CERCLA Arranger Liability in the Eighth Circuit: 
United States v. TIC Industries

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I. INTRODUCTION

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)1 is a mess. The quagmire of CERCLA interpretation and enforcement stands as an ironic metaphor for the toxic waste sites CERCLA is meant to address.2 As a result of CERCLA’s intrinsic problems,3 courts often have failed to focus clearly on the legal issues CERCLA brings before them.4 Like CERCLA itself, the line of CERCLA legal decisions is ambiguous, contradictory, and often demonstrates a poorly conceived understanding of how to apply CERCLA.5

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4 See United States v. Cordova Chem. Co. of Mich., 59 F.3d 584, 594 (6th Cir.) (Ryan, J., dissenting) (criticizing majority opinion that parent corporations were not directly liable under CERCLA for begging question of exactly how liability does exist under CERCLA), vacated, reh’g en banc granted, 67 F.3d 586 (1995).

5 This point is illustrated by the issue of when and how to impose liability on parent corpora-
One fundamental problem of CERCLA interpretation is how to harmonize CERCLA's broad scheme of strict, joint, and several liability with the primary canons of torts and corporations law on which the statute overlays. One of the greatest attractions to potential investors in a corporation is that their personal liability is limited to the amount of their investment. Limited liability—a basic principle of corporations law—protects shareholders, officers, and employees from personal liability for the debts or liabilities of the corporation unless they personally participated in the liability-creating conduct. Without a clear statement of congressional intent to override such fundamentals of pre-existing law, judicial interpretation of CERCLA should be tailored carefully to avoid conflicting with limited liability, a cardinal principle of corporations law.

6 See United States v. Wade, 577 F. Supp. 1326, 1332 (E.D. Pa. 1983) (highlighting the difficulty in determining liability under CERCLA by pointing out that § 107(a)(3) could be read literally so as to impose liability on individuals who "merely arrange for the transportation of hazardous waste but never actually do so"); see also Lynda J. Oswald & Cindy A. Schipani, CERCLA and the "Erosion" of Traditional Corporate Law Doctrine, 86 Nw. U. L. Rev. 259, 301 (1992) ("In considering the liability of parent corporations for the environmental torts of their subsidiaries, the issue is often whether the applicable standard of liability derives from common law principles of corporate law or from direct application of the statutory definitions of CERCLA.").

7 See, e.g., Oswald, Bifurcation of Owner and Operator, supra note 2, at 233 n.42 ("Under the doctrine of limited liability, the owner of a corporation is not liable for the corporation's debts. Creditors of the corporation have recourse only against the corporation itself, not against the parent company or shareholders. It is on this assumption that 'large undertakings are rested, vast enterprises are launched, and huge sums of capital are attracted.'") (citing United States v. Jon-T Chems., Inc., 768 F.2d 686, 690 (5th Cir. 1985)); see also Henry Ballantine, Corporations § 118 (rev. ed. 1946) ("The immunity of the shareholders from corporate obligations is one of the most important incidents and advantages of the separate legal entity, and serves a useful purpose in business life.").


9 See Oswald & Schipani, supra note 6, at 301.
Thus, the question of what standard of liability to apply under CERCLA aptly has been described as "how wide to cast the net."10 Most courts have imposed CERCLA liability on corporate officials consistent with CERCLA's explicit text and the corporate doctrine of limited liability—that is, only where that individual personally participated in the action creating the liability.11 As a result, persons who in fact are responsible for the improper disposal of hazardous wastes, occasionally will escape liability for cleanup costs because it cannot be shown that they personally participated in the wrongful activity.12 Thus, under the majority standard, the net of CERCLA liability is sometimes cast too narrowly.13

A few courts have focussed on CERCLA’s recognized goal of holding those responsible for improper disposal of hazardous wastes liable for the costs of the necessary cleanup.14 These courts have held corporate officials liable under CERCLA based on the status of their position within the corporation and their authority to control the disposal of hazardous wastes.15 As a result, persons who have not actually participated in the improper disposal of hazardous wastes unfairly may be personally liable for cleanup costs.16 The minority

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10 See Donald M. Carley, Personal Liability of Officers Under CERCLA: How Wide a Net Has Been Cast?, 13 TEMP. ENVTL. L. & TECH. J. 235 (1994); see also United States v. Cordova Chem. Co. of Mich., 59 F.3d 584, 589 (6th Cir.) (“the widest net possible ought not be cast” to determine liability under CERCLA), vacated, reh’g en banc granted, 67 F.3d 586 (1995); Oswald, Bifurcation of Owner and Operator, supra note 2, at 224 (“Congress cast a wide net in an effort to achieve its objectives.”).

11 See United States v. USX Corp., 68 F.3d 811, 822 (3d Cir. 1995) (“In light of the established principle of limited liability that protects corporate officers or employees who do not actually participate in liability-creating conduct, there must be some basis in the statute itself, beyond its general purpose, to support the conclusion that Congress intended to impose liability on those who control the corporation’s day-to-day activities.”); Cordova, 59 F.3d at 590 (“We are not persuaded that, in enacting CERCLA, Congress contemplated the abandonment of traditional concepts of limited liability associated with the corporate form . . . .”); Joslyn Mfg. Co. v. T.L. James & Co., 893 F.2d 80, 82 (5th Cir. 1990) (“CERCLA does not define ‘owners’ or ‘operators’ as including the parent company of offending wholly-owned subsidiaries. Nor does the legislative history indicate that Congress intended to alter so substantially basic a tenet of corporation law.”).


13 See id.

14 See Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 842 (4th Cir. 1992); see also Oswald, Bifurcation of Owner and Operator, supra note 2, at 224.

15 See TIC, 68 F.3d at 1089 (stating CERCLA liability may be imposed based on substantial indirect control of hazardous waste disposal); Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp., 976 F.2d 1388, 1341 (9th Cir. 1992) (stating CERCLA liability may be imposed based on authority to control hazardous waste disposal); Nurad, 966 F.2d at 842.

16 See TIC, 68 F.3d at 1090 (effect of liability based solely on authority to control disposal of
The judicial struggle to interpret CERCLA has been led, from the beginning, by the United States Court of Appeals for the Eighth Circuit.\(^\text{18}\) The landmark cases of *United States v. Northeastern Pharmaceutical & Chemical Co., Inc. (NEPACCO II)*\(^\text{19}\) and *United States v. Aceto Agricultural Chemicals Co.*\(^\text{20}\) created expansive liability for "arrangers" under CERCLA.\(^\text{21}\) More recently, the Eighth Circuit again struggled with the issue of CERCLA arranger liability for corporate officers and parent corporations in *United States v. TIC Investment Corp. (TIC).*\(^\text{22}\) In *TIC*, the Eighth Circuit held that a corporate officer without any personal participation in waste disposal decisions was liable as an arranger under CERCLA for the costs of cleaning up the corporation's hazardous wastes, disposed of at a nearby dump.\(^\text{23}\) The *TIC* court also held that a parent corporation, similarly, may be directly liable as an arranger under CERCLA for the hazardous waste disposal practices of its subsidiary.\(^\text{24}\)

Section II of this Comment provides an overview of CERCLA's structure and the standard of liability under CERCLA. Section III describes the development of CERCLA arranger liability in the Eighth Circuit and examines in some detail the circuit court's *TIC* opinion. Section IV analyzes the *TIC* opinion, explores some of the implications of its holding, and explains some of the problems with the Eighth

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\(^\text{17}\) See *TIC*, 68 F.3d at 1090.

\(^\text{18}\) The Western District of Missouri, in *NEPACCO I*, first addressed liability under CERCLA in the Eighth Circuit. *NEPACCO I*, supra note 3, at 847–50. In *NEPACCO II*, the Eighth Circuit became the first Court of Appeals to deal substantially with liability under CERCLA. See *NEPACCO II*, supra note 3, at 742–46.

\(^\text{19}\) *NEPACCO II*, supra note 3, at 726.

\(^\text{20}\) 872 F.2d 1373 (8th Cir. 1989).

\(^\text{21}\) "Arranger" is the term referring to a party who is covered by § 107(a)(3) of CERCLA, which imposes liability on "any person who ... arranged for disposal ... of hazardous substances owned or possessed by such person, by any other party or entity, at any facility ... owned or operated by another party or entity and containing such hazardous substances." 42 U.S.C. § 9607(a)(3).

\(^\text{22}\) 68 F.3d 1082, 1086–93, (8th Cir. 1995), cert. denied, 117 S. Ct. 50 (1996).

\(^\text{23}\) *Id.* at 1090–91.

