

A Justification in a Denial: Making the Case for CERCLA's Limited Application Abroad in *ARC Ecology v. United States Department of the Air Force*

By Jessica L. Yarnall*

In ARC Ecology v. United States Department of the Air Force, the Ninth Circuit rejected the extraterritorial application of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) for Filipino residents that requested a preliminary assessment of two former U.S. military bases under CERCLA section 105(d). This Note explores the court's decision and argues that in rejecting CERCLA's application abroad in this case, the court's use of section 111(l) actually opens new ground in allowing CERCLA's extraterritorial application. Apart from section 111(A), this Note also explores the other general tests used for justifying the extraterritorial application of a statute—the amount of U.S. control over the land in question, and the resulting harm to the United States if a court refuses to apply the statute abroad—to provide further support for CERCLA's extraterritorial application even for claimants that do not meet the section 111(l) standard.

Introduction	757
I. Background.....	757
A. CERCLA's Legislative History: Last-Minute Legislation From a Lame Duck Congress	758
B. An Overview of the Major CERCLA Provisions.....	759

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* J.D. Candidate, University of California, Berkeley School of Law (Boalt Hall), 2007. B.A., Carleton College, 2002. I appreciate the comments and support I received from Professor Dan Farber, Priscillia de Muizon, Katie Saral, Jennifer Seidenberg, Misti Schmidt and other ELQ members and writing seminar participants. Conversations with Professor Phil Frickey, Professor Bob Infelise, Martin Wagner, and Marcello Mollo were also helpful in writing this piece.

- 1. CERCLA’s Basic Liability Regime: Sections 107 and 113 759
- 2. The National Contingency Plan and Preliminary Assessment: Section 105 760
- 3. Superfund and the Uses of Superfund Monies: Section 111 761
- C. The 1986 Superfund Amendments and Reauthorization Act (SARA): A Stronger CERCLA 763
 - 1. CERCLA’s Application to the Federal Government: Section 120 763
 - 2. CERCLA’s Application to Military Facilities: The Defense Environmental Restoration Program 764
- II. The Extraterritorial Application of U.S. Environmental Laws... 766
 - A. General Overview of Extraterritoriality 766
 - B. Extraterritorial Application of U.S. Environmental Laws... 767
- III. The Case: *ARC Ecology v. United States Department of the Air Force*..... 768
 - A. District Court: *ARC Ecology v. United States Department of the Air Force*..... 769
 - B. Appellate Court Decision: *ARC Ecology*..... 771
- IV. The Argument: Examining CERCLA’s Plain Text to Chart New Ground for Foreign Claimants 774
 - A. A Critique of the Court’s Holding in *ARC Ecology*..... 774
 - B. CERCLA Permits Foreign Claimants to Bring a Claim Under Section 111(*J*) 776
 - 1. A Strict Textual Reading of Section 111..... 778
 - 2. The Legislative History of Section 111(*J*) 779
 - 3. The Logistics of Applying Section 111 to Foreign Claimants..... 781
 - 4. Was the Inclusion of Section 111(*J*) a Mere Drafting Error?..... 782
 - 5. The Concepts of International Environmental Law Support a Reciprocal Remedy in U.S. Law..... 782
 - 6. Section 111(*J*) In Practice: Hypothetical Uses..... 783
 - C. CERCLA’s Application Apart from Section 111(*J*): Meeting the Extraterritoriality Tests for U.S. Control over Land and Resulting Harm to the United States with a Non-Application of the Law 784
 - 1. The Issue of U.S. Control Over Territory and the Extraterritorial Application of CERCLA 784
 - 2. Resulting Harm to the United States Without Applying CERCLA Extraterritorially: The Effects Test..... 786
- Conclusion..... 787

INTRODUCTION

In *ARC Ecology v. United States Department of the Air Force*, the Ninth Circuit ruled against extending the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) to cover two old U.S. military bases located in the Philippines.¹ *ARC Ecology* was a case of first impression about CERCLA's application abroad.² While rejecting CERCLA's utilization abroad for the Filipino claimants in this case, the court laid the groundwork for CERCLA's extraterritorial use in other situations.

First, in Parts I and II, this Note examines CERCLA's major provisions and the legislative history of the Act and its 1986 amendments, including the Defense Environmental Restoration Program. Next, Part III explores the general concept of the extraterritorial application of U.S. laws, and then will focus on the scenarios where U.S. environmental laws have been applied abroad. Part IV examines the district and appellate court holdings in *ARC Ecology*. Part V argues that the *ARC Ecology* decision, while denying a remedy to the Filipino claimants in this case, justified CERCLA's application abroad for other claimants that qualify under section 111(I). To support this argument, this Note explores this little-known CERCLA provision in depth and further argues CERCLA's extraterritorial application could potentially occur in circumstances outside of those delineated in section 111(I) based on other general tests for the extraterritorial application of a statute: the amount of U.S. control over a territory and the resulting harm to the United States for the non-application of an ordinarily domestic statute. The Note concludes by considering a few hypothetical scenarios applying this framework.

Before delving into the extraterritorial application of CERCLA, it is important to understand the statute's complex history, to which I will now turn.

I. BACKGROUND

Although grounded in a seemingly simple premise—that a polluter should be held responsible for the costs related to his contamination of a site—CERCLA is a complex statute that significantly transformed the environmental liability regime in the United States. Recently, claimants have tried to apply CERCLA abroad. Understanding CERCLA's complex legislative history and its major provisions is vital to assessing the current disputes about CERCLA's application to U.S. entities for violations occurring internationally.

1. *ARC Ecology v. U.S. Dep't of the Air Force (ARC Ecology I)*, 294 F. Supp. 2d 1152 (N.D. Cal. 2003), *aff'd*, 411 F.3d 1092 (9th Cir. 2005).

2. *Id.* at 1156 (finding “[p]laintiffs’ contention that CERCLA applies extraterritorially is one of first impression.”).

A. *CERCLA's Legislative History: Last-Minute Legislation From a Lame Duck Congress*

CERCLA,³ also known as Superfund, was passed by Congress in 1980 in response to hazardous waste catastrophes, such as Love Canal and the Valley of the Drums, for which Congress lacked the direct authority to force a prompt cleanup.⁴ The statute imposes liability on parties that are responsible in some part for polluting an area, as a landowner, waste generator, waste transporter, or arranger of waste.⁵ It also gives the government and private parties the authority to respond to contamination and be compensated for their cleanup efforts, either through suing responsible parties for cleanup costs or from government Superfund monies.⁶

The CERCLA regime came as the result of last-minute negotiations by a lame duck Congress working to pass the statute before the Reagan Administration took office.⁷ The CERCLA bill that ultimately passed was a combination of four previously considered bills,⁸ resulting in ambiguous statutory wording⁹ and a scant, confusing, and sometimes contradictory legislative history.¹⁰

3. 42 U.S.C. §§ 9601–9675 (2006). CERCLA's numbering scheme, at least for the first part of the statute (CERCLA §§101-125), corresponds to the U.S. Code numbering system, i.e., 42 U.S.C. § 9611 is CERCLA § 111. 42 U.S.C. 9651–9661 (2006) is referenced as CERCLA §§ 301–312. For the purposes of this Note, I will mainly refer to the CERCLA section numbers rather than the U.S. Code numbering scheme.

4. See JEFFREY MILLER & CRAIG JOHNSTON, *THE LAW OF HAZARDOUS WASTE DISPOSAL AND REMEDIATION* 52 (2d ed. 2005); Richard A. Wegman & Harold G. Bailey, Jr., *The Challenge of Cleaning Up Military Wastes When U.S. Bases Are Closed*, 21 *ECOLOGY L.Q.* 865, 882 (1994). Congress had been discussing liability legislation for several years prior to these incidents, but the publicity surrounding Love Canal was the final catalyst for action. See CAROLE STERN SWITZER & LYNN A. BULAN, *CERCLA: COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (SUPERFUND)*, BASIC PRACTICE SERIES, American Bar Association Section of Environment, Energy and Resources 3 (2002).

5. See CERCLA § 107(a)(3). The category of arranger liability is for persons who played some role in a waste disposal transaction, even if they were not the direct owner or the disposer of the waste. The idea behind this category of liability was to prevent parties from creating sham disposal transactions.

6. See TRAVIS WAGNER, *THE COMPLETE GUIDE TO THE HAZARDOUS WASTE REGULATIONS* 296 (3d ed. 1999).

7. See MILLER & JOHNSTON, *supra* note 4, at 53.

8. These bills include H.R. 85, S. 1480, HR. 7020 and S. 1341. The final version that passed as CERCLA was mainly a combination of H.R. 7020 and S. 1480. See SWITZER & BULAN, *supra* note 4, at 9. H.R. 7020, introduced by Representative James Florio (D-N.J.) focused on a government response to hazardous wastes, including oil, at abandoned waste sites. S. 1480, introduced by Senators Ed Muskie (D-Me.) and John Culver (D-La.), had a much larger fund for cleanup activities than other bills, and included private recovery rights. *Id.* at 6–8.

9. See MILLER & JOHNSTON, *supra* note 4, at 54 (quoting WEST, *ENVIRONMENTAL LAW: HAZARDOUS WASTES AND SUBSTANCES* (1988)).

10. SWITZER & BULAN, *supra* note 4, at 5–8. Switzer and Bulan further caution that “anyone seeking to rely upon legislative history for the purpose of interpreting CERCLA must

Courts were then forced to interpret these conflicting provisions, filling in the statutory gaps through case law.¹¹ In order to help clarify the complicated statute and alleviate the courts' interpretive burdens, Congress passed the 1986 Superfund Amendments and Reauthorization Act (SARA). Yet, as the discussion of the *ARC Ecology* case will illuminate, these amendments served as only a partial clarification of CERCLA's ambiguities. The courts' role in interpreting and applying CERCLA thus remains a challenge.

B. An Overview of the Major CERCLA Provisions

1. CERCLA's Basic Liability Regime: Sections 107 and 113

CERCLA establishes a basic liability regime and a cleanup fund, known as the Superfund, to remediate sites with water and soil contamination due to toxic substance pollution. There are several ways to compel action under CERCLA, depending on the type of party seeking compensation. The federal, state and tribal governments can bring suits to recover cleanup costs from any party that is not in compliance with CERCLA regulations.¹² Parties that may be liable under CERCLA, known as Potentially Responsible Parties (PRPs), can also bring contribution actions against each other demanding to share cleanup costs.¹³ Concerned citizens may also sue parties for failure to comply with CERCLA, or the government for failing to perform its non-discretionary CERCLA-related duties.¹⁴

do so carefully and with much explanation." *Id.* at 5. See also MILLER & JOHNSTON, *supra* note 4, at 54.

