Section 106 of CERCLA: An Alternative to Superfund Liability

Neil Clark
SECTION 106 OF CERCLA: AN ALTERNATIVE TO SUPERFUND LIABILITY

Neil Clark*

I. INTRODUCTION

In the early 1970's, residents of Woburn, Massachusetts discovered that several cases of childhood leukemia had occurred in their neighborhood, in an area of only a few blocks.1 During the period from 1969 to 1970, twelve children were diagnosed as leukemia cases—nine of these have died.2 A subsequent study by the Massachusetts Department of Environmental Quality Engineering (DEQE) revealed that the groundwater supply that provided drinking water for the area was contaminated with industrial solvents suspected of being carcinogenic.3 Although a causal linkage has yet to be legally established between the contamination and the unusually high incidence of childhood leukemia, it is clear that years of improper hazardous waste4 disposal such as the burying of barrels in shallow landfills and the pouring of chemicals into open pools5 has left its legacy in Woburn. The contaminated area includes sixty acres of once-wooded and now barren

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1 Ripstein, Chemical Waste Beneath a Massachusetts Town, 41 Bus. & Soc’y Rev. 46 (1982).

2 Id. at 47.

3 Id.

4 It is often difficult to distinguish hazardous waste from non-hazardous waste, because most wastes can be dangerous under the right circumstances. Thus, there is no commonly recognized definition of a “hazardous waste.” However, the federal statutes governing hazardous wastes have defined what a hazardous waste is for the purpose of those acts. For example, under regulations issued pursuant to the Resource Conservation and Recovery Act (RCRA), a hazardous waste is defined as any waste which is either determined specifically by EPA to be hazardous or one that is ignitable, corrosive, reactive, or toxic. 40 C.F.R. § 261.20-261.24 (1984). See generally QUARLES, FEDERAL REGULATION OF HAZARDOUS WASTES; A GUIDE TO RCRA 50-80 (1982).

5 Ripstein, supra note 1, at 46.
land and another three hundred acres that is suspected of being contaminated.  

The plight of the people of Woburn is representative of a much broader problem in the United States. The Environmental Protection Agency (EPA) currently believes that as many as 50,000 waste disposal sites may presently contain hazardous wastes. The EPA also believes that at least two thousand of these sites contain enough hazardous waste to present imminent threats to human health. The agency estimates that each site will require an average of $3.6 million to clean up, creating a total cost of at least $7.2 billion. These costs can only increase, because it has been documented that the amount of hazardous waste produced annually in the United States is increasing at a rate of 3.5 percent each year. The extent of the problem is impossible to estimate precisely, and could be much greater than EPA currently believes.

Hazardous waste sites commonly threaten public drinking water, and thus human health, by contaminating groundwater supplies. This threat is particularly severe because almost half of the public depends on groundwater supplies for drinking water, and seventy-five percent of landfills are in areas where they could affect groundwater supplies.

In response to this threat, Congress enacted two statutes specifically addressing the problem of hazardous waste disposal. In 1976, Congress passed the Resource Conservation and Recovery Act (RCRA). That statute empowered EPA to create a comprehensive regulatory scheme to control the methods of hazardous waste disposal. What RCRA lacked, however, were provisions which would have granted EPA the authority to clean up currently dangerous sites where waste was disposed of in the past. This legislative inadequacy was particularly acute, because

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6 Id.
12 QUARLES, supra note 4, at 25.
13 Id. at 30.
16 Weiland, supra note 7, at 642.
17 According to the Senate Committee on Environment and Public Works Report,
site owners and waste transporters connected with past dumping often became insolvent before the site was a known danger.\textsuperscript{18} Congress soon recognized that except as a prospective regulatory statute, RCRA was inadequate and that another weapon was needed in the battle against unsafe disposal sites.\textsuperscript{19}

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).\textsuperscript{20} The major purpose of the Act was to fill in the gaps left by RCRA by “providing a mechanism for rapid response, including an immediately available source of funding for cleanup when hazardous substances are released into the environment.”\textsuperscript{21} The act establishes a “Superfund” which is available for government use in cleaning up a disposal site.\textsuperscript{22} After expending Superfund money, the government may then sue to recoup its costs from certain parties specified in Section 107.\textsuperscript{23}

Section 106 of CERCLA\textsuperscript{24} represents a separate, though less clear path toward the abatement of hazards at disposal sites. This section authorizes suits for equitable relief by the government to abate hazards at waste sites, but does not specify who may be liable or under what standard such liability should be determined.\textsuperscript{25} The government has attempted to utilize this general provision to force producers of hazardous waste—referred to as “generators”—to clean up sites utilized for disposal in the past.\textsuperscript{26} The failure of section 106 to specify responsible parties and a standard of liability has allowed potential defendants to challenge the government’s use of section 106 as an alternative route to liability. It is the enforcement of section 106 that has troubled courts and is the subject of this article. Before section 106 may be invoked, various threshold requirements must be met with respect to the nature of the hazard to be eliminated. Specifically,
there must be an *imminent and substantial endangerment* to health or environment due to the *release or threatened release* of a *hazardous substance* from a *facility.*\(^7\) Secondly, there is some question as to whether section 106 may be used to remedy the effects of past disposal practices or whether it can be used merely to enjoin current unsafe practices. Third, section 106 does not specify which parties are proper defendants in actions brought thereunder. Fourth, assuming the section reaches a particular defendant, there exists an issue as to what standard of liability should be applied to measure its actions. Finally, with respect to the selection of proper defendants and the standard of liability, it is unclear whether section 106 itself furnishes the necessary information, or whether that section merely authorizes suit and these substantive questions are to be determined by looking outside section 106: elsewhere in CERCLA or within the common law.

Before reaching an analysis of these substantive issues, this article will present an overview of the hazardous waste problem. Section II of this article will discuss groundwater and the processes by which it is contaminated by infiltration of hazardous wastes. Section III will then discuss the general operation of RCRA and CERCLA. The analysis will explain why the government has relied so heavily on section 106 as an enforcement mechanism. Section IV will then discuss the threshold requirements that must exist before section 106 may be invoked, and whether that section applies to the past actions of generators of hazardous wastes. Finally, assuming that section 106 applies to such parties, section V will discuss the nature and source of liability under section 106. The article will arrive at two conclusions. First, section 106 authorizes the government to obtain equitable relief forcing generators of hazardous waste to abate hazardous conditions at sites where their waste was disposed of in the past. Second, generators are strictly liable for such relief.

**II. THE PROCESS AND PROBLEMS OF GROUNDWATER CONTAMINATION BY HAZARDOUS WASTES**

Many industrial processes produce hazardous waste as a byproduct.\(^8\) For example, gold refineries produce cyanide wastes.\(^9\)

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\(^8\) EPSTEIN, supra note 14, at 9.

\(^9\) Id. at 6.
while other industries produce such hazardous by-products as lead, chromium, and arsenic. Among the most dangerous hazardous substances are PCBs (polychlorinated biphenyls), a carcinogenic insulating fluid which has resulted in health emergencies at many waste sites. If these wastes are disposed of in secure landfills, where wastes are segregated and sealed securely, they present little danger. However, according to EPA only a “negligible” portion of hazardous wastes are disposed of in this manner. Most wastes are improperly disposed of in non-secure landfills and surface impoundments, or by various “midnight” dumping techniques where waste is disposed of illegally wherever an open area can be found. Waste not properly disposed of often leaks into the groundwater supply and presents a serious threat to human health. This problem is compounded by the fact that groundwater is a common source of drinking water throughout the United States and because the nature of groundwater makes it difficult to cure any contamination. This section will discuss the problems that can result from improper disposal techniques and the infiltration of hazardous wastes into a groundwater supply.

Groundwater is water that collects in the pore spaces among particles of clay, silt, sand and gravel below the surface of the ground. This area called the zone of saturation contains water which is drawn from the surface either by conventional wells or by more sophisticated mechanical pumping devices. Providing approximately 31 trillion gallons of water each year, groundwater accounts for forty-eight percent of the public drinking water supply.

