INCONSISTENCY WITH THE NCP UNDER CERCLA: WHAT DOES IT MEAN?

*William C. Tucker**

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INTRODUCTION

Government counsel frequently encounter resistance when litigating or attempting to settle U.S. Environmental Protection Agency (EPA) cost-recovery claims under section 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).[1] This resistance occurs because potentially responsible parties (PRPs) persist in the mistaken assumption that the EPA's costs are subject to the same scrutiny their private clients might give to bills submitted by a contractor or supplier. In litigation, National Contingency Plan (NCP)[2] inconsistency is an affirmative defense to costs.[3] Because of this, PRPs frequently assert: (1)

* William C. Tucker is a Senior Assistant Regional Counsel, for the U.S. Environmental Protection Agency, Region II. He is writing here in his individual capacity and not as government counsel. All opinions expressed herein, including but not limited to positions on legal or policy issues, are entirely his own and are not to be construed as those of the EPA or the United States.

1. Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601–9675 (2006).

2. National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. §§ 300–399 (2007).

3. *See* CERCLA § 107(a)(4)(A), 42 U.S.C § 9607(a)(4)(A) (2006) (stating that PRPs are responsible for clean-up costs incurred by the United States not inconsistent with the NCP).

costs which seem unreasonable or excessive must somehow be in "violation" of the NCP; (2) EPA counsel are claiming the right to spend without restraint during remedy implementation; or (3) the EPA's failure to issue a "record of decision" (ROD) amendment or, alternatively, an "explanation of significant differences" (ESD), for the slightest change to planned remedial construction, constitutes inconsistency with the NCP.[4] However, these arguments are generally unpersuasive, not because they have no basis in common business practices, but because they lack a sound legal foundation.

First and foremost, parties asserting these defenses often misunderstand the standard of review necessary to meet their burden of establishing that the government's costs are inconsistent with the NCP. In effect, they attempt to contest the reasonableness or cost-effectiveness of the governments' expenditures on equitable grounds under the guise of an "NCP inconsistency" argument.[5] Second, their argument that changes made during remedial construction require formal modification of an EPA ROD is problematic. With this argument, these parties frequently overlook both the heavy burden required to show a ROD amendment is required, and the important due process and procedural differences that the courts have recognized between a ROD amendment and an ESD.

In fact, as this article will attempt to show, the defendant's burden in CERCLA cost-recovery actions challenging the EPA's costs is a heavy one indeed. CERCLA affords the government a high degree of deference in cost-recovery actions. First, to show "NCP inconsistency," a defendant must demonstrate on the administrative record that the EPA acted arbitrarily and capriciously *in remedy selection.*[6] PRP opportunities to challenge the EPA's costs on the basis of errors in implementation, as opposed to remedy selection, are extremely limited. Second, to show that mid-course

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4. *See* Alex A. Beehler, Steve C. Gold & Steven Novick, *Contesting of CERCLA Costs by Responsible Parties—There is No Contest*, [1992] 22 Envtl. L. Rep. (Entl. Law Inst.) 10,763, 10,764–65 (asserting as a waste of time efforts by defendants to split hairs over amount of cost recovery). PRPs also frequently challenge the EPA's cost documentation as inadequate, primarily because the EPA lacks "work performed" documentation. However, the EPA generally maintains it is only required to provide adequate cost accounting to demonstrate that costs were incurred in relation to a particular site (through invoices, payment vouchers, employee timesheets, etc.). *Id.* at 10,768. Once the EPA meets this burden of proving its costs, the burden shifts to the defendants to show the EPA's costs are inconsistent with the NCP; the EPA is not required to justify each expenditure. United States v. Kramer, 913 F. Supp. 848, 856 (D.N.J. 1995); *see* Beehler, Gold & Novick, *supra* at 10,765 & n.18 ("[P]roving that costs were consistent with the NCP is not part of the government's prima facie case.").

5. *See* United States v. Kramer, 913 F. Supp. at 852 (defendants broadly alleging that "wasteful, unnecessary, unreasonable, or excessive costs may not be recovered by the government because such costs are, as a matter of law, inconsistent with CERCLA and the NCP").

6. California v. Neville Chem. Co., 358 F.3d 661, 673 (9th Cir. 2004).

corrections made by the EPA during remedy implementation and without a formal modification to the selected remedy amount to arbitrary and capricious action, a defendant must show that the changes to the remedy were "significant" or "fundamental" and that consequential damages were incurred as a result.[7] In most cases, making such a showing will be an insurmountable burden for defendants.

I. LEGAL BACKGROUND

A. Statutory Scheme

Section 107(a) of CERCLA provides for the recovery of "all costs of removal or remedial action incurred by the United States Government or a State or Indian tribe not inconsistent with the National Contingency Plan."[8] "Notwithstanding any other provision or rule of law," section 107 liability provisions are "subject only to the defenses set forth in subsection (b) of this section."[9] Those provisions allowing the government to recover "all costs" may be contrasted with section 107(a)(4)(B), which limits private cost-recovery only to "necessary" costs "consistent with the [NCP]."[10] Thus, Congress clearly distinguished between private cost-recovery actions under section 107 and actions initiated by the government. Under the former, the burden is on the private plaintiff to show its costs are both "reasonable" and "consistent with" the NCP. In contrast, the government may recover "all" its proven costs, subject *only* to the affirmative defenses

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7. United States v. Burlington N. R.R. Co., 200 F.3d 679, 695 (10th Cir. 1999).

8. CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A) (2006).

9. 42 U.S.C. § 9607(a). Section 107(b), in relevant part, reads:

> There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by (1) an act of God; (2) an act of War; (3) an act or omission of a third party . . .; or (4) any combination of the foregoing paragraphs.

Id. § 9607(b). The third exception applies so long as the person can show he exercised due care and took precautions against foreseeable third-party acts or omissions. *Id.* Since these defenses are rarely successful, if raised at all, as a practical matter the language of section 107 virtually excludes all defenses except to the EPA's costs under "NCP inconsistency."

10. *Compare* 42 U.S.C. § 9607(a)(4)(A) (stating certain persons are liable for "all costs of removal or remedial action incurred by the [U.S.] Government or a State or an Indian tribe not inconsistent with the [NCP]"), *with* 42 U.S.C. § 9607(a)(4)(B) (stating certain persons are liable for "any other necessary costs of response incurred by any other person consistent with the [NCP]"). *See generally* Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 HARV. ENVTL. L. REV. 199 (1996) (providing an in-depth discussion of the remedial purposes of CERCLA).

set forth in section 107(b) and a showing of NCP "inconsistency."[11] CERCLA also provides that, in a cost-recovery action brought by a PRP respondent to an EPA order, the party performing the response action may only recover "reasonable costs" of that action.[12] Thus, Congress expressed a clear intent that section 107 actions initiated by the United States under CERCLA allow the government to recover all costs, and do not allow private plaintiffs to challenge costs on the grounds that they are unreasonable or unnecessary.

