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Private Party Recovery of Environmental Response Costs

James R. Haisley*

I. INTRODUCTION

Owners of sites contaminated by hazardous waste, neighbors of such sites, and other private parties may be faced with enormous costs associated with environmental cleanups, regardless of whether they had any direct involvement in the waste disposal activities. Increasingly, parties that are not responsible for these environmental harms, or, only partially at fault, are seeking to recover the costs of environmental cleanup from other responsible parties.

An action to recover environmental response costs may arise under various situations. Private parties may find themselves liable for cleaning up hazardous waste pursuant to a government order, or may choose to cleanup contaminated property voluntarily because such contamination is inconsistent with present uses of the property. Property owners may also seek to recover the costs associated with cleaning up a release or threatened release from adjacent land which threatens to contaminate their nearby property. Because the presence of hazardous waste is often difficult to detect, purchasers, lenders, and other parties to real estate transactions may also find themselves facing enormous liability and look for others to share in the cleanup costs.

Private recovery of such response costs may be available under federal and state statutes, as well as common law theories of nuisance, trespass, negligence, and strict liability. Recovery may also be available under certain insurance policies. The purpose of this article is to provide a brief

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* Attorney previously with the law firm of Davis, Graham & Stubbs; presently practicing in the Salt Lake City, Utah office of Stoel, Rives, Boley, Jones & Grey; J.D. 1987, Tulane Law School; M.S. 1983, Northern Arizona University; B.S. 1979 Northern Arizona University.
overview of the various statutory and common law theories authorizing private recovery, the scope of available relief, and potential defenses.

II. STATUTORY SOURCES FOR RECOVERY OF RESPONSE COSTS

A. The Comprehensive Environmental Response, Compensation and Liability Act of 1980

By far, the most comprehensive and widely used statutory mechanism for private recovery of environmental response costs arises under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA).\(^1\) Section 107 of CERCLA specifically provides that any person who can demonstrate that the release of a hazardous substance\(^2\) has caused it to incur response costs, may recover those necessary response costs from other parties whom the statute holds liable.\(^3\) Response costs are broadly defined to include removal and remedial action, and enforcement activities related thereto.\(^4\)

1. Potentially Liable Parties

Section 107 of CERCLA permits any person who has incurred response costs as a result of a release of hazardous substances to recover those costs from four classes of potentially responsible parties (PRPs). These “responsible parties” include: (1) Current owners and/or operators of facilities at which a hazardous substance release is occurring or is threatened; (2) persons who owned and/or operated a facility at the time of disposal of any hazardous substance;\(^5\) (3) persons who

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2. “Hazardous substances” are defined by CERCLA to include most RCRA hazardous waste and other hazardous or toxic substances identified or listed under CERCLA, the Clean Air Act, the Clean Water Act, and other identified federal statutes. 42 U.S.C. § 9601(14).
5. “Owner or Operator” is defined by CERCLA to include persons owning or operating a facility, and transporters of hazardous substances. 42 U.S.C. § 9601(20). This definition specifically excludes persons who hold an indicia of ownership primarily to protect a security interest, but have no participation in the management of a facility. However, a lender or other secured party which has even minimal involvement in management of a facility may be liable as an owner. See Tanglewood East Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568 (5th Cir. 1988); U.S. v. Maryland Bank & Trust Co., 632 F. Supp. 573 (D. Md. 1986).
arranged for the disposal, treatment, or transportation of any hazardous substance to a disposal or treatment facility; and (4) persons who accept or accepted any hazardous substance for transportation to a disposal or treatment facility. Courts which have attempted to interpret this provision of CERCLA have determined that lessors; corporate officers, directors and employees; parent corporations; successor corporations; and secured creditors which have participated in the day-to-day operational management of a site or facility may also be potentially responsible parties.

2. Prima Facie Case

The necessary elements for establishing liability in a private party cost recovery action have been defined by several court decisions. To establish a prima facie case, a plaintiff must prove that: (1) The defendant is an "owner or operator" or otherwise falls within one of the four categories of covered persons listed in section 107(a); (2) the defendant caused a "release" or threatened release of a hazardous substance into the environment; (3) the release or threatened release occurred at a "facility"; (4) the release or threatened release has


13. A "release" is defined broadly to include "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment," subject to certain exceptions. 42 U.S.C. § 9601(22).