Hazardous waste enters groundwater supplies by leaking from dumpsites located either above or below ground. These sites take

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30 Ripstein, supra note 1, at 46.  
31 S. REP. NO. 848, 96th Cong., 2d Sess. 7 (1980).  
32 QUARLES, supra note 4, at 26.  
33 Id.  
34 Id. at 25-28.  
35 Id. at 25.  
36 Id. at 30.  
37 Id. at 34.  
38 2 V. YANNECONE, JR. & B. COHEN, ENVIRONMENTAL RIGHTS AND REMEDIES 451 (1972) [hereinafter cited as YANNECONE & COHEN].  
39 Id. at 452.  
40 YANNECONE & COHEN, supra note 37, at 452.  
41 QUARLES, supra note 4, at 30.  
42 QUARLES, supra note 4, at 25.
a variety of forms. Wastes may be deposited in secure landfills, where the chemicals are segregated into separate compartments, which are well sealed to prevent leakage, and continuously monitored by EPA. Unfortunately, as noted above, these sites account for a very small percentage of the disposal of hazardous waste in the United States.

When landfills are not secured, a variety of problems can occur. First, because wastes are often disposed of in receptacles (commonly barrels) which decay, the wastes escape and leach into the groundwater supply. Further, because the wastes are not segregated in non-secure landfills, they can intermingle, cause explosions and fires, and further destroy their receptacles. By segregating the wastes and providing an impermeable liner as is done in secure landfills, these problems would be prevented.

Another common disposal method is containment in surface impoundments, which are man-made depressions or diked-in areas that hold wastes not contained in barrels. Forty-eight percent of hazardous wastes are disposed of in surface impoundments. The most serious problem with this method of disposal is leakage of liquid wastes into the groundwater supply. Preventative measures, such as providing an impermeable liner or locating the waste away from groundwater supplies could alleviate the health problems associated with this method.

Where disposal techniques are inadequate and a contaminant becomes mixed with the groundwater, it normally spreads in a plume-like shape, flowing in the direction of the flow of groundwater and fanning out to the sides. The contaminated water flows slowly, at the rate of only ten to one hundred feet per year.

Once groundwater becomes contaminated with hazardous waste, it is extremely difficult to detoxify. First, because ground-

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43 Id. at 26.
44 Id.
45 Id.
46 Id.
47 Id.
48 Id.
49 Id.
50 Id. at 24.
51 Id. at 25.
52 Id. at 26.
53 Id. at 25.
54 Id. at 30.
55 Id.
water moves so slowly, once it is contaminated it will remain impure for a long period of time. Secondly, because a contaminant generally moves in a plume-like shape, it is often necessary to drill numerous test wells to measure the quality of the water in a particular area. As a result, testing for groundwater contamination is expensive. Furthermore, once testing is completed, methods of abatement are burdensome, but can be accomplished in various ways. A contaminant may be removed from the ground by excavating an area and disposing of the materials properly. The flow of a contaminant may also be halted by inserting impermeable shields at the boundaries of the contaminated site. As a third alternative, the water may be pumped out, purified and returned to the ground.

All of these techniques, however, are very expensive, which hampers governmental and private action. For example, in the Woburn emergency, one million dollars was spent on preliminary testing before any cleanup even began. Another site in Elizabeth, New Jersey required 26 million dollars and 250,000 man hours to clean up. RCRA and CERCLA are the latest congressional attempts to deal with this problem. This article will now turn to a general discussion of these statutes and then to the issues arising under section 106 of CERCLA.

III. RCRA AND THE SUPERFUND RESPONSE AUTHORITY: THE NEED FOR SECTION 106 AS AN ALTERNATE METHOD OF HAZARD ABATEMENT

The Resource Conservation and Recovery Act (RCRA) of 1976 called for a comprehensive regulatory scheme to manage the treatment, handling and disposal of hazardous waste. RCRA provided for the proper handling of hazardous waste currently

56 Id. at 31. The duration of the contamination also depends on the life of the contaminant itself. Epstein, supra note 14, at 30.
57 Quarles, supra note 4, at 31.
58 Id.
59 Id. at 34.
60 Id.
61 Id.
62 See supra text and notes at notes 1-6.
63 Ripstein, supra note 1, at 47.
64 Graziano, Hazardous Waste Site Cleanup in Elizabeth, New Jersey, in Hazardous Waste Management for the 80's 278 (1982).
65 Quarles, supra note 4, at 2.
being disposed of, but failed to deal explicitly with past disposal activities or their effects. Thus, it merely regulates prospectively. For example, any hazardous waste is subject to a “cradle to grave” manifest system so that the waste can be traced from its origin to its ultimate disposition. Any disposal facility storing hazardous waste must obtain a permit dictating compliance with all applicable regulations. Section 3008 of RCRA established an enforcement mechanism under which orders may be issued to force compliance with permit requirements. Failure to comply with such orders may result in a fine of up to $25,000 per day, or the revocation of a permit. Section 3008 also includes criminal penalties for conscious non-compliance with permit requirements. Finally, Section 7003 authorizes suit to “immediately restrain” any person “contributing to” an “imminent and substantial endangerment to health or the environment” at a hazardous waste disposal site.

Thus, RCRA and its accompanying regulations established a comprehensive program for managing current disposal prac-
This regulatory scheme, however, does not address the crucial need to remedy presently dangerous conditions at sites where waste had been disposed of in the past. In response to this legislative inadequacy, Congress enacted CERCLA at the close of its session in 1980. The Act creates a “Superfund” which is available for immediate use to clean up a dangerous hazardous waste site. When there is a release or threatened release of a hazardous substance or any contaminant which may cause an imminent and substantial endangerment to the public health or welfare, the President is authorized, under section 111 of CERCLA, to expend a portion of the Superfund to finance remedial action. The Fund, by combining federal and industry funds specified in detail in section 131(b)(1)(A-E), amounts to 1.6 billion dollars over a five year period.

Under section 107 of CERCLA, generators and transporters of hazardous wastes, as well as waste site owners, are liable to the United States for the costs of remedial action. Such liability is subject only to the specified defenses of an act of God, an act of war, and certain acts or omissions of third parties not in a contractual or agency relationship with the defendant.

Through this statutory mechanism, Congress hoped to address the problem of improper past disposal practices by providing a rotating fund available for immediate use to abate hazardous conditions at a disposal site. Congress also intended that those responsible for the damage would ultimately bear the cost of cleanup pursuant to section 107. In practice, however, the Superfund process has failed to address adequately the problems presented by improper past disposal practices. One weakness has been the lack of proper funding. The $44 million annual allocation

75 QUARLES, supra note 4, at 3.
80 For the definition of hazardous substances under CERCLA, see infra text and notes at notes 99-108.
86 Id. at § 9607(b)(1-3).
87 S. REP. No. 848, 96th Cong., 2d Sess. 13 (1980).
88 Id.
has forced EPA to establish a list of a few hundred priority sites.\textsuperscript{89} These priority sites represent only a small percentage of the two thousand sites EPA believes to be currently dangerous to human health.\textsuperscript{90} A second weakness is the manner in which the fund operates. The Superfund mechanism requires that the government expend all of the money necessary to clean up a site and then institute a suit for reimbursement.\textsuperscript{91} If the government cannot locate a solvent responsible party, or is forced to settle with a defendant it can find, a deficit in the supposedly self-maintaining Superfund will appear.

The inadequacies of both RCRA and the Superfund process of CERCLA have prompted the government to utilize section 106 of CERCLA as an alternate method of addressing the hazards brought about by improper past disposals. Section 106(a) states, in pertinent part:

[W]hen the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also ... [issue] such orders as may be necessary to protect public health and welfare and the environment.\textsuperscript{92}

It is argued by the government that this section allows it to seek a judicial order forcing generators of hazardous wastes to abate the hazard apart from any use of the Superfund. The language of section 106, however, fails to specify proper defendants and the standard of liability under which their actions should be judged. This ambiguity has invited waste generators to challenge the government's construction of section 106. These generators have argued that section 106 can only be used to halt current improper disposal practices and thus that the only proper defendants are those who could be enjoined from continuing such practices.\textsuperscript{93}

\textsuperscript{90} S. REP. No. 848, 96th Cong., 2d Sess. 2 (1980).
\textsuperscript{93} See e.g., United States v. Wade, 546 F. Supp. 785 (E.D. Penn. 1982).
The language of section 106 does not explicitly support either interpretation. Moreover, the legislative history of section 106 is not dispositive.\textsuperscript{94} The following section will examine the validity of the government's interpretation of section 106, and discuss the role that section 106 assumes in the cleanup of sites where improper past disposal actions have led to ongoing hazardous situations.

