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FMC Corp. v. United States Department of Commerce: An Overexpansion of Operator Liability Under CERCLA

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I. INTRODUCTION

A primary goal of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) is to place the "burden of cleanup on parties responsible for creating or worsening an environmental problem." Cleanup of hazardous waste sites is the statute's top priority. Furthermore, courts consider CERCLA a remedial statute, and therefore, construe it liberally to effectuate its goals, particularly the goal of responsible parties bearing the cost of cleanup. As a result, courts have broadly interpreted the scope of "owner" and "operator" liability.

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4. See B.F. Goodrich v. Murtha, 958 F.2d 1192, 1197 (2d Cir. 1992) ("In CERCLA Congress enacted a broad remedial statute designed to enhance the authority of the EPA to respond effectively and promptly to toxic pollutant spills ... "); Dedham Water Co. v. Cumberland Farms Dairy, 889 F.2d 1146, 1150 (1st Cir. 1989) (describing CERCLA as a "broad response and reimbursement statute").
6. CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A). CERCLA defines "owner or operator" as: (i) in the case of a vessel, any person owning, operating or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any abandoned facility, any person who owned, operated or otherwise controlled activities at such facility immediately prior to such abandon-
By employing such a broad definition of “owner” and “operator,” courts have been able to impose CERCLA liability on such parties as parent and sister corporations,7 corporate officers,8 lessees,9 plant

ment, (iv) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, 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 indica of ownership primarily to protect his security interest in the vessel or facility. 


Generally, CERCLA case law demonstrates a trend toward interpreting the scope of § 107 liability broadly. See, e.g., Mobay Corp. v. Allied-Signal, 761 F. Supp. 345, 350 (D.N.J. 1991). In determining liability, many courts have taken a functional approach, asking whether a party exercised control over a particular site, instead of limiting liability to those who actually engaged in the operation of the site and disposal of the waste. See, e.g., Kayser-Roth, 910 F.2d at 27 (imposing liability on parent corporation as “operator” due to its “active involvement in the activities of the subsidiary”); United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1382 (8th Cir. 1989) (stating that if there is control, ownership, or possession it does not necessarily follow that liability will attach); United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726, 743 (8th Cir. 1986) (stating that “[i]t is the authority to control the handling and disposal of hazardous substances that is critical under the statutory scheme [of CERCLA]”), cert. denied, 484 U.S. 848 (1987).

7. Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209, (3d Cir. 1993) (stating a corporation may be held liable as “owner” under CERCLA for actions of its subsidiary corporation in situations where piercing corporate veil has been determined to be warranted); John S. Boyd Co. v. Boston Gas Co., 992 F.2d 401 (1st Cir. 1993) (stating a successor corporation in merger situation and parent corporation (when the parent can be considered “owner” or “operator”) can both be held responsible under CERCLA); CPC Int’l, 777 F. Supp. at 572 (holding parent corporation may be liable for its subsidiary corporation under CERCLA in two ways: it may be directly liable as “operator” or it may be liable through common law principles of piercing corporate veil); Mobay Corp., 761 F. Supp. at 345 (holding parent corporation liable under CERCLA if parent corporation controlled or participated in subsidiary’s actions); Kayser-Roth, 910 F.2d at 26-27 (imposing liability on a parent corporation as “operator” due to its “active involvement in the activities of its subsidiary”); New York v. Exxon Corp., 112 B.R. 540, 547 (S.D.N.Y. 1990) (holding corporation directly liable for wholly owned subsidiary’s illegal disposal of hazardous material).


9. Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 842-43 (4th Cir. 1992) (indicating former tenants can be held liable under CERCLA for disposal of underground storage tanks as long as authority to control facility was present); United States v. South Carolina Recycling & Disposal Inc., 653 F. Supp. 984 (D.S.C. 1986) (noting landowners who entered into lease with company which stored hazardous waste could not avoid liability for cleanup costs).
supervisors, \(^{10}\) excavators, \(^{11}\) and state and local governments. \(^{12}\) Most recently, in *FMC Corp. v. United States Department of Commerce* (FMCII), \(^{13}\) the Court of Appeals for the Third Circuit held that the federal government’s necessary regulatory activities during World War II subjected the United States to liability as “operator” and “arranger” under CERCLA. \(^{14}\)

Part II of this Note reviews the activities of the United States which the Third Circuit considered in qualifying the government as an “operator” under CERCLA. Part III discusses the statutory and case law pertinent to CERCLA liability and governmental immunity. Part IV explains the Third Circuit’s reasoning and suggests that the court overextended CERCLA liability, failing to fully consider the doctrine of sovereign immunity. Finally, Part V discusses the detrimental impact this case will have, concluding that Congress should amend CERCLA to clarify the scope of the federal immunity provision.

II. FACTS

In 1963, FMC Corporation (FMC) bought the 440 acre site at issue, which is located in Front Royal, Virginia. \(^{15}\) American Viscose Corporation (American Viscose) owned the facility from 1937 until 1963. \(^{16}\) In 1940, American Viscose constructed a plant on the site

\(^{10}\) *Northeastern Pharmaceutical*, 810 F.2d at 743 (holding plant supervisor for chemical manufacturer individually liable for having arranged for transportation and disposal of hazardous substances where he had authority to control handling and disposal of hazardous substances, and was directly responsible for arranging for transportation and disposal of hazardous substances).

\(^{11}\) *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1343 (9th Cir. 1992) (indicating excavator who spread some displaced contaminated soil from property over to other parts of property was liable as “transporter” under CERCLA even though material was not moved to separate parcel of land but merely to another area of the same property).

\(^{12}\) *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) (noting CERCLA intended to hold state governments liable in federal court). For a discussion of this case, see infra note 43 and accompanying text.

\(^{13}\) 29 F.3d 833 (3d Cir. 1994) (FMCII).

\(^{14}\) Id. at 834.

\(^{15}\) Id. at 835-36. The facility included a manufacturing plant and twenty three waste disposal basins and landfill areas. *Id.* at 836. The plant was owned and operated by FMC from 1963 to 1976, and by Avtex Fibers-Front Royal, Inc., from 1976 to 1989. *Id.* American Viscose is now out of business, and Avtex is undergoing bankruptcy reorganization. *FMC v. United States Dept. of Commerce*, 786 F. Supp. 471, 472-73 (E.D. Pa. 1992) (FMCII). Thus, FMC was left to seek contribution from the government under CERCLA § 113(f)(1). *FMCII*, 29 F.3d at 835.

\(^{16}\) *FMCII*, 29 F.3d at 835.
and began to manufacture textile rayon. After the bombing of Pearl Harbor, the United States government determined that an increase in the production of textile rayon was needed for the manufacturing of war-related products. As a result, the War Production Board (WPB) instructed American Viscose to convert its plant for the production of high tenacity rayon.

Several inspections of the site were conducted, assessing the implementation of environmental controls. In 1982, these inspections...

17. *Id.* As of 1942, American Viscose "was the largest rayon producer in the United States." *FMCi*, 786 F. Supp. at 475. Prior to the war, American Viscose had manufactured only commercial textile rayon. *Id.* at 474.

18. *Id.* The Chairman of the War Productions Board (WPB) considered the high tenacity rayon program extremely important and critical to the production program. *FMCi*, 786 F. Supp. at 474.