11. MILLER & JOHNSTON, *supra* note 4, at 54. One example of where courts sorted through CERCLA's contradictory wording was on the issue of active versus inactive waste sites. In one place, the statute references "inactive hazardous waste sites" while it also deems that CERCLA applies whenever there is a release or threatened release of any hazardous substance at a facility, regardless of whether the facility is active or inactive. Another example of where courts have parsed CERCLA's wording is in section 107 where the courts enabled parties outside of the EPA to address contamination—including states, tribes and other persons.

12. CERCLA § 106; 42 U.S.C. § 9606 (2006).

13. See CERCLA § 113; 42 U.S.C. § 9613. The recent Supreme Court decision in *Cooper Industries v. Aviall Services*, 543 U.S. 157 (2004), however, put the section 113 contribution action in limbo. *Aviall* demanded that for PRPs to seek contributions from one another, there must be a pending or previous action by the EPA, state government, tribe, or fully innocent party under CERCLA sections 106 or 107. See *infra* notes 124–27 and accompanying text.

14. CERCLA § 310(a); 42 U.S.C. § 9659(a). Citizen suits against a responsible party may be brought in the district court where the violation occurred. Suits against the government for failing to perform an action under section 310(a)(2) must be brought in D.C. District Court. See *id.* § 310(b); see also SWITZER & BULAN, *supra* note 4, at 22–23.

To establish liability for cleanup costs, a claimant is required to show a release or threatened release of a substance by a facility.¹⁵ Defendants to CERCLA actions fall into four general categories: current or past owners, operators, generators or transporters of the waste.¹⁶ PRPs, or the people or companies that fall in these four categories, are almost never able to escape liability through selling the property or otherwise disassociating themselves from the operation.¹⁷ Because CERCLA was intended to establish nearly strict liability, there are only three narrow defenses to CERCLA liability for contamination: an act of God, an act of war, or an act of a third party.¹⁸ Compelling cleanup action under the CERCLA scheme involves following the steps outlined in the National Contingency Plan, as described below.

2. *The National Contingency Plan and Preliminary Assessment: Section 105*

CERCLA requires the EPA to develop a National Contingency Plan (NCP)¹⁹ to guide CERCLA response actions and Superfund expenditures.²⁰ The NCP outlines the steps that actors must follow in responding to contamination, including methods for discovering contamination, evaluating releases to determine impacts, determining the appropriate response and extent of cleanup, and ensuring that actions are cost-effective.²¹ The NCP also provides a check on liability, requiring response actions by a party conducting cleanup be generally consistent with the procedures outlined in the NCP in order for the responders to seek compensation from a PRP.²²

15. A "facility" under CERCLA is broadly construed to mean most entities that emit waste. See 42 U.S.C. § 9601(9) (including "any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or . . . any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located . . ." *Id.*); see also *infra* note 143.

16. See CERCLA § 107; 42 U.S.C. § 9607 (2006).

17. See CERCLA § 107(e)(1); 42 U.S.C. § 9607(e)(1); WAGNER, *supra* note 6, at 329. For example, potentially responsible parties are prohibited from transferring liability to another party by means of a hold harmless or indemnification clause in a contract. One of the court's arguments in *ARC Ecology* was that liability issues should have been settled in the base turnover agreement, signed when the base returned to Filipino control. In a domestic CERCLA case, it would not be possible to contract out of CERCLA liability.

18. CERCLA § 107(b); 42 U.S.C. § 9607(b).

19. National Oil and Hazardous Substances Pollution Contingency Plan ("NCP"), 40 C.F.R. pt. 300 (2005). The NCP was first published prior to CERCLA to guide oil spill responses under the Clean Water Act. See Ronald G. Aronovsky, *Federalism and CERCLA: Rethinking the Role of Federal Law in Private Cleanup Cost Disputes*, 33 *ECOLOGY L.Q.* 1, 15 n. 59 (2006).

20. See CERCLA § 104(a)(1); see also MILLER & JOHNSTON, *supra* note 4, at 57.

21. See WAGNER, *supra* note 6, 326–27. See 40 C.F.R. § 300.415(b)(2) for a list of factors to be considered when determining the appropriate removal response at a site.

22. CERCLA § 107; 42 U.S.C. § 9607.

The first step for compelling CERCLA action under the NCP involves conducting the preliminary assessment to determine what kind of response is necessary. This assessment occurs at sites where there is a release or threatened release of a contaminant.²³ CERCLA section 105(d) allows “*any person* who is, or may be, affected by a release”²⁴ to petition the President²⁵ for a preliminary assessment of a property.²⁶ Within twelve months of submission, the government must complete the assessment or provide petitioners with an explanation as to why it was not conducted.²⁷ If the assessment reveals that the site poses a danger to health or the environment, the President places the site on the National Priorities List, a listing of contaminated sites, in the order of its relative danger to public health and the environment.²⁸

CERCLA also breaks down response procedures based on the type of response action that is necessary. The type of action governs how closely the NCP must be followed. For sites where an immediate, short-term response (a “removal action”) is needed to protect human health, such as installing a fence around a facility or draining the pollutants from a vessel, actions can proceed without the more extensive burdens of exactly following the NCP.²⁹ More long-term cleanups (“remedial actions”), such as treating soil and groundwater, demand the NCP’s detailed regulations be closely followed.³⁰ Sometimes, both removal and remedial actions are appropriate.

3. *Superfund and the Uses of Superfund Monies: Section 111*

In order to pay for the response costs incurred by the government or by private parties in compliance with the NCP, Congress established the national Superfund.³¹ Superfund monies are only to be used if the costs

23. See WAGNER, *supra* note 6, at 342–43.

24. CERCLA § 105(d); 42 U.S.C. § 9605(d) (emphasis added).

25. Although CERCLA utilizes the term “President” throughout, the EPA conducts these preliminary assessments on behalf of the President. If the site is a federal facility, then the authority for this assessment is that agency. See CERCLA § 115(d); 42 U.S.C. § 9615; *see also* 40 C.F.R. § 300.420(b)(5) (2006).

26. CERCLA § 105(d); 42 U.S.C. § 9605(d) (2006).

27. *Id.*

28. *Id.*

29. See SWITZER & BULAN, *supra* note 4, at 90. Removal actions usually take less than twelve months and cost less than \$2 million. See WAGNER, *supra* note 6, at 327–28.

30. See SWITZER & BULAN, *supra* note 4, at 60–61; *see also* WAGNER, *supra* note 6, at 342–43.

31. Superfund may not be much of a “super” fund any longer. Originally, the fund’s monies were derived from a special tax on polluting industries. But with stagnant funds, Superfund cleanups of sites where polluters cannot be located or are financially insolvent have also slowed. See PennEnvironment, *On April 15, American Taxpayers, Not Polluters, Will Pay To Clean Up Toxic Waste Sites* (Apr. 2006), available at <http://www.pennenvironment.org/PEair.asp?id2=23565&id3=PE&id4=PEHP>.

for a removal or remedial action cannot be recovered from potentially responsible parties.³² Due to limited federal Superfund monies, high priority sites that require long-term remedial action are ranked according to their danger on the National Priorities List (NPL), which makes the site eligible for continued federal funding.³³ The NPL is not intended to limit CERCLA liability; rather, it is a way to prioritize and share the paltry federal funding available through Superfund.³⁴ Even if a site is not listed on the NPL, private parties can still be required to remediate a site or the government can undertake a short-term removal action.³⁵ The NPL listing is only a prerequisite for long-term response actions funded by Superfund.

Section 111, a lesser-known and litigated provision of CERCLA, further discusses the uses of the Superfund, which, in addition to covering some government and private party response costs also includes recovery provisions for a specified class of foreign claimants.³⁶ More specifically, section 111(I) allows foreign claimants to petition for Superfund monies if: (1) the release of a hazardous substance occurred in navigable water or the territorial sea; (2) there is no other compensation for this loss; (3) the substance was released from a facility or vessel; (4) recovery is authorized by a treaty or executive agreement or the Secretary of State certifies that a country provides a comparable remedy for U.S. claimants.³⁷

Section 111(I) took on new importance in *ARC Ecology v. United States Department of the Air Force*. The court denied the Filipino claimants a remedy under other CERCLA sections saying that the presence of section 111(I) illustrated the narrow grounds for which foreign claimants were eligible for CERCLA funds. Yet in this denial, the court also recognized the merit of a section 111 claim for foreign claimants who could meet its criteria.

While the major provisions of CERCLA outlined a basic liability regime, its application to military and government actors was less than clear. Congress made this ambiguity one of the major focuses of the 1986 amendment process.

32. See WAGNER, *supra* note 6, at 296.

33. *Id.* at 345–46.

34. A site's listing "on the NPL is not a precondition to EPA's ability to perform shorter term 'removal actions' . . . or for EPA to require other parties to perform removal or response actions." MILLER & JOHNSTON, *supra* note 4, at 57.

35. *Id.*

36. See generally CERCLA § 111; 42 U.S.C. § 9611 (describing the Superfund).

37. CERCLA § 111(I)(1)–(4); 42 U.S.C. § 9611 (2006).

C. *The 1986 Superfund Amendments and Reauthorization Act (SARA): A Stronger CERCLA*

With CERCLA's drafting problems and its slow enforcement through the early years of the Reagan Administration, Congress quickly began discussing amendments. In 1986, it passed the Superfund Amendments and Reauthorization Act (SARA) to strengthen, clarify, and expand CERCLA's liability scheme.³⁸ Major additions to CERCLA via the SARA provisions included more detailed cleanup standards and settlement provisions, an expanded state role in cleanup actions, and an addition of citizen suit provisions.³⁹ Two significant SARA provisions discussed here are CERCLA's application to federal facilities through section 120, and its application to military installations through SARA's Defense Environmental Restoration Program.⁴⁰

1. *CERCLA's Application to the Federal Government: Section 120*

In expanding CERCLA's applications, SARA also elucidated CERCLA's relevance to federal agencies and facilities.⁴¹ Adding section 120 clarified that federal facilities "under the jurisdiction of the Secretary and owned by, leased to, or otherwise possessed by the United States at the time of actions leading to contamination by hazardous substances" would subject the government to CERCLA liability.⁴² The government's main liability from section 120 stems from weapons facilities and contaminated military bases—the issue in *ARC Ecology*. Under this provision the government incurs liability as an "operator" even if it never owned the site.⁴³ Congress spelled out federal liability for military facilities more clearly in the Defense Environmental Restoration Program, another provision of the SARA amendments.

38. See MILLER & JOHNSTON, *supra* note 4, at 55–56.

39. See SWITZER & BULAN, *supra* note 4, at 19–23.

40. For an explanation of the Defense Environmental Restoration Program (DERP), see *infra* notes 45–49 and accompanying text.

41. Wegman & Bailey, *supra* note 4, at 884. The government can only be held liable for facilities over which it had actual control, not for situations where the government or its agency only acted in a regulatory capacity. See SWITZER & BULAN, *supra* note 4, at 28–29.

