defendants, finding plaintiffs' costs necessary and, thus, recoverable if the testing procedures were fiscally reasonable and scientifically valid.\textsuperscript{31}

\textsuperscript{26} See Johnson, 226 F.3d at 960. The district court determined that the allegedly-released xylenes were excluded pursuant to CERCLA's petroleum exclusion due to the fact that they were only found in one of the pits on the property and probably resulted from petroleum spillage. See id. Xylenes are indigenous to petroleum products. See Johnson II, 1999 U.S. Dist. LEXIS 22296, at *23. Pursuant to the petroleum exclusion, CERCLA has expressly excluded xylenes from its definition of hazardous substances. See id. The fact that plaintiffs tested numerous pits on the Smith property and only found elevated levels of xylenes in one of them supports the contention that the xylenes resulted from a spillage of petroleum, and not a release, which would have contaminated the whole area. See id. at *24.

\textsuperscript{27} See Johnson, 226 F.3d at 959. The district court substantiated defendants' claim by stating, "[t]he facts that have thus far been disclosed may best be described as sketchy." Johnson 1, 1999 U.S. Dist. LEXIS 22295, at *6 n.2.

\textsuperscript{28} See Johnson, 226 F.3d at 959. Defendants filed a motion for summary judgment in the United States District Court for the Western District of Arkansas claiming plaintiffs had no evidence that "they incurred any costs related to cleanup or removal of hazardous substances." Id.

\textsuperscript{29} See id. at 960. Plaintiffs sought to recover response costs from defendants based on the threat of release from defendants' oil and gas production operations. See id. at 960-61. The response costs plaintiffs incurred included the testing and sampling, surveying and characterization of both the Johnson and Smith properties. See Johnson I, 1999 U.S. Dist. LEXIS 22295, at *8-*11. The district court, however, found that plaintiffs' costs were not response costs, and, therefore, unrecoverable because plaintiffs did not perform testing in accordance with a perceived threat of release. See Johnson, 226 F.3d at 960-61. In fact, the district court found that plaintiffs had tested the lands in an effort to prove the elements of their claims against defendants. See id.

\textsuperscript{30} See id. at 961. Plaintiffs claimed that, under CERCLA, they were entitled to recover for their response costs since they could demonstrate defendants' operations caused the contamination on their property. See id. at 959. Defendants contended that plaintiffs' testing expenses were not recoverable under CERCLA because the disputed testing expenses were litigation costs insofar as plaintiffs incurred such expenses more than eighteen months after filing suit against defendants. See id. at 961.

\textsuperscript{31} See id. at 964 (remanding case to district court to consider fiscal reasonableness and scientific validity of plaintiffs' testing procedures). "[T]here was no
III. BACKGROUND

A. CERCLA

Passed in 1980, CERCLA presents "the most comprehensive and widely used statutory mechanism for private recovery of environmental response costs."\(^{32}\) CERCLA aims "to provide a quick and efficient method of cleaning up dangerous, abandoned, or inactive hazardous waste sites."\(^{33}\) CERCLA also seeks to impose remedial liability on parties responsible for improper waste disposal practices.\(^{34}\) Ambiguity in the liability designation language of CERCLA has resulted in widely divergent judicial interpretations.\(^{35}\)

To establish liability under CERCLA, a plaintiff must prove: (1) that a defendant is within one of four categories of "covered persons"; (2) that a "release or threatened release" of a hazardous substance from a facility has occurred; (3) that the plaintiff incurred response costs as a result; and (4) that the costs were "necessary" and consistent with the National Contingency Plan (NCP).\(^{36}\) Once
evidence that the sampling and analytical test procedures complied with EPA requirements, or that the tests were performed by an EPA-or Arkansas-certified laboratory." \(\text{Id. at 961.}\)


33. Fox, supra note 3, at 772 (explaining one of two recognized primary goals of CERCLA).

34. See id. (holding responsible parties liable rather than burdening taxpayers by requiring third party to initiate cleanup). "At the same time, CERCLA seeks 'to place the cost of that response on those responsible for creating or maintaining the hazardous condition.'" Control Data Corp. v. S.C.S.C. Corp., 53 F.3d 950, 954-36 (8th Cir. 1995) (quoting United States v. Mex. Feed & Seed Co., 980 F.2d 478, 486 (8th Cir. 1992)) (noting harm to environment and care by parties plays substantial role in allocation of response costs).


36. See 42 U.S.C. § 9607 (1994); see also Control Data, 53 F.3d at 934-35 (setting test by placing burden of proof on plaintiff to prove liability); Stewman v. Mid-South Wood Prods. of Mena, Inc., 993 F.2d 646, 648 (8th Cir. 1993). In 1980, Congress required EPA to revise the National Contingency Plan [hereinafter NCP] to promote procedural uniformity and ensure cost-effective cleanups. See Deason, supra note 2, at 571. Congress required the NCP include "a section establishing standards, procedures, and methods for responding to releases of hazardous substances, pollutants and contaminants." \(\text{Id. at 572.}\) Over the years, judicial interpretations relating to the function of the NCP requirement have varied. \(\text{See id. at 577.}\) These interpretations often divide into "jurisdictions requiring NCP consistency as an element of a plaintiff's prima facie case establishing liability, jurisdictions holding that it serves only to limit the amount of recoverable damages, and jurisdictions holding that its applicability to establishing liability depends upon the procedural posture of the case." \(\text{Id. at 577-78.}\)
a plaintiff establishes liability, the court must determine the recoverable costs.37

B. Covered Persons

The first criterion for determining CERCLA liability is almost purely statutory.38 "Covered persons" include: owners or operators of a facility; any person operating a facility at the time of disposal of hazardous substances; any person owning or possessing hazardous substances and arranging for its disposal; and any person transporting hazardous substances.39 The concise language of this section of CERCLA, the statutory construction and an abundance of early litigation in the area enable parties to easily satisfy the first criterion for determining CERCLA liability.40

C. Release of Hazardous Substances

The second criterion for establishing CERCLA liability is determined by examining CERCLA's statutory language. For instance, CERCLA defines "facility" as "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

37. See Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 668 (5th Cir. 1989) (determining that once party establishes liability, court determines appropriate remedy by ascertaining each responsible party's equitable share of cleanup costs).

