Personal Liability for Hazardous Waste Cleanup: An Examination of CERCLA Section 107

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PERSONAL LIABILITY FOR HAZARDOUS WASTE CLEANUP: AN EXAMINATION OF CERCLA SECTION 107

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I. INTRODUCTION

The combination of technological improvements in the methods of manufacturing and implementation of federal and state laws controlling air and water pollution has resulted in the creation of greater amounts of solid waste. Most of this waste is disposed of on land in open dumps and sanitary landfills. Such disposal methods are dangerous because toxic chemicals may leak from waste sites and contaminate the public water supply. In response to the growing problem of hazardous waste disposal, Congress enacted two major pieces of legislation: the Resource Conservation and Recovery Act of 1976 (RCRA), and the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA).

RCRA and CERCLA each focus on a different aspect of the hazardous waste problem. RCRA primarily focuses on the management and regulation of hazardous waste disposal. CERCLA primarily focuses on the cleanup of existing hazardous waste sites.

* Articles Editor, 1985-1986, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW.
1 S. REP. NO. 848, 96th CONG., 2d Sess. 2 (1980).
3 Id.
4 Id. at 6240.
8 See H. R. REP. NO. 94-1491, supra note 2, at 4. The House committee introducing RCRA believed that it eliminated “the last remaining loophole in environmental law.” Id.
Both statutes authorize, although RCRA to a far less extent, the federal government to clean up dangerous hazardous waste sites and to bring suit to recover the clean-up costs from the parties responsible for creation of the site.\textsuperscript{10} To deter violations of the statutes,\textsuperscript{11} and to finance the necessary cleanup\textsuperscript{12} of hazardous waste sites, both RCRA and CERCLA contain criminal\textsuperscript{13} and civil\textsuperscript{14} liability provisions. The civil liability provisions of CERCLA, contained in Section 107,\textsuperscript{15} designate categories of persons responsible for the creation of hazardous waste sites and subject them to liability for clean-up costs.\textsuperscript{16}

This article examines the scope of liability under CERCLA section 107, and focuses upon its application to individual, as opposed to corporate, defendants. The few courts to consider this issue have held that individuals may be proper defendants in a CERCLA suit for the recovery of clean-up costs.\textsuperscript{17} In the case of corporate officers and employees, the corporate form has not shielded these individuals from liability where the government has demonstrated that the individual involved exercised personal control over, or was actually involved in, the treatment, transport or disposal of hazardous waste.\textsuperscript{18}

Section II discusses the growing hazardous waste problem and the parties involved in the generation and disposal of hazardous waste. It examines the RCRA liability provisions regarding ongoing hazardous waste problems, and the provisions' limited applicability to the problems abandoned hazardous waste sites pose.\textsuperscript{19} Section III

\textsuperscript{10} 42 U.S.C. § 6973 (Supp. II 1984); 42 U.S.C. §§ 9604, 9607 (1982); see also infra notes 55–105 and accompanying text.

\textsuperscript{11} According to Terrell E. Hunt, EPA acting associate enforcement counsel for special litigation, the “overwhelming value” of EPA’s criminal enforcement program is the message of deterrence it sends to private corporate officials. EPA, Justice Described as Urging Courts to Send More Corporate Violators to Jail, ENV’T REP. (BNA), Vol. 16, No. 2, at page 45 (May 10, 1985).

\textsuperscript{12} Civil liability under RCRA Section 7003 and under CERCLA Section 107 serves to finance the abatement and cleanup of hazardous waste. See infra notes 82–85 and accompanying text.

\textsuperscript{13} The criminal liability provisions of RCRA may be found in 42 U.S.C. § 6928(d) (Supp. II 1984). The criminal liability provisions of CERCLA may be found in 42 U.S.C. § 9603 (1982).


\textsuperscript{15} 42 U.S.C. § 9607(a) (1982).

\textsuperscript{16} Id.


\textsuperscript{18} See NEPACCO, 579 F. Supp. 823.

\textsuperscript{19} “Inactive” hazardous waste sites are waste sites upon which all disposal of hazardous
examines the CERCLA liability provisions; it focuses particularly on the liability of individuals under section 107. This article concludes that, although CERCLA section 107 liability may be harsh when applied to certain individuals, such findings of liability are necessary to finance the cleanup of hazardous waste sites and to deter unlawful dumping of hazardous waste.

II. THE HAZARDOUS WASTE PROBLEM AND THE RCRA STATUTORY SOLUTION

The New Jersey District Court in United States v. Price (Price I)\(^\text{20}\) described the problems of hazardous waste disposal. The Price I court said:

> For fundamental and deeply rooted psychological reasons, as well as more mundane utilitarian considerations, it is characteristic of man to bury that which he fears and wishes to rid himself of. In the past, this ingrained pattern of behavior has generally proven harmless, and indeed, has often led man to restore to the earth the substances he had removed from it. In today's industrialized society, however, the routine practice of burying highly toxic chemical waste has resulted in serious threats to the environment and to public health . . . . The dangers are especially acute when buried chemical wastes threaten to contaminate the underground aquifers upon which half the nation relies for its supply of drinking water.\(^\text{21}\)

The large number of abandoned and inactive hazardous waste sites makes the problem of controlling hazardous waste more difficult.\(^\text{22}\) It is difficult both to determine what parties are responsible for this past disposal, and to locate these parties.\(^\text{23}\) Inactive hazardous waste sites are especially dangerous because of the danger that toxic leakage from a waste site may not become apparent until long after all disposal activity has ceased.\(^\text{24}\) A 1979 study conducted by the Environmental Protection Agency (EPA) revealed 30,000 to 50,000 inactive and uncontrolled hazardous waste sites in the United States.\(^\text{25}\)
The EPA determined that 1,200 to 2,000 of these sites presented a serious risk to the public health.\textsuperscript{26} The study concluded that the cleanup of just these sites would cost from \$13.1 to \$22.1 billion.\textsuperscript{27}

The tremendous cost of cleaning up hazardous waste sites raises questions as to who should bear the financial burden for such cleanup. RCRA and CERCLA authorize, to differing extents,\textsuperscript{28} the federal government to clean up hazardous waste sites and to then bring suit to recover the clean-up costs from parties responsible for the creation of the waste site.\textsuperscript{29} Under both statutes the potentially liable parties include: (1) owners and operators of hazardous waste facilities;\textsuperscript{30} (2) transporters of hazardous waste;\textsuperscript{31} and (3) those persons who arrange for the transport of hazardous waste\textsuperscript{32} (usually generators of hazardous waste).\textsuperscript{33} These various parties could include employees as well as corporate officers.\textsuperscript{34}

Congress enacted the Resource Conservation and Recovery Act of 1976 (RCRA)\textsuperscript{35} to address the growing problem of hazardous waste disposal. RCRA authorizes the Environmental Protection Agency Administrator to promulgate regulations for the management of hazardous waste.\textsuperscript{36} RCRA has been referred to as a “cradle to grave”

