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Defining the Boundaries of State Liability under CERCLA Section 107(a)

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I. INTRODUCTION

Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in 1980 in response to the increasing concerns about the environmental and public health effects caused by the uncontrolled disposal of hazardous substances. The Act was designed to provide the federal

The term “hazardous substance” is very broadly defined in CERCLA:

(A) any substance designated pursuant to section 1321(b)(2)(A) of title 33,

(B) any element, compound, mixture, solution or substance designated pursuant to section 9602 of this title,

(C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C. § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C. § 6901 et seq.] has been suspended by Act of Congress),

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government, through the Environmental Protection Agency (EPA), with a prompt and effective mechanism with which to respond to hazardous waste problems. One of CERCLA's primary goals has been to grant the federal government with the authority to force those responsible for creating hazardous waste problems to bear the costs of remediating the dangerous conditions resulting from their actions; thus ensuring that "those who [have] planted their polluted seed [will] pay for the fruit they bear." In keeping with this central objective, the federal courts have liberally construed CERCLA to include an ever-expanding spectrum of potentially responsible parties (PRPs).

(D) any toxic pollutant listed under section 1317(a) of title 33,
(E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C. § 7412], and
(F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).


In order to accomplish this objective, Congress set up a Superfund to finance cleanup activities. See Maryland Bank & Trust, 632 F. Supp. at 576; Chambers & Gray, EPA and State Roles in RCRA and CERCLA, 4 Nat. Resources & Env't 7, 10 (1989) (EPA is authorized to utilize Superfund to clean up sites which the EPA has placed on the National Priorities List (listing nation's most hazardous sites)). CERCLA also authorized the United States to bring suit to recover these costs and to order injunctions to protect the public health. See United States v. Bliss, 667 F. Supp. at 1304.


5. FMC Corp. v. United States, No. 90-1761, at 3. Based on this objective, the federal courts have opted to liberally construe CERCLA's provisions and do not read its sections in any way inconsistent with this objective. See Mottolo, 695 F. Supp. at 622. (quoting New York v. Shore Realty Corp., 759 F.2d 1032, 1045 (2d Cir. 1985)).

6. Mottolo, 695 F. Supp at 622. The Mottolo court explained that a liberal interpretation of CERCLA serves to both achieve its remedial goals and to avoid
In 1989, the Supreme Court reinforced this trend towards broadening the scope of liability by holding in Pennsylvania v. Union Gas that states were considered "persons" subject to liability under CERCLA section 107(a). Section 107(a) imposes liability for the cleanup of hazardous wastes upon "owners or operators" of contaminated sites and on "arrangers" and "transporters" of hazardous substances. The Court stated that the clear language of CERCLA as amended by the Superfund Amendments and Reauthorization Act (SARA) acknowledged frustrating its beneficial purposes in protecting and preserving the public health and environment. Id. 7. 109 S. Ct. 2273 (1989). The Supreme Court reversed the dismissal of a third-party complaint filed by Union Gas against the Commonwealth of Pennsylvania. Id. at 2277. Union Gas, the former operator of a coal gasification plant which had been adjudged liable for the cleanup costs for a nearby creek, alleged that the state was partially responsible for the costs as an "owner or operator" of the hazardous waste site. Id. For a discussion of the Court's holding, see infra notes 22-33 and accompanying text. For a further analysis of the case, see generally Note, Piercing the Veil, supra note 3, at 341; Note, Pennsylvania v. Union Gas: Congressional Abrogation of State Sovereign Immunity Under the Commerce Clause, or Living With Hans, 58 FORDHAM L. REV. 513 (1989) [hereinafter Congressional Abrogation of State Sovereign Immunity].

8. Union Gas, 109 S. Ct. at 2278. While the potential liability of local governmental bodies has not posed any significant question in the past, much debate existed over the possible liability of states before the passage of SARA and the Supreme Court's decision in Union Gas. See Smith, The Expansive Scope of Liable Parties under CERCLA, 63 ST. JOHN'S L. REV. 821 (1989). For a discussion of how the courts have increased the scope of PRPs under CERCLA, see Comment, Apportioning Liability for the Cleanup of Hazardous Waste Sites Under the Comprehensive Environmental Response, Compensation, and Liability Act, 1 VILL. ENVTL. L.J. 537 (1990).