\(^\text{24}\) *Id.* at 1092.
Circuit's standard of CERCLA arranger liability under TIC, con­cluding that its standard of "actual or substantial control, directly or indirectly" unwisely follows a small minority of courts and imposes an overinclusive standard of CERCLA liability.25

II. OVERVIEW OF CERCLA

A. Historical Background

By the late 1970s it was clear that improper handling and disposal of hazardous substances could result in substantial adverse effects to both the environment and to human populations.26 For example, contamination by massive quantities of the pesticide Kepone resulted in the closing to fishing of 100 miles of the James River and its tributaries in Virginia.27 In upstate New York, the tragic chemical contamination of the Love Canal area was connected with miscarriages, birth defects, and other health problems of nearby residents.28


26 See Carley, supra note 10, at 236 n.9 and accompanying text.

27 For a more detailed discussion of the James River Kepone incident, see William Goldfarb, Kepone: A Case Study, 8 ENVTL. L. 645 (1978) (reprinted in PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: A COURSEBOOK ON NATURE, LAW, AND SOCIETY 42 (1992)). According to Goldfarb, in 1966, the Allied Chemical Corp. began producing the pesticide Kepone in commercial quantities at its Hopewell, Virginia plant. PLATER ET AL., supra, at 43. Allied decided to "toll" its production of Kepone in 1973. Id. at 44. Tolling is apparently a common arrangement in the chemical industry where a manufacturer sends its chemical product to another company to have it further processed. Id. The processing company receives a fee, or "toll", for its work and returns the final product to its original owner. Id. The classic example of this general type of business arrangement is a farmer sending his wheat to the mill and getting back flour. See id. Two of Allied's Kepone production manager's decided to form a corporation to bid on the Kepone tolling contract. Id. The newly formed corporation, Life Science Products Company (LSP), set itself up nearby in what had been a gasoline service station, and submitted a bid to produce Kepone, along with two other companies. Id. at 44–45. One of the other companies bid $3.00 per pound, but at 54 cents per pound, LSP's bid was by far the lowest. Id. at 44. LSP's appalling lack of safe work practices resulted in massive exposure of their workers to Kepone, a neurological poison in humans. Id. at 42, 47. After the workers required medical attention for their severe exposures, it also was discovered that massive quantities of Kepone had been released to the surrounding environment. Id. at 47–48.

28 The Love Canal area was contaminated by more than 21,000 tons of hazardous chemical waste. Laurie Goodstein, Back to Love Canal: Resettling a Symbol of Toxic Waste Hazards, WASH. POST, June 12, 1990, at A3. After these substances were detected in nearby homes and neighborhoods, the responsible company was forced to pay over $20 million to settle the resulting civil claims. Id.
In response to these and similar incidents, a lame-duck Congress enacted CERCLA in 1980 with little legislative discussion, the rushed product of last-minute compromises. Congress tried to achieve two general goals in CERCLA: (1) to provide for cleanup if a hazardous substance is released into the environment or if such release is threatened, and (2) to hold responsible parties liable for the costs of these cleanups. Due to the circumstances surrounding its creation, CERCLA has been criticized, however, as possessing vague and contradictory language that is not clarified by its sparse legislative history. As a result, the courts have struggled in an effort to interpret CERCLA so as to accomplish its broad goals.

As enacted, § 107 of CERCLA imposes liability for hazardous waste cleanup costs on four categories of responsible persons: (1) current and past owners of hazardous waste facilities, (2) current and past operators of hazardous waste facilities, (3) any person who arranged for the transportation or disposal of hazardous wastes that they owned or possessed, and (4) any person who transported hazardous waste. The statute uses the term “person” broadly to include corporate
entities as well as individuals. CERCLA's legislative history, however, does not indicate any congressional intent with respect to any potential liability of corporate officers or shareholders.

B. CERCLA's Liability Scheme

1. Strict, Joint, and Several Liability

Although CERCLA does not state explicitly a scheme of liability, courts consistently have interpreted CERCLA as creating strict, joint, and several liability. Thus, without regard for notions of intent or fault, full liability for all cleanup costs extends to any person falling in one of the four categories of responsible parties.

2. The Majority Standard—Actual Control

A great majority of courts require a showing of actual control over, or personal participation in, the disposal of hazardous wastes to impose liability under CERCLA. A clear example of this approach from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable . . . .


42 "The term 'person' means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. § 9601(21).

35 See United States v. USX Corp., 68 F.3d 811, 821 n.20 (3d Cir. 1995). At least one commentator has noted that "[s]ome environmental statutes . . . specifically name officers, agents, and/or shareholders as potentially liable parties, while still others refer directly to 'responsible corporate officers.'" Oswald, Strict Liability, supra note 16, at 586 n.29.

36 See NEPACCO I, supra note 3, at 843-45.

37 Id. at 843-44. Section 107 (b) of CERCLA provides for three limited defenses to the strict liability provisions of subsection (a): an act of God, an act of war, and an act or omission of a third party. 42 U.S.C. § 9607(b). Although the text of CERCLA does not state that this list of defenses is exclusive, the courts and commentators have treated it as such. See, e.g., Oswald, Bifurcation of Owner and Operator, supra note 2, at 230 ("[t]he statute permits only three narrow defenses . . . .").

38 Regardless of whether a given court prefers the phrase "personal participation" or "actual control," the same standard and analysis applies. Compare Riverside Market Dev. Corp. v. International Bldg. Prods., Inc., 931 F.2d 327, 330 (5th Cir. 1991) (CERCLA liability requires "personal participation") with Jacksonville Elec. Auth. v. Bernuth Corp., 996 F.2d 1107, 1110 (11th Cir. 1993) (CERCLA liability requires "actual and pervasive control") and USX Corp., 68 F.3d at 825 (application of actual control liability standard requires "actual participation" in liability creating conduct).

39 The First, Third, Fifth, Seventh, and Eleventh Circuits all require that liability under CERCLA be based on actual control over the handling of hazardous wastes. See USX Corp., 68 F.3d at 825 ("there must be a showing that the person sought to be held liable actually
is the decision of the United States Court of Appeals for the Third Circuit in *United States v. USX Corp.* The *USX* court analyzed the liability of hazardous waste "transporters" under CERCLA § 107(a)(4) and rejected the government's argument that transporter liability should be based upon control over general corporate affairs rather than actual participation in the liability-creating conduct. The court stated that interpreting CERCLA so as to conflict with the traditional limited liability concepts of corporate law would be improper without specific indication from Congress that such was its intent.

The *USX* court also provided a cogent discussion of the structural differences in the four categories of CERCLA liability. It noted that the government's argument was based on cases involving liability under §§ 107(a)(1) and (a)(2) which impose liability based on the status of ownership or operation of a hazardous waste facility. Liability of arrangers and transporters under §§ 107(a)(3) and (a)(4) was structured differently, however, by requiring specific conduct to impose liability, not mere status. Consequently, the *USX* court adopted the actual control standard and held that liability of hazardous waste transporters under § 107(a)(4), and by implication also of arrangers under § 107(a)(3), required a showing of actual participation in the liability-creating conduct.

3. The Minority Standard—Authority to Control

A minority viewpoint surfaced in the United States Court of Appeals for the Fourth Circuit's decision in *Nurad, Inc. v. William E. Hooper & Sons Co.* The *Nurad* court imposed liability under CER-

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40 *USX Corp.*, 68 F.3d at 824 n.25.
41 Id. at 825.
42 See id. at 824.
43 Id.
44 Id. at 824 n.25.
45 *USX Corp.*, 68 F.3d at 825.
46 Id.
47 966 F.2d 837, 842 (4th Cir. 1992). The Ninth Circuit, in dicta, has also adopted the example
CLA based on authority to control the disposal of hazardous wastes.\textsuperscript{48} The court did not demand proof that the defendant \textit{actually} participated in the disposal of hazardous wastes, but only required a showing that the defendant \textit{could} have controlled the disposal.\textsuperscript{49}

Besides the Fourth Circuit, only the Ninth Circuit, in dicta, has indicated a willingness to embrace the authority to control standard.\textsuperscript{50} The First, Third, Fifth, Seventh, and Eleventh Circuits have all adopted the actual control standard, requiring proof of actual participation in the disposal of hazardous wastes before imposing liability for cleanup costs.\textsuperscript{51} The Eighth Circuit seems to have had difficulty deciding on a clear liability standard.\textsuperscript{52}

III. DEVELOPMENT OF CERCLA ARRANGER LIABILITY IN THE EIGHTH CIRCUIT

A. NEPACCO II—The First Step

The United States Court of Appeals for the Eighth Circuit first interpreted liability of “arrangers” under CERCLA in \textit{NEPACCO II},\textsuperscript{53} which contained language seeming to embrace both actual control and authority to control as standards of liability.\textsuperscript{54} \textit{NEPACCO II} is therefore worth considering in some detail.