\textsuperscript{26} Id.
\textsuperscript{28} See supra notes 6–16 and accompanying text.
\textsuperscript{29} Id.; 42 U.S.C. § 6973(a) (Supp. II 1984); 42 U.S.C. § 9607(a) (1982).
\textsuperscript{30} See infra note 90.
\textsuperscript{34} See NEPACCO, 579 F. Supp. at 847–48. “Owners and operators of a facility” could encompass many possible defendants because of CERCLA’s broad definition of the term “facility.” A “facility” is defined by CERCLA as “... any site or area where a hazardous substance has been deposited, stored or placed, or otherwise come to be located ...” 42 U.S.C. § 9601(9) (1982). Under this definition, a facility may be both the generation and the disposal site for the hazardous waste. Therefore, there may be numerous “owners and operators” involved in a single CERCLA action.
\textsuperscript{36} 42 U.S.C. § 6907(a) (Supp. II 1984). RCRA provides for criminal and civil penalties to help enforce its regulations. 42 U.S.C. § 6928 (Supp. II 1984). Section 3008(a) of the Act establishes civil penalties for non-compliance with administrative orders issued because of violations of RCRA regulations. 42 U.S.C. § 6928(a)(3)(Supp II 1984). Pursuant to section 3008(a), persons violating EPA regulations enacted pursuant to RCRA who fail to take corrective action after an administrative order may be liable for a civil penalty of up to \$25,000 per day of continued non-compliance. Section 3008(d) specifies the criminal penalties of the Act. 42 U.S.C. § 6928(d) (Supp. II 1984). As amended by the 1984 legislation, this section provides criminal penalties for any person who knowingly transports, or causes transportation of, hazardous waste to a facility which does not have a permit, knowingly treats or disposes of hazardous waste without having obtained a permit, or knowingly violates the recordkeeping
piece of legislation\(^\text{37}\) because it authorizes the regulation of hazardous waste from the time of its creation to the time of its disposal.\(^\text{38}\) The purpose of RCRA is to "promote the protection of health and the environment and to conserve valuable material and energy resources"\(^\text{39}\) by, among other things, "prohibiting future open dumping on the land and requiring the conversion of existing open dumps to facilities which do not pose a danger to the environment or to health."\(^\text{40}\)

One of RCRA's most important provisions is the imminent hazard authority it grants the EPA in section 7003.\(^\text{41}\) Section 7003 authorizes the EPA to seek a judicial order to restrain toxic leaking from hazardous waste sites.\(^\text{42}\) Courts have construed section 7003 to hold individual defendants liable for the cost of abating the leakage of chemicals from such sites to the extent that such leakage poses an imminent danger to the public health or to the environment.\(^\text{43}\) Con-
gress amended section 7003, along with other provisions of RCRA, in 1980 and again in 1984. The amendments to section 7003 extend its application to hazardous waste sites which may present an imminent hazard (as opposed to is presenting) and to those parties who have contributed (in addition to those who are contributing) to the disposal of hazardous waste.

Prior to the 1984 amendments, which strengthened its provisions, section 7003 did not adequately address the problems hazardous waste sites pose. Courts were reluctant to interpret RCRA section 7003 broadly because its focus, like the rest of RCRA, was prospective. The drafters of RCRA intended the legislation to regulate wastes from a site may present (as opposed to is presenting) an imminent and substantial endangerment. 42 U.S.C. § 6973 (Supp. II 1984).

The number of actors who could serve as defendants under RCRA Section 7003 had been limited by an often strict judicial construction of who could be responsible under that section as a person “contributing to” a release of hazardous waste. See Wade I, 546 F. Supp. at 790. But see Price I, 523 F. Supp. at 1069–74. Courts had been reluctant to impose Section 7003 liability upon persons contributing to a release of hazardous waste whose activity had occurred entirely in the past, because, as aforementioned, RCRA is directed at ongoing, rather than past activity. See Wade I, 546 F. Supp. at 788–92; NEPACCO, 579 F. Supp. at 833–37. Some courts, in fact, had limited Section 7003’s applicability to present owners of sites, who would have had the power to comply with an injunction. Wade I, 546 F. Supp. at 792; United States v. Vertac Chemical Corp., 489 F. Supp. 870 (E.D. Ark. 1980); United States v. Midwest Solvents Recovery Services, Inc., 484 F. Supp. 138 (N.D. Ind. 1981). But see Price I, 523 F. Supp. at 1072–73. No court had construed Section 7003 to confer liability upon past non-negligent off site generators or transporters of hazardous waste. See Wade I, 546 F. Supp. at 790. Since courts had been reluctant to impose Section 7003 liability upon those parties whose past activities contributed to a present hazardous waste problem, Section 7003 did not fully reach responsible parties to pay for the cleanup of inactive hazardous waste sites, as all disposal of waste at these sites had occurred in the past.

In 1980, Congress amended RCRA in order to enlarge the EPA’s authority to use the imminent hazard provisions of Section 7003 to cover situations involving inactive hazardous waste sites. Pub. L. No. 96-482 § 25, 94 Stat. 2348 (1980). Under the 1980 amendments the EPA may seek injunctive relief not only where unsafe disposal “is” presenting a hazard, but where such disposal “may present” a hazard. Id. The legislative history reveals that the intent of Congress in enacting the 1980 amendments was to enable the EPA to remedy the effects of unsound past disposal practices. H.R. Rep. No. 191, 96th Cong., 1st Sess. 4–5 (1979). The EPA was specifically urged to use section 7003 to address the problem created by “abandoned sites as well as active ones.” Id.

In 1984 Congress further amended section 7003 as part of a number of amendments to RCRA, to attach liability, with some limitations, to parties responsible for the past disposal of hazardous waste. Pub. L. No. 98-616, 98 Stat. 3267 (1984).

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ongoing hazardous waste practices, not to clean up past disposal sites.\textsuperscript{50} Because section 7003 was prospective in nature, it did not address the problems of abandoned hazardous waste sites.\textsuperscript{51}

Section 7003 did not grant the EPA the authority to clean up abandoned waste sites,\textsuperscript{52} nor did it impose liability upon a sufficient number of responsible parties.\textsuperscript{53} These deficiencies were particularly significant because site owners and waste transporters connected with past dumping were often insolvent before the site became a recognized danger.\textsuperscript{54} Although section 7003 authorized the EPA to restrain leakage from a hazardous waste site, it did not authorize a general cleanup of hazardous waste sites.\textsuperscript{55} Only in cases where there was active leakage from a waste site did courts hold that RCRA applied.\textsuperscript{56} Once the leaking was alleviated, however, the problem was no longer “ongoing,” and further government cleanup was no longer authorized under RCRA.\textsuperscript{57} Because the dangers inactive sites pose may not become readily apparent until long after all disposal has ceased, section 7003 did not provide the EPA with the clean-up authority it needed to remove potentially dangerous hazardous waste sites.\textsuperscript{58}

\section*{III. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)}

After Congress enacted RCRA in 1976, Congress and the American public became more aware of the magnitude of the problems
inactive hazardous waste sites pose. This was particularly true after the Love Canal in New York and similar waste sites gained public attention. To address this growing problem, Congress has, on several occasions, amended RCRA to strengthen its enforcement provisions. Congress' most significant legislative step to address the problem, however, was passing the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA).

Congress enacted CERCLA in 1980 to facilitate the cleanup of hazardous waste sites as well as to provide the necessary financing. CERCLA directly addresses the problem of inactive hazardous waste sites and authorizes the cleanup of those sites. Congress intended to establish "a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste sites."