IV. THE APPLICABILITY OF SECTION 106 TO THE PAST ACTIONS OF GENERATORS OF HAZARDOUS WASTE

It is widely disputed whether section 106 permits the government to force generators to bear the burden of current hazard abatement at sites where such generators' waste was disposed of in the past. The broad language of section 106 has allowed several issues to arise regarding such a use of section 106. First, section 106 provides that the government may seek judicial relief when there "may be an imminent and substantial endangerment to the public health or environment" due to an "actual or threatened release" of a "hazardous substance" from a "facility."\textsuperscript{95} The definitions of each of these threshold requirements will be crucial to any conclusion about the use of section 106 in any particular case. Secondly, although it is clear that section 106 may be used to enjoin current improper disposal practices,\textsuperscript{96} it is not clear whether that section may be invoked to address a current danger which has resulted from the past actions of a defendant. The third issue that has arisen is whether generators are proper defendants at all. Section 106 does not explicitly assign liability to any one party. Finally, section 106 fails to state, in explicit terms, a standard of liability. As a result, it is unclear whether defendants are to be held to a strict liability standard, or some other standard such as one of negligence.\textsuperscript{97}

This section will first discuss each of the four threshold requirements that must be met before section 106 may be properly invoked. The article will then discuss whether section 106 may be

\textsuperscript{94} But see United States v. Price (Price III), 577 F. Supp. 1103, 1112 n.9 (D.N.J. 1983).


\textsuperscript{96} Indeed, if the section does not allow an injunction against present action, the section means nothing at all. Moreover, even cases construing section 106 restrictively recognize that section 106 may be used to enjoin current practices. See e.g., Wade, 546 F. Supp. at 799.

\textsuperscript{97} See infra notes 258, 259.
used to address the dangers resulting from the past actions of generators.

A. Definitional Issues Under Section 106

For section 106 to be invoked, there must be an "actual or threatened release" of a "hazardous substance" from a "facility" that may be presenting an "imminent and substantial endangerment" to the public health or environment. Because in any given case, the definitions of these terms may be crucial, each statutory phrase will be reviewed.

1. Hazardous Substances

Section 106 permits the Attorney General to seek relief for environmental or health dangers only when such dangers result from an actual or threatened release of a "hazardous substance." Congress has defined this term in section 101(43) of CERCLA as materials falling into one of two categories. The first category includes substances defined as hazardous by Congress and EPA and listed under the Clean Air Act, the Clean Water Act, the Toxic Substances Control Act or the Resource Conservation and Recovery Act (RCRA). The second category includes substances that possess the hazardous characteristics identified in the regulations issued pursuant to RCRA. The regulations list these characteristics as ignitability, corrosivity, reactivity and toxicity, and prescribe tests for determining when a substance possesses one of these four characteristics. The definition of "hazardous substances" in CERCLA is, therefore, quite broad, encompassing all of the substances regulated by the aforementioned environmental statutes combined.
2. Actual or Threatened Release

Section 106 also requires that there be an "actual or threatened release" of a hazardous substance from a facility before it may be invoked. A release is defined in section 101(22) as any "spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment." An actual release need not occur for section 106 to be invoked; that section requires only that there be an actual or threatened release of a hazardous substance.

3. Facility

Section 106 requires that the actual or threatened release of a hazardous substance occur from a "facility." This term is defined in section 101(9) of CERCLA as "... any building, structure, installation ... well, pit, ... impoundment, ditch, landfill ... or any site ... where a hazardous substance has been deposited, stored, disposed of, or placed or otherwise come to be located. ..." Thus, an actual or threatened release from a site where waste has been disposed of in the past is sufficient to trigger the application of section 106. The past tense construction of the second part of this definition is consistent with the general purpose of CERCLA to address dangers resulting from past disposal practices.

4. Imminent and Substantial Endangerment

The final requirement for application of section 106 is that there "... may be an imminent and substantial endangerment to the public health or welfare or the environment." Although the meaning of this phrase is seemingly well settled, it is not defined in CERCLA; consequently, in many cases brought under section 106, as well as other environmental statutes containing the phrase, defendants have asserted that conditions did not amount

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to an imminent and substantial endangerment to the public health or environment. The controversy generated by this ambiguity makes the phrase the most important threshold definitional requirement to be met before section 106 may be invoked.

First, “endangerment” requires “only proof of risk of harm, not actual harm.” In Ethyl Corp. v. EPA, the Circuit Court for the District of Columbia states that the endangerment standard is precautionary in nature, and therefore does not require proof of actual harm.

The terms of section 106 further require that this risk of harm be “imminent” and “substantial.” The term “imminent” modifies the risk of harm only; the harm itself need not be imminent, only the risk of that harm. Thus, if a carcinogen is discharged, the risk of harm is present even though the harm itself—the cancer—may not surface for years.

The term “substantial” appears to modify both “risk” and “harm.” In interpreting the phrase “imminent and substantial endangerment” in the Safe Drinking Water Act (SDWA), two courts utilized a flexible approach to this requirement by considering the degree of risk and harm. Under this test, the degree of risk necessary to satisfy the definitional requirement would decrease as the degree of harm threatened at a given site increased. Conversely, as the degree of potential harm decreased, the degree of risk required to satisfy the requirement would increase. Under this approach, however, the risk must not be “completely speculative” nor the harm “de minimis” in degree. In short, for there to be an “imminent and substantial endangerment,” the

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115 See e.g., Reilly, 546 F. Supp. at 1109-10.
116 Emergency Powers, supra note 114, at 312.
117 Ethyl Corp., 541 F.2d at 17. The case included the interpretation of the word “endanger” as it appeared in the Clean Air Act. Ethyl Corp. had sought review of an EPA order restricting lead content in gasoline. Id. at 1.
118 Id.
120 Emergency Powers, supra note 114, at 313 nn. 314, 315.
121 Ethyl Corp., 541 F.2d at 18.
123 Reserve Mining Co. v. EPA, 514 F.2d 492, 519-20 (8th Cir. 1975). Ethyl Corp., 541 F.2d at 18.
risk of harm must be imminent, and either the risk or the harm must be substantial.

Satisfaction of these definitional requirements is a prerequisite to the application of section 106 in any particular case. Even if these threshold tests are satisfied, however, there still remain substantial questions as to the scope of section 106 liability. In the following subsections, this article will discuss whether section 106 may be used to force generators to clean up the effects of past disposal of hazardous waste.

B. Applicability of Section 106 to the Past Actions of Generators

As discussed earlier, the major purpose of CERCLA was to provide a method to abate the problem of current dangers caused by past disposal practices. Prior to CERCLA's enactment, Congress recognized the difficulty of locating a solvent, responsible party to bear the cost of cleanup. In response to these concerns, Congress drafted section 107 of CERCLA to impose liability upon, among others, generators for the costs of cleanup resulting from past disposal.

As the inadequacies of the Superfund mechanism surfaced, the need for section 106 as an alternative source of liability became apparent. Similar to a section 107 action, concerns over the problems of past disposal and insolvent defendants are relevant to liability under section 106. Consequently, the government has attempted to use section 106 to impose liability on generators for abatement of hazards at sites where their waste was disposed of in the past. Such generators may be referred to as "past generators." The following subsections will discuss the applicability of section 106 to these entities.

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126 See S. REP. No. 848, 96th Cong., 2d Sess. 12 (1980).
127 Id.
129 See supra text and notes at notes 86-93.
130 See e.g., Reilly, 546 F. Supp. 1100.
131 In United States v. Wade, the District Court for the Eastern District of Pennsylvania used the term "past generator" to describe the defendant before it. This is a useful shorthand term to describe a generator of hazardous waste, who is being sued because waste it generated in the past was disposed of, also in the past, at a site that is currently presenting the requisite statutory endangerment. However, in analyzing the applicability of section 106 to "past generators" it is important to separate this shorthand into its component parts and discuss each separately. Thus, the first point to be discussed is whether section 106 applies, in general, to current dangers resulting from past actions, i.e., the generation and disposal of wastes in the past. If it does, then any party that is a
1. Application of Section 106 to Past Generators: An Objective Examination of Relevant Caselaw.

In *United States v. Reilly Tar & Chemical*, the United States brought suit under section 106 against a hazardous waste generator for abatement of groundwater pollution near the Reilly dumpsite. The defendant, as owner and operator of the site, had deposited its waste there for fifty-five years until it sold the site in 1973, years before the government's suit was brought. In denying Reilly's motion to dismiss on the grounds that section 106 does not apply to generators, the court held that a past generator was liable for relief even though the site was no longer operating and it was no longer the owner. The court found the language of section 106 to contain no limitations on the classes of persons that could be proper defendants. The court further stated that the statute should be broadly construed to give effect to Congress' intent to empower the federal government to respond effectively to the serious national problems resulting from hazardous waste disposal, noting that the judiciary should not "frustrate the government's ability to respond."