\textit{NEPACCO’s} manufacturing of the disinfectant hexachlorophene resulted in the production of hazardous waste products, including dioxin.\textsuperscript{55} Some of these hazardous wastes were deposited in fifty-five gallon drums that were stored at the manufacturing plant.\textsuperscript{56} In 1971,
a shift manager at the plant proposed to dispose of the fifty-five gallon drums at a nearby farm.\textsuperscript{57} The plant's supervisor, a vice-president of NEPACCO, approved the disposal plan, and the shift supervisor dumped eighty-five of the drums in a trench on the farm.\textsuperscript{58}

The vice-president was held liable as an arranger under CERCLA § 107(a)(3), based on his having actual control over the arrangement to dispose of the hazardous wastes at the farm.\textsuperscript{59} The vice-president "actually knew about, had immediate supervision over, and was directly responsible for arranging for the transportation and disposal of the NEPACCO plant's hazardous substances" at the farm site.\textsuperscript{60} Since the vice-president's liability was based on his actual participation in the arrangements to dispose of the hazardous wastes, \textit{NEPACCO II} seems to be adopting the actual control liability standard.\textsuperscript{61}

\textit{NEPACCO II}'s discussion can be confusing, however, because of its rejection of the vice-president's argument that he did not personally "own or possess" the hazardous substances, but that NEPACCO as a corporate entity actually owned the wastes.\textsuperscript{62} The \textit{NEPACCO II} court accepted the government's argument that the vice-president's actual control over the hazardous substances satisfied the possession language of § 107(a)(3).\textsuperscript{63} The court reasoned that the broad remedial purposes of CERCLA were inconsistent with the vice-president's proposed narrow interpretation requiring proof of personal ownership or actual physical possession of hazardous substances as a prerequisite for arranger liability.\textsuperscript{64} The court held that "[i]t is the authority to control the handling and disposal of hazardous substances that is critical under the statutory scheme."\textsuperscript{65} With careful reading, it seems clear that the "authority to control" language of the \textit{NEPACCO II} opinion is not directed towards overall arranger liability, but that it is only addressed to the vice-president's argument regarding the "owned or possessed" phrase which forms a small part of § 107(a)(3).\textsuperscript{66}

\textsuperscript{57} Id.
\textsuperscript{58} Id.
\textsuperscript{59} Id. at 743.
\textsuperscript{60} \textit{NEPACCO II}, supra note 3, at 744.
\textsuperscript{61} See id.
\textsuperscript{62} Id. at 743.
\textsuperscript{63} Id. See 42 U.S.C. § 9607(a)(3) (imposing arranger liability on "any person who . . . arranged for disposal . . . of hazardous substances owned or possessed by such person, by any other party or entity, at any facility . . . owned or operated by another party or entity and containing such hazardous substances.") (emphasis added).
\textsuperscript{64} \textit{NEPACCO II}, supra note 3, at 743.
\textsuperscript{65} Id.
\textsuperscript{66} See id. Other facts of the case also provide circumstantial evidence that authority to control was not the overall standard of liability in \textit{NEPACCO II}. NEPACCO's president, who was its
NEPACCO II's discussion of both actual control and authority to control was clumsy enough that subsequent decisions have had to revisit, reinterpret, and reclarify NEPACCO II.67

B. United States v. Aceto

The Eighth Circuit next discussed CERCLA arranger liability in United States v. Aceto Agricultural Chemicals Co.68 Aceto and the other defendants argued that under Rule 12(b)(6) of the Federal Rules of Civil Procedure the allegations in the plaintiffs' complaint were insufficient to state a claim under CERCLA § 107(a)(3) where they contracted with Aidex Corp. to formulate their technical-grade pesticides into commercial-grade pesticides.69 As a result of extensive contamination of the Aidex site by hazardous substances released during the formulation process, the United States and Iowa incurred response costs that they sought to recover from Aceto and its co-defendants.70

The defendants focused on their relationship to Aidex.71 They argued that they had hired Aidex to "formulate, not dispose" of the chemicals.72 Aceto claimed that any hazardous wastes produced belonged to Aidex, which also had control over the disposal of the wastes.73 The argument continued that because Aceto lacked the authority to control Aidex's processing of the substances, as required by the NEPACCO II opinion, the defendants should not be held liable.74

The court rejected this argument, however, as incompatible with CERCLA's goal of holding those responsible for harmful conditions major shareholder, was also found liable for cleanup costs, but under § 7003(a) of the Resource Conservation and Recovery Act of 1976 (RCRA) rather than under CERCLA. Id. at 745. If authority to control the disposal of hazardous wastes had been sufficient to impose arranger liability in NEPACCO II, then NEPACCO's president should also have been liable under CERCLA § 107(a)(3). See id. at 742 n.6. Like the vice-president who was held liable as an arranger, the president was aware of the necessity to arrange for the handling and disposal of NEPACCO's hazardous waste products, and possessed the actual authority to control such handling and disposal. See id. at 729–30. The government, however, did not argue, nor did the court discuss, the president's liability as an arranger under CERCLA § 107(a)(3). See id. at 742 n.6.

68 Aceto, 872 F.2d at 1373.
69 Id. at 1375.
70 Id. at 1376.
71 See id. at 1379.
72 Id.
73 Aceto, 872 F.2d at 1379.
74 Id. at 1381–82.
resulting from hazardous waste liable for the costs of the ensuing cleanup.\textsuperscript{75} The court, therefore, looked beyond defendants' characterization of the disputed transaction and instead examined the actual nature of the relationship between the defendants and Aidex.\textsuperscript{76} Defendants owned the pesticides throughout the process Aidex performed, which was under the direction of, and for the benefit of, the defendants.\textsuperscript{77} Furthermore, the court accepted the plaintiffs' argument that the generation of pesticide-containing wastes was inherent in the pesticide formulation process and Aidex could not formulate Aceto's pesticides without wasting and disposing of a portion of them.\textsuperscript{78} Thus, in order adequately to state a claim, an arrangement for the disposal of hazardous wastes could be implicit within Aceto's contract with Aidex.\textsuperscript{79}

The \textit{Aceto} opinion also addressed the court's holding in \textit{NEPACCO II}.\textsuperscript{80} Although the court in \textit{NEPACCO II} had stated that "[i]t is the authority to control the handling and disposal of hazardous substances that is critical under the statutory scheme," the \textit{Aceto} court clarified that this language was in response to the argument that arranger liability attached only to individuals who actually owned or possessed such wastes.\textsuperscript{81} When, as in \textit{Aceto}, possession or ownership was undisputed, the authority to control test did not apply to arranger liability.\textsuperscript{82} Thus, the complaint adequately alleged that the defendants had arranged for the disposal of hazardous substances.

Although \textit{Aceto} appeared to clarify that authority to control was not the overall standard for arranger liability under CERCLA, significant questions remained as to what the standard of liability actually was.\textsuperscript{83} Near the end of \textit{Aceto}'s discussion of CERCLA liability, the court stated that "[a]ny other decision, under the circumstances of this case, would allow defendants to simply 'close their eyes' to the method of disposal of their hazardous substances, a result contrary to

\textsuperscript{75} \textit{Id.} at 1380–81.
\textsuperscript{76} \textit{Id.} at 1381 ("Aidex is performing a process on products owned by defendants for defendants' benefit and at their direction; waste is generated and disposed of contemporaneously with the process.").
\textsuperscript{77} See \textit{id}.
\textsuperscript{78} \textit{Aceto}, 872 F.2d at 1379.
\textsuperscript{79} See \textit{id.} at 1382.
\textsuperscript{80} \textit{Id.} at 1381–82.
\textsuperscript{81} \textit{Id}.
\textsuperscript{82} \textit{Id}.
\textsuperscript{83} For instance, the Eighth Circuit in \textit{Aceto} never discussed what the criteria was to satisfy the "arranged for" language of CERCLA § 107(a)(3). \textit{See Aceto}, 872 F.2d at 1378–82.
the policies underlying CERCLA.\textsuperscript{84} That phrase seemed to imply that CERCLA does more than create liability for improper waste disposal. Rather, CERCLA imposes an active duty to prevent improper disposal of hazardous wastes.\textsuperscript{85} Ultimately, it remained unclear after Aceto whether or not the Eighth Circuit required actual control of the wrongful activity to impose liability under CERCLA.\textsuperscript{86}

C. United States v. Vertac

More recently, in \textit{United States v. Vertac Chemical Corp.}, the United States Court of Appeals for the Eighth Circuit revisited its ruling in \textit{NEPACCO II}, holding that mere authority to control disposal or treatment does not, in and of itself, establish arranger liability.\textsuperscript{87} The court specifically held that the United States was not liable as an arranger for cleanup costs at a facility that had, under contract with the government, produced Agent Orange during the Vietnam War.\textsuperscript{88} The court noted that \textit{NEPACCO II} had involved the question of ownership or possession of hazardous substances by a corporate employee with respect to liability as an arranger under CERCLA.\textsuperscript{89} The Vertac court characterized \textit{NEPACCO II} as concluding that a corporate officer “constructively possessed” the company’s hazardous wastes because he “actually knew about, had immediate supervision over, and was directly responsible for arranging for the transportation and disposal” of the hazardous substances.\textsuperscript{90}

Unlike the defendant in \textit{NEPACCO II}, however, the United States, in Vertac, did not immediately supervise or have direct responsibility for the transportation or disposal of the hazardous wastes produced at the facility.\textsuperscript{91} Also, unlike the defendants in Aceto, the United States did not supply the raw materials to the facility in Vertac, nor did it own or possess the raw materials or the work in progress.\textsuperscript{92} In con-

\textsuperscript{84} Id. at 1382 (citing United States v. Ward, 618 F. Supp. 884, 895 (E.D.N.C. 1985)).
\textsuperscript{85} See id.
\textsuperscript{86} See id.
\textsuperscript{87} United States v. Vertac Chem. Corp., 46 F.3d 803, 810 (8th Cir. 1995) (discussing liability of a government entity with statutory or regulatory authority to control the disposal of hazardous waste: “[o]ur holding in NEPACCO, when read in the context of the facts of the case, certainly does not suggest such a broad interpretation.”).
\textsuperscript{88} Id. at 807, 811.
\textsuperscript{89} Id. at 810.
\textsuperscript{90} Id. (citing NEPACCO, supra note 3, at 743).
\textsuperscript{91} Id.
\textsuperscript{92} Vertac, 46 F.3d at 811.
tracting to buy the Agent Orange produced at the facility, the United States did not, therefore, arrange for the disposal of the hazardous wastes resulting from the production of the Agent Orange.\textsuperscript{93}