CERCLA provides the EPA with a variety of regulatory tools to protect the public and the environment from the release of haz-

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59 See NEPACCO, 579 F. Supp. at 834-35.
60 Id. At Love Canal, Hooker Chemical and Plastics Corporation had dumped 21,800 tons of toxic wastes, including dioxin, into the canal. Gruson, Lindsey, Ex-Love Canal Families Get Checks, The New York Times, February 20, 1985, p.81. Years after the disposal, residents of the Love Canal neighborhood began to suffer physical injuries ranging from a variety of cancers and mental retardation to persistent rashes and migraine headaches. A lawsuit brought by former residents against the company was recently settled for $20 million. Id.
61 PUB. L. No. 95-609, 92 STAT. 3079 (1978); PUB. L. No. 96-482, 94 STAT. 2334 (1980);
63 See H.R. REP. No. 96-1016, supra note 9, at 17-18.
CERCLA, which contained a $1.6 billion Superfund to finance the cleanup of dangerous hazardous waste sites, was due to expire in 1985. On September 26, 1985, the Senate passed a bill (S51) to reauthorize CERCLA and to increase the Superfund to $7.5 billion for five years. This fund would be raised by imposing a broad based tax on industry, a tax which the Reagan administration has threatened to veto. Senate Passes $7.5 Billion Superfund Bill with Tax Administration Threatened to Veto,16 ENV'T REP. (BNA) No. 22, at 931 (September 27, 1985).
Similiarly, the House of Representatives passed a bill (HR 2005, formerly HR 2817) which would reauthorize the Superfund and sharply increase its tax on basic chemicals and oil. The House bill would increase the Superfund to $10.3 billion. The House-Senate conference on Superfund was expected after Christmas 1985, and a final bill is expected to go to the President in early February, at the earliest. House Passes $10 Billion Superfund Bill After Voting Heavy Increase in Chemical Tax, 16 ENV'T REP. (BNA) No. 33, at 1567 (December 13, 1985). Environmentalists have applauded the House bill, which for the first time would set mandatory cleanup schedules and in most cases require cleanups to meet environmental regulations and standards, provisions not contained in the Senate measure. Id.
65 H.R. REP. No. 96-1016, supra note 9, at 22.
66 "Although the Act grants most of the substantial authority to the President, he has
ardous waste. A $1.6 billion "Hazardous Substance Response Trust Fund," known as the "Superfund," was established to finance cleanup of hazardous waste sites. Section 104 of CERCLA authorizes the EPA to clean up hazardous waste sites using the "Superfund," and then to seek cost recovery from responsible parties pursuant to section 107. Section 106 authorizes the federal government to seek injunctive relief where there is an imminent and substantial endangerment to the public health or welfare due to the actual or threatened release of a hazardous substance.


CERCLA Section 221 authorizes $44 million per year from 1981 through 1985 to be appropriated to the Hazardous Substance Response Trust Fund. 42 U.S.C. § 9631 (1982). Also, the Fund is given the authority to borrow further sums as may be necessary to carry out its purposes. 42 U.S.C. § 9633 (1982).

"Amounts in the Response Trust Fund shall be available in connection with releases or threats of releases of hazardous substances into the environment only for purposes of making expenditures which are described in section III ...." 42 U.S.C. § 9611 (Supp. V 1981). CERCLA Section 111(a) provides that the President shall use the money in the fund for the following purposes: (1) payment of governmental response costs incurred pursuant to section 104 of this title ....." Id.


CERCLA Section 104(a)(1) provides that:

"Whenever (A) any hazardous substance is released or there is a substantial threat of such release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant or contaminant ... or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment ....." 42 U.S.C. § 9604(a)(1) (1982).

CERCLA Section 111 provides that:

"(a) The President shall use the money in the Fund for the following purposes: (1) payment of governmental response costs incurred pursuant to section 104 of this title ....." 42 U.S.C. § 9611 (1982).

Under CERCLA section 107, responsible parties would be: (1) the owner and operator of a facility; (2) persons who arranged for the transport or disposal of hazardous waste; and (3) persons who transported hazardous waste to be disposed. 42 U.S.C. § 9607(a) (1982).


The term "hazardous substances" is given a broad definition in CERCLA section 101. 42 U.S.C. § 9601 (1982). That definition states that substances designated by § 311(b)(2)(A) of the Federal Water Pollution Act; designated pursuant to CERCLA § 102; those having char-
CERCLA imposes both civil and criminal penalties. Section 103 establishes criminal penalties for failure to comply with CERCLA's notice and recordkeeping requirements. Section 106 provides for civil liability for failure to comply with EPA orders enacted pursuant to that section.

Unlike RCRA, CERCLA clearly addresses the problems inactive hazardous waste sites pose. CERCLA specifically authorizes the cleanup of hazardous waste sites and extends liability to generators and transporters of toxic waste who were not clearly liable under RCRA. CERCLA therefore creates a comprehensive scheme for the cleanup of hazardous waste sites and provides for cost recovery from responsible parties.

The cost of cleaning up a hazardous waste site can be enormous. Although it is desirable to clean up all dangerous waste sites, the question of who should bear this cost is troublesome. CERCLA funds waste cleanup by imposing a federal tax upon oil and chemical manufacturers to create the Superfund. When the EPA expends

acteristics identified by section 3001 of the Solid Waste Disposal Act; those listed under section 307(a) of the Federal Water Pollution Control Act; listed under section 112 of the Clean Air Act; and those imminently hazardous and subject to action taken by the EPA Administrator under section 7 of the Toxic Substances Control Act, are to be considered 'hazardous substances' under CERCLA. Id.

82 For example, the clean up costs for the waste site involved in City of Philadelphia v. Stepan Chemical Co., 544 F. Supp. at 1135, were estimated at $10 million. Id. at 1139.
84 42 U.S.C. § 9631 (1982). Note that § 107(e) provides:

(1) No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless or indemnify a party to such agreement for any liability under this section.

(2) Nothing in this subsection, including the provisions of paragraph (1) of this subsection shall bar a cause of action that a owner or operator or any other person subject to liability under this section, or a guarantor, has or would have by reason of subrogation or otherwise against any person. 42 U.S.C. § 9607(e) (1982) (emphasis added).
money from the Superfund to clean up a hazardous waste site, the federal government may then bring suit to recover this expenditure from the parties directly responsible. 85

Section 107 of CERCLA designates certain parties who may be liable for the clean-up costs of a hazardous waste site. 86 Section 107 imposes liability 87 for clean-up costs 88 and damage to natural resources 89 on: (1) past and present owners and operators 90 of hazardous waste facilities; 91 (2) persons 92 who arrange for disposal of hazardous substances 93 to facilities (usually generators); and (3) persons who transport hazardous substances to facilities from which there is a release 94 or a threatened release of toxic chemicals that results in response costs. 95 These responsible parties are liable for three types of costs incurred as a result of a release or a threatened