38. See 42 U.S.C. § 9607(a) (defining "covered persons"). CERCLA defines "covered persons" as well as those terms within the definition of "covered persons." See id.; see also 42 U.S.C. § 9601(20) (1994) (defining "owner or operator"); 42 U.S.C. § 9601(21) (defining "person").


   (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 arrange for disposal or treatment of hazardous substances owned or possessed by such person . . . , (4) any person who accepts or accepted any hazardous substance for transport to disposal or treatment facilities . . . .

Id. CERCLA further defines "owner or operator" as:

   in the case of an onshore facility or an offshore facility, any person owning or operating such facility . . . . 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.


40. See Fox, supra note 3, at 775 (noting language in CERCLA is significantly broad).
product in consumer use . . . " 41 The definitions of "release" and "threatened release" emerge from case law as well as from the statutory definition of release. 42 Courts construe "release" as describing any instance in which a toxic substance is found at a facility. 43 A "threatened release" occurs whenever substances are stored in an unsafe manner. 44 Thus, the criteria for determining whether a defendant constitutes a "facility" and whether a "release" or "threatened release" occurred involves a direct examination of CERCLA's statutory language. 45 Consequently, defendants have focused their attention on the two final elements of CERCLA liability in an attempt to establish some threshold limit on liability. 46

D. The Causation Requirement

The third prong of CERCLA requires that the release or threatened release of hazardous substances cause a plaintiff to incur response costs. 47 CERCLA identifies removal and remedial actions as the two types of cleanup actions resulting in response costs. 48 "In
order for a private party to recover these costs from the responsible party, the release of hazardous substances must have ‘caused’ the incurrence of the costs." 49

In *General Electric Co. v. Litton Industrial Automation Systems, Inc.*, 50 defendants argued that the plaintiff did not meet the third criteria of CERCLA liability because plaintiff’s response resulted from the threat of a possible lawsuit and not from a release of pollutants. 51 The Eighth Circuit, however, determined that the impetus behind plaintiff’s decision to begin the cleanup process was irrelevant. 52 The Eighth Circuit only focused upon whether the costs arose from a release or threat of release. 53 The plaintiff, in *General Electric*, thus satisfied the third criterion because the court found plaintiff incurred costs as a result of hazardous substances and not from the threat of a lawsuit. 54

In *United States v. Alcan Aluminum Corp.*, 55 the Third Circuit noted that CERCLA does not require the plaintiff to prove that the generator’s hazardous substances themselves caused the release or caused

42 U.S.C. § 9601(23). The NCP guidelines for a removal action are found in 40 C.F.R. § 300.415. See Gen. Elec. Co. v. Litton Indus. Automation Sys., 920 F.2d 1415, 1418 (8th Cir. 1990). The term “remedy” or “remedial action” in addition to removal actions, includes actions that “prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to the present or future public health or welfare or the environment.” 42 U.S.C. § 9601(24); see also Gen. Elec., 920 F.2d at 1419.


50. 920 F.2d 1415 (8th Cir. 1990).

51. See Gen. Elec., 920 F.2d at 1417-18. In *General Electric*, plaintiff sought to recover response costs from defendants, the previous owners of plaintiff’s property, for contamination of the property. See id. at 1417. Defendants appealed the district court’s award of response costs based on four claims, particularly that a “[p]laintiff should not be allowed to recover its cleanup costs because the cleanup was induced by the threat of a lawsuit [.] and [p]laintiff’s response was not consistent with the NCP.” *Id.* The Eighth Circuit rejected both claims and affirmed the district court’s grant of response costs to plaintiff. See id. at 1416. For a further discussion of defendants’ second claim in *General Electric*, see infra note 86 and accompanying text.

52. See Gen. Elec., 920 F.2d at 1418 (stating “the motives of the private party attempting to recoup response costs under 42 U.S.C. § 9607(a)(4)(B) are irrelevant.”).

53. See id. The district court found a release, based upon the fact that “from 1958 to 1963, [the] defendant dumped 500 gallons per year of waste chemicals on the ground in question. Additionally . . . a trench was used to bury a barrel which contained . . . toxic material.” *Id.* (citing Gen. Elec. Co. v. Litton Bus. Sys., Inc., 715 F. Supp. 949, 957 (W.D. Mo. 1989)).

54. See id. at 1417-18 (observing “42 U.S.C. § 9607 holds the party responsible for hazardous substance release liable for cleanup costs incurred as a result of the release.”).

55. 964 F.2d 252 (3d Cir. 1992).
the incurrence of response costs; rather, it requires the plaintiff to prove that the release or threatened release caused the incurrence of response costs, and that the defendant is a generator of hazardous substances at the facility.\textsuperscript{56}

The \textit{Alcan} court rejected the argument that a plaintiff must prove defendants’ disposal of hazardous waste either caused the release or caused plaintiff to incur response costs.\textsuperscript{57} Instead, the court imposed liability on defendants for their part in the contamination.\textsuperscript{58}

Contrary to the statutory definition of release and the Third Circuit’s \textit{Alcan} decision, the Fifth Circuit, in \textit{Amoco Oil Co. v. Borden, Inc.},\textsuperscript{59} added an additional criterion that a release must threaten the public health or the environment in order for response costs to be recoverable.\textsuperscript{60} In \textit{Amoco}, the Fifth Circuit concluded that a plaintiff met CERCLA liability requirements and found that “[t]o justifiably incur response costs, one necessarily must have acted to contain a release threatening the public health or the environment.”\textsuperscript{61} Accordingly, plaintiffs must demonstrate that the release or threatened release violates or is likely to violate any applicable state or federal standard.\textsuperscript{62} The \textit{Amoco} court relied upon any “legally ap-
applicable or relevant appropriate requirement” (ARAR) to define
the limits of appropriate response costs. The plaintiff, in *Amoco*,
satisfied this requirement by showing the radioactive emissions ex-
ceeded the limits of an applicable standard and was therefore justi-
fied in incurring response costs as a matter of law. According
to the Fifth Circuit, CERCLA liability thus attaches only upon the re-
lease of a hazardous substance that poses a significant threat to the
public or the environment by exceeding ARARs.