42. 10 U.S.C. § 2701(c)(1)(B). Federal leadership on CERCLA cleanup was viewed as important: "[t]he federal government must be seen as one that practices what it preaches, and it must set an example for others. It should (and in many cases the law requires it to) do what it asks of others." Steven Herman, *Environmental Cleanup and Compliance at Federal Facilities: An EPA Perspective*, 24 ENVTL. L. 1097, 1098 (1994).

43. See ROGER FINDLEY, DANIEL FARBER & JODY FREEMAN, *CASES AND MATERIAL ON ENVIRONMENTAL LAW* (6th ed.) 778–79 (2003).

2. CERCLA's Application to Military Facilities: The Defense Environmental Restoration Program

Another significant part of the 1986 SARA amendments—the Defense Environmental Restoration Program (DERP)⁴⁴—dealt more specifically with the government's liability for military installations.⁴⁵ DERP outlined CERCLA section 120's application to military facilities, and required the remediation of Department of Defense-operated federal sites:⁴⁶

The Secretary of Defense shall carry out a program of environmental restoration at facilities under the jurisdiction of the Secretary Activities of the program . . . shall be carried out subject to, and in a manner consistent with, section 120 of CERCLA The Secretary shall carry out (in accordance with the provisions of this chapter and CERCLA) all response actions with respect to releases of hazardous substances from each of the following:

Each facility or site owned by, leased to, or otherwise possessed by the United States and under the jurisdiction of the Secretary.

Each facility or site which was under the jurisdiction of the Secretary and owned by, leased to, or otherwise possessed by the United States at the time of actions leading to contamination by hazardous substances.

Each vessel owned or operated by the Department of Defense.⁴⁷

The DERP provisions delineating CERCLA's application to military facilities were one step in a long and continuing tug-of-war between the Department of Defense (DOD) and Congress over environmental

44. DERP is funded by the Defense Environmental Restoration Account, which is split into two accounts, depending on if the base is an active site or slated to be closed. *See infra* note 45. Active bases and formerly used defense sites (FUDS) are funded through the Environmental Restoration Account whereas bases scheduled for closure or realignment are funded through the Base Realignment and Closure (BRAC) account. Funds from these accounts are allocated based on the site's prioritization and the future anticipated needs of the military branch. For more explanation of DERP's funding structure, see Office of the Deputy Under Secretary of Defense (Installations & Environment) Environmental Management Office, *Defense Environmental Restoration Program Funding*, <https://www.denix.osd.mil/denix/Public/Library/Cleanup/CleanupOfc/derp/funding.html> (last visited July 16, 2006).

45. DERP is considered to be part of the SARA Amendments. "In 1986 Congress amended CERCLA to create the Defense Environmental Restoration Program (DERP)." Office of the Deputy Under Secretary of Defense (Installations & Environment) Environmental Management Office, *History of the Defense Environmental Restoration Program*, <https://www.denix.osd.mil/denix/Public/Library/Cleanup/CleanupOfc/derp/history.html> (last visited July 16, 2006).

46. CERCLA section 120 is discussed *supra* Section I.C(1). For the text of DERP, see 10 U.S.C. § 2701(a)(2); 42 U.S.C. § 9620.

47. 10 U.S.C. § 2701(c)(1)(a)–(c).

compliance.⁴⁸ A main thorn in this debate involved overseas DOD activities. Congress recognized the U.S. duty to remediate overseas bases as a legal obligation, at least in some part: “the United States has an obligation, *partly legal* but primarily moral, to clean up damage to the environment caused by American military operations.”⁴⁹ The DOD was less convinced that it should clean up its operations overseas, and was not forthcoming in sharing its present activities with Congress.

One example of the terse interactions between the DOD and Congress on environmental issues came in 1991 committee hearings where Congress received conflicting information from the DOD regarding its overseas environmental compliance activities at the bases at issue in *ARC Ecology*. The DOD originally asserted to Representative Richard Ray, chair of the House Armed Services Hearing on Environmental Compliance, that its operations adhered to environmental regulations promulgated both by the United States and the Philippines, but it quickly retracted that assertion.⁵⁰ The DOD officials then informed Representative Ray they awaited translations of Filipino environmental laws before choosing a method by which to comply with them—a weak explanation since Filipino laws were already published in English.⁵¹ Given these types of interactions, DERP reflected Congress’ intent to clearly outline the military’s obligation to comply with CERCLA regulations in all of its activities.

Through the passage of the SARA amendments, including section 120 and the DERP, Congress clarified its intent with regard to CERCLA’s application. Though potentially costly, Congress wanted the federal government to take responsibility for its own pollution, on military bases or otherwise. Even with SARA’s attempt to clarify and strengthen CERCLA’s liability regime, however, several ambiguities lingered and courts continue to interpret the statute to fill in concepts that remain unclear.

ARC Ecology tests CERCLA’s application to the U.S. military in its overseas operations in light of the DERP amendments. In order to understand why bringing suit under CERCLA might be problematic as a foreign plaintiff seeking compensation for damages incurred abroad, it is

48. The DOD continues to defend itself on shirking cleanup issues related to base closure. See *Critics: BRAC Too Tied to Money*, Insidedefense.com (Mar. 9, 2006), available at <http://www.military.com/features/0,15240,90332,00.html>.

49. Wegman & Bailey, *supra* note 4, at 934 n.377 (quoting H.R. Rep. 101-665, 101st Cong. 2d. Session, 344, 348 (1990), reprinted in 1990 U.S.C.C.A.N. 2931, 3074) (emphasis added).

50. See *id.* at 937 nn.388–90 (citing DOD Env’tl. Programs: Hearings Before the Readiness Subcomm., the Env’tl. Restoration Panel, and the Dep’t of Energy Defense Nuclear Facilities Panel of the H. Comm. on Armed Servs., 102d Cong., 1st Sess. 194 (1991)).

51. See *id.* at 937 nn.390–92.

important to first appreciate how and when U.S. laws are applied extraterritorially.

II. THE EXTRATERRITORIAL APPLICATION OF U.S. ENVIRONMENTAL LAWS

A. General Overview of Extraterritoriality

To examine CERCLA's application abroad, it is necessary to give a general overview of the concept of extraterritoriality, with special attention to the environmental law context.⁵² Although Congress does have the power to pass and enforce laws outside of the United States, there is a strong presumption against the extraterritorial application of U.S. laws for two reasons: Congress' traditional role as a domestic legislative body, and the notion of State⁵³ sovereignty.⁵⁴ The primary role of Congress is to pass legislation to solve domestic problems, and most pieces of legislation are passed with the intent of applying only within the United States unless otherwise stated.⁵⁵ Without explicit statutory language, courts generally avoid construing statutes to apply outside of the United States since an application of U.S. laws in other countries could lead to clashes between sovereign States.⁵⁶

Extraterritoriality rules apply with less force in an area abroad where there is some degree of U.S. influence, such as a global commons area. For an area where the United States "has sovereignty or has some

52. This Note provides only a short overview of the concept of extraterritoriality since the main focus of this piece is CERCLA and not extraterritoriality in general. For a more in-depth discussion of extraterritoriality and current jurisprudence in this area, see Gerald F. Hess, *The Trail Smelter, the Columbia River, and the Extraterritorial Application of CERCLA*, 18 GEO. INT'L ENVTL. L. REV. 1 (2005). Hess categorizes the current analytical approaches to extraterritoriality as those: 1) involving congressional intent as demonstrated by the statute; 2) pertaining to the effects of an actor's conduct; 3) relating to the reasonableness of the statute's application; and 4) avoiding the presumption against extraterritoriality altogether. *Id.* at 25-42. Other scholars, such as Eskridge, Frickey, and Garrett, suggest that extraterritoriality is a strong enough presumption that it can only be overcome by statutory text. See WILLIAM ESKRIDGE, PHILIP FRICKEY & ELIZABETH GARRETT, *LEGISLATION* (3d ed. 2001); see also LINDA MALONE & SCOTT PASTERNAK, *DEFENDING THE ENVIRONMENT: CIVIL SOCIETY STRATEGIES TO ENFORCE INTERNATIONAL ENVIRONMENTAL LAW* (2004).

53. I use the term State in the international sense of the word.

54. Some scholars argue that the presumption against extraterritorial application of law is strong enough to be termed a "clear statement rule" or a presumption that can only be overcome through an express statement found in the plain text of the statute. See ESKRIDGE ET AL., *supra* note 52, at 908.

55. See *Equal Employment Opportunity Comm'n v. Arabian Oil*, 499 U.S. 244, 248 (1991) (citing *Foley Bros. v. Filardo*, 336 U.S. 281, 284-85 (1949) and *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 147 (1957)).

56. See Hess, *supra* note 52, at 25-46. While U.S. courts generally avoid applying U.S. laws abroad, this area of the law is currently in flux. *Id.* For a more extensive analysis of the extraterritoriality concept and current court approaches, see *id.*

measure of legislative control,”⁵⁷ “the presumption against extraterritoriality . . . [is] much weaker.”⁵⁸

For an area outside of the United States with no U.S. legislative control or influence, a statute can be applied extraterritorially in two general scenarios: if the plain text of the statute states that Congress intends an extraterritorial application or if harm would result to the United States if the statute were not applied abroad. The latter scenario has provided for the extraterritorial application of antitrust and trademark laws even in the absence of explicit statutory language permitting such a use.⁵⁹

B. *Extraterritorial Application of U.S. Environmental Laws*

For environmental laws, courts will overcome the presumption against extraterritoriality—even without explicit wording in the statute—if there is evidence that an action taken abroad will adversely impact the United States, the global commons, or another sovereign country that has not consented to the damage.⁶⁰ For example, the D.C. Circuit in *Environmental Defense Fund v. Massey* applied the National Environmental Policy Act (NEPA) to U.S. government actions in Antarctica since the territory is considered part of the global commons and would therefore pose no sovereignty conflict since it is partially “owned” by all countries.⁶¹ The court required the U.S. government to undertake an environmental impact study before any major action occurred there despite the presumption against NEPA’s extraterritorial application.⁶²

57. *Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-04-256-AAM, 2004 U.S. Dist. LEXIS 23041, at *16 (E.D. Wash. Nov. 4, 2004) (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)).

58. *Env’tl. Def. Fund v. Massey*, 986 F.2d 528, 533 (D.C. Cir. 1993). The statute’s language regarding the extraterritorial application of a statute only comes into play if the area is “beyond places over which the United States has some sovereignty or some measure of legislative control.” *Arabian Oil*, 499 U.S. at 248.

59. See *Pakootas*, 2004 U.S. Dist. LEXIS, at *19 (quoting *Massey*, 986 F.2d at 531). There is no presumption against extraterritoriality if the failure to extend the statute will result in adverse effects in the United States, as in the Sherman Antitrust Act and the Lanham Trademark Act.