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86 Id.
87 Under CERCLA section 107, the standard of liability has been held to be strict liability. See infra notes 108-15 and accompanying text.
89 “Natural resources” under CERCLA means “fish, wildlife, biota, air, water, groundwater, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States . . . , any state or local government, or any foreign government.” 42 U.S.C. § 9601(16) (1982).
90 “Owner or operator” is defined by CERCLA as “. . . in the case of an onshore facility or an offshore facility, any person owning or operating such facility . . . . . . [S]uch term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership to protect his security interest in the vessel or facility.” 42 U.S.C. § 9601(20)(A) (1982). Note that CERCLA defines “owner or operator” in section 101, but confers liability upon “owners and operators” in section 107. 42 U.S.C. § 9607(a) (1982). The author is unaware of any significance behind this distinction.
91 “Facility” is defined by CERCLA as “any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located . . . . . . .” 42 U.S.C. § 9601(9) (1982).
93 See supra note 76.
94 “Release” under CERCLA means “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment . . . . . . .” 42 U.S.C. § 9601(22) (1982).
release of hazardous waste: (1) governmental response costs (costs incurred by the federal government to clean up hazardous waste sites); 96 (2) private response costs (costs incurred by other parties consistent with the National Contingency Plan), 98 and (3) damages to natural resources. 99

Section 107 provides limited defenses to defendants. 100 A party otherwise liable under section 107 may escape liability if it can establish by a preponderance of the evidence that the release or threat of release of hazardous substances and resulting damages were caused by an act of God; 101 an act of war; 102 or an act or omission of a third party other than an employee or agent of the defendant, or one whose act or omission occurs in connection with a contractual

96 In NEPACCO, governmental response costs included:
   a) Investigations, monitoring and testing to identify the extent of danger to the public health or welfare or the environment,
   b) Investigations, monitoring and testing to identify the extent of the release or threatened release of hazardous substances,
   c) planning and implementation of response action,
   d) recovery of the costs associated with the above actions, and to enforce the provisions of CERCLA including the costs incurred for the staffs of the EPA and the Department of Justice.
579 F. Supp. at 850.
97 Private parties may have the right to bring suit under this section. Jones v. Inmont Corp., 546 F. Supp. 1425 (D.C. Ohio 1984).
   In City of Philadelphia v. Stepan Chemical Co., 544 F. Supp 1135 (E.D. Pa. 1982), the Court held that “any other person” as used in CERCLA § 107(a)(4)(B) could include a party subject to liability under the Act. In Stepan, the city of Philadelphia cleaned up a hazardous waste site which it owned and then sought to recover cleanup costs and consequential damages from the generators and transporters of the hazardous waste. Despite the fact that the city could be held liable under CERCLA as the owner of the waste site, its action against the defendants in this case was permitted under section 107. 544 F. Supp. at 1142–43.
98 Under CERCLA section 105, the President was given 180 days after the enactment of the Act to promulgate a National Contingency Plan to “establish procedures and standards for responding to releases of hazardous substances, pollutants and contaminants . . . .” 42 U.S.C. § 9605 (1982). This responsibility, as with other provisions of the act delegating authority to the President, was delegated to the EPA Administrator. See supra note 66. The CERCLA National Contingency Plan was intended to be merely a revision of the National Contingency Plan published pursuant to section 311 of the Federal Water Pollution Act. 42 U.S.C. § 9605 (1982). The legislative history of CERCLA indicates that the National Contingency Plan was regarded as a means of assuring that responses under the Act would be both cost effective and environmentally sound. See City of Philadelphia v. Stepan Chemical Co., 544 F. Supp. at 1144; 126 CONG. REC. S14965 (daily ed. Nov. 24, 1980) (remarks of Sen. Randolph).
100 See 42 U.S.C. § 9607(b) (1982).
relationship with the defendant. The third party exception applies only if the defendant both exercised due care with respect to the hazardous substance, and took necessary precautions against acts or omissions of the third party.

A. Strict Liability

In spite of the comprehensive nature of its hazardous waste clean-up provisions, CERCLA's standards of liability are vague. Congress removed references to strict liability, and to joint and several liability before its final passage, leaving these matters for judicial interpretation.

The standard of liability under CERCLA is strict liability. Although it does not specifically mention strict liability, CERCLA's definitional section, states that liability under CERCLA "shall be construed to be the standard of liability which obtains under section 311 of the Federal Water Pollution Control Act." Although section 311 of the Federal Water Pollution Control Act, does not explicitly mention strict liability, courts have inferred such liability from the language of the Act, which subjects certain parties to liability unless they can successfully assert one of the limited defenses specified in the Act. Congress' reference to section 311 in CERCLA is logical, because the same defenses to liability found in

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103 United States v. Argent, No. 83-0523, slip op. (D.N.M. May 4, 1984). In Argent, discussed infra at text accompanying notes 208-28, the court held that a CERCLA section 107 defendant could not be excused from liability under the third party defense where the "act or omission" of the third party occurred in connection with a contractual arrangement, in that case a lease agreement. Id.
107 Id. at 843-44.
109 See 42 U.S.C. § 9601(32) (1982), which currently reads that "liability shall be construed to be the standard of liability which obtains under section 1321 of Title 33," which is an analogous proposition. See text accompanying notes 110-15. The strict liability provision contained in the original Senate version of CERCLA was deleted from the statute as enacted. See NEPACCO, 579 F. Supp. at 843.
110 Id.
112 Id.
section 311 of the Federal Water Pollution Control Act also appear in section 107 of CERCLA. Courts construing CERCLA have therefore held parties strictly liable for statutory violations.

B. Joint and Several Liability

Congress also deleted references to joint and several liability from the final version of CERCLA. The original Senate proposal specifically imposed joint and several liability, but this language was deleted from the final version of the bill as part of the “hastily drawn compromise which resulted in the enactment of CERCLA.” Federal courts construing liability under CERCLA, however, uniformly have held that CERCLA permits, but does not mandate, joint and several liability. It is therefore within the discretion of the court to impose joint and several liability. Furthermore, some courts have held that joint and several liability should be imposed under CERCLA, unless the defendants can establish “that a reasonable basis exists for apportioning the harm against them.”

CERCLA’s standard of strict liability, coupled with the possibility of joint and several liability, places a heavy burden on defendants. CERCLA does, however, place some constraints on the amount of liability that courts may impose under section 107. Section 107 liability is premised upon a governmental response pursuant to section 104 and the National Contingency Plan, or a response by another party in accordance with the National Contingency Plan.

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116 NEPACCO, 579 F. Supp. at 844. The final version of CERCLA was a severely diminished piece of compromise legislation from which a number of significant features were deleted. See generally Grad, A Legislative History of the Comprehensive Environmental Response Compensation and Liability (“Superfund”) Act of 1980, 8 COLUM. J. OF ENVTL. L. 1 (1982).

117 NEPACCO, 579 F. Supp. at 844.


121 See supra note 96 and accompanying text.


Both section 104 and the National Contingency Plan impose practical limitations on the extent and cost of a hazardous waste clean-up operation.\(^{124}\) Under section 104, unless the EPA determines that there is an emergency or there is an arrangement to share response costs with a state, such costs will not continue after $1 million has been obligated or a period of six months has passed since the date of the initial response.\(^{125}\)

The National Contingency Plan\(^{126}\) establishes procedures and standards for responding to releases of hazardous substances, pollutants, and contaminants.\(^{127}\) These procedures include methods for discovering and investigating hazardous substance disposal facilities,\(^{128}\) for determining the appropriate extent of removal of the substances,\(^{129}\) for assuring that remedial actions are cost-effective,\(^{130}\) and for determining priorities among releases or threatened releases.\(^{131}\) The statute and the National Contingency Plan, thus limit the extent of liability under CERCLA section 107.