In *United States v. Price*, the government attempted to force a defendant to implement cleanup at a site it did not own but where its waste had been disposed of. In refusing to grant the defendant's motion to dismiss the government's claim under section 106, the court held that the second component of "past generator" must then be discussed, the issue being whether section 106 applies to generators of hazardous waste. It is important to emphasize that where the defendant is a generator who is being sued with respect to his past actions, that defendant may extricate itself by convincing a court either that section 106 does not apply to the broad category of past actions or the more narrow category of generators. That is, for section 106 to be applicable to "past generators" it must be applicable to both past actions and generators.

\[127 \] 546 F. Supp. 1100 (D. Minn. 1982).

\[128 \] The *Reilly* opinion does not indicate exactly what type of relief the plaintiff was requesting. Because the decision was merely a refusal of the defendant's motion to dismiss, the court never reached the issue of relief.

\[129 \] *Reilly*, 546 F. Supp. at 1105.

\[130 \] *Id.*

\[131 \] *Id.* at 1120.

\[132 \] *Id.*

\[133 \] *Id.*

\[134 \] *Id.*


\[136 \] *Id.* at 1107.
106, the Price court held that past generators were liable under section 106 for a variety of reasons. First, the court stated that the language of section 7003 of RCRA was inadequate to impose such liability on past generators, and that Congress drafted section 106 to cure this deficiency. Secondly, the court stated that it is likely that Congress intended section 106 to be used as an alternative to the Superfund mechanism in view of the fact that the amount of money Congress allocated to the Superfund was much too small to address the dangers at all of the sites Congress considered to be in need of attention.

In United States v. Outboard Marine Co. (OMC), the government brought suit under section 106 for injunctive relief against a generator who at the time of the suit owned a disposal facility that was discharging a hazardous substance into navigable waters. The court described the requested relief as a "cleanup injunction"—a court order forcing the defendant to undertake cleanup efforts. The court refused to grant the defendant's motion to dismiss the section 106 claim, stating that OMC was clearly a proper defendant under section 107 of CERCLA and that Congress must have intended the same parties to be liable for injunctive relief under section 106. The court utilized section 107 on the understanding that section 106 merely authorized suits and that substantive content in such suits must derive from another source, section 107 of CERCLA.

In United States v. A & F Materials Company, Inc., the government sued a past generator in part under section 106 in order to obtain an injunction to force the defendant to clean up a site at which its waste had been disposed but which it did not own. The court refused to dismiss the government's claim under section 106, holding that the vague language of section 106 indicated that liability under section 106 is dependent on section 107. Because

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142 Id. at 1110-12.
143 Id. at 1111.
144 Id. at 1112.
145 556 F. Supp. 54 (N.D. Ill. 1982).
146 The court found that the facility was discharging polychlorinated biphenyls (PCB's) into navigable waters. OMC, 556 F. Supp. at 54. PCB's are a carcinogenic insulating fluid whose manufacture is now banned. S. REP. No. 848, 96th Cong., 2d Sess. 6 (1980).
147 OMC, 556 F. Supp. at 56.
148 Id. at 57.
149 Id. at 56-57.
152 Id. at 1257.
past generators were explicitly liable parties under section 107 the court concluded that they were also liable under section 106.\textsuperscript{153}

In \textit{United States v. New England Pharmaceutical}\textsuperscript{154} (NEP) the government sued a past generator under section 106 in an attempt to obtain an order forcing the defendant to perform cleanup of a site that the defendant did not own.\textsuperscript{155} In refusing to dismiss the government’s claim under 106, the court held that section 106 is applicable to past generators whose waste was disposed of at sites owned by other persons.\textsuperscript{156} First, the court stated that the broad language of section 106 indicates that all parties liable for costs under section 107 are liable for equitable relief under section 106.\textsuperscript{157} The court reasoned that in order for CERCLA to function effectively, section 106 and 107 must be allowed to work in tandem, and that the differences in the types of relief authorized by the two sections refutes the argument that this use of section 106 represents merely the duplication of the Superfund mechanism.\textsuperscript{158} The court did state, however, that section 106 was intended to be used when the Superfund process proved to be too cumbersome in the face of an imminent and substantial endangerment.\textsuperscript{159}

\textit{United States v. Wade}\textsuperscript{160} stands, at least in part, in opposition to the above cases. In \textit{Wade}, the government brought suit against a generator that had contracted to have its waste stored at a site that it did not own.\textsuperscript{161} The government sought relief under section 106, requesting the court to order the defendant to pay the costs of designing and implementing a plan to clean up the contaminated site.\textsuperscript{162} The court granted the defendant’s motion to dismiss the section 106 claim on two grounds. First, the court stated that the type of relief requested by the government was inappropriate under the statute because it was an attempt to disguise a request for money damages as injunctive relief.\textsuperscript{163} Secondly, the court

\begin{flushleft}
\textsuperscript{152} Id.
\textsuperscript{155} Id. at 826.
\textsuperscript{156} Id. at 839.
\textsuperscript{157} Id. at 840 n. 17.
\textsuperscript{158} Id.
\textsuperscript{160} United States v. Wade, 546 F. Supp. 785 (D. Penn. 1982).
\textsuperscript{161} Id. at 787.
\textsuperscript{162} Id. at 792.
\end{flushleft}
stated that section 106 was not applicable to past generators who never owned the site in question (off-site generators). The court reasoned that past, off-site generators are expressly liable in actions brought pursuant to the response cost recovery provisions in section 107 of CERCLA but that section 106 does not evidence an intent to confer liability on past generators. The court further stated that section 106 applies only to future actions because the court was of the opinion that section 106 was written in the present tense, authorizing relief because of an “‘actual or threatened release of a hazardous substance from a facility...’” In sum, Wade held that because section 106 did not apply to past actions, hazardous waste generators could not be held liable for past acts that relate to current pollution. Thus, Wade stands not for the inapplicability of section 106 to generators as such, but rather, for the inapplicability of that section to past actions.

The foregoing section demonstrates that the caselaw supports the application of section 106 to generators with regard to current dangers resulting from past disposal of their hazardous waste. However, Wade held that section 106 does not allow the judiciary to issue injunctions forcing the cleanup of sites that are presenting a current danger due to past disposal. Aside from Wade, courts have unanimously held that section 106 may be used to force such cleanup by generators, but they differ in their reasoning. In OMC, A & F Materials, and NEP, the courts stated that section 106 is dependent on section 107 with regard to determining proper defendants. In Reilly and Price, however, the courts reversed Price I after the Wade opinion was issued, stating that the lower court had read Jaffe incorrectly, and that the payment of money to fund a study to implement a site cleanup program was not an inappropriate form of equitable relief because it was preventive in nature, not compensatory. United States v. Price (Price II), 688 F.2d 204, 212 (3d Cir. 1982). Because the Wade court is bound by the Third Circuit Court’s opinion in Price, this part of its holding will probably not stand on appeal.

The Wade reasoning is somewhat unclear. The court appears to blur the distinction between the applicability of section 106 to past actions and its applicability to generators into one issue. The court in United States v. Outboard Marine Co., however, read the opinion as holding that section was inapplicable to the past generator defendant because that section does not apply to past actions, and this is what the language of Wade indicates. OMC, 556 F. Supp. at 58 n. 3. See Wade, 546 F. Supp. at 794.
seem to draw substance from section 106 itself in determining that past generators are liable under section 106.\textsuperscript{172} Finally, all of these cases—except Wade—agreed that section 106 applies to current dangers caused by past actions.\textsuperscript{173} This article, by reviewing the language of section 106 and the relevant caselaw, will discuss the applicability of section 106 to both current and past generators. The article concludes that section 106 applies to both generators and to past actions and thus to “past generators.”