In contrast, the Third Circuit in *Alcan* stated, “[i]t is difficult to
imagine that Congress intended to impose a quantitative require-
ment on the definition of hazardous substances and thereby permit
a polluter to add to the total pollution but avoid liability because

part B of the Inactive Tailings Standards.” *Id.* Plaintiff’s evidence of elevated ra-
dium concentrations above an applicable standard proved that a release of
hazardous substances occurred that justified the incurrence of response costs. *See id.* at 671-72.

63. *Id.* (citing 42 U.S.C. § 9621(d)(2)(A)) (1988). The standard of “any le-
gally applicable or relevant appropriate standard” [hereinafter ARAR] includes
“any standard, requirement, criteria, or limitation under any Federal environ-
mental law” or any more stringent “State environmental or facility siting law.” *Id.* (citing 42 U.S.C. § 9621(d)(2)(A) (1988)) (explaining limitations upon recoverable response costs to establish limits on liability).

64. *See id.* at 671-72. Plaintiff relied upon subpart B of the Inactive Tailings
Standard, which provides:

(a) The concentration of radium-226 in land averaged over an area of
100 square meters shall not exceed the background level by more than –
(1) 5 pCi/g, averaged over the first 15 cm of soil below the surface, and
(2) 15 pCi/g, averaged over 15 cm thick layers of soil more than 15 cm
below the surface.

*Id.* (citing 40 C.F.R. § 192.12 (1988)). In a footnote, the court noted that
“[r]adium-226, . . . , is measured by weight in pCi/g, or picocuries per gram of the
substance measured.” *Id.* at 671 n.13.

65. *See id.* at 669-70 (allowing CERCLA liability to attach to release for any
quantity of hazardous substance would exceed CERCLA’s statutory purposes by
holding those who have not posed any threat to public or environment liable).
Though EPA argues they should be given deference for CERCLA’s liability
scheme, final authority for statutory construction lies within the courts statutory
interpretation. *See id.* at 670 n.11 (citing Fed. Election Comm’n v. Democratic
Senatorial Campaign Comm., 454 U.S. 27, 31-32 (1981)). In *Licciardi v. Murphy Oil
USA Inc.*, a decision following *Amoco*, the Fifth Circuit concluded that responsible
parties will not be held liable unless there is evidence the release posed a threat to
the public or the environment. *See Licciardi v. Murphy Oil U.S.A., Inc.*, 111 F.3d
396, 399 (5th Cir. 1997) (per curium). Plaintiffs, in *Licciardi*, sought to recover
response costs from defendant for contamination found on plaintiffs’ property.
*See id.* at 397-98. While the contamination was determined to have come from
defendant’s property, plaintiffs did not recover response costs because they pro-
vided no evidence regarding the levels of hazardous substances, other than being
above background levels. *See id.* at 399. The court concluded by stating that “[w]e
have been pointed to no evidence that the found ‘release’ justified the response
costs.” *Id.* (relying on *Amoco* holding that “liability does not attach to release of
‘any quantity of hazardous substance.’”).

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the amount of its own pollution was minimal." Following *Alcan*, the Eighth Circuit, in *Control Data Corp. v. S.C.S.C. Corp.*, stated that "CERCLA does not require the plaintiff to prove that the defendant caused actual harm to the environment at the liability stage." The Eighth Circuit noted that requiring plaintiff to prove actual environmental harm would frustrate the goal of CERCLA, encouraging a quick response and placing the cost of that response on those responsible for the hazardous condition. Since the plaintiff in *Control Data* had fulfilled the goal of CERCLA by efficiently responding to a perceived threat to the environment, defendants' bear the responsibility to take part in the costs of the recovery action, including the costs of the investigation. Therefore, according to the Eighth Circuit, it is immaterial whether the release caused actual physical harm to the environment.

The above decisions demonstrate the decisional split among the Third, Fifth, and Eighth Circuits regarding what constitutes causation of a release or threat of release. The Third and Eighth Circuits impose a less stringent standard upon its plaintiffs and only require a showing that there was a reasonable risk that a release or threat of release would contaminate their property. The Fifth Circuit, however, imposes a stricter standard requiring that plaintiffs prove that the release of a hazardous substance causes harm to the environment.


67. 53 F.3d 930 (8th Cir. 1995).

68. *Id.* at 935 (citing *Alcan*, 964 F.2d at 252, 264-66) (explaining harm to environment only becomes significant when allocating responsibility).

69. *See id.* at 936 (stating "a plain reading of the statute leads us to the conclusion that once a party is liable, it is liable for its share, as determined by Section 9613(f), or 'any' and all response costs, not just those costs 'caused' by its release.").

70. *See id.* The investigation, in *Control Data*, began after plaintiff discovered its own release. *See id.* Chemicals from defendants' property, however, also contributed to the contamination of plaintiff's property. *See id.* Thereafter, the court found defendants liable for a portion of the costs, including the investigation costs. *See id.* According to CERCLA, responsible parties face liability for recovery costs, including investigation costs which fall within the ambit of recovery costs. *See id.*

71. *See id.* at 935 (interpreting CERCLA as not requiring that plaintiffs prove defendants caused actual harm to the environment).

public or environment by exceeding an applicable testing standard. 75

E. Necessity and Consistency With the National Contingency Plan

The fourth element necessary to establish liability considers whether the costs incurred were “necessary” and consistent with the NCP. 74 This requirement may be divided further into necessary costs and costs consistent with the NCP. 75

1. “Necessary” Costs

Since neither the NCP nor CERCLA define “necessary,” courts generally disagree on what constitutes “necessary.” 76 Consequently, “courts have adopted a case-by-case, fact-based method to determine whether incurred response costs are ‘necessary.’” 77

