CHAPTERS

COVERT RCRA ENFORCEMENT: SEEKING COMPENSATORY DAMAGES UNDER THE FEDERAL TORT CLAIMS ACT FOR ENVIRONMENTAL CONTAMINATION

BY

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The United States government stands out as one of the worst environmental polluters domestically, and it continues to remediate environmental contamination stemming from its own federal facilities. Not only does contamination at federal sites damage the surrounding environment, but such pollution can gravely injure nearby residents. Historically, these injured parties have been unable to recover compensatory damages from the government for harm to their property or person caused by government violations of the Resource Conservation and Recovery Act (RCRA). When plaintiffs subsequently turned to the Federal Tort Claims Act (FTCA) to seek damages for RCRA violations, their claims were either barred by the discretionary function exception (DFE) or dismissed for attempting to indirectly enforce RCRA using the FTCA. This Chapter profiles Myers v. United States *and suggests that compensatory damages can be sought from the government for RCRA violations using the FTCA. In* Myers*, the United States Court of Appeals for the Ninth Circuit found that an FTCA claim for compensatory damages was tenable when the plaintiff alleged that the Navy violated its own guidelines during a remediation project—guidelines implemented to keep the remediation operating within the confines of RCRA. By arguing that the Navy violated its own directives*

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instead of RCRA, the plaintiff in Myers *overcame the DFE, circumvented the prohibition of indirect enforcement, and brought an FTCA claim against the government for compensatory damages. This Chapter discusses the enforcement mechanisms of RCRA and the FTCA, the obstacles posed by the DFE and indirect enforcement, and how* Myers *provides a means for overcoming these obstacles and achieving covert RCRA enforcement using agency guidelines. The Chapter then examines how the same obstacles posed by the DFE and indirect enforcement can also arise during the negligence phase of an FTCA suit. Finally, this Chapter concludes that, taken together, the Ninth Circuit's FTCA analysis and Supreme Court precedent authorize this novel manner of RCRA enforcement to fully compensate victims of the government's environmental contamination.*

I. INTRODUCTION

"Much of the worst pollution in the United States emanates from facilities owned and operated by the federal government."[1]

Since 1985, federal facilities have proven to be some of the most polluted sites in the United States, and a staggering number of these facilities are responsible for widespread environmental contamination.[2] In 2010, the Department of Defense (DOD) estimated that 4,475 federal sites were either in the cleanup or investigatory phases of the DOD's installation restoration program (IRP).[3] Additionally, and incidental to the IRP sites, 1,528 locations were designated active military munitions response sites (MMRS) housing unexploded ordnance, discarded military munitions, or munitions constituents.[4] The estimated cost to complete the restoration of all IRP sites was $12.8 billion, and another $15.2 billion for the MMRS sites.[5] Combined, that is $28 billion dollars to address environmental contamination at DOD sites alone. The federal government, therefore, is arguably one of the principal causes of environmental contamination in the United States.

It is logical that the vast amount of environmental contamination caused by the government could result in injuries to citizens living near these facilities. However, injured parties are precluded from seeking compensation from the government unless authorized by a waiver of sovereign immunity.[6] Two waivers of sovereign immunity are key to this Chapter: the Resource Conservation and Recovery Act (RCRA)[7] and the Federal Tort Claims Act (FTCA).[8] The first, RCRA, waives sovereign immunity for three types of citizen suits: 1) to enforce a violation of a

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1 J.B. Wolverton, *Sovereign Immunity and National Priorities: Enforcing Federal Facilities' Compliance with Environmental Statutes*, 15 HARV. ENVTL. L. REV. 565, 565 (1991).

2 Charles de Saillan, *The Use of Imminent Hazard Provisions of Environmental Laws to Compel Cleanup at Federal Facilities*, 27 STAN. ENVTL. L.J. 43, 45–46 (2008).

3 U.S. DEP'T OF DEF., FISCAL YEAR 2010: THE DEFENSE ENVIRONMENTAL PROGRAMS ANNUAL REPORT TO CONGRESS 48, fig.6-5 (2011), *available at* http://www.denix.osd.mil/arc/upload/508-FY10DEP-ARC_Final-Report.pdf.

4 *Id.* at 43, 51 fig.6-9.

5 *Id.* at 50, 53.

6 *See* Lane v. Pena, 518 U.S. 187, 190–92 (1996) (holding that "[t]o sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims").

7 Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901–6992k (2006) (amending Solid Waste Disposal Act, Pub. L. No. 89-272, 79 Stat. 992 (1965)).

8 28 U.S.C §§ 1291, 1346, 1402, 2401–2402, 2411–2412 (2006).

permit, standard, or regulation;[9] 2) to abate imminent and substantial endangerments to health or the environment;[10] and 3) to force the United States Environmental Protection Agency (EPA) to perform a nondiscretionary duty.[11] The broad waivers of sovereign immunity granted by RCRA are tempered, however, by the three remedies it allows: 1) imposition of civil penalties paid to the United States;[12] 2) injunctions to restrain RCRA violators;[13] and 3) injunctions to remediate environmental damage if the plaintiff has not yet remedied it himself.[14] Courts are not permitted to award compensatory damages.[15] Parties injured as a result of RCRA violations are, thus without a means to seek money damages if they sue under RCRA alone.

The FTCA, on the other hand, subjects the United States to tort liability as determined by the law of the place where the act occured.[16] Nonetheless, the discretionary function exception (DFE) bars FTCA suits against the government when alleged misconduct is found to be an act of "discretion."[17] To determine whether an act is discretionary or not, the Supreme Court adopted a two-prong test in *Berkovitz v. United States*.[18] If a plaintiff can prove that the government either failed to follow mandatory directives, or that its decision was not based on protected policy concerns, the DFE will not immunize the United States from liability.[19] As a result, plaintiffs may recover compensatory damages through an FTCA suit despite the DFE.

Not surprisingly, citizen plaintiffs have attempted to take a "front door" approach to seeking compensatory damages for RCRA violations using the FTCA, and have argued that RCRA imposes mandatory directives on the government that precludes the DFE.[20] This manner of overt attack, however,

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9 42 U.S.C. § 6972(a)(1)(A) (2006); Michael Hearn, *One Person's Waste is Another Person's Liability: Closing the Liability Loophole in RCRA's Citizen Enforcement Action*, 42 MCGEORGE L. REV. 467, 471 (2010).

10 42 U.S.C. § 6972(a)(1)(B) (2006); Hearn, *supra* note 9, at 471–72.

11 42 U.S.C. § 6972(a)(2) (2006); Hearn, *supra* note 9, at 472.

12 42 U.S.C. §§ 6928(a), (g), 6972(a)(1)(A) (2006). These civil penalties are paid to the United States Treasury. *See* 31 U.S.C § 3302(c) (2006).

13 42 U.S.C. § 6972(a)(1)(A)–(B) (2006).

14 Meghrig v. KFC W., Inc., 516 U.S. 479, 484 (1996) (declaring that "RCRA's citizen suit provision is not directed at providing compensation for past cleanup efforts").

15 Commerce Holding Co. v. Buckstone, 749 F. Supp. 441, 445 (E.D.N.Y. 1990).

16 Federal Tort Claims Act, 28 U.S.C. § 1346(b) (2006); Grover Glenn Hankins, *The Federal Tort Claims Act: A Smooth Stone for the Sling*, 31 GONZ. L. REV. 27, 55–56 (1996).

17 28 U.S.C § 2680(a) (2006) (providing agencies with immunity from suits for claims based upon an agency's exercise of authorized discretion).

18 486 U.S. 531, 536–38 (1988) (proclaiming that courts must first consider whether 1) the action is a matter of choice for the acting employee or agency, and 2) whether Congress intended to immunize that type of discretion from liability).

19 *Id.* at 536.

20 *See, e.g.*, Abreu v. United States, 468 F.3d 20, 30–32 (1st Cir. 2006); Sanchez v. United States, 707 F. Supp. 2d 216, 227 (D.P.R. 2010), *aff'd sub nom.* Sanchez *ex rel.* D.R.-S. v. United States, 671 F.3d 86 (1st Cir. 2012).

results in case dismissal.[21] Violations of RCRA cannot be charged under the FTCA because doing so would amount to "indirect enforcement" and would "adversely affect the RCRA statutory scheme."[22] Hence, injured plaintiffs may not overtly seek compensatory damages from the government for RCRA violations by suing under the FTCA.

Notwithstanding the government's paradoxical immunity from paying money damages for violating its own environmental mandates, a "back door" manner of environmental enforcement exists. In *Myers v. United States*,[23] the United States Court of Appeals for the Ninth Circuit held that the DFE did not bar an injured plaintiff's FTCA claim seeking compensatory damages for thallium poisoning suffered during a Navy remediation project.[24] The court found that mandatory directives listed in the Navy's Health and Safety Program Manual (Program Manual)[25] left no room for discretion, and that the standards in the Federal Facility Agreement (FFA)[26] were not based upon protected policy concerns.[27] Consequently, both the Program Manual and the FFA foreclosed application of the DFE.[28] Significantly, thallium is designated as a hazardous waste by RCRA,[29] and because it was released and shot airborne during the remediation project,[30] Myers could have brought suit under RCRA to enjoin the Navy's conduct.[31] However, if she had done so, she would not have been entitled to compensatory damages. By bringing suit under the FTCA instead, Myers was able to seek monetary compensation. The court's holding in *Myers* is novel because both the Program Manual and the FFA were implemented to keep the remediation project operating in accordance with RCRA.[32] By citing the Program Manual and the FFA, instead

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21 *Abreu*, 468 F.3d at 32 ("[A] damage action under the FTCA is not available . . . based on a RCRA violation period"); *Sanchez*, 707 F. Supp. 2d at 228 (finding that "[p]laintiffs have not met their burden of pleading nor [made a] showing that subject matter jurisdiction exists").

22 *Abreu*, 468 F.3d at 30–31; *see also Sanchez*, 707 F. Supp. 2d at 228; Akers v. United States, No. CV.01-1348-HU, 2003 WL 23531298, at *10 (D. Or. July 8, 2003).

23 652 F.3d 1021 (9th Cir. 2011).

24 *Id.* at 1033.

25 NAVAL FACILITIES ENG'G COMMAND, U.S. NAVY, NAVFACINST 5100.11J, SAFETY AND HEALTH PROGRAM MANUAL ¶ 0402.a (2000) [hereinafter PROGRAM MANUAL], *available at* https://portal.navfac.navy.mil/portal/page/portal/navfac/navfac_ww_pp/navfac_hq_pp/navfac_sf_pp/navfac_sf_resource/5100_11j.pdf.

26 U.S. DEP'T OF DEF., U.S. DEP'T OF THE NAVY & STATE OF CAL., CAMP PENDLETON MARINE CORPS BASE FEDERAL FACILITY AGREEMENT ¶ 20.1 (1990) [hereinafter FEDERAL FACILITY AGREEMENT], *available at* http://www.marines.mil/unit/basecamppendleton/Pages/BaseStaffandAgencies/Environmental/IR/PDFs/CPEN_FFA.pdf. Significantly contaminated federal facilities are addressed by section 120 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund). The terms and conditions of the cleanup are governed by an interagency agreement (also referred to as a Federal Facility Agreement) entered into by EPA and the facility. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9620 (2006).

27 *Myers*, 652 F.3d at 1029–33.

28 *Id.* at 1033.