**C. Personal Liability Under CERCLA Section 107**

As discussed earlier, CERCLA imposes liability on: (1) past and present owners and operators of hazardous waste facilities; (2) persons who arrange for the transport of hazardous waste; and (3) persons who transport hazardous waste.\(^{132}\) These parties include individuals as well as corporations.\(^{133}\) The federal government has sought to hold both corporations and their corporate officers and employees responsible for the costs of hazardous waste cleanup under CERCLA.\(^{134}\) Although individual defendants have argued that their actions were the actions of the corporation, thereby shielding

\(^{124}\) See 42 U.S.C. §§ 9604(c)(1), 9605 (1982).


\(^{126}\) The federal cleanup of hazardous waste sites must be in accordance with the National Contingency Plan. 42 U.S.C. § 9604(a)(1) (1982). Although CERCLA does not specify that other parties undertaking hazardous waste cleanup must do so in accordance with the National Contingency Plan, the Act does specify that they must do so in order for liability to attach to responsible parties. 42 U.S.C. § 9607(a)(4)(b) (1982).


them from liability under the doctrine of limited liability, this argument has not succeeded. The few district courts to consider this issue uniformly have held that the corporate form does not shield individuals from personal liability where such individuals have exercised personal control over, or have actually been involved in, the disposal of hazardous waste.

1. The Doctrine of Limited Liability

Corporations possess rights and liabilities distinct from those possessed by their shareholders and officers. The concept of limited liability means that the liability of a corporation, and of its owners and officers for "acts of the corporation," extends only to the assets of the corporation. In fact, this limitation on liability is one of the primary purposes for forming a corporation.

In certain situations, the corporate form is ignored and individual employees or corporate officers may be held liable for the actions of the corporation. For example, corporate officers may be individually liable for participation in the tortious or criminal activity of a corporation. The liability of a corporate officer is not derived from his "official relation" to the corporation, but results "because of some wrong or negligent act...amounting to a breach of duty."

135 See NEPACCO, 579 F. Supp. at 847 (although the court does not explicitly refer to limited liability, the concept is addressed).
136 See infra notes 141-243 and accompanying text.
137 Id.
141 See Walkovsky v. Carlton, 18 N.Y.2d 414, 417, 223 N.E.2d 6, 7 (1966). Note that there is a growing tendency on the part of the courts to disregard the corporate form as a barrier to actions against corporate officers. See FLETCHER, supra note 140, § 41 at 388.
144 Aubrey's Adm'r v. Stimson, 160 Ky. 563, 169 S.W. 991 (1914). The court noted that "Irreasonable businessmen would hesitate to become officers of large corporations if they were held to be the insurers of its subordinate employees." Id. at 992.
For personal liability to attach, the officer must be a participant in the wrongful act. 145

In addition, corporate employees may be held personally liable for activities they directly controlled and supervised. 146 Courts have held employees who were the "guiding spirit" or the "central figure" 147 in the damaging corporate activity liable. 148 Courts have also held corporate officers who were both officers and shareholders of a closely held corporation 149 liable for activities over which they had control. 150

Courts have also found personal liability under the doctrine of "piercing the corporate veil." 151 This doctrine is based on the premise that the corporation is a creature of the state as its franchise is granted by the state for a useful and valid purpose. 152 Consequently, corporations may not use their franchises for unlawful purposes. 153

The fiction of the corporate entity and the limited liability this fiction provides may be disregarded under circumstances where the corporation is a "mere shell, serving no legitimate business purpose, and is used principally as an intermediary to perpetrate fraud or to promote injustice." 154

Similarly, the corporate form may be disregarded where there is such unity of interest between the individual employee or officer and the corporation that the separate personalities of the parties no longer exist. 155 Courts have adopted this "alter ego" theory in those cases where the idea of the corporate entity has been used as a subterfuge and not to hold the individual liable would work an in-

145 Id.

It is a general rule of law supported by cases far too numerous to list that officers of a corporation are personally responsible for the alleged tortious conduct of the corporation, if they personally took part in the commission of a tort or specifically directed other officers, agents or employees of the corporation to commit the act.

Id.
147 See Donsco Inc. v. Casper Corp., 587 F.2d 602, 606 (3d Cir. 1978).
148 See Escude Cruz v. Ortho Pharmaceutical Corp., 619 F.2d 902, 907 (1st Cir. 1980).
149 A closely held corporation or a close corporation, is one whose shares, or at least the voting shares, are held by a single shareholder or a closely-knit group of shareholders. FLETCHER, 1A CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 70.1, at 3.
150 Marks v. Polaroid Corp., 237 F.2d 428, 435 (1st Cir. 1956).
151 Piercing the corporate veil is a judicial process whereby the court may disregard the usual immunity of corporate officers or entities from liability for corporate activities. See Walkovsky v. Carlton, 18 N.Y.2d at 417, 223 N.E.2d at 7.
152 See Appellants' Brief at 23, NEPACCO, 579 F. Supp. 823.
153 See Edgar v. Fred Jones Lincoln-Mercury, Etc., 524 F.2d 162, 166 (10th Cir. 1975).
154 Bankers Life and Casualty Company v. Kirtley, 338 F.2d 1006, 1013 (8th Cir. 1964).
155 See e.g., Doyn Aircraft, Inc. v. Wylie, 443 F.2d 579, 584 (10th Cir. 1971).
justice. To pierce the corporate veil under this "alter ego" theory, a plaintiff would have to show that an individual defendant "so dominated the corporation that it ha[d] no will or existence of its own."

In sum, although the corporate form usually shields corporate officers and employees from liability for "acts of the corporation," courts will ignore the corporate form in certain exceptional circumstances. In general, courts have ignored the corporate form in those cases where the individual involved participated in a tort or a crime or where the corporate form is being used to shield an individual from liability for fraud or where it works an injustice.

2. Personal Liability of Corporate Officers Under CERCLA Section 107

Courts construing liability under CERCLA section 107 uniformly have held that corporate officers may be held individually liable as "persons" within the meaning of the statute. The liability is based on the officers' participation in, or direct authority for, the generation or disposal of hazardous waste. Corporate officers may also be liable under CERCLA section 107 based on the alternative theory of piercing the corporate veil. Under this approach, the government or other plaintiff pleads that corporate officers should be liable for the "acts of the corporation" because the corporate form is a mere shell or is the "alter ego" of the individual defendants.