In United States v. Wade, the court held that section 106 did not impose liability on the defendant generator while each of the other cases construing that section have held to the contrary. However, the latter cases differed among themselves in their conclusion as to the proper source of substantive standards to be applied in actions brought under section 106. Some of this confusion is based on disagreement over whether section 106 is substantive or merely jurisdictional. A jurisdictional statute empowers a party to bring suit and confers jurisdiction upon the courts to hear that action.\textsuperscript{174} If such a statute is merely jurisdictional, it does not create liability in any party.\textsuperscript{175} Rather, it is dependent on another source for substantive standards\textsuperscript{176} such as the common law or remaining statutory provisions.\textsuperscript{177} A substantive statute, on the other hand, creates and defines liability in actions brought thereunder.\textsuperscript{178} The language of the statute is therefore the only proper source of substance in actions brought thereunder.\textsuperscript{179}

In the analysis below, this article will discuss whether section 106 is substantive or merely jurisdictional. After concluding that

\begin{itemize}
  \item \textsuperscript{172} Reilly, 546 F. Supp. at 1113; Price III, 577 F. Supp. at 1111-12. Note, however, that while the Price court appears to treat section 106 as substantive in determining whether the defendant was a proper party, the court never explicitly states that this is what it is doing. Moreover, in discussing the proper standard of liability under section 106, the Price court explicitly rejects the Reilly analysis of section 106 as substantive. Price III, 577 F. Supp. at 1113. Thus, Price is somewhat unclear on this issue of whether section 106 is jurisdictional or substantive.
  \item \textsuperscript{173} See, e.g., Reilly, 546 F. Supp. at 1113. See supra text and notes at notes 130-67.
  \item \textsuperscript{174} OMC, 556 F. Supp. at 55. \textsuperscript{175} See also United States v. Midwest Solvent Recovery Service Inc., 484 F. Supp. 138, 144 (N.D. Ind. 1980) (construing section 7003 of RCRA).
  \item \textsuperscript{176} Id. See also A & F Materials, 578 F. Supp. at 1257; NEP, 579 F. Supp. at 839.
  \item \textsuperscript{177} OMC, 556 F. Supp. at 55.
  \item \textsuperscript{178} Id. \textsuperscript{179} See OMC, 556 F. Supp. at 55. See also NEP, 579 F. Supp. at 839.
\end{itemize}
section 106 should be read as merely jurisdictional and dependent on section 107 for its substance, the article will discuss the applicability of section 106 to generators of hazardous waste in that context.

a. Section 106: A Jurisdictional or Substantive Statute?

Most cases construing section 106 of CERCLA have not squarely addressed the issue of whether the section is jurisdictional or substantive. Those decisions which have treated section 106 as substantive seem merely to assume that the section should be read as such without exploring the issue. The three cases that have construed section 106 as jurisdictional only have merely stated that the broad language of section 106 is too vague to create liability in any party, and have therefore concluded that the proper defendants are those defined in section 107 of CERCLA.

The decision which most squarely addresses this issue is United States v. Outboard Marine Co. (OMC), which concluded that section 106 was merely jurisdictional. The OMC court noted that the plain language of section 106 does not create liability in any party; rather, it merely authorizes lawsuits and equitable relief. The court expressly rejected the Reilly court's reliance on the

180 See, e.g., Reilly, 546 F. Supp. at 1113.

181 See, e.g., OMC, 556 F. Supp. at 57. Although these decisions construing section 106 have split on this issue, all but Wade have found that generators are liable for their past actions under that section. See, e.g., NEP, 579 F. Supp. at 839. However, the issue retains its importance because if section 106 is substantive, there is a stronger case supporting the conclusion reached in Wade. First, if section 106 is substantive, it does not depend on section 107 for specification of proper parties. Therefore, it is possible to argue that there should be a distinction made between “off-site” and “on-site” generators (those who do not own or do own the site in question, respectively). This would not be possible under section 107 which makes no such distinction; it holds any generator liable, regardless of its ownership of the site. 42 U.S.C. § 9607(a) (Supp. V 1981). This argument is made stronger by the phrase in section 106 which directs the court to grant “such relief as the public interest and the equities of the case shall require.” 42 U.S.C. § 9606(a) (Supp. V 1981). It may be argued that to hold a generator liable for waste disposal over which it had no control (as may be the case with respect to an off-site generator) would be inequitable or against the public interest. Thus, although even those courts which have treated section 106 as substantive have held that generators are liable, see, e.g., Reilly, 546 F. Supp. 1100, 1113, this conclusion is not as clearly mandated under the language of section 106 itself as under section 107. Therefore, while the issue of whether section 106 is substantive or jurisdictional has not proved to be dispositive thus far, it could prove to be of great importance.

182 OMC, 556 F. Supp. at 55.

183 Id.
phrase “the public interest and the equities of the case” as giving sufficient guidance to draw substance from section 106. Finally, the court concluded that section 107 of CERCLA was the main liability creating provision, and that those liable under section 107 are liable in actions brought pursuant to section 106. Other cases have followed this line of reasoning, holding that section 106 is dependent on the substantive provisions in section 107.

This interpretation of section 106 as merely jurisdictional seems to be correct for a number of reasons. First, the cases that have read that section as substantive have offered no arguments as to why it should be construed as such. Instead, they have merely assumed that section 106 is substantive and proceeded to decide whether or not the section applies to past generators. Secondly, it is difficult to conclude that Congress intended section 106 to confer substantive liability when that section was drafted so vaguely in comparison to section 107. The latter section states in great detail who should be liable under the Act, while the former merely authorizes the relief necessary to abate a threat due to the release of a hazardous substance without any mention of who the defendant may be in actions for such relief. If Congress had intended section 106 to confer substantive liability, it is likely that they would have used some language which would at least suggest which parties are proper defendants. For example, Congress could have drafted section 106 to be similar to section 7003 of RCRA, which authorizes the immediate restraint of anyone “contributing to” the creation of a hazardous condition. This phrase, while not as clear as section 107 of CERCLA, at least focuses to some extent on the party to be sued rather than the threat to be abated. Finally, it seems likely that apart from language to the contrary, the same party liable for damages

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184 Id.
185 Id. at 56-57.
187 See, e.g., Reilly, 546 F. Supp. at 1111-14; see also Wade, 546 F. Supp. at 789.
191 This is not to suggest that section 7003 is necessarily substantive. However, the language does seem to provide better grounds for such a conclusion than the language of section 106 of CERCLA. For a decision holding that section 7003 is substantive, see Reilly, 546 F. Supp. at 1107. But see United States v. Midwest Solvent Recovery Service Inc., 484 F. Supp. 138, 143 (N.D. Ind. 1980).
under section 107 should also be liable for equitable relief under section 106.\textsuperscript{192}

In sum, there is ample basis to conclude that section 106, which provides almost no guidance as to who is liable thereunder, is jurisdictional only.\textsuperscript{193} If section 106 is jurisdictional only the inquiry must turn to the proper source of substantive standards. The following subsection will address this issue, and concludes that the proper source for substantive standards under section 106 is section 107 of CERCLA.

b. The Source of Substantive Standards under Section 106: Federal Common Law or Section 107 of CERCLA?

In *United States v. Outboard Marine Co.* (OMC) the court recognized that substantive standards under section 106 could be found in the federal common law of nuisance or section 107 of CERCLA.\textsuperscript{194} The court concluded that section 107 was the proper source, basing its analysis on the Supreme Court’s decision in *City of Milwaukee v. Illinois*\textsuperscript{195} (Milwaukee II), which eliminated the use of the federal common law in the area of hazardous waste disposal. The following subsections will discuss whether the OMC court reached the proper conclusion. The article concludes that the federal common law is no longer applicable under section 106 and that section 107 is therefore the proper source of substantive standards.

(i) Federal Common Law of Nuisance

In *Illinois v. City of Milwaukee* (Milwaukee I)\textsuperscript{196} the Supreme Court held that the state could maintain an action for abatement of water pollution under the federal common law of nuisance.\textsuperscript{197} The court reasoned that the pollution of navigable waters involved a uniquely federal interest which required a uniform fed-

\textsuperscript{192} *OMC*, 556 F. Supp. at 57.
\textsuperscript{194} *OMC*, 556 F. Supp. at 56.
\textsuperscript{196} 406 U.S. 91, 92 (1972).
eral rule. The court further held that until some future time when federal statutes occupied the realm of water pollution, the federal common law claim could be utilized. This rule was subsequently expanded to permit federal courts to decide groundwater pollution cases under the federal common law of nuisance as well. After these cases were decided, however, the Supreme Court held, in City of Milwaukee v. Illinois (Milwaukee II) that the 1972 amendments to the Federal Water Pollution Control Act (FWPCA) had occupied the field of water pollution and had preempted the federal common law of nuisance with respect to water pollution. The court stated that the preemption question is unlike the constitutional issue of the preemption of state law in that the federal common law is an unusual development that may be used only in the absence of an act of Congress. As such, federal common law is easily displaced by federal statutes.