14. The term "facility" means any building, structure, installation, equipment,
caused a party to incur response costs; (5) the response costs are necessary; and (6) the response costs are consistent with the National Contingency Plan (NCP).

3. Scope of Recoverable Response Costs

The remedies available to private parties under CERCLA include recovery of response costs and declaratory relief. Response costs include past costs incurred in removal or remediation of a contaminated site. Although courts are generally reluctant to award future response costs, they may grant declaratory relief for the recovery of future costs once those costs have been incurred.

Removal and remediation are specifically defined in CERCLA. Removal activities include investigation of a release, cleanup or removal of hazardous substances, disposal of removed material, and other actions necessary to minimize damage to the public health, welfare or environment. Removal activities are generally intended as temporary measures. Remediation, on the other hand, is intended to provide a more permanent remedy in lieu of, or in addition to, a removal action. Remediation generally includes action taken to prevent or minimize the release of hazardous substances so they do not migrate and endanger the public health or the environment.

Recent court opinions have provided additional clarification of these definitions and identified the following as recoverable costs under the general parameters of "response costs."

15. The NCP is promulgated by the EPA order to "establish procedures and standards for responding to releases of hazardous substances, pollutants, and contaminants . . . ." 42 U.S.C. § 9605. The NCP is intended to provide guidance for cleanup actions and shall address the methods for investigating facilities, methods for evaluating a release or threatened release, criteria for determining appropriate removal and remedial measures, roles for government and non-government entities, and means for assuring cost-effectiveness. Id. The provisions of the NCP dealing with CERCLA were first promulgated in 1982. The NCP was revised in 1985 and again in 1990. The revised NCP is now codified at 40 C.F.R. Part 300 (1990).


a. Preliminary Investigative Costs. The first step in any response action is to investigate and assess the extent of contamination. CERCLA specifically includes within the definition of "removal" "such actions as may be necessary to monitor, assess, and evaluate the release or threatened release of hazardous substances."\(^20\) Courts have generally held that on-site testing and investigative costs fall within this definition.\(^21\) This may be true even if a party has not yet begun a cleanup. However, costs incurred before learning of the contamination or for other purposes such as an environmental audit in connection with a purchase of the property, are not recoverable.\(^22\)

b. Cleanup Costs Associated With Removal and Remediation. Given the intent of CERCLA and the statutory definition of removal and remediation, courts generally have little difficulty in concluding that the term response costs should include a broad range of cleanup activities.\(^23\) This may include costs associated with cleanup activities such as removal and disposal of contaminated soil, containers and materials; storage; confinement; neutralization; construction of fencing, dikes or ditches; repair or replacement of leaking containers; and treatment or incineration.\(^24\)

c. Public Health and Welfare. Response costs may also include those measures necessary to protect or minimize the risk or damage to the public health and welfare. CERCLA specifically includes as remedial costs expenses in connection with "security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for ... [and other emergency disaster relief]."\(^25\)

One issue which has been frequently litigated involves

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recovery of response costs in connection with contamination of water supplies. Under CERCLA, a party may recover the costs associated with providing an alternative water supply, but there is some uncertainty as to whether a party can recover for the loss of use of existing wells. Similarly, when a private party is seeking additional water supplies which are not "necessary" remedial costs, recovery may be denied.