60. MALONE & PASTERNAK, *supra* note 52, at 214 (citing *Sierra Club v. Adams*, 578 F.2d 389 (D.C. Cir. 1978) and *Massey*, 986 F.2d 528).

61. 986 F.2d 528 (D.C. Cir. 1993).

62. *Id.* Some authors argue that *Massey* could also justify a “headquarters” theory—the idea that federal decisions which trigger U.S. environmental statutes abroad are made in the United States; thus, no discussion about an extraterritorial application of a statute would be necessary since the *decision* is made domestically. See MALONE & PASTERNAK, *supra* note 52, at 214. Enthusiasm about *Massey* also waned after the D.C. District Court decision in *NEPA Coalition of Japan v. Aspin*, 837 F. Supp. 466 (D.D.C. 1993), which declined to apply NEPA to a Japanese military base due to sovereignty concerns. See also *infra* notes 145 & 151 for recent cases that overcome sovereignty concerns to apply U.S. law to military installations abroad.

The extraterritorial application of environmental laws that include citizen suit provisions is similar to the laws that do not have such provisions. Under environmental statutes with citizen suit provisions—CERCLA, the Resource Conservation and Recovery Act (RCRA), and the Clean Water Act—the government can generally be held accountable for failing to comply with a mandatory duty.⁶³ To bring a citizen suit for environmental violations occurring abroad, a court would first need to conduct a *Massey*-like analysis discussing: 1) the ownership of the land in question; 2) the plain language of the statute; and 3) use the general concepts of statutory interpretation to determine the legislative intent behind the statute before it could discuss the merits of the failure to act under the statute.⁶⁴

Building on a critique of *ARC Ecology*, this Note will discuss CERCLA's application abroad utilizing the tests for the extraterritorial application of a statute—the ownership status of the land at issue, the statute's plain text regarding a foreign application, and the legislative history as it pertains to this application.

III. THE CASE: *ARC ECOLOGY V. UNITED STATES DEPARTMENT OF THE AIR FORCE*

CERCLA's complicated text and legislative record combined with the historical presumption against a law's extraterritorial application provide the backdrop to the court's holding in *ARC Ecology*. But the history of *ARC Ecology* dates back even further than the CERCLA debates. The United States first established a military presence in the Philippines following World War II when it signed an agreement allowing it to establish bases. Over the years, the relationship between the U.S. military bases and the local Filipino communities has been tumultuous. Due to years of strong protest from Filipino citizens, the Filipino Senate voted not to renew the base agreement with the United States in 1991, forcing U.S. troops to pull its operations out of Clark Air Base and Subic Bay Naval Station.⁶⁵

Soon after the U.S. military left the bases, Filipino citizens began suffering injuries from the unexploded bombs and contaminated water found on the former bases and in surrounding communities.⁶⁶ The contaminated water sickened residents who complained of abnormally high occurrences of cerebral palsy, leukemia, heart defects, cancer,

63. MALONE & PASTERNAK, *supra* note 52, at 215.

64. *Id.*

65. See Kim David Chanbonpin, *Holding the U.S. Accountable for Environmental Damages Caused by the U.S. Military in the Philippines: A Plan for the Future*, 4 ASIAN-PAC. L. & POL'Y J. 245, 270 (2003).

66. *Deadly Legacy; Dangerous Ground: Leftover Bombs, Chemicals Wreak Havoc at Former U.S. Bases in Philippines* (hereinafter "Deadly Legacy"), S.F. CHRON., July 5, 2001, at A1.

urinary infections, and skin rashes.⁶⁷ To compound the problems, the Mount Pinatubo eruption in June 1991 forced 30,000 refugees to relocate to the Clark Air Force Base. Unaware of the environmental problems there, the refugees dug wells on top of an old Air Force motor pool where toxic chemicals had already leached into the groundwater.⁶⁸

Filipino government officials were not informed of the extensive environmental damage at Clark and Subic until a 1992 U.S. General Accounting Office report emerged, discussing the extensive environmental problems at the Filipino bases.⁶⁹ The report highlighted the severe groundwater pollution at the Clark Air Force Base and the port damage to the Subic Bay Naval Station, which remained contaminated from battleship repairs occurring as far back as the Vietnam War.⁷⁰ Residents soon demanded action, and brought suit against the United States asking for an extraterritorial application of CERCLA to the former military installations.⁷¹

A. *District Court: ARC Ecology v. United States Department of the Air Force*

In June 2000, eight years after the United States stopped its formal occupation of the two military bases in the Philippines, a group of Filipino citizens petitioned the Air Force and Navy to conduct a preliminary assessment at the former Clark Air Force Base and Subic Bay Naval Base under CERCLA section 105(d). The Air Force and Navy declined to conduct such an assessment.⁷²

Following this denial, the Filipino citizens brought a citizen suit under sections 105(d)⁷³ and 310(a)⁷⁴ of CERCLA and sections 706(1) and (2)⁷⁵ of the Administrative Procedure Act (APA) to compel a preliminary assessment of the bases. Appellants argued that these provisions of

67. See *id.*; see also Chanbonpin, *supra* note 65, at 270.

68. See Chanbonpin, *supra* note 65, at 270.

69. U.S. GEN. ACCOUNTING OFFICE, MILITARY BASE CLOSURES: U.S. FINANCIAL OBLIGATIONS IN THE PHILIPPINES, Pub. No. B-242758 (1992). See also *Deadly Legacy*, *supra* note 66, at A1.

70. See *Deadly Legacy*, *supra* note 66, at A1.

71. See *id.*

72. Brief for Federal Appellees at 9, *ARC Ecology v. U.S. Dep't of the Air Force* (9th Cir. Aug. 2, 2004) (No. 04-15031). The President delegates the authority to conduct preliminary assessments to the individual federal agencies in cases where the claim is against one of these agencies, which is the Secretary of Defense for military agencies.

73. 42 U.S.C. § 9605(d) (2006).

74. 42 U.S.C. § 9659(a).

75. 5 U.S.C. § 706 (requiring the court to “compel agency action unlawfully withheld or unreasonably delayed” when agency action is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law”).

CERCLA, in combination with the 1986 SARA amendments establishing the DERP,⁷⁶ permitted an extraterritorial application of CERCLA.⁷⁷

The district court dismissed the case for failure to state a claim under CERCLA, finding the statute's plain language did not allow its extraterritorial application.⁷⁸ The court based its holding on the legislative history, logistical framework and context of the statute, the plain language of CERCLA, and another case which denied the extraterritorial application of RCRA, a similar statute.⁷⁹

First, the court examined CERCLA's legislative history, paying special attention to the 1986 CERCLA reauthorization debates.⁸⁰ The court stated that there was a "decidedly domestic focus" to the discussions, despite the new requirement passed as part of SARA debates that the DOD report to Congress on its foreign environmental remediation expenditures.⁸¹ While the plaintiffs took this requirement as a sign of Congress' intent to apply CERCLA abroad, the court weighed another reporting requirement more heavily: a study about the total number of Superfund sites. The assessment, completed by the U.S. Technology Office, only listed sites located within the United States and did not list any sites abroad.⁸²

Second, the court rejected CERCLA's application abroad based on the larger context of CERCLA, saying that the statute did not account for the logistics of assessing foreign claims. For example, other parts of the section 105 guidelines pertaining to the NPL only required compiling a list of priorities among the sites with contaminant releases "throughout the United States," not in other territories.⁸³ Since the initial preliminary assessment and NCP guidelines at issue in this case were also part of section 105, the court reasoned that Congress did not intend section 105(d) to permit preliminary assessments abroad.⁸⁴

Third, the court said that the presumption against CERCLA's extraterritorial application was not overcome by the plain language of the statute. The definition of United States only includes "any other territory or possession over which the United States has jurisdiction"—which did not extend to the Philippines as an independent, sovereign nation.⁸⁵ The

76. 10 U.S.C. §§ 2701–2709.

77. *ARC Ecology v. U.S. Dep't of the Air Force (ARC Ecology II)* 411 F.3d 1092, 1094–95 (9th Cir. 2005).

78. *ARC Ecology v. U.S. Dep't of the Air Force (ARC Ecology I)*, 294 F. Supp. 2d 1152, 1159 (N.D. Cal. 2003).

79. *See id.*

80. *ARC Ecology I*, 294 F. Supp. 2d at 1156.

81. *See id.*; *see also* 10 U.S.C. § 2701(c)(1)(B) (2006).

82. *ARC Ecology I*, 294 F. Supp. 2d at 1156.

83. *See* CERCLA § 105(a)(8)(B); *see also* *ARC Ecology I*, 294 F. Supp. 2d at 1156.

84. *ARC Ecology I*, 294 F. Supp. 2d at 1157.

85. *Id.* at 1158.

court noted that another CERCLA provision not at issue in the case, section 111(*l*), delineates instances where foreign claimants are entitled to make claims.⁸⁶ Foreign claimants are eligible to bring a case for CERCLA compensation under section 111(*l*) when “recovery is ‘authorized’ by a ‘treaty or an executive agreement between the United States and foreign country or if the Secretary of State . . . certifies that such country provides a comparable remedy for United States claimants.’”⁸⁷

Finally, the court examined the citizen suit provisions found in RCRA—as a statute similar to CERCLA—to provide additional justification for denying the extraterritorial CERCLA claim. The court found that there was no support to apply CERCLA abroad since a New York district court’s decision in *Amlon Metals v. FMC Corporation* concluded RCRA did not apply “to waste located within the territory of another sovereign nation.”⁸⁸ The court in *Amlon Metals* based its holding on the idea that there are no provisions to protect the sovereignty of foreign countries contained within RCRA, although the statute contains similar provisions to protect the rights of domestic state governments.⁸⁹

The district court dismissed the Filipino citizens’ claim with prejudice.⁹⁰

B. Appellate Court Decision: ARC Ecology

On *de novo* review, the Ninth Circuit Court of Appeals affirmed the lower court’s ruling that CERCLA does not apply extraterritorially to the Filipino claimants in this case. The court examined five main issues on appeal: the plain language, the timing of the suit, the intent of Congress, the logistics of applying CERCLA abroad, and the relevance of international law to the case.

First, the court noted that CERCLA’s language regarding extraterritorial intent was ambiguous in the provisions at issue, and since another section explicitly provided a remedy for foreign claimants, the text would not justify CERCLA’s application in this case. CERCLA’s general definition of United States in section 101(27) includes a “*possession* over which the United States has jurisdiction.”⁹¹ While the language in section 105(d) is silent about the locations that it covers, the 1986 DERP amendment indicates CERCLA covers any base possessed

86. CERCLA § 111(*l*); 42 U.S.C. § 9611(*l*) (2006).

87. *ARC Ecology v. United States Dep’t of the Air Force (ARC Ecology I)*, 294 F. Supp. 2d 1152, 1158 (N.D. Cal. 2003) (quoting CERCLA § 111(*l*)).

