Passing the Operator Buck in United States v. Township of Brighton: Whether Pollution-Related or General Activities Create CERCLA Liability for a Governmental Entity

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PASSING THE "OPERATOR" BUCK IN UNITED STATES v. TOWNSHIP OF BRIGHTON: WHETHER POLLUTION-RELATED OR GENERAL ACTIVITIES CREATE CERCLA LIABILITY FOR A GOVERNMENTAL ENTITY

I. INTRODUCTION

In United States v. Township of Brighton, the Sixth Circuit Court of Appeals held that Brighton Township, a governmental entity, should be held liable as an operator under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), based on the entity's regulatory activities at a privately-owned landfill, if it asserted actual control over the facility's day-to-day operations. The Brighton Township court, however, left open the question of whether these day-to-day operations are limited to pollution-related activities at the facility or if the day-to-day operations extend to general operations of the facility as a whole, because the Sixth Circuit failed to specify the factors considered in making that determination. The court thus passed the buck to lower courts and left them to weigh compelling policy interests in answering the question for themselves.

1. 153 F.3d 307 (6th Cir. 1998).
3. See United States v. Township of Brighton, 153 F.3d 307, 313-16 (6th Cir. 1998). Judge Boggs stated that the issue of what level of control over a facility renders a governmental entity an operator was one of first impression in the Sixth Circuit. See id. at 313. Writing the majority opinion for the court, Judge Boggs held that although “mere regulation” of a facility is insufficient to render a governmental entity an operator, actual operation or actual control over the day-to-day operations of a facility suffices. Id. at 316. Judge Boggs highlighted that an actual control test should be applied, that affirmative acts by the governmental entity are required and that regulation of the facility must be extensive enough to equate to actual operation of the facility. See id. at 314-16.
4. See id. at 314-16. Judge Boggs defined operator status solely in terms of "direct[ing] the workings of, manag[ing], or conduct[ing] the affairs of a facility," and thus ignored the requirement of United States v. Bestfoods that such activities be specifically related to pollution. Id. at 314 (quoting Bestfoods, __U.S.__, 118 S. Ct. 1876, 1887 (1998)). For a discussion of Judge Boggs' failure to include in his definition of operator status any explicit factors to assist lower courts in making the operator determination for a governmental regulatory entity, see infra note 97 and accompanying text.
5. See generally Diana Ng, Debating the Wisdom of Placing Superfund Costs on Municipalities, 69 S. Cal. L. Rev. 2193, 2193-204 (1996) (discussing competing policy interests at stake in conferring liability upon governmental entities).
Holding a governmental entity liable under CERCLA creates a difficult situation because it implicates competing policy concerns.\(^6\) One argument in favor of limiting CERCLA governmental liability is that imposing liability unfairly punishes the government for performing its public functions.\(^7\) Under this view, because governmental entities operate on a non-profit basis under tight monetary budgets, they are ill-equipped to bear the costs of cleaning up hazardous waste sites.\(^8\)

An argument against limiting governmental liability is that it is essential to promote CERCLA's goal of "making the polluter pay."\(^9\)

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6. See id. at 2193 (explaining debate among municipalities, private parties and legislators regarding whether municipalities may be held liable under CERCLA, noting several federal courts have held municipalities are to be deemed liable). See, e.g., B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1199-1206 (2d Cir. 1992) (holding municipalities liable under CERCLA for sending residential household waste to landfills); Transportation Leasing Co. v. California, 861 F. Supp. 931, 960-61 (C.D. Cal. 1993) (holding municipality liable as arranger under CERCLA); New Jersey Dep't of Envtl. Protection & Energy v. Gloucester Envtl. Management Servs., Inc., 821 F. Supp. 999, 1004 (D.N.J. 1993) (stating municipalities are included in CERCLA's definition of "persons" who may incur liability); Anderson v. City of Minnetonka, No. CV 3-90-312, 1993 WL 95361, at *11-13 (D. Minn. Jan. 27, 1993) (holding municipality liable for depositing household waste at landfill because waste could constitute "hazardous substance" under CERCLA). Despite these holdings, however, parties continue to debate the policy issues that arise from applying CERCLA liability to municipalities. See Ng, supra note 5, at 2194.

7. See Ng, supra note 5, at 2201-02. One author explained that subjecting governmental entities to liability creates a "no-win situation" because although the necessity of regulating services prevents governmental entities from ceasing provision of services, governmental entities nevertheless are forced to subject themselves to threat of extensive CERCLA liability. See id. (citing Joseph M. Manko & Madeleine H. Cozine, The Battle Over Municipal Liability Under CERCLA Heats Up: An Analysis of Proposed Congressional Amendments to Superfund, 5 VILL. ENVTL. L.J. 23, 32 (1994)). For further discussion of this principle, see Manko & Cozine, supra, at 32 (explaining impracticality and probable illegality of local governments' withdrawal of services).

8. See Ng, supra note 5, at 2202 (explaining unlike private parties, local governments cannot absorb cleanup costs by passing such costs to consumers and must instead pass costs on to taxpayers; and such cost shifting undermines CERCLA's underlying policy because Congress intended for local industry, not local taxpayers, to pick up tab for hazardous waste cleanup) (citations omitted). See also G. Nelson Smith, III, Trashing the Town and Making It Pay: The Problem with the Municipal Liability Scheme Under CERCLA, 26 CONN. L. REV. 585, 596 (1994) (explaining governmental entity may be forced to increase taxes to raise revenue to pay cleanup costs, and may also have to cut essential services to community, file for bankruptcy or even issue bonds). Judge Boggs touched on this argument in Brightton Township when he acknowledged in his opinion that "if Brighton Township had been willing to spend more money in the 1960s and 1970s," it could have made different arrangements for disposal of local waste and thereby avoided liability. Brighton Township, 153 F.3d at 316.

The rationale supporting this argument is that leniency on governmental entities discourages them from implementing better environmental regulations and unfairly forces private parties to bear cleanup costs. It follows that taxpayers, not private parties, should bear cleanup costs because they are the ultimate beneficiaries of governmental regulatory activities.

Because both sides of the policy argument are compelling, courts need a concrete, objective standard to determine the liability of governmental entities based on their regulatory activities. The Sixth Circuit did not provide such a standard in *Brighton Township*. Instead, it issued a decision containing three opinions, each of which sets forth different operator standards.

Part II of this Note sets forth the facts of *Brighton Township*. Next, Part III discusses CERCLA's liability scheme and outlines the case law pertaining to the operator liability of governmental entities engaged in regulatory activities. Then, Part IV discusses the majority opinion, concurrence and dissent of *Brighton Township*.

Ng, *supra* note 5, at 2199-201 (discussing arguments against limiting municipal liability).

10. See Manko & Cozine, *supra* note 7, at 34 (stating such lenient liability schemes would both hamper remediation process as well as provide disincentive for local governments to implement more sound environmental procedures for handling hazardous wastes).

11. See Fraccascia, *supra* note 9, at 1117 (stating residents of municipality are responsible for creating household waste and should be held responsible for costs associated with cleanup). See also Molly A. Meegan, *Municipal Liability for Hazardous Household Hazardous Waste: An Analysis of the Superfund Statute and Its Policy Implications*, 79 Geo. L.J. 1783, 1797-98 (1991) (discussing ways in which liability can be tailored to consider municipalities' unique characteristics).

12. See *Brighton Township*, 153 F.3d at 323-25. In her concurrence, Judge Moore weighed concerns about the potential chilling effect on governmental remedial efforts against CERCLA's "polluter pays" principle. See id. She then expressed the Sixth Circuit's task by stating, "[t]hus, our task of identifying when a governmental entity becomes an operator requires us to balance carefully CERCLA's broad remedial purpose against concerns of deterring state involvement in regulating hazardous waste management and clean-up." Id. at 325 (emphasis added).

13. For a discussion of the Sixth Circuit's failure to set forth an inclusive, objective standard by which to gauge the operator liability of a governmental regulatory entity, see *infra* notes 159-65 and accompanying text. For a discussion of the likely impact of this absence of guidance, see *infra* notes 166-74 and accompanying text.

14. For a discussion of the facts and procedural history of *Brighton Township*, see *infra* notes 19-32 and accompanying text.

15. For a discussion of CERCLA's liability scheme and an outline of the case law pertaining to the operator liability of governmental entities engaged in regulatory activities, including a comparison of which test to apply in making such a determination, see *infra* notes 33-87 and accompanying text.

16. For a discussion of the three opinions the Sixth Circuit set forth in *Brighton Township*, see *infra* notes 88-124 and accompanying text.
Subsequently, Part V focuses on the Sixth Circuit’s failure to determine whether either pollution-related activities or general activities are the prerequisite for governmental operator liability. Further, Part V illustrates the need for a more definitive standard.17 Last, Part VI demonstrates that in the absence of such a definitive standard, policy arguments regarding leniency for governmental entities will prove to be outcome-determinative.18

II. FACTS

At issue in Brighton Township was a fifteen-acre landfill, located in the township, that the Collett family owned from 1960 until its forced closing in 1973.19 While the Colletts owned the landfill, they entered into a series of contracts with the township which progressively required the Colletts to conform to more specifications engendered by the township Board of Appeals.20 Until 1967, the contracts permitted the Colletts to independently arrange to accept all kinds of waste from outside sources.21 From 1967 until 1973, however, the Board agreed to pay the Colletts a higher fee in return for the Colletts’ restriction of the use of the landfill to township

17. For a critical analysis of each of the Sixth Circuit’s opinions in Brighton Township, see infra notes 125-65 and accompanying text.

18. For a discussion of the likely effect policy arguments will have on courts’ decisions in light of the Sixth Circuit’s failure to set forth a definitive standard in Brighton Township, see infra notes 166-74 and accompanying text.

19. See Brighton Township, 153 F.3d at 310. Vaughan Collett owned the landfill property from 1960 until 1971; his son, Jack, then assumed ownership through 1973. See id. In 1973 the township closed the dump for its repeated inability to meet state regulations regarding the maintenance of a landfill. See id. at 311.

20. See id. The 1960 agreement provided that the township would use the site as a landfill for town residents, and the minutes from the Brighton Township Board meeting regarding that contract stated that the landfill would have to “meet specifications of and be under the supervision of the [township’s] Board of Appeals.” Id. at 310. The agreement required the township to pay Vaughan Collett $60 per month in rent and $10 per month for maintenance, in return for which Collett was to maintain the facility and retain full salvage rights. See id. Also, the agreement made admission to the landfill free for township residents and allowed Collett to make fee arrangements with any non-residents who used the landfill. See id.

The 1961 agreement changed the relationship between Collett and the township. See id. In it, the township clarified that Collett could not accept commercial or industrial waste from residents, but was permitted to make separate arrangements to accept it. See id. The 1965 contract then reversed the township’s position, allowing local commercial waste from residents to be dumped at the landfill. See id.

21. See id.
residents.\(^{22}\) The township also made additional appropriations to the landfill for repair, maintenance and cleanup.\(^{23}\)

Problems began in 1965 when Vaughan Collett, having difficulty maintaining the landfill, asked the Board for financial help cleaning it up.\(^{24}\) After considering the landfill’s failure to comply with state regulations, the Board arranged to have parts of the landfill bulldozed and removed.\(^{25}\) Nonetheless, conditions worsened, and in 1971 the Michigan Department of Public Health threatened to take legal steps to close the landfill if the township did not measurably improve the landfill.\(^{26}\) In 1973 the Board closed the landfill because it was unable to meet the state’s regulations.\(^{27}\)

Subsequently, after investigating the landfill in 1989 and 1990, the federal government determined that the site qualified for a

\(^{22}\) See id. Under the agreement that was in effect from 1967 through 1973, non-residents and industrial customers, who formerly were allowed to contract separately with Collett, were unable to use the landfill. See id. The township’s monthly fees to Collett increased from 1967 through 1973, the first monthly fee in 1968 being $70, and the last monthly fee set in 1971 being $500 for rental and an additional $666 for maintenance. See id.