Other costs relating to public health and welfare include expenses for medical testing, screening and/or monitoring. Courts are split on the extent to which these costs are recoverable. In Brewer v. Ravan, the court concluded that medical expenses incurred in the treatment of personal injuries or diseases caused by a release of hazardous substances are not recoverable. Nevertheless, the court awarded the costs of medical testing and screening "to assess the effect of the release or discharge on the public health or to identify potential public health problems presented by the release." Other courts have taken a contrary view and concluded that even costs related to medical screening and/or monitoring are not "necessary costs of response," and therefore not recoverable.

d. Relocation and Evacuation. CERCLA specifically provides for recovery of costs associated with the temporary evacuation and housing of threatened individuals. Recovery of costs for permanent relocation of residents and businesses is also available "where the President determines that, alone or in combination with other matters, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secured disposition offsite of

27. See Jones v. Inmont Corp., 584 F. Supp. 1425, 1429 (S.D. Ohio 1984) (court concluded that response costs include the loss of use of wells for drinking water); but see Lutz v. Chromatex, Inc., 718 F. Supp. 413 (M.D. Pa. 1989) (loss of wells more appropriately characterized as natural resources damages and are not "response costs" for purposes of cost recovery).
30. Id. at 1179.
33. 42 U.S.C. § 9601(23); see also, Tanglewood East Homeowners v. Charles Thomas, Inc., 849 F.2d 1568, 1575 (5th Cir. 1988).
hazardous substances, or may otherwise be necessary to protect the public health or welfare.\footnote{34} In the absence of such a finding, permanent relocation costs are not recoverable.\footnote{35}

e. Attorney Fees. Legal costs and attorney fees in a CERCLA action can be substantial. Courts are divided on whether or not these fees are recoverable. Some courts have awarded costs and attorney fees as enforcement activities related to a response action.\footnote{36} Other courts attempt to distinguish between government and non-government enforcement costs and allowed government recovery of costs and attorney fees, but deny recovery to private litigants.\footnote{37} Finally, at least one court allowed private parties to recover legal costs and fees associated with investigating and negotiating response activities, but denied costs and fees of litigation to recover response costs or other "enforcement expenses."\footnote{38}

f. Costs Not Recoverable. A private party generally cannot recover damages in an action brought under section 107 of CERCLA. Damages which are not recoverable include:

\begin{enumerate}
\item Business losses or economic damages;\footnote{39}
\item Diminution in property value;\footnote{40}
\item Expenses incurred in connection with personal injuries;\footnote{41}
\item Punitive damages.\footnote{42}
\end{enumerate}

4. Consistency with the National Contingency Plan (NCP)

A private party can recover the costs of removal or remediation only to the extent those costs are consistent with

\footnotesize{34. 42 U.S.C. § 9601(24).  
the NCP. 43 A party seeking recovery bears the burden of proving consistency. Because a removal action is generally taken in response to an immediate threat, the NCP's procedural requirements are less stringent for removal than remedial actions. Section 300.415 of the NCP sets forth the factors to be considered in determining the propriety of a removal action. These regulations include a list of precautions, controls and containment actions that may be appropriate. 44

The NCP requirements for a remedial action are more stringent than those for removal. The NCP requires a preliminary site assessment, followed by preparation of a Remedial Investigation/Feasibility Study (RI/FS) that assesses the site and appropriate remedies. 45 The private party must then select an appropriate and cost effective remedy and provide an opportunity for public comment on the alternatives.

It is often difficult to determine whether response costs are consistent with the NCP. Prior to 1990, courts were divided as to the appropriate standard to apply in determining consistency. 46 In 1990, the EPA amended the NCP to end the confusion. The NCP now provides that a "private party response action will be considered 'consistent with the NCP' if the action, when evaluated as a whole, is in substantial compliance with the applicable requirements . . . [of the NCP] and results in a CERCLA-quality cleanup." 47

As a practical matter, a private party should consider obtaining the EPA's approval before incurring any response costs. Although not a prerequisite to recovery, 48 The EPA's approval may minimize disagreement between parties and enhance the opportunity for cost recovery. This advantage must be weighed against the risk that the EPA's approval will delay completion and increase the costs of the cleanup.

47. See 40 C.F.R. § 300.700(c)(3)(i) (emphasis added).
48. See, e.g., Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887, 892 (9th Cir. 1986).
5. Apportionment of Liability/Contribution

a. Joint and Several Liability. Liability under CERCLA is joint and several. However, a court may apportion liability, particularly in a private party action, if defendants can prove that such a division of costs is appropriate.