9. For a general discussion of liability as an "owner or operator" under section 107(a), see infra notes 34-60 and accompanying text.

10. For a general discussion of liability as an "arranger" under section 107(a)(3), see infra notes 61-70 and accompanying text.

11. This Article will not discuss CERCLA "transporter" liability under section 107(a)(4) since the cases involving state liability have not as yet addressed this issue.


The SARA amendments also assigned fines for violations and provided for both enforcement and contribution suits. See FMC Corp. v. United States, No. 90-1761, 1, 3 (E.D. Pa. July 18, 1990) (WESTLAW, Fed Library, Courts file). Persons assessed with cleanup costs by the federal government were granted the right to seek contribution from any other person who was potentially liable under the Act. See United States v. New Castle County, 727 F. Supp. 854, 859 (D. Del 1989). This right to contribution is an express statutory right provided for in CERCLA section 113(f)(1) as added by SARA. Id. See Rockwell Int'l Corp. v. UI Int'l Corp., 702 F. Supp. 1384, 1389 (N.D. Ill. 1988) (purpose of CERCLA section 113(f) is simple—to provide parties found liable under CERCLA with an avenue for obtaining compensation from other responsible parties); Colorado v. ASARCO, 608 F. Supp. 1484, 1492 (D. Colo. 1985) (presents federal principle,
Congress' intent that states be liable along with everyone else for response costs recoverable under CERCLA.

The Supreme Court's holding in *Union Gas* raises serious concerns regarding potential state liability under CERCLA, the most immediate of which is how the courts are to assess such liability given states' unique role as regulators. Through their police power, states traditionally act to protect the public health, safety, and welfare. In this capacity, states are now involved in various activities at hazardous waste facilities in an attempt to alleviate the grave environmental problems posed by the release of hazardous materials. These activities include a range of functions, from issuing permits and monitoring disposal of hazardous materials, to initiating remedial actions to clean up contaminated sites. Given the Supreme Court's holding in *Union Gas*, the issues that are left unresolved are these: if a state is to be held liable in any situation in which a nongovernmental entity is liable, will its actions taken pursuant to a regulatory program expose it to liability under CERCLA section 107(a)? If so, what effect will this liability have on the prospective clean up of hazardous waste sites by states?

This Article examines recent cases that have addressed state liability under CERCLA, including the decision of the District Court of Delaware in *United States v. New Castle County*. This decision focuses on how the courts are to determine when a state may be liable as an "owner or operator" and "arranger." Through an analysis of how the courts define the boundaries of state liability, this Article questions whether a workable test has been later codified in CERCLA section 113(f), that contribution can only be procured from parties liable under applicable law).

13. CERCLA section 101(23) provides that response costs under the Act include the terms, "remove, removal, remedy and remedial action." 42 U.S.C. § 9601 (23). "Remove" and "removal" include the following:

[T]he cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release.

42 U.S.C. § 9601(23).

14. The Supreme Court has long recognized the authority of the States to exercise its police power to protect the general welfare of the public. *See* Mugler v. Kansas, 123 U.S. 623, 661 (1887).


16. For a discussion of this case, see infra notes 102-19 and accompanying text.
adopted by the courts that adequately considers the role that regulatory action plays in determining state liability under CERCLA.

II. LIABILITY UNDER CERCLA SECTION 107(a)

A. The Statutory Framework for State Liability

To achieve Congress' goal of holding all responsible parties liable, CERCLA requires as part of a prima facie case of liability, that the PRP be a liable "person" within the meaning of section 107(a). The four classes of persons recognized by CERCLA include the following: current owners or operators of the hazardous substance facility; owners or operators of the facility at the time of disposal; persons who arranged for treatment or disposal of hazardous substances at the facility; and persons who transported hazardous substances for treatment and disposal at the facility.