To aid in determining which response costs are “necessary” and to provide safeguards for defendants, the Third Circuit, in Lansford-Coaldale Joint Water Authority v. Tonolli Corp. 78 set forth criteria mandating defendants be held liable only in situations where “(1) there was a reasonable risk (although one that may not materialize) that the defendant’s release or threatened release of hazardous substances would contaminate the plaintiff’s property; and (2) the monitoring and evaluation expenses were incurred by the plaintiff in a reasonable manner.” 79 Adding these requirements pre-

73. See Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 669 (5th Cir. 1989). For a further discussion of the Amoco court’s treatment of what constitutes causation of a release or threat of release, see supra notes 59-65 and accompanying text.
75. See Deason, supra note 2, at 576-77. Despite whether the fourth element of CERCLA liability is viewed as one or two elements, the NCP consistency requirement almost always brings about a disputed factual question. See id. at 577.
76. See Fox, supra note 3, at 780-83 (determining “necessary” costs of response).
77. Id. For a discussion of the varying methods courts have adopted to determine what constitutes “necessary” response costs, see infra notes 78-81, 93-97 and accompanying text.
78. 4 F.3d 1209 (3d Cir. 1993).
79. Id. at 1219. The plaintiff, in Lansford-Coaldale, owned water supply wells that provided public water in Carbon County, Pennsylvania. See id. at 1212. Defendants were a sister/parent corporation to the bankrupt owner of property located adjacent to plaintiff, which was formerly used for lead smelting. See id. Plaintiff brought suit against defendants, inter alia, to recover monitoring and evaluation costs incurred from plaintiff’s belief of a release or threat of release from defendants’ property. See id. When notified that defendants had applied for a permit for disposal of hazardous waste, plaintiff sought evaluation of his property. See id. The court determined that plaintiff did in fact incur monitoring and evalu-
vents plaintiffs from employing a CERCLA liability claim in which the costs incurred were part of a needless and expensive monitoring study. With these requirements, the Third Circuit can ensure that defendants who are found liable under CERCLA are truly responsible for the costs incurred.

2. Consistency with the NCP

"The NCP is a body of regulations promulgated by EPA to govern the cleanup of CERCLA toxic waste sites." While a site evaluation must be consistent with the NCP's requirements, it need not strictly comply with the letter of the NCP. The Code of Federal Regulations sets forth five basic requirements for a removal action under the NCP. First, a site assessment must be performed to determine the appropriateness of a removal action. Second, the lead agency shall take efforts to determine whether any known responsible parties "can and will perform the necessary removal action promptly and properly." Third, in evaluating the appropriateness of a removal action, the lead agency shall look to several factors, including exposure to people, contamination of water, barrels that pose a threat of release, contaminated soil that may migrate, weather conditions that may affect the contaminants, and costs from a threat of release from defendants' property. See id. at 1219. Plaintiff, however, failed to establish the other elements needed to prove CERCLA liability. See id.

80. See id. at 1219 (explaining requirement of proving defendant's responsibility for release or threatened release and incurred costs necessary and consistent with NCP would help to prevent recovery of needless costs by plaintiffs). The Lanford-Coaldale court determined that, since the Environmental Protection Agency [hereinafter EPA] conducted removal actions under CERCLA and since the defendant had applied for a permit to dispose of hazardous waste at its facility, plaintiff incurred monitoring and response costs in response to a release and threat of a release caused by defendant. See id. at 1219-20.

81. See id. The Third Circuit also simultaneously complies with CERCLA's goal of placing liability on responsible parties. See Fox, supra note 3, at 769.

82. Fox, supra note 3, at 777 (citing generally 40 C.F.R. § 300).

83. See Gen. Elec. Co. v. Litton Indus. Automation Sys., 920 F.2d 1415, 1420 (8th Cir. 1990). "It is not necessary that every factor mentioned by the NCP be dealt with explicitly." Id. For example, failure to consider explicitly the weather conditions factor would not prevent a cost from being consistent with the NCP. See id. As long as the evaluation performed is consistent with the NCP requirements concerning a removal or remedial action, this prong of CERCLA liability will be met. See id. Consequently, noncompliance with merely one section alone does not render response costs inconsistent with the NCP. NL Indus. v. Kaplan, 792 F.2d 896, 899 (9th Cir. 1986).

84. See National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. § 300.415 (2001).

85. See 40 C.F.R. § 300.415(a)(1).

86. 40 C.F.R. § 300.415(a)(2).
threat of fire, and other factors.\textsuperscript{87} Fourth, the cleanup action will begin as soon as possible in an appropriate manner.\textsuperscript{88} Finally, where removal will reduce the spread of contamination and the likelihood of exposure to humans, contaminated soil and barrels of contaminants should be removed.\textsuperscript{89} In determining whether the response costs complied with the NCP, the \textit{General Electric} court looked to the statutory requirements and determined the removal costs were consistent with the NCP.\textsuperscript{90}

\section*{IV. Narrative Analysis}

In \textit{Johnson}, the Eighth Circuit faced the task of determining whether costs incurred by plaintiffs were recoverable response costs under CERCLA.\textsuperscript{91} The court began by examining various judicial interpretations of the four criteria that plaintiffs must establish to impose CERCLA liability.\textsuperscript{92}

The \textit{Johnson} court rejected the Fifth Circuit's decisions in \textit{Amoco} and \textit{Licciardi}, because it did not believe a landowner should be responsible for the costs of testing and sampling his property if prompted by a release or threat of release of a hazardous substance from another's property.\textsuperscript{93} In addition, based on CERCLA's plain