The leading case finding personal liability under CERCLA section 107 is United States v. Northeastern Pharmaceutical and Chemical Co. (NEPACCO). In NEPACCO, the court found the president and the vice-president of NEPACCO, as well as its hazardous waste

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156 Fletcher, supra note 149, at § 41.10.
158 See supra notes 141–57 and accompanying text.
159 See supra note 92.
160 See NEPACCO, 579 F. Supp. at 823; Mottolo, 22 Env't Rep. Cas. at 1026.
161 Id.
162 Mottolo, 22 Env't Rep. Cas. at 1029.
163 Id.
transporter, strictly liable under CERCLA for the clean-up costs of a site containing hazardous waste from the NEPACCO plant.\textsuperscript{165} The NEPACCO court found the vice-president of NEPACCO liable under CERCLA section 107(a)(3)\textsuperscript{166} on the grounds that he was a “person arranging the disposal and transport of hazardous waste” from the NEPACCO plant to an unlawful hazardous waste site.\textsuperscript{167} The court held that the term “person” within the meaning of CERCLA should be liberally interpreted to include both employees and the corporation.\textsuperscript{168} The NEPACCO court also noted that, under the terms of section 107(a)(3), a defendant need not “actually own or possess the waste.”\textsuperscript{169} Rather, it is sufficient if the defendant has “direct supervision and knowledge of the disposal of” the hazardous waste.\textsuperscript{170} Because the NEPACCO vice-president arranged for the transport and disposal of hazardous waste, he was liable under section 107(a)(3) regardless of whether he personally owned or possessed the hazardous waste or the facility.\textsuperscript{171}

The court found both the president and vice-president of NEPACCO liable under CERCLA section 107(a)(1),\textsuperscript{172} as owners and operators\textsuperscript{173} of a facility.\textsuperscript{174} The vice-president qualified as an owner and operator of NEPACCO because he was in charge of one of its plants and was a major stockholder actively participating in NEPACCO’s management.\textsuperscript{175} The president was also an “owner and operator” because he was a major stockholder who had “the capacity

\textsuperscript{165} NEPACCO, 579 F. Supp. at 846–50.
\textsuperscript{167} NEPACCO, 579 F. Supp. at 848.
\textsuperscript{168} Id.
\textsuperscript{169} Id. at 847. CERCLA § 107(c)(3) imposes liability upon:
any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter to transport for disposal or treatment, 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 . . . .
\textsuperscript{170} NEPACCO, 579 F. Supp. at 847.
\textsuperscript{171} Id.

\textsuperscript{174} See supra note 92.
\textsuperscript{175} NEPACCO, 579 F. Supp. at 848.
and general responsibility as president to control the disposal of hazardous waste."176 In holding the defendants liable under CERCLA, the district court noted:

[t]he statute literally reads that a person who owns interest in a facility and is actively participating in its management can be held liable for the disposal of hazardous waste. Such a construction appears to be supported by the intent of Congress. CERCLA promotes the timely cleanup of inactive hazardous waste sites. It was designed to insure, so far as possible, that the parties responsible for the creation of hazardous waste sites be liable for the response costs in cleaning them up ....177

The NEPACCO court also emphasized that to allow the individual defendants to hide behind the corporate form would frustrate the purpose of CERCLA by exempting from the operation of the statute "a large class of persons ... uniquely qualified to assume the burden [of hazardous waste cleanup]."178

In a similar case, United States v. Mottolo,179 the Federal District Court of New Hampshire denied defendant's summary judgment motion and ruled that the president and principal stockholder of Lewis Chemical Corporation could be held liable under CERCLA section 107(a)(3) because he was a person who arranged for the disposal or transport for disposal of hazardous waste.180 The court reasoned that a corporate officer who personally participates in the tortious activities of a corporation, and whose involvement is causally related to the alleged injury, is liable for those torts.181 The Mottolo court also noted that under CERCLA section 107(a)(3) the defendant need not own or possess the hazardous substances,182 but that his liability under the statute was premised on his involvement with the disposal of the hazardous substances.183

The Mottolo court also ruled that the defendant could be held liable under the alter ego theory of liability.184 To pierce the corporate veil, however, the government would have to "allege with sufficient

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176 Id. at 849.
177 Id. at 848.
178 Id. at 849.
180 Id.
181 Id., citing FLETCHER, 3A CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 1137.
182 Mottolo, 22 Env't Rep. Cas. at 1029.
183 Id.
184 Id.
particularity that [the defendant] had so dominated the corporation that it has no will or existence of its own."185

In United States v Carolawn Co.,186 the Federal District Court of South Carolina held that three individuals who owned, operated, and were officers of a company operating a hazardous waste site could be subject to personal liability under CERCLA.187 The court held that the three individuals who owned the site were, under CERCLA section 107(a), liable as "owners of a site which is the subject of a CERCLA response action [and] are liable to the government for response expenses."188 The court held that, unless the three defendants could raise one of the narrow affirmative defenses available under section 107(b),189 they may be held liable for the government's clean-up costs.190

The Carolawn court also found that two of the three defendants could be subject to CERCLA section 107 liability as operators of the site.191 The court ruled that CERCLA contemplated individual liability under section 107, despite the possibility that the individuals operate in the corporate form.192 The court stated that "to the extent that an individual has control or authority over the activities of a facility from which hazardous substances are released or participates in the management of such facility, he may be held liable for response costs incurred at a facility notwithstanding the corporate character of the business."193

In light of these decisions, the imposition of corporate officer liability under CERCLA turns on the level of involvement by the officer in the corporation's hazardous waste activity. Although corporate officers generally are not personally liable for acts performed in their corporate capacity,194 the corporate form will not shield corporate officers from liability for tortious or criminal activity.195 The few courts to construe corporate officer liability under CERCLA

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185 Id. Note that the Government need not pierce the corporate veil in order to hold an individual liable under CERCLA, so long as that individual is involved in the corporation's hazardous waste activity, he may be liable for the torts of the corporation. See N.Y. v. Shore Realty, 22 Env't Rep. Cas. (BNA) 1625, 1641 (2d Cir. 1985).


187 Id.

188 Id. at 2130.

189 Id. See also supra notes 100–105 and accompanying text.

190 Mottolo, 21 Env't Rep. Cas. at 2130.

191 Id. at 2131.

192 Id.

193 Id.

194 See supra notes 138-157 and accompanying text.

195 Id.
section 107 have found such liability premised upon the statutory language of CERCLA, which specifically dictates that persons liable may include both individuals and corporations, and the general corporate law principle that corporate officers may be liable for the torts of the corporation in which they participated. Moreover, ownership of the hazardous waste, or of the waste facility itself, is not a prerequisite for a finding of section 107 liability. Thus, if a corporate officer or employee is directly involved in, or has authority over, the generation, transport, arranging for transport, or allowing the dumping of hazardous waste, he may be subject to personal liability under CERCLA section 107.

3. Liability of Hazardous Waste Facility Owners

The liability of owners under CERCLA section 107 differs from the liability of corporate officers because the element of personal participation in hazardous waste activity is not required to find liability. Section 107(a) subjects "the owner and operator of a facility" to liability for hazardous waste clean-up costs. An owner or operator is defined by CERCLA as "any person owning or operating such facility." This does not, however, include a person who, without participating in the management of a facility, possesses "indicia of ownership" to protect a security interest in the facility. Consequently, courts have held that persons owning an interest in a facility may not be found liable under CERCLA unless they actively participate in its management. Stockholders and secured creditors have fallen into this category. The general rule, however, is that ownership of a facility could result in liability under CERCLA. Such liability is not contingent upon any personal participation in the management of the facility.