Section 113(j), enacted with the Superfund Amendments and Reauthorization Act of 1986 (SARA),[13] makes clear that the only relevant challenge to a section 107 action brought by the government (aside from those enumerated defenses in section 107(b)) is that the government's *choice of response action*, development and implementation of which resulted in the incurrence of costs, is inconsistent with the NCP.[14] Subsection (j)(2) provides that a party challenging the EPA's response action in a CERCLA judicial action must "demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law."[15] If a court finds the selection of a response action erroneous under that standard, section 113(j)(3) limits a defendant's victory to only those demonstrable damages affected by the error. That is, the government may still recover all its costs except those demonstrably attributable to the NCP inconsistency in remedy selection. That subsection states that in such an event "the court shall award . . . only the response costs or damages that are not inconsistent with the [NCP]."[16] Thus, the section 113(j)(3) standard upholding the EPA's choice of response action unless "arbitrary or capricious or otherwise not in accordance with law" is the only basis on which the EPA's costs may be challenged as "inconsistent" with the NCP.[17] This is reinforced by the language of section 113(j)(4), which states: "In reviewing alleged procedural errors [under the NCP], the court may disallow costs or damages only if the errors were so serious and related to matters of such central relevance to the action that the action would have been significantly changed had such errors not been made."[18]

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11. 42 U.S.C. § 9607(a), (b); *see also* 42 U.S.C. § 9613(g)(2) (CERCLA statute of limitations).
12. 42 U.S.C. § 9606(b)(2)(A).
13. Superfund Amendments and Reauthorization Act of 1986 (SARA) § 113(c)(2), Pub. L. No. 99-499, 100 Stat. 1613, 1650 (codified as amended at 42 U.S.C. § 9613(j)).
14. 42 U.S.C. § 9613(j).
15. 42 U.S.C. § 9613(j)(2).
16. 42 U.S.C. § 9613(j)(3).
17. *Id.*
18. 42 U.S.C. § 9613(j)(4).

Thus, it is clear that CERCLA affords the government a high degree of deference, both in remedy selection and cost-recovery. In addition, the statute also specifically allows the EPA to recover its legal costs. With the SARA amendments of 1986, Congress amended section 101(25) of CERCLA, which defines the terms "removal" and "remedial action" to include "enforcement activities related thereto."[19] The congressional history indicates that this change was made to give the EPA "authority to recover costs for enforcement actions taken against responsible parties."[20] However, this should in no way be taken as a limitation on legal costs recoverable under section 107(a) of CERCLA. Section 104(b)(1) grants the EPA authority to "undertake such planning, legal, fiscal, economic, engineering, architectural, and other studies or investigations as [it] may deem necessary or appropriate to plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this chapter."[21] Thus, the statute expressly authorizes legal expenses, not only to "recover the costs" of response actions, but also to "plan and direct" such actions and generally to "enforce the provisions" of CERCLA.[22]

In other words, the statute not only authorizes the incurrence of response costs for cost recovery litigation, but also authorizes related enforcement actions, including those legal costs incurred in planning and directing response actions and in enforcing the remedial provisions of CERCLA. Such costs may include, among others, costs of obtaining access under section 104(e), costs incurred in providing legal advice to the EPA's program offices, and legal costs of claims settlement and defense under a response action contract.[23]

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19. 42 U.S.C. § 9601(25).

20. H.R. REP. NO. 99-253(I), at 66–67 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2848–49.

21. 42 U.S.C. § 9604(b)(1).

22. *Id. See generally* Jason K. Northcutt, Comment, *Reviving CERCLA's Liability: Why Government Agencies Should Recover Their Attorneys' Fees in Response Cost Recovery Actions*, 27 B.C. ENVTL. AFF. L. REV. 779, 799 (2000) (citing the argument that section 104(b) includes attorney's fees); Robert A. Mullins, *The Aftermath of* Key Tronic*: Implications for Attorney's Fee Awards*, 24 ENVTL. L. 1513 (1994) (explaining that the Government can collect legal expenses to undertake legal studies for planning purposes); Albertina D. Susco, Key Tronic Corporation v. United States*: Recovery of Attorney's Fees in Private Cost-Recovery Actions under CERCLA*, 6 VILL. ENVTL. L.J. 405 (1995) (explaining that the Government can collect legal expenses).

23. 42 U.S.C. § 9604(e). *See generally* 40 C.F.R. pt. 35, subpt O (2007). Subpart O authorizes payments to states under cooperative agreements for contractor claims settlement and defense. The recipient of an award under a cooperative agreement or state contract "may incur costs (including *legal*, technical and administrative)" to assess or settle a claim "by or against the recipient," to "defend against a contractor claim for increased costs," or "to prosecute a claim to enforce a contract." 40 C.F.R. § 35.6600(b), (c) (emphasis added).

B. Case Law

CERCLA allows the United States to recover "all costs . . . not inconsistent with the [NCP]."[24] "The NCP regulates the *choice of response actions*, not the costs" incurred.[25] Thus, the United States is entitled to recover all of its response costs not inconsistent with the NCP, if the decision to incur the challenged costs was not arbitrary and capricious.[26]

A private party seeking to recover costs in a CERCLA action can only recover reasonable costs, plus interest.[27] However, when the government brings a cost recovery action, it can recover all response costs, even those that may be excessive, as long as the selection of the remedy is not inconsistent with the NCP.[28] PRPs have the burden of proof as to whether a remedial action was selected in a manner inconsistent with the NCP.[29]

To establish NCP inconsistency, a PRP must demonstrate that the EPA selected its response action in a manner that was arbitrary and capricious.[30] A review of the EPA's remedy decision is based upon review of the administrative record only.[31]

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24. 42 U.S.C. § 9607(a)(4)(A).

25. United States v. Hardage, 982 F.2d 1436, 1443 (10th Cir. 1992) (emphasis in original); United States v. Kramer, 913 F. Supp. 848, 866 (D.N.J. 1995).

26. 42 U.S.C. § 9607(a)(4)(A); United States v. R.W. Meyer, Inc., 889 F.2d 1497, 1508 (6th Cir. 1989); United States v. Ne. Pharm. & Chem. Co. (NEPACCO), 810 F.2d 726, 748 (8th Cir. 1986).

27. 42 U.S.C. § 9606(b)(2)(A).

28. *See* 42 U.S.C. § 9607(a)(4)(A) (requiring "all costs of removal or remedial action" be consistent); *Hardage*, 982 F.2d at 1442 (holding that inconsistency of a particular cost will depend on whether the response action is deemed inconsistent) (citing NEPACCO, 810 F.2d at 748).

29. United States v. Am. Cyanamid Co., 786 F. Supp. 152, 161 (D.R.I. 1992); *see also* O'Neil v. Picillo, 682 F. Supp. 706, 728 (D.R.I. 1988), *aff'd*, 883 F.2d 176 (1st Cir. 1989) (holding that the burden of proving that the cleanup was inconsistent with the plan rests with the defendant).

