
Kim Kocher

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RECOVERY OF RESPONSE COSTS UNDER CERCLA: A QUESTION OF CAUSATION UNDER DEDHAM WATER CO. v. CUMBERLAND FARMS DAIRY, INC.

In Dedham Water Co. v. Cumberland Farms Dairy, the First Circuit held that a private cause of action exists under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) for a neighboring plaintiff’s recovery of the costs of responding to the mere threat of contamination from a defendant’s hazardous substances. The court held that it is sufficient for the plaintiff to show that a release or threatened release of a hazardous substance from the defendant’s facility caused the plaintiff reasonably to incur response costs. This note analyzes the First Circuit’s interpretation of CERCLA’s causation requirements.

I. INTRODUCTION

In March 1979, Dedham Water, a regulated public utility, discovered that two of its source wells were contaminated with volatile organic chemicals (VOCs). Based on its survey of the surrounding surface waters, Dedham Water concluded that the nearby Cumberland Farms truck maintenance facility was the source of the VOCs. Dedham Water reported the contamination to the Massachusetts Department of Environmental Quality Engineering (DEQE), which ordered the contaminated wells removed.

3. Dedham Water, 889 F.2d at 1157-58.
4. Id. at 1148. The chemicals found in Dedham Water’s wells included trichloroethane, trichloroethylene, dichloroethylene, and tetrachloroethylene. Id. The primary source of Dedham Water’s supply is a well field consisting of four wells located on the west bank of the Neponset River. Id.
5. Id. Cumberland Farms is located approximately 1,000 feet south of Dedham Water’s well field, on the east bank of the Neponset River. Id. Dedham Water tested the water in the surrounding area and found high levels of VOCs in a drainage ditch, which flowed directly from a drainage pipe located on Cumberland Farms’ property. See Brief for Plaintiff-Appellant at 7-8, Dedham Water v. Cumberland Farms Dairy, Inc., 889 F.2d 1146 (1st Cir. 1989) (No. 88-2080).

The Shield Packaging Company and the New Neponset Valley Sewer are also located nearby on the east bank of the Neponset River. Dedham Water, 889 F.2d at 1148.
from service.\textsuperscript{6} Tests conducted by the DEQE in June, 1979 revealed that samples from the Cumberland Farms well and drainage pipe discharge contained extremely high levels of VOCs.\textsuperscript{7} The DEQE subsequently ordered Cumberland Farms to test the water coming from its production well.\textsuperscript{8} The analyses conducted by Cumberland Farms in September, 1979 also showed VOC contamination.\textsuperscript{9} Dedham Water retained an engineering firm, Metcalf & Eddy, to address the well contamination problem.\textsuperscript{10} In 1980, Metcalf & Eddy recommended that Dedham Water erect a water treatment plant.\textsuperscript{11} Dedham Water retained a hydrology firm, Geraghty & Miller, which concluded during 1982, that Cumberland Farms was the source of the VOC contamination of Dedham Water's well field.\textsuperscript{12}

Dedham Water subsequently instituted an action against Cumberland Farms for response costs under CERCLA.\textsuperscript{13} Undis-

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\item \textsuperscript{6} \textit{Dedham Water}, 889 F.2d at 1148. Dedham Water pumped the water from these wells to waste facilities in June, 1979. \textit{Id.} at 1149.
\item \textsuperscript{7} \textit{Id.} at 1148-49. The DEQE tests detected trichloroethylene and trichloroethane. \textit{Id.} at 1148.
\item \textsuperscript{8} \textit{Id.}
\item \textsuperscript{9} \textit{Id.}
\item \textsuperscript{10} \textit{Id.} at 1149.
\item \textsuperscript{11} \textit{Id.} Ultimately, in 1985, Dedham Water approved the Metcalf & Eddy recommendation for a water treatment plant. \textit{Id.} The plant went into service in March, 1987. \textit{Id.}
\item \textsuperscript{13} Dedham Water Co. v. Cumberland Farms Dairy, Inc., 889 F.2d at 1147. \textit{See} CERCLA \textsection 107, 42 U.S.C. \textsection 9607 (1988). The suit, filed in October, 1982, included allegations of violations of the Clean Water Act (CWA), the Resource Conservation and Recovery Act (RCRA), and state statutory and common law environmental requirements. \textit{Dedham Water}, 889 F.2d at 1147. Dedham Water sought injunctive relief, response costs, and damages due to the release or threatened release of hazardous substances by Cumberland Farms. \textit{Id.} In 1986, the district court dismissed all of the claims for lack of jurisdiction because the plaintiff had not complied with the 60-day notice provision prescribed in CERCLA. \textit{Id.} at 1147 & n.1. \textit{See} Dedham Water Co. v. Cumberland Farms Dairy, Inc., 643 F. Supp. 667, 669 (D. Mass.), \textit{rev'd}, 805 F.2d 1074 (1st Cir. 1986). On appeal, the CERCLA and RCRA claims were reinstated. \textit{Dedham Water}, 889 F.2d at 1147. \textit{See} Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1084 (1st Cir. 1986). After the initial dismissal of its claims, Dedham Water filed two new suits in the district court including a claim under the CWA, 889 F.2d at 1147. All of the prior actions were then consolidated in Dedham Water's "Consolidated Complaint." \textit{Id.} Plaintiff filed a Motion for Summary Judgment which was denied by the district court. \textit{Id.} The trial began in November, 1987. \textit{Id.} Only the CERCLA claim will be discussed in this note.
\end{itemize}
puted evidence showed that Cumberland Farms historically used solvents and degreasers containing VOCs, which mechanics regularly dumped into drains and catch basins on Cumberland Farms' property.\textsuperscript{14} However, the United States District Court for the District of Massachusetts held that Dedham Water had failed to prove that Cumberland Farms was responsible for the contamination of Dedham Water's well field.\textsuperscript{15} The district court entered judgment for Cumberland Farms.\textsuperscript{16} Dedham Water appealed. The issue on appeal was whether, under CERCLA, the plaintiff must prove that a hazardous substance released by the defendant's facility actually caused contamination of the plaintiff's property, or whether it is sufficient to show that there was a release or threatened release of a hazardous substance from the defendant's facility which caused the plaintiff to incur response costs.\textsuperscript{17} The United States Court of Appeals for the First Circuit held that a release or threatened release of a hazardous substance from the defendant's facility which causes the plaintiff to incur response costs triggers CERCLA liability.\textsuperscript{18} Therefore, liability in a two-site case is not limited to those situations where the defendant's contaminants physically migrate to the plaintiff's property.\textsuperscript{19} The court of appeals vacated the judgment of the district court and remanded the case for a new trial.\textsuperscript{20} The district court was then faced with resolving the novel issue of whether releases or threatened releases of hazardous substances from the Cumber-