19. Faced with the problem of mobilizing the economy for World War II, Congress granted the Executive Branch the authority to do so. The President then created the WPB by executive order in January of 1942. Exec. Order No. 9024, 7 Fed. Reg. 329 (1942). The WPB was dissolved after the war. Its functions were transferred to the Civilian Production Administration. Later, its powers were transferred once again to the Secretary of Commerce (the defendant in *FMCi*). Exec. Order No. 9841, 12 Fed. Reg. 2645 (1947).


The WPB had the authority to: "increase, accelerate, and regulate the production and supply of materials, articles, and equipment and the provision of emergency plant facilities . . . required for the national defense" and to "[f]ormulate plans for the mobilization for defense of the production facilities of the Nation, and to take all lawful action necessary to carry out such plans." *FMCi*, 786 F. Supp. at 474 (quoting Exec. Order No. 8629, 6 Fed. Reg. 191 (1941)); *see* John L. O'Brien & Manly Fleischmann, *The War Production Board Policies and Procedures*, 13 GEO. WASH. L. REV. 1, 24-37 (1944).

20. *FMCi*, 29 F.3d at 835. Under the direction of WPB, facilities were required to fulfill government military contracts. The WPB could oversee the flow of raw materials to ensure the adequacy of those materials to fill those military contracts. *See* Priorities Statute, *supra* note 19, at 236. This was accomplished through a series of federal regulations known as "Priorities Ranking System." *Id.* Under this system, the WPB would review the supply and demand of any good that appeared to be scant. *Id.* The Board also had the ability to make "program determinations." These would establish how much of the good was needed and identify facilities to help meet this need. *See* O'Brien & Fleischmann, *supra* note 19, at 20-21. These facilities were then given priority in receiving crucial raw materials on the condition that those raw materials could be used only as directed by the WPB. If a company refused to conform to any WPB priority order or directive, its facility could be seized by the government for fair market value. *See* Selective Training and Service Act of 1940, Pub. L. No. 76-783, 54 Stat. 885, 892 (1940).
tions revealed serious environmental hazards on the site.\textsuperscript{21} The United States Environmental Protection Agency (EPA) subsequently began the necessary cleanup, notifying FMC of its potential liability under CERCLA.\textsuperscript{22}

FMC initiated and exclusively financed a site cleanup in 1988. In 1990, FMC filed suit for contribution against the Department of Commerce for its wartime activities under section 113(f) of CERCLA.\textsuperscript{23} FMC alleged that, as a result of the government's pervasive regulations during World War II, the government was jointly liable as "owner," "operator," and "arranger" under CERCLA.\textsuperscript{24} FMC argued that the government effectively operated the plant in conjunction with American Viscose, and therefore, should share in the response costs.\textsuperscript{25} On appeal, the Third Circuit held the government liable as "operator" and "arranger."

\textsuperscript{21}FMCII, 29 F.3d at 835. Carbon disulfide, a chemical used in the manufacturing of high tenacity rayon, was found in the ground water near the plant. \textit{Id.} Approximately 65,500 cubic yards of hazardous viscose waste was disposed of at the facility in unlined basins during the war. \textit{Id.} at 838.

\textsuperscript{22}Id. at 885. CERCLA authorizes EPA to take response action to minimize and eliminate the dangers posed by threatened or actual releases of hazardous substances. CERCLA § 104(a), 42 U.S.C. § 9604(a). CERCLA also authorizes EPA to clean up sites that pose "an imminent and substantial endangerment to the public health." CERCLA § 106(a), 42 U.S.C. § 9606(a). In doing so, the EPA has two options. First, EPA may accomplish cleanup by compelling the parties responsible for the site to undertake remedial measures. CERCLA § 104(a)(1), 42 U.S.C. § 9604(a)(1). See B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1197 (2d Cir. 1992). Second, EPA has the alternative of cleaning up the site itself by financing available through "Superfund," and then suing the responsible parties for reimbursement. This reimbursement then replenishes Superfund. CERCLA §§ 107(a)(4)(A), 111, 42 U.S.C. §§ 9607(a)(4)(A), 9611; see \textit{B.F. Goodrich}, 958 F.2d at 1197. Parties sued by EPA can then recover a portion of their costs from other potentially liable parties. CERCLA § 113(f), 42 U.S.C. § 9613(f).

\textsuperscript{23}FMCII, 29 F.3d at 835. CERCLA § 113(f) states that persons assessed with response costs under CERCLA may "seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, \ldots ." CERCLA § 113(f), 42 U.S.C. § 9613(f).

\textsuperscript{24}For a discussion of "owner" and "operator" liability, see \textit{supra} note 6. For a discussion of "arranger," see \textit{infra} note 34 and accompanying text.

\textsuperscript{25}FMCII, 29 F.3d at 835.

\textsuperscript{26}Id. The district court held the government liable on all three theories: as an "owner," "operator," and "arranger." \textit{FMCI}, 786 F. Supp. at 481. On appeal, the Third Circuit summarized the factual findings of the district court regarding the activities of the government:

"(1) the government required American Viscose to stop making regular rayon and start producing high tenacity rayon; (2) the government mandated the amount and specifications of the rayon produced and the selling price; (3) the government owned the equipment used to make the high tenacity rayon and owned a plant used to make raw materials; (4) the government supervised the production process through the enactment of specifications and the placement of on-site supervisors and inspectors; it supervised the workers; and it had the power to fire workers
III. BACKGROUND

A. The Doctrine of Sovereign Immunity

Sovereign immunity, a long-standing principle of the American government, shields the United States from civil and criminal liability. The United States, as sovereign, is “immune from suit save as it consents to be sued.” The consent cannot be implied, rather it must be unequivocally expressed, and waivers must be construed narrowly in favor of the government. Thus, the doctrine of sovereign immunity imposes serious limitations on suits against the federal government.

or seize the plant if its orders were not followed; and (5) the government knew the generation of waste inhered in the production process; it was aware of the methods of disposal for the waste; and it provided the equipment for the waste disposal."

FMCII, 29 F.3d at 838.

After making the factual findings and conclusions of law, the district court ordered the case to trial to assess the liability of FMC and the government. Id. However, the allocation issues were settled by the two parties, subject to the government’s right to appeal the holding as “operator” and “arranger.” Id. Under the settlement agreement, the government is liable for eight percent of the cleanup costs as “owner.” Id. However, the Third Circuit affirmed the district court’s holding, thus, the government is liable for 26% of the cleanup costs. Id. Since the government settled on the issue of “owner” liability, the Court of Appeals did not address this issue. Id.

27. The first case addressing sovereign immunity was The Siren, 74 U.S. (7 Wall.) 152 (1868). In this case, the Supreme Court adopted the proposition that permitting suits against the government, without the consent of the government, would endanger public safety and hinder public services. Id. at 154. The Court decided that public policy mandated the doctrine of sovereign immunity. The Court concluded that public welfare would be harmed if “the supreme authority could be subjected to suit . . . .” Id.

Following Siren, the Court noted in United States v. Lee, 106 U.S. 196 (1882), that the doctrine of sovereign immunity had “always been treated as an established doctrine.” Today, the doctrine is such that for the United States to be sued, it must have waived its immunity. United States v. Testan, 424 U.S. 392, 399 (1976).