The district courts, following the broad pronouncements of Milwaukee II, have consistently held that CERCLA and RCRA preempt the use of the federal common law of nuisance with respect to water and groundwater pollution. For example, the OMC court, relying on Milwaukee II, held that the federal common law was not the proper source of substantive standards in actions brought pursuant to section 106 of CERCLA. Similarly, in City of Philadelphia v. Stepan Chemical Company, the court stated that RCRA and CERCLA had “unquestionably” occupied the field of hazardous waste disposal. Thus, in construing section 107 of CERCLA, the court stated that the use of federal common law is no longer permissible in cases of groundwater pollution resulting from hazardous waste disposal. Other federal courts have uniformly adopted this conclusion.

196 Id.
199 Id. at 317-19.
200 Id. at 314.
201 Id. at 314.
202 The court noted that much less deference is to be accorded to federal common law than state law in pre-emption questions. Id. at 312-17.
203 See e.g., OMC, 556 F. Supp. at 56.
204 OMC, 556 F. Supp. at 56.
206 Id. at 1148.
207 Id. at 1147.
It is therefore clear that the federal common law of nuisance no longer applies in the field of hazardous waste disposal. As a result, the substantive standards governing an action brought pursuant to section 106 of CERCLA must derive from the remaining provisions of CERCLA.

(ii) Responsible Parties Under Section 107 of CERCLA

If section 106 is merely a jurisdictional statute and the use of the federal common law is no longer possible in hazardous waste cases, then the only remaining source of substantive standards is the balance of CERCLA. The class of responsible persons must therefore be determined by section 107, which is the only section of CERCLA that defines potential defendants under the act. Courts that have held that section 106 does not define proper defendants have uniformly looked to section 107 for such substantive content.

The language of section 107 clearly specifies any generator as a proper defendant. Under section 107(a)(2) any person who at the time of disposal owned or operated a facility at which hazardous substances were disposed of is expressly stated to be a proper defendant. Thus, a generator such as the defendant in Reilly, who disposed of its waste at its own site (on-site generator) would be a proper defendant under section 107 regardless of whether it still owns the site at the time of the imminent and substantial endangerment. Secondly, section 107(a)(3) clearly specifies as a proper defendant any party who arranged for the transport and/or disposal of hazardous waste at a site owned by someone else (off-site generator). Thus, a generator such as the defendant in Price who arranged to have waste disposed of at a facility is also a proper defendant under section 107.

Therefore, because substantive standards under section 106

211 For an excellent criticism of Milwaukee II, see Collins supra note 197.
212 See OMC, 556 F. Supp. at 56.
213 Id.
214 Id. See also A & F Materials, 578 F. Supp. at 1259.
218 Id.
220 Id.
must derive from section 107 of CERCLA, and because all generators are clearly specified as proper defendants in section 107, generators may be responsible parties in actions brought under section 106. However, in order for section 106 to be applicable to past generators, it must be applicable not only to generators, but also to past actions. The following subsection will discuss this issue and will conclude that section 106 does apply to past actions; that is, that the section may be used to force cleanup at facilities that are currently dangerous due to past disposal of hazardous waste and the subsequent release or threatened release of such waste.

3. Applicability of Section 106 to Past Actions: An Analysis of the Language of Section 106 and the Relevant Caselaw

In order for a past generator to be a proper defendant under section 106, that section must be construed to be applicable to past actions. Most courts that have addressed this issue have phrased their discussion in terms of whether section 106 applies to "inactive" sites. An inactive site is one at which waste was disposed of in the past but which is not operating as a facility at the time an action is brought. Thus the class of "inactive sites" is merely a subset of the class of past disposal sites, and this article will address the more general category of past actions without regard to whether the site is currently in operation.

The question of the applicability of section 106 to past actions should be governed entirely by section 106, without reference to section 107. Section 106 explicitly requires that certain conditions must exist at a "facility" before the section may be invoked, and section 101 defines a "facility" as a site where both past and present disposal actions have occurred. Thus, section 106 pro-
vides a clear answer to the question of whether that section applies to past actions. In the balance of this subsection, this article will analyze the language of section 106 and the relevant caselaw in determining whether section 106 may be invoked where past disposal has led to a current danger at a facility. The article concludes that section 106 clearly applies to such past actions. Because section 106 also applies to generators, it is applicable to past generators.

In *United States v. Wade*, the sole decision to hold that section 106 applies only to present and future actions, the court correctly noted that the language of that section provides for relief in the event of an "actual or threatened release from a facility." The court reasoned that this statutory phrase precludes the application of that section to past actions because the phrase is written in the present tense. The court’s reasoning, however, is not convincing. While this phrase is arguably written in the present tense, CERCLA defines the term "facility" in a way that clearly brings past actions within the ambit of section 106. A facility is defined as "any site or area where a hazardous substance has been disposed of, or placed or otherwise come to be located." (emphasis added). Thus, while the actual or threatened release must occur presently, the site from which the substance is released is defined to include sites where hazardous waste has been deposited in the past. Furthermore, the statute defines a "release" to include such processes as "leaking," "escaping," and "leaching," none of which require any current conduct by a hazardous waste generator. This definition therefore includes under section 106 any discharges from inactive sites, or more

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228 Even if section 106 does not determine on its own whether past actions may be addressed under that section, the considerations discussed above indicate that section 107 of CERCLA would provide the resolution of this issue. *See supra* text and notes at notes 194-215. As the liability provision for Superfund, section 107 is written completely in the past tense, and clearly applies to past actions. *Wade*, 546 F. Supp. at 794. Indeed, the principal purpose of Superfund was to address problems of inactive and orphan sites. *See S. REP. No. 848, 96th Cong., 2d Sess. 12-13 (1980).* Thus, if section 107 is to determine whether or not past actions may be addressed in actions under section 106, the issue would hardly arise; it is clear that section 107 applies to such actions.

229 *See supra* text and notes at notes 173-224.


233 *Id.*


235 *See supra* note 225.
generally, the release of a hazardous substance anytime after it has been placed in a disposal site.

Comparison to the analogous section 7003 of RCRA further suggests the applicability of section 106 to past actions. Section 7003 authorizes the President to "immediately restrain" any person "contributing to ... [the] handling, storage, treatment, transportation or disposal ..." of hazardous wastes (emphasis added). This language restrains a party who is "contributing" to the creation of a hazard by its present actions. In sharp contrast, the language of section 106 of CERCLA states that the government may secure "such relief as may be necessary to abate ..." the hazard. This language concentrates on the abatement of present dangers, however and whenever caused, rather than the current restraint of particular parties. Thus, it indicates that a party may be liable for an ongoing hazard under section 106, although the disposal activities have ceased.

The application of general principles of statutory interpretation also supports the conclusion that section 106 applies to past actions. In construing section 7003 of RCRA, the district court in United States v. Waste Industries adopted the rules stated by the Supreme Court decision in Ex Parte Public National Bank of New York. There, the court recognized that a statute is animated by a general purpose, and that each section should be construed so as to produce a harmonious whole with regard to that purpose. Applying this rule to section 7003 of RCRA, the Waste Industries court noted that RCRA was a regulatory statute whose purpose was to impose standards upon ongoing conduct connected with the handling and disposal of hazardous waste. Congress had no intention of imposing liability for past disposal practices. The court therefore concluded that section 7003

236 See supra text and notes at notes 99-108.
237 These terms do not exclusively describe events occurring as a result of past disposal, but they clearly include such events within their scope.
238 See Price, 577 F. Supp. at 1111; Reilly, 546 F. Supp. at 1111.
240 Waste Industries, 556 F. Supp. at 1307. But see Price II, 688 F.2d at 214 (stating that section 7003 could, in some circumstances, apply to past actions).
242 See Reilly, 546 F. Supp. at 1113.
245 278 U.S. 101, 104 (1928).
247 Id. at 1310.
should similarly be limited to regulating ongoing actions, since any other result would be inconsistent with the generally prospective and regulatory purpose of RCRA.

Application of this principle to CERCLA suggests that section 106 should be read to provide relief from current dangers caused by past actions. Unlike RCRA, the underlying purpose of CERCLA was not to provide a prospective regulatory scheme for the hazardous waste industry. Rather, the thrust of the statute is to facilitate the abatement of current hazards caused by past disposal at hazardous waste sites. In order to produce a result consistent with the general purpose of CERCLA, section 106 should be construed to apply to current dangers resulting from past disposal activities.