\textsuperscript{14.} Dedham Water, 889 F.2d at 1148. The solvents and cleansers used by Cumberland Farms contained such VOCs as trichloroethane, trichloroethylene, dichloroethane, and tetrachloroethylene. \textit{Id.} at 1148 n.2. The drains and catch basins into which the chemicals were dumped were connected to a drainage pipe owned by Cumberland Farms which discharged directly into a drainage ditch, which flowed toward the Dedham Water well field and ultimately to the Neponset River. \textit{Id.} at 1148. Cumberland Farms also conceded that it continued to use the contaminated well water for washing trucks and continued to dispose of the contaminated water via the catch basins until April, 1982 when its well was permanently shut down. \textit{Id.}

\textsuperscript{15.} Dedham Water, 689 F. Supp. at 1235. The court concluded that the Geraghty & Miller study "found no evidence" of groundwater contamination emanating from Cumberland Farms and traveling toward Dedham Water's well field. \textit{Id.} at 1231. Furthermore, the court determined that the Shield Packaging facility was a probable source of contamination of both the Cumberland Farms well and the plaintiff's well field. \textit{Id.} at 1233.

\textsuperscript{16.} \textit{Id.} at 1235.

\textsuperscript{17.} Dedham Water, 889 F.2d at 1150. The plaintiff did not contest the district court's finding that Cumberland Farms was not the source of the contamination of the plaintiff's wells. \textit{Id.} at 1149.

\textsuperscript{18.} \textit{Id.} at 1157.

\textsuperscript{19.} \textit{Id.} at 1158.

\textsuperscript{20.} \textit{Id.} at 1147-48.
land Farms facility caused Dedham Water to incur response costs even though it was not the defendant's waste that actually caused the contamination of the plaintiff's well field.\textsuperscript{21}

The district court entered judgment for the defendant.\textsuperscript{22} The court held that the threatened releases from the defendant's facility did not cause the response costs for which the plaintiff sought reimbursement.\textsuperscript{23} The court found that the plaintiff reasonably believed, based on the studies conducted by Geraghty & Miller, in 1982, that VOCs migrated and would continue to migrate from the defendant's facility to the plaintiff's well field.\textsuperscript{24} However, the court held that the costs sought by the plaintiff for the construction of a water treatment plant resulted from the Metcalf & Eddy recommendation in 1980 to treat existing contamination and not from the plaintiff's belief that the defendant's facility constituted a threat of future contamination.\textsuperscript{25}

II. History

CERCLA was enacted in 1980 in response to the growing problem of the contamination of land and water resources with toxic waste.\textsuperscript{26} To facilitate the emergency abatement of the release of hazardous substances and the cleanup of hazardous waste sites, Congress intended that persons covered by the statute be held strictly liable.\textsuperscript{27} Although CERCLA lacks an explicit provi-

\begin{itemize}
\item 21. \textit{Id.} at 1150.
\item 22. \textit{Dedham Water}, 770 F. Supp. at 43.
\item 23. \textit{Id.} at 42.
\item 24. \textit{Id.} at 42-43.
\item 25. \textit{Id.} The court was unpersuaded that a perceived threat of future contamination from Cumberland Farms was what drove the plaintiff to construct the treatment plant. \textit{Id.} In the court's opinion, the only response that related to Geraghty & Miller's findings was the plaintiff's decision in 1982 to sue Cumberland Farms for damages. \textit{Id.} at 43. The court speaking through District Judge Skinner concluded:

\begin{quote}
The defendant, according to the testimony in this case, is a blatant polluter, and the plaintiffs operate a public water supply system. It would be gratifying to exact reimbursement from the defendant for the benefit of the plaintiffs. As long as causation is a necessary element of liability, however, I cannot do so on this record.
\end{quote}

\textit{Id.}


\item 27. \textit{See} State of New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985). CERCLA proceeded through the House and Senate in two separate versions. The original House bill provided that "any person who caused or con-
tion for strict liability, section 101(32) provides that liability under CERCLA shall be construed to be the standard of liability under section 311 of the Clean Water Act (CWA).28 Courts have interpreted section 311 of the CWA as imposing strict liability.29 Moreover, courts have repeatedly confirmed the strict liability scheme under CERCLA.30

CERCLA provides for a private right of action.31 To establish a prima facie case for cost recovery under CERCLA, a private-party must establish the following elements: (1) the defendant’s site must fall within the statutory definition of “vessel” or “facility,”32 (2) the defendant must fall within one of four classes of


Strict liability under CERCLA is not absolute. Section 107(b) provides defenses for a release of a hazardous substance caused by an act of God, an act of war or an act or omission of a third party unrelated to the defendant. 42 U.S.C. § 9607(b). Therefore, interpreting CERCLA as requiring a showing of causation renders superfluous the affirmative defenses provided under section 107(b). Shore Realty, 759 F.2d at 1044 (“we will not construe a statute in any way that makes some of its provisions surplusage”).

31. See CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B). Necessary costs may be recovered by “any other person” who has acted consistently with the National Contingency Plan. Id. For a discussion of the National Contingency Plan, see infra note 35.

32. See CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1). The CERCLA definition of “facility” includes “any site or area where a hazardous substance has been deposited, . . . or otherwise come to be located.” Id. § 9601(9). For judicial interpretation of “facility,” see, United States v. Mottolo, 695 F. Supp. 615, 622-23 (D.N.H. 1988)(“[b]ecause hazardous substances were deposited at the Mot- tollo site, it is a ‘facility’ within the meaning of CERCLA”).