17. "Person" is defined under CERCLA section 101(21) to include any "individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. § 9601(21).

18. To establish a prima facie case of liability under CERCLA, the United States must demonstrate the following:
   1) each of the sites is a "facility";
   2) a "release" or a "threatened release" of a "hazardous substance" from the sites has occurred or is occurring;
   3) the release or threatened release has caused the United States to incur response costs; and
   4) the defendants fall within at least one of the classes of liable persons described by sections 107(a)(1)-(a)(4).


19. The express language of CERCLA section 107(a) provides as follows: Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section:
   (1) the owner and operator of a vessel or a facility,
   (2) any person who at the time of 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, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
   (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for-
      (A) all costs of removal or remedial action incurred by the
States were not originally subject to section 107(a) liability because the Eleventh Amendment's guarantee of sovereign immunity acted as a constitutional bar to such liability. After SARA was enacted in 1986 however, many courts recognized that the plain language of these amendments clearly expressed Congressional intent to abrogate this sovereign immunity defense.

The Supreme Court affirmed this growing trend in Union Gas, citing the "cascade of plain language" that evidenced legislative authority to include states in the scope of PRPs. The Court explained that liability under section 107(a) is determined on the basis of the activities that a "person" may undertake, and "person" as defined in the statute explicitly includes states. The Court reasoned therefore, that states are "persons" subject to liability under section 107(a).

The Court also stated that its holding was further supported by the language in section 101(20)(D) which exempts states from liability where title is acquired involuntarily. This section pro-

United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.


23. See supra note 17 for the definition of "person" under section 101(21).


25. Id.

26. Id. at 2279.
The term "owner or operator" does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section [107(a)].

The Court concluded that to deny state liability would be inconsistent with this section's plain language since it would have been unnecessary to provide an exclusion for state liability if such liability were not available.

The Court also noted that the language of CERCLA section 120(a)(1) further supports this holding. This section expressly waives the federal government's immunity from suits for damages under CERCLA, employing almost the identical language of section 101(20)(D). The Court held this to be clear justification for the abrogation of states' sovereign immunity and the potential for section 107(a) liability.

The final statutory support cited by the Supreme Court for the recognition of state liability was found in section 107(d)(2) which exempts states from liability where the state acts in response to an emergency created by the release or threatened release of a hazardous substance from a facility owned by another

29. CERCLA section 120(a)(1) provides as follows:
   Each department, agency and instrumentality of the United States (including the executive, legislature, and judicial branches of government) shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title. . .
30. Id.
person.\textsuperscript{32} The Supreme Court concluded that this exemption, together with the rest of CERCLA, unequivocally expressed that states be subject to liability along with everyone else.\textsuperscript{33}

B. "Owner or Operator" Liability

Under CERCLA section 107(a)(1) and (2), liability as an "owner or operator" includes persons both currently owning or operating a hazardous waste facility and those who held title to or operated the facility at the time the hazardous waste materials were released.\textsuperscript{34} CERCLA defines "owner or operator" in section 101(20)(A) as follows:

The term "owner or operator" means . . . (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.\textsuperscript{35}

Most courts agree that this statutory definition sheds little light on how the courts are to make liability determinations.\textsuperscript{36}

\textsuperscript{32} CERCLA section 107(d)(2) provides the following: No State or local government shall be liable under this subchapter for costs or damages as a result of actions taken in response to an emergency created by the release or threatened release of a hazardous substance generated by or from a facility owned by another person. This paragraph shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the State or local government. . . .


\textsuperscript{33} Union Gas, 109 S. Ct. at 2278.

\textsuperscript{34} Idaho v. Bunker Hill Co., 635 F. Supp. 665, 671 (D. Idaho 1986). The district court held that a parent corporation was liable in contribution to the state for the activities of its subsidiary despite the fact that the corporation did not hold title at the time that the action was brought. \textit{Id.} at 672. The court imposed liability as an "owner" since the parent held title to the contaminated facility at the time the hazardous substances were first discovered. \textit{Id.}

\textsuperscript{35} 42 U.S.C. 9601(20)(A).