\(^{23}\) See id. at 310-11. The extra appropriations were for “dump repair,” “additional expenses,” bulldozing, plowing for fire protection, fees for a bulldozing company, snow removal and crane work. Id. The Board made the following appropriations to Vaughan Collett: $600 in 1968; $1,400 in 1969; $12,000 in 1970; and $14,000 in 1971. See id. When the landfill closed in 1973, the Board made final appropriations to Jack Collett to cover the landfill and for other rehabilitative work, totaling $4,214 to be paid if the county health department and township officials were satisfied with their completion. See id.

\(^{24}\) See Brighton Township, 153 F.3d at 311. Although the township first refused to provide Vaughan Collett with cleanup funds, it later obtained an estimate for “excavating and covering” some “old scrap” at the landfill. Id. In 1966, Vaughan Collett asked the township to provide a bulldozer. See id.

\(^{25}\) See id. The Board determined that after some changes the landfill would be able to comply with the state regulations. See id. In August of 1966, the Board established a committee to examine the landfill’s problems and report what could be done to fix them. See id. In May of 1967, the Board arranged for additional bulldozing and inquired about having the Brighton Township Junior Fire Department burn some of the accumulated debris at the landfill. See id. When the Michigan state government began regulating landfills more seriously in the late 1960s, the county sanitarian, sometimes with township officials, visited the landfill. See id.

\(^{26}\) See id. From 1971 through 1972, the Michigan Department of Public Health sent several letters to the township supervisor in which it gave notice of the sanitarian’s findings. See id. These findings included inadequate protection of the groundwater, inadequate cover over the refuse, no refuse compaction, absence of a responsible director of the facility, fires burning in the refuse and a salvage operation in complete disarray. See id. Although one letter noted the elimination of fires and improvement in the piles of appliances and cars, the threat to close the dump remained in force. See id.

\(^{27}\) See id. The “insufficiency of alternative facilities” delayed the township in closing the landfill. Id. Once the township remedied the problems with the alternatives, the township closed the landfill and notified the state health officer that the township had fulfilled its cleanup duties. See id.
CERCLA removal action, the cost of which eventually reached $500,000.28 In March of 1994 the United States filed suit against Jack Collett and the township in the District Court for the Eastern District of Michigan for recovery of response costs involved in the cleanup of the site.29 The district court found both Collett and the township jointly and severally liable for all response costs.30 The township appealed to the Sixth Circuit, arguing that the district court erred in finding it liable as an operator of the landfill.31

28. See id. at 311-12. The 1989 federal field investigation team found hazardous materials at the site, particularly concentrated around a section of 200 drums in poor condition. See id. at 311. The 1990 Environmental Protection Agency (EPA) technical assessment team determined that the site met the criteria of the National Contingency Plan, which is the CERCLA set of regulations that provides the criteria for a CERCLA removal action. See id. at 312. The estimated cost of the removal action in 1990 exceeded $400,000. See id. Through 1995, however, the United States incurred an actual cost of $490,948, exclusive of interest. See id.

29. See Brighton Township, 153 F.3d at 312.

30. See id. In March of 1996, the District Court for the Eastern District of Michigan entered a default judgment against Jack Collett, who later did not appeal. See id. Later that month the district court ruled from the bench and found both Collett and the township jointly and severally liable for the full amount of response costs and postjudgment interest. See id. The district court entered final judgment in May of 1996, and both the United States and Brighton Township appealed the decision to the United States Court of Appeals for the Sixth Circuit. See id.

31. See id. Brighton Township raised two additional issues on appeal. See id. First, Brighton Township argued that this "facility" was improperly defined to include the township dump and that the landfill did not meet the definition of facility listed in CERCLA sections 101(9)(A) and (B). It argued that because the township dumped on only three acres in the southwest corner of the landfill's fifteen acres, and because the government found no hazardous waste on those three acres, the government should have excluded those three acres from the boundaries of the facility. See id. The Sixth Circuit rejected the township's argument based on the Colletts' having moved refuse around on the property and having placed materials from non-residents and industries in other parts of the site. See id. at 312-13. The court explained that because the Colletts used the entire property as a landfill, the district court properly classified it as a single facility. See id. at 313. Other courts have similarly held that a facility is defined by the bounds of the entire site on which it is located. See, e.g., City of North Miami v. Berger, 828 F. Supp. 401, 407-08 (E.D. Va. 1993); Rhodes v. County of Darlington, 833 F. Supp. 1163, 1177-78 (D.S.C. 1992) (relying on listing of "landfill" in CERCLA section 101(9)(A) as mandate that entire landfill site be deemed facility). At least one court, however, has permitted the division of an entire site into various facilities. See Nurad, Inc. v. William E. Hooper & Sons, Inc., 966 F.2d 837, 842-43 (4th Cir. 1992) (relying on CERCLA section 101(9)(B) to limit bounds of facility to only "area where hazardous substances had come to be located" surrounding underground storage tanks). For an analysis of the way in which courts determine what constitutes a "facility," see generally William B. Johnson, What Constitutes Facility? Within the Meaning of § 101(9) of the Comprehensive, Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.A. § 9601(9)), 147 A.L.R. Fed. 469, 488-95, § 2(b) (1996). For the text of CERCLA section 101(9), see infra note 37.

Second, Brighton Township appealed the district court's finding that liability for the conditions was not divisible and that the township was jointly and severally liable for all response costs. See Brighton Township, 153 F.3d at 312, 317. Based on
Sixth Circuit vacated the district court's opinion and remanded the issue of the township's operator status to the district court to apply the standards set forth in the Sixth Circuit opinion.\[^{32}\]

### III. Background

#### A. CERCLA's Statutory Scheme

In 1980 Congress passed CERCLA in an attempt to remedy the serious environmental and health effects of inactive hazardous waste sites.\[^{33}\] CERCLA provides strict, joint and several liability for responsible parties.\[^{34}\] Courts consider CERCLA a remedial statute that the district court's finding that the harm was not divisible because Brighton Township did not meet its burden of proof to establish that there was a "reasonable basis to conclude that the harm [was] divisible," the Sixth Circuit's task was to define what constitutes "a reasonable basis." \[^{Id. at 318 (quoting RESTATEMENT (SECOND) OF TORTS § 433A (1965)).}\] Holding that proper divisibility factors are based on causation, rather than on equity or normative fault, the court of appeals declined to make an exhaustive list of bases for apportioning causation and remanded to the district court the divisibility of harm issue. \[^{See id. at 319-20.}\]

and construe it liberally to effectuate its two primary goals: (1) to cleanup hazardous waste sites and (2) to make responsible parties pay for the cleanup.\footnote{35}

\footnote{35 See H.R. Rep. No. 99-253, pt. 3, at 15 (1985), reprinted in 1986 U.S.C.C.A.N. 3038, 3038 (stating CERCLA's two primary goals are "(1) to provide for cleanup if a hazardous substance is released into the environment or if such release is threatened, and (2) to hold responsible parties liable for the costs of these cleanups"). The House Report describes the goals of CERCLA as:

an inventory of inactive hazardous waste sites in a systematic manner, establishment of priorities among the sites based on relative danger, a response program to contain dangerous releases from inactive hazardous waste sites, acceleration of the elimination of unsafe hazardous waste sites, and a systematic program of funding to identify, evaluate and take responsive actions at inactive hazardous waste sites to assure protection of public health and the environment in a cost effective manner.

H.R. Rep. No. 96-1016, at 25. See also Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp., 976 F.2d 1338, 1340 (9th Cir. 1992) (stating CERCLA is construed liberally to achieve goals of statute); B.F. Goodrich v. Murtha, 958 F.2d 1192, 1197 (2d Cir. 1992) (explaining, "[i]n CERCLA Congress enacted a broad remedial statute designed to enhance the authority of the EPA to respond effectively and promptly to toxic pollutant spills"); Dedham Water Co. v. Cumberland Farms Dairy, 889 F.2d 1146, 1150 (1st Cir. 1989) (describing CERCLA as "broad response and reimbursement statute"). For a list of additional authorities, see Stovall, supra note 34, at 284 n.28.}

Under CERCLA, liability for responsible parties is also joint and several. See \textit{R.W. Meyer, Inc.}, 889 F.2d at 1507; United States v. Alcan Aluminum Co., 990 F.2d 711, 722 (2d Cir. 1993) (stating CERCLA imposes joint and several liability for indivisible harm and allows for apportionment when "two or more persons independently are responsible for a single harm that is divisible" (citing \textit{Monsanto}, 858 F.2d at 171-73)). A defendant may escape the imposition of joint and several liability by establishing one of the following defenses.

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by:

(1) an act of God;
(2) an act of war;
(3) an act or omission of a [wholly unrelated] third party . . . .

\textsc{CERCLA} \textsection 107(b), 42 U.S.C. \textsection 9607(b). See also Amy C. Stovall, \textit{Note, Limiting Operator Liability for Parent Corporations Under CERCLA: United States v. Cordova Chemical Co.}, 43 \textsc{Vill. L. Rev.} 219, 232 n.37 (1998) (stating, "although the statute includes these defenses, courts interpret them very narrowly, limiting their successful use by litigants") (citing United States v. Shell Oil Co., 841 F. Supp. 962, 970 (C.D. Cal. 1993)); John M. Hyson, "Fairness" and \textit{Joint and Several Liability in Government Cost Recovery Actions Under CERCLA}, 21 \textsc{Harv. Envtl. L. Rev.} 137, 142 (1997) (stating federal courts presume joint and several liability for defendants who are liable under section 107(a) and have no defense to liability under section 107(b)); Lynda J. Oswald, \textit{New Directions in Joint and Several Liability Under CERCLA?}, 28 \textsc{U.C. Davis L. Rev.} 299, 314-16 (1995) (discussing burden shifting under CERCLA liability scheme).
A defendant is liable for response costs under CERCLA if a plaintiff fulfills four requirements. First, the contaminated site must qualify as a "facility." Second, the defendant must fall within one or more of the four classifications of responsible "persons" listed in section 107(a) of CERCLA, one of which is the operator classification. Third, there must be a "release" or "threatened release" of a hazardous substance from the site. Fourth, the plain-

36. See Oswald, supra note 34, at 314-18 (noting CERCLA does not burden plaintiff with showing defendant's actions caused harm). The author explains that courts "have determined that [placing] a proximate causation requirement [upon the plaintiff] would conflict with CERCLA's statutory goal of promoting cleanup of contaminated sites by requiring the government to meet an extremely high burden of proof and by diverting government funds from cleanup actions to litigation costs." Id. at 318. See also Alcan Aluminum, 990 F.2d at 722 (explaining, "[t]he [plaintiff] has no burden of proof with respect to what caused the release of hazardous waste and triggered response costs," but instead, "[defendant] as the polluter bears the ultimate burden of establishing a reasonable basis for apportioning liability"). But see Shore Realty, 759 F.2d at 1044 n.17 (explaining even though section 107(a) imposes strict liability and does not require plaintiff to prove causation, defendant may raise causation as defense).

37. See CERCLA § 101(9), 42 U.S.C. § 9601(9). CERCLA section 101(9) defines "facility" as:

(A) Any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or

(B) Any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

Id. For the Sixth Circuit's holding in Brighton Township regarding whether the landfill qualified as a "facility," see supra note 31.

38. See CERCLA § 107(a), 42 U.S.C. § 9607(a). CERCLA section 107(a) provides for four categories of responsible "persons":

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of the disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, . . . of hazardous substances owned or possessed by such person . . . , and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities . . . from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance . . .

Id.

39. See CERCLA § 107(a)(4), 42 U.S.C. 9607(a)(4) (setting forth requirement of "a release, or a threatened release . . ."). CERCLA section 101(22) defines "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment . . . ." Id. § 101(22), 42 U.S.C. §§ 9601(22).
B. Operator Status of Governmental Entity

This Note focuses on the second of these requirements, which is the classification of a governmental entity as an operator under CERCLA section 107(a). Because a governmental entity is a “person” under section 101(21), it may be liable as an owner or operator under section 107(a) in the same way as a private entity. Thus,

40. See CERCLA § 107(a)(4), 42 U.S.C. §9607(a)(4) (stating requirement release or threatened release “cause[] the incurrence of response costs . . . ”). Although CERCLA does not specifically define the term “response costs,” it does define the terms “response” and “respond” to mean “remove, removal, remedy, and remedial action; all such terms (including the terms ‘removal’ and ‘remedial action’) include enforcement activities related thereto.” Id. § 101(25), 42 U.S.C. 9601(25) (footnote omitted).