Judicial interpretation of “vessel,” “facility,” and “hazardous substance” are beyond the scope of this note.
covered persons,\textsuperscript{33} (3) there must be a release, or threatened release of a hazardous substance from the defendant’s vessel or facility,\textsuperscript{34} and (4) the release or threatened release must cause the plaintiff to incur response costs.\textsuperscript{35} According to the plain language of the statute, an owner of a facility from which there is a

\textsuperscript{33} See CERCLA § 107(a), 42 U.S.C. § 9607(a). Section 107(a) defines “covered persons” as the following:

1. the owner or operator of a vessel or a facility,
2. any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
3. any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
4. any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance . . . .

\textsuperscript{34} See id. § 9607(a)(4). CERCLA defines a “release” as “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment” of a hazardous substance. Id. § 9601(22).

A “threatened release” has been held to include “corroding and deteriorating tanks, lack of expertise in handling hazardous waste, and even the failure to license the facility.” Shore Realty, 759 F.2d at 1045.

\textsuperscript{35} See CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4). For decisions adopting this formulation of the prima facie claim, see, Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 668 (5th Cir. 1989); Mottola, 695 F. Supp. at 622-23; Wade, 577 F. Supp. at 1332. But see Artesian Water Co., 659 F. Supp. at 1291 (Section 9607(a)(4)(B) requirement that private party’s response costs be consistent with National Contingency Plan is element of prima facie claim for cost recovery). For a discussion of the National Contingency Plan, see infra note 35.

Where there are two or more possible causes of the incurrence of response costs, the Artesian Water court resolved the question of causation in fact by applying the substantial factor rule of causation. Artesian Water, 659 F. Supp. at 1283. That court, in a question of first impression, applied the substantial factor rule of causation as a matter of federal common law. Id. at 1283 n.25. Supported by case law, the Artesian Water court found that Congress intended to grant authority to create federal common law in determining liability issues under CERCLA. Id. (citations omitted). The substantial factor rule of causation applies where releases or threatened releases from two or more sites contribute to the incurrence of response costs and application of the “but-for” rule individually would absolve all responsible parties of liability. Id. at 1283. Therefore, the defendant’s release or threatened release is a cause in fact if it was a material element and a substantial factor in bringing about the incidence of response costs. Id.
release or threatened release of a hazardous substance which causes the incurrence of response costs is potentially liable for such costs.\textsuperscript{36}

Neither the statute nor case law contains a clear standard for determining that a release or threatened release of a contaminant emanated "from" a defendant's facility. Courts have most frequently dealt with the recovery of costs for the cleanup of the defendant's site itself.\textsuperscript{37} In these "one-site" cases, there is no need to trace chemical ownership; the facts reveal an obvious nexus between the substance subject to be cleaned and its origin at the defendant's site.\textsuperscript{38} Liability is triggered once the court de-

\textsuperscript{36} See CERCLA § 107(a), 42 U.S.C. § 9607(a). CERCLA defines "response" as removal or remedial action. See id. § 9601(25). "Remove" or "removal" is defined as follows:

\textsuperscript{37} See, e.g., Amoco Oil, 889 F.2d at 670; Shore Realty, 759 F.2d at 1044; Wade, 577 F. Supp. at 1332-33.

\textsuperscript{38} See, e.g., Amoco Oil, 889 F.2d at 669 (gas emanating from radionuclides on site); Shore Realty, 759 F.2d at 1045 (leaking tanks and pipelines, continued leaching and seepage from earlier spills, and leaking drums on site); Wade, 577 F. Supp. at 1334 (leaching of hazardous substances into soil at site). But cf. State of Idaho v. Bunker Hill Co., 635 F. Supp. 665, 674 (D. Idaho 1986). In Bunker Hill, involving damage to natural resources, the United States District Court for the District of Idaho held that strict liability under CERCLA does not abrogate the necessity of showing causation. Id. The pertinent section of CERCLA under which the state brought action in Bunker Hill pertains only to damages to natural resources. Id. That section states that an owner shall be liable for "damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release." Id. See CERCLA §§ 107(a)(4)(C), 107(f)(1), 42 U.S.C. §§ 9607(a)(4)(C), 9607(f)(1). The Bunker Hill court ruled that although the mental state of the defendant is irrelevant, the plaintiff must show a causal nexus between the defendant's acts and the damage for which relief is sought. 635 F. Supp. at 674.
termines that there has been a release or threatened release of a hazardous substance at a site owned or operated by the defendant.\textsuperscript{39} Few courts have dealt with a plaintiff’s recovery of response costs caused by the release or threatened release of a hazardous substance from a neighboring defendant’s facility.

Various means of demonstrating that a contaminant has emanated from the defendant’s facility are discernable in the two-site cases. Notably, none of the plaintiffs in these two-site cases was required to show that the release caused actual contamination of the plaintiff’s property.\textsuperscript{40} In \textit{State of Vermont v. Staco, Inc.},\textsuperscript{41} the plaintiff recovered the costs of responding to mercury carried from the defendant’s facility on the bodies and personal effects of workers.\textsuperscript{42} In addition, the plaintiff recovered costs incurred for responding to the threat of the release of mercury into the groundwater via the workers’ domestic septic systems, without a showing of actual groundwater contamination.\textsuperscript{43}

Similarly, in \textit{Artesian Water Co. v. Government of New Castle County},\textsuperscript{44} the plaintiff showed that contaminants were found in the vicinity of the plaintiff’s well field, but offered no proof of actual contamination of the wells by the defendant’s waste.\textsuperscript{45} In \textit{Artesian Water}, the analyses by plaintiff’s experts showed that hazardous substances were present in the groundwater and in sediment near the defendant’s site.\textsuperscript{46} This was considered by the court as sufficient proof of a release or threatened release from the defendant’s site to satisfy the liability requirements under the statute.\textsuperscript{47} Furthermore, the \textit{Artesian Water} court held that to recover costs of response due to the release or threat of release of pollutants off-site, the plaintiff need not prove beyond dispute that hazardous substances found near the defendant’s site actually flowed from

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\item \textsuperscript{39} \textit{Amoco Oil}, 889 F.2d at 668; \textit{Shore Realty}, 759 F.2d at 1044; \textit{Wade}, 577 F. Supp. at 1333.
\item \textsuperscript{41} 684 F. Supp. 822 (D. Vt. 1988).
\item \textsuperscript{42} \textit{Id.} at 833-35.
\item \textsuperscript{43} \textit{Id.} at 834-35.
\item \textsuperscript{44} 659 F. Supp. 1269 (D. Del. 1987).
\item \textsuperscript{45} \textit{Id.} at 1281.
\item \textsuperscript{46} \textit{Id.}
\item \textsuperscript{47} \textit{Id.} at 1282.
\end{itemize}
that site. The court took notice that tracing contaminants to a particular source is exceedingly difficult from a technological standpoint. Therefore, the court reasoned, imposing such a requirement on a plaintiff may, in effect, enable owners to escape financial responsibility for the clean-up, thus eviscerating the remedial purpose underlying CERCLA.