In seeking apportionment, the moving party bears the burden of proving that the harm is divisible. Divisibility of harm and apportionment may be evaluated by looking to a variety of equitable factors. Most courts have relied upon the so-called Gore Factors in evaluating the appropriateness of apportionment. These factors include: 1) the volume of waste contributed; 2) the toxicity of waste; 3) the extent to which a party's contribution is distinguishable from other parties; 4) the relative degree of care exercised by the parties; and 5) the degree of cooperation in cleanup.

If the harm is not divisible, each party may be joint and severally liable and responsible for all cleanup costs. Similarly, if the government is involved, courts may hesitate to apportion liability among private parties, and may instead require that the parties seek contribution among themselves.

b. Contribution. Prior to the Superfund Amendments and Reauthorization Act of 1986 (SARA), there was some doubt as to whether CERCLA provided for recovery by contribution. With the passage of SARA, CERCLA now provides that any person may seek contribution from another person who is liable or potentially liable under section 107(a), and a court may "allocate response costs among liable parties using such equita-


50. The Gore Factors refer to criteria named after a sponsor of an amendment to the original 1980 CERCLA bill. The amendment would have provided considerations upon which to disallow joint and several liability in appropriate cases. Although the amendment failed, the factors have been considered by courts in determining the appropriateness of apportionment.


52. Allied Corp., 691 F. Supp. at 1116.

ble factors as the court determines are appropriate." These "equitable factors" are similar to those discussed above in considering apportionment.

Although the distinctions between an action under section 107 and a contribution claim are often blurred, some important differences exist. These include:

(1) The only prerequisite to a contribution claim is that a plaintiff have a claim against another party with whom it shares CERCLA liability, as opposed to the numerous elements for a prima facie case under section 107 outlined above;

(2) By definition, a contribution action presumes apportionment is necessary and appropriate;

(3) A contribution action may offer a wider scope of recoverable costs;

(4) A contribution action may offer a wider range of equitable defenses; and

(5) The applicable statute of limitations may differ depending upon the type of action brought.

6. Defenses

Defenses to CERCLA are limited. Under section 107, the only circumstances under which an otherwise responsible party can avoid liability is by establishing that the release or threatened release was caused solely by:

(1) An act of God; 55

(2) An act of war;

(3) An act or omission of a third party other than an employee or agent of the defendant, or one whose act or omission occurs in connection with a contractual relationship with the defendant, and where a) the defendant exercised due care in light of all relevant facts and circumstances, and b) the defendant took precautions against such acts or omissions and


55. CERCLA defines "act of God" as an "unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight." 42 U.S.C. § 9601(1). Heavy rainfall, hurricanes, or even earthquakes are probably not acts of God if they are foreseeable and a private party could have taken measures to guard against the effects. See United States v. Stringfellow, 661 F. Supp. 1053, 1061 (C.D. Cal. 1987) (heavy rains not an act of God because they were foreseeable based upon normal climatic conditions and because the harm could have been prevented through design and installation of proper drainage channels).
the foreseeable results; or

(4) Any combination of the above defenses.\footnote{42 U.S.C. \S 9607(b).}

Of these defenses, the third-party defense, which also applies to "innocent landowners," is the most frequently used. To successfully assert the third-party defense, a party must prove that it had no contractual or other relationship with the third party causing the release, and that the third party was the sole cause of the environmental contamination. The defense requires a showing that the discharge could not have been prevented through the exercise of due care.\footnote{See State v. Time Oil Co., 678 F. Supp. 529 (W.D. Wash. 1988).} Additionally, to invoke the innocent landowner defense, a party must demonstrate that (1) it purchased the contaminated facility after the disposal of hazardous substances, and (2) after conducting all appropriate inquiry, it had no knowledge or reason to know that hazardous substances had been released or disposed of at the facility.\footnote{42 U.S.C. \S 9601(35)(A) and (B).}

In addition to the limited statutory defenses to a section 107 action, a variety of common law defenses may be available in an action for contribution, including estoppel, unclean hands, laches, due care, and contract or other agreement.