In short, three factors militate in favor of interpreting section 106 as applying to past actions. First, the definitions of "facility" and "release" in CERCLA indicate that leakage of hazardous wastes from sites where waste has been disposed in the past is one of the dangerous conditions that section 106 was designed to address. Indeed, the main purpose of CERCLA was to address current dangers that exist due to past disposal practices. Secondly, unlike the analogous section 7003 of RCRA, which authorizes the "immediate restraint" of anyone "contributing to" the creation of a hazard, section 106 of CERCLA contains no language which could limit the operation of the section to current acts contributing to the creation of a dangerous condition. Finally, because CERCLA in general was enacted as a retrospective cleanup statute, consistency with that general purpose demands that section 106 be interpreted to be applicable to past actions as well.

348 Id. at 1310-11.
349 Id.
354 See supra note 251.
357 See supra note 251.
358 See supra note 246.
4. Conclusion: Whether Section 106 Applies to Past Generators of Hazardous Waste

Section 106 of CERCLA should be applicable to generators of hazardous waste with regard to their past actions. First, section 106, through the operation of the explicit language of section 107, applies to all generators of hazardous waste. Secondly, section 106 applies to past actions for three reasons. First, the definitions of "facility" and "release" in CERCLA clearly incorporate past disposal actions under the operation of section 106. Secondly, comparison to section 7003 of RCRA illustrates that the operation of section 106 was not intended to be limited to ongoing disposal practices. Third, because CERCLA is generally a retrospective cleanup statute, a harmonious reading of the statute requires that section 106 be interpreted to be applicable to past actions as well.

Therefore, because section 106 clearly applies to generators and past actions, the provision may be invoked to secure equitable relief against past generators. One issue that remains, however, concerns the choice of the proper standard of liability to be applied to past generator defendants in actions brought pursuant to section 106. The following section of this article will discuss this issue, and concludes that a standard of strict liability, indicated in section 107 of CERCLA, is the proper standard to be applied under section 106.

V. THE STANDARD OF LIABILITY UNDER SECTION 106

Section 106 of CERCLA does not specify any standard of liability. Most courts, therefore, have recognized that section 106 was not intended to impose liability, but that such a substantive standard must derive from another provision within the statute. Great confusion exists however over what that standard should be. In cases brought pursuant to section 106, the government has consistently argued that a standard of strict liability applies,

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261 Generally, under a strict liability standard, the plaintiff need only prove that the defendant committed the act in question and that such act caused the harm complained of. The thrust of the standard is that lack of due care need not be shown by the plaintiff, and that such due care does not constitute a defense to liability. See generally, W. KEETON, D. DOBBS, & D. OWENS, PROSSER AND KEETON ON TORTS, 534-38 (1984) (hereinafter cited as PROSSER & KEETON).
while defendant generators have asserted that a negligence standard is appropriate. In the following subsections, this article will discuss (1) the proper source of a standard of liability in actions brought under section 106, and (2) whether that standard is one of strict liability or one of negligence. The article concludes that the proper standard of liability in actions brought under section 106 is one of strict liability, to be drawn from section 107 of CERCLA.

A. The Source of a Standard of Liability in Actions Brought Under Section 106

Section 106 does not define any substantive standard of liability to be applied in actions brought thereunder. As concluded above, the section is merely jurisdictional, and substantive standards must be drawn from some other source such as the federal common law of nuisance or other provisions within CERCLA. After the decisions of Milwaukee II and its progeny, it would seem that federal common law is no longer available in actions brought under section 106.

In United States v. Price, for example, the court held that Milwaukee II had preempted the federal common law of nuisance and that section 107 was clearly the proper source of a standard of liability in actions brought under section 106. The court reasoned that the language of section 106 does not define any standard of liability to be applied to defendants under section 106 while section 107, entitled “liability” clearly “sets forth standards of liability and associated defenses.” Other courts have reached this conclusion based on similar considerations.

Therefore, it is clear that a substantive standard of liability in actions brought under section 106 must derive from section 107 of

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362 If a standard of negligence is proper under section 106, the government will have to establish a duty of due care in the defendant and that the failure to meet such duty proximately caused the injury at a waste disposal site. PROSSER & KEETON, supra note 261, at 143-45. This is of course a substantially more difficult burden for the plaintiff than that which obtains under a strict liability standard. See supra note 261.

363 See e.g., Price, 577 F. Supp. at 1113.


366 See supra text and notes at notes 196-212.


368 Id.

CERCLA. The following subsection will discuss whether the standard which derives from section 107 is one of strict liability or of negligence.

B. A Proper Standard of Liability Under Section 107

Section 107 does not explicitly define a standard of liability. It merely states that certain parties shall be "liable" for certain costs of hazard abatement at facilities and certain damage to natural resources. The term "liable" is then defined in section 101(32) of CERCLA as the standard of liability provided under section 311 of the Clean Water Act (CWA). Caselaw construing section 311 and section 107, as well as the legislative history of CERCLA, clearly establish that defendants in actions brought under these sections, and thus under section 106, should be held to a standard of strict liability.

Cases construing section 311 of CWA have uniformly held that strict liability is the appropriate standard under that section. In each of those cases, an oil tanker had discharged oil into navigable waters as a result of various mishaps such as a collision with a tugboat, and the accidental opening of an oil valve by an em-

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271 Clean Water Act § 311, 33 U.S.C. § 1321 (1977). Section 107 of CERCLA states that parties shall be liable "subject only" to the specific defenses listed therein, and due care is not among them. 42 U.S.C. § 9607(b) (Supp. V 1981). This suggests that section 107 itself would impose strict liability, and one court has so held. Reilly, 546 F. Supp. at 1118. Because the statute specifies that the standard of liability for section 107 actions should be the standard provided in section 311 of CWA, the latter provision is the proper focus of the inquiry.
273 On several occasions, federal courts have held that polluters sued under section 311 of the Clean Water Act are strictly liable for cleanup. See, e.g., United States v. LeBouf Bros. Towing Co., 621 F.2d 787 (5th Cir. 1980), Steuart Transportation Co. v. Allied Towing Corp., 596 F.2d 609 (4th Cir. 1979), United States v. M/V Big Sam, 681 F.2d 432 (5th Cir. 1982), Sabine Towing & Transportation Co. Inc. v. United States, 666 F.2d 561 (Ct. Cl. 1981). Each of these cases involve the spillage of oil into navigable waters as a result of various mishaps. In each case, the court states that section 311 actions are governed by a standard of strict liability. None of these cases, however, provide any reasons for the adoption of this standard. See, e.g., LeBouf, 621 F.2d at 789; Sabine, 666 F.2d at 563; Steuart, 596 F.2d at 613; M/V Big Sam, 681 F.2d at 437. Nonetheless, these decisions are consistent with the text of section 311, which states that liability is imposed "subject to the defenses" specified therein. 33 U.S.C. § 1321 (Supp. V 1981). Because due care is not among the defenses specified, it seems clear that strict liability is the proper standard. See Price III, 577 F. Supp. at 1114 (interpreting similar language in section 107 of CERCLA).
274 M/V Big Sam, 681 F.2d at 437.
ployee of the tanker. In reviewing the district court decisions, the circuit courts uniformly held that section 311 of CWA imposes a strict liability standard on those who are proper defendants under that section, noting that such liability was subject only to the defenses enumerated in the statute.

Cases construing section 107 have also uniformly concluded that strict liability is the proper standard under that section. For example, in *City of Philadelphia v. Stepan Chemical Company*, the city brought an action, in part under CERCLA, to recover costs incurred as a result of the defendant's dumping of industrial waste in a city landfill. In denying the defendant's motion to dismiss the city's CERCLA claim on other grounds, the court stated in dictum that the cases construing section 311 of CWA and the legislative history of CERCLA clearly indicate that the appropriate standard under section 107 is one of strict liability. The result reached in *United States v. Price* strengthens the conclusion that strict liability is the proper standard of liability. There, the government sued under section 106 of CERCLA to force a past generator to undertake cleanup at a facility. The court held that section 107 was the proper source of a substantive standard and that the standard was one of strict liability. The court reasoned that the provision of a defense in section 107(b)(3) that includes a requirement of due care would be meaningless unless section 107 imposed strict liability. The court further found that a strict liability standard would best serve the Congressional purpose in enacting CERCLA: to facilitate cleanup and deflect the costs from the taxpayers by imposing it on, among others, past generators. In addition to *Price*, other federal courts have reached the conclusion that section 107 imposes strict