An alternative approach to liability was recommended in United States v. Bell Petroleum Services, Inc. The Bell court disapproved of the approach, taken by the Artesian Water and Dedham Water courts, of treating soil and groundwater as two different sites. The Bell court determined that soil and groundwater should be analyzed as a single site. As the ownership of land encompasses the depths beneath the soil, the Bell court reasoned that the site owner should be held strictly liable for a release occurring beneath the surface as well. The court recognized that treating separately the emanation of a hazardous substance from the soil into the groundwater imposes a causation requirement where none is required.

Although involving a different provision of CERCLA than at issue in Dedham Water, recognition of the infeasibility of tracing chemical ownership underpinned the Fourth Circuit's decision in United States v. Monsanto Co. Where multiple generators are po-

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48. Id.
49. Id.
50. Id. See also Staco, 684 F. Supp. at 833.
52. Id. at 12.
53. Id. In Bell, investigations revealed that chromium, a hazardous substance disposed of at the defendant's site, was present in the underlying aquifer. Id. at 2. The defendants argued that whether or not they caused the release of chromium onto the soil, there was no link between the contamination of the soil and the chromium found in the ground water. Id. at 11-12.
54. See Bell at 13 (citing King v. Hester, 200 F.2d 807 (5th Cir. 1952)).
55. Id. at 14. The Bell court based its analysis on the Fifth Circuit's finding in Tanglewood East Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568, 1572 (5th Cir. 1988), that liability for the clean-up of a contaminated site may be strictly imposed upon the present owner of the site even though a prior owner had actually caused the contamination. See Bell at 12 (citing Tanglewood, 849 F.2d 1568). In other words, liability may be imposed upon a defendant for mere ownership of a facility from which there is a release or threatened release of a hazardous substance. See Bell at 9.
56. Bell at 11-12. Additionally, under CERCLA's definitions, a release into the "environment" includes a release into surface water, groundwater, or the subsurface of the soil. See CERCLA § 101(8), 42 U.S.C. § 9601(8). See also Mottolo, 695 F. Supp. at 623.
57. 858 F.2d 160, 170 (4th Cir. 1988). The specific issue involved genera-
tentially responsible for the release of hazardous waste from a single facility, the court found that requiring "proof of ownership" of the hazardous substance at the time of release would frustrate the statute's goals. The court held that a showing of chemical similarity between the generator defendant's waste and the hazardous substance released at the site was sufficient to trigger liability under the statute.

III. THE CIRCUIT COURT OPINION

Against this background, the First Circuit in Dedham Water proceeded to examine the elements of a prima facie claim for cost recovery under CERCLA. The court recognized that CERCLA imposes strict liability on covered persons. There was no dispute regarding the defendant's classification as a "covered person" under the statute. The parties also stipulated that Cumberland Farms was a "facility" within the meaning of the statute.

The issue remaining, therefore, was whether a CERCLA liability under section 107(a)(3). Id. at 169-70. See CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3).

58. Monsanto, 858 F.2d at 170. The Monsanto court noted: Throughout the statute's legislative history, there appears the recurring theme of facilitating prompt action to remedy the environmental blight of unscrupulous waste disposal. In deleting causation language from section 107(a), we assume as have many other courts, that Congress knew of the synergistic and migratory capacities of leaking chemical waste, and the technological infeasibility of tracing improperly disposed of waste to its source.

Id. (footnotes omitted).

59. Id. at 169. The generator defendant in Monsanto alleged that section 107(a)(3) requires a showing that the waste which the generator defendant sent to the site was present at the site at the time of release. Id. The court specifically held that "absent proof that a generator defendant's specific waste remained at a facility at the time of release, a showing of chemical similarity between hazardous substances is sufficient." Id. The Wade court held, under similar factual circumstances, that "to require a plaintiff under CERCLA to 'fingerprint' wastes is to eviscerate the statute." Wade, 577 F. Supp. at 1332. The court added that "besides eviscerating the statute the generator defendant's contention would lead to ludicrous results. For example, assuming wastes could be 'fingerprinted,' once all the hazardous substances in a generator's waste had migrated from the 'facility' the generator could no longer be held liable." Id. at 1333.

60. Dedham Water, 889 F.2d at 1150. The court adopted the Artesian Water formulation of the elements necessary to establish a prima facie claim. Id. For a discussion of the Artesian Water requirements, see supra note 34 and accompanying text. The additional element of the reasonableness of the response costs will not be addressed in this note.

61. Dedham Water, 889 F.2d at 1150 (citations omitted). The court reached the conclusion that CERCLA imposes strict liability based on the statute's legislative history and the pertinent case law. See id. at 1152-53.