29 Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6924(d)(2)(B)(viii) (2006).

30 *Myers*, 652 F.3d at 1025–26.

31 42 U.S.C. § 6972(a)(1)(B) (2006) (discussing citizen suits).

32 PROGRAM MANUAL, *supra* note 25, at ¶ 0402 (describing how the management and control of hazardous materials, as well as compliance with health and safety protocols, are the

of RCRA itself, Myers overcame the DFE and effectively enforced RCRA through an FTCA suit. Therefore, injured parties may seek compensatory damages for governmental RCRA violations by covertly invoking RCRA standards—implemented through agency guidelines—in an FTCA action.

This Chapter explores the support for, and the implications of, the Ninth Circuit's holding in *Myers*. Part II chronicles the legal interpretation of RCRA and the FTCA leading up to *Myers*, and illuminates specific Supreme Court decisions supporting the use of agency guidelines as a source of mandatory directives. Part III analyzes the DFE, the case of *Myers* itself, and how indirect enforcement occurs during FTCA litigation. Part IV examines how a prima facie negligence cause of action is articulated, how indirect enforcement arises during negligence claims, and how the laws of EPA-authorized states might circumvent indirect enforcement. Finally, Part V concludes that covert use of RCRA by using agency guidelines to overcome the DFE is supported by the FTCA's statutory language and Supreme Court precedent.

II. BACKGROUND

That the federal government of the United States is one of the worst environmental polluters in the nation is peculiar. But this oddity approaches the absurd when considering the government's use of sovereign immunity as a defense against paying victims compensatory damages for its environmental pollution. In attempting to defeat this folly, plaintiffs have commonly brought claims under two statutes: RCRA and the FTCA.[33] As noted in Part I, RCRA waives sovereign immunity for citizen suits seeking to enforce permits, abate certain endangerments, and compel the EPA to undertake nondiscretionary duties.[34] Courts may not award compensatory damages under RCRA;[35] however, the following section will describe in greater detail the three remaining remedies that are available for citizens who sue under RCRA: 1) penalties payable to the United States,[36] 2) injunctions to restrain RCRA violators,[37] and 3) injunctions to remediate damage if the plaintiff has not yet remedied it himself.[38] The second statute, the FTCA, waives sovereign immunity for state law negligence claims

responsibility of the Navy during its cleanup projects); FEDERAL FACILITY AGREEMENT, *supra* note 26, at 5–6 (subjecting all parties to RCRA jurisdiction).

[33] *See, e.g.*, Abreu v. United States, 468 F.3d 20, 22–23, 29 (1st Cir. 2006) (invoking RCRA and the FTCA); *see also* Sanchez v. United States, 707 F. Supp. 2d 216, 228 (D.P.R. 2010), *aff'd sub nom.* Sanchez *ex rel.* D.R.-S. v. United States, 671 F.3d 86 (1st Cir. 2012); Akers v. United States No. CV.01-1348-HU, 2003 WL 23531298, at *6 (D. Or. July 8, 2003).

[34] *See* 42 U.S.C. § 6972(a)(1)(A)–(a)(2) (2006); *see also* Hearn, *supra* note 9.

[35] Commerce Holding Co. v. Buckstone, 749 F. Supp. 441, 445 (E.D.N.Y. 1990).

[36] 42 U.S.C. §§ 6928(a)(1), (g), 6972(a)(1)(A). These civil penalties are deposited in the United States Treasury. *See* 31 U.S.C § 3302(b) (2006).

[37] 42 U.S.C. § 6972(a) (2006).

[38] *See* Meghrig v. KFC W., Inc., 516 U.S. 479, 484 (1996) (holding that "a private citizen suing under 6972(a)(1)(B) could seek a mandatory injunction, i.e., one that orders a responsible party to 'take action' by attending to the cleanup and proper disposal of toxic waste").

and allows plaintiffs to seek compensatory damages.[39] And although it may appear that injuries to persons or property resulting from negligent violations of RCRA might render violators liable under the FTCA, this is not the case. The remedial schemes of these two statutes are mutually exclusive.[40]

This Part will first examine the relevant provisions of RCRA, including analysis of its citizen suit provision, the three forms of relief it provides, and an explanation of how these forms of relief are insufficient to provide injured plaintiffs with compensatory damages. Next, this Part will survey the pertinent text of the FTCA, its authorization for awards of compensatory damages, and the DFE. Finally, this Part will conclude with a description of the indirect enforcement problem, which prevents RCRA from being overtly invoked in an FTCA suit.

A. The Resource Conservation and Recovery Act

In an attempt to "eliminate the last remaining loophole in environmental law," Congress passed RCRA to regulate the generation, transportation, treatment, storage, and disposal of solid hazardous and non-hazardous waste.[41] In fact, RCRA is so comprehensive that it provides its own enforcement mechanism,[42] and "empowers EPA to regulate hazardous wastes from cradle to grave."[43] Further, RCRA's citizen suit provision gives citizens civil enforcement power similar to that of the government.[44] Citizens may bring suits to enforce permits,[45] abate imminent and substantial endangerments,[46] and force the EPA to perform non-discretionary duties.[47] Consequently, citizen suits have become a prevalent enforcement mechanism for RCRA.[48] Yet, courts may not award compensatory damages under RCRA because the statute limits relief to civil penalties payable to the U.S. Treasury, and injunctions to restrain violators and remediate

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39 *See* Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1) (2006) (holding the government liable for "the negligent or wrongful act or omission of any employee . . . in accordance with the law of the place where the act or omission occurred").

40 *See Abreu*, 468 F.3d 20, 30–32 (1st Cir. 2006) (holding that "allowing recovery of compensatory damages under the FTCA for RCRA violations would adversely affect the RCRA statutory scheme").

41 Hearn, *supra* note 9, at 467; *see also* Randall Butterfield, *Recovering Environmental Cleanup Costs Under the Resource Conservation and Recovery Act: A Potential Solution to a Persistent Problem*, 49 VAND. L. REV. 689, 691–93 (1996) ("RCRA is a comprehensive environmental statute designed to regulate solid and hazardous wastes from 'cradle to grave.'" (quoting City of Chicago v. Envtl. Def. Fund, 511 U.S. 328, 331 (1994))).

42 42 U.S.C. § 6928 (2006) (authorizing administrative, criminal, and civil penalties for past and current violations of RCRA).

43 *City of Chicago*, 511 U.S. at 331; Envtl. Def. Fund v. EPA, 852 F.2d 1316, 1318 (D.C. Cir. 1988).

44 42 U.S.C. § 6972 (2006).

45 *Id.* § 6972(a)(1)(A).

46 *Id.* § 6972(a)(1)(B).

47 *Id.* § 6972(a)(2); *see also* Hearn, *supra* note 9, at 471–72.

48 Hearn, *supra* note 9, at 471.

environmental harms in the absence of any remediation by the plaintiff.[49] Hence, because RCRA's text fails to authorize recovery of compensatory damages, its relief mechanisms may not fully compensate injured parties for their injuries.

The first type of remedy RCRA makes available for citizens is civil penalties—under section 7002(a)(1)(A) of RCRA, a citizen may bring suit against "any person"[50] who is in violation of a "permit, standard, regulation, condition, requirement, prohibition, or order" effective pursuant to RCRA.[51] The word "person" is defined to include the United States, or any governmental instrumentality or agency.[52] An action under this section may seek civil penalties authorized by section 3008(a) and (g) of RCRA.[53] Section 3008(g) of RCRA specifies that "any person" who violates RCRA will be liable to the United States for civil penalties up to $25,000 per violation.[54] Because each day a violation is ongoing is considered a separate violation, section 3008(g) of RCRA is a vehicle for citizens to impose considerable penalties on RCRA violators.

This enforcement mechanism arms citizens with a powerful tool to force RCRA violators to comply with the statute's mandates, but any penalty assessed will go to the United States Treasury and not to plaintiffs.[55] It is true that a winning plaintiff may recover litigation costs,[56] but the congressional intent to omit a private tort remedy from RCRA is clear.[57] After the Supreme Court's decision in *United States Department of Energy v. Ohio*,[58] Congress enacted the Federal Facility Compliance Act (FFCA).[59] Although the FFCA made several important amendments to RCRA,[60] in passing it, Congress

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[49] *See* 42 U.S.C. § 6972(a)(1)(A) (2006) (governing injunctions); *id.* § 6928(a), (g) (governing compliance orders and civil penalties); *see also* Meghrig v. KFC W., Inc., 516 U.S. 479, 484 (1996) (stating that the availability of mandatory and prohibitory injunctions in citizen suits under section 6972(a) implies that RCRA is "not directed at providing compensation for past cleanup efforts").

[50] 42 U.S.C. § 6972(a)(1)(A) (2006).

[51] *Id.* (specifying that a violation of any "permit, standard, regulation, condition, requirement, prohibition, or order" effective pursuant to RCRA is actionable).

[52] *Id.*

[53] *Id.* §§ 6928(a), (g), 6972(a).

[54] *Id.* § 6928(g).

[55] 31 U.S.C. § 3302(b) (2006) (specifying that any "official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury").

[56] 42 U.S.C. § 6972(e) (2006).

[57] H.R. REP. NO. 102-111, at 15 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1287, 1301.

[58] 503 U.S. 607, 617–18, 625, 628 (1992) (holding that fines for past violations were not enforceable under RCRA and that RCRA's definition of "person" did not include the United States).

[59] Federal Facility Compliance Act of 1992, Pub. L. No. 102-386, 106 Stat. 1505 (1992) (codified as amended at 42 U.S.C. §§ 6908, 6939c–6939e, 6965 (2006)).

[60] First, it made the federal government clearly subject to civil penalties for past violations. 42 U.S.C. § 6961 (2006). Second, it expanded the waiver of sovereign immunity to cover "all civil and administrative penalties and fines, regardless of whether such penalties or fines are punitive or coercive in nature." Federal Facility Compliance Act of 1992 § 102, 106 Stat. at 1505 (1992) (codified at 42 U.S.C. § 6961(a) (2006)). Finally, the amendment expanded the definition of "person" to include "each department, agency, and instrumentality of the United States."

explicitly stated that it did "not intend . . . in any manner to authorize civil tort actions against the federal government for damages."[61] Thus, section 7002(a)(1)(A) of RCRA does not allow injured plaintiffs to recover compensatory damages from the government.

Next, citizens may sue to halt violators two ways.[62] If the citizen can demonstrate a violation of RCRA's standards or requirements, a court is authorized by section 7002(a)(1)(A) of RCRA to issue an injunction ordering the violator to come into compliance.[63] There is a caveat to this enforcement mechanism, however: the plaintiff must be acting as a "private attorney general" seeking to benefit the public at large.[64] Therefore, a remedy for private benefit is untenable under this section, making private compensatory damages unrecoverable.