\textsuperscript{36} United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 578 (D. Md. 1986). The court stated, "the structure of section 107(a), like so much of this hastily patched together compromise Act, is not a model of statutory clarity." \textit{Id}. See also United States v. Aceto Agric. Chem. Corp., 872 F.2d 1373, 1380.
Much of the confusion in determining "owner or operator" liability arises because the statute refers to both "owner or operator" and "owner and operator" in different sections of the Act, thereby creating uncertainty as to when a PRP who does not hold title may be liable. The District Court of Maryland explained in *United States v. Maryland Bank & Trust Co.*, that in light of legislative history and statutory interpretation, the phrase should be read in the disjunctive, and a party need not be both an "owner" and "operator" to incur liability under this Act. This Article refers to "owner or operator" liability as explained in both the *Maryland Bank & Trust* opinion and the following judicial interpretations of this definition.

In general, both current owners and prior owners of a contaminated disposal site will be liable as "owners" under CERCLA sections 107(a)(1) and (2). Evidence that the PRP in any way operated the site or contributed to the release of the hazardous substance is unnecessary. Proof of ownership of the site is sufficient.

The courts have held a party that does not own title to the facility may still be liable as an "operator" if the party has exercised control over the facility. Much of the litigation concerning "owner or operator" liability has thus focused on testing the degree of control that gives rise to "operator" liability.

Most courts have held that the PRP must actually exercise

(8th Cir. 1989) (broad language and legislative history of CERCLA shed little light on intended meaning of 107(a)); CPC Int'l. Inc. v. Aerojet-General Corp., 751 F. Supp. 783, 788 (W.D. Mich. 1989) ("Many courts have grappled with the application of this definition of 'owner-operator' in a wide variety of circumstances"); United States v. Kayser-Roth Corp., 724 F. Supp. 15, 19 (D.R.I. 1989), aff'd, 910 F.2d 24 (1st Cir. 1990) ("CERCLA's definition of 'owner or operator' is not especially illuminating").


38. *See* CERCLA section 107(a), 42 U.S.C. § 9607(a), *supra* note 19 and accompanying text.


41. *Id.* at 577-78. The court reasoned that to define "owner or operator" as "owner and operator" would render CERCLA section 107(a)(1) totally useless. *Id.* at 578.

42. *Id.* at 578. (citing New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985)).


control over the facility and not merely be in a position to exercise such control for "owner or operator" liability to attach.\textsuperscript{46} In \textit{Rockwell International Corp. v. IU International Corp.},\textsuperscript{47} the District Court for the Northern District of Illinois held that the mere ability to control, without its being exercised, is insufficient to justify a finding of liability.\textsuperscript{48} The court, however, then set forth the PRP's activities which evidenced sufficient "indicia of the actual exercise of control."\textsuperscript{49} These activities included the hiring or approving of corporate officers, determining officers' responsibilities, establishing procedures and plans, and suggesting changes that directly affected the disposal of hazardous substances.\textsuperscript{50}

In addition, the Court of Appeals for the Seventh Circuit identified in \textit{Edward Hines Lumber Co. v. Vulcan Materials Co.}\textsuperscript{51} the type of participation in site activities that gives rise to "owner or operator" liability under section 107(a).\textsuperscript{52} The court held that a chemical supplier for a wood treatment facility was not an "owner or operator" because the supplier had not actively participated in the daily control and management of the facility.\textsuperscript{53}