41. This Note focuses on the “operator” category of “persons” CERCLA sections 107(a)(1) and (2) contain. See CERCLA § 107(a), 42 U.S.C. § 9607(a). CERCLA sections 107(a)(1)-(4) list the other categories of “persons,” including “owner” and “arranger.” Id. For the text of CERCLA section 107(a), see supra note 38.

This Note construes CERCLA section 107(a)(1) to mean the “owner or operator” of a facility. Confusion arises in interpreting CERCLA’s “owner” and “operator” provisions. CERCLA section 107(a)(1) imposes liability on the “owner and operator” of a facility. See CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1) (emphasis added). CERCLA section 107(a)(2), however, imposes liability on those who “owned or operated” a facility at the time of the disposal of the hazardous substances. See CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2) (emphasis added). This textual difference invites defendants to argue that liability attaches only if the current owner and the current operator are the same person. See John Copeland Nagle, CERCLA’s Mistakes, 38 WM. & MARY L. REV. 1405, 1413 (1997) (seizing on conflicts created by “and” and “or” variances in statutory language). Courts have consistently rejected this argument since CERCLA’s inception in 1980. See, e.g., Redwing Carriers, Inc. v. Saraland Apartments, Ltd., 94 F.3d 1489, 1497-98 (11th Cir. 1996) (finding “owner or operator” is proper interpretation of statute); United States v. Fleet Factors Corp., 901 F.2d 1550, 1554 n.3 (11th Cir. 1990) (inerring Congress’s failure to define term “owner and operator” in CERCLA proved use to be mistaken). Indeed, prior to 1995, textual arguments relying on the “owner and operator” language of CERCLA section 107(a)(1) failed in every case in which a CERCLA defendant raised it. See Nagle, supra, at 1413. The one case in which the argument was successful was reversed on appeal. See Redwing Carriers, 875 F. Supp. 1545, 1556 (S.D. Ala. 1995), aff’d in part and rev’d in part, 94 F.3d 1489, 1497-98 (11th Cir. 1996) (stating Eleventh Circuit interprets “owner and operator” as disjunctive).

42. See CERCLA § 101(21), 42 U.S.C. § 9601(21). CERCLA section 101(21) defines “person” as “an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body.” Id. See Pennsylvania v. Union Gas Co., 491 U.S. 1, 7-13 (1989); FMC Corp. v. United States Dep’t of Commerce, 29 F.3d 833, 840 (3d Cir. 1994)(en banc); Thiolek Corp. v. Department of Treasury, 987 F.2d 376, 382 (6th Cir. 1993); B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1199 (2d Cir. 1992) (explaining that governmental entity may be held liable under CERCLA sections 107(a) and 117(f) in same way as
a governmental entity may be liable based on either ownership of its own facility or, as in *Brighton Township*, operation of a privately-owned facility.\textsuperscript{43}

Although courts agree that a governmental entity may qualify as an operator, they have not set forth criteria to determine whether a governmental entity is to be held liable as an operator of a facility.\textsuperscript{44} Despite the difficulty inherent in doing so, courts generally use the same standards for a governmental entity as they do for a private entity in determining this.\textsuperscript{45} The two main tests courts use to determine operator liability of private and governmental entities are the "authority-to-control" test and the "actual control" test.\textsuperscript{46}

\textsuperscript{43} For cases illustrating that governmental ownership of a site may be the basis of liability, see *United States v. Allied Corp.*, Nos. C-83-5898-FMS, 1990 WL 515976, at *1-3 (N.D. Cal. April 25, 1990) (basing liability on federal ownership of military base); *New Jersey Dep't of Envtl. Protection and Energy*, 821 F. Supp. at 1004-05 (basing liability on municipal ownership of sanitary landfill). For illustration of the potential for governmental operation of a site to be the basis of such liability, see *United States v. Stringfellow*, 20 Envtl. L. Rep. 20,656 (C.D. Cal. Jan. 9, 1990) (basing liability on State of California's operation of hazardous waste site).

\textsuperscript{44} For cases highlighting courts' approval with holding both governmental and non-governmental entities liable as operators, see supra note 42. The confusion regarding what factors contribute to a finding of operator liability stems from CERCLA's circular definition of "operator" as "any person . . . operating such facility." CERCLA § 101(20)(A)(ii), 42 U.S.C. § 9601(20)(A)(ii). \textit{See also} FMC Corp. v. United States Dep't of Commerce, 29 F.3d 833, 843 (3d Cir. 1994) (stating CERCLA's definition of operator "gives little guidance to the courts in determining if a particular person or entity is liable as an operator"). Although the Court in *United States v. Bestfoods*, U.S.-, 118 S.Ct. 1876, 1887 (1998), provided lower courts with some guidance for determination of the operator status of a private entity, no uniform body of case law exists to guide courts in making the operator determination for a governmental entity. See Davison, supra note 33, at 75-78 (explaining lower courts have no "universal formula" for determining when person, especially governmental entity, is operator of facility under CERCLA sections 107(a)(1) or 107(a)(2)).

\textsuperscript{45} See Davison, supra note 33, at 70 (stating courts usually employ same totality-of-relevant-circumstances standard to determine liability of both governmental and private entities). \textit{See also} FMC Corp., 29 F.3d at 843 (applying operator criteria used in corporate context to governmental regulatory activity). Courts have not always found it easy, however, to apply the same operator standards. See Davison, supra note 33, at 70-71 (explaining courts have encountered difficulty in determining whether to hold governmental entities liable as PRPs on basis of governmental regulatory activities, involvement with private business facilities or cleanup of hazardous substances).

\textsuperscript{46} For use of the "authority to control" test, see *Nurad, Inc. v. William E. Hooper & Sons, Co.*, 966 F.2d 837, 842 (4th Cir. 1992) (stating authority to control,
The authority-to-control test holds liable those parties who have the authority to control a contaminated site's operations.\footnote{47} In contrast, the actual control test, which recently gained support from the United States Supreme Court in \textit{United States v. Bestfoods}, holds liable only those parties who actively control or participate in a site's operations.\footnote{48} In applying either of these tests, courts must balance CERCLA's purpose of making responsible parties pay for cleanup with the opposing interest in not creating unlimited liability for parties who were only remotely involved.\footnote{49} Thus, whether a court finds a governmental entity liable as an operator depends not
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not actual control, is appropriate standard); \textit{United States v. Fleet Factors Corp.}, 901 F.2d 1550, 1557-58 (11th Cir. 1990) (employing authority-to-control standard). For a discussion of the authority-to-control test, see infra note 47. For use of the “actual control” test, see \textit{Bestfoods}, ___ U.S. at ___, 118 S. Ct. at 1887 (indicating support for actual control test); \textit{Long Beach Unified Sch. Dist. v. Dorothy B. Godwin Cal. Living Trust}, 32 F.3d 1364, 1367 (9th Cir. 1994); \textit{FMC Corp.}, 29 F.3d at 843; \textit{United States v. Kayser-Roth Corp.}, 910 F.2d 24, 27 (1st Cir. 1990) (employing actual control test). For discussion of the actual control test, see infra note 48. For a definition of the authority-to-control test, see \textit{Nurad}, 966 F.2d at 842 (stating authority to control, not actual control, is appropriate standard). For cases adopting the authority-to-control test, see \textit{United States v. Carolina Transformer Co.}, 978 F.2d 832, 836-37 (4th Cir. 1992) (adopting authority-to-control test); \textit{Fleet Factors}, 901 F.2d at 1558 (using similar authority-to-control test used in \textit{Nurad} and \textit{Carolina Transformer} and holding “a secured creditor will be liable if its involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose”). \textit{Cf.} \textit{East Bay Mun. Util. Dist. v. United States Dep't of Commerce}, 948 F. Supp. 78, 92 (D.D.C. 1996) (specifying, in applying test, “[t]he authority to control must be specifically related to the control of waste disposal and "general authority to control operation of the facility is not the relevant legal standard"). For discussion forth new corporate operator definition in terms similar to those found in actual control test and analyzing whether lower court properly applied actual control test in parent-subsidiary context). In \textit{Bestfoods}, the United States Supreme Court indicated support for the “actual control” test: [U]nder CERCLA, an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility. To sharpen the definition for purposes of CERCLA's concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations. \textit{Id.} at ___, 118 S. Ct. at 1887.
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\footnote{47} See Davison, \textit{supra} note 33, at 78 (citing \textit{Reading Co.}, 155 B.R. at 908. Addressing the policy debate surrounding the question of whether to hold municipalities legally responsible for cleaning up landfills, one author explains: On one hand, if municipalities fail to [dispose] of waste, they create a potential health risk. On the other hand, if municipalities do [dispose of the waste], they potentially face millions of dollars in liability. . . . [M]unicipalities often are punished disproportionately by having to pay high damage awards resulting from the CERCLA liability scheme. Moreover, as the law is currently interpreted, there is very little municipalities.

\url{http://digitalcommons.law.villanova.edu/elj/vol10/iss2/3}
only upon which test the court uses, but also upon whether a finding of liability is consistent with CERCLA's goals.\textsuperscript{50}

\textbf{1. Authority-to-Control Test}

The defendant's authority to control a site's operations, regardless of whether the defendant exercises it, is the focus of the authority-to-control test.\textsuperscript{51} In \textit{Nurad, Inc. v. William E. Hooper & Sons, Co.}, the Fourth Circuit Court of Appeals used this test to hold tenant defendants not liable as operators.\textsuperscript{52} The \textit{Nurad} court based its decision on the defendants' lack of authority to control the operations or decisions regarding hazardous substance disposal at the site.\textsuperscript{53} As shown in \textit{Nurad}, the test thus ensures that a party who has the authority to cleanup a site, but declines to actually exercise it, will be held responsible for cleanup costs.\textsuperscript{54}

Further, the authority-to-control test allows a court to consider a defendant's actual control of a site as evidence of its authority to control, subject to one limitation; that is, a court may not make a showing of actual control a prerequisite for finding authority to control.\textsuperscript{55} The effect of this limitation is that a court may consider a commingling of actual control and authority-to-control facts only as

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\textit{can do to avoid liability, other than to hope that the waste deposited in the landfills is not hazardous.}\textsuperscript{Smith, supra note 8, at 594.}
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\textit{\textsuperscript{50. See Davison, supra note 33, at 78 (stating whether courts hold governmental entities liable depends upon test chosen and whether courts find governmental liability proper within CERCLA's purposes). See also FMC Corp., 29 F.3d at 840, 843 (discussing CERCLA's goals and concluding actual control test should be applied to determine operator status of governmental entity engaged in regulatory activities).}
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\textit{\textsuperscript{51. For discussion of the authority-to-control test, see supra note 47 and infra note 54 and accompanying text.}
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\textit{\textsuperscript{52. See Nurad, 966 F.2d at 842 (reasoning showing of actual control over facility is unnecessary for operator liability as long as authority to control is present).}
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\textit{\textsuperscript{53. See id. (stating district court properly found defendants not liable as operators due to lack of authority to control operations involving disposal of site's hazardous substances or contents of site's underground storage tanks).}
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\textit{\textsuperscript{54. See id. (stating test "properly declines to absolve from CERCLA liability a party who possessed the authority to abate the damage caused . . . but who declined to actually exercise that authority by undertaking efforts at a cleanup").}
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\textit{\textsuperscript{55. See id. (explaining court may consider defendant's actual conduct as evidence of authority to control but may not "inflate" item of evidence into "dispositive legal requirement"). See also City of N. Miami, Florida v. Berger, 828 F. Supp. 401, 409-10 (E.D. Va. 1993) (relying on Nurad to adopt authority-to-control test). In Berger, the undisputed facts showed that the defendant had "exercised direct and substantial control over the day-to-day operations of the landfill" and acted "essential[ly]" as an "on-site manager." Berger, 828 F. Supp. at 410. The Berger court held that, even though the exercise of actual control is unnecessary under the test the Fourth Circuit enunciated in Nurad and Carolina Transformer, it can constitute clear evidence of the defendant's authority to control the site. See id.}
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evidence of authority to control. For example, in Northwestern Mutual Life Insurance Co. v. Atlantic Research Corp. the District Court for the Eastern District of Virginia applied the authority-to-control test to hold a corporate entity liable as an operator of a facility. The defendant had authority to control because it leased portions of the facility where releases occurred and it had an official license to store and use radioactive materials on the property. The Northwestern court explained that the defendant’s actual control of other parts of the facility, including installation of underground storage tanks, maintenance of trailers, and storage of chemical waste, was further evidence of this authority.