\begin{itemize}
  \item \textsuperscript{87} See 40 C.F.R. § 300.415(b)(2).
  \item \textsuperscript{88} See 40 C.F.R. § 300.415(b)(3).
  \item \textsuperscript{89} See 40 C.F.R. § 300.415(e)(7).
  \item \textsuperscript{90} See id. "The requirement that private response costs be consistent with the NCP has been dealt with extensively through early CERCLA litigation." Fox, supra note 3, at 777. The \textit{General Electric} court based its determination that the removal action was consistent with NCP on the following factors: (1) the site was evaluated in 1981 and 1985 by environmental evaluators; (2) plaintiff notified defendant of the potential cleanup to take place; (3) an evaluation of potential response actions was prepared; (4) plaintiff's response time was adequate; and (5) excavation of the site complied with the NCP. See \textit{Gen. Elec.}, 920 F.2d at 1419-20. For a further discussion of \textit{General Electric}, see supra notes 50-54 and accompanying text.
  \item \textsuperscript{91} See \textit{Johnson v. James Langley Operating Co.}, 226 F.3d 957, 961 (8th Cir. 2000). For a further discussion of the facts of \textit{Johnson}, see supra notes 18-31 and accompanying text.
  \item \textsuperscript{92} See \textit{Johnson}, 226 F.3d at 961-62. For a discussion of the criteria necessary to establish CERCLA liability, see supra notes 36-37 and accompanying text.
  \item \textsuperscript{93} See \textit{Johnson}, 226 F.3d at 962 (remarking "CERCLA plainly contemplates liability for site assessment."). The Fifth Circuit, in \textit{Amoco}, advocated a factual inquiry to determine if plaintiffs' response costs were justified. See id. The Fifth Circuit rejected the argument that liability automatically attaches upon the release of any quantity of hazardous waste. See id. Rather the release must have threatened the public health or environment. See id. (citing \textit{Amoco Oil Co. v. Borden, Inc.}, 889 F.2d 664, 670 (5th Cir. 1989)). The court did not identify a minimum showing of necessity. See id. The Fifth Circuit, however, did hold that "a plaintiff who has incurred response costs meets the liability requirement as a matter of law if it is shown that any release violates, or any threatened release is likely to violate, any applicable state or federal standard, including the most stringent."
language, the Johnson court opposed the Fifth Circuit by noting that the definition of hazardous substances contains no reference to any quantitative threshold. The Johnson court reasoned that imposing a minimum threshold for hazardous substances would undermine the policy decision Congress made when enacting CERCLA.

Further, the Johnson court addressed whether response costs must be caused by a release or a threat of release. Following the reasoning of the Eighth Circuit, in General Electric, the Johnson court held that plaintiffs’ response costs were not litigation costs and did, in fact, arise out of a threat of release of hazardous substances.

Finally, the Johnson court addressed the fourth criterion for establishing CERCLA liability, specifically whether plaintiffs’ response costs were “necessary” and consistent with the NCP. The court followed the standard set forth by the Third Circuit in Lansford-Coaldale, stating “[t]esting and sampling expenses are necessary only if the party seeking to recover costs has an objectively reasonable belief that the defendant’s release or threatened release of hazardous substances would contaminate his property.” Relying on

Id. (quoting Amoco, 889 F.2d at 671). Following the Amoco decision, the Fifth Circuit, in Licciardi, decided that even if hazardous substance levels were found above background levels, the landowner could not be justified in seeking testing and sampling costs if the levels are not in excess of ARAR. See id. (citing Licciardi v. Murphy Oil U.S.A., Inc., 111 F.3d 396, 399 (5th Cir. 1997)); see also 42 U.S.C. § 9621(d)(2)(A) (1994) (describing ARAR). See id. For a further discussion of ARAR, see supra note 65 and accompanying text.


95. See Johnson, 226 F.3d at 962 (citing Acushnet Co. v. Mohasco Corp., 191 F.3d 69, 78 n.9 (1st Cir. 1999)).

96. See id. (citing Gen. Elec. Co. v. Litton Indus. Automation Sys., 920 F.2d 1415, 1417 (8th Cir. 1990)). For a further discussion of the CERCLA liability requirement of causation of a release or threat of release, see supra notes 47-73 and accompanying text.

97. See Johnson, 226 F.3d at 963 (deciding relevance of whether plaintiffs incurred response costs eighteen months after filing suit). In General Electric, the Eighth Circuit rejected that cleanup costs prompted by the threat of litigation were unrecoverable litigation expenses. See id. (citing Gen. Elec., 920 F.2d at 1418). “[T]he motives of the private party attempting to recoup response costs under 42 U.S.C. § 9607(a)(4)(B) are irrelevant.” Gen. Elec., 920 F.2d at 1418 (stating purpose of encouraging timely cleanup of hazardous waste sites would be frustrated if private parties could not recover response costs).

98. See Johnson, 226 F.3d at 963-64 (citing 42 U.S.C. § 9607(a)(4)(B) (1994)).

99. Id. at 964 (citing Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209, 1219 (3d Cir. 1993)). The Johnson court interpreted the “in a reasonable manner” language of the Lansford-Coaldale court to imply that scientifically deficient or unduly costly testing methods cannot be necessary. See id. For a further discussion of the court’s analysis of response costs that are necessary in Lansford-Coaldale, see supra notes 78-81 and accompanying text.
the Third Circuit's reasoning in *Lansford-Coaldale*, the *Johnson* court held that the expenses cannot be unduly burdensome and the testing methods must not be scientifically deficient.\(^{100}\) Thus, the *Johnson* court found the fiscal reasonableness and scientific validity of the procedures plaintiffs employed in the sampling and testing to be essential in proving the necessity of plaintiffs' costs.\(^{101}\)

Although the *Johnson* court concluded that the first three criteria necessary to establish CERCLA liability were fulfilled, the court noted that more evidence was needed to determine whether the response costs that plaintiffs incurred were, in fact, "necessary."\(^{102}\) Thus, the Eighth Circuit remanded the decision to the district court to determine whether the incurred costs were necessary.\(^{103}\)

V. CRITICAL ANALYSIS

In its decision, the *Johnson* court followed Eighth Circuit precedent while integrating corresponding arguments raised in the Third and Fifth Circuits.\(^{104}\) The *Johnson* analysis attempted to protect innocent parties from "footing the bill" in order to have a peace of mind.\(^{105}\) The *Johnson* court, however, could not fully accomplish this objective without further proceedings in the district court.\(^{106}\) The *Johnson* court appropriately found defendants liable, but also thought it necessary to ensure the validity of response costs incurred by plaintiffs before making defendants pay the costs.\(^{107}\) This holding demonstrates the *Johnson* court's concern with finding