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\item \textsuperscript{47} 702 F. Supp. 1384 (N.D. Ill. 1988).
\item \textsuperscript{48} Id. In this case, a purchaser which owned a manufacturing facility filed suit against prior operators of the facility to recover past and future cleanup costs for hazardous substances discovered at its site. Id. at 1386. No governmental action had yet been taken, but plaintiff sought to obtain a declaratory judgment concerning defendant's liability for future cleanup costs. Id. The district court denied the defendant's motion to dismiss on those issues, holding their participation in the hiring of corporate officers and involvement in other management activities warranted a finding of liability as an "operator." Id. at 1390.
\item \textsuperscript{49} Id. at 1390.
\item \textsuperscript{50} Id. at 1390-91.
\item \textsuperscript{51} 861 F.2d 155 (7th Cir. 1988).
\item \textsuperscript{52} Id. at 158. The plaintiff, Edward Hines Lumber Co. (a wood processing company), hired Osmose Wood Preserving Inc., a chemical supplier, to construct a processing plant. Id. at 156. While Osmose designed and constructed the facility, installed the wood treatment system, trained the personnel, supplied the hazardous chemicals for the system, and reserved the right to conduct inspections, Hines operated the plant after it opened. Id. After the plant had been sold, EPA ordered Hines and the subsequent owner to conduct cleanup operations. Id. at 155. Hines sued a number of suppliers (including Vulcan Materials which was later dropped as a defendant) to recover the costs of cleanup. Id. at 155-56. The district court granted summary judgment for Osmose, rejecting claims that Osmose was a PRP under CERCLA; the Seventh Circuit affirmed. Id. at 156.
\item \textsuperscript{53} Id. at 158. The court also applied common law theories of independent contractor and joint venture liability but held that Osmose was not liable to Hines. Id. at 158-59. See Note, Interpreting "Owner" and "Operator" Liability Under CERCLA: Edward Hines Lumber Co. v. Vulcan Materials Co., 38 J. URB. & CONTEMP. L. 229, 240-41 (1990); Note, Liability of Responsible Parties for Hazardous Waste

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A recent development in case law suggests that those with the ability to control the disposal of hazardous waste may be liable despite a lack of actual control over the facility. In *United States v. Fleet Factors Corp.*, the Eleventh Circuit raised the possibility that “owner or operator” liability may be imposed upon a secured creditor which does not actively involve itself in daily operational and management decisions. Citing the language of CERCLA section 101(20)(A) which exempts from “owner or operator” liability one who, “without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest,” the court established a standard which imposes liability where the secured creditors involvement in management is broad enough to support the inference that it could affect hazardous waste disposal decisions. The court held, “a secured creditor may incur section 9607(a)(2) liability, without being an operator, by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation’s treatment of hazardous wastes.”

While at least one other court has followed the reasoning in *Fleet Factors* with regards to a secured creditor, it is uncertain whether other courts in determining the measure of control required for a finding of “owner or operator” liability will reach as far as the Eleventh Circuit has in situations other than those involving secured creditors. The majority of courts continue to look for evidence of the PRP’s actual control over management decisions concerning hiring and supervision of employees and the disposal and treatment of waste as primary indicators of active operation or participation.

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*Cleanup: CERCLA Section 107 Liability After One Decade, 1 Vill. Envtl. L.J. 563 (1990).*

54. 901 F.2d 1550 (11th Cir. 1990).
55. Id. at 1556.
56. See supra text accompanying note 35 for the relevant language of CERCLA section 101(20)(A).
57. *Fleet Factors*, 901 F.2d at 1558.
58. Id. at 1557. The court explained that an example of the type of activity that could subject a secured creditor to liability as an “operator” would be United States v. Kayser-Roth Corp., 724 F. Supp. 15, 23 (D.R.I. 1989), aff’d 910 F.2d 24 (1st Cir. 1990). Id. at 1557, n.10. In *Kayser-Roth*, the circuit court imposed liability as an “operator” on a parent corporation where that corporation had exercised pervasive control over monetary, employment, and environmental matters. 910 F.2d at 27.
59. *In Re Bergsoe Metal Corp.*, 910 F.2d 668 (9th Cir. 1990).
C. “Arranger” Liability

Under section 107(a)(3), "any person who by contract, agreement, or otherwise arranged for disposal or treatment . . . of hazardous substances" may be liable as an "arranger." When adjudicating claims under this section, the courts apply essentially the same type of control analysis as is applied for "owner or operator" liability determinations.