Furthermore, the States are granted sovereign immunity through the Eleventh Amendment of the United States Constitution which states “[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign State.” U.S. Const. amend. XI.


29. Testan, 424 U.S. at 399. See also Mitchell v. United States, 787 F.2d 466, 467 (9th Cir. 1986) (indicating parties bringing action against United States bear “burden on demonstrating an unequivocal waiver of immunity”).

B. Congressional Waiver of Sovereign Immunity under CERCLA


Section 107(a) of CERCLA defines the four types of liable parties as: (1) "the owner and operator of a vessel (otherwise subject to jurisdiction of the United States) or a facility. . . .", (2) "any person who at time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of . . . .", (3) "any person who . . . arranged for disposal or treatment . . . .", and (4) "any person who accepts or accepted any hazardous substances for transport . . . ." Congress then defined "operator" circularly as "any person . . . operating such facility."

31. Generally, CERCLA liability attaches if: "1) a release of hazardous substance has occurred, 2) at a facility, 3) causing a plaintiff to incur response costs, and 4) the defendant is a responsible party as defined under section 107(a)." Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 668 (5th Cir. 1989); United States v. Aceto Agric. Chem. Corp., 872 F.2d 1373 (8th Cir. 1989); CPC Int'l, 731 F. Supp. at 786.

The only defenses to liability under CERCLA are set forth in § 107(b). 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 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 . . . . if the defendant establishes . . . . that (a) he exercised due care with respect to the hazardous substance concerned . . . . and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could forcibly result from such acts or omission; or
(4) any combination of the foregoing paragraphs.

CERCLA § 107(b), 42 U.S.C. § 9607(b).

34. CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3). This section provides: "any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility owned or operated by another person or entity and containing such hazardous substances. . . . ."

Id.

35. CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4). This section provides "any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person, from which there is a release, or threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable. . . . ." Id.

The United States government is included in the definition of "person." Section 120(a)(1) of CERCLA provides that "[e]ach department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantially, as any non-governmental agency." Section 101(20)(D) of CERCLA sets forth exclusions for those liable for response costs as an "owner" or "operator." Specifically, CERCLA excludes a state or local government from liability when it involuntarily acquires land subject to liability. Additionally, section 107(d)(2) of CERCLA provides another exception to governmental immunity when a state or local government acts in response to an emergency created by the release or threatened release of a hazardous substance. This emergency exception, however, does not apply if the state or local government's action is grossly negligent or constitutes intentional misconduct.

2. Case Law Interpreting CERCLA's Waiver of Sovereign Immunity

The United States Supreme Court addressed the issue of state liability under CERCLA in Pennsylvania v. Union Gas Company. In Union Gas, the Court held that the language of CERCLA clearly es-

37. CERCLA § 101(21), 42 U.S.C. § 9601(21). The term "person" is defined 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." Id. (emphasis added).


40. Id. The term 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 functions as sovereign." Id.

41. CERCLA § 107(d)(2), 42 U.S.C. § 9607(d)(2). "No state or local government shall be liable under this subsection 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." Id. (emphasis added).

42. Id. "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 . . . . [R]eckless, willful, or wanton misconduct shall constitute gross negligence." Id. (emphasis added).

43. 491 U.S. 1 (1989). In Union Gas, the United States reimbursed the State of Pennsylvania for cleanup costs of a coal gasification plant, and then sued respondent, the "operator" of the former facility, to recover response costs. Id. The "operator" then filed a third-party complaint against the State of Pennsylvania. Id. at 5-6.
stablishes Congress's intent to hold states liable for damages. The Court looked solely to the plain language of sections 101(20)(D) and 101(21) of CERCLA and concluded that these two sections constitute a general congressional waiver of the states' immunity when a state would otherwise qualify as a liable party under section 107(a). Significantly, the Court noted in dicta that section 120(a)(1) constitutes a waiver of federal immunity where the federal government would otherwise be liable under section 107(a).

In United States v. Allied Corp., the United States District Court for the Northern District of California held the United States Navy liable under CERCLA for cleanup costs arising from a demolition which caused the release of a hazardous substance on property it owned. Thus, where the government takes actual ownership of a site, its conduct mirrors that of a non-governmental entity, and it may incur liability to the same extent as that entity.

In contrast to the general waiver of state immunity established by Union Gas, and to the more limited waiver of federal immunity recognized in Allied Corp., an exception has developed, in conjunction with section 107(d)(2) of CERCLA, limiting the liability of both state and federal governments acting in a regulatory capacity. In United States v. Atlas Minerals and Chemicals, Inc., the United States District Court for the Eastern District of Pennsylvania held that the waiver of federal sovereign immunity under section 120 of CERCLA does not extend to response or remedial actions undertaken by EPA. The court reasoned that "when the EPA undertakes such actions, it is not acting as a private party; it is acting to ameliorate a dangerous situation that, but for the prior actions of the generators and transporters of the hazardous waste, would not

44. Id. at 5. In United States v. Atlas Minerals and Chemicals, Inc., 797 F. Supp. 411 (E.D. Pa. 1992), the United States District Court for the Eastern District of Pennsylvania noted that "the Union Gas Court did not hold that the waiver of federal sovereign immunity under CERCLA was coextensive with the waiver of state sovereign immunity." Atlas Minerals, 797 F. Supp. at 420 n.19.
45. CERCLA § 101(20)(D), 42 U.S.C. § 9601(20)(D). For a discussion of this section, see supra notes 39-40 and accompanying text.
46. CERCLA § 101(21), 42 U.S.C. § 9601(21). This section expressly includes "States" in the definition of "person." See supra note 37 and accompanying text.
47. Union Gas, 491 U.S. at 7-13.
48. Id. at 10 (dictum).
50. Id. at *2-4.
51. See id.
52. 797 F. Supp. at 411.
53. Id. at 420-21.
exist." Likewise, in *United States v. Western Processing Co.*, the United States District Court in Washington at Seattle held there is no federal waiver with respect to contribution claims based on regulatory activities. Also, in *In re Paoli Railroad Yard PCB Litigation*, the federal government was held immune from CERCLA liability in connection with cleanup activities at the Paoli Rail Yard. In *In re Paoli R.R. Yard*, the United States District Court for the Eastern District of Pennsylvania specifically stated that the United States would be liable under section 107(a) of CERCLA if it acted in a non-regulatory capacity. The court stated, "the United States is to contribute its share when it acts in a fashion analogous to that of a business


55. 761 F. Supp. at 725. In *Western Processing*, the court held that the counterclaims of RSR Corporation against the United States had to be dismissed for lack of subject matter jurisdiction. *Id.* The court stated:

> It cannot be argued with full conviction that the EPA, in carrying out its duties under the statute, assumes the risk of becoming a liable party as an 'owner/operator' under CERCLA Section 107, and the idea was rejected by Congress. Moreover, a waiver of sovereign immunity cannot be based on such tenuous ground as an implication, especially one of such ghostly manifestation.

*Id.* at 729.