62. Id. at 1151.

63. Id.
plaintiff in a two-site situation may recover costs incurred in response to the threat of contamination from a release or threatened release of a hazardous substance from the defendant's facility although the defendant's waste has not actually contaminated the plaintiff's property.64

The plaintiff argued that a CERCLA plaintiff need only prove that the release or threatened release of a hazardous substance from the defendant's facility caused the plaintiff to incur response costs.65 The neighboring plaintiff need not show that the defendant's hazardous substances migrated to the plaintiff's property66 as CERCLA expressly provides relief for response to a threatened release.67 The district court failed to examine the alternative "liability-creating event" of a threatened release of hazardous substances.68 To that end, the Plaintiff noted that "it is impossible to understand causation under CERCLA without examining Congressional inclusion of the term 'threatened release' in the context of establishing liability."69 Were liability to depend solely upon actual contamination, the term "threatened release" would be superfluous.70

Furthermore, Dedham Water maintained that requiring the CERCLA plaintiff to show migration of the defendant's waste would reinstate a causation requirement, which Congress intentionally deleted from the final version of the statute.71 The plaintiff stressed that courts have recognized the technological infeasibility of establishing "proof of ownership," and have consequently required only a weak showing of causation.72 A stricter causation requirement would eviscerate the remedial purpose of

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64. Id. at 1150.
66. Id.
67. Id. at 22.
68. Id. at 23.
69. Id. The plaintiff noted that under the legislative prototype for CERCLA section 107, CWA section 311, liability is triggered only for actual releases. Id. The plaintiff stressed that Congress chose to affirmatively expand liability under CERLCA to include liability for threatened releases, a fact noted by the court in United States v. Ottati & Goss, Inc., 630 F. Supp. 1361, 1404 (D.N.H. 1985). Id.
71. Id. at 32-33. "The compromised version [of CERCLA] imposed liability on classes of persons without reference to whether they caused or contributed to the actual contamination." Id. at 33.
72. Id. at 33-34 (citing Artesian Water, 659 F. Supp. at 1282; Monsanto, 858 F.2d at 170; Wade, 577 F. Supp. at 1332).
CERCLA.\textsuperscript{73} The "liability-creating event" under CERCLA, therefore, is a release or threatened release of a hazardous substance which causes the incurrence of response costs, not actual contamination of the plaintiff's property.\textsuperscript{74} The plaintiff characterized the perception of a threatened release as "a reasonable expectation of environmental harm."\textsuperscript{75} The plaintiff cited, as examples, the definitions attributed to a "threatened release" in several one-site cases.\textsuperscript{76} The plaintiff also noted that in the two-site case, \textit{Artesian Water}, the neighboring plaintiff was permitted to recover costs incurred as a result of the threat that the defendant's waste could migrate to the plaintiff's uncontaminated property.\textsuperscript{77} The \textit{Artesian Water} defendant was held liable even though no actual contamination of the plaintiff's property occurred and such contamination was unlikely ever to occur.\textsuperscript{78} The \textit{Artesian Water} plaintiff responded to the threat of a release of hazardous chemicals as perceived by both the plaintiff and the state environmental agency.\textsuperscript{79} Dedham Water argued that the \textit{Artesian Water} court correctly captured the CERCLA causation requirement.\textsuperscript{80} "The underlying analysis in \textit{Artesian Water} affirms the plain language of CERCLA and suggests that CERCLA liability turns on a reasonably perceived threat of contamination at the time of the decision to incur response costs."\textsuperscript{81} Drawing a comparison to \textit{Artesian Water}, Dedham Water argued that it reasonably believed the release or threatened release of hazardous substances from Cumberland Farms posed a threat of contamination to its well field.\textsuperscript{82} Dedham Water marked the similarities between the factual basis for its perception of threatened contamination from the Cumberland Farms facility and the facts relied upon in \textit{Artesian Water}.\textsuperscript{83} Dedham Water

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  \item \textsuperscript{73} Id. at 32-33.
  \item \textsuperscript{74} Id. at 22-23.
  \item \textsuperscript{75} Id. at 23.
  \item \textsuperscript{76} See id. at 24-25. The plaintiff noted the defendant's lack of expertise in handling hazardous waste and deteriorating tanks in \textit{Shore Realty}, 759 F.2d at 1045.
  \item \textsuperscript{77} Id. at 25.
  \item \textsuperscript{78} Id. at 27.
  \item \textsuperscript{79} Id. at 27-28.
  \item \textsuperscript{80} Brief for Plaintiff—Appellant at 27, Dedham Water Co. v. Cumberland Farms Dairy, Inc., 889 F.2d 1146 (1st Cir. 1989) (No. 88-2080).
  \item \textsuperscript{81} Id. at 29.
  \item \textsuperscript{82} Id. at 32.
  \item \textsuperscript{83} Id. at 30.
\end{itemize}
feared further actual or threatened releases from Cumberland Farms due to the Cumberland Farms' practice of on-site disposal of waste containing VOCs and Dedham Water's detection of VOCs in the surrounding surface waters.\textsuperscript{84} “The reasonableness of Dedham Water's perception of the threat, as shown by the physical facts known to it while it was expending response costs, is dispositive on the issue of CERCLA § 107 liability.”\textsuperscript{85}

Defendant Cumberland Farms argued that the district court properly rejected Dedham Water's claims.\textsuperscript{86} The defendant maintained that Dedham Water responded to the existing contamination of its well field and not to a reasonably perceived threat of future contamination from the Cumberland Farms facility.\textsuperscript{87} To recover response costs from Cumberland Farms, therefore, the district court properly required that Dedham Water prove that Cumberland Farms caused the contamination of its well field.\textsuperscript{88}

The defendant contended that Dedham Water's interpretation of CERCLA permits a plaintiff to recover costs of response for any subjective belief in a threat of contamination however mistaken that belief might be.\textsuperscript{89} Cumberland Farms maintained that the cases on which Dedham Water relied do not support this "peculiar" interpretation of CERCLA.\textsuperscript{90} First, in the one-site cases, the plaintiff typically seeks to recover costs for cleaning up a hazardous dump site that is releasing or threatening to release contaminants into the environment.\textsuperscript{91} “In such cases, there is no question that the releases that caused the [plaintiff] to respond