Again, in \textit{Vertac}, the Eighth Circuit based its analysis regarding CERCLA arranger liability, in great part, on the question of satisfying the "owned or possessed" phrase of § 107(a)(3).\textsuperscript{94} In the line of cases from \textit{NEPACCO II}, to \textit{Aceto}, through \textit{Vertac}, the Eighth Circuit never squarely confronted what constitutes "arranged for disposal or treatment" within the meaning of § 107(a)(3).\textsuperscript{95}

D. United States v. Gurley

In 1994, the United States Court of Appeals for the Eighth Circuit also addressed CERCLA liability in \textit{United States v. Gurley}, this time regarding liability under CERCLA § 107(a)(2) as an "operator."\textsuperscript{96} The \textit{Gurley} court first surveyed existing case law on the issue and observed that the Fourth Circuit would impose CERCLA liability based only on a showing of authority to control the disposal of hazardous substances.\textsuperscript{97} However, the court noted that several circuits required proof of personal participation in, or actual control over, the disposal of hazardous substances.\textsuperscript{98} The \textit{Gurley} court also remarked that, unless an individual was acting \textit{ultra vires}, having actual control over the disposal of hazardous wastes encompassed having authority to control that disposal.\textsuperscript{99} In addition, the dictionary definitions of the term "operator," the court noted, "connote some type of action or affirmative conduct, an element not required by those courts that ask only whether a defendant had the authority to control the operation of the facility."\textsuperscript{100} Based on its analysis, and reasoning that its decision

\textsuperscript{93} Id.\textsuperscript{94} Id. at 810–11 ("a governmental entity cannot be found to have owned or possessed hazardous substances under § 9607(a)(3) merely because it had statutory or regulatory authority to control activities ... the United States did not own or possess the raw materials or the work in process ... [i]t also cannot reasonably be inferred that the United States constructively owned or possessed the raw materials or the work in process").\textsuperscript{95} See generally supra notes 53–94 and accompanying text.\textsuperscript{96} United States v. Gurley, 43 F.3d 1188, 1192 (8th Cir. 1994).\textsuperscript{97} Id. at 1193 (citing United States v. Carolina Transformer Co., 978 F.2d 832, 836–37 (4th Cir. 1992) (quoting Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 842 (4th Cir. 1992))).\textsuperscript{98} Id. at 1192–93 (citing Sidney S. Arst, Co. v. Pipefitters Welfare Educ. Fund, 25 F.3d 417, 421 (7th Cir. 1994); Riverside Market Dev. Corp. v. International Bldg. Prods., Inc., 981 F.2d 327, 330 (5th Cir. 1991); New York v. Shore Realty Corp., 759 F.2d 1032, 1052 (2d Cir. 1985)).\textsuperscript{99} Id. at 1193.\textsuperscript{100} Id.
was analogous to that in *NEPACCO II*, the *Gurley* court followed the majority rule in requiring actual control over the disposal of hazardous wastes to impose liability under CERCLA.

After *Gurley*, the Eighth Circuit seemed fully to have rejected authority to control the disposal of hazardous wastes as sufficient to impose liability under CERCLA. However, the *Gurley* court was addressing liability of operators under § 107(a)(2) rather than arrangers under § 107(a)(3), as in the *NEPACCO II - Aceto - Vertac* line of cases. As a result, the Eighth Circuit had still not reached the question of what constitutes “arranged for disposal or treatment” within the meaning of § 107(a)(3) of CERCLA. The court finally reached this issue in *United States v. TIC Investment Corp.*

E. United States v. TIC—Liability based on “actual or substantial control, directly or indirectly”

1. Basic Facts and Procedural History

The White Farm Equipment Co. (WFE) owned and operated a farm implement manufacturing plant in Iowa from 1971 until 1985. WFE’s plant produced hazardous wastes which were disposed of at a nearby dumpsite. Between 1980 and 1985, WFE was a wholly owned subsidiary, first of TIC Investment Corp. (TICI), then of TIC United Corp. (TICU). Stratton Georgoulis was the sole shareholder of both TICI and TICU, and also served as the president and chairman of the board of both. In addition, Georgoulis was chairman of the board of WFE, and for some of the time in question served as its president.

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103 See supra note 39 and accompanying text.
104 *Gurley*, 43 F.3d at 1192; *Vertac*, 46 F.3d at 810; *Aceto*, 872 F.2d at 1376; *NEPACCO II*, supra note 3, at 744.
105 See *Gurley*, 43 F.3d at 1192; *Vertac*, 46 F.3d at 810; *Aceto*, 872 F.2d at 1376; *NEPACCO II*, supra note 3, at 744.
107 Id. at 1084.
108 Id.
109 Id.
110 Id.
111 *TIC*, 68 F.3d at 1084.
During this period, Georgoulis had authority to control, and did in fact
directly or indirectly control "virtually every aspect of WFE's opera-
tions." However, for purposes of the appeal, the court assumed that
neither Georgoulis nor any other employee of TICI or TICU was
personally aware of WFE's waste disposal practices.

WFE defaulted on loans and was purchased after foreclosure in
1985 by Allied Products Corp. In 1988, the Environmental Protec-
tion Agency placed the dumpsite on the National Priorities List and,
together with Allied, began remediation. To recover remediation
costs pursuant to CERCLA, the United States and Allied sued Geor-
goulis, TICI and TICU. After cross-motions for summary judgment,
the United States District Court for the Northern District of Iowa
ruled in favor of the government and held in partial summary judg-
ment that all three defendants were liable directly under CERCLA
§ 107(a)(3) as "arrangers" of hazardous waste disposal. On appeal,
the United States Court of Appeals for the Eighth Circuit affirmed
arranger liability of Georgoulis, and remanded for further proceed-
ings on the question of TICI and TICU's arranger liability as parent
corporations.

2. The Initial Framing of the Issues

The TIC circuit opinion began by discussing the general nature of
arranger liability under CERCLA. In this case, the court said, the
ownership or possession of the hazardous substances disposed of at
the dumpsite was not disputed because WFE was wholly owned by
TICI and TICU at the time in question, and because Georgoulis was

112 Id. at 1090.
113 Id. at 1084.
114 Id. at 1085.
115 Id. The Environmental Protection Agency (EPA) starts the CERCLA site evaluation
process with a Hazard Ranking System which identifies, assesses, and ranks the hazards
associated with contamination of a site by hazardous materials. See 40 C.F.R. § 300, App. A
(1994). Then, the EPA lists the worst sites, in greatest need of attention, on the National
Priorities List (NPL) in order to allocate the resources needed for the extensive cleanup. See
116 TIC, 68 F.3d at 1085.
117 Id.
118 Id. Since the district court found the defendants "directly" liable as "persons" who ar-
ranged for disposal of hazardous wastes, neither the district court nor the reviewing circuit
court discussed plaintiffs' alternative theory of defendants' arranger liability based upon the
common law doctrine of piercing the corporate veil. Id. at 1085 n.2.
119 Id. at 1093.
120 Id. at 1085-86.
the sole shareholder of TICI and TICU. The only question, the court stated, was whether the defendants "arranged for" the disposal of hazardous substances at the dumpsite.

The Eighth Circuit next reviewed the trial court's reasoning in finding Georgoulis liable as an arranger. The trial court held that the standard to determine the liability of a corporate officer as an arranger under § 107(a)(3) was the same authority to control standard used to determine operator liability under § 107(a)(2). In addition, the trial court held, there must be a showing that this authority actually was used to control the operations of the corporation. The trial court concluded that Georgoulis both possessed the necessary authority to control all of the operations of WFE, and made extensive use of that authority; therefore, Georgoulis was liable as an arranger.

Before beginning its own analysis, the circuit court also summarized the defendants' arguments. The defendants contended that liability as an arranger required a showing of intent to arrange for

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121 TIC, 68 F.3d at 1086. Although the issue of ownership or possession was not disputed in this case, the court's premise seems open to dispute. See id. Corporate shareholders, as such, do not have the legal right to transfer the legal title to or the physical location of corporate assets. BALLANTINE, supra note 7, § 118. A person owning shares in a corporation which owns or possess hazardous substances is not the same thing as that person directly owning or possessing the hazardous substances. See id. In so far as the "owned or possessed" language of § 107(a)(3) means "right to control" the hazardous substances, in the context of a corporation it should only be applicable to corporate officers and employees, and possibly the corporate directors, not, without more, the corporation's shareholders (or parent corporations) as such. See id.

122 TIC, 68 F.3d at 1086.

123 Id.

124 Id.

125 Id. This part of both the district court's reasoning and the Eighth Circuit's characterization of that reasoning could seem to be contradictory in that, at first blush, the district court seems to be trying to apply both the authority to control standard and the actual control standard. See id; see also United States v. TIC Investment Corp., 866 F. Supp. 1173, 1180 (N.D. Iowa 1994). Applying both standards would be logically meaningless, since, as noted by the Gurley court, unless an individual was acting ultra vires, having actual control over the disposal of hazardous wastes encompasses having authority to control that disposal. See United States v. Gurley, 43 F.3d 1188, 1198 (8th Cir. 1994). However, the district court's analysis is not addressing Georgoulis' authority to control or actual participation in arrangements for the disposal of WFE's hazardous wastes, but rather his general authority to control WFE itself and his actual participation in WFE's overall operations. See TIC, 866 F. Supp. at 1180. The district court's requirement of authority to control WFE generally, plus actual exercise of that general authority over WFE, is not equivalent to requiring actual control over WFE's hazardous waste disposal arrangements. See id. As a practical matter, the district court's criteria amounts to authority to control the disposal of hazardous wastes. See id.