30. Wash. State Dep't of Transp. v. Wash. Natural Gas Co., 59 F.3d 793, 802 (9th Cir. 1995); *see also* Minnesota v. Kalman W. Abrams Metals, Inc., 155 F.3d 1019, 1024 (8th Cir. 1998) (stating that "defendants have the burden of proving that the costs incurred were inconsistent with the NCP, an issue that is judicially reviewed under the arbitrary and capricious standard of review for agency action"); California v. Neville Chem. Co., 358 F.3d 661, 673 (9th Cir. 2004) (stating "to show that the Department's actions were inconsistent with the [NCP], the burden is on Neville to show that the Department acted in an arbitrary and capricious manner in choosing a particular response action"); *Am. Cyanamid Co.*, 786 F. Supp. at 158 (citing United States v. Ward, 618 F. Supp. 884, 900 (E.D.N.C. 1985)) (stating that to satisfy its "burden of proving that the response costs claimed by the [U.S.] are inconsistent with the [NCP] . . . defendants must prove that the agency's actions were arbitrary and capricious").

31. *See* 42 U.S.C. § 9613(j)(2) (2006) (providing that courts "shall uphold [the EPA's] decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law"); *see also In re* Bell Petroleum Servs., Inc., 3 F.3d 889, 904–05 (5th Cir. 1993), *rev'd in part on other grounds*, 64 F.3d 202 (5th Cir. 1995), *rehearing denied* (Nov. 14, 1995) (reviewing authority is "limited to the administrative record").

Furthermore, should a response action be found inconsistent with the NCP, the United States is not precluded from recovering costs incurred in implementing that action, unless the defendants can also show that excess costs were incurred because of inconsistency with the NCP.[32] PRPs can only question the cost-effectiveness of a remedial action when addressing the remedy selection phase. However, once the EPA chooses a remedy that is not arbitrary and capricious, cost-effectiveness is no longer a viable challenge.[33]

As long as the choice of remedy is not arbitrary and capricious, costs of implementation are presumed to be reasonable, and the United States is under no obligation to minimize its response costs.[34] The strongly worded *Kramer* opinion, a Third Circuit district court case, follows the holdings of other circuits when it states that costs that are unreasonable, unnecessary, improper, not cost-effective, and excessive may still not be inconsistent with the NCP and, therefore, recoverable by the EPA.[35]

II. NCP CONSISTENCY: WHAT DOES IT REALLY MEAN?

A. The NCP Consistency Standard of Review

PRPs frequently assert that costs are unrecoverable when they arise from "actions" that are inconsistent with the NCP, citing such cases as *United States v. Kramer*.[36] They challenge the government's costs as inconsistent with the NCP based on alleged failure to "comply" with the NCP in implementing a remedy.[37] However, PRPs making this argument

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32. United States v. W.R. Grace & Co., 280 F. Supp. 2d 1149, 1179 (D. Mont. 2003), *aff'd*, 429 F.3d 1224 (9th Cir. 2005); United States v. Burlington N. R.R. Co., 200 F.3d 679, 695 (10th Cir. 1999); *Am. Cyanamid Co.*, 786 F. Supp. at 161; United States v. Kramer, 913 F. Supp. 848, 867 (D.N.J. 1995); *O'Neil*, 682 F. Supp. at 729.

33. *See Kramer*, 913 F. Supp. at 867 (finding that, as a matter of law, arguments of cost-effect do not allege inconsistency with the NCP); *Am. Cyanamid Co.*, 786 F. Supp. at 162 (stating "[o]nce EPA validly chooses a permanent remedy for a site, cost-effectiveness is no longer a viable challenge to the implementation of that remedy"); *see also Kalman W. Abrams Metals, Inc.*, 155 F.3d at 1025 (stating that consistency with the NCP is presumed unless the EPA acted arbitrarily and capriciously).

34. United States v. Hardage, 982 F.2d 1436, 1442 (10th Cir. 1992); *Am. Cyanamid Co.*, 786 F. Supp. at 161.

35. *Kramer*, 913 F. Supp. at 867.

36. *Id.*

37. *See* Wash. State Dep't Transp. v. Wash. Natural Gas Co., 59 F.3d 793 (9th Cir. 1995) (finding that Washington State Department of Transportation (WSDOT) had not referred to the NCP in selecting the remedy for that site, and that its "lead representative on the coordination team handling the contamination project was not even aware that the NCP existed"). Without stopping its inquiry there, the court proceeded to evaluate WSDOT's actions "under the standards set forth in the NCP," because

misinterpret the standard of review. The *Kramer* opinion holds that once the EPA has documented its costs, in order to challenge those costs the burden shifts to the defendants to show that the remedy selected in the ROD is inconsistent with the NCP.[38] The court in that case granted two government motions, holding first that "defendants' arguments that costs are excessive, unreasonable, duplicative, not cost-effective, and improper do not allege inconsistency with the [NCP]" and "do not provide a defense to a cost recovery action under section 107(a) of [CERCLA]."[39] The court further held that "as a matter of law, those same arguments do not allege inconsistency with the NCP and therefore do not provide defenses in a cost recovery action under section 107(a) of CERCLA."[40] In its opinion, the court quoted *United States v. Hardage* with approval:

> The court in *Hardage* clearly stated: "When the government is seeking response costs, . . . consistency with the NCP is presumed unless defendant can overcome this presumption by presenting evidence of inconsistency. . . . In order to show that a government response cost is inconsistent with the NCP, a defendant must demonstrate that the government's response action giving rise to the particular cost is inconsistent with the NCP. To show that a government response action is inconsistent with the NCP, a defendant must demonstrate that the EPA acted arbitrarily and capriciously in choosing a particular response action to respond to a hazardous waste site."[41]

The court further stated, quoting from an earlier opinion, that "[c]ost effectiveness is a criteria for the EPA only when choosing a permanent remedy for a site among competing alternatives. This is the only reference

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"an environmental cleanup could conceivably follow a standard procedure consistent with the NCP, even if the NCP is not actually referenced." *Id.* at 803; *see also* United States v. Ne. Pharm. & Chem. Co., 810 F.2d 726, 748 (8th Cir. 1986) (showing that there is a significant difference between "NCP consistency" and "NCP compliance"). PRPs often argue that the NCP imposes strict and minute requirements upon the EPA, the least infraction of which is a violation sufficient to deny the EPA cost recovery. However, NCP inconsistency is an affirmative defense that requires a defendant to show, on the administrative record, that the EPA acted with such disregard for the NCP in selecting the remedy that its behavior was "arbitrary and capricious." This standard is highly deferential to the government. *See* United States v. Ward, 618 F. Supp. 884, 900 (E.D.N.C. 1985) ("[I]t would be an unreasonable waste of judicial time and government resources not to mention an usurpation of agency authority, to require the EPA to justify its every action in order to recover under section 107 . . . .").

38. *Kramer*, 913 F. Supp. at 866.

39. *Id.* at 849.

40. *Id.* at 867.