By considering actual control as evidence of authority to control, a court’s application of the authority-to-control test may, in practice, stray from the goal of focusing solely on a defendant’s authority to control a site. This commingling of two types of evidence has led at least one court to explicitly adopt the actual control test in an effort to return to what it deemed to be the crux of the matter; that is, actual control. Although the circuit courts

56. For a discussion of the permissible use of facts that demonstrate actual control as evidence of authority to control, see supra note 55.

57. See Northwestern Mut. Life Ins. Co. v. Atlantic Research Corp., 847 F. Supp. 389, 397-98 (conferring operator status upon plaintiff who was lessor/occupier of site for having authority to control). The court in Northwestern explained that the authority-to-control test is based on the notion that an occupier or user of a facility who has the authority to control it must bear the responsibility of preventing environmental harm. See id. at 398.

58. See id. (clarifying that plaintiff “was not an innocent tenant, far removed from the area of contamination and powerless to effect remedial cleanup”). The Northwestern court added that in addition to having the authority to control the contaminated areas, the plaintiff also had actual control over the area and was directly participating in activities which contributed to the release of hazardous substances. See id.

59. See id. For a discussion of the use of actual control as evidence of an entity’s authority to control, see supra note 55 and accompanying text.

60. For a discussion of the goals of the authority-to-control test, see supra note 54 and accompanying text. Notably, one court’s departure from the authority-to-control test was so extensive it created a new hybrid test that combines both the actual control and authority-to-control tests. See United States v. Gurley, 43 F.3d 1188, 1193 (8th Cir. 1994) (adopting different test whereby court may not hold party liable as operator unless party “(1) had authority to determine whether hazardous wastes would be disposed of and to determine the method of disposal and (2) actually exercised that authority, either by personally performing the tasks necessary to dispose of the hazardous wastes or by directing others to perform those tasks”) (emphasis added). This test runs counter to the authority-to-control test’s goal of holding liable those parties who had the authority to control the site but who failed to act pursuant to that authority. See Nurad, 966 F.2d at 842.

are divided regarding which test to employ, more circuits now employ the actual control test than the authority-to-control test.62

2. Actual Control Test

Under the actual control test, a court will deem an entity an operator if the entity "play[s] an active role in running the facility, typically involving hands-on, day-to-day participation in the facility's management."63 The test requires an entity to exercise "substantial control" over the facility, which involves its active involvement in the facility's operations.64 The precise meaning of these terms, however, is often elusive.

operator, and Edward Hines Lumber Co. v. Vulcan Materials Co., in which the Seventh Circuit refused to impose liability upon a builder, and stated that the distinction between the two results was "an exceedingly fine line" because "[i]n neither of these cases did the result turn on unexercised 'authority'; it turned upon what the alleged operator actually did." Id. (citing Kaiser, 976 F.2d 1138 (9th Cir. 1992); Hines, 861 F.2d 155 (7th Cir. 1988)). The Washington court then concluded that "[a]ctive involvement in the activity that produces the contamination is what is required for 'operator' liability." Id.

62. For a list of cases in which the First, Third, Sixth, and Ninth circuits adopted the actual control test, see Brighton Township, 153 F.3d at 314; Long Beach Unified Sch. Dist. v. Dorothy B. Godwin Cal. Living Trust, 32 F.3d 1364, 1367 (9th Cir. 1994); FMC Corp., 29 F.3d at 843; Kayser-Roth Corp., 910 F.2d at 27. For a list of cases in which the Fourth and Eleventh Circuits adopted the authority-to-control test, see Nurad, 966 F.2d at 842; Fleet Factors Corp., 901 F.2d at 1558. Note also that the Court's Bestfoods operator definition comports in large part with the actual control test. See Bestfoods, ___ U.S. at ___, 118 S.Ct. at 1887 (formulating new operator definition for parent-subsidiary context). For the Court's definition of operator as stated in Bestfoods, see supra note 48.

63. Long Beach Unified Sch. Dist., 32 F.3d at 1367 (stating "[t]o be an operator of a hazardous waste facility, a party must do more than stand by and fail to prevent the contamination. It must play an active role in running the facility, typically involving hands-on, day-to-day participation in the facility's management"). See also United States v. Vertac Chem. Corp., 46 F.3d 803, 806 (8th Cir. 1995) (noting operator must actively run facility by managing daily activities). Debate, however, arises regarding whether these activities must relate to pollution-based activities or to general activities at the facility as a whole. Compare, e.g., Jacksonville Elec. Auth. v. Bernuth Corp., 996 F.2d 1107, 1110 (11th Cir. 1993) (stating Eleventh Circuit standards do not require individuals to actually control specific decisions to dispose of hazardous substances to be held liable as operator), with United States v. Gurley, 43 F.3d 1188, 1195 (8th Cir. 1993) (stating officer or shareholder of corporation can be found liable only when there exists actual control of disposal of hazardous substances at facility).

64. See FMC Corp., 29 F.3d at 833, 843 (extending actual control test from corporate field to governmental field). The court in FMC Corp. relied on its earlier holding in Lansford-Coaldale Joint Water Auth. v. Tonolli Corp. in finding that an entity will be liable under the actual control test if there is evidence that it exercised "substantial control" over the facility. FMC Corp., 29 F.3d at 843 (citing Lansford-Coaldale, 4 F.3d 1209, 1222 (3d Cir. 1993)). As the Lansford-Coaldale court stated, "[t]o be an operator requires more than merely complete ownership and the concomitant general authority or ability to control that comes with ownership. At a minimum [substantial control] requires active involvement in the activities of the
Courts have encountered tremendous difficulty in determining what activities demonstrate "substantial control" and "day-to-day control," especially in cases involving governmental regulation of privately owned facilities. Recently, in United States v. Bestfoods, the United States Supreme Court attempted to clarify the definition of "corporate operator." Rejecting CERCLA's definition of operator as "useless," the Court stated that the term should be given its "ordinary or natural meaning." An operator is thus "someone who directs the workings of, manages, or conducts the affairs of a facility." In the context of "environmental contamination," the Court stated that an operator must exercise such control over those operations pertaining specifically to the maintenance and disposal of hazardous waste. These standards comport with the traditional actual control test, even though the Court did not specifically designate them as such. Although Bestfoods clarified the operator defi-

65. For a discussion of the difficulty courts have encountered in finding operator status based on governmental regulation of a site, see Davison, supra note 33, at 83-98.

66. See generally United States v. Bestfoods, ___U.S.____, 118 S. Ct. 1876 (1998) (involving CERCLA liability between corporate entity and subsidiary and adopting actual control concepts for determining operator status applicable to both corporate and governmental entities). For further examples of application of the actual control test to both private and governmental entities, see Vertac, 46 F.3d at 806 (applying actual control test used in corporate setting to governmental entity); FMC Corp., 29 F.3d at 843 (discussing actual control test with regard to corporations and immediately applying those standards to governmental entity's activities at site); United States v. Iron Mountain Mines, Inc., 881 F. Supp. 1432, 1450 (E.D. Cal. 1995) (rejecting owners' allegations United States was operator of mine because owners did not allege United States had "'hands-on, day-to-day' management" of site or "controlled the cause of contamination . . . ". (quotations omitted)).

67. See Bestfoods, ___U.S. at ___, 118 S. Ct. at 1887 (citing Bailey v. United States, 516 U.S. 137, 145 (1995)). See also Edward Hines Lumber Co. v. Vulcan Materials Co., 861 F.2d 155, 156 (7th Cir. 1988) (stating "[t]he circularity [of CERCLA's operator definition] strongly implies . . . that the statutory terms have their ordinary meanings rather than unusual or technical meanings").

68. Bestfoods, ___U.S. at ___, 118 S. Ct. at 1887. For the text of the Bestfoods operator definition, see supra note 48. For further discussion of the Bestfoods holding, see infra notes 127-58 and accompanying text.

69. Id. (defining CERCLA liability as meaning "an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations"). Id.

70. See id. In Bestfoods, the district court had applied the actual control test to the parent corporation's relationship with the subsidiary, focusing on whether the corporation controlled the subsidiary's operations. See id. The Bestfoods Court disagreed with the district court's particular application of the test, explaining that the proper inquiry was not "whether the parent operated the subsidiary, but rather, whether the parent operated the facility." Id. In setting forth the proper
nition as it applies in the corporate context, it contributed little to courts' determination of operator liability of a governmental entity. 71 Questions regarding the meaning of actual control requirements, such as "substantial control" and "day-to-day control," therefore, remain in the governmental operator liability context. 72

3. Factors for Determining Actual Control

Courts vary regarding the factors they deem determinative of a governmental entity's operator status, particularly when the governmental entity is regulating a site. 73 While some courts hold that mere regulation of a site suffices to impose operator liability, other courts require more. 74 This section illustrates the different approaches courts take on the difficult issue of governmental operator liability.

At least one court has held that regulation alone is enough to impose liability upon a governmental entity. In FMC Corp. v. United States Department of Commerce, the Third Circuit Court of Appeals held that a governmental entity is liable under CERCLA section 107 when its regulatory activities are extensive enough to qualify it as an.

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71. See id. (discussing operator liability only in corporate context). Although the criteria set forth in the Bestfoods operator definition apply to the determination of the operator liability of a governmental entity, questions arise regarding the adequacy of a corporate definition's application to a governmental entity. See id. at 324 (Moore, J., concurring) (acknowledging courts should hold governmental and corporate operators similarly liable, however, policy considerations indicate governmental entities might require different factors or levels of satisfaction of corporate criteria). Even Judge Boggs, writing for the majority in Brighton Township, specifically addressed the difficulty of applying an operator definition intended for a "corporate honeycomb" to a governmental entity. See id. at 314. For an extensive discussion of the problems inherent in determining the operator liability of a governmental entity acting in a regulatory capacity, see Davison, supra note 33, at 85-98.

72. For an introduction to the difficulty found in applying corporate operator standards to a governmental entity, see supra note 71.

73. For a discussion regarding the lack of uniformity as to which factors qualify a governmental regulator as an operator, see infra note 87 and accompanying text.

74. See generally Davison, supra note 33, at 82-83 (explaining that although most courts hold regulatory activity alone is insufficient to render governmental entity liable, regulatory activity sometimes suffices if it amounts to "operation" for purposes of actual control test).
operator of a facility. In that case, the United States commissioned a privately-owned plant to make war products during World War II. The United States made most decisions regarding the plant's operation. The FMC Corp. court concluded that the United States' regulatory activities were "extensive enough" under the actual control test because the United States exerted substantial control over the facility's daily operations and policy decisions.

Conversely, other courts have held that a governmental entity should not be liable as an operator solely on the basis of regulatory activities. In United States v. Dart Industries, Inc., the Fourth Circuit Court of Appeals held that neither governmental regulatory activity, nor governmental failure to exercise regulatory authority, suffices to establish liability. The Dart court concluded that the South Carolina Department of Health and Environmental Control (DHEC) did not have operator status even though it inspected the site and approved applications for waste disposal at the site. The

75. See FMC Corp. v. United States Dep't of Commerce, 29 F.3d 833, 843-45 (3d Cir. 1994) (stating regulatory activity may be sufficient to impose operator liability upon governmental entity). The FMC Corp. court stated:

Just as the government can be liable for hazardous wastes created at a military base it owns, the government can be liable when it engages in regulatory activities extensive enough to make it an operator of a facility or an arranger of the disposal of hazardous wastes even though no private party could engage in the regulatory activities at issue.

Id. at 840.

76. See id. at 843.

77. See id. The United States determined the products that the facility would manufacture, controlled the supply of raw materials, supplied equipment for use in the manufacturing process, participated in the management of the labor force, had authority to remove workers, controlled the price of the product and controlled who would purchase the product. See id.

78. Id. (stating United States had both "'substantial control' over facility as well as 'active involvement in activities there'" (quotation omitted)).