56. *Id.*

57. 790 F. Supp. 94 (E.D. Pa. 1992). In this case, the federal government brought suit against the railroad transportation authority for claims arising under CERCLA. *Id.* The Southeastern Pennsylvania Transportation Authority (SEPTA) then filed counterclaims against the federal government for the government's alleged contamination during the cleanup of the rail yard. *Id.* SEPTA sought contribution and indemnification from the government for response costs incurred in the cleanup of Paoli Rail Yard. *Id.* On the government's motion to dismiss, the court held that the government did not become an "operator" under CERCLA, and did not subject itself to liability when it undertook environmental cleanup activities. *Id.* at 95-97.

58. *Id.* at 97.

59. *Id.* The court stated that "[t]he United States would be liable under section 107(a) of CERCLA if it was acting in a manner other than its regulatory capacity." *Id.*
concern." Similarly, in *United States v. Azrael*, the United States District Court for the District of Maryland held that the federal government, as well as the individual states, were immune from claims for contribution based on the regulatory activity of hiring a contractor to clean the site.

Thus, judicial interpretation supports the view that Congress intended to hold states liable in federal court for CERCLA damages. Furthermore, in situations where the federal government owns property and acts as a private entity, it may incur liability as would any private entity. An important exception to these waivers has emerged, however, for both federal and state governments when they act in a regulatory manner.

IV. Analysis

A. The Third Circuit's Reasoning

The Third Circuit began its analysis in *FMC II* by acknowledging and describing the well-settled principles of sovereign immu-

60. *In re Paoli R.R. Yard*, 790 F. Supp. at 97 (citing *Western Processing*, 761 F. Supp. at 730). The court also noted that Congress specifically rejected an amendment to CERCLA that would make government negligence a separate defense to CERCLA liability. *Id.* The court stated that "allowing contribution counterclaims in this situation would undermine Congress' intent to ensure that those who benefit financially from a commercial activity should internalize the health and environmental costs of that activity into the costs of doing business." *Id.* (citing *Azrael*, 765 F. Supp. at 1245).

61. 765 F. Supp. 1239 (D. Md. 1991). In *Azrael*, the United States brought an action against nine potentially liable parties to recover cleanup costs incurred by the United States under CERCLA. *Id.* The United States was also seeking a declaratory judgement for future cleanup costs. *Id.* at 1241. The State of Maryland intervened as a plaintiff claiming it also incurred cleanup costs, and seeking to recover those cleanup costs under CERCLA and state law. *Id.*

The defendants, Edward Azrael, Harriet Azrael, and Cele Landay, American Telegraph and Telephone Company, General Motors Corporation, Baltimore Gas and Electric Company, Browning-Ferris, Inc., and J. William Parker and Sons, Inc., filed counterclaims against the United States and Maryland alleging that they were also potentially liable under CERCLA § 107(a)(3) as parties who arranged for the disposal of hazardous substances at that site. *Id.* The United States arranged for its contractors to disperse wastes containing hazardous substances over the facility. *Id.*

On the motion to dismiss the counterclaims, the court held that the United States and individual states were immune from claims for contribution based on the activities of contractors they had hired to clean the site. *Id.* at 1246.

62. *Id.*

63. For a discussion of state liability as interpreted by the Supreme Court, see *supra* notes 43-48 and accompanying text.

64. For a discussion of judicial interpretation of federal liability, see *supra* notes 49-51 and accompanying text.

65. For a discussion of this exception, see *supra* notes 52-64 and accompanying text.
The court noted that the federal government is immune from suit unless it consents to be sued, and that consent cannot be implied.\textsuperscript{67} In addition, the waivers must be construed narrowly in favor of the government.\textsuperscript{68}

The court then addressed the government's argument that the CERCLA immunity waiver provision is restricted from being applied to regulatory activity, and the government's wartime production was exactly this type of permitted activity.\textsuperscript{69} The court found support for the government's position in several cases.\textsuperscript{70} \textit{In re Paoli Railroad Yard PCP Litigation}, \textit{United States v. Atlas Minerals and Chemicals},\textsuperscript{71} and \textit{Reading Co. v. City of Philadelphia},\textsuperscript{72} held that the waiver of governmental immunity in section 120 of CERCLA did not extend to situations where the government acts in a regulatory capacity.\textsuperscript{73} The Third Circuit, however, concluded that regulatory

\begin{itemize}
\item \textsuperscript{66} FMCI, 29 F.3d at 838.
\item \textsuperscript{67} Id. at 839 (citing United States v. Testan, 424 U.S. 392, 399 (1976) (consent must be "unequivocally" expressed)).
\item \textsuperscript{68} Id. (citing United States v. Idaho, 113 S. Ct. 1893, 1896 (1993); United States v. Nordic Village, Inc., 112 S. Ct. 1011, 1015 (1992)).
\item \textsuperscript{69} FMCI, 29 F.3d at 839-40. The government argued that CERCLA § 120 pertaining to sovereign immunity did not constitute a waiver for claims arising out of wartime regulatory activities. Id. at 835-36, 839.
\item The government originally filed a motion to dismiss, arguing that the United States could not have been an "operator" or an "arranger" for disposal under CERCLA because its activities were simply regulatory. Id. at 835. The district court rejected this argument, holding the United States liable. Id. at 836.
\item In a subsequent motion for partial summary judgment, the United States argued that sovereign immunity was not waived under CERCLA for purely regulatory activities. Furthermore, the government argued that their activities during wartime did not rise to the level of ownership or operation liability under CERCLA. Id. The district court denied the motion, holding that there were unsettled material facts regarding the "owner" and "operator" issues. Id. In March 1991, the district court held a four day non-jury trial on the issues of liability. Id. The district court held the government liable on all three theories. FMCI, 786 F. Supp. at 471.
\item The government contended that a per se rule had been established declaring that regulatory activities could not generate CERCLA liability, since only a government has the authority to regulate. FMCI, 29 F.3d at 839. In support of this provision, the government cited \textit{In re Paoli R.R. Yard}, 790 F. Supp. at 95-96; \textit{Reading Co. v. City of Phila.}, 155 B.R. 890, 897 (E.D. Pa. 1993); \textit{United States v. Atlas Minerals and Chems.}, Inc., 797 F. Supp. 411, 420 (E.D. Pa. 1992). FMCI, 29 F.3d at 839.
\item For a discussion of these cases, see infra notes 71-74 and accompanying text.
\item \textsuperscript{71} \textit{In re Paoli R.R. Yard}, 790 F. Supp. at 94. For a discussion of this case, see supra notes 57-60 and accompanying text.
\item \textsuperscript{72} Atlas Minerals, 797 F. Supp. at 411. For a discussion of this case, see supra notes 52-54 and accompanying text.
\item \textsuperscript{73} \textit{Reading}, 155 B.R. at 890. For a discussion of this case, see supra note 54.
\item \textsuperscript{74} FMCI, 29 F.3d at 839 (quoting \textit{In re Paoli R.R. Yard}, 790 F. Supp. at 97 (the United States "would be liable under section 107(a) of CERCLA if it was acting in a manner other than its regulatory capacity."); (quoting \textit{Atlas Minerals}, 797 F. Supp. at 420 (stating that "the waiver contained in \textit{[CERCLA § 120 (a)(1)] only
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activities on behalf of the government were not necessarily exempt from the waiver provisions. The fact that the government, unlike a private party, has the ability to regulate in this manner is not sufficient to establish a per se rule in the government's favor. The court reached this conclusion by looking to the language of section 120(a)(1) of CERCLA, which does not explicitly state that regulatory activities cannot generate liability. Instead, the provision states that the government is liable in the same fashion, and to the same degree, as a non-governmental entity. Relying on section 120(a)(1), the court noted that the government is liable when it engages in activities that would make a private party liable if that private party engaged in those same activities. The court then concluded that the government would be liable even if no private party had the ability to engage in the activities the government performed.