Alternatively, citizens may invoke RCRA's "imminent" citizen suit provision.[65] This empowers plaintiffs to seek an injunction to "restrain" a violator responsible for the "past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste" if that violation poses an "imminent and substantial endangerment to health or the environment."[66] The key to this section is the word "imminent." The violation must be ongoing to satisfy section 7002(a)(1)(B) of RCRA;[67] wholly past endangerments do not raise a cause of action.[68] Even if a citizen does succeed in acquiring an injunction under this method, he will not receive compensatory damages because that remedy is beyond the injunctive relief allowed, and it would be a remedy for a past endangerment.[69]

Finally, citizens may use section 7002(a)(1)(B) of RCRA to force violators to remediate an ongoing violation.[70] The language of section 7002(a)(1)(B) of RCRA enables courts to order violators to "take such other action as may be necessary,"[71] but this has been narrowly applied to only allow remediation of "imminent and substantial endangerments."[72] In *Meghrig v. KFC Western, Inc.*, the Supreme Court stated that an "endangerment can only be imminent if it threaten[s] to occur

Federal Facility Compliance Act of 1992 § 103, 106 Stat. at 1507 (1992) (codified at 42 U.S.C. § 6903(15) (2006)).

61 H.R. REP. NO. 102-111, at 15, *reprinted in* 1992 U.S.C.C.A.N. 1287, 1301.

62 Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6972(a) (2006).

63 *Id.* § 6972(a)(1)(A); Butterfield, *supra* note 41, at 702.

64 Envtl. Def. Fund, Inc. v. Lamphier, 714 F.2d 331, 337 (4th Cir. 1983); Butterfield, *supra* note 41, at 702.

65 42 U.S.C. § 6972(a)(1)(B) (2006).

66 42 U.S.C. § 6972(a); Butterfield, *supra* note 41, at 701.

67 Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 56–58 (1987)

68 *Id.* at 62–63 (setting the standard for environmental citizen suit provisions by holding that "wholly past violations" are not actionable); Butterfield, *supra* note 41, at 695.

69 Butterfield, *supra* note 41, at 736–37.

70 42 U.S.C. § 6972(a)(1)(B) (2006).

71 *Id.* § 6972(a)(2).

72 *See* Meghrig v. KFC W., Inc., 516 U.S. 479, 486–87 (1996) (interpreting section 6972(a) of RCRA).

immediately."[73] As such, because KFC had already remediated the pollution, there was no longer an imminent endangerment.[74] The Court concluded that Congress did not intend to create a cost-recovery mechanism in RCRA, so courts may not order violators to compensate plaintiffs for injuries or remediation costs using this statute.[75]

In fact, there can be no recovery of monetary damages under RCRA by private citizens whatsoever.[76] As illustrated by *Commerce Holding Co. v. Buckstone*,[77] RCRA "does not provide a private action for damages."[78] When the plaintiff sought compensation for his cleanup costs, the court dismissed his claim and held that the recovery of remediation costs "does not comport with the statute's purpose."[79] According to the court, not only would the recovery of cleanup costs not be "equitable relief," but also it would allow the plaintiff to achieve a "private remedy" instead of a general remedy for the public at large.[80] This confirmed that RCRA does not provide any form of compensatory damages because such relief is purely a private remedy.

B. The Federal Tort Claims Act

Passed by the 79th Congress in 1946,[81] the FTCA marked a turning point for sovereign immunity.[82] After nearly thirty years of consideration, Congress elected to pay damages for the misconduct of government employees acting within the scope of their employment.[83] For that reason, section 2674 of the FTCA holds the government liable for tort claims to the same extent as a private person under the law of the state where the act occurred.[84] However, the government's assumption of liability was not all-encompassing, and Congress carved out a sweeping exception for discretionary decisions.[85]

Courts lack subject matter jurisdiction over claims based upon the exercise of a "discretionary function," whether or not that discretion was abused.[86] The DFE thus emerged as a formidable hurdle for injured plaintiffs, since the government undoubtedly attempts to trace all of its injurious

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73 *Meghrig*, 516 U.S. at 485–86 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY OF ENGLISH LANGUAGE 1245 (2d ed. 1934)) (internal quotation marks omitted).

74 *See id.* at 486–87.

75 *Id.* at 486–88.

76 Commerce Holding Co. v. Buckstone, 749 F. Supp. 441, 445 (E.D.N.Y. 1990).

77 749 F. Supp. 441.

78 *Id.* at 445.

79 *Id.*

80 *See id.* (quoting Envtl. Def. Fund, Inc. v. Lamphier, 714 F.2d 331, 337 (4th Cir. 1983)).

81 Federal Tort Claims Act, ch. 753, 60 Stat. 842 (1946) (codified as amended at 28 U.S.C. §§ 1291, 1346, 1402, 2401–2402, 2411–2412 (2006)).

82 *See* Dalehite v. United States, 346 U.S. 15, 24–27 (1953) (explaining how the FTCA simplified recovery from the government and took the place of private bills).

83 *Id.*

84 28 U.S.C. § 2674 (2006).

85 *See Dalehite*, 346 U.S. at 26–27.

86 28 U.S.C. § 2680(a) (2006); *see Dalehite*, 346 U.S. at 26–27.

misdeeds to acts of "discretion."[87] To claim DFE protection, the government must satisfy the two-prong test developed in *Berkovitz v. United States*.[88] First, a court must consider whether governmental action was a matter of choice; if the act was nondiscretionary, then the DFE does not apply.[89] Second, the court must examine whether Congress intended to immunize that type of discretion from liability; only social, economic, and political policy choices are protected.[90] In this manner, the second prong limits the first prong to discretionary acts based upon protected policy concerns. If a plaintiff can overcome either prong, the DFE will not apply.[91] Still, even if a plaintiff can overcome the DFE he must then make out a prima facie case under state law to prove governmental negligence.[92] The FTCA, in sum, imposes tort liability on the government for compensatory damages, but it limits liability to non-discretionary acts and decisions based upon unprotected policy concerns.

C. The Problem of Indirect Enforcement

As numerous courts have established, an injured plaintiff cannot recover any form of compensation under RCRA, nor may plaintiffs enforce RCRA against wholly "past endangerments."[93] For the FTCA, plaintiffs must overcome the DFE to receive compensation for governmental negligence.[94] It might appear that the synergy of these two statutes would allow plaintiffs to seek compensatory damages for governmental pollution. Yet a plaintiff's assertion of RCRA violations in his FTCA suit will result in the dismissal of his case.[95] The United States Court of Appeals for the First Circuit rationalized dismissal in this context by noting that suits under the FTCA seeking to enforce RCRA "amounts to indirect enforcement."[96]

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[87] The government has attempted to shield itself from liability by arguing for the "discretionary function exception" in several contexts. *See, e.g.*, Faber v. United States, 56 F.3d 1122, 1125 (9th Cir. 1995) (claiming the U.S. Forest Service's failure to warn of known dangers in a national forest was discretionary); Sutton v. Earles, 26 F.3d 903, 910 (9th Cir. 1994) (arguing decision not to warn of a known water hazard was an act of discretion); Boyd v. United States, 881 F.2d 895, 898 (10th Cir. 1989) (claiming failure to warn swimmers of dangerous conditions in a popular swimming area was an act of discretion); Kennewick Irrigation Dist. v. United States, 880 F.2d 1018, 1031–32 (9th Cir. 1989) (asserting that a contracting officer's decision whether to remove ground material was an act of discretion).

[88] 486 U.S. 531, 536–537 (1988).

[89] *Id.* at 536.

[90] *Id.* at 536–537.

[91] *Id.* at 537.

[92] Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1) (2006) (waiving sovereign immunity for claims based on governmental negligence).

[93] *See, e.g.*, Meghrig v. KFC W., Inc., 516 U.S. 479, 485–486 (1996); Price v. U.S. Navy, 39 F.3d 1011, 1019 (9th Cir. 1994).

[94] *See Berkovitz*, 486 U.S. at 537.

[95] *See, e.g.*, *Abreu*, 468 F.3d 20, 25 (1st Cir. 2006); ; OSI, Inc. v. United States, 285 F.3d 947, 953 (11th Cir. 2002); Sanchez v. United States, 707 F. Supp. 2d 216, 227 (D.P.R. 2010); McLellan Highway Corp. v. United States, 95 F. Supp. 2d 1, 17 (D. Mass. 2000).

[96] *Abreu*, 468 F.3d at 30.

The view that indirect enforcement occurs when one federal statute is used to establish a cause of action under another federal statute is not novel.[97] As established by the Supreme Court in *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n* (*Middlesex County*),[98] where Congress has provided enforcement provisions for remedying a violation of a federal statute, "it cannot be assumed that Congress intended to authorize by implication additional judicial remedies."[99] Similarly, because RCRA does not provide a private cause of action for damages, one should not be implied via a separate federal statute.[100] Rather, courts should construe the FTCA's waiver of sovereign immunity to fit "into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole."[101] Allowing RCRA's enforcement provisions to enlarge those of the FTCA, and vice versa, would allow inequitable enforcement throughout the statutory system.[102] Therefore, courts do not allow indirect enforcement due to the fact that it would adversely affect RCRA's statutory scheme.[103]

The prohibition of indirect enforcement is supported by Congress' intent to disallow compensatory damages under RCRA. In passing the Federal Facility Compliance Act,[104] Congress remarked that it did not "authorize civil tort actions against the federal government for damages."[105] RCRA's single purpose is to reduce the generation of hazardous waste and ensure that the storage and treatment of such waste is properly done so as to minimize harm to human health and the environment.[106] Therefore, private remedies are beyond RCRA's waiver of sovereign immunity, and overt use of RCRA to overcome the DFE in FTCA actions is strictly disallowed.[107]

III. GETTING AROUND THE DISCRETIONARY FUNCTION EXCEPTION

A plaintiff seeking compensatory damages from the government through the FTCA will surely face contentions that the violation was based on a discretionary act, so overcoming the DFE poses a major hurdle during FTCA litigation.[108] Further, if a party alleges injuries based on RCRA violations, the DFE obstacle is compounded by indirect enforcement issues.[109] However, *Myers v. United States* provides a precedential avenue for

97 *Id.*

98 453 U.S. 1 (1981).

99 *Id.* at 14.

100 Commerce Holding Co. v. Buckstone, 749 F. Supp. 441, 445 (E.D.N.Y. 1990).

101 *Abreu*, 468 F.3d at 30 (quoting Feres v. United States, 340 U.S. 135, 139 (1950)).

102 *Id.* at 31.

103 *Id.*

104 Federal Facility Compliance Act of 1992, Pub. L. No. 102-386, 106 Stat. 1505 (1992) (codified as amended at 42 U.S.C. §§ 6908, 6939c–6939e, 6965 (2006)).

105 H.R. REP. NO. 102-111, at 15 (1991) , *reprinted in* 1992 U.S.C.C.A.N. 1287, 1301.

106 Meghrig v. KFC W., Inc., 516 U.S. 479, 483 (1996).

107 *See Abreu*, 468 F.3d at 30.

108 *See supra* note 86 and accompanying text.

109 *See supra* Part II.C.

"back door" RCRA enforcement using the FTCA to seek compensatory damages. Even so, there are caveats to this litigation tactic. For example, the prohibition on indirect enforcement plays a role in both the drafting of the plaintiff's complaint and the agency guidelines that plaintiffs may cite.[110] Nevertheless, agency guidelines requiring compliance with RCRA can help plaintiffs overcome the DFE and allow back door RCRA enforcement for compensatory damages.[111]

A. The Discretionary Function Exception as a Limit to Claims Against the United States

The DFE bars FTCA suits for claims based on acts of governmental discretion.[112] The first case to address the DFE was *Dalehite v. United States*.[113] In *Dalehite*, the Supreme Court expansively defined the reach of the DFE, and held that it applied "[n]ot only [to] agencies of government . . . but [to] all employees exercising discretion."[114] Also, the court stated that discretion exists anywhere where there is room for policy judgment and decision.[115] Two years later, in *Indian Towing v. United States*,[116] the Supreme Court held that the DFE did not apply when the government undertook a duty to warn the public of danger, induced reliance upon that warning, and failed to perform its duty in a careful manner.[117] Once the government undertook the duty to warn, it became nondiscretionary, and the DFE became inapplicable.[118] Clearly, the Supreme Court drew a line between discretionary choices and mandatory duties for DFE analysis.