79. See United States v. Dart Indus., Inc., 847 F.2d 144, 145 (4th Cir. 1988) (determining whether South Carolina Department of Health and Environmental Control (DHEC) should be deemed operator of Fort Lawn landfill site based on its regulatory activities there). For a discussion of Dart's holding, see Davison, supra note 33, at 86.

80. See id. at 146 (listing activities DHEC conducted at site). The Dart court explained:

DHEC approved or disapproved applications to store wastes at Fort Lawn, inspected the site, and required proper transportation of the wastes delivered to Fort Lawn. However, there is no allegation that DHEC went beyond this governmental supervision and directly managed Carolawn's employees or finances at the Fort Lawn site. Thus, this court finds that DHEC is not an owner or operator under [CERCLA].

Id.
Fourth Circuit based its decision on the fact that DHEC did not directly manage the waste site's employees or finances. 81

Likewise, in United States v. New Castle County, the Delaware District Court held that the state of Delaware was not liable as an operator when the state selected, planned, regulated and supervised a landfill. 82 The New Castle court listed the following factors as relevant to the determination of governmental operator liability:

Whether the person sought to be strapped with operator status controlled the finances of the facility; managed the employees of the facility; managed the daily business operations of the facility; was responsible for the maintenance of environmental control at the facility; and conferred or received any commercial or economic benefit from the facility, other than the payment or receipt of taxes. 83

Considering the totality of the circumstances, the New Castle court concluded that the state of Delaware was not liable because these factors were not substantially present. 84

When similar factors are substantially present, however, a court may be more inclined to impose operator liability upon a governmental entity for its regulatory activities. In United States v. Stringfellow, a special master held the state of California liable as an operator of a landfill based on the state's regulatory activities. 85

81. See id. (expressing approval of district court's finding DHEC's activities were "merely 'a series of regulatory actions'" (citation omitted).

82. See United States v. New Castle County, 727 F. Supp. 854, 869 (D. Del. 1989). The State of Delaware's regulatory activities included selection of the site for the landfill, planning and design of the landfill and its operations, determining types of wastes to be disposed of at the site, issuing a permit for the landfill, requiring site users to submit periodic reports to the state and monitoring the site to ensure compliance with landfill regulatory standards. See id. at 862.

83. Id. at 869 (noting list of factors is not exclusive and courts should decide each case based on "unique factual situation presented"). Importantly, the factors the New Castle court set forth include more types of activities than those the Dart court previously set forth. Compare New Castle, 727 F. Supp. at 869 (listing site selection and planning, decisions regarding types of waste to dispose, issuing permits and monitoring site as determinants of operator liability), with Dart, 847 F.2d at 146 (listing only management of employees and finances as criteria for operator liability).

84. See New Castle, 727 F. Supp. at 869 (adding State of Delaware should not be held liable as operator merely because its regulatory program may have been more inclusive than another state's program). The New Castle court concluded that despite CERCLA's goals, operator liability should not be overly expansive because "statutes have not only ends but also limits,' and the limits of operator status do not encompass [these] actions. . . .." Id. at 870 (quoting Edward Hines Lumber Co. v. Vulcan Materials Co., 861 F.2d 155, 157 (7th Cir. 1988)).

The state had actual control over the facility because it chose the landfill's location, designed and built the landfill, hired and supervised the employees responsible for day-to-day operations, and set the job responsibilities for each of these employees.86

The lesson of these cases is evident. Despite the seemingly clear rule that a governmental entity must have actual control over a facility’s daily operations to be held liable as an operator, courts differ greatly as to what factors should be determinative of this day-to-day control.87

IV. NARRATIVE ANALYSIS

A. The Opinion of the Court

The Sixth Circuit’s Brighton Township decision consisted of three opinions: Judge Boggs, writing for the majority; Judge Moore, concurring; and Judge Dowd, dissenting.88 In the majority opinion, Judge Boggs set forth several broad standards to guide a determination of governmental operator liability.89 First, Judge Boggs extended the use of the actual control test from the corporate context to a case involving a governmental entity-defendant.90 Beginning exceeded regulatory responsibilities by “regularly visiting the site, hiring employees, making operational decisions, and controlling waste dumping”).

86. See FMC Corp. v. United States Dep't Commerce, 29 F.3d 833, 844 (3d Cir. 1994). (recounting facts Stringfellow court found dispositive). The Stringfellow court held that the special master correctly decided that the state negligently selected, investigated, designed and inspected the site. See Stringfellow, 20 Env't L. Rep. at 20,656. The court based its conclusion on the state’s failure to conduct soil, core or other tests to locate the waste. See id.

87. For a discussion of how courts differ regarding the factors that should determine the actual control test's requirement of day-to-day control, see supra notes 73-86 and accompanying text. See also United States v. Brighton Township, 153 F.3d 307, 326 (6th Cir. 1998) (Moore, J., concurring) (recognizing “[c]ourts seeking to determine whether a government entity maintained 'substantial control' over a facility generally look at whether the state exercised 'considerable day-to-day control' or 'hands-on' control. Unfortunately, courts differ as to what circumstances amount to day-to-day control.” (quoting FMC Corp., 29 F.3d at 844)).

88. See Brighton Township, 152 F.3d 307.

89. See id. at 314-16.

90. See id. at 314. Judge Boggs distinguished the corporate-form cases in which the test had been used as “not directly applicable” in this case because corporate and governmental control of a facility are “vastly different.” Id. See generally Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489 (11th Cir. 1996) (adopting actual control test); United States v. Kayser-Roth Corp., 910 F.2d 24 (1st Cir. 1990) (employing actual control test).

Judge Boggs reasoned that “[t]he task of placing responsibility for an action in one or more cells of a corporate honeycomb is vastly different than evaluating . . . the responsibility of a single entity in a vacuum, especially in the context of a strict liability statute.” Brighton Township, 153 F.3d at 314. According to Judge Boggs, however, these cases highlighted the importance of establishing “some actual con-
his analysis with the Court’s “sensible” *Bestfoods* definition of operator, Judge Boggs explained that the ordinary meaning of “to operate” includes the “direction of a facility’s activities.”

Second, Judge Boggs addressed the question, previously raised in *Nurad, Inc. v. William E. Hooper & Sons, Co.*, of whether a failure to act suffices to render a governmental entity liable as an operator. The *Nurad* court held that it does not suffice, explaining that actual control requires a showing of affirmative acts. Judge Boggs agreed with the *Nurad* court, and, further, stressed that once a defendant’s affirmative acts demonstrate actual control, a defendant is liable for all of the resulting harm, whether from omissions or affirmative acts.

Third, Judge Boggs examined the Third Circuit’s holding in *FMC Corp. v. United States Department of Commerce* that a governmental entity may be liable “‘when it engages in regulatory activities extensive enough to make it an operator of a facility.’” He explained that a court’s task is to distinguish between governmental regulation of a landfill exercised as a “conventional police power” and supported the *Bestfoods* mandate that a defendant perform some affirmative acts before it may be liable as an operator. See id.

91. *Brighton Township*, 153 F.3d at 314. Judge Boggs discussed the “circular” definition of CERCLA that the *Bestfoods* Court faced and found the Court's approach “sensible” for defining the term “operator” by its ordinary meaning. *Id.* Judge Boggs quoted from *Bestfoods*, acknowledging that “[w]hen [Congress] used the verb ‘to operate,’ we recognized that the statute obviously meant something more than mere mechanical activation of pumps and valves, and must be read to contemplate ‘operation’ as including the exercise of direction over the facility’s activities.” *Id.* (quoting *Bestfoods*, U.S. at __, 118 S. Ct. at 1889). See also Edward Hines Lumber Co. v. Vulcan Materials Co., 861 F.2d 155, 156 (7th Cir. 1988) (stating “circularity” of CERCLA operator definition implies “statutory terms have their ordinary, rather than unusual or technical meanings”).

92. See *Nurad, Inc. v. William E. Hooper & Sons, Co.*, 966 F.2d 837, 842 (4th Cir. 1992) (holding liable defendants possessing authority to abate damage improper disposal caused but declining to actually exercise authority by instituting cleanup). Judge Boggs stated that although the Sixth Circuit declined to adopt the Fourth Circuit’s authority-to-control test, *Nurad* accurately raised the issue of the effect of failure to act on liability. See *Brighton Township*, 153 F.3d at 315.

93. See id.

94. See id. Judge Boggs explained that once affirmative acts render a party an operator, that party may not claim later that it was not responsible for the particular hazard its actions caused. See id. A contrary holding would allow operators to escape liability despite their negligent management of their facilities and would defeat the strict liability scheme of CERCLA section 107(a). See id. Judge Boggs also noted that the township is barred from asserting the defense that the act or omission of a third party caused the harm, since the defense excludes those third parties to whom the operator is contractually bound. See id. at 315 n.8.

95. *Id.* at 315 (quoting FMC Corp. v. United States Dep’t Commerce, 29 F.3d 833, 844 (3d Cir. 1999)). For a discussion of the Third Circuit’s holding in *FMC Corp. v. United States Department of Commerce*, see supra notes 64, 75-78 and accompanying text.
and governmental macromanagement of a landfill disguised as "regulation." Judge Boggs, however, refused to adopt any particular factors a court must consider in making this distinction, asserting that it is a fact intensive inquiry that can only be decided on a case-by-case basis. Accordingly, he remanded the case to the district court to decide the issue, using his opinion as guidance.

B. Judge Moore's Concurrence

Writing separately to address the policy considerations involved in determining the operator status of a governmental entity, Judge Moore concluded that a governmental entity should be held liable as an operator if it asserts actual control over the pollution-related activities at a facility. Judge Moore explained that, despite

96. Id.

97. See id. at 315 n.9 (acknowledging although some of Judge Moore's factors may aid in making operator determination, "[p]recisely because this is a fact-intensive inquiry, district courts should not feel bound to weigh any factors that do not apply to the facts of their particular case"). Judge Boggs continued:

All too often, lower courts transform our suggestions into requirements. No court should feel bound by the list of factors the concurrence has provided, helpful though it is. Rather, courts should see if the plain language of the statute applies – that is, whether the defendant is an 'operator' – and should look to the results we and others have reached, and to the facts we have found most dispositive in reaching them. What courts should not do... is take a list of reasons why the facts in one case led the court to a particular result, and transform it into a mechanical checklist of narrow and rigid factors.

Id. (citation omitted).

98. See Brighton Township, 153 F.3d at 315-16. Judge Boggs identified several facts in explaining why he could not conclude as a matter of law that the township was not an operator. See id. at 315. First, the record showed that the agreement between Vaughan Collett and the township required the landfill to meet the Board of Appeals' specifications. See id. Second, the township repeatedly made ad hoc appropriations to the landfill and arranged for bulldozing and other maintenance when either of the Colletts could not perform the task himself. See id. at 316. Third, the township assumed responsibility for improving the site's condition both before and after state scrutiny, even as early as 1965. See id.

Although Judge Boggs was "sympathetic" to the township's problem, he found "no basis [ ] to conclude that the township was somehow forced to take such direct responsibility and action." Id. Judge Boggs indicated that if the township had been amenable to spending more funds in the 1960s and 1970s, it could have avoided liability by disposing of its waste elsewhere and by cleaning up the landfill site. See id.

99. See id. at 323-28 (Moore, J., concurring). She then added a list of factors that should guide a court's determination of operator liability for a governmental entity. See id. at 327. For a list of these factors, see infra note 113 and accompanying text.

Although Judge Moore clearly stated that control over pollution-related activities is a prerequisite for governmental operator liability, she did not clarify whether actual control over a facility's general activities is also required. See id. at 323-28. In one portion of her concurrence she indicates that only control over pollution-related activities is necessary because "[a] governmental entity may maintain a sig-
CERCLA's mandate that courts are to treat governmental entities in the same manner as private entities for liability purposes, CERCLA does not state whether the same level of control over a facility renders both governmental and private entities liable.  

In determining whether the same level of control should apply to both, Judge Moore identified several competing policies. One policy favors the prevention of courts' hindrance of governmental regulation of hazardous waste sites. The opposing policy pro-

significant degree of control over a facility's treatment of hazardous waste without 'hands-on' involvement in a facility's [general] activities." Id. at 327. In another portion, however, she expresses support for courts that adopt a "broader notion" of defining "'actual control' to encompass not only the micromanaging of a facility's pollution activities, but also macromanaging a facility's operations." Id. (footnote and citations omitted). Each statement contradicts the other as to whether actual control over the facility's general activities is an additional requirement for liability to attach. There are several indications in Judge Moore's concurrence, however, of her view that actual control over a facility's general operations is not an additional requirement.