The Third Circuit justified its rationale through a literal reading of the statute's language. The court reasoned that this rationale is consistent with CERCLA's purpose of making those applies to situations in which the government has acted as a business," and "does not extend to situations in which the EPA has undertaken response or remedial actions at a hazardous waste site.") (quoting Reading, 155 B.R. at 897 (indicating that the "government, unlike private entities must act to remedy environmental crises, a government cannot, in such circumstances be considered an owner, operator or arranger for CERCLA purposes.").

75. FMCII, 29 F.3d at 840.
76. Id. (citing CERCLA § 120(a)(1), 42 U.S.C. § 9620(a)(1)). For a discussion of CERCLA § 120(a)(1), see supra text accompanying note 38.
77. CERCLA § 120(a)(1), 42 U.S.C. § 9620(a)(1).
78. FMCII, 29 F.3d at 840.
79. Id. The court reasoned that:

Just as the government can be liable for hazardous wastes created at a military base it owns, the government can be liable when it engages in regulatory activities extensive enough to make it an operator of a facility or an arranger of the disposal of hazardous wastes even though no private party could engage in the regulatory activities at issue. Id. (citing Allied, 1990 WL 515976, at *2-4).

The court noted that the United States Navy would be liable for cleanup of a military base because a private party would be liable in the same situation, even though a private party does not have the ability to own a military base. Id. Cf. Allied, 1990 WL 515976, at *2-4 (holding United States Navy liable under CERCLA because it authorized demolition which caused release of hazardous substances).
80. FMCII, 29 F.3d at 840 (citing Alcan, 964 F.2d at 260). The court likened this statutory interpretation to that used in Indian Towing Co. v. United States, 350 U.S. 61 (1955). In Indian Towing, the Supreme Court interpreted a similar waiver provision in the Federal Tort Claims Act to waive sovereign immunity even with respect to activities in which a private party could not take part. Id. The Indian Towing Court quoted the Federal Tort Claims Act of 1946, which states that "[t]he United States shall be liable, . . . in the same manner and to the same extent as a private individual under like circumstances." Id. (quoting 28 U.S.C. § 2674). The FMCII court found Indian Towing controlling. FMCII, 29 F.3d at 840.
responsible for the problems caused by disposal bear the costs of rectifying the damage they produced.\textsuperscript{81} While CERCLA specifically lists three defenses to liability in section 107(b), regulatory activity is not included.\textsuperscript{82} The court then asserted that its reasoning was consistent with section 107(d) of CERCLA.\textsuperscript{83} Specifically, the court found that since section 107(d)(2) expressly protects states and local governments from liability for actions taken in response to an emergency, these emergency response procedures were meant to be treated differently than other governmental regulatory activities.\textsuperscript{84} Thus, section 107(d)(2) shields a state or local government when responding to an emergency, and not “simply because it acts in a regulatory capacity.”\textsuperscript{85} The Third Circuit concluded that since this distinction was made for state and local governments, it should also apply to the federal government.\textsuperscript{86}

\textsuperscript{81} FMCII, 29 F.3d at 840 (quoting Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209, 1221 (3d Cir. 1993) (noting CERCLA’s essential purpose of “making those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created.”)).

The court also cited United States v. Azrael, 765 F. Supp. 1239 (D. Md. 1991) which stated that a party benefiting from commercial activity should internalize health and environmental costs of the activity into the costs of doing business. FMCII, 29 F.3d at 840 (citing Azrael, 765 F. Supp. at 1245); but see infra notes 145-46 and accompanying text.

\textsuperscript{82} FMCII, 29 F.3d at 841. The court compared this analysis to that in United States v. Rohm & Haas Co. Id. (citing United States v. Rohm & Haas Co., 2 F.3d 1265, 1276 (3d Cir. 1993)). The Rohm & Haas court refused to read the term “removal” in CERCLA, as including governmental oversight of private remedial actions, in part because the court found it important that Congress had specifically left out any mention of oversight in the definition of removal. Id. Likewise, the FMCII court concluded that since it did not consider the term “removal” to include unspecified conduct, it would not read a broad exception into §§ 107(b) or 120(a)(1). FMCII, 29 F.3d at 840.

For a full discussion of the defenses to CERCLA liability in § 107(b), see supra note 91 and accompanying text.

\textsuperscript{83} FMCII, 29 F.3d at 841.

\textsuperscript{84} Id. “Congress’s creation of an exception for cleanup activities by state and local governments plainly shows that it intended to treat those activities differently from other government activities.” Id.

\textsuperscript{85} Id. The court stated that it was not suggesting that all of the cases the government cited were decided incorrectly. Id. However, the court noted that those cases all involved governmental regulatory activities undertaken solely to cleanup hazardous materials. Id. at 840. According to the court, “CERCLA does not intend to discourage the government from making cleanup efforts by making the government liable for such efforts.” Id.

\textsuperscript{86} Id. The court noted that “Congress intended to treat the federal government in the same manner as state and local governments.” Id. The court specifically highlighted that since the state and local governments do not have an exception to the waiver for the consequences of regulatory conduct in general, neither does the federal government. Id.
The FMC court next addressed the issue of the location of the waiver provision in the "Federal facilities" portion of the statute. The government contended that Congress waived governmental liability only for federally owned facilities since the waiver provision is located in a section entitled "Federal facilities." The court, however, found this argument unpersuasive for three reasons. First, the court noted that the language of section 120 does not limit application of the waiver solely to situations in which the government is the owner. Second, the court reasoned that, even though Congress added section 120 in 1986 to address federal facilities, the original version also waived immunity using very similar language, and it was not located under a section entitled "Federal facilities." Third, the court stated that in 1986, when Congress moved the waiver from section 107 to section 120, it maintained that the government would still be exposed to liability under section 107. The court concluded that Congress did not limit the waiver's scope simply by moving it to a new section. Rather, the court reasoned that Congress moved the waiver section pursuant to a reorganization scheme, and therefore, the waiver of immunity in section 120 applied to the government in this case.

87. Id.
88. FMCII, 29 F.3d at 842.
89. Id. The court noted that the section deals with the application of CERCLA to the federal government and not specifically to property owned by the federal government. Id. The language of the section "imposes liability on the government to the same extent as liability is imposed on any 'nongovernmental agency.'" Id. (quoting CERCLA § 120(a)(1), 42 U.S.C. § 9620(a)(1)).
90. Id. The original version provided that "[e]ach department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any non-governmental entity, including liability under this section." Id. (quoting Pub. L. No. 96-510, 94 Stat. 2783 (1980)). This section was not linked to the federal facilities section since that section did not exist in the original version. Id.
91. Id. The court reasoned that since this "liability under section" reference was an exact counterpart to § 107 as originally enacted, Congress did not expressly limit the scope of the waiver. Id.
92. Id. The court stated that it would be unreasonable to infer that Congress would impliedly limit its section by moving it. Id.
93. FMCII, 29 F.3d at 842. The court stated: Inasmuch as Congress did nothing in terms in 1986 to narrow its earlier waiver of sovereign immunity, it would be unreasonable for us to infer that it impliedly limited its original waiver by moving the waiver section. Indeed, if anything, through its enactment of section 120, Congress reemphasized its intention that CERCLA be applied to the government. Id.