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100. See *Johnson*, 226 F.3d at 964 (citing *Lansford-Coaldale*, 4 F.3d at 1219).
101. See id. (holding that while plaintiffs' costs constitute response costs, whether they are necessary must be examined further). The *Johnson* court failed to address the question of whether plaintiffs' response costs were consistent with the NCP since it was not yet evident whether the costs met the "necessary" requirement of the second prong. See id.
102. See id. For a further discussion of the first three criteria needed to prove CERCLA liability, see supra notes 38-73 and accompanying text.
103. See *Johnson*, 226 F.3d at 964 (reversing district court and remanding matter for further proceedings). To determine whether plaintiffs' response costs were necessary, the district court must look at the fiscal reasonableness and scientific validity of the procedures used in the environmental testing done at plaintiffs' properties. See id.
104. See generally *Johnson*, 226 F.3d 957. For a further discussion of the *Johnson* court's application of the Third, Fifth, and Eighth Circuit decisions, see supra notes 91-103 and accompanying text.
105. See *Johnson*, 226 F.3d at 962-64 (stating testing and sampling costs should not be "saddled" on landowner).
106. See id. (finding insufficient evidence proving fiscal reasonableness and scientific validity which was needed in order to comply with "necessary" element of CERCLA).
107. See id. (determining need to establish plaintiffs' costs as necessary by using fiscal reasonableness and scientific validity).
defendants liable by giving plaintiffs another chance to prove defendants' liability, while ensuring its decision was justified under CERCLA.108

In determining whether there was a release or a threat of release, Johnson looked to the plain statutory language of CERCLA, which defines release and hazardous substance.109 The court concluded that the plain language of CERCLA does not contain any quantitative threshold in the definition of hazardous substance.110 Therefore, the court correctly construed the statute in favor of plaintiffs by deciding that a landowner should not be saddled with the costs of testing and sampling in response to a release or a threat of release of a hazardous substance if the statutory language lacks any specified quantitative threshold in the statutory language and CERCLA plainly contemplates liability for site assessment.111

The minimum level of a hazardous substance standard that the Fifth Circuit established in Amoco and Licciardi is unduly harsh on plaintiffs who have reasonably spent money to sample and test their property because of a threat of a release of hazardous substances.112 Thus, the Eighth Circuit's decision to balance the interests of both plaintiffs and defendants was proper.113 The Johnson court's decision sympathized more with plaintiffs by rejecting the Fifth Circuit's strict standard, while simultaneously sympathizing with defendants

108. See id. at 957-64 (exemplifying Eighth Circuit's willingness to give plaintiffs another chance to prove defendants' liability under CERCLA).
109. See 42 U.S.C. § 9601(14), (22) (1994). CERCLA defines "hazardous substance" as:
   (A) any substance designated pursuant to ... Federal Water Pollution Control Act ... , (B) any element, compound, mixture, solution of substance designated pursuant to section 102 of [CERCLA], (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act ..., (D) any toxic pollutant listed under ... Federal Water Pollution Control Act, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act, and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 7 of the Toxic Substances Control Act.

42 U.S.C. § 9601(14). The definition of hazardous substance does not include petroleum unless specifically listed under the subparagraphs of CERCLA section 9601(14). See id. For the CERCLA definition of "release," see supra note 43.

110. See Johnson, 226 F.3d at 962 (citing United States v. Alcan Aluminum Corp., 964 F.2d 252, 260-61 (3d Cir. 1992)) (observing other important terms defined in CERCLA, but failing to recognize any quantitative threshold).

111. See id. (revealing court's disagreement with Amoco and Licciardi to extent such decisions placed testing and sampling costs on landowners).

112. See id. at 962-64 (discussing court's disagreement with Fifth Circuit's analysis in Amoco and Licciardi).

113. See id. (analyzing arguments and interests of both parties while adhering to plain language mandates set forth in CERCLA).
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by requiring plaintiffs to prove all of the requirements set forth in the statutory language of CERCLA.114 This approach benefits landowners because it enables a landowner concerned about a local hazardous substance release or threat of release to seek testing and sampling of his property without fear of bearing exorbitant costs.115 In making its decision, the Johnson court not only adhered to the statutory language of CERCLA, but also considered such consequences on landowners if they had to pay for testing and sampling.116 For example, if landowners living near a hazardous waste site fear having to pay to test their property, then potentially dangerous situations may continue undetected.117 By following Eighth Circuit precedent, the Johnson court took a more sensitive view toward plaintiffs by rejecting the Fifth Circuit's argument in Amoco and Licciardi, stating that a release must have threatened public health or the environment.118 The Johnson court appropriately followed Eighth Circuit precedent, refusing to hinder landowners with a heightened burden of proving a release or threat of release of a hazardous substance on their property.119

The Johnson court further contemplated whether the release or threat of release actually caused the response costs in question.120 In determining that the threat of release actually caused the response costs, the Johnson court again adopted a pro-plaintiff approach and looked to precedent for guidance.121 Based on the

114. See id. The Johnson court followed the requirements of CERCLA, with the exception of the NCP requirement of consistency. See id. Unlike the Fifth Circuit, however, the court did not read the requirements to draw further limitations into CERCLA. See id.; see also Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 670-72 (5th Cir. 1989).

115. See Johnson, 226 F.3d at 962 (arguing quantitative minimum threshold for CERCLA liability would undo Congress's policy decision that threat of hazardous substances does not depend on minimum quantity or concentration).

116. See id. The purpose of CERCLA focuses on cleaning up hazardous substances to prevent injury to humans or the environment, while avoiding burdening taxpayers. See id.

117. See Fox, supra note 3, at 772 (identifying one of CERCLA's purposes as imposing liability on responsible parties when third parties initiate cleanup).

118. See Johnson, 226 F.3d at 962. The Eighth Circuit, in Johnson, correctly disagreed with the Fifth Circuit in that plaintiffs need not establish hazardous substance levels in violation of applicable standards. See id. The Johnson court determined this an erroneously strict view of the Fifth Circuit and interpreted the language of CERCLA according to its plain language, rather than creating additional standards. See id.

119. See id. at 959-64 (interpreting CERCLA liability in plaintiffs' favor and rejecting view of Fifth Circuit's view as established in Amoco).