41. *Id.* at 862 (citing *Hardage*, 982 F.2d at 1442 (citations omitted)) (emphasis added).

to cost-effectiveness of hazardous substance response actions in the NCP." In addition, the *Kramer* court emphasized:

> Even if a response action is shown to be inconsistent with the NCP, defendants still have not triumphed. In order to establish the amount of costs to be disallowed, "the defendants have the burden of demonstrating that the clean-up, because of some variance from the Plan, resulted in demonstrable excess costs."[42]

In a recent opinion, the Third Circuit reaffirmed the standard for NCP consistency set forth in *Kramer*. In the opinion filed December 22, 2005, in *United States v. E.I. DuPont de Nemours & Co.*, on appeal from the District Court for the District of Delaware, the circuit court sitting en banc overruled *United States v. Rohm & Haas Co.*, and held that CERCLA authorizes the United States to recover removal and remedial action oversight costs.[43] DuPont's amici contended that if oversight costs were recoverable, "responsible parties will be held unfairly liable for the 'waste and inefficiency' of EPA practices."[44] In response, the court reiterated the standard of review applicable to an NCP inconsistency claim.[45] Citing *United States v. Northeastern Pharmaceutical & Chemical Co.*, the court reaffirmed that "responsible parties have the burden of proving" costs inconsistent with the NCP and that "the arbitrary and capricious standard is the proper measure of review."[46] The court then stated that:

> We agree EPA response costs are presumed consistent with the [NCP] unless a responsible party overcomes this presumption by establishing the EPA's response action giving rise to the costs is inconsistent with the [NCP]. . . . To establish an EPA response action is inconsistent with the [NCP], a responsible party must show the EPA acted

42. *Id.* (citing *Am. Cyanamid Co.*, 786 F. Supp. at 161) (citations omitted).

43. United States v. E.I. DuPont De Nemours & Co., 432 F.3d 161, 179 (3d Cir. 2005). *See generally* Erin C. Bartley, Comment, *The Government Always Wins: The Government Can Now Recover Certain Oversight Costs under CERCLA,* United States v. E.I. DuPont De Nemours and Company, Inc., 13 MO. ENVTL. L. & POL'Y REV. 241 (2006) (case summary).

44. *E.I. DuPont de Nemours & Co.*, 432 F.3d at 178.

45. *Id.*

46. *Id.* (citing United States v. N.E. Pharm. & Chem. Co., 810 F.2d 726, 747–48 (8th Cir. 1986)).

> arbitrarily and capriciously in choosing the response action.[47]

Other circuit courts addressing this issue have adopted this standard of review. In addressing an NCP inconsistency claim, the Ninth Circuit cited both *Washington. State Department of Transportation v. Washington Natural Gas Co.* (*WSDOT*) and *Hardage* with approval, stating that in order to "show that the Department's actions were inconsistent with the NCP, the burden is on [the defendant] to show that the Department acted in an arbitrary and capricious manner *in choosing a particular response action.*"[48] Essentially, PRPs attempting to argue that the EPA "violated" the NCP through mistakes in remedy implementation are trying to cloak in the guise of NCP inconsistency an argument—which has been repeatedly rejected by the federal courts—that the government's costs are not recoverable because they are not cost-effective. However, the federal bench has spoken loud and clear on this point.

B. Remedy Implementation vs. Remedy Selection

While acknowledging that liability may be imposed under CERCLA for all remedial costs incurred by the governments that are "not inconsistent with the [NCP],"[49] PRPs often maintain that the government is saying that NCP compliance is not required during remedy implementation, and the remedy selection process is the only time that NCP compliance is required. If true, PRPs' counsel maintain that the EPA can act with impunity and collect unlimited response costs, as long as the PRPs cannot prove the EPA was inconsistent with the NCP during remedy selection.[50]

In reply, government counsel maintain that under the *Kramer* rationale an allegation that costs are excessive or not cost-effective does "not allege inconsistency with the NCP," and is therefore not a defense to a cost

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47. *Id.*

48. California v. Neville Chem. Co., 358 F.3d 661, 673 (9th Cir. 2004) (emphasis added); United States v. Hardage, 982 F.2d 1436, 1508 (10th Cir. 1992); *see also* Wash. State Dep't of Transp. v. Wash. Natural Gas Co., 59 F.3d 793, 802 (9th Cir 1995) (stating that defendants have burden of proving WSDOT's action was arbitrary and capricious); United States v. R.W. Meyer, Inc., 889 F.2d 1497, 1508 (6th Cir. 1989) (stating that defendants have burden of proving that the EPA acted arbitrarily and capriciously).

49. CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A) (2006).

50. Although PRPs sometimes maintain that NCP compliance is required for remedy implementation, because the NCP primarily addresses remedy selection, not implementation, they often have difficulty pointing to specific provisions of the NCP which they allege are "violated" or not complied with in the course of implementing the remedial action.

recovery action under section 107(a) of CERCLA.[51] As noted above, the Third Circuit has validated *Kramer* in holding that "[t]o establish an EPA response action is inconsistent with the [NCP], a responsible party must show EPA acted arbitrarily and capriciously *in choosing the response action*."[52] However, government counsel usually do not contend that the governments can expend unlimited response costs, or completely disregard the NCP during remedy implementation, even though the federal courts have consistently held that cost-effectiveness is not a requirement once the remedy has been selected.[53] In fact, the NCP provides a regulatory scheme designed to ensure that the government's remedy implementation costs are adequately documented and not profligately incurred.

Subsection 300.435(a) of the NCP provides that "[t]he remedial design/remedial action (RD/RA) stage includes the development of the actual design of the selected remedy and implementation of the remedy through construction. A period of operation and maintenance may follow the RA activities."[54] Section 300.435(b)(1) requires that "[a]ll RD/RA activities shall be in conformance with the remedy selected and set forth in the ROD or other decision document for that site."[55] Section 300.160 specifically requires accounting of RD/RA expenditures for cost-recovery purposes.[56] This provision is important since, as the *Kramer* court stated, "once the government proves that it incurred the costs for a particular site,

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51. United States v. Kramer, 913 F. Supp. 848, 850 (D.N.J. 1995).

52. *DuPont*, 432 F.3d at 178–79 (emphasis added); *see also Neville Chem. Co.*, 358 F.3d at 673 (finding no evidence the EPA acted "arbitrarily and capriciously in choosing a particular response action").

53. *See Kramer*, 913 F. Supp. at 867 (D.N.J. 1995) (holding that the EPA must only evaluate the cost effectiveness of competing remedies, not the cost effectiveness of items in the response chosen); United States v. Am. Cyanamid Co., 786 F. Supp. 152, 162 (D.R.I. 1992); Minnesota v. Kalman W. Abrams Metals, Inc., 155 F.3d 1019, 1025 (8th Cir. 1998).

54. 40 C.F.R. § 300.435(a) (2007).