The court also suggested that the government itself does not consider the waiver limited to federal facilities. Id. at n.2. The court cited Key Tronic Corp. v. United States, 114 S. Ct. 1960 (1994). The facts of this case indicate that the
Concluding that Congress did in fact statutorily waive governmental immunity, the Third Circuit turned to the issue of whether the government's activities would qualify it as an "operator" if the government was a private party. The court affirmed the district court's ruling that the government's activities qualified it as an "operator." Although acknowledging the detrimental impact this decision may have on the government, the court stated that it could not be influenced by that factor. Ultimately, the court sought to accurately apply principles of law.

B. The Dissent

The dissent in FMCII argued that Congress did not waive sovereign immunity for the exclusive government activity of "coordinating and steering the country's private industries" for military purposes during wartime. Furthermore, the dissent reasoned that even if Congress had waived governmental immunity, the govern-

United States Air Force agreed to settle a suit that was brought by EPA. According to Key Tronic Corp., the Air Force agreed to settle by paying EPA $1.45 million. EPA alleged that Air Force was liable for response costs because they were one of numerous parties that used a site for disposal. This disposal later contaminated the water. FMCII, 29 F.3d at 842 (citing Key Tronic Corp. v. United States, 114 S. Ct. 1960 (1994)).

The FMCII court similarly affirmed the district court's holding regarding arranger liability. Since the court was equally divided on this point, the court affirmed the judgment of the district court without discussion. FMCII, 29 F.3d at 846.

The court noted that potential liability is "massive and far outpaces anything Congress could have imagined, much less intended" when it adopted the waiver provision. (citing government's brief).

The court noted that its approach was necessarily the same as that of the Supreme Court when it responded to an argument that the Racketeer Influenced and Corrupt Organizations Act (RICO) was being applied too broadly: "this defect - if defect it is - is inherent in the statute as written, and its correction must lie with Congress." (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985)).

94. Id. at 843.
95. Id. at 844-46. Since the court was equally divided on this point, the court affirmed the judgment of the district court without discussion. FMCII, 29 F.3d at 846.
96. FMCII, 29 F.3d at 846. The court noted that the government's brief urged that potential liability is "massive and far outpaces anything Congress could have imagined, much less intended" when it adopted the waiver provision. (citing government's brief).
97. Id. The court noted that its approach was necessarily the same as that of the Supreme Court when the Court responded to an argument that the Racketeer Influenced and Corrupt Organizations Act (RICO) was being applied too broadly: "this defect - if defect it is - is inherent in the statute as written, and its correction must lie with Congress." (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985)).
98. Id. at 846 (Sloviter, C.J., dissenting).
ment's activities failed to establish "operator" status. The dissent determined that the scope of the waiver should be narrowly construed. The dissent agreed with the majority that the operation of facilities such as a federal park or naval base would subject the federal government to liability as an "owner." The dissent, however, disagreed with the majority by asserting that the regulation of private parks, or other private facilities would not subject the government to liability as an "operator." In so concluding, the dissent found the majority's interpretation of the waiver illogical. Under the majority's interpretation, if the government engages in activities that would make a private party liable, the government is liable even if a private party does not have the ability to partake in those governmental activities. The dissent asserted that there are certain activities that are inherent in the role of the government, which no private party may duplicate and which, therefore, are excluded from the waiver. Mobilizing the economy for the war effort is an activity uniquely inherent to the government, and as such, is excluded from the waiver provision.

99. FMCII, 29 F.3d at 846. Chief Judge Sloviter, along with Judges Cowen and Roth, dissented on both the application of the waiver provision, and on the premise that even if the waiver was applied, the government's activities during World War II would not qualify as an owner or operator of a facility. Id. at 847-51. Judge Stapleton joined with respect only to the latter. Id. at 851-54.

100. Id. at 847 (citing Testan, 424 U.S. at 399).

101. Id.

102. Id.

103. Id. The dissent compared this interpretation to saying that "birds are required to have passports to fly across the borders of nations that require people to have passports." Id.

104. FMCII, 29 F.3d at 847. The dissenters observed that while the Supreme Court has not yet addressed the issue, courts have generally held that a similar waiver in the Federal Tort Claims Act does not extend to the government's regulatory power because there are no private analogs to this regulatory power. Id. (citing Myers v. United States, 17 F.3d 890, 905 (6th Cir. 1994); Akutowicz v. United States, 859 F.2d 1122, 1126 (2d Cir. 1988); C.P. Chem. Co. v. United States, 810 F.2d 34, 37 (2d Cir. 1987); Jayvee Brand, Inc. v. United States, 721 F.2d 385, 390 (D.C. Cir. 1983); McMann v. Northern Pueblos Enters., 594 F.2d 784, 785-86 (10th Cir. 1979)).

105. Id. The dissent did recognize that there may be some government activities which may be fairly included within the regulation realm that can be performed by private parties. Id. The dissent noted that operation of a lighthouse is one such activity. Id. (citing Indian Towing, 350 U.S. at 69).

In contrast, the dissent asserted that there are some regulatory activities that are specifically reserved for the government and these are the regulatory activities to which the waiver in CERCLA § 120 does not extend. Winning a war is one such activity. Id. (citing Feres v. United States, 340 U.S. 135, 141-42 (1950) (holding government not liable under Federal Tort Claims Act for injuries to members of the armed forces incident to service, in part because "no private individual has the power to conscript or mobilize a private army with such authorities over persons as the Government vests in echelons of command.").
The dissent also noted that the majority did not eliminate all distinctions between private parties and the government. The dissent contended that by recognizing an "implied" exception to the waiver when the federal government acts with the purpose of cleanup, and not recognizing any other exceptions, the majority ignored other important obligations of the federal government outside the environmental context.

The dissent also suggested that the location of the waiver under the title "Federal facilities" supports the proposition that the waiver was meant to apply only to federally owned facilities. The dissent asserted that the majority failed to consider the possibility that Congress did in fact move the section for a reason. Additionally, the dissent considered the legislative history of CERCLA, which suggests Congress moved the waiver provision under the section entitled "Federal facilities" to limit its scope.

Finally, the dissent reviewed the well-established principle that if there is ambiguity in a waiver provision, that waiver must be narrow.

Only the federal government had the power and ability to accomplish the overarching goal of mobilizing the economy. Id. at 848. No private party had the ability to engage in such an activity, and the majority offers "not one shred of evidence that when Congress limited its waiver to actions for which a nongovernmental entity would be liable, it intended to waive liability for these activities." Id. at 848-49.

Id. at 848.

Id. The dissent then noted that the Supreme Court has recognized that the government had a "primary obligation to bring about whatever production of war equipment and supplies shall be necessary to win a war." Id. (quoting Lichter v. United States, 334 U.S. 742, 765-66 (1948)).