126 TIC, 866 F. Supp. at 1181.

127 TIC, 68 F.3d at 1086–87.
disposal of a hazardous substance.\textsuperscript{128} Basically, the defendants argued for an actual control liability standard and proof of actual personal participation in WFE's hazardous waste disposal arrangements.\textsuperscript{129} The defendants also attempted to reconcile previous Eighth Circuit decisions with their position.\textsuperscript{130} Notwithstanding the discussion in \textit{NEPACCO II} regarding authority to control establishing possession of hazardous wastes, the defendants argued that liability as an arranger, in that case, actually had been imposed based on the defendant's actual involvement in the waste disposal arrangement.\textsuperscript{131} In addition, the \textit{TIC} defendants cited \textit{Gurley} and \textit{Vertac} as requiring actual control over the hazardous waste disposal to create liability under CERCLA.\textsuperscript{132} The defendants contended that \textit{Aceto} was distinguishable because the issue in that case was whether or not an arrangement between the parties was a disposal or a sale of the materials containing hazardous substances, whereas this case was about whether defendants "ever intentionally participated in any arrangement."\textsuperscript{133}

3. The \textit{TIC} Court's Analysis

a. Interpretation of the Case Law

The Eighth Circuit began its analysis of Georgoulis' liability by agreeing that \textit{Gurley} and \textit{Vertac} impose a requirement "of actual participation in or exercise of control over activities that are causally connected to, or have some nexus with, the arrangement for disposal of hazardous substances . . . ."\textsuperscript{134} However, the court rejected the defendants' further argument that liability requires specific intent to arrange for the disposal of hazardous substances, explaining that the \textit{Aceto} holding undermined the defendants' specific intent argument and advanced the purposes of CERCLA.\textsuperscript{135} Thus, the \textit{TIC} court reasoned that \textit{Aceto} implicitly rejected a specific intent requirement, and

\textsuperscript{128} \textit{Id.} at 1087.
\textsuperscript{129} See \textit{id.}
\textsuperscript{130} \textit{Id.}
\textsuperscript{131} \textit{Id.}
\textsuperscript{132} \textit{TIC}, 68 F.3d at 1087 (citing United States v. \textit{Vertac} Chem. Corp., 46 F.3d 803, 810 (8th Cir. 1995); United States v. \textit{Gurley}, 43 F.3d 1188, 1192 (8th Cir. 1994)).
\textsuperscript{133} \textit{Id.}
\textsuperscript{134} \textit{Id.} at 1087--88.
\textsuperscript{135} \textit{Id.} at 1088.
the court also recalled Aceto’s rejection of the notion that generators of hazardous substances could “simply close their eyes” to their disposal to avoid liability for response costs.\(^\text{136}\)

The TIC opinion found additional support for Georgoulis’ liability in Gurley, which held an individual employee liable as an operator where there was authority to dispose of hazardous waste and that authority actually was exercised.\(^\text{137}\) The TIC court extracted from Gurley a statement that “perhaps persons who are officers, directors, or shareholders are more likely [than a mere employee] to cause a company to dispose of hazardous wastes.”\(^\text{138}\) The circuit court stated that accepting the defendants’ argument that Gurley imposes a specific intent requirement would violate the goals underlying CERCLA by creating a loophole for corporate officials like Georgoulis, who, although controlling virtually every major aspect of a company, would be encouraged to turn a blind eye to the company’s hazardous waste disposal practices.\(^\text{139}\) Meanwhile, the employee actually performing the disposal activities could not avoid personal liability, even if he or she had no meaningful decisionmaking authority.\(^\text{140}\)

Based on its understanding of CERCLA and its analysis of case law from the circuit, primarily Aceto and Gurley, the TIC court concluded that § 107(a)(3) arranger liability does not impose a specific intent requirement as contended by defendants.\(^\text{141}\) The court decided that a corporate officer or director\(^\text{142}\) is subject to direct arranger liability if

\(^\text{136}\) Id.

\(^\text{137}\) TIC, 68 F.3d at 1088 (citing United States v. Gurley, 43 F.3d 1188, 1193 (8th Cir. 1994)).

\(^\text{138}\) Id. (citing Gurley, 43 F.3d at 1194).

\(^\text{139}\) Id. at 1089.

\(^\text{140}\) Id.

\(^\text{141}\) Id.

\(^\text{142}\) Earlier in the opinion, the TIC court had noted specifically Georgoulis’ status as a shareholder in TICI and TICU. See TIC 68 F.3d at 1084 ("Georgoulis was, at all relevant times, the sole shareholder of TICI and TICU."); Id. at 1088 (distinguishing Georgoulis from the defendant in Gurley who was a "non-officer, non-director, non-shareholder employee.") (emphasis added); Id. at 1089 ("... he was an officer, director, and shareholder ... "). However, except in circumstances covered by the common-law doctrine of piercing the corporate veil, shareholders as such have no control over the operations of a corporation. BALLANTINE, supra note 7, § 122. In addition, the TIC court’s analysis of the defendants’ liability is based upon their active involvement in the affairs of WFE as directors and officers, not upon their status as shareholders in WFE. See TIC, 68 F.3d at 1088-93. It is not likely a court would hold an individual shareholder liable under CERCLA without extensive involvement in the day-to-day affairs of the corporation. See Oswald, Bifurcation of Owner and Operator, supra note 2, at 227 n.17 ("every case imposing liability upon an individual shareholder has involved an active shareholder of a closely-held corporation. The liability of these individuals is more correctly based in their actions as
he or she possessed actual authority to control and did in fact exercise "actual or substantial control, directly or indirectly" over hazardous waste disposal practices. The court attempted to clarify this by explaining that to be liable, "the exercise of control must be causally related to the arrangement for disposal . . . rather than merely the operations or activities of the ostensible arranger." By this "actual exercise of control" standard, the TIC court purported to protect the typical corporate officer, who, although having the authority to control hazardous waste disposal practices, in actual practice had delegated away the real exercise of that authority.

b. The Defendants' Liability

In this case, the TIC court observed, Georgoulis did not delegate any substantial decision-making authority, but rather, personally and completely controlled virtually every significant aspect of WFE's operations. Based on its review of the record, the TIC court found that Georgoulis' complete control of WFE left its employees with no meaningful decision-making power and "inexorably" led to continuation of the relatively inexpensive hazardous waste disposal arrangements at the nearby dumpsite. Georgoulis had, therefore, exercised "substantial indirect control over the disposal arrangement." Accordingly, the Eighth Circuit affirmed the trial court's finding that Georgoulis was directly and personally liable under CERCLA § 107(a)(3) as an arranger.

In addressing the liability of TICI and TICU, the TIC court rejected the trial court's holding that they were liable as arrangers and instead applied the same standard of "actual or substantial control, directly or indirectly" over hazardous waste disposal arrangements.

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143 TIC, 68 F.3d at 1089.
144 Id. at 1089 n.7.
145 See id. at 1089.
146 Id. at 1090.
147 Id.
148 TIC, 68 F.3d at 1089.
149 Id. at 1091.
as was used to determine Georgoulis' liability.\textsuperscript{150} The various documented relations apparent between TICI, TICU and WFE consisted solely of certain specific financial services TICI and TICU had performed for WFE.\textsuperscript{151} Based upon the circuit court's review of the record, there was not sufficient evidence to establish as a material fact beyond dispute that the government was entitled to summary judgment on the issue of TICI and TICU's liability as arrangers.\textsuperscript{152}

IV. ANALYSIS AND CRITIQUE OF THE TIC DECISION

A. A Flawed Standard of Liability Arises from the Court's Analytical Structure

The government's argument, in TIC, was basically that the court should follow the authority to control standard,\textsuperscript{153} while the defendants essentially argued for the actual control standard.\textsuperscript{154} Although the court's language of "actual or substantial control, directly or indirectly" blurred the distinction between the two liability standards, the defendant's liability clearly was not based on any showing of his personal or actual participation in WFE's disposal of its hazardous wastes.\textsuperscript{155} The TIC court, instead, held Georgoulis liable based upon

\begin{footnotesize}
\textsuperscript{150} See id. at 1092.
\textsuperscript{151} See id.
\textsuperscript{152} Id. at 1089.
\textsuperscript{153} The government does not provide a convenient label, like "authority to control," for its proposed standard of liability of arrangers under § 107 (a)(3). See TIC, 68 F.3d at 1089. The government argued, however, for arranger liability based upon general involvement in daily operations of the company, without the necessity for showing involvement in actual arrangements for disposal of hazardous substances. See id. This criteria for liability equates to the authority to control liability standard discussed in Section II of this Comment. See supra notes 47-50 and accompanying text.
\textsuperscript{154} Because the court wrote without significant reference to the development of CERCLA liability by other courts and the resulting discussion by legal commentators, the language of the TIC opinion failed to conform to previously developed terms of art. See infra note 157 and accompanying text. The defendants' argument, however, that liability as an arranger requires that a person take some intentional action to arrange for disposal of a hazardous substance, equates to the actual control standard discussed, supra in Section II of this Comment. Compare TIC, 68 F.3d at 1087 (defendants' argument for liability based on "some intentional action to arrange for the disposal of a hazardous substance"), with United States v. USX Corp., 68 F.3d 811, 825 (3d Cir. 1995) (requiring actual control of liability-creating conduct to impose liability).
\textsuperscript{155} See TIC, 68 F.3d at 1090 ("The lack of evidence showing that Georgoulis was personally involved in, or aware of, the details of the disposal arrangement does not bar his liability.").
\end{footnotesize}
his "substantial indirect control" over WFE's hazardous waste disposal arrangements.\textsuperscript{156}