B. \textit{Oil Pollution Act}

Releases of petroleum are specifically excluded from coverage by CERCLA under the so-called "petroleum exclusion."\footnote{42 U.S.C. \S 9601(14).} In an effort to establish a comprehensive liability scheme for oil spills and in response to the Exxon Valdez incident, Congress recently enacted the Oil Pollution Act of 1990 (OPA).\footnote{33 U.S.C. \S\S 2701-2761.} The OPA contains language similar to the hazardous substance release provisions under CERCLA, but applies specifically to discharges or threatened discharges of oil into or on navigable waters, adjoining shoreline, or to the exclusive economic zone.\footnote{33 U.S.C. \S 2702(a).}

The scope of waters covered by the OPA is quite broad. EPA has defined "navigable waters" to include all interstate waters, and all waters which may be susceptible to or which could affect interstate or foreign commerce, including lakes,
streams, mud flats, wetlands, wet meadows, or natural ponds.\textsuperscript{62} This definition includes normally dry arroyos,\textsuperscript{63} as well as man-made waters.\textsuperscript{64} Given this broad definition, the OPA could have a significant impact on inland areas such as Utah.

A party who is responsible for a vessel or facility\textsuperscript{65} from which oil is discharged, or which poses a substantial threat of discharge, into or upon navigable waters may be liable for removal costs and damages.\textsuperscript{66} Liability is strict, joint and several. Removal costs may include the costs of containment and removal of oil or hazardous substances from water, or such other actions necessary to minimize or mitigate damage to the public health or welfare. These costs may also include costs necessary to prevent, minimize, or mitigate a substantial threat of a discharge of oil.\textsuperscript{67}

Under the OPA, an owner or operator may recover from a third party that was the sole cause of a discharge, any removal costs which are consistent with the NCP, as well as damages.\textsuperscript{68} This language is substantially similar to CERCLA section 107(a)(4)(B), but includes recovery of certain damages including the loss of real or personal property, loss of subsistence use of natural resources, or loss of profits or earning capacity.\textsuperscript{69}

Responsible parties may also seek contribution from other persons who are liable or potentially liable.\textsuperscript{70} Unlike CERCLA, the OPA does not direct what factors are to be applied in apportioning liability and instead a court must look to other applicable state and federal law. A contribution action

\begin{itemize}
\item \textsuperscript{62} 33 C.F.R. § 328.3(a).
\item \textsuperscript{63} Quivera Mining Co. v. EPA, 765 F.2d 126, 129-30 (10th Cir. 1985), cert. denied, 474 U.S. 1055 (1986).
\item \textsuperscript{64} Leslie Salt Co. v. United States, 896 F.2d 354, 360 (9th Cir. 1990), cert. denied, 111 S. Ct. 1089 (1991).
\item \textsuperscript{65} The OPA defines "responsible party" to include any person owning, operating, or chartering a vessel; any person owning or operating a facility; the lessee or permittee of an offshore facility; a licensee of a deep water port; and any person owning or operating a pipeline. In the case of an abandoned vessel or facility, "responsible party" includes any person who would have been a responsible party immediately prior to the abandonment of the vessel or facility. 33 U.S.C. § 2701(32).
\item \textsuperscript{66} 33 U.S.C. § 2702(a).
\item \textsuperscript{67} 33 U.S.C. § 2701(31).
\item \textsuperscript{68} 33 U.S.C. § 2702(b)(1)(B) and (d)(1)(A).
\item \textsuperscript{69} See 33 U.S.C. § 2702(b)(2).
\item \textsuperscript{70} 33 U.S.C. § 2709.
\end{itemize}
must be filed within three years of either payment of a claim or entry of a judgment or judicially approved settlement against the responsible party.\(^71\)

Several defenses similar to those in CERCLA are also available under the OPA. For instance, a responsible party is not liable for removal costs or damages if it can demonstrate that the incident resulted solely from an act of God; an act of war; or an act or omission of a third party, other than an employee, agent, or party in a contractual relationship with the responsible party; or some combination of the above.\(^72\)