Id. at 849. The dissent stated:

[W]hen the government undertakes to respond to society's problems through operation of its own facilities (as distinguished from regulating the conduct of others), for example a government hospital, prison or military base, that its activities are analogous to those of private parties, and it is consequently subject to 'operator' liability under CERCLA.

Id.

According to the dissent, studies suggest that there are numerous government facilities dangerous enough to be included in CERCLA liability. Id. (citing Stan Millan, Federal Facilities and Environmental Compliance: Toward a Solution, 36 Loy. L. Rev. 319, 321-24 (1990); 57 Fed. Reg. 31,758 (July 17, 1992)).

Id. See 132 Cong. Rec. 28,413 (1986) (statement of Senator Stafford) (suggesting that § 120 exists to deal with "two to three potentially hazardous sites at each of 473 military bases across the country," and "sites operated by the Department of Energy"); 131 Cong. Rec. 24,733 (1985) (statement of Senator Wilson) (stating that military bases are primary target when talking about "federal facilities").
rowly construed in favor of the United States. There is more than one plausible interpretation of the waiver, with no compelling evidence to demonstrate that Congress unmistakably intended governmental liability in this particular scenario, thus the waiver should be limited.

C. The Third Circuit’s Overexpansion of “Operator” Liability under CERCLA

In attempting to effectuate the goals of CERCLA, the Third Circuit effectively undermined the well settled principles of federal sovereign immunity. By concentrating on expanding “operator” liability under CERCLA, the Third Circuit has initiated the erosion of the doctrine of federal sovereign immunity.

The majority opinion stated that since section 120(a)(1) provides that the government is liable in the same manner and to the same extent as any non-governmental entity, the government is also liable when it engages in an activity that a non-governmental entity is unable to engage in. The court took this step without considering the strict requirements of sovereign immunity. Although the

111. FMC Corp., 29 F.3d at 850. (quoting United States v. Idaho, 113 S. Ct. 1893, 1896 (1993)). "The foregoing [interpretations] are assuredly not the only readings of [the provision], but they are plausible ones which is enough to establish that a reading imposing monetary liability on the Government is not "unambiguous" and therefore should not be adopted." Id.

112. Id. at 851. According to the dissent, "it is difficult to imagine that by the words of section 120 Congress intended to impose massive liability on the United States for the environmental consequences of this regulation, ... without some reference in the legislative history to its intent to do so." Id.

The dissent then discussed the idea that even if the waiver is not limited, the government’s activities during World War II should not qualify it as an operator. Id. The dissent concluded that an examination of the relevant facts demonstrated that the governmental activities relied on by the district court and the majority are insufficient to qualify the government as an operator. Id. at 851-54.

113. The primary goal of CERCLA is to place the burden of cleanup on the responsible parties. See supra notes 2-3 and accompanying text.

114. For a discussion of the applicable sovereign immunity principles, see supra notes 27-30 and accompanying text.

115. For a discussion of courts employing a broad definition of “operator,” see supra notes 6-12 and accompanying text.

116. For a discussion of the erosion of the doctrine of federal sovereign immunity, see infra note 118 and accompanying text.

117. For a discussion of the majority opinion on the issue of governmental liability in comparison to non-governmental liability, see supra notes 78-79 and accompanying text.
court's reasoning was, in itself, logical, the doctrine specifically precludes this type of conclusion.\textsuperscript{118}

The Supreme Court has interpreted the doctrine of sovereign immunity as requiring an unequivocal waiver of immunity by the government in order to be sued.\textsuperscript{119} This unequivocal standard also mandates that a waiver be construed narrowly in favor of the federal government.\textsuperscript{120} The Supreme Court recently reiterated this rule of strict construction when it remarked that if language in a waiver is susceptible to more than one reading, it is not "unambiguous," and thus, does not qualify as an effective waiver.\textsuperscript{121} The language of section 120\textsuperscript{122} indicates that the express waiver contains some limitation.\textsuperscript{123} As the United States District Court for the Eastern District of Pennsylvania in \textit{In re Paoli R.R. Yard} noted, although "'[t]here is no question that Congress expected government agencies to shoulder their proportionate share of CERCLA response costs when they have acted as owners, operators, generators, or transporters,'" the waiver of sovereign immunity under section 120(a) of CERCLA is "limited only to circumstances under which a private party could also be held liable."\textsuperscript{124} The language in section 120 holding the government liable "to the same extent as any non-governmental entity"\textsuperscript{125} limits that waiver to activities that a private party 	extit{could} in fact undertake.\textsuperscript{126} The government may be treated as the equivalent of a private party for purposes of CERCLA liability.

\textsuperscript{118} The doctrine of sovereign immunity, as interpreted by the United States Supreme Court, calls for a narrow interpretation of waivers in favor of the government. See \textit{supra} note 30 and accompanying text.

\textsuperscript{119} \textit{Testan}, 424 U.S. at 399 (quoting United States v. King, 395 U.S. 1, 4 (1957)).

\textsuperscript{120} United States v. Idaho, 113 S. Ct. at 1896 (quoting Ardestani v. INS, 112 S. Ct. 515, 520 (1991)).


\textsuperscript{122} For a discussion of this waiver, see \textit{supra} text accompanying note 38.


\textsuperscript{125} CERCLA § 120(a)(1), 42 U.S.C. § 9620(a)(1). For a discussion of this section, see \textit{supra} text accompanying note 38.

\textsuperscript{126} Katzman, \textit{supra} note 123, at 1205. These limiting words suggest the government may not be held liable for activities in which private parties could not also be deemed liable. \textit{Id}.
but may not be held liable in situations where private parties could not also be deemed liable.\textsuperscript{127}

Section 120 is further limited by the title “Federal facilities.”\textsuperscript{128} This title suggests that the waiver applies only to those facilities that are actually owned by the government.\textsuperscript{129} The majority in \textit{FMCII} stated that the waiver was placed in this section simply for convenient ordering of the statute.\textsuperscript{130} As the dissent noted, however, it is possible that Congress re-ordered the statute in an effort to limit the waiver.\textsuperscript{131} Furthermore, legislative history additionally supports this conclusion.\textsuperscript{132}

In support of its rationale that the waiver is broad, the Third Circuit relied on a distinguishable district court case. In \textit{United States v. Allied Corp.},\textsuperscript{133} the United States District Court for the Northern District of California held the government liable as an “owner” for contamination.\textsuperscript{134} However, in \textit{Allied Corp.}, the government actually owned the land, where in \textit{FMCII}, the government did not. This is an important distinction based upon the fact that the CERCLA waiver provision is contained in a section entitled “Federal facilities.”

Even if this statute is not limiting, it is, at the least, ambiguous.\textsuperscript{135} The statute is clear to the extent that if the government acts in a way which would impose liability on a private party, it too is

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\item \textsuperscript{127} Id. The vast majority of federal courts that have considered the text of § 120 have determined that the section is “carefully limited.” \textit{Id.} (citing \textit{Hardage}, 32 Env't Rep. Cas. (BNA) at 1061). \textit{See}, e.g., \textit{Atlas Minerals}, 797 F. Supp. at 420 (“Although [section 120] does contain a waiver of sovereign immunity, that waiver is limited.”).

\item \textsuperscript{128} CERCLA § 120, 42 U.S.C. § 9620.