First, Judge Moore emphasizes that a governmental entity can have a great degree of control over a facility's pollution-related activities despite the fact that it does not control the facility's general operations. See id. Second, she advocates that courts adopt a "broad conceptualization" of the meaning of actual control, but refers to the dual requirement of both general and pollution-related activities as a "broader notion" utilized by courts. Id. (emphasis added). Focusing solely on the language of these two juxtaposed sentences, it may be that Judge Moore thought the dual requirement was a "broader" notion than what she would require. Finally, the factors Judge Moore set forth are specifically pollution-related and are meant "to determine whether the regulatory activities of a governmental entity went beyond mere regulation and amounted to macromanagement of the facility in question." Id. For purposes of this Note, however, it is necessary only to identify that governmental operator liability turns on whether the governmental entity exerts actual control over a facility's pollution-related activities.

100. See id. at 323-24. Despite CERCLA's directive that courts treat governmental and non-governmental operators alike for liability purposes, "the statute is silent as to whether the same threshold of control over a facility renders both a governmental entity and a non-governmental entity an operator." Id. at 324. Judge Moore added that "[a] governmental entity responsible in part for the release or threatened release of hazardous substances from a facility 'shall be subject to the provisions of [CERCLA] in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607.'" Id. at 323-24 (quoting CERCLA § 101(20)(D), 42 U.S.C. § 9601(20)(D)). For a more complete discussion of the coextensive liability of governmental and non-governmental entities, see supra note 42.

101. See id. at 324 (noting policy considerations indicate inadvisability of considering same factors similarly where governmental conduct occurs in regulatory context). But see FMC Corp. v. United States Dep't of Commerce, 29 F.3d 833, 843 (3d Cir. 1994) (emphasizing governmental and non-governmental entities share same status as potentially responsible parties and applying corporate factors to both).

102. See Brighton Township, 153 F.3d at 324 (explaining because public entrusts governmental entities with regulatory power as guardians of health, safety and welfare, courts should avoid inhibiting governmental regulation of facilities). Judge Moore emphasized that governmental regulation is becoming increasingly necessary to remedy environmental problems involving hazardous waste release.
motes CERCLA's broad remedial purpose of holding all responsible parties liable. Judge Moore stated that a court must balance both interests in imposing operator status upon a governmental entity.

After criticizing the majority's opinion for failing to define a clear actual control standard for governmental regulatory activity, Judge Moore identified factors based on recent case law that should comprise an actual control standard. First, she rejected the approach of the Delaware District Court in *United States v. New Castle County*, in which a governmental entity must engage in "far-reaching" activities at a facility before it will be deemed an operator.

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See id. As such, "courts should take care not to inhibit unduly the regulatory activities" of governmental entities and should consider the "possibility that 'widespread state liability may have a chilling effect on long-term remedial efforts, since states may be unwilling to act when CERCLA liability is sure to be imposed.'" *Id.* (quoting Janeen Olsen, Comment, *Defining the Boundaries of State Liability Under CERCLA Section 107(a)*, 2 Vill. Envtl. LJ. 183, 204 (1991)).

103. See id. at 324-25. Judge Moore stated that a court cannot ignore CERCLA's legislative history, which "makes clear that 'Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created.'" *Id.* (quoting Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986)).

104. See id. at 325 (stating "our task of identifying when a governmental entity becomes an operator requires us to balance carefully CERCLA's broad remedial purpose against concerns of deterring state involvement in regulating hazardous waste management and clean-up").

105. See id. (agreeing actual control test should apply, but expressing disapproval with majority’s and dissent’s opinion because unclear standards failed to provide lower courts with direct guidance regarding when governmental regulatory activities are extensive enough to impose operator status upon governmental entity). Before beginning her discussion of the factors that should determine operator status, Judge Moore indicated her agreement with the majority’s adoption of the actual control test, its rejection of the authority-to-control test and Judge Boggs’ assertion that once a governmental entity engages in affirmative acts of operating a facility, any subsequent omissions will be grounds for liability as well. See id.

Then, Judge Moore established the basic elements of actual control. See id. at 325-26. She stated that “[a] governmental entity exercises actual control over a facility where its involvement extends beyond ‘mere regulation’ and amounts to ‘substantial control’, or ‘active involvement in the activities’ at the facility.” *Id.* at 325 (quoting *FMC Corp.*, 29 F.3d at 843; United States v. Vertac Chem. Corp., 46 F.3d 803, 808 (8th Cir. 1995)). Judge Moore emphasized that, under *Bestfoods*, these activities must be specifically related to pollution. See id., 153 F.3d at 326-27. The actual control “standard ‘requires a fact-intensive inquiry’ and consideration of the ‘totality of the circumstances.’” *Id.* (quoting *Vertac*, 46 F.3d at 808; United States v. New Castle County, 727 F. Supp. 854, 864-870 (D. Del. 1989)). Judge Moore concluded by stating that although courts will uniformly look for “considerable day-to-day control” or “hands on” control, “unfortunately, courts differ as to what circumstances amount to day-to-day control.” *Id.* (citations omitted).

106. See id. (citing *New Castle*, 727 F. Supp. at 866-67). Judge Moore stated that the *New Castle* approach “essentially equat[es] substantial control with main-
Judge Moore concluded that the New Castle approach was too lenient on governmental entities because it finds a governmental entity liable only if the entity profited commercially from the involvement.\textsuperscript{107} She explained that such a requirement effectively creates a forbidden regulatory exception to CERCLA liability.\textsuperscript{108} Judge Moore continued by rejecting the approach adopted in United States v. Dart Industries, Inc. because it too narrowly defined “hands-on control” as direct management of the facility’s employees or finances.\textsuperscript{109} She explained that this approach frustrates CERCLA’s remedial purpose by shielding governmental entities from liability even when they exercise significant control over pollution-based activities.\textsuperscript{110}
Judge Moore thus concluded that a “broad conceptualization” was necessary. She insisted that a governmental entity should be deemed an operator only if it asserts actual control over the facility's pollution-related activities. Further, she listed the factors courts should consider when determining whether the governmental entity exercises actual control over pollution-related activities, such as the government's knowledge of environmental dangers, participation in design, opening and closing of the facility, and monitoring of hazardous waste disposal. Judge Moore emphasized that this standard prevents a governmental entity from escaping liability merely because it neither hires and supervises employees nor makes financial decisions for the entity as a whole.

C. Judge Dowd’s Dissent

In his dissenting opinion, Judge Dowd interpreted United States v. Bestfoods to mean that operator liability attaches only if the governmental entity managed the facility's day-to-day activities. Under this standard, Judge Dowd concluded that the majority

111. See id. at 327 (reasoning governmental entity may have much control over facility's pollution treatment without “hands-on involvement” in facility's activities). Judge Moore supported a “broad conceptualization” of actual control “in order to strike the appropriate balance between CERCLA's remedial purpose and concerns over chilling regulatory efforts in the hazardous waste arena.” Id.  

112. See id. at 327. For a discussion of Judge Moore's emphasis on pollution-based activities as a requirement for governmental operator liability, see supra note 99 and accompanying text. 

113. See id. The following is the complete list of Judge Moore's factors: [T]he government’s expertise and knowledge of the environmental dangers posed by hazardous waste, establishment and design of the facility, participation in the opening and closing of a facility, hiring or supervising employees involved in activities related to pollution, determination of the facility's operational plan, monitoring of and control over hazardous waste disposal, and public declarations of responsibility over the facility and/or its hazardous waste disposal.  

Id. (echoing six of eleven factors listed in United States v. Stringfellow, 20 Envtl. L. Rep. 20656, 20658 (C.D. Cal. Jan.9, 1990)). Judge Moore emphasized that these factors are not exhaustive, nor does any one factor necessarily suffice to render a governmental entity liable as an operator. See id. She added that district courts should weigh these factors along with any others that indicate actual control over a facility’s hazardous waste operations to determine whether the governmental entity’s regulatory activities “went beyond mere regulation and amounted to macromanagement of the facility in question.” Id. For a discussion of these factors' shortcomings, see infra notes 137-40 and accompanying text. 

114. See Brighton Township, 153 F.3d at 327 (clarifying her position, Judge Moore stated, "[a] governmental entity may maintain a significant degree of control over a facility's treatment of hazardous waste without 'hands on' involvement in a facility's activities"). 

115. See id. at 333 (Dowd, J., dissenting).
should not have found the township liable as an operator of a facility.  

Initially, Judge Dowd explained that a court should not find a governmental entity liable based on a low threshold of control. He pointed to the “narrow holding” in Bestfoods which provides that, within the corporate context, activities which involve the facility but are consistent with the parent’s status (such as monitoring performance, supervising finance decisions and stating general policies and procedures) do not give rise to operator liability. Judge Dowd applied this standard to find the township’s actions insufficient to render it liable as an operator. Judge Dowd then examined the pertinent case law and concluded that only if a governmental entity manages the day-to-day activities of the facility should a court find it liable. Relying on the elements the courts in FMC Corp., Dart and New Castle used, Judge Dowd stated that the requisite high level of control over day-to-day operations includes

116. See id. (agreeing with court’s adoption of actual control standard for Sixth Circuit but stating final judgment should be for township because activities did not equate to actual control under Bestfoods standard).

117. See id. In Judge Dowd’s view, Bestfoods requires that a governmental entity meet a higher threshold of control before a court can deem it an operator. See id.

118. See id. The Bestfoods “narrow holding” provides:

“[A]ctivities that involve the facility but which are consistent with the parent’s investor status, such as monitoring of the subsidiary’s performance, supervision of the subsidiary’s finance and capital budget decisions, and articulation of general policies and procedures, should not give rise to direct liability.” (citation omitted). The critical question is whether, in degree and detail, actions directed to the facility by an agent of the parent alone are eccentric under accepted norms of parental oversight of a subsidiary’s facility. United States v. Bestfoods, ___ U.S. at ___, 118 S. Ct. 1876, 1889 (1998) (citation omitted).

119. See Brighton Township, 153 F.3d at 333. First, Judge Dowd explained that although Bestfoods specifically addressed the operator question in the corporate context and Brighton Township involved the liability of a governmental entity, the Sixth Circuit should apply Bestfoods “narrow holding.” Id. Judge Dowd then concluded that the township’s actions were insufficient to render it liable as an operator because the actions were consistent with its role as a regulator under the Bestfoods “narrow holding.” Id. at 334. For a discussion of the Bestfoods “narrow holding” see supra note 118.

120. See id. Judge Dowd relied on the following cases in making his conclusion: FMC Corp., 29 F.3d at 844 (holding United States liable as operator because of “considerable day-to-day control” over production process, building and controlling plants, supervising employee conduct, supplying machinery and controlling product marketing and price); Dart, 847 F.2d at 146 (finding no operator liability where government entity did not directly manage waste site’s employees, finances, or daily activities); New Castle, 727 F. Supp. at 870 (finding no state liability as operator where periodically inspected site and mandated some details of soil construction and compaction, but did not manage landfill’s day-to-day operations).
hiring and supervising the facility’s employees and controlling its financial decisions.\textsuperscript{121}

Judge Dowd thus refused to hold the township liable as an operator because the township did not hire the employees at the landfill, did not have the authority to supervise or fire them, and did not manage the landfill’s finances.\textsuperscript{122} Although the township arguably maintained a degree of regulatory control over the facility, according to Judge Dowd, these regulatory activities alone could not create liability without evidence of day-to-day management.\textsuperscript{123} Judge Dowd supported his position with the district court’s explicit findings that Collett, not the township, managed the daily operations of the facility and that the township did not exercise its control over the facility on a daily basis.\textsuperscript{124}

V. CRITICAL ANALYSIS

The existence of three different opinions from a three-judge bench illustrates that the Sixth Circuit did not solve the governmental operator mystery through its decision in \textit{Brighton Township}. This result stems from the Sixth Circuit’s inadequate application of the \textit{Bestfoods} operator standard, a task which has now become the re-

\textsuperscript{121}. \textit{See} \textit{Brighton Township}, 153 F.3d at 334. Judge Dowd noted that although these cases were decided before \textit{Bestfoods}, they are in complete agreement with the \textit{Bestfoods} holding that an operator must “direct[,] the workings of, manage[,] or conduct[,] the affairs of a facility.” \textit{Id}. (citation omitted).