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\item \textsuperscript{84} Id. at 31. At the time that Dedham Water responded to the release and threatened release of VOCs by Cumberland Farms, the DEQE had closed plaintiff’s two contaminated wells; had found that VOCs similar to those found in plaintiff’s wells were being disposed of on the defendant's property and discharged into a drainage ditch that flowed in the direction of Dedham Water's wells; and had filed a lawsuit against Cumberland Farms for the disposal of hazardous waste into the environment. \textit{Id.} at 30.
\item Dedham Water had hired Geraghty & Miller to perform a hydrogeological study. \textit{Id.} The Geraghty & Miller study concluded that the releases of hazardous substances from the Cumberland Farms facility were causing contamination of Dedham Water's wells and posed a continuing threat. \textit{Id.}
\item \textsuperscript{85} \textit{Id.} at 30-31 n.13.
\item \textsuperscript{86} Brief for Defendant-Appellee at 13, Dedham Water Co. v. Cumberland Farms Dairy, Inc., 889 F.2d 1146 (1st Cir. 1989) (No. 88-2080).
\item \textsuperscript{87} \textit{Id.} at 17.
\item \textsuperscript{88} \textit{Id.} at 12.
\item \textsuperscript{89} \textit{Id.} at 14.
\item \textsuperscript{90} \textit{Id.}
\item \textsuperscript{91} Brief for Defendant—Appellee at 18, Dedham Water Co. v. Cumberland Farms Dairy, Inc., 889 F.2d 1146 (1st Cir. 1989) (No. 88-2080).
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originated from the very site that is the object of the investigation and cleanup." The dispute in such cases involves who may be held responsible for the costs, not whether the contaminants originated at the site.

In the few two-site cases heard, there was no real doubt about the origin of the contamination that prompted the response costs. The only two-site case cited by the plaintiff was Artesian Water. In Artesian Water, the plaintiff presented undisputed evidence that the groundwater contamination to which it responded was released from the defendant’s facility. Furthermore, the Artesian Water court had no occasion to construe the term “threatened release” because the Artesian Water plaintiff had taken measures to forestall contamination from an actual release of hazardous substances by the defendant into the groundwater. Cumberland Farms argued that nothing in Artesian Water supports Dedham Water’s “bizarre contention that a mistaken subjective belief that a release from a defendant’s site actually caused response costs establishes that a ‘threatened release’ by that defendant caused those costs.”

Relying on Artesian Water, the defendant argued that proof of causation is an essential element of a prima facie case under CERCLA. The plaintiff must show a causal nexus between the release or threatened release and the response. The inclusion of the term, “threatened release,” does not diminish the necessity of showing causation. The defendant argued that giving effect to CERCLA’s causation requirement is consistent with the Congressional intent of imposing liability on those parties responsible for

92. Id.
93. Id. at 18-19.
94. Id. at 19. The defendant cited Ottati where owners of a waste dump facility were held liable for EPA’s cost of responding to off-site contamination. Id. at 19-20. In that case, it was undisputed that the owner contributed to extensive contamination of the soil and groundwater. Id. (citing Ottati, 630 F. Supp. at 1405-06). Cumberland Farms concluded that on that basis, the Ottati court found a sufficient causal nexus between the defendant’s site and the off-site contamination to hold the defendant liable. Id. at 20 (citing Ottati, 630 F. Supp. at 1406).
95. Id. at 15 n.8.
96. Id. at 20-21.
97. Id. at 15 n.8.
98. Id.
100. Id. at 13-14.
101. Id. at 15-16.
creating the harmful conditions.\textsuperscript{102} Nothing in the legislative history, the plain language of the statute or case law suggests that a defendant is liable for costs spent to respond to contamination with which the defendant has no connection.\textsuperscript{103} In this regard, Cumberland Farms contended that it is not an unreasonable burden for a plaintiff to prove that off-site contamination to which it responded was substantially caused by releases from the defendant’s facility.\textsuperscript{104} The district court in \textit{Dedham Water} found that Cumberland Farms did not contribute to any groundwater pollution at all, much less the contamination to which Dedham Water had responded.\textsuperscript{105} According to the defendant, Dedham Water could have met this burden with respect to releases from other neighboring facilities.\textsuperscript{106} Simply stated, Dedham Water sued the wrong neighbor.\textsuperscript{107}

The circuit court held in favor of Dedham Water.\textsuperscript{108} Based on a literal reading of CERCLA, liability attaches when a “release” or “threatened release” from a defendant’s facility causes the plaintiff to incur reasonable response costs.\textsuperscript{109} The court’s interpretation of the statute is intended to encompass the situation in which a plaintiff reasonably believes that a particular release is likely to contaminate its property and reasonably incurs costs to prevent the anticipated contamination although no contamination actually occurs.\textsuperscript{110} The statute does not state, according to the court, “that liability is imposed only if the defendant causes actual contamination of the plaintiff’s property.”\textsuperscript{111} The

\textsuperscript{102}: \textit{Id.} at 24.
\textsuperscript{103}: \textit{Id.}
\textsuperscript{104}: Brief for Defendant—Appellee at 25, \textit{Dedham Water Co. v. Cumberland Farms Dairy, Inc.}, 889 F.2d 1146 (1st Cir. 1989) (No. 88-2080).
\textsuperscript{105}: \textit{Id.} at 22.
\textsuperscript{106}: \textit{Id.} at 25.
\textsuperscript{107}: \textit{Id.} at 26.
\textsuperscript{108}: \textit{See} \textit{Dedham Water Co. v. Cumberland Farms Dairy, Inc.}, 889 F.2d 1146, 1157 (1st Cir. 1989).
\textsuperscript{109}: \textit{Id.} at 1152. The court cited New York v. Shore Realty, 759 F.2d 1032 (2d. Cir. 1985), as authority for broadly construing the terms “release” and “threatened release.” \textit{Dedham Water}, 889 F.2d at 1152. For a discussion of the \textit{Shore Realty} definitions, see \textit{ supra} notes 33 \& 37. For the statutory definition of “release,” see \textit{ supra} note 33.

The court determined that the VOCs at issue fell within CERCLA’s definition of hazardous substances. 889 F.2d at 1152.
\textsuperscript{110}: \textit{Id.} at 1157. The court also noted that “liability in respect to costs caused by releases (or threatened releases) that do not in fact contaminate wells exists only where the statutory requirements are met; and the relevant standards are objective.” \textit{Id.} at 1158 (citation omitted).
\textsuperscript{111}: \textit{Dedham Water}, 889 F.2d at 1152.
court found support for its interpretation of CERCLA in *Artesian Water.* The court noted that the facts of the instant case are "virtually identical" to those of *Artesian Water* where the plaintiff had made an adequate showing of a release or threatened release of a hazardous substance from the defendant's facility to satisfy its burden on summary judgment. Therefore, the First Circuit concluded that the district court had failed to properly consider the plaintiff's claim that the release or threatened release of a hazardous substance from the defendant's facility caused the plaintiff to incur response costs.