88. *ARC Ecology I*, 294 F. Supp. 2d at 1159 (quoting *Amlon Metals v. FMC Corp.*, 775 F. Supp. 668, 672 (S.D.N.Y. 1991)).

89. *Id.* (quoting *Amlon Metals*, 775 F. Supp. at 672).

90. *Id.* at 1160.

91. *ARC Ecology v. United States Dep’t of the Air Force (ARC Ecology II)* 411 F.3d 1092, 1097 (9th Cir. 2005).

by United States at time of contamination,⁹² which might allow “reasonable minds [to] conclude that, when it was enacted CERCLA applied to Clark and Subic because they were possessed by the U.S.”⁹³ Despite evidence that CERCLA might apply to the bases through the application of DERP, the court elected not to make a decision about this issue in its holding due to the timing of the claim.⁹⁴

The court found that CERCLA has language pertaining specifically to foreign citizens, which, though not an issue in this case, made a strong argument for “*expressio unius est exclusio alterius*.”⁹⁵ CERCLA section 111(*l*) allows recovery for “a narrow class of foreign claimants, which does not include the appellants” in this case.⁹⁶ Section 111(*l*) requires the release of contaminants to occur in navigable waters, or the territorial sea or shoreline of a foreign country, as opposed to a military installation.⁹⁷ The section 111(*l*) provisions also requires there to be a treaty authorizing recovery, which no longer existed here.⁹⁸ Based on the presence of this provision in CERCLA, the court concluded that Congress would have used more explicit language if it also intended section 105(*d*) to apply abroad.⁹⁹

Second, the court emphasized that the timing of appellants’ claim was a main issue for its denial: “Even if at its inception CERCLA covered Clark and Subic, the relevant inquiry is whether the appellants had a cause of action at the time they commenced this litigation in 2002.”¹⁰⁰ Since the base agreement with the Philippines expired ten years prior to the suit, the President did not have the authority to conduct the preliminary assessment at this later date “absent some agreement with the foreign government,” which the court concluded did not exist here.¹⁰¹ As a result of the timing argument, the court never reached a conclusion as to whether CERCLA applied to foreign military bases through an application of the DERP amendments.¹⁰² Since the claim was filed ten years after the United States gave up control of the bases with no special

92. DERP passed as part of the SARA amendments in 1986.

93. *ARC Ecology II*, 411 F.3d at 1097.

94. For a discussion of the timing problems with the claim, see *infra* notes 100–03 and accompanying text.

95. *ARC Ecology II*, 411 F.3d at 1097. This Latin phrase stands for the doctrine claiming that statutory “omissions are the equivalent of exclusions when a statute affirmatively designates certain persons, things or manners of operation.” *Id.* at 1100.

96. *Id.* at 1099.

97. *Id.*

98. *ARC Ecology II*, 411 F.3d at 1099.

99. *Id.*

100. *Id.* at 1098.

101. *Id.* at 1099. This passage also makes reference to 42 U.S.C. § 9611(*l*) where there is a treaty or certification of a reciprocal remedy offered by that country.

102. *Id.* For a discussion of the DERP amendment issue, see *supra* notes 91–94 and accompanying text.

agreement to conduct a preliminary assessment under CERCLA, the court found plaintiffs could not state a current CERCLA claim.¹⁰³

Third, the court said that CERCLA's legislative history indicated that Congress did not intend an extraterritorial application.¹⁰⁴ As the district court also noted in its decision, during the 1986 reauthorization debates, a House committee observed that there were 10,000 Superfund sites across the nation while the record was "silent as to any extraterritorial application of CERCLA."¹⁰⁵ Given this silence in the congressional record, the court applied the presumption against the extraterritorial application of CERCLA "with particular force" since the claimants here were foreign,¹⁰⁶ and academic commentary supported the conclusion that foreign residents generally could not bring CERCLA claims.¹⁰⁷

Fourth, the Ninth Circuit cited examples of where CERCLA's logistical procedures did not account for an extraterritorial application. Concurring with the district court's analysis, the Ninth Circuit observed that the NCP consultation provisions only accounted for site reclamation discussions with state authorities while no analogous provisions existed for a consultation with foreign authorities.¹⁰⁸ It also took notice of the fact that the NPL lists no foreign sites.¹⁰⁹ Further, the court found CERCLA's citizen suit provisions problematic since they required that a case be brought in the district court where the CERCLA violation occurred, which would not be possible for a claim originating abroad.¹¹⁰

Finally, the court rejected the appellants' claim that international law would be violated by refusing to apply CERCLA abroad. The Filipino claimants argued that the non-injury principle of international law, found in Restatement (Third) of the Foreign Relations Law of the United States, was violated in this case.¹¹¹ Again, the court turned to the timing

103. This is not to assert that there is a statute of limitations to CERCLA. The court seemed to imply that that because the land changed hands and was no longer under the present control of the United States, it was not appropriate for a foreign claimant to bring suit.

104. *Id.*

105. *Id.* at 1101.

106. *Id.* at 1098.

107. *Id.* at 1101.

108. *Id.* at 1100.

109. *Id.* at 1101.

110. *Id.* at 1100 (citing 42 U.S.C. § 9659(b)(1)). While the court made this argument, citizen suits under CERCLA can always be heard in D.C. district court. *See supra* note 14.

111. *See* Restatement (Third) of the Foreign Relations Law of the United States § 601-1:

A state is obliged to take such measures . . . to ensure that activities within its jurisdiction or control (a) conform to generally accepted international rules and standards for the prevention, reduction, and control of injury to the environment of another state or of areas beyond the limits of national jurisdiction; and (b) are conducted so as *not to cause significant injury to the environment of another state or of areas beyond the limits of national jurisdiction.*

issue to reject this argument, stating “[e]ven if we were to accept the appellants’ gloss on international law—that one nation should not injure another nation’s environment—it does not follow that denying the appellants a cause of action as of 2002 violates international law” since compensation should have been negotiated at the base turnover.¹¹²

The Ninth Circuit affirmed the district court’s decision that appellants failed to state a claim under CERCLA.

IV. THE ARGUMENT: EXAMINING CERCLA’S PLAIN TEXT TO CHART NEW GROUND FOR FOREIGN CLAIMANTS

While the Ninth Circuit did not permit the Filipino claimants to recover in *ARC Ecology*, its decision nevertheless paves the way for the extraterritorial application of CERCLA. This Note will first critique the court’s reasoning in *ARC Ecology*, where the court reached the correct decision but with partially incorrect reasoning. Next, the Note will examine the three prerequisites to applying CERCLA extraterritorially—the statute’s plain text, the degree of U.S. legislative control over the land abroad, and the possibility of resulting harm to the United States without applying the statute. The Note argues that section 111(J) meets the court’s textual test for CERCLA’s application abroad although the Ninth Circuit denied the Filipino claimants relief in this case under section 111. Here, the Note explores the text and context of section 111(J), and analyzes the legislative debates to argue that section 111(J) was not a committee drafting error, and is supported by concepts found in international law. The Note also looks at hypothetical scenarios where future section 111(J) claim might be brought forth. Even apart from using section 111(J), this Note argues there are two other possibilities to apply CERCLA outside of the United States: 1) based on U.S. legislative control over the land at issue in a CERCLA claim, and 2) based on the possibility of resulting harm to the United States due to the non-application of the law, a reason that has also been recently explored by another court in the Ninth Circuit.¹¹³ First, I turn to an analysis of the holding in *ARC Ecology*.

A. A Critique of the Court’s Holding in *ARC Ecology*

In order to determine if the court’s holding was correct in *ARC Ecology*, the tests for overcoming the presumption against the extraterritorial application of a law need to be examined in light of

Id. (emphasis added).

112. *ARC Ecology v. U.S. Dep’t of the Air Force (ARC Ecology II)*, 411 F.3d 1092, 1102 (9th Cir. 2005).

113. Such as military bases or embassies where current treaties exist. The other case in the Ninth Circuit dealing with similar issues is *Pakootas v. Teck Cominco*, see *infra* note 153.

CERCLA and the facts of the case. To overcome the presumption, there must be: (1) some measure of legislative control over an area to mitigate sovereignty concerns; (2) plain text in the statute to explicitly indicate congressional intent to apply the law abroad; or (3) evidence that the United States would be harmed in the absence of the law's application abroad.¹¹⁴ In *ARC Ecology*, these tests were not fully met by the Filipino claimants.

Although the decision reached in *ARC Ecology* can be taken as correct in light of the extraterritoriality tests, the court's reasons for reaching its holding were questionable. In terms of why the court came out right in this case, neither the test involving legislative control over the area nor the statute's plain text indicated support for an extraterritorial application of CERCLA here. If one presumes that the United States returned all control over bases in the early 1990s to the Philippines, applying CERCLA at this point in time causes sovereignty concerns. Further, CERCLA's text does explicitly outline cases where foreign claimants can make CERCLA claims in section 111(*J*), which would likely indicate that the general provisions of CERCLA, such as section 105(*d*) in this case, would not ordinarily apply extraterritorially.

However, there are three major problems with the Ninth Circuit's reasoning in *ARC Ecology*. First, the court did not address what might be the most contentious issue—the final test justifying an extraterritorial application of a statute—resulting harm to the United States for the non-application of the law. If one considers types of harm to the United States to include damage to global commons areas, or the harm to another sovereign country without its consent, applying CERCLA extraterritorially might be justified even without explicit authorizing language in the statute. Relations between the United States and the Philippines have suffered over the base contamination issue. The Philippines, while signing a base agreement with the United States, never explicitly consented to allowing environmental damage.¹¹⁵

Second, the court's reliance on CERCLA's internal consistency and legislative history is problematic. CERCLA's cogency has notoriously been an issue given the rapid nature under which the final legislation was

114. See *supra* Section I. On the last prong of this analysis, the harm to the United States would also include damage to the global commons or another sovereign county that has not consented to the damage. See MALONE & PASTERNAK, *supra* note 52 (citing *Sierra Club v. Adams*, 578 F.2d 389 (D.C. Cir. 1978) and *Env'tl. Def. Fund v. Massey*, 986 F.2d 528 (D.C. Cir. 1993)).

115. For more about the base agreement, see *infra* note 142 and accompanying text. The agreement did specify that the United States would leave behind certain infrastructure at no cost, but environmental damage and compensation were not covered in the agreement. It might be construed that this provision was consideration, in part, for the environmental damage. However, in order to determine if this was equitable compensation, the preliminary assessment under CERCLA would need to be undertaken to equitable compensation.

passed.¹¹⁶ Placing faith in CERCLA as a statute of common-sense logistics is misguided.