In Carolawn, individual owners of a business were subject to section 107 liability even though their business was incorporated. The court held that the three individuals who were the owners of

196 See supra notes 159-193 and accompanying text.
197 Id.
198 Id. See also NEPACCO, 579 F. Supp. 845-50.
201 Id.
202 See NEPACCO, 579 F. Supp. at 848.
205 Carolawn, 21 Env't Rep. Cas. at 2130-31.
the hazardous waste site were liable under section 107(a) because they owned a facility which was the subject of a governmental response action.\textsuperscript{206} That two of the three individual defendants were also held liable as operators of the facility did not negate the fact that ownership alone was enough to support a liability finding under CERCLA.\textsuperscript{207}

The federal district court in New Mexico interpreted owner liability broadly in \textit{United States v. Argent}\.\textsuperscript{208} In \textit{Argent}, the court denied defendant’s summary judgment motion and ruled that a landowner/lessor may be liable as an “owner” under section 107(a).\textsuperscript{209} In \textit{Argent}, the defendant leased a warehouse to Argent Corporation, a business that used hazardous chemicals to recover silver from used film.\textsuperscript{210} The defendant, who had no connection with the business, argued that mere ownership of the land, without any further connection with the business, did not render him an owner of a facility within the meaning of CERCLA.\textsuperscript{211} The court rejected this contention and found instead that, as the undisputed owner of the land and building, the defendant was an owner susceptible to liability under CERCLA.\textsuperscript{212}

The \textit{Argent} court based its decision on precedent,\textsuperscript{213} legislative history,\textsuperscript{214} and the statutory language.\textsuperscript{215} First, the \textit{Argent} court found that \textit{Carolawn} and \textit{NEPACCO} implicitly supported a finding that a landowner/lessor may be liable as an owner under CERCLA.\textsuperscript{216} The \textit{Carolawn} court had found three individual owners of land liable under CERCLA as owners of a waste facility.\textsuperscript{217} The \textit{NEPACCO} court had noted that the owner of the waste site could have been joined by the other defendants as a co-defendant.\textsuperscript{218} These opinions indicated that ownership of a hazardous waste site, without any further connection with the activity on the land, was sufficient to cause an individual to be found an owner within the meaning of

\begin{itemize}
  \item \textsuperscript{206} \textit{Id.}
  \item \textsuperscript{207} \textit{Id.}
  \item \textsuperscript{208} \textit{Argent}, No. 83-0523BB, slip op. (D.N.M. 1984).
  \item \textsuperscript{209} \textit{Id.} at 3-4.
  \item \textsuperscript{210} \textit{Id.} at 2.
  \item \textsuperscript{211} \textit{Id.} at 2-3.
  \item \textsuperscript{212} \textit{Id.} at 3-4.
  \item \textsuperscript{213} \textit{Id.} at 3.
  \item \textsuperscript{214} \textit{Id.}
  \item \textsuperscript{215} \textit{Id.}
  \item \textsuperscript{216} \textit{Id.}
  \item \textsuperscript{217} \textit{See supra} note 30.
  \item \textsuperscript{218} \textit{NEPACCO}, 579 F. Supp. at 845, n.26.
\end{itemize}
CERCLA. Second, the Argent court noted that CERCLA's legislative history indicated that Congress deliberately omitted from CERCLA language that would have required participation in the management or in the operation of the facility as a prerequisite to owner liability. Finally, the court noted that CERCLA's plain language supported its holding. Section 107 explicitly subjects owners of hazardous waste sites to liability for cleanup, with no further requirement that they need to have participated in the actual disposal of hazardous waste.

After determining that the defendant was an owner subject to section 107 liability, the Argent court ruled that he could not assert the "third party defense" set forth in section 107(b)(3). He was therefore not exempt from liability on the basis that the release or threat of release was caused by the act or omission of a third party. Section 107(b)(3) provides that a defendant may not assert a third party defense if the act or omission of that third party occurred in connection with a contractual relationship with the defendant. In Argent, the Argent Corporation's production of hazardous waste occurred in connection with a lease agreement with the defendant. The district court thus held that the third party defense was unavailable.

In New York v. Shore Realty Corp., the federal district court in New York held that a corporate owner of land could be held liable under CERCLA for governmental cleanup costs where wastes were disposed of prior to, and for a short time subsequent to, the land purchase. The court in Shore implied that owners of land on which wastes had been disposed may be held liable for clean-up costs, even where the disposal occurred entirely before their purchase. After finding the corporate owner of the waste site liable,

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219 See id.; Carolawn, 21 Env't Rep. Cas. at 2130.
220 Argent, No. 83-0523BB, slip op. at 3.
221 Id. at 3–4.
223 Argent, No. 83-0523BB, slip op. at 4; see also supra notes 103–105 and accompanying text.
225 Id.
226 Id.
227 Argent, No. 83–0523BB, slip op. at 4.
228 Id.
229 22 Env't Rep. Cas. (BNA) 1625 (2d Cir. 1985).
230 See supra note 88.
232 Id.
the *Shore* court found another defendant, a corporate officer and major stockholder in the corporation, personally liable because he managed the corporation and was in charge of the operation of the waste site.233

As indicated by the court in *Shore*, CERCLA liability may attach to owners of waste sites on which all waste disposal occurred before their purchase of the land.234 The court found the potential for such liability in *United States v. Mirabile.*235 In *Mirabile*, a federal district court in Pennsylvania ruled, among other things, that individual landowners who purchased land upon which hazardous waste had been previously disposed could be held liable under section 107.236 The court ruled, however, that subsequent landowners could escape liability if they are able to establish the section 107(b)(3) third party defense.237 The *Mirabile* court stated that "a common sense reading of the statute suggests that the defense would be potentially available to a party who can establish that he purchased property on which hazardous wastes were placed by others and that he did not add to those wastes."238 To escape liability, the subsequent landowners would also have to establish that they exercised due care with respect to the waste and that they took precautions against foreseeable acts or omissions of others.239

In sum, the only prerequisite to owner liability under CERCLA is ownership of a hazardous waste site that the government or some other party has responded to and incurred clean-up costs.240 Ownership that triggers CERCLA liability may be occasioned at either the time of the disposal of the hazardous wastes or at the time the

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233 *Id.* at 1640–41. The *Shore* court relied on NEPACCO and *Carolawn* as authority on the issue of defendant Leo Grande's personal liability. *Id.* at 1640.

234 *See Shore*, 22 Env't Rep. Cas. at 1639. Subsequent landowner liability was found under RCRA in *U.S. v. Price (Price I)*. 523 F. Supp. 1055. In *Price I*, the federal district court in New Jersey held that the defendants' purchase of land years after hazardous waste was dumped on it, subjected them to liability pursuant to section 7003 of RCRA. *Id.* at 1073. The *Price I* court held that, under the terms of the statute, the defendants contributed to the current environmental hazard by virtue of their "studied indifference" to the situation. *Id.* The *Price I* court was persuaded by the fact that the defendants were aware at the time of their purchase that hazardous wastes had been dumped on the property. The court stated: "[s]ubsequent owners [are] liable unless they 'could not reasonably be expected to have actual knowledge of the pretense of hazardous waste at such facility or site and its potential for release.'" *Id.* at 1076 quoting 42 U.S.C. § 6934(b).