Part of the TIC decision's analytical murkiness may be due to its structure. Except for a single footnote that merely listed cases and paraphrased their holdings, the court did not discuss or refer to CERCLA liability cases decided in other circuits to support its reasoning.\textsuperscript{157} The TIC court substantially neglected past cases addressing liability under CERCLA of corporate officers and parent corporations, and the discussion of many legal commentators on that subject.\textsuperscript{158} As a result, the court's discussion of arranger liability fails to confront adequately the inherent conflict between its liability standard—based on "substantial, indirect control"—and the principle of limited liability which is fundamental to corporations law.\textsuperscript{159} A more complete and proper analysis would have concluded that liability under § 107(a)(3) of CERCLA requires actual participation or involvement in the arrangements for disposal of hazardous wastes.\textsuperscript{160} In creating a liability standard which does not require actual control of the disposal of hazardous wastes, the Eighth Circuit's holding is based on a flawed analysis of CERCLAl's text and legislative history and case law in the Eighth Circuit.\textsuperscript{161}

\textsuperscript{156} Id.
\textsuperscript{157} See id. at 1091 n.9. (citing cases concerning direct liability of parent corporations as "operators" under CERCLA § 107(a)(2)). First, the TIC court, based upon the holding in United States v. Vertac Chem. Corp., 46 F.3d 803, 807-09 (8th Cir. 1995), characterized the standard for such liability in the Eighth Circuit as requiring "authority to control and actually or substantially controlling the facility at which the disposal occurred, . . ." Id. Then, the TIC court cites cases from other circuits that adopted "similar" standards. Id. (citing Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209, 1221-22 & n.13 (3d Cir. 1993); Jacksonville Elec. Auth. v. Bernuth Corp., 996 F.2d 1107, 1110 (11th Cir. 1993); United States v. Kayser-Roth Corp., 910 F.2d 24, 26-27 (1st Cir. 1990)). However, the cited cases actually seem to require actual participation and involvement in hazardous waste disposal activities, not actual or substantial participation—as established by the Eighth Circuit. Compare Kayser-Roth, 910 F.2d at 26-27 (requiring active involvement in activities of subsidiary for parent corporation to be liable under § 107(a)(2) with TIC, 68 F.3d at 1090 (imposing liability based upon "substantial indirect" control over hazardous waste disposal arrangement without evidence of actual involvement). Note 9 of the TIC opinion concludes by noting two other minority standards for operator liability. TIC, 68 F.3d at 1091 n.9 (citing Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 842 (4th Cir. 1992); United States v. Cordova Chem. Co., 59 F.3d 584, 590-91 (6th Cir.), vacated, reh'g en banc granted, 67 F.3d 586 (1995)). Other than this brief listing of holdings, the TIC court fails to discuss or develop the relationship of its standard of "actual or substantial control, directly or indirectly" to the liability standards of other circuits. See id.

\textsuperscript{158} See supra note 157 and accompanying text.
\textsuperscript{159} See generally supra notes 7-17, 38-42 and accompanying text.
\textsuperscript{160} See id.
\textsuperscript{161} See TIC, 68 F.3d at 1088-89.
B. Legislative History and CERCLA's Goals

1. Assumption that CERCLA Imposes an Active Duty to Prevent Improper Disposal of Hazardous Substances

The TIC court asserted that its holding furthered the legislative goals behind CERCLA. However, the circuit court did not refer to CERCLA's legislative history, other than to cite approvingly the trial court's statement that "Congress's goals" in enacting CERCLA were: "(1) to ensure that those responsible for the problems caused by hazardous wastes are required to pay for the clean-up costs . . . and (2) to ensure that responsible persons are not allowed to avoid liability by remaining idle." Actually, the trial court had characterized these not as "Congress's goals," but as "[t]he recognized purposes of CERCLA legislation." The circuit court's phrase "Congress's goals" seems to imply reference to either the language of the statute itself, or at least its legislative record. However, the phrase "recognized purposes" actually used by the trial court refers to judicially recognized purposes and to the cases cited for authority.

Careful parsing of the legislative goals that the TIC circuit court attributed to CERCLA is enlightening. The first goal, ensuring that those responsible for the problems of hazardous wastes are required to pay for cleanup costs, is supported by CERCLA's legislative record. The second goal cited, however, ensuring that responsible persons are not allowed to avoid liability by remaining idle, was not drawn from the statute or its legislative record, but was a paraphrasing by the trial court of the justification invoked in Nurad, Inc. v. William E. Hooper & Sons Co. when the Fourth Circuit adopted the widely criticized authority to control standard of CERCLA liability.

162 See id. at 1089 (dismissing defendant's argument by stating that "such a holding would violate the goals underlying CERCLA," and stating that its holding is "based upon our understanding of CERCLA").
163 Id. at 1088 (citing United States v. TIC Investment Corp., 866 F. Supp. 1173, 1177 (N.D. Iowa 1994)).
164 TIC, 866 F. Supp. at 1177.
165 See TIC, 68 F.3d at 1088.
166 See TIC, 866 F. Supp. at 1177.
167 H.R. REP. No. 253 (III), 99th Cong., 1st Sess. 15 (1985), reprinted in 1986 U.S.C.C.A.N. 3038, 3038 (Congress tried to achieve two general goals by passing CERCLA: "(1) to provide for cleanup if a hazardous substance is released into the environment or if such release is threatened, and (2) to hold responsible parties liable for the costs of these clean-ups.").
168 Before TIC, the authority to control liability standard had been followed by only the Fourth
ity.\textsuperscript{169} Therefore, ensuring that “responsible persons are not allowed to avoid liability by remaining idle” is not, as characterized by the TIC circuit court, a congressional goal drawn from CERCLA’s text or legislative history, but an attempt by one federal circuit, to justify an over-inclusive standard of liability; a liability standard that has been rejected roundly by the vast majority of courts to consider the question.\textsuperscript{170}

In addition, the language quoted by TIC implicitly makes an assumption about CERCLA that the majority of courts following the actual control liability standard have been unwilling to make.\textsuperscript{171} “To ensure that responsible persons are not allowed to avoid liability by remaining idle” seems to imply that CERCLA imposes an active duty on every individual, whenever possible, to prevent the mishandling of hazardous substances.\textsuperscript{172} The support for this assumption would appear to be the remedial nature of the statute and its broad goal of ensuring that those responsible for the problems of hazardous wastes are required to pay for cleanup costs.\textsuperscript{173} In view of its vague provisions and meager legislative history, however, there should be some more substantial basis than CERCLA’s general aspirations for extending its scope beyond its plain language.\textsuperscript{174}

The assumption that CERCLA does more than hold accountable those responsible for hazardous waste disposal problems—that it imposes an active duty on all individuals to prevent hazardous waste disposal problems—is the conceptual basis for imposing liability without proof of actual control of the waste disposal activities such as the

\begin{itemize}
  \item Circuit, Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 842 (4th Cir. 1992) and the Ninth Circuit, Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp., 976 F.2d 1338, 1341 (9th Cir. 1992). \textsuperscript{169} See supra notes 47–50 and accompanying text. Even the TIC opinion itself seems critical of the Nurad holding. See TIC, 68 F.3d at 1091 n.9 (Nurad established CERCLA liability based on “mere authority to control.”) (emphasis added).
  \item See TIC, 866 F. Supp. at 1177 (citing Nurad, 966 F.2d at 845); H.R. REP. No. 99–253 (III) at 15.
  \item See TIC, 68 F.3d at 1088; H.R. REP. No. 99–253 (III) at 15; supra note 39 and accompanying text.
  \item See TIC, 68 F.3d at 1088; supra note 39 and accompanying text.
  \item See, e.g., United States v. Aceto Agric. Chems. Co., 872 F.2d 1373, 1382 (8th Cir. 1989) (rejecting defendants’ argument as contrary to the policies underlying CERCLA and which “would allow defendants to simply ‘close their eyes’ to the method of disposal of their hazardous substances”).
  \item See TIC, 866 F. Supp. at 1177 (citing Nurad, 966 F.2d at 845).
\end{itemize}
authority to control standard.\textsuperscript{175} In blithely adopting the justification of the Nurad court as one of CERCLA's goals, it seems inevitable that the TIC court would also end up adopting a standard of liability that requires a lesser showing than the personal participation needed to satisfy the actual control test.\textsuperscript{176} CERCLA's actual language, however, seems to impose liability on persons based upon improper waste disposal in which they themselves actually participated.\textsuperscript{177}