Finally, the court's outright rejection of two significant bodies of law—customary international law and the Restatement (Third) of the Foreign Relations Law of the United States—is unnecessary. The court's decision in this case could have been reached without discussing either of these issues.

Despite these problems with the court's holding, its reliance on section 111(*J*) is the most important aspect of the decision in *ARC Ecology*. As a yet non-litigated provision of CERCLA, section 111(*J*) explicitly allows foreign claimants to bring CERCLA actions for damages occurring extraterritorially. This Note will more fully explore CERCLA section 111(*J*) below and outline its potential uses for future cases in light of the *ARC Ecology* decision.

B. CERCLA Permits Foreign Claimants to Bring a Claim Under Section 111(A)

Citing the *expressio unius*¹¹⁷ canon of textual interpretation, both the district and appellate courts in *ARC Ecology* indicated that the express language of CERCLA in section 111(*J*)¹¹⁸ provides the grounds for foreign citizens to make claims under CERCLA in specific circumstances, for which the claimants in this case did not qualify. To date, no claim has been brought under section 111(*J*),¹¹⁹ which permits foreign claimants to be reimbursed from Superfund monies:

116. See *supra* Section II for a discussion about CERCLA's lack of consistency.

117. The expression of one thing indicates the exclusion of other things. See ESKRIDGE, ET AL., *supra* note 54, at Appendix B.

118. 42 U.S.C. § 9611(*J*) (2006).

119. According to a search of Lexis and Westlaw in April 2006, *ARC Ecology* was the first case to mention CERCLA section 111(*J*), although the provision itself has not been the primary subject of litigation. The only other subsequent case mentioning this provision is *Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-04-256-AAM, 2004 U.S. Dist. LEXIS 23041, at *47–50 (E.D. Wash. Nov. 4, 2004). *Pakootas* reinforces the idea of section 111(*J*) as a mechanism for “innocent” foreign claimants, distinguishing the provision from that of the parties in *Pakootas*, which involved pollution of U.S. waters by a Canadian company:

[Section] 9611(*J*) provides a mechanism for foreign claimants, who are not in any way “responsible” for a release of hazardous substances, to seek reimbursement from the Superfund for costs incurred in responding to the release of such substances in the navigable waters or in or on the territorial sea or adjacent shoreline of a foreign country of which the claimant is a resident, where the release was from a facility or from a vessel located adjacent to or within the navigable waters or was discharged in connection with activities conducted under U.S. law (the Outer Continental Shelf Lands Act or the Deepwater Port Act). § 9611(*J*) pertains to releases outside the U.S. as opposed to releases within the U.S. which, of course, is the situation in the case at bar.

Id. at 48–49.

Foreign Claimants. To the extent that the provisions of this chapter permit, a foreign claimant may assert a claim to the same extent that a United States claimant may assert a claim if—(1) the release of a hazardous substance occurred (A) in the navigable waters or (B) in or on the territorial sea or adjacent shoreline of a foreign country of which the claimant is a resident;

(2) the claimant is not otherwise compensated for his loss;

(3) the hazardous substance was released from a facility or from a vessel located adjacent to or within the navigable waters or was discharged in connection with activities conducted under the Outer Continental Shelf Lands Act . . . or the Deepwater Port Act . . . ; and

(4) recovery is authorized by a treaty or an executive agreement between the United States and foreign country involved, or if the Secretary of State in consultation with the Attorney General and other appropriate officials, certified that such country provides a comparable remedy for United States claimants.¹²⁰

Section 111 as a whole refers to the use of Superfund monies. As previously mentioned, Superfund monies can be used for reimbursing government response costs¹²¹ or for non-governmental response costs consistent with the NCP.¹²² The normal procedures for dispensing monies under Superfund require the preliminary assessment of the area where the President, or the designated federal agency, determines if an immediate removal response is required, or if a more extensive remedial action is needed. If the latter is true and extensive remediation is required, the President would list the site on the NPL to wait in line with other projects for Superfund monies.¹²³

While the section 111(*J*) text clearly indicates that foreign applicants can make CERCLA claims, the impetus for Congress to enact such a provision is less clear. This Note will further explore the text of section 111(*J*), delving into the legislative history, the larger CERCLA context, and the logistics of applying CERCLA to foreign applicants. It will also address and reject the possibility of section 111(*J*) as a drafting error, citing support for the concept of a reciprocal remedy in international environmental law. Finally, this Note will address hypothetical uses of section 111(*J*) in other situations apart from this case.

120. CERCLA § 111(*J*); 42 U.S.C. § 9611(*J*).

121. 42 U.S.C. § 9611(a)(1) (citing 42 U.S.C. § 9604).

122. *Id.* § 9611(a)(2) (citing 42 U.S.C. § 9605).

123. The line for Superfund monies is long after the tax that provided most of the money for the trust expired in 1995. *See supra* note 31. CERCLA section 111(e)(3) also indicates that remedial actions at federal sites are treated differently. Funds for cleanups at federal facilities come from the agency's funds, rather than from the Superfund. *See also* Dep't of Energy, DOE Environmental Policy and Guidance (2004), <http://www.eh.doe.gov/oepla/laws/cercla.html>.

1. *A Strict Textual Reading of Section 111*

The plain text of section 111(*f*) supports the notion of allowing foreign claimants to bring CERCLA cases when certain criteria are met, as does the Supreme Court's recent turn to literal CERCLA interpretation in *Cooper Industries v. Aviall Services*.¹²⁴ In the years prior to the 2004 *Aviall* decision, most courts took the liberty of filling in the holes and sorting through CERCLA's contradictions to discern the most logical case outcome given the statute's purposive meaning. But recently, despite this general court tradition and CERCLA's numerous drafting errors, the Supreme Court's decision in *Aviall* adopted a strictly textual view of section 113,¹²⁵ which allows responsible parties to seek contributions from other liable parties for cleanup costs. The *Aviall* case has severely limited the number of section 113 cases, and reduced the incentive for private cleanups.¹²⁶ Many practitioners viewed the Court's strict textual interpretation in *Aviall* as yielding nearly an absurd result since Congress intended CERCLA to spur both public and private entities into remediate waste sites, not to chill voluntary cleanup actions. The Supreme Court's decision overturned years of lower court interpretations of sections 107 and 113 for contribution claims between potentially responsible parties. Courts that now wish to enable recovery between responsible parties are being forced to reinterpret their prior jurisprudence on section 107, which after the SARA amendments was utilized as a mechanism limited to innocent parties to obtain full recovery as opposed to being available to all parties.¹²⁷

The *Aviall* decision was significant in demonstrating the Supreme Court's vigorous use of text—even for a statute like CERCLA—where there is a strong history of judicial intervention to sort through the complicated statute. The Court's turn to a new textualist reading of CERCLA would also support allowing section 111(*f*) claims by foreign applicants, where the plain text is clear. This reading is also supported by the section's legislative history.

124. 543 U.S. 157 (2004).

125. The exact wording of CERCLA section 113 requires that for a contribution action to be brought between PRPs there must be a "previous or pending" action by the EPA or an innocent party under section 106 or 107. See 42 U.S.C. §§ 9606, 9607 & 9613 (2006). Most courts had previously allowed contribution actions to occur even without other pending actions.

126. See generally Aronovsky, *supra* note 19 (2006).

127. For a further discussion of the CERCLA sections 107 and 113 dilemma, see Aronovsky, *supra* note 19. There is now a circuit split in dealing with contribution claims. Some circuits allow responsible parties to seek contribution under section 107, as opposed to section 107 claims for full liability, which is how courts utilized section 107 after the 1986 SARA amendments. Other courts refuse PRP recovery under section 107 and still only allow contribution claims to occur under section 113, meaning that the government or an innocent party must have pursued or be pursuing an action. See, e.g., *Viacom, Inc. v. United States*, 404 F. Supp. 2d 3 (D.D.C. 2005).

2. *The Legislative History of Section 111(A)*

While utilizing CERCLA's legislative history should only be done in a limited capacity, especially considering the Court's recent new textualist approach to CERCLA, an analysis of the legislative history sheds some light on Congress' intention to allow CERCLA's extraterritorial application.

First, this section was originally referring to petroleum, a substance that was excluded from CERCLA's coverage in the final days of the compromise bill.¹²⁸ Section 111(A) originally contained the words "oil pollution" in place of "hazardous substance,"¹²⁹ and the timing of its discussion corresponded with a serious oil spill near Campeche, Mexico, off the coast of the Yucatan peninsula in 1979. The 140 million gallon spill contaminated the Gulf of Mexico and caused serious damage to United States waters.¹³⁰ In reaction to the spill's effects, section 111(A) was to "encourage developing reciprocal arrangements for compensation by providing for payments to foreign claimant[s] for the effects of U.S. spills if the foreign nation allows similar recovery for our claimants."¹³¹ There is no irony lost that section 111 was originally supposed to allow recovery for oil and chemical spills in light of the current petroleum exclusion in CERCLA.

128. See 42 U.S.C. §§ 9601(14) & (33) (2006) (excluding gas, oil and petroleum under CERCLA's definitions of "hazardous substance" and "contaminant."). For more elaboration on the petroleum exclusion, see Scott Lansdown, *The Application of RCRA and CERCLA to Wastes Produced by Oil and Gas Operations*, A.B.A. Section of Natural Resources, Energy, and Environmental Law, Monograph Series (No. 19), at 28 (1993).

129. H.R. 4020, 96th Cong. (as considered by House, Sept. 1980); H.R. 85, 96th Cong. (1980) (as passed by House Sept. 19, 1980); CERCLA Leg. Hist. 16, 103 (Sept. 19, 1980).

130. The Bay of Campeche, or the IXTOC I spill, was the largest unintentional oil spill in history. See Wikipedia, Bay of Campeche, http://en.wikipedia.org/wiki/Bay_of_Campeche. See also Robert Stewart, *Our Ocean Planet—Oceanography in the 21st Century*, <http://oceanworld.tamu.edu/resources/oceanography-book/oilspills.htm> (last visited Oct. 6, 2006) (citing Hazardous Materials Response Div., Office of Response & Restoration, Nat'l Ocean Serv., Nat'l Oceanic & Atmospheric Admin., http://spills.incidentnews.gov/incidentnews/FMPro?-db=history&-format=history_detail.htm&-lay=history&RecID=32915&-find (last visited Oct. 6, 2006)). In comparison, the Exxon Valdez spill off the coast of Alaska was around 11 million gallons. See also Largest Spill Table, http://www.scu.edu.au/schools/edu/student_pages/1999/tryfell/OIL%20WEB/Largest%20Spills/Table%202.html (last visited July 16, 2006).