\item \textsuperscript{129} \textit{See FMCII}, 29 F.3d at 849 (Sloviter, C.J., dissenting). The dissent asserted that “[t]he placement and title of the sovereign immunity waiver in section 120 entitled 'Federal facilities' lends support to the government's proposition that the provision was intended only to ensure CERCLA liability for hazardous waste generated at federally-owned or federally-operated facilities.” \textit{Id.}

\item \textsuperscript{130} For a discussion of this part of the opinion, see \textit{supra} notes 88-93 and accompanying text.

\item \textsuperscript{131} \textit{FMCII}, 29 F.3d at 849 (Sloviter, C.J., dissenting). The dissent stated that “the majority fail[ed] to consider the likelihood that the new placement was intended to clarify the scope of the waiver.” \textit{Id.}

\item \textsuperscript{132} \textit{Id.} According to the dissent, “remarks by senators contemporaneous to the legislation that placed the waiver under the 'Federal facilities' designation suggest that this is indeed Congress's view of the scope of the waiver, and the majority points to nothing to the contrary in the legislative record.” \textit{Id.}

\item \textsuperscript{133} \textit{Allied Corp.}, 1990 WL 515976, at *2. For a discussion of this case, see \textit{supra} notes 49-51 and accompanying text.

\item \textsuperscript{134} \textit{Allied Corp.}, 1990 WL 515976, at *7.

\item \textsuperscript{135} Katzman, \textit{supra} note 123, at 1205. The fact that courts disagree on the appropriate interpretation of the statute supports the conclusion that it is ambiguous. \textit{Id.} at 1205 n.104.
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liable. The statute is ambiguous as to the proper result when the federal government engages in activity which is outside the authority of non-governmental entities. The statute is clear to the extent that when the government owns the land it is liable. The statute is ambiguous as to what happens when the site at issue is not a "Federal facility." In light of the well-established doctrine of sovereign immunity, this apparent ambiguity in the waiver must be construed in favor of limiting, rather than expanding, the waiver.

The district courts that have limited the waiver have consistently relied on these sound sovereign immunity principles. There is a basic assumption in American law that when the federal government acts in a policymaking capacity, it is immune from liability for damages. If Congress intended to override this assumption in CERCLA, it would have explicitly waived governmental immunity.

The Third Circuit considered its holding consistent with the goals of CERCLA. In particular, the court emphasized the goal of making those responsible for the waste pay for cleanup. The court, however, did not balance the policy reasoning behind that goal: that the costs of cleanup should be internalized through the company. Of importance is the fact that the government re-

137. Since the statute specifically addresses the situation where the government acts in the same manner as a nongovernmental agency, but does not address the situation where the government acts as only a government can, it is ambiguous. See CERCLA § 120(a)(1), 42 U.S.C. § 9620(a)(1).
138. The statute would be unambiguous when the government owns the land for two reasons. First, owning the land is an activity that a nongovernmental agency could take part in, and if it did, the agency too would be liable. See CERCLA § 120, 42 U.S.C. § 9620. Second, if the government owned the land, the land would then be a "Federal facility." See CERCLA § 120(a)(2), 42 U.S.C. § 9620(a)(2).
139. For a discussion of the applicable sovereign immunity principles, see supra notes 27-30 and accompanying text.
140. If a waiver is ambiguous it must be construed in favor of the government. See supra note 30 and accompanying text.
141. See cases cited supra note 124.
143. Katzman, supra note 123, at 1196.
144. FMC, 29 F.3d at 840.
145. CERCLA's purpose is to ensure that sites contaminated by hazardous substances are cleaned up and that persons handling or using hazardous substances internalize the full costs those substances impose on society and on the environment. A fundamental principle of CERCLA is that "those who benefit financially from commercial activity [should] internalize the health and environment costs of that activity into the costs of doing business." S. REP. NO. 848, 96th
ceived no profits from its regulatory activities, and therefore, would have no way of internalizing those cleanup costs. On the other hand, American Viscose increased its profits by 300% during the war.\textsuperscript{146}

In addition to undermining the doctrine of sovereign immunity, the Third Circuit ignored other important obligations of the federal government outside the environmental arena.\textsuperscript{147} For instance, the war effort is certainly a necessary facet of the federal government’s powers.\textsuperscript{148} Whether the government should be responsible for these necessary regulatory activities is a policy decision that should ultimately be deferred to Congress.

V. IMPACT

The implications of this decision are readily apparent. The \textit{FMCII} decision represents the first case in which a court has held the federal government liable as an “operator” under CERCLA section 107 at a facility not wholly owned by the government. Given the federal government’s control over much of the nation’s economy during World War II, the Korean War, the Vietnam War, and to a lesser extent, the Persian Gulf War, the number of waste sites for which the government may be required to contribute to cleanup costs is enormous.\textsuperscript{149} In the context of World War II alone, the government fears that if the \textit{FMCII} holding is taken to its logical extreme, the United States could be deemed liable “for all industrial waste produced from 1942-1945 by nature of its regulation or its authority to take over plants when that authority went unexercised.”\textsuperscript{150} This case alone will cost the government between $26,000,000 and $78,000,000.\textsuperscript{151} This case has paved the way for

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\textsuperscript{146} Reply Brief for the Federal Appellants at 14 n.11, \textit{FMC Corp.} (No. 92-1945) (citing documents revealing profit increase at Front Royal site from $339,148 in 1940 to $1,080,000 in 1944).

\textsuperscript{147} \textit{FMCII}, 29 F.3d at 848 (Sloviter, C.J., dissenting).

\textsuperscript{148} \textit{Id.}


\textsuperscript{150} Defendant’s Pretrial Findings of Fact and Conclusions of Law at 69, \textit{FMC Corp.} (No. 90-1761).

\textsuperscript{151} \textit{FMCII}, 29 F.3d at 838.
enormous governmental liability which will ultimately be paid with taxpayer dollars.

Perhaps more importantly, the Third Circuit expanded the scope of “operator” liability under CERCLA at the expense of the doctrine of sovereign immunity. In an effort to reach the “deep pockets,” the court has expanded an ambiguous, if not limited, waiver, thereby undermining the long-standing principle of the sovereign immunity that a waiver must be “unequivocally expressed.”

The issue in this case is rooted in a policy argument which Congress must resolve. The decision to waive governmental immunity must be made by Congress, therefore, Congress must also decide the scope of those waivers. Congress must unambiguously state the extent of liability to be placed on the government when it acts in a regulatory manner during wartime.

Tricia R. Russo

152. Rena I. Steinzor & Matthew F. Lintner, Should Taxpayers Pay the Cost of Superfund?, 22 ENVTL. L. REP. (ENVT. L. INST.) 10,089 (Feb. 1992) (stating third parties may have played only a trivial role in contamination of the site, but their “deep pockets” make them popular for cost-sharing purposes). Much of the CERCLA litigation represents an attempt to shift the overwhelming costs of Superfund liability onto third parties or the public, rather than to pinpoint the “truly responsible parties.” Id. See Anne D. Webber, Note, Misery Loves Company: Spreading the Costs of CERCLA Cleanup, 42 VAND. L. REV. 1469, 1493-97 (1989).

153. See supra note 29 and accompanying text.