\textsuperscript{122}. \textit{See} \textit{id}. at 334. In pertinent part, the district court found that the Colletts maintained the daily operations of the landfill by setting hours of operation, directing residents where to dump different kinds of trash, deciding where and when to bury or burn trash, and charging dumping fees to non-residents. \textit{See id}. The findings state that the township did not exercise its control over the facility on a daily basis. \textit{See id}. Relying on the minutes of the Board meetings, however, the district court found sufficient evidence that the township did maintain actual control over operations at the dump. \textit{See id}. Although the district court found that the township exercised actual control over the facility, Judge Dowd focused on the lack of evidence of its daily control over the facility. \textit{See id}. Specifically, Judge Dowd noted that the record was void of any evidence that the township hired or managed the facility’s employees or directed its finances. \textit{See id}.

\textsuperscript{123}. \textit{See} \textit{id}. Judge Dowd stated that \textit{Brighton Township}’s giving Collett the permit to open the landfill and keeping the authority to “supervise” the facility did not “give rise to a finding of actual control in the absence of evidence of day-to-day management.” \textit{Id} (citing \textit{Bestfoods}, ___ U.S. at ___, 118 S. Ct. at 1889).

\textsuperscript{124}. \textit{See} \textit{id}. at 335. In addition, Judge Dowd dissented from the scope of the majority’s remand. \textit{See id}. The majority affirmed certain fact findings that the district court purportedly made. \textit{See id}. Judge Dowd concluded that “[t]hese ‘findings’ that the majority ‘affirms,’ . . . are not restricted to the actual findings of fact made by the district court, but rather include some ‘findings’ made by the majority after its own review of the testimony given at the three-day bench trial.” \textit{Id}. Judge Dowd stressed that an appellate court may not engage in such fact finding and must restrict its review to the district court’s fact findings. \textit{See id}.  

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sponsibility of the lower courts. This section discusses the court’s failure to determine whether, under Bestfoods, CERCLA operator status for governmental entities is based on either pollution-related activities or day-to-day control of the facility’s general activities.

A. Different Interpretations of Bestfoods

In Bestfoods, the Court defined who qualifies as an operator under CERCLA. The first part of the Bestfoods operator definition states that an operator is one “who directs the workings of, manages, or conducts the affairs of a facility.” The next part of the definition specifies that “an operator must manage, direct, or conduct operations specifically related to pollution. . . .” Despite the ostensible clarity of this definition, the Sixth Circuit formulated three distinct interpretations of the term “operator.”

Judge Boggs’ majority opinion focused solely on the first part of the Bestfoods operator definition. For Judge Boggs, the crucial issue mirrored that of Dart and New Castle, that is, whether the government “was running the facility or merely regulating it.”

125. See Bestfoods, ___ U.S. at ___, 118 S. Ct. at 1887. At issue in Bestfoods was whether a parent corporation could be held liable as an operator under CERCLA for the costs of cleaning up industrial waste its subsidiary generated. See id. at ___, 118 S. Ct. at 1881. Importantly, Bestfoods did not address the operator liability of a governmental entity based on its regulation of a privately-owned facility. See id. In Brighton Township, the Sixth Circuit applied the Bestfoods standard to the governmental regulation of a privately-owned facility, but it failed to set forth substantial factors to guide the analysis. See Brighton Township, 153 F.3d at 315. The Sixth Circuit vacated the district court’s decision and remanded for further proceedings consistent with the majority opinion’s actual control standards. See id.

126. See supra notes 3-4 and accompanying text. In her concurrence, Judge Moore raised a second, and corollary, issue that was present in Brighton Township. If operator status is strictly dependent upon pollution-related activities, what is the requisite level of control that must be exerted over these activities? See Brighton Township, 153 F.3d at 327 n.6 (discussing Bestfoods and stating Court “left open the question of whether participation in a facility’s pollution-related operations must involve substantial day-to-day control in order to hold a party liable as an operator for response costs”).

127. See Bestfoods, ___ U.S. at ___, 118 S. Ct. at 1887.

128. Id. For the text of the operator definition the Bestfoods Court set forth, see supra note 48.

129. Id.

130. See Brighton Township, 153 F.3d at 314. Indeed, at no point in his opinion did Judge Boggs state a requirement that a facility’s activities must be specifically related to pollution. See id. at 313-16. For a discussion of Judge Boggs’ opinion, see supra notes 88-98 and accompanying text.

131. Id. at 316 n.11. Although the crucial issue was the same in the three cases, Judge Boggs distinguished Brighton Township from Dart and New Castle by highlighting that the township took “hands-on, non-regulatory action distinct from that of the entities in Dart and New Castle.” Id. He also emphasized that although
government's regulation of the facility was so extensive as to constitute "macromanagement" of the facility, then the court would deem the governmental entity an operator. By framing the issue in this manner, Judge Boggs implicitly adopted the view that the governmental entity must exert control over the activities of the facility as a whole, not solely over pollution-related activities to be held liable as an operator. Judge Dowd also relied solely on the first part of the Bestfoods definition in concluding that control over day-to-day activities of the facility as a whole is the key to operator liability.

Judge Moore's dissenting opinion, however, focused on both parts of the Bestfoods operator definition. She concluded that a governmental entity exercises actual control over a facility when its involvement exceeds regulation and amounts to active participation in the facility's pollution-related activities. Additionally, Judge Moore noted that Bestfoods failed to specify the requisite level of

the facts of Brighton Township are more like Dart than FMC Corp., the court should not split the differences and similarities between two cases from other jurisdictions. See id. Instead, the court should state the law and apply it to the facts of Brighton Township. See id. For a discussion of the facts of FMC Corp., see supra notes 75-78 and accompanying text. For a discussion of the facts of Dart, see supra notes 79-81 and accompanying text. For a discussion of the facts of New Castle, see supra notes 82-84 and accompanying text.

132. See id. at 315 (citing FMC Corp., 29 F.3d at 840). Judge Boggs explained that as a result of FMC Corp., "a governmental entity, by regulating the operation of a facility actively and extensively enough, can itself become an operator." Id. (citation omitted). According to Judge Boggs, the court's "task is to distinguish (1) situations in which a governing authority uses its conventional police power to ensure that a dump does not pose a threat to public health and safety; from (2) situations in which the 'regulations' are just the government's method of macromanaging the facility." Id. (footnote omitted).

133. See id. at 315. Although it is unclear, Judge Boggs seems to indicate that control over pollution-related activities is evidence of only control over general activities. See id. This inference is drawn from the fact that Judge Boggs discusses only general activities of control throughout his opinion. See id. When reviewing the district court's fact findings and explaining why he could not conclude that the township was not an operator, however, Judge Boggs cites Bestfoods as defining the term "operator" to "include [an] entity that makes 'decisions about compliance with environmental regulations.'" Id. at 316 (citation omitted).

134. See id. at 333-34. For Judge Dowd's adoption of the actual control test and interpretation of case law prior to Brighton Township, see supra note 121 and accompanying text. For a discussion of Judge Dowd's dissent, see supra notes 115-24 and accompanying text.

135. See Brighton Township, 153 F.3d at 325-28 (Moore, J., concurring).

136. See id., 153 F.3d at 325. Judge Moore added that Bestfoods requires these activities to be "specifically related to pollution." Id. (citing Bestfoods, ___ U.S. at __, 118 S. Ct. at 1887). For a discussion of Judge Moore's concurrence, see supra notes 99-114 and accompanying text. For a discussion of whether Judge Moore would additionally require that actual control be exerted over a facility's general operations, see supra note 99.
control an entity must exert over a facility's pollution-related activities to be held liable as an operator. However, she did not provide an explicit standard. Instead, she set forth several factors trial courts should consider in determining the operator liability of a governmental entity, including whether the government knows of the facility's environmental problems, hires and supervises employees whose jobs relate to pollution, monitors the disposal of hazardous waste or takes public responsibility for the site's hazardous waste disposal. Judge Moore thus avoided the task of determining the requisite level of control over pollution-related activities by setting forth factors that courts may consider at their discretion.

B. Potential Reasons For Different Interpretations of Bestfoods

1. Difficulty in Making Case Law Comport With Bestfoods

One potential reason for the Sixth Circuit's divergence in Brighton Township is the difficulty inherent in applying the factors amounting to actual control in the existing case law to the new-improved Bestfoods standard. Decisions prior to Bestfoods relied mainly on the level of control exerted over a facility's operations as a whole and made no distinction for specific pollution-based activities. Bestfoods introduced the more specific pollution-related re-

137. See id. at 327 n.6 (noting Bestfoods Court did not decide "whether participation in a facility's pollution-related operations must involve substantial day-to-day control in order to hold a party liable for response costs"). For further mention of this question left unanswered by the Brighton Township court, see supra note 126.

138. See id. at 327, n.6 (observing Bestfoods left question unanswered and turning discussion toward new area).

139. See Brighton Township, 153 F. 3d at 327.

140. For the complete list of factors Judge Moore set forth and a discussion of the discretion trial courts have in using them, see supra note 113 and accompanying text.

141. See Bestfoods, ___ U.S. ___, 118 S. Ct. 1876 (representing most recent expression on issue of operator liability). In Bestfoods, the Court emphasized the importance of courts' focusing on the proper relationship between a proposed operator and its subsidiary or subservient entity when applying the actual control test. See id. at ___, 118 S.Ct. at 1887. The Court explained that courts must focus on the proposed operator's pollution-related activities at the facility run by the subsidiary or subservient entity, rather than on the proposed operator's control over the management of its subsidiary or subservient entity. See id. (emphasis added). For a discussion of the Bestfoods holding, see supra notes 66-71 and accompanying text. For an analysis of the differences between the Bestfoods holding and pre-existing case law, see infra note 142 and accompanying text.

142. See Long Beach Unified Sch. Dist. v. Dorothy B. Godwin California Living Trust, 32 F.3d 1364, 1367 (9th Cir. 1994) (stating "[t]o be an operator . . . a party must do more than stand by and fail to prevent the contamination. It must play an active role in running the facility, typically involving hands-on, day-to-day participation in the facility's management."); FMC Corp. v. United States Dep't of
quirement. The current confusion regarding whether the requirement is actual control over activities as a whole or over pollution-based activities may thus be a result of this development.

2. Difficulty in Interpreting Bestfoods’ “Narrow Holding”

Another reason for the divergence may be what Judge Dowd referred to as Bestfoods’ “narrow holding.” Bestfoods first purports to impose operator liability upon an entity that exercises substantial control over a facility’s pollution-related activities. Nonetheless, in its “narrow holding,” Bestfoods exempts a parent corporation from liability for activities it conducts at the facility in accordance with its investor status. Judges Moore and Dowd seized upon this distinction, and although each extended the principle to the governmental regulatory context, they reached different conclusions.

Judge Moore used this passage to support her already stated contention that general activities do not create liability unless they

Commerce, 29 F.3d 833, 843 (3d Cir. 1994) (stating “substantial control’ requires ‘active involvement in the activities of the other corporation’” and holding governmental entity liable based on general management activities over facility) (citation omitted); Lansford-Coaldale Joint Water Auth. v. Tonoli Corp., 4 F.3d 1209, 1224 n.7 (3d Cir. 1993) (stating “a company may be considered an operator even if it did not exert control over the hazardous waste disposal decisions of an affiliated corporation, as long as there is otherwise sufficient indicia of substantial management control over the affairs of the affiliate”); Jacksonville Elec. Auth. v. Bernuth Corp., 996 F.2d 1107, 1110 (11th Cir. 1993) (stating under Eleventh Circuit’s standard, individual need not have actually controlled specific decision to dispose of hazardous substances for court to hold it liable). But see United States v. Gurley, 43 F.3d 1188, 1193 (8th Cir. 1994) (stating court can find officer or shareholder of corporation liable only if he actually controlled disposal of hazardous substances at facility).