131. H. Public Works & Transportation Subcomm., Hearings on Comprehensive Oil Pollution Liability and Compensation Act, 96 Cong. House Hearings 1979, 372–74 (testimony of Coast Guard, Env'tl. Prot. Agency, Nat'l Oceanic & Atmos. Admin., and Dep't of Justice); CERCLA Leg. Hist. 57 (Sept. 26, 1979). See also Hazardous Materials Response Division, Office of Response and Restoration, National Ocean Service, National Oceanic and Atmospheric Administration, http://spills.incidentnews.gov/incidentnews/FMPro?-db=history&-format=history_detail.htm&-lay=history&RecID=32915&-find (last visited Oct. 6, 2006) (noting that the U.S. government "publicly requested compensation from Mexico for damages associated with the spill without first entering into negotiations with the Mexican government" where Mexico denied all liability).

Second, to further support the idea that Congress was aware of its creation of a remedy for foreign claimants under section 111(J), there was some committee discussion between Howard Cannon, the Chairman of the Senate Committee on Commerce, Science, and Transportation; Mortimer Downey and David Ortez from the Department of Transportation; and Captain Charles Corbett from the Coast Guard about the potential extraterritorial reach of CERCLA:

The CHAIRMAN. There doesn't appear to be any geographical limitation on the term "environment" contained in the definition of a release. Therefore, it would appear that this term could be interpreted to mean the global environment. Is this appropriate or is it inappropriate in that it would extend the reach of S. 1480 beyond the legitimate relationship with releases within the United States and its territorial waters and the contiguous zone?

Mr. ORTEZ. This is one of the problems with the bill. This is an area that is very vague. It is unclear what the drafters of the bill intended when they used the term "environment." It is not defined in the bill, and when it appears in certain provisions, it is unclear what the scope of coverage for those particular provisions are. We would like to see some definition in the bill itself of what the environment is in terms of the scope of the applicability of the bill. Some of the provisions refer to damages that occur to foreign countries. Other provisions don't seem to deal with that problem. It is a real problem with the bill in terms of the drafting. The problem with the definition of environment is one of those areas where the bill is particularly vague.

The CHAIRMAN. Do you think it would be appropriate or inappropriate to assert jurisdiction over foreign vessels and foreign nationals outside the United States or its territorial waters?

Mr. DOWNEY. The issue of coverage of foreign carriers is one we would like to review at some length and provide for the record.

The CHAIRMAN. I am thinking of some of the problems, we had recently in the Mexican oil spill. In my judgment, we don't have a basis for asserting jurisdiction as broadly as in this legislation

Mr. CORBETT. I would like to say one or two things on that subject. First of all, as far as the Mexican oil spill, naturally we had authority to clean up the oil around our shores and we did so using the 311(k) fund.

We also had the authority, in our view, to go down to the wellhead, in response to the threat of pollution and clean up oil down at that wellhead. As it turned out, we were asked to do so by the Mexican Government, so the issue did not arise. As part of the matter of making some of S. 1480's provisions applicable in foreign ports throughout the world, I think we would have to look very carefully at

some of the international conventions to which we are a party and perhaps give you a more informed response on that in writing.¹³²

It seems at least somewhat significant that a Senate committee was aware of potential problems with extending CERCLA abroad, and yet chose to do so anyway despite the concerns raised in the committee debates. At the same time, like the rest of the CERCLA statute, section 111(*l*) lacks an extensive legislative history, so it would be problematic to rely on this testimony alone.

The legislative history pertaining to section 111(*l*) was grounded in the idea of providing a reciprocal remedy for chemical or oil spills, and there was contemplation of allowing foreign applicants to make claims for damages occurring abroad.

3. *The Logistics of Applying Section 111 to Foreign Claimants*

Although the court implied in *ARC Ecology* that a section 111(*l*) action by foreign claimants would be legitimate because the text and legislative history support such a claim, a section 111(*l*) action would also encounter many of the logistical problems that the court cited in denying the claim in this case, such as the NPL listing requirement and finding a federal district court to hear a foreign CERCLA claim.¹³³ Yet a careful reading of CERCLA remedies many of these issues. If foreign claimants brought a citizen's suit against the government for section 111(*l*) reimbursement, CERCLA section 310(b) allows the suit to be heard in D.C. District Court rather than the place where the damage occurred, which was one reason that the lower court cited in denying the section 105(d) claim.¹³⁴ Further, just because a foreign site is not currently listed on the NPL, removal claim is not precluded; NPL listing only determines eligibility for continued federal funding for long-term remedial action, not a short-term removals for immediate threats to human health.¹³⁵ The logistical issues for allowing foreign claimants to bring CERCLA claims are not insurmountable.

132. Environmental Emergency Response Act: Hearing Before the S. Commerce, Science and Transp. Comm., 96th Cong. 97-98 (Sept. 11-12, 1980) (DOT and EPA testimony); CERCLA Leg. Hist. 60 (Sept. 11-12, 1980).

133. See *supra* note 14 for an explanation of where CERCLA suits can be brought.

134. *Id.*

135. See *supra* note 34 for a discussion of the NPL concept in the context of general CERCLA liability. Also, by virtue of being a case of first impression, the argument that the NPL would already contain U.S. military properties abroad is illogical, an argument that the court makes in *ARC Ecology v. U.S. Dep't of the Air Force (ARC Ecology II)*, 411 F.3d 1092, 1101 (9th Cir. 2005).

4. *Was the Inclusion of Section 111(A) a Mere Drafting Error?*

Given the somewhat conflicting text and legislative history of section 111(A)—that the provision was to apply to oil spills and oil is now excluded from CERCLA coverage—one might ask if the provision was merely left in CERCLA as a scrivener's error. This Note will argue that section 111's presence is no editing oversight, as supported by the original committee discussions and subsequent amendments.

Although the words of the statute originally supported Congress' intent for section 111 to apply to oil spills, the wording was changed to "hazardous substances," indicating that when petroleum was excluded from the bill, the wording also changed in this provision to make it consistent with the new CERCLA framework. Further, section 111 survived the 1986 SARA amendments and other subsequent amendment periods.¹³⁶ If section 111(A) were purely an error, it could have been deleted during one of these debates. Finally, the committee discussion of the consequences of allowing foreign claimants to bring CERCLA actions indicated that Congress was aware, at least to some degree, of the potential ramifications of its decision.

5. *The Concepts of International Environmental Law Support a Reciprocal Remedy in U.S. Law*

The presence of section 111(A) to provide a reciprocal remedy to foreign claimants was no drafting error, and is supported by similar concepts found in international environmental law, the "polluter pays principle," and the notion of states taking responsibility for injuries caused to nationals of other states.¹³⁷ While international law alone is not instrumental when interpreting section 111(A), it can provide another way by which this statutory provision can be understood.

As the Restatement (Third) of the Foreign Relations Law of the United States notes, international law supports providing access to a remedy for a foreign party injured by another state's actions:

Where pollution originating in a state has cause significant injury to persons outside that state, or has created a significant risk of such injury, the state of origin is obligated to accord to the person injured . . . access to the same judicial or administrative remedies as are available in similar circumstances to persons within the state.¹³⁸

136. CERCLA has been examined by Congress several times since its initial passage.

137. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 601-02, 711-13 (1987).

138. *Id.* § 602-2. See also *id.* § 711 (noting that "state is responsible under international law for injury to a national of another state caused by an official act . . . that violates (a) a human right . . . (b) a personal right . . . (c) a right to property or another economic interest"). If someone is injured, they are allowed to seek remedy under international law, the law of the

The concepts of international law support the inclusion of a provision within CERCLA—or other U.S. environmental statutes—to provide a remedy for parties injured by U.S. activities overseas, especially those conducted by the U.S. government.¹³⁹

6. Section 111(l) In Practice: Hypothetical Uses

Now that the presence of section 111(l) has been explained and justified, this Note will address the potential litigation uses of section 111(l). Given the strict requirements for foreign claimants under section 111(l), can anyone make a claim under this CERCLA provision? This Note argues that there are at least two hypothetical ways that section 111(l) could be used, for claimants situated similarly to those in *ARC Ecology* and for other water pollution occurring abroad. In the case of *ARC Ecology*, a claim under section 111(l) could have been brought for the Subic Bay pollution if a valid base agreement still existed, which was not true for the actual case that was brought before the court.¹⁴⁰ Recall that section 111(l) requires that there be a release in navigable waters, the territorial sea or adjacent shoreline of a foreign country, that there was no compensation, that the release was from a facility or vessel, and that the recovery is authorized by a treaty or executive agreement or some evidence that the country allows a similar remedy for U.S. claimants.

All of the section 111(l) tests would have been met since the releases occurred in waters adjacent to the Philippines and there was no other compensation given for the damage that occurred.¹⁴¹ The releases occurred either from a facility—the Subic Naval Base itself—which was adjacent to the Bay, or from a vessel owned by the Navy. Finally, the base agreement would have constituted the current treaty to meet the final prong of the test.¹⁴²

violating state, another state's law, or through agreement between the person and responsible state. *Id.* § 713(2).

139. For further discussion of the concepts and principles of international environmental law, see generally DAVID HUNTER, JAMES SALZMAN, & DURWOOD ZAELEKE, *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* (1998).

140. The court also hinted that the result might have been different if there was a current base agreement. See *supra* note 101 and accompanying text.

141. The compensation issue depends on how one views the value of the infrastructure left by the U.S. military relative to the environmental damage that occurred in the Philippines.

142. Agreement Between the United States of America and the Republic of the Philippines Concerning Military Bases. 61 Stat. 4019, T.I.A.S. 1775 (1947). The original base agreement provided some compensation and liability provisions for damages, although none pertaining directly to environmental damage. Article VIII noted that for any water-related actions that the U.S. military took outside of the base to ensure that there was an adequate water supply, the United States would “pay just compensation for any injury to persons or damage to property that may result from action taken in connection with this article.” Article XXIII provided for general liability for claims of damage to property or personal injury caused by the U.S. military within one year after the accident or incident. However, the 1991 Visiting Force Agreement

Apart from the scenario posed by revising the facts in *ARC Ecology*, section 111(*l*) would provide a remedy for water pollution stemming from other U.S. military facilities,¹⁴³ embassies, or vessels operating abroad that pollute navigable or adjacent territorial waters. Situations fully unrelated to military endeavors, such as a ship under a U.S. flag that is caught dumping chemical containers in foreign waters, could be sued under this provision so long as there was some agreement between the countries pertaining to recovery.¹⁴⁴

C. CERCLA's Application Apart from Section 111(l): Meeting the Extraterritoriality Tests for U.S. Control over Land and Resulting Harm to the United States with a Non-Application of the Law

While there is clearly room under section 111(*l*) to apply CERCLA abroad, this category is indeed narrow. Based on the other two tests for extraterritoriality—U.S. control and adverse effects to the United States—this Note will argue that plaintiffs can bring other extraterritorial claims under CERCLA.