Proof of ownership or possession of hazardous substances is not required for a finding of "arranger" liability. In United States v. Northeastern Pharmaceutical and Chemical Co., the Eighth Circuit imposed liability under section 107(a)(3) on a corporate vice president, holding that he had actually arranged for and controlled the disposal of hazardous substances. The court explained that proof of ownership or possession is not relevant to the inquiry under section 107(a)(3) and instead imposed liability based on its findings that the supervisor had known about, had immediate supervision over, and had been directly responsible for arranging for transportation and disposal of hazardous materials.

Recent caselaw has defined the analysis under section 107(a)(3) as the search for some nexus between the alleged PRP and the owner of the hazardous materials. In New York v. Johnstown, the State of New York had filed suit under CERCLA against two cities as "owners or operators" of solid waste management facilities. One of the defendants, the City of Johnstown, counterclaimed, alleging that the State was liable as an "arranger" since it had either permitted or directed waste to be

61. 42 U.S.C. 9607(a)(3). For the full language of this section, see supra note 19.
62. See supra notes 34-59.
63. 810 F.2d 726 (8th Cir. 1986), aff’g in part and rev’g in part, 579 F. Supp. 823 (W.D. Mo. 1984), cert. denied, 484 U.S. 848 (1987) [hereinafter NEPACCO].
64. NEPACCO, 810 F.2d at 745. The NEPACCO case involved a suit brought by the United States against NEPACCO’s president, Michaels, and vice president, Lee. Id. at 729-30. Suit was also brought against the transporter of hazardous substances and the owner of the contaminated plant. Id. The EPA initiated the suit after learning that hazardous waste had been disposed of at the contaminated site. Lee and Michaels had previously entered into an agreement with the generators to store the waste at that site. Id. at 730.
65. Id. at 743. The circuit court explained that requiring evidence of actual possession or ownership of hazardous substances would frustrate the broad remedial purposes of CERCLA. Id. For a further discussion of CERCLA’s primary goals, see supra notes 1-6 and accompanying text.
67. Id. at 35.
placed in the facilities. The court dismissed the counterclaim against the State finding that in seeking to abate and remedy the release of hazardous substances at the facilities, the State had not acted as an "arranger" subject to CERCLA liability.

The Johnstown court explained that liability as an "arranger" could not be imposed in this situation because no nexus existed between the State and the City which owned the hazardous waste materials. While the court did not address the question of how close the relationship between the parties must be in order to establish this nexus, it explained that the State's attempts to solve the hazardous waste problems in this case were not the kind of activity that would subject a state to liability under section 107(a)(3).

III. STATE LIABILITY UNDER CERCLA SECTION 107(a)

A. Judicial Consideration of State Liability Claims and the Question of Regulation

Recent cases that have addressed the question of state liability under CERCLA section 107(a) have applied basically the same type of control analysis that has been applied in cases involving nongovernmental PRPs. In particular, the courts have looked to whether the state has exercised control over the employment decisions, finances, and especially the disposal and treatment of hazardous substances as indicators of CERCLA liability. In doing so, the courts have not only begun to identify the boundaries of state liability, but have also responded to the argument put forth by the states that they have acted not as an "owner or operator" or "arranger," but merely as a regulator.

68. Id. at 36.
69. Id. at 37.
71. Johnstown, 701 F. Supp. at 37. The Johnstown case, which was decided before Union Gas, did not address the question of state liability under CERCLA, but merely applied the traditional "owner or operator" liability analysis to assess the State's potential responsibility. Id. at 35-36.
72. See supra notes 34-71 for a discussion of the control analysis as applied to nongovernmental PRPs.
73. See supra notes 34-71 and accompanying text.
In *United States v. Dart Industries*, the Fourth Circuit affirmed the dismissal of a third-party complaint filed against the South Carolina Department of Health and Environmental Control (DHEC), holding that the agency was not an "owner or operator" within the meaning of section 107(a)(3). In their complaint, the third-party plaintiffs had alleged the state agency was liable under CERCLA because it had actively participated in the operations of the hazardous waste site. DHEC argued that all of its activity at the site was taken pursuant to its regulatory capacity. The district court dismissed the complaint, holding DHEC's action amounted to nothing more than a "series of regulations."