55. 40 C.F.R. § 300.435(b)(1). The NCP primarily addresses remedy selection, not implementation. For that reason, NCP provisions arguably applicable to remedy implementation are few and are either extremely limited in scope or extremely broad. For example, 40 C.F.R. § 300.435(b) further requires that certain quality assurance/quality control (QA/QC) sampling procedures be followed, and that the lead agency ensure that "applicable or relevant and appropriate requirements" (ARARs) are met. The remaining subsections, 40 C.F.R. § 300.435(c)–(f), address, respectively, community relations (including ESD and ROD amendment procedures), contractor conflict of interest, recontracting, and operation and maintenance. Although 40 C.F.R. § 300.435 is the only NCP section to directly address RD/RA, certain other NCP provisions may be read as governing discrete aspects of remedy implementation. *See, e.g.*, 40 C.F.R. § 300.150 (worker health and safety requirements); § 300.160(b) (requiring documentation for cost recovery); § 300.400(c) (containing certain requirements for fund-financed actions, including "prompt response" and community sensitivity); § 300.400(e) (permit requirements); § 300.515(g) (requirement for site cooperative agreements and joint EPA-State inspections "at the conclusion of construction" to ensure ARARs are met).

56. 40 C.F.R. § 300.160.

the burden shifts to the defendants to prove that the costs arose from actions that were inconsistent with the NCP."[57] Read together, these provisions provide a regulatory scheme designed to ensure that the government cannot act with impunity in the conduct of a remedial action.

Consistent with NCP section 300.435(b)(1), which requires that all RD/RA activities "shall be in conformance with the remedy selected and set forth in the ROD," the *Kramer* court, while allowing the government to recover documented costs which are "unreasonable," "excessive," and "not cost-effective" (as long as defendants cannot show the selected remedy is inconsistent with the NCP), would limit recovery of costs to those incurred in performing the remedy selected in the ROD.[58] The court held that "while the NCP requires the EPA to evaluate the cost-effectiveness of competing remedies, the NCP does not require that items of response cost be 'reasonable,' 'proper,' or 'cost-effective.'"[59] Yet the court also held that costs arising "from fraud, double-billing or activities that do not relate to the lawful remedy . . . are not recoverable under section 107."[60] That is precisely because such costs are not incurred in performing the remedy selected in the ROD. The NCP requirements for cost accounting and NCP procedures applicable to remedy selection, including consideration of cost-effectiveness, along with the NCP requirement that costs be incurred in performing the remedy selected in the ROD, are designed to ensure that the government does not collect "unlimited" response costs during remedy implementation. The *Kramer* court elaborated upon this principle:

> Congress has not given the EPA a license to squander the funding from the Superfund that it must use for such remedial actions. By requiring that the actions be selected in a manner consistent with the NCP, the statute embraces the requirement that the EPA consider the cost-effectiveness of various alternative remedial plans before selecting the approach to be taken at the site. . . . The limitation on recovery of response costs "incurred" by the government similarly implies that costs unrelated to the duly selected remedy are unrecoverable, and also that costs . . . are not recoverable until they have been paid by the government, again implying the regularity and due care of

57. *Kramer*, 913 F. Supp. at 856 n.9; *see also* United States v. Hardage, 982 F.2d 1436, 1442 (10th Cir. 1992) (stating that the burden of proof of inconsistency with the NCP rests with the defendant).

58. *Kramer*, 913 F. Supp. at 867; 40 C.F.R. § 300.435(b)(1).

59. *Kramer*, 913 F. Supp. at 867.

60. *Id.*

governmental accounting and disbursement measures as a safeguard.[61]

PRPs frequently cite, but misinterpret the import of, several key opinions, including *Minnesota v. Kalman W. Abrams Metals, Inc.*[62] and *WSDOT*.[63] *Kalman* is cited in support of the assertion that NCP consistency applies to all phases of cleanup governed by the NCP, including remedy implementation. The inquiry in *Kalman*, however, was not whether the State of Minnesota followed the NCP in implementing the remedy, but whether the remedy selection process itself was inconsistent with the NCP. In *Kalman*, the district court found that the State of Minnesota "failed to undertake a feasibility study" prior to choosing the experimental soil washing remedy. Instead, the State relied on a prior EPA Site Assessment and ignored its own contractor's and the EPA contractor's recommendations for "complete removal" of contaminants.[64] In addition, the court found the State "gave the public minimal public notice of the proposed soil washing remedy and contracted to implement that remedy before the public comment period ended."[65] Finally, the district court found that when the soil washing remedy failed, the State hired "new contractors, at increased expense, to clean up the site."[66] The court of appeals held that this was arbitrary and capricious and inconsistent with the NCP because the State "failed to monitor [its own contractor] and modify the remedy when the unevaluated problem turned out to be greater than anticipated."[67] The *Kalman* court, therefore, found the State's actions arbitrary and capricious based on inadequate site investigation, failure to evaluate remedial alternatives, failure to provide for pre-decisional public notice and comment, and failure to modify the remedy when changed circumstances

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61. *Id.* at 865.

62. Minnesota v. Kalman W. Abrams Metals, Inc., 155 F.3d 1019, 1024–25 (8th Cir. 1998).

63. Wash. State Dept. of Transp. v. Wash. Natural Gas Co., 59 F.3d 793, 802 (9th Cir. 1995); *see also* United States v. Jones, 267 F. Supp. 2d 1349, 1363–64 (M.D. Ga. 2003). *Jones* was a Clean Water Act (CWA) case in which, among other claims, the government sought reimbursement of removal costs under the Oil Pollution Act (OPA), 33 U.S.C. §§ 2701–2720 (2006). *Id.* at 1349–50. The United States had moved for summary judgment on liability and costs; the court granted the government's motion as to liability, but denied summary judgment as to costs, since issues of fact remained with regard to defendant's "NCP consistency" defense. *Id.* at 1352–53, 1364. Thus, this case is inconclusive. It is worth noting, however, that the court also granted the government's motion for summary judgment as to defendants' affirmative defense contesting the "reasonableness" of the government's costs. *Id.* at 1364.

64. *Kalman W. Abrams Metals, Inc.*, 155 F.3d at 1024–25.

65. *Id.* at 1024.

66. *Id.* at 1025.

67. *Id.*

required.[68] All the State's errors go to remedy selection, not implementation.

Similarly, PRPs cite *WSDOT* for the proposition that NCP consistency applies to all remedial actions. However, the holding of *WSDOT* is quite different. In that case, response costs incurred by WSDOT were held not recoverable by the Ninth Circuit because WSDOT's actions in selecting the remedy were found to be arbitrary and capricious and inconsistent with the NCP.[69] The court applied this standard because "[t]he NCP is designed to make the party seeking response costs *choose a cost-effective course of action* to protect public health and the environment."[70] The court further elaborated on the standard for NCP inconsistency review as follows:

> To prove that a response action of the EPA was inconsistent with the NCP, a defendant must prove that the EPA's response action was arbitrary and capricious. This legal standard is justified 'because determining the appropriate removal and remedial action involves specialized knowledge and expertise, [and therefore] the choice of a particular cleanup method is a matter within the discretion of the [government].'[71]

The record before the court demonstrated that the lead representative from WSDOT on the coordination team did not even know the NCP existed when developing a remedial action for the site.[72] WSDOT "utterly failed" to adequately conduct a remedial investigation: the court found that "WSDOT's initial investigation failed to determine either the nature or the extent of the threat posed," as required by the NCP.[73] In addition, WSDOT did not properly evaluate remedial alternatives as specified in the "feasibility study" requirements of the NCP.[74] Finally, "WSDOT failed to provide an opportunity for public review and comment of the alternative remedial measures it was considering."[75] As a result, the response costs were disallowed, not because WSDOT didn't follow the NCP with regard to remedy implementation or due to the State's excessive costs, but rather

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68. *Id.*

69. Wash. State Dep't of Transp. v. Wash. Natural Gas Co., 59 F.3d 793, 805 (9th Cir. 1995).

70. *Id.* at 802 (emphasis added).