**IV. ANALYSIS AND IMPACT**

It is submitted that the circuit court properly ordered a new trial. The plain language of CERCLA provides for the recovery of response costs caused by a release or threatened release of a hazardous substance. The circuit court recognized that a plaintiff might incur costs in response to a reasonable belief in the threat of contamination from a defendant's facility although the defendant's waste does not actually contaminate the plaintiff’s...
property. The district court, however, only considered the plaintiff’s “central allegation” that chemical discharges from Cumberland Farms’ property caused the groundwater contamination in the plaintiff’s well field. The district court had failed to properly consider the plaintiff’s claim that the threat of contamination from releases or threatened releases of VOCs from Cumberland Farms caused the incurrence of response costs.

Cumberland Farms argued that Dedham Water would construe CERCLA to permit a plaintiff to recover for responding to any erroneous but subjective belief in the threat of contamination. To prevent recovery from a defendant posing no real threat of contamination, the circuit court properly applied an objective standard to evaluate the threat of release.

The circuit court opinion does not diminish the necessity of showing a causal link between the release or threatened release of a hazardous substance and the incurrence of response costs. It is not sufficient to show that there was a release or reasonably perceived threat of release followed by response costs. The CERCLA plaintiff must show that a release or threatened release of a hazardous substance from the defendant’s facility was the reason for which the plaintiff incurred the particular costs which it seeks to recover. For example, Defendant Cumberland Farms had argued that Dedham Water decided to construct the water treatment plant before having any reason to believe that Cumberland Farms posed a threat of contamination. The district court recognized that Metcalf & Eddy recommended the construction of

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117. Dedham Water, 889 F.2d at 1157.
119. Id.
120. See Dedham Water, 889 F.2d at 1154.
122. See Dedham Water, 889 F.2d at 1158. The statute indicates that the costs incurred must be reasonable and necessary but offers no other guidance for determining what constitutes a threatened release. See CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4). The court evidently adopted the standard of a reasonable belief in the threat of release by operation of the principles of statutory construction. See, e.g., California Medical Ass’n v. FEC, 453 U.S. 182 (1981).

It can be argued that a standard stricter than a reasonable belief offers greater assurance that a defendant will not unfairly be held responsible for a release or threatened release with which it has no real connection. It is suggested, however, that a stricter standard, such as substantial certainty, is contrary to the CERCLA purpose of facilitating hazardous waste clean-up.

123. See 889 F.2d at 1152-53, 1157-58.
125. See Dedham Water, 770 F. Supp. at 42.
the plant in 1980, but it was not until 1982 that the plaintiff reasonably believed that Cumberland Farms posed a threat of contamination. Although the plant was not constructed until 1985 while Dedham Water reasonably believed in the threat of contamination from Cumberland Farms, the court was not persuaded that the perceived threat of contamination rather than the existing pollution in the plaintiff’s well was what caused the plaintiff to build the water treatment plant.

Although an accurate application of CERCLA, the district court analysis appears to invite abuse in situations, like Dedham Water, where a reasonably perceived threat exists but the connection to the response costs is lacking. The district court inquired into the plaintiff’s motivation for constructing the water treatment plant. A director of Dedham Water testified as to the state of mind of the other directors in order to establish that the threat of contamination from Cumberland Farms was the driving force behind the company’s decision to construct the water treatment plant. Finding no corroborating evidence in the board of directors’ meeting minutes, the district court concluded that it was not the belief that defendant’s facility posed a threat of contamination that motivated the plaintiff’s decision. In similar situations, the district court’s opinion appears to encourage directors merely to stuff the corporate files with memoranda indicating that a belief in the threat of contamination from a particular source is the reason for incurring particular costs. It is submitted, however, that the potential for unjust results is checked by the logical necessity of matching the nature of the costs incurred to the threat alleged. Additionally, to avoid misuse of the potential threat allegation where the plaintiff, such as Dedham Water, cannot prove to a particular court’s satisfaction that the contamination to which it responded was the defendant’s waste, it is suggested that courts adopt a definitive, technologically achievable standard for demonstrating that a release emanated from a defendant’s facility.

In conformity with a literal reading of the statute, the circuit court concluded that a CERCLA plaintiff need not prove that de-

126. Id.
127. Id. at 42-43.
128. See id. at 43.
129. Id.
130. Id.
131. See infra notes 136-38 and accompanying text.
132. See infra notes 139-47 and accompanying text.
defendant's waste migrated to and contaminated the plaintiff's property in order to recover the costs of responding to the threat of contamination by a hazardous substance from the defendant's facility.\textsuperscript{133} Nothing in the language of CERCLA, its legislative history, or case law requires proof of actual contamination of the plaintiff's property by defendant's waste before CERCLA section 107(a)(4)(B) liability is triggered in this context.\textsuperscript{134} If proof of actual contamination were required, a plaintiff could never recover costs incurred for a "threatened" release as expressly provided by the statute.\textsuperscript{135} Furthermore, the circuit court's refusal to impose the requirement of proof of actual contamination of the plaintiff's property by the defendant's waste promotes the CERCLA goal of preventing hazardous waste contamination.\textsuperscript{136}

Contrary to a general rule requiring proof of contamination, it is submitted that it is the nature of the costs for which relief is sought that dictates the extent to which the plaintiff must show the effects of releases or threatened releases from the defendant's facility on the environment. For example, if a plaintiff seeks to recover costs incurred for preventing contamination, the plaintiff must establish that it acted in response to a reasonably perceived threat of contamination from actual or threatened releases from the defendant's facility.\textsuperscript{137} If the plaintiff seeks to recover costs for eliminating contaminants from its property, logically, the plaintiff must establish that the defendant's waste was a source of the contamination.\textsuperscript{138} As a result, a defendant with no connection to the contamination (or threat of contamination) which prompted the plaintiff's particular response costs cannot be held

\begin{footnotesize}
133. See Dedham Water, 889 F.2d at 1154.
134. See id.
135. See id. at 1158.
136. For a discussion of CERCLA goals and policies, see supra text accompanying notes 25-26.
137. As in Artesian Water, a plaintiff may recover the costs incurred in evaluating and monitoring a threat of contamination. Artesian Water, 659 F. Supp. 1269, 1299. However, Dedham Water faced the more difficult task of proving that the construction of a water treatment plant was caused by the mere threat of contamination by VOCs emanating from Cumberland Farms. Dedham Water, 770 F. Supp. at 42.