236 *Id.*

237 *Id.*

238 *Id.*

239 *Id.*

240 *See generally id.* at 1632–37; *Argent*, No. 83–0523BB, slip op. at 1–5.
cleanup of such wastes occurs.\textsuperscript{241} Liability may be excused, however, if the defendant successfully asserts one of the section 107(b)(3) defenses, in particular the third party defense.\textsuperscript{242} Moreover, CERCLA treats outright ownership and more attenuated interests in land differently. For liability to attach to a corporate stockholder or a secured creditor, that party must have participated in the hazardous waste activity, either directly, or through participation in the facility’s management.\textsuperscript{243}

IV. ANALYSIS OF PERSONAL LIABILITY UNDER CERCLA
SECTION 107

The liability provisions of CERCLA reach individuals who may be unaware that they could be subject to liability. Such individuals fall into two categories: (1) corporate officers and employees; and (2) owners of land on which hazardous waste is located.\textsuperscript{244} Both of these groups of potential defendants in a section 107 cost recovery action often argue that they should be exempt from liability. Corporate officers and employees argue the limited liability of the corporate form protects them.\textsuperscript{245} Landowners who are not involved with the hazardous waste producing activity also argue that they should not be subject to liability for the misconduct of others.\textsuperscript{246} Both these arguments have failed due to the broad judicial construction of liability under CERCLA section 107.\textsuperscript{247}

The perceived harshness of individual liability under CERCLA is justified by the seriousness of the nation’s hazardous waste problem and by the need to clean up hazardous waste sites.\textsuperscript{248} Imposing personal liability may be necessary to ensure that the federal government reaches a “deep pocket” to finance clean-up costs. This is particularly true where a corporate defendant is insolvent but its major stockholders and officers have access to capital. In fact, to date, most of the CERCLA decisions addressing personal liability of corporate officers have involved close corporations.\textsuperscript{249} In close

\textsuperscript{241} Mirabile, No. 84–2280, slip op.
\textsuperscript{242} Id.
\textsuperscript{243} See NEPACCO, 579 F. Supp. at 848.
\textsuperscript{244} See supra notes 159–243 and accompanying text.
\textsuperscript{245} See NEPACCO, 579 F. Supp. at 847.
\textsuperscript{246} See generally Argent, No. 83–0523BB, slip op.
\textsuperscript{247} See supra notes 159–243 and accompanying text.
\textsuperscript{248} See supra notes 20–27 and accompanying text.
\textsuperscript{249} See Mirabile, No. 84–2280, slip. op.
corporations, stock is not usually publicly distributed. Close corporations are not formed to gather public investment, but rather, to secure the benefits of operating in the corporate form, including the advantages of limited liability. To allow individuals to hide behind the corporate shield to escape liability frustrates CERCLA's regulatory purpose.

Historically legislation enacted to protect the public health has been construed to permit the effectuation of the regulatory purpose despite resulting hardship to individual defendants. This has occurred largely with respect to federal regulatory laws under which courts traditionally have permitted a less demanding showing of criminal culpability in order to promote the regulatory purpose for which they were enacted. Such statutes often involve the handling of dangerous substances by persons who should be aware of the public regulatory laws pertaining to them. These substances have included items covered by the Federal Food, Drug and Cosmetic Act, and more recently, hazardous waste as covered by RCRA.

The Federal Food, Drug and Cosmetic Act is designed to protect the public from impure food and drugs. It provides that persons who introduce impure food or drugs into interstate commerce may be guilty of a misdemeanor. Liability under that Act reaches both individuals and corporations, and it dispenses with the conventional intent requirement for criminal liability. In fact, the Court, in its decision in United States v. Dotterweich, stated:

In the interest of the larger good it puts the burden of acting upon a person otherwise innocent but standing in a responsible relation to a public danger . . . . Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protections of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are totally helpless.

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252 Id.
253 See id.
255 42 U.S.C.S. § 331(k).
258 Id. at 283.
Liability under the Food, Drug and Cosmetic Act is thus not prem­
ised upon a defendant's position in the corporate hierarchy, but
rather upon "his accountability, because of the responsibility and
authority of his position, for the conditions which gave rise to the
charges against him."\textsuperscript{259}

The public interest in regulating hazardous waste is no less press­
ing than that of regulating the purity of food and drugs. In United
States v. Johnson & Towers Inc.,\textsuperscript{260} the court compared the criminal
provisions of RCRA to those under the Food and Drug Act consid­
ered in Dotterweich.\textsuperscript{261} The court concluded that Congress intended
in RCRA, as in the Food and Drug Act, to control hazards from
which the public was unable to protect itself.\textsuperscript{262} The Johnson &
Towers court noted that it would "undercut the purposes of the
legislation" to limit the class of potential defendants in a hazardous
waste case to less than all of those who bear a responsibility for
handling hazardous materials.\textsuperscript{263}

Although the above cases deal with criminal liability, courts may
apply the same rationale to the imposition of civil liability under
CERCLA. In each case, when balancing the relative hardships in­
volved, Congress concluded that the interest of the general public
in cleaning up hazardous waste sites outweighed the incidental hard­
ships upon individual defendants.\textsuperscript{264} To facilitate the necessary
cleanup of dangerous hazardous waste sites, Congress chose to cast
a wide net of liability upon all those parties responsible, including
individuals, for the creation of these sites.\textsuperscript{265} Individuals subject to
liability include those operating within a corporate structure as well
as landowners whose involvement with the hazardous waste activity
upon their land may be negligible. These parties may be held culp­
able under CERCLA because they, as opposed to the generally
innocent public, stand in a responsible position to a known danger.\textsuperscript{266}
Congress thus decided to place the financial hardship for hazardous
waste cleanup upon the parties who had actual control over hazard­
dous wastes.\textsuperscript{267}

\textsuperscript{259} Park, 421 U.S. at 675.
\textsuperscript{260} 741 F.2d 662 (3rd Cir. 1984).
\textsuperscript{261} Id. at 666.
\textsuperscript{262} Id. at 667.
\textsuperscript{263} Id.
\textsuperscript{264} See S. REP. No. 848, supra note 1, at 13.
\textsuperscript{265} Id. at 31.
\textsuperscript{266} Id. at 13.
\textsuperscript{267} Id.
V. CONCLUSION

Congress enacted CERCLA to respond to the growing dangers posed by hazardous waste sites, especially those which are “inactive” and which are the result of past improper waste disposal practices. CERCLA authorizes the federal government to clean up hazardous waste sites that pose dangers to the environment, using funds from the statutorily created Superfund. The government may bring suit to recover the costs of such clean-up operations from responsible parties. The responsible parties may be both individuals and/or corporate defendants.

Individual defendants have sought to escape liability under CERCLA by asserting that the corporate form limits the liability of individuals for acts taken on behalf of the corporation. Courts have rejected this argument, and have premised individual liability upon involvement by the individual in illegal or tortious acts of the corporation. Courts have also given extreme deference to the express congressional intent to hold culpable individuals liable for clean-up expenses.

Individual liability of owners of hazardous waste sites, as opposed to the other actors who may be defendants in a CERCLA liability action, is not premised upon actual involvement in the practice of hazardous waste disposal unless the ownership is in the form of a security interest. Individual or corporate owners of land on which hazardous wastes are located may not claim exemption from liability on the grounds that they were not involved in the dumping of the hazardous waste. These defendants would have to establish under the section 107 third party defense that they were completely without fault to be excused from liability.

Congress granted the federal government the power to clean up dangerous hazardous waste sites and placed the financial burden for the cleanup upon the parties who own or have participated in the creation of the sites. These parties include both the corporations responsible for the hazardous waste problem and the individuals through whom the corporations have acted.