On appeal, the Fourth Circuit stated that DHEC was not liable as an "owner or operator" since it did not control the facility. The court held that in approving applications to store wastes, inspecting the site, and requiring proper transportation of wastes delivered to the site, DHEC had not exercised control over the site. The court explained that the agency was not a responsible party since it had not gone beyond governmental supervision and directly managed the employees or finances at the site.

However, in *CPC Int'l Inc. v. Aerojet-General Corp.*, the District Court for the Western District of Michigan denied a state environmental agency's motion to dismiss claims of "owner or operator" liability because the agency's activities substantially differed from those of DHEC in the *Dart* case. The district court explained that while regulatory activity like that of DHEC normally will not designate one as an "owner or operator," where the party

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75. *Dart*, 847 F.2d at 146. This case was decided prior to the *Union Gas* decision that sovereign immunity no longer applied in CERCLA cases; however, the circuit court addressed first the issue of CERCLA liability. Having found that DHEC had not acted as an "owner or operator" under CERCLA, it declined to address the question of sovereign immunity. *Id.*
77. *Id.* at 619.
78. *Id.* at 621.
79. *Dart*, 847 F.2d at 146.
80. *Id.*
81. *Id.*
83. *Id.* at 788. The prior operator of a contaminated site filed his CERCLA claims against, *inter alia*, the Michigan Department of Natural Resources (MDNR), alleging that the defendants should be liable for present and future response costs. *Id.* at 785. The district court rejected MDNR's motion to dismiss the claim of "owner or operator" liability, based on its finding of assumed control of activities. *Id.*
assumes control of an activity and then fails to perform, that party should "bear responsibility for any pollution which results."\(^{84}\) The court's conclusions stemmed primarily from an agreement that the agency had entered into with a generator in which the agency had agreed to actually remove and dispose of the waste and operate wells on the site.\(^{85}\) Such activity said the court, constituted hands-on participation that exceeded the mere regulatory supervision exhibited in Dart.\(^{86}\)

The district court also denied the agency's motion to dismiss a claim of liability as an "arranger."\(^{87}\) The court found that the agreement between the agency and the defendant for the removal of the waste demonstrated a sufficient nexus between the two parties to give rise to liability as an "arranger."\(^{88}\)

Relying on this control analysis, the District Court for the Central District of California also imposed liability on the State of California in *United States v. Stringfellow*.\(^{89}\) The court affirmed the finding of a Special Master that the State was liable as an "owner," "operator," and "arranger" based on its active participation in the operation of a contaminated site.\(^{90}\)

The State first asserted that it could not be held liable since it had acted only in its regulatory capacity.\(^{91}\) The court held however, that the State's actions clearly went beyond mere regulation and amounted to liability as an "operator."\(^{92}\) Citing the

\(^{84}\) *Id.* at 788.

\(^{85}\) *Id.* at 786. Under the agreement, the generator was to pay the state agency $600,000 and properly dispose of a hazardous substance at the site in exchange for the agency's agreement not to hold the generator liable for subsequent remedial actions as a result of prior contamination. *Id.* The agency also agreed to assume the responsibility of installing and operating purge wells at the site. *Id.*

\(^{86}\) *CPC International*, 731 F. Supp. at 788. See *supra* notes 79-81 and accompanying text for a discussion of those activities that DHEC had been involved in.

\(^{87}\) *Id.* at 790. The court held the agency's obligation to dispose of the wastes and operate the purge wells constituted a constructive possession in accordance with "arranger" liability in section 107(a)(3). *Id.*

\(^{88}\) *Id.* The court explained this type of activity was "exactly the type of behavior that CERCLA intended to include." *Id.*


\(^{90}\) *Id.* at 20,658. This case dealt with the review by the Central District of California of the findings of the Special Master concerning the liability of California in regard to its activities at the Stringfellow toxic waste disposal site. *Id.* at 20,656. The Special Master had granted a direct verdict against the State, finding that the State had exceeded mere regulation. *Id.*

\(^{91}\) *Id.*

\(^{92}\) *Id.*

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Rockwell case, the court stated a number of factors should be considered in determining whether the requisite control is present:

There are eleven factors to look at: expertise and knowledge of dangers of hazardous waste, conception of idea of the site, design of the site, supervision, inspection, receipt of reports of the site, hiring or approving hiring of employees, determining operational responsibilities, control of disposal, ability to discover and abate harm, public declarations of responsibility, participation in opening and closing of the site, and benefiting from the existence of the site.