2. Excessive Reliance on Statutory Purpose

A more thorough analysis of CERCLA also should recognize the difficulty in determining the specific, as opposed to the general, goals of Congress with respect to liability under CERCLA—a hastily-passed statute with ambiguous provisions.\textsuperscript{178} Therefore, although CERCLA should be construed liberally to effectuate its goals as a remedial statute, it should not be employed to "fill in the blanks so as to discern a congressional intent to impose liability under nearly every conceivable scenario."\textsuperscript{179}

Congress usually is specific and explicit when it intends for legislation to change the interpretation of a judicially created concept.\textsuperscript{180} At the time that Congress passed CERCLA, it was a well-recognized principle of corporations law that mere control of a corporation, without more, was not adequate grounds for imposing liability on a corporate officer or director for the actions of other officers, directors or employees.\textsuperscript{181} Instead the principle of limited liability required actual participation in the wrongful conduct as a prerequisite for imposing personal liability on corporate officers, directors, and employees.\textsuperscript{182} Because of the state of corporate law at the time of CERCLA's passing, there should be some support in the statute itself, besides its

\textsuperscript{175} See, e.g., NEPACCO I, supra note 3, at 848–49 (stating authority to control is the proper standard for CERCLA liability; to hold otherwise "would frustrate congressional purpose by exempting from the operation of the Act a large class of persons who are uniquely qualified to assume the burden imposed by [CERCLA].").

\textsuperscript{176} See supra notes 47–49 and accompanying text.

\textsuperscript{177} See Cordova, 59 F.3d at 589 ("Congress intended that those responsible for disposal of chemical poisons bear the cost and responsibility for remedying the harmful conditions they created") (emphasis in original).

\textsuperscript{178} See id. at 588.

\textsuperscript{179} Id.

\textsuperscript{180} United States v. USX Corp., 68 F.3d 811, 824 (3d Cir. 1995).

\textsuperscript{181} Id.

\textsuperscript{182} See generally 3A FLETCHER, supra note 8, § 1137; Richard G. Dennis, Liability of Officers,
broad remedial goals, for assuming a congressional intention to impose liability on corporate officials merely because of their general control of routine business activities.\(^{183}\) The sparse legislative history, however, indicates that Congress anticipated that "issues of liability not resolved by this Act . . . shall be governed by traditional and evolving principles of common law."\(^{184}\) Based on these considerations, the courts should impose liability only on those persons, corporate or otherwise, who Congress clearly made liable—those who actually participate in the processing of hazardous wastes.\(^{185}\)

3. CERCLA's Structure—Liability Based on Action as Opposed to Status

In addition to lacking support in CERCLA's legislative history and relying excessively on CERCLA's broad remedial purpose, the TIC court fails to understand the differences between liability under the differing subsections of CERCLA. The few courts to adopt liability based on "authority to control," rather than the personal participation required by the actual control standard, have done so in the context of liability of owners and operators of a hazardous waste site under CERCLA §§ 107(a)(1) and (a)(2), not arrangers or transporters under CERCLA §§ 107(a)(3) and (a)(4).\(^{186}\)

There is, however, a structural difference in CERCLA between liability under §§ 107(a)(1) and (a)(2) and liability under §§ 107(a)(3) and (a)(4).\(^{187}\) Liability as an owner or operator under §§ 107(a)(1) and (a)(2) is based upon a party's status as owner or operator, not any specific conduct or actions.\(^{188}\) In contrast, liability of arrangers and transporters under §§ 107(a)(3) and (a)(4) is based upon a party's

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183 USX Corp., 68 F.3d at 822.
184 Oswald, Strict Liability, supra note 16, at 590 n.41.
185 USX Corp., 68 F.3d at 822.
187 See USX Corp., 68 F.3d at 824 n.25.
188 Id. It is possible to argue, as in Gurley, that operator liability is not based on status but, as with arrangers and transporters, on specific actions or conduct. See United States v. Gurley, 43 F.3d 1188, 1192 (8th Cir. 1994). That perspective, however, also seems to lead to a requirement of actual personal participation in the operations creating the liability, as with the actual control liability standard. See id. ("These definitions connote some type of action or affirmative conduct, an element not required by those courts that ask only whether a defendant had the authority to control the operation of the facility").
Even assuming that authority to control is justifiable as the proper standard for assessing liability on a person with the legal status of "owner" under §§ 107(a)(1) and (a)(2), that same standard may not necessarily be justifiable for assessing liability based on specific actions as required for "arranger" liability under § 107(a)(3). In fact, liability based on specific actions, such as arranging for the disposal of hazardous substances, apparently would require a showing that the allegedly liable party actually took those specific actions.

C. TIC’s Misreading of Eighth Circuit Case Law

1. Trial Court’s Misapplication of NEPACCO II

The TIC circuit court opinion is burdened further by its questionable analysis of Eighth Circuit CERCLA case law, beginning with a failure to correct the TIC trial court’s misreading of NEPACCO II. In NEPACCO II, the issue of ownership or possession of the hazardous substances was central to the dispute. NEPACCO’s vice-president personally did not own or possess the hazardous substances; rather, the hazardous wastes were owned or possessed by the corporate entity, NEPACCO. The vice-president argued, therefore, that he could not be held individually liable for having arranged for the transportation and disposal of hazardous substances under § 107(a)(3), even though he actually made the specific arrangements for waste disposal.

The NEPACCO II court, however, agreed with the plaintiffs’ argument that defendant’s actual control over NEPACCO’s hazardous wastes satisfied the possession requirement. Although the NEPACCO II court stated, without elaboration or citation, that it was “authority to control . . . disposal of hazardous substances that is critical under

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189 USX Corp., 68 F.3d at 824 n.25.
190 See id.
191 See id.
193 See NEPACCO II, supra note 3, at 743-44; 42 U.S.C. § 9607(a)(3) (“imposing liability for response costs as an arranger on any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person.”) (emphasis added).
194 NEPACCO II, supra note 3, at 743.
195 Id.
196 Id.
the statutory scheme," the defendant's liability was based, in fact, upon his actual control over the disposal of NEPACCO's hazardous wastes. The defendant's actual control was demonstrated by virtue of his actions as plant supervisor—he "actually knew about, had immediate supervision over, and was directly responsible for arranging for the transportation and disposal of the NEPACCO plant's hazardous substances . . . ." In other words, because defendant had actual control over NEPACCO's hazardous wastes, that satisfied the "owned or possessed" language of § 107(a)(3), and because defendant exercised his actual control to make the specific arrangements for disposal of NEPACCO's hazardous wastes, the rest of § 107(a)(3) was satisfied, and liability as an arranger was established. However, the TIC trial court cited the NEPACCO II authority to control language as standing for the proposition that showing authority to control was the standard required to establish liability as an arranger.

To summarize, the authority to control language that the NEPACCO II court used in its discussion of ownership or possession of hazardous materials was misread by the TIC trial court as a basis for using authority to control to establish overall arranger liability. That misreading of NEPACCO II by the TIC trial court was the foundation for that court's holding Georgoulis liable as an arranger. Rather than closely scrutinizing the district court's holding, however, the TIC appellate court proceeded to examine and reject the defendants' claims that the Eighth Circuit's decisions in Aceto and Gurley require a showing of actual control of the arrangement for disposal of hazardous wastes to be liable.

2. Questionable Application of Aceto and Gurley

First considering Aceto, the TIC appellate court stated that "Aceto rejected the notion that generators of hazardous substances could simply 'close their eyes' to the method of disposal of their hazardous substances to avoid any liability for response costs." In Aceto, though, the court did not have to confront the difference between the author-
ility to control standard discussed and the actual control standard that in fact was applied in *NEPACCO II*. The defendants in *Aceto* did argue that they should have avoided liability based on *NEPACCO II* because they did not have authority to control the operations at the Aidex manufacturing facility. The *Aceto* court, however, brushed aside their argument based upon defendants actual legal ownership of the hazardous materials at the site.

The *TIC* circuit court also read the decision in *Gurley* as supporting Georgoulis' liability as an arranger, notwithstanding the fact that there is no showing that he personally participated in the arrangements for WFE to dispose of its hazardous wastes. This interpretation was a peculiar reading of *Gurley*, which explicitly rejected the authority to control standard for operator liability and required actual control to establish operator liability.

Despite the *Gurley* holding, however, the *TIC* court focused on the fact that the liable individual in *Gurley* was a corporate employee, rather than an officer, director, or shareholder. The *Gurley* defendant's argument was that, as a simple employee, he lacked the authority to control the disposal of the company's hazardous wastes. The *Gurley* court responded by noting that "officers, directors or shareholders are more likely to cause a company to dispose of hazardous wastes, but we decline to confer immunity on all persons who do not hold such positions." *Gurley* therefore rejected liability based simply on corporate status as employee, officer, director or stockholder.

The *TIC* court, however, merely quoted the language of *Gurley* and stated that officers, directors and shareholders, by virtue of their corporate status and authority to control corporate actions in general, by their very position are responsible for all handling of hazardous wastes by the corporation. The *TIC* decision thus misread *Gurley* to stand for its "substantial, indirect" control standard of liability.