For a discussion of the proof necessary to establish that a release emanated from the defendant's facility, see infra notes 139-47 and accompanying text.

For a discussion of a reasonably perceived threat, see supra note 121 and accompanying text.

138. The plaintiff must show that the defendant's waste was at least a substantial factor prompting the response costs. See Artesian Water, 659 F. Supp. 1269, 1283.
\end{footnotesize}
liable for those costs under CERCLA.\textsuperscript{139}

At issue in certain two-site cases involving alleged releases from the defendant’s facility,\textsuperscript{140} is the connection between substances present at the defendant’s facility and those substances detected off-site.\textsuperscript{141} It is submitted that, consistent with the legislative history of CERCLA and case law, the circuit court properly declined to read a rigorous chemical causation requirement into proof that a release or threatened release emanated from the defendant’s facility.\textsuperscript{142} Requiring proof of the defendant’s ownership of the off-site contaminants contradicts the CERCLA goal of facilitating the clean-up of environmental hazards.\textsuperscript{143}

However, by relying on the formulation “release or threatened release” courts have avoided the necessity of specifying a practicable standard for determining that a release in fact emanated from the defendant’s site.\textsuperscript{144} Therefore, where neighboring plaintiffs seek to recover costs incurred due to an alleged release from the defendant’s site, courts may be reluctant to conclude, without extensive findings of fact, that such a release actually emanated from the defendant’s facility.\textsuperscript{145} As a result, despite

\textsuperscript{139} See, e.g., Dedham Water, 689 F. Supp. at 1226. Defendant Cumberland Farms had contended that Dedham Water built the water treatment plant in response to actual contamination of its wells for which Cumberland Farms was not responsible. Brief for Defendant-Appellee at 16-17, Dedham Water Co. v. Cumberland Farms Dairy, Inc., 889 F.2d 1146 (1st Cir. 1989) (No. 88-2080).

\textsuperscript{140} This is in reference to situations like that presented in Dedham Water in which contaminants are detected near a defendant’s site.

\textsuperscript{141} Tracing the origin of a hazardous substance will be viewed as “chemical” causation to distinguish this type of causation from the causation of response costs.

\textsuperscript{142} Dedham Water, 889 F.2d at 1152. Both Dedham Water and the Artesian Water plaintiff had detected contaminants in the immediate vicinity of the defendants’ sites. Based on the factual similarity of the instant case to Artesian Water, the court was correct in determining that Dedham Water had satisfied the statutory requirement of showing that there was a release or threatened release of VOCs from the Cumberland Farms facility. See id. at 1154.

\textsuperscript{143} See Artesian Water, 659 F. Supp. at 1282; Monsanto, 858 F.2d at 170.

\textsuperscript{144} It is submitted that the outcome of Dedham Water is supported by Artesian Water not by application of any standard established by that court for determining when a release has emanated from a defendant’s facility, but based on the factual similarity of the two cases. Although the Artesian Water court stated that the plaintiff was not required to prove beyond dispute that contaminants emanated from the defendant’s site, the court did not articulate a specific method for determining whether releases emanate from a particular site. See Artesian Water, 659 F. Supp. at 1269. For a discussion of the facts of Artesian Water, see supra text accompanying notes 43-49.

\textsuperscript{145} See, e.g., United States v. Bell Petroleum Services, Inc., No. MO-88-CA-05 (W.D. Tex. Nov. 9, 1989) (LEXIS, Genfed. library, Dist. file). In Bell, the court was reluctant to rely solely upon the theory that the defendant was strictly liable for the release of chromium based upon the defendant’s ownership of the
Congress' attempt to limit the plaintiff's burden of showing causation under CERCLA, courts may in effect reinstate a stringent chemical causation requirement, that of "fingerprinting" a hazardous substance located at the defendant's site to the contamination off-site. It is suggested, based on the nature of the evidence produced in Artesian Water supporting that plaintiff's claim, that the burden of proving that a release or threatened release emanated from a defendant's site is reasonably met by establishing the defendant's facility as the most likely source of the off-site pollutants. A more liberal standard is provided by analogy to the Monsanto case. Although Monsanto involved multiple generator liability, the decision was based upon the recognition of the technological infeasibility of tracing chemical ownership. Therefore, borrowing from Monsanto, proof of chemical similarity between the off-site pollutants and the defendant's waste would satisfy the required showing that a release emanated from the defendant's facility.

In conclusion, the circuit court properly gave effect to the express CERCLA provision for the recovery of response costs caused by a release or threatened release of a hazardous substance from a defendant's facility. In two-site situations, a plaintiff may, therefore, recover those costs incurred in response to the threat of contamination from a release or threatened release from a defendant's facility whether or not the defendant's waste actually migrates to and contaminates the plaintiff's property. The circuit court's interpretation of CERCLA does not, however, diminish the necessity of establishing a causal nexus between a release or threatened release and the response costs. Although CERCLA imposes liability without relation to a defendant's fault, the CERCLA causation requirement provides sufficient

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146. For a discussion of Artesian Water, see supra text accompanying notes 43-49.

147. For a discussion of Monsanto, see supra notes 56-58 and accompanying text.

148. It is submitted that the Bell approach of imposing liability for the release of contaminants into the groundwater based on the defendant's ownership of the depths beneath the soil is limited on its facts to cases in which the pollutants are detected in a plume directly beneath a parcel of land owned by the defendant upon which hazardous substances have been released. For a discussion of Bell, see supra notes 50-55 and accompanying text.

149. For a discussion of the strict liability scheme under CERCLA, see supra notes 26-29 and accompanying text.
assurance that a defendant will not be held liable for costs unrelated to a response to a release or threatened release of a hazardous substance emanating from that defendant’s facility.

Kim Kocher