These two cases were the principal authority for the FTCA and DFE until the 1980s,[119] after which came three cases that progressed interpretation of the DFE. The first was *United States v. S.A. Empresa de Viacao Aerea Rio Grandense* (Varig Airlines).[120] In that case, the owner of an airline brought a claim against the United States for damages resulting from the destruction of its Boeing 707 after a fire broke out in an improperly designed lavatory; the case was consolidated with a suit for wrongful death resulting from the fire.[121] Although the government was not the designer, the Civil Aeronautics Agency (Agency)—predecessor to the Federal Aeronautics

110 *See infra* Part III.A–C.
111 *See infra* Part III.A–C.
112 *See supra* Part II.B.
113 346 U.S. 15 (1953).
114 *Id.* at 33.
115 *Id.* at 36.
116 350 U.S. 61 (1955).
117 *Id.* at 64–65, 69.
118 *Id.*
119 United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 810–13 (1984) (discussing *Dalehite* and *Indian Towing* in the context of interpreting the DFE).
120 467 U.S. 797 (1984).
121 *Id.* at 800. The lavatory waste receptacles of the Boeing 707 were required by Civil Aeronautics Agency regulations to be capable of containing a fire. *Id.* at 801.

Agency—was responsible for certifying airplane designs.[122] As part of its certification process, the Agency performed "spot-checks" on newly designed airplanes using methods outlined in the Agency's Manual of Procedure.[123] In holding that the suit was barred by the DFE, the Court noted that the Agency Secretary was delegated the authority to make the Manual of Procedure "judgment of the best course"—in other words, discretion.[124] Moreover, the Manual gave inspectors discretion as to how detailed an inspection to conduct.[125] The execution of "spot-checks" in accordance with agency directives was, accordingly, protected by the DFE.[126] The Court went on to announce that by creating the DFE, "Congress wished to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."[127] In short, only social, economic, and political policy decisions are protected by the DFE, and internal agency guidelines may qualify as a source of mandatory directives.[128]

Four years later, *Berkovitz v. United States*[129] established the current test for FTCA and DFE cases.[130] The plaintiffs in *Berkovitz* sued the government because their two-month-old son contracted polio and became paralyzed shortly after receiving a vaccine called Orimune that was designed to treat the disease.[131] They claimed that the government wrongfully licensed a laboratory to produce Orimune, and that it wrongfully approved the release of the vaccine.[132] Necessarily, the Court analyzed the government's procedures for licensing and releasing vaccines, and determined that agencies do not have discretion to deviate from mandated procedures because they leave no room for policy judgments.[133] To reach that conclusion, the Court implemented a two-prong test that considered: 1) whether the disputed action was a matter of choice for the acting employee or agency, and 2) whether Congress intended to immunize that type of discretion from liability.[134] Upon examination, the Court concluded that the DFE does not bar claims arising out of federal regulatory programs because

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122 *Id.* at 800.

123 *Id.* at 816–17.

124 *Id.* (quoting *Dalehite*, 346 U.S. 15, 34 (1953)).

125 *Id.* at 817–18. Inspectors were allowed to independently judge the credibility of the designer based upon the designer's compliance history. *Id.* Thus, inspectors had "discretion" regarding whether to check every nook of the airplane or to take the designer's word for it. *See id.* at 816–17.

126 *Id.* at 819.

127 *Id.* at 814

128 *See* Green v. United States, 630 F.3d 1245, 1251 (9th Cir. 2011).

129 486 U.S. 531 (1988).

130 *See* United States v. Gaubert, 499 U.S. 315, 322 (1991).

131 *Berkovitz*, 486 U.S. at 533.

132 *Id.*

133 *Id.* at 546–48.

134 *Id.* at 536; *see also* Stephen L. Nelson, *The King's Wrongs and the Federal District Courts: Understanding the Discretionary Function Exception to the Federal Tort Claims Act*, 51 S. TEX. L. REV. 259, 277–78 (2009) (discussing how the *Berkovitz* test was developed and relied on by the Supreme Court).

they are not political, social, and economic judgments.[135] Because the agencies refused to follow mandatory guidelines, the DFE did not apply.[136]

Most recently, the Supreme Court's decision in *United States v. Gaubert*[137] validated the two-prong test employed in *Berkovitz*.[138] In *Gaubert*, the Court's examination reiterated *Berkovitz* and focused "not on the agent's subjective intent in exercising the discretion conferred . . . but on the nature of the actions taken, and on whether they are susceptible to policy analysis."[139] Unlike *Berkovitz*, however, the DFE barred the suit because the allegedly negligent decisions were made at the managerial level, where discretion was assumed to exist.[140] Consequently, current FTCA and DFE analysis applies the *Berkovitz* two-prong test, so a winning argument will either establish that the government failed to adhere to mandatory directives, or that the exercised discretion was not based upon protected policy considerations.[141]

B. Use of Agency Guidelines to Overcome the Discretionary Function Exception

The first step in seeking compensatory damage from the government in an FTCA suit is overcoming the DFE.[142] No matter what violation a plaintiff alleges, if the government can successfully raise the DFE, the plaintiff's claim will be dismissed.[143] In this context, *Myers* provides a novel avenue for overcoming the DFE by its use of agency guidelines to negate each prong of the *Berkovitz* test.[144] Further, because the agency guidelines applied RCRA's standards, *Myers* allows "back door" RCRA enforcement for compensatory damages.[145]

1. Myers v. United States *as a Method for "Back Door" RCRA Enforcement Through the FTCA*

Due to the bar against indirect enforcement, an injured plaintiff is not at liberty to seek compensation from the government for violating RCRA using the FTCA.[146] Yet, because RCRA controls the life of hazardous waste from "cradle to grave," it is difficult to imagine how anyone injured as a result of a RCRA violation could be fully compensated. Nevertheless, that was the covert result achieved in *Myers* when compensatory damages were sought

135 *Berkovitz*, 486 U.S. at 538–39.
136 *Id.* at 547–48.
137 499 U.S. 315 (1991).
138 Nelson, *supra* note 134, at 276–77.
139 *Id.* at 277 (quoting *Gaubert*, 499 U.S. at 325).
140 *Id.* at 277–78.
141 *Berkovitz*, 486 U.S. 536–38.
142 *See id.* at 535–36.
143 *See, e.g.*, *id.* at 537.
144 *See* Myers v. United States, 652 F.3d 1021, 1030–32 (9th Cir. 2011).
145 *See* discussion *infra* Part III.B.1.
146 *See supra* Part II.C.

for the victim's injuries.[147] Because the plaintiff could have alleged RCRA violations instead of negligence, *Myers* demonstrates that "back door" RCRA enforcement can be achieved using the FTCA. Significantly, the manner in which the violation was articulated established the FTCA claim without citing RCRA.[148]

In the case, Myers, a child suing ad litem through her guardian, appealed the ruling of the United States District Court for the Southern District of California that the DFE barred her FTCA suit against the government.[149] Myers sought compensatory damages for injuries resulting from the Navy's remediation project at Camp Pendleton, and brought claims of negligence, nuisance, trespass, strict liability, and battery.[150] She argued that the DFE was inapplicable because the Navy was required to undertake mandatory safety measures during the project.[151] Specifically, the Navy failed to follow safety procedures outlined in its safety and health Program Manual,[152] and the project's FFA.[153] Upon inspection, the Ninth Circuit found that both the Program Manual and FFA foreclosed application of the DFE.[154]

For this particular cleanup project, the Navy was responsible for remediating thallium contamination at Camp Pendleton.[155] Thallium is designated as a hazardous waste under RCRA,[156] and the FFA required contaminated soil to be excavated and dumped into the Box Canyon Landfill.[157] Incidentally, the landfill was adjacent to a family housing area and an elementary school.[158] By all accounts, the cleanup was meant to remove the thallium from its poisoned cradle and bury it in a permanent grave, so RCRA should have applied.[159] To do the work, the Navy employed a contractor who was responsible for developing a health and safety plan (HASP), monitoring airborne contaminants, and stopping operations if conditions presented a risk to health or safety.[160] In the fall of 1999, 240,000 cubic yards of thallium-contaminated soil were dumped into Box Canyon Landfill and thallium dust was shot airborne.[161] The dust monitoring system registered more than 200 such "exceedences"—instances when "total dust" levels were excessive enough that the HASP required work stoppage;

147 *Myers*, 652 F.3d at 1023, 1037–38 (holding that the plaintiff could bring a suit seeking compensatory damages but remanding the case for the determination of liability).

148 *Id.* at 1023–27.

149 *Id.* at 1027.

150 *Id.*

151 *Id.* at 1029–30.

152 PROGRAM MANUAL, *supra* note 25, at ¶ 0407.b ("Each . . . activity shall ensure that plans are reviewed and accepted prior to issuing the Notice to Proceed."); *id.* at ¶ 0407.c ("All [Health and Safety Plans] shall be reviewed prior to initiating site work by a competent person.").

153 FEDERAL FACILITY AGREEMENT, *supra* note 26, at ¶¶ 12.9, 13.1, 13.3.

154 *Myers*, 652 F.3d at 1033.

155 *Id.* at 1024–26.

156 Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6924(d)(2)(B)(viii) (2006).

157 *Myers*, 652 F.3d at 1025–26.

158 *Id.* at 1025.

159 *See* City of Chicago v. Envtl. Def. Fund, 511 U.S. 328, 331(1994).

160 *Myers*, 652 F.3d at 1025.

161 *Id.* at 1026.

however, work was never actually stopped.[162] Nor did the Navy ever look at the air monitoring data to check the contractor's compliance, as prescribed by the Navy's Health and Safety Program Manual.[163]

Unfortunately for Myers, her family lived in the Camp Pendleton housing area adjacent to the Box Canyon Landfill, and her yard and elementary school were only 50 feet and 200 feet away from the landfill, respectively.[164] Soon after the thallium-contaminated soil was dumped, Myers became ill and demonstrated symptoms of thallium poisoning.[165] Myers's argument on appeal was that the Navy's Program Manual and the FFA required the Navy to oversee the contractor's compliance with safety procedures, so the Navy's failure to do so constituted a violation of a mandatory directive and precluded application of the DFE.[166]

The Ninth Circuit has stated previously that the DFE only insulates government decision making based on protected policy concerns,[167] and thus the two-prong *Berkovitz* test should determine the applicability of the DFE.[168] Ultimately, the Ninth Circuit agreed with Myers that the Program Manual imposed mandatory directives that divested the Navy of any discretion.[169] Furthermore, implementation of the FFA's requirements was not the type of policy consideration protected by the DFE. Consequently, the DFE did not bar Myers's suit against the government.[170] First, the Ninth Circuit interpreted the language of the Program Manual as requiring that the Navy itself review the contractor's compliance with the HASP.[171] Because these procedures were mandatory, the Navy had "no rightful option but to adhere to the directive."[172] This contradicted the Navy's agreement with the contractor, which made the contractor responsible for safety review.[173] Hence, when the Navy ignored the mandatory duty imposed by the Program Manual, the DFE became inapplicable as a defense for the government.[174] Next, the Ninth Circuit addressed whether the FFA provisions also imposed a mandatory duty.[175] Here, the court found that the FFA did not mandate

162 *Id.* at 1025–26.