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205 See *Aceto*, 872 F.2d at 1381–82.
206 Id.
207 Id.
208 See *United States v. TIC Investment Corp.*, 68 F.3d 1082, 1088 (8th Cir. 1995), cert. denied, 117 S. Ct. 50 (1996).
209 *United States v. Gurley*, 43 F.3d 1188, 1193 (8th Cir. 1994) ("an individual may not be held liable as an 'operator' . . . unless he or she . . . personally perform[ed] the tasks necessary to dispose of the hazardous wastes or [directed] others to perform those tasks.").
210 *TIC*, 68 F.3d at 1088–89.
211 See *Gurley*, 43 F.3d at 1194.
212 Id.
213 See id.
214 See *TIC*, 68 F.3d at 1089.
when in fact, Gurley actually rejected this standard based upon status, and instead required a showing of specific personal involvement in the hazardous disposal arrangements.215

In summary, the TIC decision relies upon a mistaken reading of CERCLA's legislative history, excessive reliance upon its broad remedial goals, and mischaracterizations of past Eighth Circuit CERCLA case law. Upon this flawed foundation it erects its standard of personal liability under CERCLA for "arrangers" of hazardous waste disposal.

D. The Wrong Standard—"Actual or Substantial Control, Directly or Indirectly"

In United States v. TIC Industries, the United States Court of Appeals for the Eighth Circuit at last discussed the issue of what constituted "arranged for disposal or treatment" within the meaning of § 107(a)(3) of CERCLA.216 The court's final standard of liability—"actual or substantial control, directly or indirectly"—was unclear, however:217 The TIC court evidently was trying to craft a liability standard that required more than just authority to control the disposal of hazardous wastes.218 Yet Georgoulis' liability was not based on a showing of actual direct involvement in WFE's waste disposal arrangements, but rather on his "substantial indirect control over the disposal arrangement."219 The Eighth Circuit's standard of liability, therefore, does not correspond to the actual control test adopted by most other circuit courts.220

Under the actual control standard, persons with little or no connection to the disposal of hazardous wastes are not held liable.221 The major disadvantage of the actual control standard is that responsible

215 Compare id. at 1088 ("careful reading of Gurley . . . supports the district court's finding of Georgoulis' liability as arranger in the present case") with Gurley, 43 F.3d at 1193 (liability requires actual involvement in disposal of hazardous wastes). The TIC court's ability to read Gurley as supporting the district court's imposition of liability on Georgoulis is strange considering that the court makes no effort to reconcile Gurley and its own holding, based on "actual or substantial control, directly or indirectly." See TIC, 68 F.3d at 1089-90.
216 See TIC, 68 F.3d at 1089.
217 See id.
218 Id. (liability requires "authority to control, and . . . actual or substantial control, directly or indirectly.").
219 See id. at 1090.
220 See supra note 39 and accompanying text.
221 See United States v. USX Corp., 68 F.3d 811, 825 (3d Cir. 1995) (imposing liability under actual control test requires that "person sought to be held liable actually participated in the
persons sometimes will not be liable because no showing can be made that they personally participated in, or had actual control over, the disposal of hazardous wastes. On the other hand, the actual control liability standard comports with a straight-forward reading of CERCLA’s text. For instance, to impose liability as an arranger of hazardous waste disposal under § 107(a)(3), the actual control standard requires that a person actually participated in the arrangement for disposal.

In contrast, liability without proof of actual control of the disposal of hazardous wastes aggressively advances CERCLA’s goal of holding persons accountable for the results of improper hazardous waste disposal. This result, however, requires that the text of CERCLA be given a somewhat strained interpretation. For example, CERCLA § 107(a)(3) imposes liability on persons who “arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment.” Any test that imposes liability without requiring proof of personal participation essentially is saying a person “arranged for” without any proof that they did in fact “arrange for.”

Imposing liability without requiring actual control of the disposal of hazardous wastes, like the authority to control standard does, also ensures that sometimes parties without any knowledge of, or involvement in, the disposal of hazardous wastes will be liable for cleanup costs.

liability-creating conduct’’); United States v. Cordova Chem. Co. of Mich., 59 F.3d 584, 589 (6th Cir.) (“Congress intended that those responsible for disposal of chemical poisons bear the cost and responsibility for remedying the harmful conditions they created”) (emphasis in original), vacated, reh’g en banc granted, 67 F.3d 586 (1995).

See TIC, 68 F.3d at 1089.

See USX Corp., 68 F.3d at 824 (“it is appropriate to limit liability to those persons who are clearly made liable by the language Congress used—those who actively participate [in the handling of hazardous wastes]”).

See, e.g., NEPACCO II, supra note 3, at 745.

See NEPACCO I, supra note 3, at 1179 (adopting authority to control standard to prevent “encouraging] persons in authority to turn a blind eye to the method of disposal of their corporation’s hazardous substances”).

See United States v. Gurley, 43 F.3d 1188, 1193 (8th Cir. 1994) (reasoning that authority to control standard for liability under CERCLA § 107(a)(2) is inconsistent with the specific action or affirmative conduct implicit in the term “operator”).


See id.

See Oswald, Strict Liability, supra note 16, at 618 (corporate officer doing no more than hiring licensed transporter to transport hazardous wastes to disposal facility based upon authority to control would be liable for cleanup costs resulting from transporter’s negligence).
Moreover, liability without actual control also conflicts with the established principles of corporations law.230 The limited liability rule protects from liability corporate officers, directors and employees who do not actually participate in the liability-creating conduct.231 Under the authority to control standard, however, there will always be at least one corporate officer who will be personally liable.232 After all, every corporate facility will have at least one officer with ultimate responsibility for corporate operations there.233

Ironically, holding corporate officers personally liable based upon their authority to control corporate actions may actually frustrate rather than advance CERCLA's stated goals.234 If an officer becomes active in a company's waste disposal arrangements, he may be creating liability for himself under CERCLA's strict joint and several liability scheme.235 One logical way to avoid this personal liability would be to avoid any involvement in a company's hazardous waste disposal decisions.236 So, rather than fostering greater involvement by corporate officials in hazardous waste disposal decisions, the authority to control liability standard may actually encourage less such involvement.237 Moreover, the possibility of personal liability may also discourage otherwise qualified officers from serving with companies at all involved with hazardous substances.238

VI. CONCLUSION

In summary, the Eighth Circuit's opinion in United States v. TIC Industries was based on two justifications: (1) its understanding of the structure and history of CERCLA, and (2) the court's interpretation of past CERCLA case law. Both branches of the court's analysis were flawed fundamentally—TIC's invocation of CERCLA's goals was cursory and incomplete, and the court's analysis of past Eighth Circuit cases was questionable and poorly executed. Moreover, the court's liability standard conflicts with fundamental principles of corporations law. Although the court seemed to be searching for a broad

230 See supra note 13 and accompanying text.
231 See supra note 13 and accompanying text.
232 See Oswald, Strict Liability, supra note 16, at 618.
233 See id.
234 See Carley, supra note 10, at 259.
235 See id.
236 See id.
237 See id.
238 See id.
form of the actual control liability standard, "substantial, indirect" control appears functionally equivalent to the widely criticized authority to control standard that is rejected by all but a small minority of courts.

In view of the specific facts of the case, the TIC court, despite its questionable approach, appears to have accomplished the correct result.\(^{239}\) The court seems to have been on the right track in its conclusion that arranger liability should require "some level of actual participation in, or exercise of control over, activities that are causally connected to, or have some nexus with, the arrangement for disposal of hazardous substances."\(^{240}\) In this case, Georgoulis' control of WFE's day-to-day operations was so complete that he effectively assumed all meaningful decision-making authority.\(^{241}\) It could be argued that Georgoulis' complete control therefore actually included effective control of WFE's waste disposal arrangements.\(^{242}\) It then would be appropriate to hold Georgoulis personally liable for the consequences of WFE's improper disposal of its hazardous wastes.\(^{243}\)

The problem with the TIC decision is in the liability standard it created and applied: "actual or substantial control, directly or indirectly."\(^{244}\) The court should have characterized Georgoulis' extensive and complete control of WFE as the equivalent of actual personal involvement in WFE's waste disposal arrangement. The TIC court, instead however, imposed liability on Georgoulis based on his "substantial indirect control" over WFE's waste disposal arrangements, notwithstanding the lack of evidence of his personal involvement in that arrangement.\(^{245}\) Thus, Georgoulis' actions and conduct appear irrelevant to his liability, which seems based on his substantial authority within WFE.\(^{246}\) In TIC therefore, the Eighth Circuit has adopted, in effect, an authority to control standard of CERCLA arranger liability.\(^{247}\)

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\(^{239}\) See United States v. TIC Investment Corp., 68 F.3d 1082, 1090 (8th Cir. 1995), cert. denied, 117 S. Ct. 50 (1996).

\(^{240}\) See id. at 1087–88.

\(^{241}\) Id. at 1090.

\(^{242}\) See id. at 1087–88.

\(^{243}\) See id.

\(^{244}\) See TIC, 68 F.3d at 1089.

\(^{245}\) See id. at 1090.

\(^{246}\) See id.

\(^{247}\) See Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 842 (4th Cir. 1992) (applying CERCLA operator liability based on authority deriving from ability to control disposal of hazardous wastes).