143. See Bestfoods, ___ U.S. at __, 118 S. Ct. at 1887 (stating purpose of pollution-related standard was “[t]o sharpen the definition for purposes of CERCLA’s concern with environmental contamination . . . .”).

144. For a discussion of the differences between the Bestfoods standard and the criteria found in pre-existing case law, see supra notes 141-43 and accompanying text.

145. See Brighton Township, 153 F.3d at 333 (Dowd, J., dissenting) (setting forth Bestfoods operator definition and listing Court’s “specific activities that would and would not be sufficient for operator liability”) (citing Bestfoods, ___ U.S. at __, 118 S. Ct. at 1889)). For a discussion of Judge Dowd’s dissent, see supra notes 115-24 and accompanying text.

146. See Bestfoods, ___ U.S. at __, 118 S. Ct. at 1887. For the text of the Bestfoods operator definition, see supra note 48.

147. See Brighton Township, 153 F.3d at 327 n.6, 333 (quoting Bestfoods, ___ U.S. at __, 118 S. Ct. at 1889). For the text of this “narrow holding,” see supra note 118.

148. See id. at 327 n.6 (Moore, J., concurring) (demonstrating differences in ways Judges Moore and Dowd interpreted Bestfoods “narrow holding”).
are specifically related to pollution. Under her interpretation of this passage, activities such as hiring or supervising employees or making financial decisions are as consistent with a governmental entity's regulatory status as they are with a parent corporation's investor status. Thus, under this "narrow holding," such activities are insufficient to impose liability unless they are specifically related to pollution.

Judge Moore's opinion is internally inconsistent. Whereas Bestfoods sets forth activities that are consistent with a parent corporation's investor status, Judge Moore failed to set forth activities that are consistent with a governmental entity's regulatory status. By implying that no difference exists between the two contexts, Judge Moore weakened her earlier rationale that the regulatory function of a governmental entity is unique and that a requirement of pollution-related activities to impose liability protects this function. To be consistent with her premise that governmental regulation requires special attention, she should have defined governmental regulatory activities and pollution-related activities. Such precise definitions would prevent a chilling effect on governmental regulation by ensuring that a governmental entity would be judged by government-specific rather than corporate standards.

149. See id. (emphasizing pollution-related requirement as means to balance two competing policies of broad, remedial purposes of CERCLA against concern regarding chilling actions of environmental regulatory bodies).

150. See id. (stating "contrary to Judge Dowd's position, the hiring or supervision of a facility's employees or control over a facility's financial decisions does not give rise to operator liability, unless of course such activities are "specifically related to pollution").

151. See id.

152. See Brighton Township, 153 F.3d at 327 n.6 (Moore, J., concurring). In Bestfoods, the Court listed activities consistent with a parent's investor status as "monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures ... ." Bestfoods, — U.S. at —, 118 S. Ct. at 1889. In Brighton Township, although Judge Moore stated that the Bestfoods principle is applicable to cases arising outside the parent-subsidiary context, she did not state which governmental regulatory activities would be exempted from "operator" analysis under the same principle of this "narrow holding." See Brighton Township, 153 F.3d at 327 n.6.

153. See Brighton Township, 153 F.3d at 324 (noting unique function of governmental entity to protect public health, safety and welfare through increased regulations in environmental arena). For a discussion of Judge Moore's emphasis on the distinct nature of governmental regulatory activity and the balancing of interests courts must conduct, see supra notes 99-114 and accompanying text.

154. For a discussion of how Judge Moore failed to define the pollution-related activities that would give rise to governmental operator liability, see supra note 152 and accompanying text.

155. For a discussion of Judge Moore's concern with chilling governmental regulation of hazardous waste sites, see supra notes 102, 153 and accompanying text.
Conversely, Judge Dowd relied on the same passage to support his position that general activities do not confer liability unless they fall outside the governmental entity's regulatory sphere, regardless of whether they are pollution-related. Judge Dowd, like Judge Moore, found that the activities consistent with a parent's investor status are the same as for a governmental entity's regulatory status. Judge Dowd's analysis, however, did not contradict any earlier parts of his opinion, since he made no distinction at any point between governmental regulatory activities and typical corporate activities.

C. The Weak Final Product

Overall, the Sixth Circuit set forth a weak opinion in *Brighton Township* because it failed to enunciate a workable standard for lower courts to use in determining whether a governmental entity should be deemed an operator based on its pollution-related activities or its general activities involving control of the facility. What Judge Boggs called a "proper standard," others may call a sham. Establishing that the actual control test applies, that affirmative acts are required to render an entity liable and that a governmental entity may be liable when its regulatory activities are extensive enough to make it an operator, are all restatements of pre-existing law. Judge Boggs' failure to set forth factors for lower courts' analysis

156. *See Brighton Township*, 153 F.3d at 333 (Dowd, J., dissenting).
157. *See id.* The inference that Judge Dowd defines corporate and governmental activities in the same manner rests in Judge Dowd's failure to define any separate standards for governmental regulatory activity. *See id.* at 333-34. Indeed, Judge Dowd specifically relies on the factors enunciated in pre-existing case law pertaining to corporate entities, stating:

> [T]he case law demonstrates that the criteria for finding such a high level of control over day-to-day operations include hiring and supervising the employees, and the control of the financial decisions of the facility. Although these cases were decided prior to the *Bestfoods* case, they are completely in line with *Bestfoods*’ holding . . . .

*Id.* at 333-34.
158. *See id.* at 333-35.
159. For a critical discussion of the *Brighton Township* court's failure to clarify whether the basis of operator liability must be pollution-related activities or general activities, see *supra* notes 125-40 and accompanying text. For a narrative analysis of the court's opinion, written by Judge Boggs, see *supra* notes 88-98 and accompanying text.
161. *See id.* at 314-16. For a discussion of Judge Boggs' opinion, see *supra* notes 88-98 and accompanying text. Judge Boggs' findings do not supplement pre-existing case law to answer the question of whether the activities establishing actual control for a governmental entity must be pollution-related or based on general activities as a whole. *See id.*
perpetuates the confusion regarding the determination of the operator status of a governmental entity.\textsuperscript{162} In short, Judge Boggs passed the "governmental operator" buck to the district court. Further, Judge Dowd's approach is similarly insufficient because it distinctly overlooked the second part of the \textit{Bestfoods} definition requiring an entity to "manage, direct, or conduct operations specifically related to pollution."\textsuperscript{163} For these reasons, the soundest approach is Judge Moore's holding that actual control over the pollution-related activities of a facility are required to confer operator status upon a governmental operator.\textsuperscript{164} Her failure, however, to state the requisite level of control over a facility's pollution-related activities to confer operator liability upon a governmental entity, and her failure to define what, if any, pollution-based activities are consistent with the governmental entity's status as a regulator, limit the usefulness of her analysis.\textsuperscript{165} Because of this ambiguity, she too passed the buck to the district court.

\section*{VI. IMPACT}

The Sixth Circuit's failure to set forth workable criteria to use in determining whether a governmental entity is liable as an operator for its regulation of a privately-owned facility shifts the burden of interpreting \textit{Bestfoods} to lower courts and other circuits.\textsuperscript{166} The key question remains unanswered: Does \textit{Bestfoods} mean that, in the CERCLA context, a governmental entity is liable based on its pollution-related activities at a facility or on its general activities of actual control over the facility as a whole?\textsuperscript{167} Certainly, Judge Boggs' silence on the issue of pollution-related activities may indicate that a
pollution-based requirement is unnecessary. But Judge Boggs’ failure to provide explicit standards permits other courts to reach disparate results, even in similar factual contexts, as long as they address the three key elements (actual control, affirmative acts and the level of extensiveness of the regulatory activity).

When a court must decide a close call of liability for a governmental entity, policy concerns regarding the appropriate level of leniency will be outcome determinative. Courts that focus on CERCLA’s goal of “making the polluter pay,” regardless of who the polluter is, will interpret Bestfoods as Judge Moore did in Brighton Township and hold liable any governmental entity that exercises ac-

168. See Brighton Township, 153 F.3d at 314 (declining to include pollution-based requirement when setting forth standard to be an operator, Brighton Township must have engaged in “some affirmative acts,” that is, “that they ‘operated’ the site by ‘direct[ing] the workings,’ ‘manag[ing],’ or ‘conduct[ing] the affairs of the facility’”).

169. For a fuller discussion of the criteria Judge Boggs set forth in Brighton Township, see supra notes 88-98 and accompanying text. Courts will turn to Judge Moore’s and Judge Dowd’s opinions as blueprints of differing Bestfoods interpretations when they find Judge Boggs’ standard unworkable. For a discussion of Judge Moore’s concurrence, see supra notes 99-114 and accompanying text. For a discussion of Judge Dowd’s dissent, see supra notes 115-24 and accompanying text.

170. For example, Judge Boggs, in his opinion for the court, touched on the budgetary and political restraints on governmental entities like Brighton Township. See Brighton Township, 153 F.3d at 316. Judge Boggs stated:

While we are sympathetic to the plight of the township, which could not have been happy when this dirty problem fell into its lap, there is no basis for us to conclude that the township was somehow forced to take such direct responsibility and action. Perhaps ironically, if Brighton Township had been willing to spend more money in the 1960s and 1970s, it could have made other, arm’s-length arrangements for the disposal of local refuse and the rehabilitation of Collett’s property, and probably avoided operator liability.

Id.

In the lone amicus brief, Michigan Townships Association (MTA) argued on behalf of Brighton Township against operator liability, relying in part on policy. See Brief for Brighton Township as amicus curiae at 10, United States v. Township of Brighton, 155 F.3d 307 (6th Cir. 1998) (No. 96-1802). MTA presented the following argument:

Brighton Township by having some regulations in 1960 is being punished and the court in essence is saying that it would have been better off had the Township had no regulations at all then [sic] to have some, because despite the fact that they had no ownership in the property, no day-to-day control over the operations, no supervision of employees, etc., the Township can still be found liable for all costs of clean-up of hazardous substances regardless of whether those materials were disposed of by Township residents. Thus, municipalities instead of becoming more involved in environmental concerns will now be encouraged by this decision to have as little or no responsibility at all. Is this what our legislators intended when they passed CERCLA?

Id. (emphasis in original). For a discussion of the role that policy arguments play in a court’s holding, see supra notes 6-11 and accompanying text.
tual control over a facility's pollution-related activities.\textsuperscript{171} Other courts will struggle to balance the consequences of holding financially-strapped governmental entities liable with the competing purpose of making responsible parties pay.\textsuperscript{172} These courts will prefer the approach adopted by Judges Boggs and Dowd in \textit{Brighton Township}, which requires actual control over the facility's general operations.\textsuperscript{173}

The doors the Sixth Circuit left open in \textit{Brighton Township} must now be closed by other courts, at least one of which must take a stance and state whether pollution-related activities or general activities at a facility are the proper focus of inquiry for making the operator determination. In \textit{Bestfoods} the Court laid the groundwork for such a distinction.\textsuperscript{174} In accepting the buck the Sixth Circuit passed, the courts must follow the \textit{Bestfoods} mandate by setting forth a standard with explicit factors to demonstrate the level of control necessary to impose operator liability on a governmental entity regulating a privately-owned site.

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\textsuperscript{171} For a discussion of Judge Moore's concurrence, which focuses on pollution-related activities as the standard for CERCLA operator liability, see \textit{supra} notes 99-114 and accompanying text. Because both \textit{Bestfoods} and \textit{Brighton Township} leave open the question of the requisite level of control over these pollution-related activities, courts will have to determine that level for themselves based on the facts of the case, the finances available to the governmental entity and policy considerations. \textit{See Brighton Township}, 153 F.3d at 327 n.6.

\textsuperscript{172} For arguments against adopting a lenient approach for governmental entities, see \textit{supra} notes 9-11 and accompanying text. For arguments in favor of limiting governmental liability, see \textit{supra} notes 7-8 and accompanying text.

\textsuperscript{173} For a discussion of Judge Boggs' approach, see \textit{supra} notes 88-98 and accompanying text. For a discussion of Judge Dowd's approach, see \textit{supra} notes 115-24 and accompanying text.

\textsuperscript{174} \textit{See Bestfoods}, ___U.S. at __, 118 S. Ct. at 1889. For the text of the \textit{Bestfoods} operator definition, see \textit{supra} note 48.