71. *Id.* at 802 (citing United States v. Hardage, 982 F.2d 1436, 1442 (10th Cir. 1992) (quoting United States v. NEPACCO, 810 F.2d 726, 748 (8th Cir. 1986))) (emphasis added) (citations omitted); United States v. R.W. Meyer, Inc., 889 F.2d 1497, 1508 (6th Cir. 1989); *NEPACCO*, 810 F.2d at 748.

72. *Wash. Natural Gas Co.*, 59 F.3d at 805.

73. *Id.* at 803.

74. *Id.* at 805.

75. *Id.*

because the court found that WSDOT selected its remedial action in an arbitrary and capricious manner that was inconsistent with the NCP. In short, the *WSDOT* opinion does not speak to remedy implementation. Rather, like *Kalman*, the court held the State's actions arbitrary and capricious based on "utter" failure of the remedial investigation, failure to evaluate remedial alternatives, and failure to provide public notice and opportunity for comment.[76]

PRPs characterize the EPA's position as denying that NCP consistency is not required for remedy implementation, but only for remedy selection. However, that is not the case. The NCP provides a regulatory scheme that requires the government to act "in conformance with the remedy selected and set forth in the ROD," to consider cost-effectiveness in remedy selection, and to keep an accurate accounting of its costs.[77] These NCP requirements are designed to ensure that the government does not collect unlimited response costs or act with impunity during remedy implementation. Once these NCP requirements are met, however, to avoid liability for all of the government's costs, a PRP must show, not that the government's costs were not cost-effective or unreasonable, but that the selection of the response action was arbitrary and capricious and inconsistent with the NCP.

Individual site costs may only be challenged based upon NCP inconsistency in remedy selection once documented and if incurred in connection with a particular site. Costs may not be challenged as inconsistent with the NCP merely because they are unreasonable, not cost-effective, or excessive. Nevertheless, PRPs frequently persist in challenging the EPA's costs as excessive or not cost-effective based on allegations of, among others, design errors, contract disputes, mismanagement of contracts, and inadequate contractor oversight on the part of the EPA or its state counterparts. However, as the *Kramer* opinion clearly holds, costs which not only are "excessive," but also those which are "unreasonable, duplicative, not cost-effective, and improper . . . as a matter of law . . . *do not allege inconsistency with the NCP* and therefore do not provide defenses in a cost recovery action under section 107(a) of

76. *Id.* at 804–05; *see* Teresa Saint-Amour, *Is It Consistent or Not Inconsistent? The Question Remains Unanswered Following* Washington State Department of Transportation v. Washington Natural Gas Co., 7 VILL. ENVT. L.J. 401, 429–30 (1996) (explaining that a state agency cannot recover costs when its remedial selection is "arbitrary and capricious").

77. 40 C.F.R. §§ 300.435(b)(1), .430(f)(1)(ii)(D), .160(d) (2007).

CERCLA."[78] Under *Kramer* and similar cases, a government motion to strike any such defenses would be granted.[79]

C. Changes Requiring Remedy Modification

PRPs often claim that the EPA, without a ROD amendment or an ESD, implemented significant remedy changes in violation of the NCP.[80] They frequently argue that minor changes made during remedy implementation or construction, such as modifications to methane gas venting systems, provisions of temporary water supplies, extensions of caps or impermeable covers protecting previously undetected waste material, and the like, were "significant" or even "fundamental" remedy changes requiring the EPA to follow formal remedy modification procedures, such as issuance of ROD amendments or ESDs. It is important to note that the threshold question is not whether a particular component of a remedy was itself significantly changed, but whether the remedy selected in the ROD was significantly changed by a modification to a particular component of the remedy. The NCP states that "after the adoption of the ROD, if the remedial action . . . differs significantly from the remedy selected in the ROD with respect to scope, performance, or cost, the lead agency shall . . . [p]ublish an explanation of significant differences when the differences . . . significantly change but do not fundamentally alter *the remedy* selected in the ROD."[81] The preamble to the EPA's NCP regulations published in 1990 clarifies the difference between significant changes to a ROD by discussing those that are "nonsignificant."

> Nonsignificant changes are minor changes that usually arise during design and construction, when modifications are made to the functional specifications of the remedy *to optimize performance and minimize cost.* This may result in minor changes to the type and/or cost of materials, equipment, facilities, services and supplies used to

78. United States v. Kramer, 913 F. Supp. 848, 867 (D.N.J. 1995) (emphasis added).

79. *See id.* at 867; *Am. Cyanamid Co.*, 786 F. Supp. at 162; *Kalman W. Abrams Metals, Inc.*, 155 F.3d at 1025.

80. Note that when PRPs allege a "significant" change in the remedy occurred, their argument must be that an ESD is required. However, under the NCP and relevant case law, if such a change is "fundamental," then their argument must be that a ROD amendment is required.

81. 40 C.F.R. § 300.435(c)(2) (emphasis added).

> implement the remedy. The lead agency need not prepare an ESD for minor changes.[82]

The EPA's remedies typically consist of multiple components only one of which represents the primary treatment methodology. Minor changes to components of a remedy that are not primary, occurring during design and construction and made in order to "optimize performance and minimize cost," are described in the NCP as "nonsignificant."[83] Nevertheless, PRPs frequently allege that minor changes made "to optimize performance and minimize cost" constitute significant changes requiring an ESD.

It is instructive in this regard to read the examples of "significant" changes requiring an ESD given in the EPA's *Guide to Preparing Superfund Proposed Plans, Records of Decision, and Other Remedy Selection Decision Documents* (ROD Guidance).[84] They include: (1) a significant increase in volume of waste material to be treated resulting in a substantial cost increase; (2) off-site disposal rather than on-site disposal selected in the ROD, resulting in a significant increase in costs and implementation time; (3) implementation of a ROD contingency, changing the primary remedy from pump and treat to monitored natural attenuation; (4) newly promulgated cleanup levels requiring a significant change in cleanup level, timing, volume or cost of the remedy; (5) a zoning change from residential to commercial significantly changing threat levels, risk scenarios and cleanup levels specified in the ROD; and (6) a change to the primary pump and treat system from air stripping for ex-situ treatment of groundwater to biological treatment of groundwater.[85] All of these examples involve not a modification to one small component of the remedy, resulting in lower costs, but substantially increased waste volume, cost, or implementation time; significant changes in risk and contaminant cleanup levels to be achieved; or substitution of one primary treatment technology for another.