163 *Id.*; PROGRAM MANUAL, *supra* note 25, at ¶ 0407.c (requiring the Navy to approve HASPs before work begins).

164 *Myers*, 652 F.3d at 1026.

165 *Id.* at 1026–27.

166 *Id.* at 1027.

167 Terbush v. United States, 516 F.3d 1125, 1129 (9th Cir. 2008).

168 *Id.*

169 *Myers*, 652 F.3d at 1033.

170 *Id.*

171 PROGRAM MANUAL, *supra* note 25, at ¶ 0407.c ("All HASPs shall be reviewed prior to initializing site work by a competent person.").

172 *Myers*, 652 F.3d at 1028 (quoting Berkovitz v. United States, 486 U.S. 531, 536 (1988)).

173 *Id.* at 1036–37.

174 Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2680 (2006).

175 *Myers*, 652 F.3d at 1030–31. The FFA provides that a Quality Assurance Officer "will ensure that all work is performed in accordance with approved work plans, sampling plans and [Quality Assurance Project Plans]" and "shall maintain for inspection a log of quality assurance field activities and provide a copy to the Parties upon request." FEDERAL FACILITY AGREEMENT, *supra* note 26, at ¶ 20.1.

Navy action, but instead it allowed for discretion.[176] As a result, the court went on to analyze the FFA under the second prong of the *Berkovitz* test.[177]

It is important to note that the FFA's stated purpose was to assure compliance with RCRA.[178] More specifically, the FFA required conformity with sections 3004(u) and (v), 3008(h), and 6001 of RCRA.[179] The FFA was therefore effective pursuant to RCRA, so Myers arguably could have sought civil penalties under RCRA for the FFA violations.[180] In addition, the discharge of thallium into the air conceivably presented an "imminent and substantial endangerment to health or the environment."[181] This endangerment occurred because the Navy was "contributing to the . . . present handling, storage, treatment, transportation, [and] disposal of [a] . . . hazardous waste."[182] For this reason, Myers might also have brought a claim under section 7002(a)(1)(B) of RCRA to enjoin the dumping of thallium-contaminated soil, and force the government to remediate the new pollution it generated.

In light of the FFA's provisions, the Ninth Circuit then examined whether the discretion given to the Navy was based upon protected policy concerns.[183] The court pointed out that the "decision to adopt safety precautions may be based on policy considerations, but the implementation of those precautions is not."[184] The Ninth Circuit analogized this case to *Marlys Bear Medicine v. United States* ex rel. *Secretary of the Department of Interior*[185] and held that the Navy was required to ensure that the contractor complied with the safety provisions.[186] Yet, the court never specified which safety standards the Navy failed to follow. Despite the FFA's extensive adoption of RCRA standards, the Ninth Circuit never mentioned RCRA during the case, possibly seeking to avoid overtly referencing RCRA in the FTCA suit. Whatever the source of the FFA's safety precautions, once they were chosen, the Navy was bound to implement them and could not claim DFE protection for failing to follow non-policy-driven directives.[187]

Finally, regarding Myers's tort claims, because the Ninth Circuit found that the DFE did not apply, the court analyzed the reasonableness of the Navy's remediation activity.[188] Under the FTCA, the Navy was liable to Myers

176 *Myers*, 652 F.3d at 1030–31.

177 *Id.* at 1031.

178 FEDERAL FACILITY AGREEMENT, *supra* note 26, at ¶ 1.2(e).

179 *Id.* at ¶¶ 3.1, 17.1.

180 Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6972(a)(1)(A) (2006).

181 *Id.* § 6972(a)(1)(B).

182 *Id.*

183 Myers v. United States, 652 F.3d 1021, 1031 (9th Cir. 2011).

184 *Id.* at 1032 (quoting Marlys Bear Medicine v. United States *ex rel.* Sec'y of the Dep't of Interior, 241 F.3d 1208, 1215 (9th Cir. 2001)).

185 241 F.3d at 1216 (9th Cir. 2001) (holding that a failure to effectuate policy choices already does not constitute a protected policy judgment under the DFE and rejecting a contention that "limited resources" was a policy-based excuse for the failure to adhere to professional standards).

186 *Myers*, 652 F.3d at 1032–33.

187 *See id.*

188 *Id.* at 1033–37.

in accordance with the law of the place where the act occurred.[189] In Myers's case, California law was applicable, and state precedent created direct liability for the Navy's non-delegable duty of reasonable care.[190] The Navy even conceded that the project involved "peculiar risk," so it was foreseeable that persons exposed to thallium could be harmed.[191] Moreover, the Navy never took steps to review the air-monitoring samples or to ensure the contractor's compliance with safety protocol.[192] Consequently, the court found that the Navy did not act reasonably, and the case was remanded to determine causation and damages.[193] In short, by demonstrating governmental negligence without overtly citing RCRA, Myers successfully brought an FTCA suit for compensatory damage arising out of an arguable RCRA violation. *Myers*, thus, opens a "back door" for RCRA enforcement by allowing plaintiffs to covertly use RCRA standards in an FTCA suit for compensatory damages.

2. Overcoming the First Berkovitz *Prong: Internal Agency Guidelines as Mandatory Authority*

To overcome the DFE, a plaintiff must negate either prong of the *Berkovitz* test.[194] To negate the first prong, a plaintiff must argue that the challenged governmental action did not involve an element of discretion.[195] Since the inception of the Supreme Court's DFE analysis, agency plans and regulations have been cited as sources of mandatory directives.[196] In *Dalehite v. United States* the Supreme Court examined the "plan" used by the government to manufacture and export fertilizer-grade nitrogen to determine whether the plan's procedures were nondiscretionary.[197] This demonstrates that, as early as its first FTCA case, the Supreme Court considered agency guidelines to be a source for mandatory governmental directives.

In subsequent cases, the Supreme Court continued to examine agency guidelines under the first prong of the *Berkovitz* test.[198] In *Varig Airlines*, the Civil Aeronautics Agency used a "Manual of Procedure" to guide the examination and certification of aircraft designs.[199] The Court reviewed the manual to determine whether it allowed employee discretion during airplane inspection.[200] Although the Court ultimately held that the manual did allow

189 *See* Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1) (2006).
190 Yanez v. United States, 63 F.3d 870, 872–73 (9th Cir. 1995).
191 *Myers*, 652 F.3d at 1035.
192 *Id.* at 1036–37.
193 *Id.*
194 Berkovitz v. United States, 486 U.S. 531, 536–38 (1988).
195 *Id.*
196 Dalehite v. United States, 346 U.S. 15, 42 (1953).
197 *See id.*
198 *See, e.g.*, *Varig Airlines*, 467 U.S. 797, 817–19 (1984).
199 *Id.*
200 *Id.*

for discretion,[201] the endorsement of agency guidelines as a source of mandatory directives is significant. Not only did the Court continue to use agency guidelines as a source of mandatory directives, but it did so thirty-one years after it first endorsed that analysis in *Dalehite*.[202] Furthermore, seven years later in *Gaubert,* the Court noted that "an agency may rely on *internal guidelines* rather than on published regulations" for mandatory directives.[203] The Supreme Court, thus, pioneered using agency guidelines as sources of mandatory directives, and has repeatedly approved using such guidelines for DFE analysis.

The Ninth Circuit adheres to this precedent and inspects agency guidelines under the first prong of the *Berkovitz* test.[204] In *Starrett v. United States*, the Ninth Circuit found that the Navy's Manual on Naval Preventive Medicine could be a source for "specific and mandatory requirements."[205] More recently, in *Bolt v. United States*,[206] the court denied DFE immunity when an Army handbook that "set forth specific and mandatory duties" for snow removal was ignored, thus opening the door to FTCA liability.[207] The principle behind interpreting agency guidelines as mandatory is that the failure of a party to effectuate policy choices already made is not discretionary.[208] Accordingly, such choices fail the first prong of the *Berkovitz* test because the discretionary decisions were made at the drafting stage of the guidelines. Once an agency issues directives, they become mandatory and a failure to follow them precludes application of the DFE.[209]

There is an exception, however, to the use of agency guidelines as mandatory authority. As the Tenth Circuit noted in *Aragon v. United States*,[210] "an agency manual . . . is not *necessarily* entitled to the force and effect of law."[211] When agency manuals merely serve as advisory documents, the implementation of their directives is not mandatory but discretionary.[212] In *Aragon*, the manual recognized that there was no standard method for treating industrial waste at the time, so instead of specifying mandatory conduct, it merely suggested pollution controls.[213] It follows that if a guideline is meant for mere guidance, it cannot overcome the DFE.[214]

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201 *Id.* at 820–21.

202 *See Dalehite*, 346 U.S. at 42.

203 United States v. Gaubert, 499 U.S. 315, 324 (1991) (emphasis added).

204 *See, e.g.*, Starrett v. United States, 847 F.2d 539, 541 (9th Cir. 1988).

205 *Id.*; *see also* Summers v. United States, 905 F.2d 1212, 1213 (9th Cir. 1990) (holding a Park Service "Safety Management Program" to be mandatory authority for identifying hazards).

206 509 F.3d 1028 (9th Cir. 2007).

207 *Id.* at 1030.

208 Camozzi v. Roland/Miller & Hope Consulting Grp., 866 F.2d 287, 290 (9th Cir.1989).

209 *Id.* at 292.

210 146 F.3d 819 (10th Cir. 1998).

211 *Id.* at 824 (emphasis added) (citing Schweiker v. Hansen, 450 U.S. 785, 789 (1981)).

212 *Id.* (citing Hamlet v. United States, 63 F.3d 1097, 1103–05 (Fed. Cir. 1995)).

213 *Id.* at 826.

214 *See* OSI, Inc. v. United States, 285 F.3d 947, 952 (11th Cir. 2002); Sanchez v. United States, 707 F. Supp. 2d 216, 232 (D.P.R. 2010); Loughlin v. United States, 286 F. Supp. 2d 1, 11 (D.D.C. 2003).

Nevertheless, many circuits support the Ninth Circuit's analysis of agency guidelines.[215] In *Aslakson v. United States*, the Eight Circuit held that a governmental safety manual set mandatory standards that left no room for discretion.[216] As the court reasoned, the "discretionary function exception does not apply to a claim that government employees failed to comply with regulations or policies designed to guide their actions in a particular situation."[217] Still, the court recognized the distinction between agency provisions that are mandatory, and those that are merely meant to provide guidance.[218] Because agency manuals that are meant for mere guidance are not mandatory, they will be ineffective in overcoming the DFE. Even so, in the wake of *Myers*, plaintiffs across jurisdictions may argue that agency guidelines mandate certain actions.

This is a potent weapon for injured plaintiffs when agency guidelines specify safety procedures, like the Program Manual in *Myers*, which was designed to prevent exposures to hazardous waste.[219] RCRA's citizen suit provision makes hazardous waste contamination actionable.[220] Therefore, if agency guidelines require adherence to RCRA's standards, they can be used to overcome the first *Berkovitz* prong and facilitate "back door" RCRA enforcement.