120. See id. at 963 (determining irrelevance of timing of response costs with respect to initiation of action).

121. See id. In General Electric, the court rejected the argument that cleanup costs prompted by the threat of litigation were unrecoverable litigation expenses.
Eighth Circuit's holding in *General Electric*, the *Johnson* court decided that the mere timing of the initiation of litigation did not transform the response costs into litigation costs.122 Following past precedent from the Eighth Circuit, the *Johnson* court reasonably protected the landowner's interests by allowing response costs to be recoverable under CERCLA despite motive or timing.123 This decision appropriately coincides with CERCLA's goal to "impose remedial liability for improper waste disposal practices on responsible parties, rather than burdening taxpayers, when a third party . . . initiates cleanup measures."124

The *Johnson* court's final determination rested on whether the response costs were necessary and consistent with the NCP.125 On this point, the *Johnson* court strayed from past precedent, instead, relying upon the Third Circuit's decision in *Lansford-Coaldale*.126 The *Lansford-Coaldale* court established safeguards to ensure defendants would not be held responsible for testing and sampling costs incurred in an unreasonable manner.127 Accordingly, the *Johnson* court determined that if the testing methods were scientifically deficient or unduly costly, they were not necessary and consistent with the NCP.128 Therefore, to demonstrate the necessity of the costs, plaintiffs must prove the fiscal reasonableness and scientific validity of the procedures employed in obtaining the results of the testing and sampling.129 Consequently, the *Johnson* court could not determine the recoverability of the response costs without addi-

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See id. (citing Gen. Elec. Co. v. Litton Indus. Automation Sys., 920 F.2d 1415, 1418 (8th Cir. 1990)). The *General Electric* court determined that the motives of parties attempting to recover response costs were irrelevant. See Gen. Elec., 920 F.2d at 1418 (allowing that it would frustrate purpose of encouraging timely cleanup of hazardous waste sites if response costs transform into unrecoverable litigation costs).

122. See *Johnson*, 226 F.3d at 963 (holding plaintiffs' response costs cannot be deemed unrecoverable due to timing of response).

123. See id. (finding CERCLA acts as strict liability statute and "unclean hands" defense is not among limited statutorily defined defenses).

124. Fox, supra note 3, at 772 (footnote omitted) (stating recognized goal of CERCLA).

125. See *Johnson*, 226 F.3d at 963-64 (identifying final criterion as more significant CERCLA limitation).

126. See id. at 963-64 (relying on Third Circuit decision). For a further discussion of the analysis in *Lansford-Coaldale*, see supra notes 79-81 and accompanying text.


128. See *Johnson*, 226 F.3d at 963-64 (determining necessity and consistency of plaintiffs' response costs with NCP).

129. See id. (holding if assessment data was scientifically untrustworthy, such response costs would be unnecessary and unrecoverable).
tional findings from plaintiffs. The court remanded the case to the district court to determine whether the procedures plaintiffs used in obtaining the testing results were fiscally reasonable and scientifically valid.

Implicit in this decision, the Johnson court attempts to appear neutral in its approach, while simultaneously giving plaintiffs another chance to prove defendants' liability. Rather than decide solely in defendants' favor, the court seemingly elects to allow plaintiffs the opportunity to show that the costs were not incurred in an unreasonable manner, thereby holding defendants liable. Since plaintiffs previously established by whom and where testing and sampling had been done, it remained unclear why the court decided to also determine whether the costs plaintiffs incurred were scientifically valid and economically reasonable. Such a determination would prolong the final decision, whereas if the court had merely followed the explicit language of CERCLA there would have been no need to examine the scientific validity and economic reasonableness of plaintiffs' costs. Notwithstanding the NCP requirement, the court apparently overlooked that the test for proving defendants' liability under CERCLA had been satisfied without adding any additional standards. Therefore, while an argument could be made that the Johnson court was attempting to give plaintiffs another chance to produce evidence, the court simultaneously made the situation more difficult for plaintiffs. Had the Johnson court solely followed the past precedent of the Eighth Circuit, plaintiffs would have prevailed because all of the CERCLA requirements would have been satisfied. Thus, the Johnson court can also be seen as hindering plaintiffs' case by prolonging the case.

130. See id. (employing plaintiffs with another opportunity to prove defendants' liability).

131. See id. (remanding case to district court for further proceedings not inconsistent with Eighth Circuit's opinion).

132. See id.

133. See Johnson, 226 F.3d at 963-64 (enhancing requirements that plaintiff must show to prove defendants' liability).

134. See id. For a further discussion of the testing and sampling practice plaintiffs utilized, see supra notes 22-25 and accompanying text.

135. See Johnson, 226 F.3d at 963-64.

136. See id. at 962-64. For a further discussion of the precise statutory language of CERCLA, see supra notes 38-39 and accompanying text.

137. See Johnson, 226 F.3d at 964 (imposing greater standards thereby increasing burden on plaintiffs).

138. See id. at 962-64. For a further discussion of Eighth Circuit past precedent, see supra notes 50-54, 67-71 and accompanying text.
and making plaintiffs provide more evidence before rendering a decision.\textsuperscript{139}

The \textit{Johnson} court erroneously failed to follow \textit{General Electric} by not analyzing the case for compliance with the NCP.\textsuperscript{140} According to CERCLA, the costs must be deemed necessary and consistent with the NCP.\textsuperscript{141} The \textit{General Electric} court looked at the major statutory factors of the NCP and determined that the removal costs were consistent with the NCP.\textsuperscript{142} In \textit{Johnson}, however, the Eighth Circuit only addressed whether the response costs were necessary and totally disregarded the NCP requirement.\textsuperscript{143} Thus, the \textit{Johnson} court erred in failing to perform the required CERCLA NCP analysis that the Eighth Circuit performed in \textit{General Electric}.\textsuperscript{144}