It is further instructive to read the examples given in the 1990 NCP Preamble of "significant" changes requiring an ESD. They include the following: (1) a newly promulgated requirement affects "a *basic feature* of

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82. National Oil and Hazardous Substances Pollution Contingency Plan, 55 Fed. Reg. 8666, 8772 (Mar. 8, 1990) (emphasis added).

83. *Id.*

84. OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, U.S. ENVTL. PROT. AGENCY, OSWER 9200.1-23P, A GUIDE TO PREPARING SUPERFUND PROPOSED PLANS, RECORDS OF DECISION, AND OTHER REMEDY SELECTION DECISION DOCUMENTS 7-3 fig.7-1 (1999), *available at* http://epa.gov/superfund/policy/remedy/rods/index.htm (providing examples of "minor" changes including: (1) a 25% increase in volume of soil to be treated; (2) a change in an on-site disposal location; and (3) a change from quarterly to semi-annual groundwater monitoring).

85. *Id.*

the remedy, such as timing or cost," but does not fundamentally alter the remedy specified in the ROD; (2) sampling during the design phase "indicates the need to increase the volume of waste material to be removed and incinerated by *50 percent*, requiring an increase in cost"; (3) the "use of *carbon adsorption instead of air stripping* to conduct ground-water treatment," with the pump and treat approach remaining the same.[86] As with the ROD guidance, the examples include substantial increases in waste volume, "basic" changes to timing and cost, and the substitution of one primary treatment technology for another. Often, changes alleged by PRPs to be significant did not significantly affect overall timing or cost of construction, increase the volume of waste material to be treated, or constitute substitution of one primary treatment technology for another, as is the case with the examples provided in the preamble.

PRPs challenging the EPA's costs on this basis often rely on *United States v. Burlington Northern Railroad Co.*[87] In *Burlington Northern*, a hazardous sludge that was to be pumped out of the site contained more rock than anticipated, requiring a modification of the already-selected remedial action plan.[88] One modification—the addition of a gravity settling tank to remove the rock in the sludge—increased the remedy's cost by $100,000 to a total of $2.3 million.[89] The court held that this modification did *not* require reconsideration of the remedy currently in place.[90] However, subsequent post-ROD difficulties increased costs by approximately 61% (or $1.4 million).[91] Thus, the Tenth Circuit affirmed the district court's holding that this increase fundamentally altered the remedy "with respect to scope and cost," and that failure to amend the ROD was inconsistent with the NCP.[92] However, the court further held that to avoid liability the defendant must show that the "arbitrary and capricious actions of the EPA resulted in

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86. National Oil and Hazardous Substances Pollution Contingency Plan, Preamble, 55 Fed. Reg. at 8772 (emphasis added).

87. United States v. Burlington N. R.R. Co., 200 F.3d 679 (10th Cir. 1999).

88. *Id.* at 693 (stating the issue was whether the unanticipated rock content significantly changed or fundamentally altered the remedial plan).

89. *Id.*

90. *Id.* at 699 (reversing "the district court's holding that the EPA's conclusion to remediate the site to a 1×10^{-5} cancer risk level was arbitrary and capricious").

91. *Id.* at 694.

92. *Id.* Note that the court did not find a "significant" change requiring an ESD, but a "fundamental" change requiring a ROD amendment. The public notice procedures are quite different for both. The NCP regulations, 40 C.F.R. § 300.435(c)(2)(i)(A), (B), require that an ESD only be made "available to the public in the administrative record," and that the EPA publish a "notice that briefly summarizes" the ESD. No public comment period is required. A ROD amendment, on the other hand, must be made "available to the public . . . *prior* to the commencement of the remedial action affected by the amendment," and the public given an opportunity to comment. § 300.435(c)(2)(ii)(H) (emphasis added).

avoidable and unnecessary remediation costs," and remanded for a determination whether the EPA's remedial actions "resulted in demonstrable excess costs" that would not have otherwise been incurred.[93]

Therefore, even if PRPs are successful in arguing that a change made during construction rises to a "fundamental" change to the remedy requiring a ROD amendment, under the holding of *Burlington Northern* a defendant must show the government acted arbitrarily in not issuing one *and* incurred additional costs as a result.[94] This is a heavy burden for PRPs to meet for the simple reason that mid-course changes made during construction often result in lower, not higher costs, and if they do increase costs, those costs are usually small in comparison to the total costs sought by the EPA in a cost-recovery action. Most PRPs will have difficulty meeting their burden of proving that "demonstrable excess costs" were incurred as a result.[95]

PRPs sometimes cite other EPA regions' ESDs and ROD amendments as precedent. However, the fact that the EPA may have issued ESDs in certain circumstances does not bind the Agency in other circumstances. In addition, defendants have the burden to show that *failure* to issue an ESD, which as noted above requires public notice, but not prior public notice and comment, is arbitrary and capricious and inconsistent with the NCP. This standard is not met by citing examples of ESDs issued by the Agency undertaken in an excess of caution, perhaps anticipating a challenge based on failure to issue a ROD modification. Finally, it is important to recognize that there appears to be no cases in which a federal court has held an EPA action arbitrary and capricious for the agency's failure to issue an ESD,

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93. *Burlington N. R.R. Co.*, 200 F.3d at 695 (emphasis added).

94. *Id.*; *see also* Minnesota v. Kalman W. Abrams Metals, Inc., 155 F.3d 1019 (8th Cir. 1998) (finding "states may recover all costs except those that appellees prove were inconsistent with the NCP"); O'Neil v. Picillo, 682 F. Supp. 706, 729 (D.R.I. 1988), *aff'd*, 883 F.2d 176 (1st Cir. 1989) (stating "the defendants have the burden of demonstrating that the clean-up, because of some variance from the Plan, resulted in demonstrable excess costs"); United States v. Am. Cyanamid Co., 786 F. Supp. 152, 161 (D.R.I. 1992); United States v. Kramer, 913 F. Supp. 848, 867 (D.N.J. 1995) ("As the party claiming the benefit of an exception to cost recovery, the defendants carry the burden of proving that the actions that gave rise to the costs were inconsistent with the NCP."). But consider the initial ruling of *United States v. Wash. State Department of Transportation*, in which the court found the EPA's construction of air strippers was not supported by the administrative record and therefore was arbitrary and capricious. United States v. Wash. State Dep't of Transp., No. C05-5447RJB, 2007 WL 445972, at *19 (W.D. Wash. Feb. 07, 2007). In a subsequent proceeding and in contravention of existing case law, the court placed the burden on the government to demonstrate that the EPA would have incurred the same amount of response costs by installing the air strippers as part of the remedial action. United States v. Wash. State Dep't of Transp., No. C05-5447RJB, 2007 U.S. Dist. LEXIS 30544, at *27–28 (W.D. Wash. Apr. 25, 2007).