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275 *LeBouf*, 621 F.2d at 788.
276 See *MV/Big Sam*, 681 F.2d at 437.
278 Id. at 1135. Under CERCLA, responsible parties are liable to cities, states, or the federal government for incurring response costs. 42 U.S.C. § 9607(a) (Supp. V 1981).
279 The defendants' argument was that the city should not be allowed to sue because as the site owner, the city was also a responsible party under CERCLA. The court held that this did not prevent the city from maintaining the action. *Stepan*, 544 F. Supp. at 1141.
280 *Stepan*, 544 F. Supp. at 1135.
281 *Price III*, 577 F. Supp. at 1108.
282 Id. at 1113-14.
283 Id. at 1114.
284 Id.
liability on those whose actions are to be judged under that section.285

The legislative history of CERCLA reinforces the conclusion that the proper standard under section 107 is one of strict liability.286 In its original version, section 107 specifically stated that defendants in actions brought thereunder would be strictly liable. This language was subsequently deleted and replaced by the reference to the standard specified in section 311 of CWA.287 Despite this alteration, the legislative record suggests a Congressional intent to impose strict liability. Senator Randolph, Chairman of the Committee on Environment and Public Works, stated that the compromise version finally enacted retained a standard of strict liability by the reference to section 311.288 Congressman Florio, who introduced the original bill, stated that the compromise version of section 107 was still intended to impose a standard of strict liability.289 Moreover, federal courts hearing actions under CERCLA have stated that the legislative history clearly supports the conclusion that the proper standard under section 107 is one of strict liability.290

Thus, both the legislative history of CERCLA and the caselaw construing section 107 and section 311 of CWA uniformly recognize that the standard of liability under section 107 is one of strict liability. In some cases, the application of a strict liability standard could be crucial to the fulfillment of Congress' intent in enacting CERCLA, which was to address the problem of unsafe past disposal sites.291 A negligence standard could present many obstacles to reaching that goal. For example, it could be difficult to establish a lack of due care on the part of a generator, who at the time of the enforcement may be the only solvent responsible party. Both the passage of time and inadequate record keeping, especially prior to the enactment of RCRA, would make a finding of liability particularly difficult. The imposition of strict liability, therefore, facilitates the attainment of the Congressional goal of

285 See e.g., Reilly, 546 F. Supp. at 1118; Wade, 546 F. Supp. at 793 n. 20.
287 Stepan, 544 F. Supp. at 1140; Grad, supra note 287 at 19.
290 Wade, 546 F. Supp. at 793 n. 26; Stepan, 544 F. Supp. at 1140 n. 4.
forcing those responsible for hazardous wastes to bear the costs involved in rendering disposal sites harmless to the public health and environment.\footnote{Id. at 13.}

One commentator has argued, however, that it is unfair to impose strict liability on a party who was not "intimately involved" in the challenged pollution activity.\footnote{Dore, The Standard of Civil Liability for Hazardous Waste Disposal Activity: Some Quirks of Superfund, 57 NOTRE DAME LAW. 260, 276 (1981). The author wrote: 
[S]trict liability standard should be confined to those parties who engaged in substantial and purposeful hazardous waste disposal ... (and not those) whose conduct was substantially unrelated to the present danger ... or who did not obtain commercial benefit from their conduct.} According to this argument, all of the cases applying a strict liability standard under section 311 of CWA have involved defendants who have been directly involved in oil tanker spills.\footnote{Id. at 275.} It is further argued that while imposition of strict liability in such cases is justified, some situations under CERCLA warrant only a standard of negligence. One such example is where a defendant purchases a landfill years after dumping has ceased and is technically liable as a site owner under section 107(a)(1).\footnote{This was the situation in Price I, 523 F. Supp. at 1073 (D. N.J. 1981).}

While this approach could avoid some potentially inequitable results, it is inconsistent with the caselaw and the statute itself. Federal courts have uniformly acknowledged that actions under section 107 are governed by a standard of strict liability.\footnote{Wade, 546 F. Supp. at 793 n. 21; Reilly, 546 F. Supp. at 1118; Stepan, 544 F. Supp. at 1140 n. 4, Price III, 577 F. Supp. at 1113-14.} There is no indication in any of these cases that defendants should be held to a different standard of liability depending on the extent of their involvement in the disposal activity.\footnote{It should be understood that the argument was "noted," "in passing," without an opinion on its validity in Stepan, 544 F. Supp. at 1143 n. 10.} Moreover, it is illogical to limit section 107 liability by arguing that cases under section 311 have involved only certain parties. Section 107 explicitly defines the parties that may be liable in actions brought under that section;\footnote{42 U.S.C. § 9607(a) (Supp. V 1981).} section 311 merely furnishes the standard to be applied to any responsible party under section 107.\footnote{42 U.S.C. § 9601(32) (Supp. V 1981).} Thus, this argument is clearly inconsistent with the statute itself and the caselaw construing section 107.

Finally, although it seems clear that a defendant with only a
minimal role in the activity in question should not be liable to the same extent as one who more fully contributed to the hazard, the solution to this inequity is not to alter the strict liability standard. The statute mandates such a standard, and it would be problematic to decide what level of participation would be sufficient to warrant the strict liability standard. A more simple solution that is consistent with the statute and caselaw would be to apportion liability among parties according to their contribution to the hazardous condition. Indeed, the caselaw has begun to develop the concept of joint and several liability\textsuperscript{300} under CERCLA to accomplish the goal of equitable apportionment. Under these few cases, if the defendant can show that its contribution to the hazard was separable from the others and also demonstrate the extent of its contribution, it will be liable only for such contribution.\textsuperscript{301} It seems clear, therefore, that a defendant who purchases a landfill years after dumping had ceased would be technically strictly liable, but would share in the cost of cleanup only to the extent of its contribution to the hazard.\textsuperscript{302}

In conclusion, the source of a substantive standard of liability to be applied in actions brought under section 106 is section 107 of CERCLA. This standard is defined in CERCLA as the standard provided under section 311 of CWA.\textsuperscript{303} The cases interpreting both section 311 and CERCLA, as well as the legislative history of CERCLA, support the conclusion that the proper standard is one of strict liability.\textsuperscript{304} Therefore, where the government invokes section 106, the standard of liability that must be applied in such actions is one of strict liability.

\textsuperscript{300} If a party is jointly and severally liable, he is individually liable for the entire harm; the plaintiff may recover from that defendant alone, but of course, may only recover once. Traditionally, a party was jointly and severally liable only when he acted in concert with others to commit an act. Recently, the trend has been to impose joint and several liability in cases where the defendants' acts unite to cause a single indivisible harm regardless whether they acted in concert or not. See generally, PROSSER & KEETON, supra note 261, at 313-24.


\textsuperscript{304} See supra text and notes at notes 270-92.
When CERCLA was enacted, it seemed that the Superfund mechanism would be perfectly suited to solve the environmental problems presented by such hazardous waste disposal sites as Love Canal. However, as it became apparent that the Superfund was too small and often too cumbersome, the government turned to section 106 as an alternate method of cleaning up hazardous waste sites. While this reliance on section 106 has brought vigorous opposition from past generators of hazardous waste, the statute has been successfully enforced. From the caselaw generated by section 106, a number of conclusions can be reached. First, section 106 clearly applies to past actions. The definition of "facility" in CERCLA explicitly includes sites where waste has been deposited in the past. In addition, because the general purpose of CERCLA was to address the problem of past disposal, it seems likely that section 106 was intended to reach the effects of past and present disposal.

Secondly, section 106 is merely a jurisdictional statute which specifies neither the parties liable under that section nor the standard of liability to be applied. Milwaukee II and its progeny suggest that the proper source of substantive standards is section 107 of CERCLA.

Analysis of section 107 and the caselaw construing that section indicates that generators of hazardous waste are proper defendants in actions brought under section 106. Section 107 explicitly states that such parties are liable for various costs of cleanup and for damage to the environment. Finally, the standard of liability to be applied to such parties has been uniformly held to be one of strict liability. Moreover, the legislative history of CERCLA indicates that Congress intended that such a standard be applied under section 107.

The use of section 106 against past generators promises to be very effective. Only the Wade court has held that section 106 may not be used to force past generators to undertake cleanup at sites where their waste, disposed of in the past, is now contributing to an imminent and substantial endangerment to health or environment. If the government continues to prevail in the enforcement of section 106 against both present and past generators, the Congressional purpose of CERCLA will be realized. Past hazard-

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305 See S. REP. No. 848, 96th Cong., 2d Sess. 7-10 (1980).
ous waste disposal sites will be more readily rendered harmless through cleanup, and those parties responsible will have further incentive to ensure that their waste is safely disposed of. These developments will help prevent the reoccurrence of countless tragedies throughout the nation.