3. Overcoming the Second Berkovitz *Prong: Following Agency Directives is Nondiscretionary*

Beyond the first prong of the *Berkovitz* test, plaintiffs may still face the onerous task of demonstrating that the government's alleged misfeasance was not the result of a protected policy choice.[221] The DFE exists to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through . . . an action in tort."[222] Generally, these decisions have been labeled as "public policy" choices.[223] Again, *Myers* provides ammunition for injured plaintiffs in defeating the DFE because "[t]he decision to adopt safety precautions may be based in policy considerations, but the implementation of those precautions is not."[224] This distinction narrows the applicability of the DFE by limiting public policy decisions to the drafting stage of agency guidelines.

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215 Riley v. United States, 486 F.3d 1030 (8th Cir. 2007) (examining an agency manual during DFE analysis); Aslakson v. United States, 790 F.2d 688 (8th Cir. 1986) (examining an agency manual during DFE analysis).

216 *Aslakson*, 790 F.2d at 692.

217 *Id.*

218 *See Riley*, 486 F.3d at 1033 (noting that because the stated intent of the manual was to provide guidance and flexibility, it could not be considered mandatory).

219 *See* PROGRAM MANUAL, *supra* note 25, at ¶¶ 0408–0410.

220 Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6972(a) (2006).

221 Berkovitz v. United States, 486 U.S. 531, 536–38 (1988).

222 *Varig Airlines*, 467 U.S. 797, 814 (1984).

223 Myers v. United States, 652 F.3d 1021, 1031 (9th Cir. 2011).

224 *Id.* at 1032 (quoting Marlys Bear Medicine v. United States *ex rel.* Sec'y of the Dep't of Interior, 241 F.3d 1208, 1215 (9th Cir. 2001)).

Therefore, once the procedures are operative, there is no longer any discretion during their implementation.

This feature of the DFE is supported by the Supreme Court's holding in *Indian Towing Co. v. United States*.[225] In that case, when the plaintiff's ship ran aground because the nearby lighthouse was not operating, the government argued that operating the lighthouse was a discretionary act.[226] The Court responded by explaining that:

> The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act.[227]

When the government chose to operate the lighthouse, it made a discretionary decision, but once that choice was made, its obligation to use due care became nondiscretionary.[228] This is the same distinction observed in *Myers* when the court confined the application of the DFE to the drafting stage of the FFA, and refused to find the implementation of its directives to be policy choices.[229]

Refusing to apply the DFE against the implementation of guidelines was not merely a whimsical choice by the Ninth Circuit. In 1987, the court agreed with the 8th Circuit that "[w]here the challenged governmental activity involves safety considerations under an established policy rather than the balancing of competing public policy considerations, the rationale for the exception falls away and the United States will be held responsible for the negligence of its employees."[230] When the government argued that budgetary concerns were relevant "policy" considerations, the court responded that allowing budgetary constraints to trigger the DFE would allow the DFE to "all but swallow the [FTCA]."[231] The court has reiterated this logic and held that the government cannot shortchange safety measures once it undertakes the responsibility of enforcing them.[232]

The Ninth Circuit is not alone in arriving at these results.[233] For example, in *Aslakson*, the Eight Circuit acknowledged that the failure to implement agency directives prescribing electrical line maintenance was not

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225 350 U.S. 61 (1955).

226 *Id.* at 62, 64–67.

227 *Id.* at 69.

228 *Id.*

229 *Myers*, 652 F.3d at 1031–33.

230 ARA Leisure Servs. v. United States, 831 F.2d 193, 195 (9th Cir. 1987) (quoting Aslakson v. United States, 790 F.2d 688, 693 (8th Cir. 1986).

231 *Id.* at 195–96.

232 Whisnant v. United States, 400 F.3d 1177, 1182–83 (9th Cir. 2005); Marlys Bear Medicine v. United States *ex rel.* Sec'y of the Dep't of Interior, 241 F.3d 1208, 1216–17 (9th Cir. 2001).

233 *See Aslakson*, 790 F.2d at 694.

within the scope of the DFE.[234] The court explained that while the policy at issue required "some degree of judgment on the part of government officials, it [was] not the kind of judgment that involv[ed] the weighing of public policy considerations."[235] Also, while the Ninth Circuit decided more DFE cases between 1946 and 2007 than any other circuit, it was "relatively moderate" in the number of times it actually found the government to be liable.[236] Consequently, the Ninth Circuit's analysis in *Myers* is not an outlier, and an agency's failure to follow its own guidelines will likely negate the second *Berkovitz* prong.

C. How the Problem of Indirect Enforcement Affects the Use of Agency Guidelines as Sources of Authority, Foreclosing the Discretionary Function Exception

The prohibition of indirect enforcement directly affects the ability of plaintiffs to use RCRA as a means for defeating the DFE.[237] To summarize, the problem of indirect enforcement arises when a plaintiff argues that RCRA establishes a non-discretionary duty, the violation of which opens the government to liability under the FTCA.[238] As *Myers* demonstrates, however, while a plaintiff may not *overtly* cite RCRA to overcome the DFE, *covert* use of RCRA can circumvent the problem of indirect enforcement.[239] Covert allusions to RCRA in both the complaint and the agency guidelines allow plaintiffs to bring FTCA claims against the government for RCRA violations and seek compensatory damages.[240]

1. Overt Versus Covert Mention of RCRA in a FTCA Complaint

The most apparent way indirect enforcement arises is when a plaintiff argues in his complaint that RCRA imposes mandatory duties on the government.[241] As the court stated in *Abreu v. United States*, "allowing the recovery of damages in a FTCA suit, based on the violation of . . . RCRA, would undermine the intent of Congress to preclude compensatory damages awards for RCRA violations."[242] In that case the plaintiffs argued that the DFE was inapplicable because the government violated RCRA.[243] This overt attempt to enforce the "comprehensive" statutory scheme of RCRA through the FTCA epitomized indirect enforcement.[244] *Abreu*, thus, illustrates that an

234 *Id.*
235 *Id.* at 693.
236 Nelson, *supra* note 134, at 297–98.
237 *See supra* notes 93–97 and accompanying text.
238 *See supra* Part II.C.
239 *See infra* Part IV.B.
240 *See infra* Part IV.B.
241 *See, e.g.*, Abreu v. United States, 468 F.3d 20, 26, 29–30, 32 (1st Cir. 2006).
242 *Id.* at 32.
243 *Id.* at 26, 32.
244 *See id.* at 29–30, 32.

FTCA suit is not available when a plaintiff overtly invokes RCRA in his complaint to overcome the DFE.

It is firmly rooted in precedent that overt use of RCRA in FTCA suits constitutes indirect enforcement.[245] In *Sanchez v. United States* the plaintiffs sued the Navy under the FTCA for violating RCRA.[246] Because of indirect enforcement, the plaintiffs' claims were dismissed.[247] Likewise, in *Akers v. United States*[248] it was held that the imposition of RCRA liability under the FTCA was impermissible.[249] These cases support the holding in Abreu that a plaintiff may not cite RCRA in his FTCA complaint as a means of overcoming the DFE.

Nevertheless, Myers indicates that covert use of RCRA in an FTCA complaint is tenable. Myers specifically made claims based on negligence, nuisance, trespass, strict liability, and battery.[250] None of these claims were directly based on RCRA, and nowhere in the case was RCRA even discussed.[251] Instead of overtly citing RCRA in an attempt to overcome the DFE, Myers argued that the Navy violated its own policies in the Program Manual and the FFA when it failed to oversee safety compliance.[252] Myers covertly invoked RCRA, as alluded to in the Program Manual and directly cited in the FFA,[253] to demonstrate the government's negligence in failing to meet its own criteria. Thus, because Myers did not overtly cite RCRA, her claims were not dismissed—indicating that covert use of RCRA in a party's complaint will not raise indirect enforcement issues.

With this in mind, it appears as though the secret to defeating the DFE is not so much in what violation the plaintiff alleges the government committed, but rather how the plaintiff articulates this violation. In fact, the Ninth Circuit found that "the question of whether the government [is] negligent is irrelevant to the applicability of the discretionary function exception[, but] the question of how the government is alleged to have been negligent is critical."[254] By focusing DFE analysis on what standards the

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245 *See supra* Part II.C.

246 Sanchez v. United States, 707 F. Supp. 2d 216, 221–22 (D.P.R. 2010), *aff'd sub nom.* Sanchez *ex rel.* D.R.-S. v. United States, 671 F.3d 86 (1st Cir. 2012).

247 *See id.* at 228.

248 No. CV.01-1348-HU, 2003 WL 23531298 (D. Or. 2003).

249 *Id.* at *13–14.

250 Myers v. United States, 652 F.3d 1021, 1027 (9th Cir. 2011).

251 *See id.* at 1023–38 (omitting discussion of RCRA altogether).

252 *Id.* at 1027.

253 PROGRAM MANUAL, *supra* note 25, at ¶ 0401 (proclaiming that the Program Manual is meant to guide management and control of hazardous materials, and prevent exposure to chemical and physical hazards); FEDERAL FACILITY AGREEMENT, *supra* note 26, at ¶¶ 16.1, 17.1 (requiring compliance with RCRA).

254 Whisnant v. United States, 400 F.3d 1177, 1184–85 (9th Cir. 2005). In *Whisnant*, the court went on to explain:

> If Whisnant were claiming that the government was negligent in electing to employ contractors rather than doing the work itself, or in designing its safety regulations, then his claim would most likely be barred; instead, he is claiming that the government negligently ignored health hazards that were called to its attention, and so his claim is

government is alleged to have violated, plaintiffs can argue governmental violations of agency guidelines and distinguish their suits from overt attempts to indirectly enforce RCRA.

2. Overt Versus Covert Mention of RCRA in Agency Guidelines

Indirect enforcement concerns might also arise when a plaintiff cites agency guidelines that overtly require RCRA compliance. According to this author's research, as of yet, no such case has been litigated. Theoretically, *Myers* stands for the proposition that direct mentions of RCRA in agency guidelines poses no indirect enforcement problem. However, factors such as jurisdictional precedent and a plaintiff's skill in articulating a complaint would play pivotal roles in the success of such a claim.

To illustrate, *Myers* involved both covert and overt use of RCRA by citing to agency directives. The Program Manual never mentioned RCRA directly,[255] so its use in *Myers* indicates that covert mentions of RCRA in agency guidelines can support a claim of FTCA liability. Covert use of RCRA occurred because the Program Manual maintained that its purpose was to guide the "management and control of hazardous materials" and to serve to "prevent exposures to chemical and physical hazards."[256] Therefore, an airborne release of thallium—listed as one of RCRA's hazardous wastes[257]—has the potential to violate the Program Manual's proscription against the release of hazardous material, as well as RCRA itself.[258] Although the language used in the Program Manual did not directly correlate with RCRA, in principle both the statute and the manual sought to prevent injury from the same hazardous substance, so citing to these covert RCRA standards did not violate indirect enforcement.

The FFA, conversely, specifically cited RCRA in setting standards for the remediation project.[259] Indeed, one of the stated purposes of the Navy's project was to "[a]ssure compliance . . . with RCRA."[260] The FFA also went on to specify that all parties to the FFA were required to comply with sections 3004(u) and (v), and 3008(h) of RCRA.[261] However, the court in *Myers* never mentioned that it based its decision on RCRA standards, as contemplated by the FFA.[262] When the Ninth Circuit found that the DFE did not apply, it cited its own precedent, not RCRA.[263] The court reaffirmed that the "decision to

> not barred. Because it failed to recognize the import of this distinction, the district court mischaracterized Whisnant's allegations and thereby erred in dismissing his action.