95. *See Burlington N. R.R. Co.*, 200 F.3d at 695.

rather the only relevant precedent concerns a failure to issue a ROD amendment.[96]

PRPs sometimes claim that failure to comply with NCP public notice requirements is a separate NCP violation. However, as noted above, the inquiry is *not* whether the government has "violated" the NCP, nor how many such violations the EPA may have committed, but whether the PRPs can show that the government's actions in selecting a response action (or in failing to issue a ROD amendment) are arbitrary and capricious. Public notice is part and parcel of the procedures specified under the NCP for issuance of ESDs and ROD amendments.[97] In fact, the provisions applicable to such remedy modifications are found under "community relations."[98] Nevertheless, it is important to recognize that there is an important due process or procedural distinction between a "significant" remedy change requiring an ESD, and a "fundamental" change requiring a ROD amendment that makes it unlikely that a court would deny the EPA's costs for only failing to issue an ESD.

Whereas a ROD amendment requires prior public notice and comment, an ESD does not.[99] Perhaps for that reason, courts addressing this issue have found error when the government failed to follow NCP public notice and comment procedures for ROD amendments, not ESDs.[100] The NCP only requires that an ESD and supporting documentation be made "available to the public in the administrative record," and that the EPA publish a "notice that briefly summarizes" the ESD; no public comment period is required.[101] In another case, *Atlantic Richfield Co.*, the Atlantic Richfield Co. (ARCO) sought reimbursement from the EPA of costs it incurred under a unilateral administrative order (UAO) in connection with the excavation and removal of a greater volume of aluminum wastewater sludge than had been anticipated in the ROD, under section 106(b)(2)(D) of CERCLA.[102] ARCO argued that the EPA's order was arbitrary and capricious and inconsistent with the NCP.[103] Its argument was that the ordered work constituted a fundamental deviation from the remedy selected

96. *See, e.g., id.* at 679 (holding the EPA's actions arbitrary and capricious for not issuing a ROD).

97. 40 C.F.R. § 300.435(c) (2007).

98. *Id.*

99. 40 C.F.R. § 300.435(c)(2)(i)(A), (B).

100. *E.g., Burlington N. R.R. Co.*, 200 F.3d at 694; *see also* Atlantic Richfield Co., 8 E.A.D. 394, 418 (1999), *available at* http://www.epa.gov/eab/ disk11/atlantic.pdf ("In short, these provisions indicate that if a proposed enforcement action is 'significant[ly] differ[ent]' from the remedy selected in the ROD, notice to the public is required.").

101. 40 C.F.R. § 300.435(c)(2)(i)(A), (B).

102. Atlantic Richfield Co., 8 E.A.D. at 396.

103. *Id.* at 398.

in the ROD and that the EPA had failed to issue a ROD amendment.[104] The EPA's Environmental Appeals Board (EAB) rejected ARCO's argument.[105] Despite the change in remedy, the EAB found the change was merely "significant," not "fundamental," requiring not a ROD amendment but an ESD.[106] The EAB further held that the EPA was justified in ordering the company to proceed with the remedy prior to the issuance of an ESD.[107] The EAB explained:

> During the period when the ESD is being prepared and then made available to the public, the lead agency should proceed with the pre-design, design, construction, or operation activities associated with the remedy. The remedy can continue to be implemented . . . because the ESD represents only a notice of a change, and is not a formal opportunity for public comment since the Agency is not reconsidering the overall remedy.[108]

By contrast, a ROD amendment and its supporting information must be made "available to the public . . . prior to the commencement of the remedial action affected by the amendment."[109]

CONCLUSION

PRP arguments attacking the EPA's costs as unreasonable or excessive do not allege inconsistency with the NCP within the meaning of CERCLA section 107(a), and therefore these arguments cannot provide a defense under *Kramer* and relevant case law. PRPs frequently mistake the correct standard of review. Essentially, they are attempting to contest the "reasonableness" or cost-effectiveness of the government's costs under the cloak of NCP inconsistency, without attempting to prove error in the selection of the remedial action. The latter is the correct standard of review for an NCP inconsistency defense. As demonstrated above, it is well

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104. *Id.*

105. *Id.* at 399.

106. *Id.* at 421.

107. *Id.*

108. *Id.* at 419 (quoting OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, U.S. ENVTL. PROT. AGENCY, INTERIM FINAL GUIDANCE ON PREPARING SUPERFUND DECISION DOCUMENTS, OSWER Dir. 9355.3–02, ch. 8, at 10 (June 1989)).

109. *Id.* at 420 (quoting 40 C.F.R. § 300.435(c)(2)(ii)) (contrasting that section with § 300.435(c)(2)(i), which states only that an ESD and its supporting information must be made "available to the public" at some unspecified time).

established that, to show the government's costs are inconsistent with the NCP, the burden is on the PRPs to show that the agency acted in an arbitrary and capricious manner "in choosing a particular response action."[110] That is a heavy burden to meet, and the standard of review is one highly deferential to the government.

PRPs would like to demonstrate that without a detailed examination of the reasonableness of each item of the governments' costs the EPA would have *carte blanche* to spend without restraint and to collect unlimited response costs. In making that claim, however, they overlook essential NCP provisions designed to ensure that the government's costs are accounted for and are incurred in furtherance of a remedial action selected under extensive NCP provisions governing remedy selection, which include the requirement that the selected remedy be cost-effective.[111] It is precisely this NCP requirement that the *Kramer* court found so persuasive. The court held that, once the EPA selects its remedy in compliance with the NCP, the EPA may recover all costs incurred in performance of that remedy. The court also held the allegations that costs are "excessive, unreasonable, duplicative, not cost-effective, and improper" do not allege inconsistency with the NCP and "do not provide a defense to a cost recovery action under section 107(a)" of CERCLA.[112]

Finally, PRP attempts to construe relatively minor changes made during construction as "significant" or "fundamental" changes to a remedy are usually doomed to fail. In any case, PRPs have the additional burden of establishing that demonstrable damages or excess costs were incurred as a result. Thus, PRPs generally will be unsuccessful in meeting either burden of proof.

110. United States v. Hardage, 982 F.2d 1436, 1442 (10th Cir. 1992); California v. Neville Chem. Co., 358 F.3d 661, 673 (9th Cir. 2004); Wash. State Dep't of Transp. v. Wash. Natural Gas Co., 59 F.3d 793, 802 (9th Cir. 1995); United States v. R.W. Meyer, Inc., 889 F.2d 1497, 1508 (6th Cir. 1989); United States v. Ne. Pharm. & Chem. Co., 810 F.2d 726, 748 (8th Cir. 1986).

111. The NCP requires the government to act "in conformance with the remedy selected and set forth in the ROD," consider cost-effectiveness in remedy selection, and keep an accurate accounting of its costs. 40 C.F.R. §§ 300.435(b)(1), .430(f)(1)(ii)(D), .160(d) (2007).

112. United States v. Kramer, 913 F. Supp. 848, 867 (D.N.J. 1995).