C. Resource Conservation and Recovery Act

The Resource Conservation and Recovery Act (RCRA)\(^73\) has often been described as “cradle to the grave” regulation of hazardous substances. The Act applies primarily to active facilities and requires, among other things, that owners and operators of regulated facilities inspect and maintain the facility, remedy any deteriorations or malfunctions, and eventually close the facility to prevent or minimize the escape of hazardous materials. RCRA also contains a citizens suit provision whereby “any person may commence a civil action on his own behalf . . . against any person . . . who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an eminent or substantial endangerment to health or the environment . . . .”\(^74\)

The citizen suit provision has been widely interpreted to provide only injunctive relief and no cause of action for private damages.\(^75\) However, there is support for the proposition that an owner or operator of a RCRA facility may nonetheless recover the costs of a RCRA mandated corrective action or closure from other responsible parties by characterizing those costs as “response costs” under CERCLA.\(^76\) This situation may arise where a party acquires a RCRA facility which had been con-

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71. 33 U.S.C. § 2717(0)(3).
73. 42 U.S.C. §§ 6901-6992(k).
taminated by a previous owner. Although subsequent cleanups may be pursuant to a RCRA order, an owner or operator could characterize those costs as response costs and potentially recover them under section 107 of CERCLA. 77

D. State Programs

In addition to the federal statutes discussed above, several states have enacted laws providing for private recovery of environmental response costs. In Utah, the Legislature passed a state superfund statute in 1989 known as the Hazardous Substance Mitigation Act (HSMA). 78 The HSMA is considered a statute of "last resort." It authorizes the Utah Department of Environmental Quality to undertake cleanup and enforcement actions at potential hazardous waste sites in Utah only if the release cannot be cleaned up under any other statute. All remedial investigations and actions under the HSMA must be consistent with the substantive requirements of CERCLA and follow the procedures of the National Contingency Plan.

Any expenses incurred by the Department of Environmental Quality in the abatement of an emergency release, remedial investigation, or remedial action may be recovered from responsible parties. 79 A private party which incurs response costs in excess of its liability may seek to recover those costs from another party who is or may be liable. Unlike CERCLA, the Act prohibits joint and several liability. Instead, the HSMA provides for contribution and requires the court to apportion costs based upon the responsible party's contribution to the release. The court may consider such equitable factors as the quantity, mobility, persistence, and toxicity of materials contributed, and the relative behavior of responsible parties contributing to the release. The burden of proving proportionate contribution is on each party. If a party does not prove its proportionate contribution, the HSMA directs the court or the Director of the Department to apportion liability based upon available evidence and the standards set forth above. 80

77. See Mardan, 600 F. Supp. at 1049.
80. See Utah Code Ann. § 19-6-310(2); § 19-6-316(2); § 19-6-318(2) (1991).
In addition to the above statutory sources for cost recovery, there are several common law theories which may assist parties in recovering the costs of environmental cleanups. These actions may be pursued either in addition to CERCLA or other statutory claims, or independently if the elements of the applicable statute cannot be met.

A. Nuisance

Perhaps the most frequently used common law cause of action for relief from environmental harm is that of nuisance. Generally, an action in nuisance can provide both equitable relief and damages which result from the unlawful interference with the use and enjoyment of one's property. The elements of nuisance are:

(1) Another person’s conduct is the legal cause of an invasion of one’s interest in the private use and enjoyment of land; and

(2) The invasion is either intentional and unreasonable; or unintentional but otherwise actionable under the rules controlling liability for negligent conduct, reckless conduct, or abnormally dangerous conditions or activities. 81

In Utah, courts are generally more concerned with the nature and relative importance of the interests interfered with, than with the unreasonableness of the conduct leading to the invasion. The preeminent Utah case examining the application of nuisance in the environmental context is Branch v. Western Petroleum. 82 In Branch, a petroleum company was found liable for nuisance and strict liability for oil waste products which had been placed in a waste pit and subsequently seeped into the groundwater of an adjacent landowner. In reaching this conclusion the court looked to the type and extent of the invasion upon plaintiff’s property interest and found it of no consequence that defendant was engaged in a wholly legitimate business.