Id. at 1185.

255 *See* PROGRAM MANUAL, *supra* note 25 (failing to mention RCRA at all).

256 *Id.* at ¶¶ 0401, 0407.

257 Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6924(d)(2)(B)(viii) (2006).

258 *See* 40 C.F.R. § 270.1(c) (2006) (requiring permits for the disposal of hazardous waste).

259 FEDERAL FACILITY AGREEMENT, *supra* note 26, at ¶ 17.1 (mentioning sections 6924(u) and (v), and section 6928(h) of RCRA).

260 *Id.* at ¶ 1.2(e).

261 *Id.* at ¶ 17.1.

262 *See* Myers v. United States, 652 F.3d 1021 (9th Cir. 2011) (failing to mention RCRA).

263 *See id.* at 1031–33.

adopt safety precautions may be based on policy considerations, but the implementation of those precautions is not."[264] This suggests that even if a plaintiff argues that the government failed to adhere to agency directives requiring RCRA compliance, he will not violate indirect enforcement because the agency, in adopting directives, already determined what constitutes a violation. Even though an agency may also violate RCRA, because it violated *its own* guidelines, indirect enforcement problems should not arise.

On the other hand, this reasoning stretches the limits of what constitutes indirect enforcement. As *Abreu* announced, compensatory damages are strictly forbidden under RCRA.[265] However, an FTCA claim based on the government's violation of its own guidelines is distinct from a RCRA violation.[266] A RCRA violation is demonstrated by comparing the statute's text to the conduct of the alleged violator, and RCRA sets out specific standards for proving violations under section 7002(a)(1) and (2).[267] In contrast, when a plaintiff alleges a violation of agency guidelines, he is asserting that the agency failed to adhere to *its own* standards. Although the agency may have adopted guidelines similar to RCRA, or even RCRA's actual standards, once the agency adopts safety procedures the agency must hold itself accountable to those standards.[268] Therefore, a suit alleging the violation of agency guidelines that are based on RCRA does not seek to enforce RCRA; rather, it enforces the agency's own mandates and therefore should not run afoul of indirect enforcement issues.

Moreover, the dominant policy consideration behind barring indirect enforcement is that allowing compensatory damages for RCRA violations would adversely affect Congress's statutory scheme.[269] Yet the FTCA, like RCRA, "should be construed to fit . . . into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole."[270] Allowing a plaintiff to bring an FTCA suit based on an agency's violation of its own standards is precisely the purpose of the FTCA.[271] The FTCA waives sovereign immunity for tort claims by persons injured by a government agent acting within the scope of his duties.[272] As such, holding the government liable for negligence due to a failure to adhere to agency guidelines is a textbook FTCA claim, not indirect enforcement of a statute that is covertly implied in the guidelines. This should be the case

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264 *Id.* at 1032 (quoting Marlys Bear Medicine v. United States *ex rel.* Sec'y of the Dep't of Interior, 241 F.3d 1208, 1215 (9th Cir. 2001)).

265 Abreu v. United States, 468 F.3d 20, 31 (1st Cir. 2006).

266 *See id.* (concluding that compensatory damages are unavailable in a FTCA action based on a RCRA violation but not precluding compensatory damages based on other violations).

267 Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6972(a)(1)–(2) (2006).

268 *See supra* Part III.B.2.

269 *Abreu*, 468 F.3d at 31.

270 Feres v. United States, 340 U.S. 135, 139 (1950).

271 *See* Dalehite v. United States, 346 U.S. 15, 24–25 (1953) (describing the FTCA as the "offspring of a feeling that the Government should assume the obligation to pay damages for the misfeasance of employees").

272 *Id.* at 27–28.

even if those agency guidelines invoke RCRA because the alleged violation will not be of RCRA specifically, but instead a violation of the agency's own protocol.

IV. ESTABLISHING NEGLIGENCE

Overcoming the DFE is only the first step in an FTCA suit. Next, a plaintiff must make out a claim based on state law.[273] Because the FTCA waives sovereign immunity for state-law claims, a plaintiff must prove governmental negligence to recover compensatory damages.[274] Although alleging statutory violations has traditionally been a viable means of demonstrating negligence,[275] overt use of RCRA to prove negligence is strictly disallowed due to the prohibition of indirect enforcement.[276] However, as exemplified by *Myers v. United States*, RCRA can be used covertly in negligence claims to prove unreasonable government conduct.[277] Such covert use does not raise indirect enforcement issues. Additionally, in states authorized by the EPA to enforce RCRA, state law supersedes RCRA and may provide plaintiffs with an additional means of proving negligence.[278]

A. The Nature of a Negligence Cause of Action

Proving negligence in an FTCA suit is the same as in any state-law negligence claim.[279] It would be logical then, for RCRA violations to define what would constitute unreasonable conduct. However, overt use of RCRA to establish the duty of care is disallowed because it would amount to indirect enforcement of the statute.[280]

1. How Plaintiffs Normally Establish Negligence

Negligence under the FTCA is established the same as any other negligence claim.[281] The plaintiff is required to make out all the prima facie elements of negligence required by his jurisdiction.[282] Generally, a prima facie negligence claim requires the plaintiff to establish five elements: 1) the defendant owed a duty of care to the plaintiff, 2) defendant breached his duty by engaging in unreasonably risky conduct, 3) defendant's conduct in fact caused harm to the plaintiff, 4) defendant's conduct was a proximate cause of the plaintiff's injury, and 5) an amount of damages exists as a result

273 Federal Tort Claims Act, 28 U.S.C. § 2674 (2006); *see supra* Part II.B.
274 *See infra* Part IV.A.1.
275 Martin v. Herzog, 126 N.E. 814, 820 (N.Y. 1920).
276 Abreu v. United States, 468 F.3d 20, 32 (1st Cir. 2006).
277 *See Myers*, 652 F.3d 1021 (9th Cir. 2011).
278 Murray v. Bath Iron Works Corp., 867 F. Supp. 33, 43 (D. Me. 1994).
279 Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1) (2006) (waiving sovereign immunity for negligence claims as if the United States were a private person).
280 Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 317–20 (2005).
281 28 U.S.C. § 1346(b)(1) (2006).
282 *Id.* § 2674.

of the harm.[283] Proving causation and damages is not within the scope of this Chapter, but the first two elements of negligence are of special interest. First, a plaintiff must show that the defendant owed him a duty of reasonable care.[284] If the defendant did not owe the plaintiff a duty of care, then no negligence cause of action exists.[285] Next, if a defendant's conduct was not unreasonable, then it cannot constitute a breach of the duty of care, and no compensatory damages are recoverable.[286] It is therefore vital to a plaintiff's negligence claim that a standard exists by which to measure the reasonableness of the defendant's actions.

2. How RCRA and Agency Guidelines Can Be Used to Establish Negligence

Establishing a defendant's duty of care, and the breach of that duty, is essential to any negligence claim.[287] A plaintiff may demonstrate a breach of the duty of care by comparing the defendant's conduct to industry standards and statutes.[288] Agency guidelines should be considered analogous to industry standards, and the government's deviation from such guidelines should be powerful evidence that a breach of duty occurred. Applying the reasonable person standard, a reasonable government agency should adhere to the guidelines it adopts. The violation of a statute is even more powerful evidence of a breach of the duty of care.[289] Historically, statutory violations were evidence of per se negligence.[290] Under this historical approach, a violation of RCRA's statutory standards and any agency guidelines promulgated in furtherance of RCRA should provide evidence of governmental negligence.

3. How Indirect Enforcement Prevents Use of RCRA

Although in theory, agency guidelines and RCRA should be viable authorities for demonstrating the government's breach of the duty of care, the prohibition of indirect enforcement bars a plaintiff from using these tools. Courts generally will dismiss a plaintiff's claim if it appears that the plaintiff is attempting to use RCRA to obtain compensatory damages, even though a claim of governmental negligence under the FTCA is designed to

283 DAN B. DOBBS, THE LAW OF TORTS 269 (2000).

284 *Id.* at 270–71.

285 RESTATEMENT (THIRD) OF TORTS: GEN. PRINCIPLES § 6 (Tentative Draft No. 6, 1999); *see* DOBBS, *supra* note 283, at 270–71.

286 DOBBS, *supra* note 283, at 270–71.

287 *Id.*

288 Ruffiner v. Material Serv. Corp., 506 N.E.2d 581, 584 (Ill. 1987) (noting that industry or trade standards, or standards promulgated by regulatory groups and agencies are relevant for determining the standard of care in a negligence action); Martin v. Herzog, 126 N.E. 814, 820 (N.Y. 1920) (noting that the violation of a statutory duty constitutes "negligence as a matter of law").

289 JOHN L. DIAMOND ET AL., TORTS CAPSULE SUMMARY § 4.03(A) (2004), *available at* http://www.lexisnexis.com/lawschool/study/outlines/word/torts.doc (last visited July, 15, 2012).

290 *Ruffiner*, 506 N.E.2d at 584 (proclaiming that the violation of a duty imposed by statute is evidence of negligence as matter of law).

provide an injured plaintiff with such relief.[291] It follows that RCRA cannot be used to establish negligence per se because such overt use violates the bar on indirect enforcement.[292] Arguably, overt use of RCRA to demonstrate a breach of the government's duty of care would also constitute indirect enforcement. In effect, because RCRA specifically does not create a cause of action for damages, it is presumable that any overt use of RCRA as evidence of negligence will trigger indirect enforcement concerns, so plaintiffs should not cite RCRA as evidence of governmental negligence.

B. Covert Use of RCRA

Unlike overt use of RCRA, covert use can provide a means to circumvent indirect enforcement issues. By not openly citing RCRA as proof of a breach of the duty of care, plaintiffs may hold the government liable under RCRA-like standards for negligence claims.

1. What "Covert Use" Involves

Covert use of RCRA occurs when the statute is not specifically cited as evidence of the government's breach of the duty of care, but when a plaintiff establishes the breach by citing to a document that incorporates RCRA. An example of this is where the plaintiff in *Myers* alleged the Navy violated its own Program Manual and FFA, but not RCRA.[293] By citing documents that implemented standards analogous to RCRA (the Program Manual), and even RCRA itself (the FFA), Myers held the government accountable for violating RCRA's standards without overtly mentioning RCRA.[294] Thus, covert use, thus, seeks to achieve the result barred due to indirect enforcement by surreptitiously holding the government accountable for RCRA violations using agency guidelines.

2. How "Covert Use" Circumvents Indirect Enforcement

Covert use of RCRA through citing RCRA-like agency guidelines effectively circumvents the bar on indirect enforcement because agency guidelines are analogous to industry standards. The principle behind barring indirect enforcement is that courts should "refrain from imposing liability on the government when doing so would subvert a congressional decision to preclude regulated entity liability [for compensatory damages] in the statute creating the mandatory directive."[295] Because RCRA provides a

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[291] *See supra* Part II.C.

[292] *See* Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 318–20 (2005); *see also* Short v. Ultramar Diamond Shamrock, 46 F. Supp. 2d 1199, 1201 (D. Kan. 1999) ("Plaintiffs cannot use the theory of negligence per se to bootstrap a private cause of action for damages when one is not provided for by the RCRA.").