Although the \textit{Johnson} court tended to comply with Eighth Circuit past precedent, it failed to mirror that precedent, adding two new criteria for CERCLA liability and omitting any discussion of consistency with the NCP.\textsuperscript{145} The lack of any discussion regarding whether plaintiffs complied with the requirement that response costs be consistent with the NCP renders the \textit{Johnson} decision incomplete.\textsuperscript{146} As exemplified in \textit{General Electric}, the NCP analysis almost entirely relies on the statute's text, while the \textit{Johnson} opinion errs with its silence as to how to comply with the NCP and whether the response costs have complied with the NCP.\textsuperscript{147} Additionally, the court expanded the burden of proof facing plaintiffs seeking to establish CERCLA liability by adding two new standards to apply when determining the necessity of response costs.\textsuperscript{148} According to

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\textsuperscript{139} See \textit{Johnson}, 226 F.3d at 962-64. For a further discussion of the \textit{Johnson} court's holding, see supra notes 93-103 and accompanying text.
\textsuperscript{140} See \textit{Gen. Elec. Co. v. Litton Indus. Automation Sys.}, 920 F.2d 1415, 1420 (8th Cir. 1990); see also \textit{Johnson}, 226 F.3d at 963-64.
\textsuperscript{141} See 42 U.S.C. § 9607 (1994). For a further discussion of the criteria a plaintiff must prove for CERCLA liability, see supra notes 36-37 and accompanying text.
\textsuperscript{142} See \textit{Gen. Elec.}, 920 F.2d at 1420. For a further discussion of the application of NCP to the facts of \textit{General Electric}, see supra note 90 and accompanying text.
\textsuperscript{143} See \textit{Johnson}, 226 F.3d at 963-64 (applying CERCLA liability criteria to facts of case).
\textsuperscript{144} See id.; see also \textit{Gen. Elec.}, 920 F.2d at 420.
\textsuperscript{145} See \textit{Johnson}, 226 F.3d at 962-64. For a further discussion of the Eighth Circuit's addition of two new criteria to CERCLA liability analysis in \textit{Johnson}, see supra notes 98-101 and accompanying text.
\textsuperscript{146} Compare \textit{Johnson}, 226 F.3d at 964, with \textit{Gen. Elec.}, 920 F.2d at 420 (exemplifying elimination of discussion of NCP requirement in \textit{Johnson} decision).
\textsuperscript{147} See \textit{Johnson}, 226 F.3d at 964; see also \textit{Gen. Elec.}, 920 F.2d at 420. For a further discussion of the \textit{General Electric} court's analysis of the NCP consistency requirement, see supra notes 85-86 and accompanying text.
\textsuperscript{148} See \textit{Johnson}, 226 F.3d at 964 (1994).
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the standards for CERCLA liability, NCP compliance must be shown in order to determine CERCLA liability, but the additional standards of fiscal reasonableness and scientific validity need not be demonstrated. Therefore, the new standard adopted by the Eighth Circuit creates an additional requirement beyond the requirements of CERCLA. Consequently, plaintiffs will have more to prove when establishing defendants' liability for response costs.

VI. IMPACT

The Johnson decision expands past decisions of the Eighth Circuit and will likely impact the overall determination of CERCLA liability. To the peril of CERCLA plaintiffs, the Johnson decision adds the Third Circuit requirements for determining whether response costs are necessary to the Eighth Circuit analysis. Additionally, the Johnson court's rejection of the Amoco and Licciardi standard provides other circuits greater incentive to reject the Fifth Circuit's requirement of compliance with an ARAR in order to establish causation.

The Eighth Circuit set its own precedent for what may be considered necessary response costs for remedial actions, testing and sampling, by following the Third Circuit standard set forth in Lansford-Coaldale. This standard will have a significant impact on fu...
ture Eighth Circuit decisions. Lower courts will have more criteria to guide their determination of whether plaintiffs have successfully demonstrated defendants' liability for response costs under CERCLA. 156 Although the additional requirement gave plaintiffs, in Johnson, another chance to prove defendants' liability, such a requirement imposed on subsequent decisions will result in a greater burden of proof on future plaintiffs. 157

Furthermore, the Johnson court's requirement that plaintiffs prove the validity of their sampling and testing techniques in order to recover their response costs will impact the testing methods that potential plaintiffs employ. 158 The emphasis will be on obtaining a credible environmental consulting and testing company whose results fall within what the court sees as scientifically valid and fiscally reasonable. 159 Because this standard has not yet been followed, more controversy may surface over what constitutes a scientifically valid and fiscally reasonable testing procedure.

Although the Johnson court's holding did not conflict with other Eighth Circuit decisions, it has increased the number of requirements that a plaintiff must prove for CERCLA liability and has dismissed the analysis of determining consistency with the NCP. 160 Moreover, the Eighth Circuit enhanced its split with the Fifth Circuit, making it more difficult for other courts to settle the issue of whether elevated levels of hazardous substances must be shown in order for there to have been a release or threat of release. 161 Accordingly, the Johnson decision will have a significant impact on future text. The facts of General Electric differed greatly from the facts of Johnson insofar as the Johnson court did not have to worry about actual cleanup costs being necessary, but only whether testing and sampling costs were necessary. See Johnson, 226 F.3d at 961. For the facts of Johnson, see supra notes 18-31 and accompanying text. The two differ, because, with removal costs, there is a cleanup or removal of hazardous substances from the environment, whereas, with sampling and testing costs (remedial action), one is trying to ascertain whether a release occurred or if there was just a threat of release and how to handle the prevention of the release of hazardous substances. See 42 U.S.C. § 9601(23), (24) (1994). For a discussion of the statutory definitions of removal and remedial actions, see supra note 48 and accompanying text. For a further discussion of the Third Circuit's CERCLA requirements set forth in Lansford-Coaldale, see supra notes 78-81 and accompanying text.

156. See Johnson, 226 F.3d at 964 (setting appropriate context for such considerations).
157. See id.
158. See id. (discussing untrustworthy data).
159. See id.
160. See id. at 961-64 (setting standards for CERCLA liability).
161. See Johnson, 226 F.3d at 963 (rejecting Fifth Circuit's adoption of requirement for meeting elevated levels of hazardous substances to prove causation).
ture decisions dealing with proving CERCLA liability for recovery of testing and sampling response costs, both inside and outside the Eighth Circuit.

Andrea R. Prosics