The Branch court also recognized the doctrine of nuisance per se. 83 Under this theory, if a defendant's conduct creates a

82. 657 P.2d 267 (Utah 1982).
83. Id. at 276.
nuisance and also violates a statutory prohibition, such conduct may constitute a nuisance per se without regard to the conduct or interests involved. In analyzing nuisance per se the reasonableness of defendant's conduct and the balancing of relative interests is immaterial because the Legislature has presumably intended to strike any such balancing in favor of the innocent party.

B. Trespass

A claim for trespass requires a plaintiff to demonstrate that a defendant or something in defendant's control has recklessly or negligently, or as a result of an abnormally dangerous activity, entered the land belonging to another and caused harm to the land or the possessor. Although closely related, trespass is distinguishable from nuisance in that trespass requires a physical invasion, while a nuisance generally interferes with a person's use and enjoyment of the land. In the context of pollution cases, these causes of action often overlap and a court may combine a trespass claim with a claim for nuisance.

C. Negligence

To recover on a claim of negligence, a potential plaintiff must show that:

(1) The defendant had a legal duty or obligation to the plaintiff which required the defendant to conform to a standard of conduct that protects the plaintiff from unreasonable risks;

(2) That the defendant failed to conform to that standard;

(3) That the harm suffered was proximately caused by the defendant's failure to conform to the standard; and

(4) That the plaintiff's person or property was actually injured or damaged.

The doctrine of negligence is not commonly used in environmental waste litigation because of the difficulties in proving defendant's duty to the plaintiff and causation of plaintiff's harm.

84. See Restatement (Second) of Torts § 165 (1965).
D. Strict Liability

Strict liability is often characterized as liability regardless of fault. Under Utah law, persons who engage in abnormally dangerous activities may be strictly liable for damages proximately caused by that activity, independent of the presence or absence of any negligent conduct. The critical issue is determining whether the conduct leading to the environmental harm constitutes an abnormally dangerous activity. Courts may look not only to the type of activity involved, but also its proximity to adjacent property owners, risks associated with the activity, and public policy. In *Branch*, the Utah Supreme Court held the oil company strictly liable for polluting its neighbor's water wells because the company's disposal of formation water into the waste pit "constituted an abnormally dangerous and inappropriate use of the land in light of its proximity to the [neighbor's] property and was unduly dangerous to [their] use of their well water."86 The court also indicated that it may be more inclined to impose strict liability upon industrial polluters because industry "can and should assume the costs of pollution as a cost of doing business rather than charge the loss to a wholly innocent party."87

IV. INSURANCE

An additional method of recovering or minimizing the costs of environmental liabilities is through insurance. Increasingly, companies involved in environmental cleanups are turning to present and former insurers to recover costs incurred in connection with such cleanups. However, because of the staggering costs associated with cleanups, adequate environmental coverage is often costly and difficult to obtain.

The opportunity to recover environmental response costs depends largely upon the extent of coverage provided in a liability insurance policy. If the policy either expressly excludes or includes environmental liability, then coverage issues should not arise. More commonly, coverage issues arise in determining whether a traditional Comprehensive General Liability (CGL) policy includes environmental harms. Since 1970, CGL policies have typically included a "pollution exclusion" that denies cov-

86. *Branch*, 657 P.2d at 274.
87. *Id.* at 275.
verage for pollution claims unless the pollution was "sudden and accidental." Thus, immediate and unintentional releases typically will be covered under a CGL policy, but gradual or long-term releases may not.

Where ambiguities in an insurance policy exist, the general rule of construction is in favor of the insured. If a claim is covered, courts typically allow recovery of response costs which can be characterized as damages to property. However, where response costs are considered a mere economic loss or equitable "damages," courts are more likely to deny recovery.

V. Conclusion

In light of the potentially staggering costs associated with environmental response, it has become increasingly important for persons facing these costs to identify other responsible parties to share the expense. Fortunately, several federal and state statutes, as well as common law theories, are available to assist parties in recovering environmental response costs from others who share the responsibility. By using these mechanisms, parties who incur costs can attempt to inject some level of fairness into the system, and force those parties which bear the bulk of the responsibility for environmental contamination to also bear the bulk of the cost.