[293] *See* Myers v. United States, 652 F.3d 1021, 1027–28 (9th Cir. 2011).

[294] *See id.* at 1027.

[295] Abreu v. United States, 468 F.3d 20, 30 (1st Cir. 2006).

comprehensive enforcement scheme,[296] the limited remedies it allows demonstrate Congress's intent to foreclose any implied private cause of action.[297] However, when the Supreme Court announced this rule, it did so in the context of a federal cause of action, not a state cause of action.[298] In *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n* (*Middlesex County*), the plaintiffs brought claims under the Federal Water Pollution Control Act (FWPCA)[299] and the Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA)[300] for money damages.[301] Importantly, the plaintiffs tried to use federal statutes to create a federal cause of action for money damages, despite the fact that the statutes do not "expressly authoriz[e]" suits for money damages.[302] The Court inferred congressional intent to preclude other remedies, given that the statutory remedial schemes at issue were "sufficiently comprehensive."[303] Nonetheless, enforcing a federal cause of action is distinguishable from a state-law cause of action, and the bar against indirect enforcement should be confined to situations in which federal statutes foreclose federal causes of action for damages.

Uniquely, the FTCA does not create a federal cause of action, but instead defers to state law for negligence claims.[304] This distinguishes FTCA claims from claims founded on other federal statutes—such as the FWPCA and the MPRSA in *Middlesex County*—because the FTCA specifically waives sovereign immunity for tort actions based on state law.[305] Because state law on negligence is the foundation of an FTCA claim, all means of establishing negligence under state law should be appropriate in an FTCA suit. An example of this is the use of industry standards to establish a breach of the duty of care. In the historic case of *The T.J. Hooper*[306] it was proclaimed that even adherence to industry standards cannot defend against a negligence claim, if such adherence disregards precautions that would mitigate harm.[307] It follows that the violation of industry standards can itself demonstrate negligence, and this is the view adopted by many state courts.[308] If one accepts agency guidelines as analogous to industry standards, then use of guidelines to prove negligence should not violate the policy announced in

296 *Id.* at 29.

297 Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 20–21 (1981).

298 *See id.* at 4.

299 33 U.S.C. §§ 1251–1387 (2006).

300 33 U.S.C. §§ 1401–1445 (2006).

301 *Middlesex Cnty. Sewerage Auth.*, 453 U.S. at 4–5.

302 *Id.* at 5, 11–12, 14. Although the statutes do not expressly authorize suits for money damages, the possibility was not foreclosed, as the court did not rule on the issue. *Id.* at 11.

303 *Id.* at 20.

304 Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1) (2006).

305 *Id.*

306 60 F.2d 737 (2nd Cir. 1932).

307 *Id.* at 740.

308 Seaboard Coast Line R.R. Co. v. Clark, 491 So. 2d 1196, 1198–99 (Fla. Dist. Ct. App. 1986); *see also* St. Louis-S.F. Ry. Co. v. White, 369 So. 2d 1007, 1011 (Fla. Dist. Ct. App. 1979); Pullen v. West, 92 P.3d 584, 599–600 (Kan. 2004); Elledge v. Richland/Lexington Sch. Dist. Five, 534 S.E.2d 289, 290–91 (S.C. Ct. App. 2000).

Middlesex County because they are not comprehensive federal statutes, but instead are industry protocol specific to the agency that implemented them.

In fact, agency guidelines were used in *Myers* to demonstrate negligence.[309] In *Myers*, the court held that the Navy acted unreasonably, not only by violating its mandatory duty under the Program Manual, but also by failing to adhere to safety standards in the FFA.[310] These guidelines established the standards the Navy had to comply with during its remediation project. Citing the Program Manual, *Myers* held that "violation of the mandatory duty to ensure adherence to the safety plans is plainly a breach of the duty to exercise reasonable care."[311] The court did not even raise the issue of indirect enforcement during its ruling. In essence then, covert use of RCRA—as implemented through agency guidelines—should not trigger indirect enforcement problems when used to establish state-law negligence claims.

C. Use of Hazardous Waste Law in States Authorized to Enforce RCRA

A final avenue for "back door" RCRA enforcement through the FTCA might exist in EPA-authorized states. RCRA provides that states may seek authorization from EPA to develop and enforce their own hazardous waste laws.[312] If the state receives authorization, then it may issue and enforce permits for the storage, treatment, and disposal of hazardous waste as if they were issued pursuant to section 3014(d)(1) of RCRA.[313] Also, section 3009 of RCRA gives authorized states power to impose requirements that are "more stringent" than RCRA's.[314] Because states are empowered to enforce their own hazardous waste laws, a plaintiff might attempt to demonstrate FTCA negligence by pointing to governmental violations of these laws. Generally speaking, proving governmental negligence based on a violation of state hazardous waste law should not present indirect enforcement issues. However, there is a possibility that the language of RCRA could prevent such use.[315]

1. Use of the Hazardous Waste Laws in Authorized States

The violation of a statute can be powerful evidence of a breach of the duty of care. Raising such an argument in an authorized state would require using state law—instead of a federal statute—as the proof of negligence.[316] In this manner, if the federal government violates state hazardous waste laws, an injured plaintiff could bring suit under the FTCA.[317] After overcoming the

309 Myers v. United States, 652 F.3d 1021, 1036–37 (9th Cir. 2011).
310 *Id.*
311 *Id.* at 1037.
312 Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6926(b) (2006).
313 *Id.*
314 42 U.S.C. § 6929 (2006).
315 *See infra* Part VI.C.2.
316 *See supra* note 304 and accompanying text.
317 *See supra* Part IV.B.2.

DFE, the plaintiff would need to make out a prima facie case for negligence.[318] Because the laws of the authorized state govern hazardous waste treatment within its jurisdiction, the government's violation of those laws could be evidence of negligence per se.[319] Alternatively, the failure of the government to adhere to the state's laws could also be evidence of negligence, because the government's failure to comply with state law indicates unreasonable conduct and a breach of the duty of care.[320] For this reason, laws of EPA-authorized states may provide plaintiffs with additional means of proving governmental negligence.

2. Does the Use of State Hazardous Waste Laws Circumvent Indirect Enforcement?

Proving governmental negligence using hazardous waste laws enacted by an EPA-authorized state should not raise issues of indirect enforcement. The principle behind prohibiting indirect enforcement is that one federal enforcement mechanism should not be subverted by another, to achieve a forbidden result.[321] In the context of an EPA-authorized state, however, state law provides the standard of reasonableness for holding the government liable for negligence. Because state law provides the standard instead of federal law, no indirect enforcement problems should exist. On the other hand, section 3006(b) of RCRA stipulates that an authorized state's issuance of permits will be "deemed to have been issued under section 3014(d)(1)."[322] As such, an indirect enforcement problem could arise if courts interpret the enforcement of an authorized state's hazardous waste law to be conducted pursuant to RCRA, and consequently required to fit into RCRA's statutory scheme.

One might argue to the contrary, that indirect enforcement of RCRA does not occur when the federal government negligently violates an authorized state's laws. The primary argument is that hazardous waste laws passed by an authorized state supersede RCRA, so use of these laws does not involve RCRA's statutory scheme.[323] Specifically, hazardous waste enforcement in authorized states is based on state law, not federal law, and FTCA suits are specifically required to assert state law causes of action.[324] Hence, indirect enforcement issues should not arise when state hazardous waste laws are used to prove negligence in an FTCA suit.

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318 *See supra* Parts III.B.2–3 (discussing the two-prong *Berkovitz* test for overcoming the DFE); *supra* Parts IV.A.1–2 (discussing the prima facie negligence action).

319 *E.g.*, Martin v. Herzog, 126 N.E. 814, 815 (N.Y. 1920) (proclaiming that violation of a statute is "more than some evidence of negligence . . . [i]t *is* negligence in itself").

320 *See supra* notes 288–90 and accompanying text.

321 *See supra* notes 295–97 and accompanying text.

322 Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6926(b) (2006).

323 42 U.S.C. § 6926(b) (2006); *see also* Murray v. Bath Iron Works Corp., 867 F. Supp. 33, 43 (D. Me. 1994).

324 Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1) (2006) (stating that the United States shall be liable to the same extent as a private individual in accordance with the law where the act occurred).

Nevertheless, courts could construe use of an authorized state's laws as indirect enforcement because authorized state programs become effective pursuant to RCRA, and therefore RCRA's citizen suit provisions still apply.[325] If this is the case, then a claim of negligence based on an authorized state's laws could be interpreted as an attempt to bypass RCRA's statutory scheme and seek forbidden compensatory damages. Support for this argument is found in EPA's opinion that RCRA citizen suits may still be brought in a state after it has received authorization to implement its own hazardous waste laws.[326] The preservation of RCRA's citizen suit provisions in authorized states implies that the programs of those states are effective alongside RCRA, and that RCRA's statutory scheme remains operative in all areas not superseded by state law. This makes sense considering that RCRA requires state laws to offer protections that are least equivalent to those of RCRA, effectively setting the minimum bar for hazardous waste enforcement and citizen suit authorization.[327] Therefore, considering that states may only enforce hazardous waste laws that are equal to or more stringent than RCRA, if courts adhere to the *Middlesex County* line of analysis,[328] then the prohibition on indirect enforcement will bar FTCA negligence claims that are based on the violation of authorized state hazardous waste laws.

V. CONCLUSION

In sum, the ability of an injured plaintiff to articulate how the government violated its own directives is paramount to the success of his FTCA claim. The problem of indirect enforcement will bar claims that overtly cite RCRA in an attempt to overcome the DFE and prove negligence. On the other hand, it is feasible for a plaintiff to covertly use RCRA to overcome the DFE and prove negligence. By arguing that a government entity violated its own directives—such as directives prescribing RCRA-like standards that are either mandatory or not based upon protected policy concerns—a plaintiff can circumvent the bar on indirect enforcement and defeat the DFE. Furthermore, plaintiffs may use these agency guidelines during the negligence phase of an FTCA suit to prove that the government acted unreasonably and breached its duty of care. Through this "covert" invocation of RCRA, injured plaintiffs may seek compensatory damages for governmental RCRA violations in FTCA negligence suits, effectuating "back door" RCRA enforcement.

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[325] *See* Sierra Club v. Chemical Handling Corp., 824 F. Supp. 195, 197 (D. Colo. 1993) ("[B]ecause Colorado's hazardous waste program was authorized by RCRA, it also became 'effective' pursuant to RCRA, and therefore the citizen suit provision of section 6972(a)(1)(A) applies."); *see also Murray*, 867 F.Supp. at 43 (agreeing with *Chemical Handling Corp.*, and citing cases holding citizen suits are still available for state-authorized RCRA programs).

[326] Lutz v. Chromatex, Inc., 725 F. Supp. 258, 261–62 (M.D. Pa. 1989) ("EPA itself takes the position that a RCRA citizen suit may be brought . . . [by] 'any person, *whether in an authorized or unauthorized State* . . . to enforce compliance with statutory and regulatory standards.'" (quoting Texas; Decision on Final Authorization of State Hazardous Waste Management Program, 49 Fed. Reg. 48,300, 48,304 (Dec. 12, 1984) (to be codified at 40 C.F.R. pt. 271))).

[327] 42 U.S.C. § 6929 (2006).

[328] *See supra* Part II.C.