1. The Issue of U.S. Control Over Territory and the Extraterritorial Application of CERCLA

Recall from the initial tests for extraterritoriality that having some measure of U.S. control over a given property can be enough to negate the presumption against the application of a U.S. law abroad. Considering this test, every U.S. military installation abroad could be forced to comply with U.S. regulations on a number of issues, environmental or otherwise. This section briefly explores the concept of current control over U.S. operations abroad based on existing treaties and two recent Ninth Circuit cases involving the military.

Where there is a current base agreement or treaty in operation, sovereignty conflicts are minimal. Embassies and military bases are located outside of the territorial borders of the United States, but treaties allow the United States to exercise its jurisdiction over these areas, which

(VFA) specifically denied recovery for environmental damages. See Chanbonpin, *supra* note 65, at 259 n.63. Appellants in this case sued ten years after the expiration of the original base agreement, taking away any measure of U.S. control over the bases. See *ARC Ecology v. U.S. Dep't of the Air Force (ARC Ecology II)* 411 F.3d 1092, 1098, 1102 (9th Cir. 2005).

143. The court in *ARC Ecology II* noted that a military base might not qualify as a facility under section 111(*l*), but the CERCLA statute itself interprets "facility" quite liberally, allowing almost any place where contamination is found to constitute a facility under CERCLA. *ARC Ecology II*, 411 F.3d at 1099. See also *supra* note 15 for a discussion about CERCLA's definition of the term.

144. One might also make the argument that the general concepts of international law, as noted by the Restatement, might be adequate to fulfill this test—that a comparable remedy exist for U.S. citizens that are injured—under section 111(*l*). See *infra* Section IV.B.5.

is often exclusive jurisdiction for the duration of the agreement. In the case of a military installation, a Status of Forces agreement (SOFA) requires military bases to conform to U.S. regulations, as opposed to the regulations of the host nation.¹⁴⁵ Embassies and consulates, protected under the Vienna Treaty on Diplomatic and Consular Relations are even considered by some courts to be an actual “part of the territory of the United States of America.”¹⁴⁶

According to *ARC Ecology* and two other recent Ninth Circuit cases,¹⁴⁷ courts might be slowly moving to apply U.S. laws to military bases, and to the personnel who live and work on those bases. The court in *ARC Ecology* denied several of the appellants’ claims based on timing, stating that liability issues between the governments should have been sorted out at the time of the base turnover.¹⁴⁸ Dicta from the case indicated that a current base agreement would have given the President or executive agency the authority to conduct a preliminary assessment and cleanup; authority that did not exist at the time of this suit.¹⁴⁹ Appellants sued the United States under CERCLA ten years after the base agreement between the United States and the Philippines expired.¹⁵⁰

Two other cases in the Ninth Circuit also support the idea that a current base agreement permits suit. A district court in the Ninth Circuit recently stated in dicta from *Okinawa Dugong v. Rumsfeld* that it did not see a sovereignty issue with applying the National Historic Preservation Act to the DOD’s operations in Japan since “the substance of plaintiff’s complaint does not seek to thrust this court into issues of foreign affairs; rather, *it summons the court’s attention to matters under the control of the United States Department of Defense.*”¹⁵¹ Additionally, a Ninth Circuit case, *United States v. Corey*, allowed the prosecution of a civilian base worker for crimes committed near, but not on, one of the same military bases in the Philippines at issue in this case.¹⁵²

The basic arguments about overcoming sovereignty concerns based on legislative control of an area outside of the territorial United States—that some measure of legislative control can overcome the presumption

145. *United States v. Corey*, 232 F.3d 1166, 1181 (9th Cir. 2000) (noting that the Yokota Air Base does not follow Japanese environmental, labor or other statutes regulating gambling or medical licenses on the base.)

146. *Id.* at 1182 (quoting *United States v. Archer*, 51 F. Supp. 708, 709 (S.D. Cal. 1943), but noting that not all courts espouse such an extreme view).

147. See *Okinawa Dugong v. Rumsfeld*, No. C 03-4350 MHP, 2005 U.S. Dist. LEXIS 3123 (N.D. Cal. Mar. 2, 2005); *Corey*, 232 F.3d 1166.

148. *ARC Ecology v. U.S. Dep’t of the Air Force (ARC Ecology II)* 411 F.3d 1092, 1098, 1102 (9th Cir. 2005).

149. *Id.*

150. The Philippines did not renew the base agreement after 1992. See *supra* note 65.

151. *Okinawa Dugong*, 2005 U.S. Dist. LEXIS at *63–64 (emphasis added).

152. 232 F.3d 1166 (9th Cir. 2000).

against applying the law abroad—enable courts to apply U.S. law to U.S. entities like the military and embassies. Courts have likely been reluctant to apply U.S. law extraterritorially because of political, rather than legal, concerns. Recent cases show that this attitude might be changing.

2. *Resulting Harm to the United States Without Applying CERCLA Extraterritorially: the Effects Test*

Three scenarios justify CERCLA's application where harm to the United States would result from its non-application: harm to U.S. territory from a foreign actor, harm to U.S. citizens abroad by the U.S. military, and harm to U.S. military interests abroad as more of a policy concern. In the first scenario, there is support for CERCLA's extraterritorial application where U.S. land, water, or citizens are being harmed. Even without direct evidence of congressional intent, an Eastern District of Washington court in *Pakootas v. Teck Cominco* allowed CERCLA's application to clean up hazardous substances at sites under "the jurisdiction of the United States."¹⁵³ A summary judgment motion in *Pakootas* initially authorized CERCLA's application to a Canadian company located on foreign soil for pollution caused in waters on the U.S.–Canada border.¹⁵⁴ The Ninth Circuit affirmed this conclusion, although finding CERCLA's application in *Pakootas* was not actually extraterritorial since "the leaching of hazardous substances from slag that settled at the Site . . . took place in the United States,"¹⁵⁵ which placed the facility within U.S. borders although "the original source of the hazardous substances [was] located in a foreign country."¹⁵⁶ *Pakootas* demonstrates the court's willingness to find a way to apply CERCLA when U.S. citizens are being harmed by pollution that originates from abroad.

Returning to the scenario posed in *ARC Ecology*, if a U.S. citizen brought a citizen's suit under CERCLA for environmental contamination occurring on a military base abroad, the case for CERCLA's application would be bolstered. The presumption against an extraterritorial application of a U.S. law is not as strong if domestic plaintiffs are bringing the suit. One of CERCLA's main goals is to protect the health and environment of U.S. citizens. At bases that are currently operated or used by U.S. forces, Congress funds environmental compliance work to protect

153. *Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-04-256-AAM, 2004 U.S. Dist. LEXIS 23041, at *50–51 (E.D. Wash. Nov. 4, 2004) (emphasis added), *aff'd* 452 F.3d 1066 (9th Cir. 2006).

154. *Id.*

155. 452 F.3d 1066, 1078 (9th Cir. 2006).

156. *Id.* at 1079. For the court's discussion about its view of "facility" under CERCLA in this case, see *id.* at 1075.

American personnel and their families who live and work there.¹⁵⁷ There is no reason that courts should deny U.S. military personnel the protection of U.S. environmental laws on these bases and disallow CERCLA claims to be brought by U.S. citizens living and working there.

Further, there is the idea of resulting harm to U.S. policy interests through setting a bad precedent for how the United States uses land. Other countries may start refusing to lease land to or renew base agreements with the U.S. military for its operations if the United States continues to pollute land abroad and refuses to take responsibility for its actions. This problem would result in dire consequences for U.S. security interests in the long run.

The recent decision in *ARC Ecology* lends credible support to a variety of circumstances where the extraterritorial application of CERCLA could be made.

CONCLUSION

U.S. military installations abroad present serious environmental problems. According to one article, the DOD is currently cleaning up 1800 bases “in the United States and overseas”¹⁵⁸ although there are still several thousand additional sites that require remediation. A legal framework currently exists under CERCLA law to remedy some of these issues, although the framework is somewhat limited in its scope.¹⁵⁹ An overhaul of base remediation laws is still needed to clean up bases that are already closed or are in the process of closing.

In the meantime, the tests for an extraterritorial application of a U.S. law—the plain text of the statute, the measure of control over the land at issue, and the resulting harm to the U.S. with the non-application of the statute—can be met by the current CERCLA regime, justifying its use abroad in a number of scenarios. *ARC Ecology v. United States Department of the Air Force* vindicates the literal application of CERCLA section 111(*l*), providing a remedy to foreign claimants who meet the requirements outlined in that section. A careful analysis of section 111(*l*) reveals that it was the intentional placement into U.S. law

157. Wegman & Bailey, *supra* note 4, at 932 n.374. (citing H.R. Rep. 101-665, at 387 (1990), *reprinted in* 1990 U.S.C.C.A.N. 2931, 3070-71). There is some congressional reluctance to fund overseas environmental restoration but this is tied to an unwillingness to export U.S. jobs abroad. If Congress can ensure that some of the projects go to U.S.-based contractors then these concerns are alleviated.

158. See Herman, *supra* note 42, at 1097. Only 100 of these 1,800 bases are listed on the NPL, which means that many of these base cleanups are due to voluntary compliance with CERCLA regulations. *Id.*

159. This Note does not discuss international legal obligations to remediate bases. See J. Martin Wagner & Neil A.F. Popovic, *Environmental Injustice on United States Bases in Panama: International Law and the Right to Land Free from Contamination and Explosives*, 38 VA. J. INT'L L. 401 (1998).

of a reciprocal remedy provision for foreign claimants, with the hopes of inspiring similar legislation in other countries. Despite its grounding in oil spill politics, section 111(*l*)'s plain text is clear and allows for CERCLA's application to pollution caused by U.S. vessels, facilities, or military installations in waters abroad where there is a treaty or base agreement in place.

Additionally, beyond section 111(*l*), the general tests for an extraterritorial application of a law would be met by CERCLA where there is some U.S. control over an area abroad or where U.S. citizens would be harmed with the non-application of the statute extraterritorially. Scenarios where U.S. control would exist include areas where there is a current base agreement or treaty allowing for military or embassy operations abroad. Additionally, suits under the theory of harm to the United States could be justified where U.S. citizens—either within the territorial United States or abroad—would be harmed by the non-application of the law. Finally, the policy ramifications of leaving contaminated military bases around the world might provide additional support for CERCLA's application under the resulting harm to the United States rationale.

While the scope of CERCLA's extraterritorial application is still limited, "civil society needs to continue to bring these suits if a broadening of availability and effectiveness [of these strategies] is ever to occur."¹⁶⁰ Hopefully, this Note has provided a starting point for plaintiffs considering the litigation of future extraterritorial CERCLA claims.

160. MALONE & PASTERNAK, *supra* note 52, at 211.