The court found that all of these factors existed in this case. In particular, the court cited the fact that the State regularly visited the site, hired employees, made operational decisions and controlled the dumping of hazardous wastes as evidencing such control as an "operator."

In a separate holding, the district court also held that California was liable as an "owner" under CERCLA despite the fact that it did not hold legal title to the property. The court found that liability in this instance was predicated upon the State's active control of the site as well as the statutory definition of "owner" in section 101(20) which it misstated as, "a person owning...title or control...", any person who owned, operated or otherwise controlled activities..." The court's reasoning is inconsistent with the actual language of this section which defines both "owner or operator" and not merely "owner." Because the state did not own title to the contaminated site, the court should not have held it liable as an "owner."

94. Id.
95. Id.
96. Id.
98. Id. For the language of section 101(20)(A), see supra text accompanying note 35.
99. For a discussion of the confusing nature of the statutory definition of "owner or operator", see supra notes 35-41 and accompanying text.
100. While the misinterpretation of section 101(20)(A) does not appear to affect the outcome in the case, given California's actions as an "operator," its conclusion is inconsistent with the holdings of other federal courts regarding the correct definition of "owner or operator" liability under CERCLA. See supra notes 34-60 and accompanying text.
The court also held the state was liable under section 107(a)(3) as having arranged for the disposal and treatment of the hazardous waste.\textsuperscript{101} The court pointed to documents showing that the Regional Water Quality Control Board Officer had permitted the disposal of acid at the site numerous times since 1973.\textsuperscript{102} Such a finding, the court decided, was sufficient to justify holding as a matter of law that the State was an “arranger.”\textsuperscript{103}

B. United States v. New Castle County

In a clear attempt to set forth when a state may be liable under section 107(a), the District Court of Delaware in \textit{United States v. New Castle County},\textsuperscript{104} addressed a third-party complaint filed by generators of hazardous waste against the State of Delaware.\textsuperscript{105} The complaint alleged that Delaware was responsible for part of the costs incurred in cleaning up releases of hazardous substances at the Tybouts Corner Landfill Site (Site) since it had acted as an “owner or operator” and “arranger.”\textsuperscript{106} The court dismissed the complaint based on its findings that the State’s regulation of the hazardous waste site did not make it a PRP liable under CERCLA.\textsuperscript{107}

The court explained that in deciding whether a party is subject to CERCLA liability, the court should consider certain factors that evidence whether the PRP has controlled the site.\textsuperscript{108} The court should question whether the PRP 1) managed the employees of the facility; 2) managed the daily business operations of the facility; 3) was responsible for the maintenance of environmental regulations; and 4) had any financial interest in the facility.

\begin{itemize}
  \item \textsuperscript{101} \textit{Stringfellow}, 20 Envtl. L. Rep. at 20,658.
  \item \textsuperscript{102} \textit{Id.}
  \item \textsuperscript{103} \textit{Id.} The court did not discuss the argument set forth in \textit{Johnstown}, that there be some nexus between the PRP and the owner of the hazardous substances; however, the special master’s finding of actual disposal of the substances by the state official was sufficient to justify its holding without further analysis. For a discussion of \textit{Johnstown} and the nexus argument, see \textit{supra} notes 66-71 and accompanying text.
  \item \textsuperscript{104} \textit{United States v. New Castle County}, 727 F. Supp. 854 (D. Del. 1989).
  \item \textsuperscript{105} \textit{Id.} at 857.
  \item \textsuperscript{106} \textit{Id.} Other claims including those under CERCLA section 106(a) had also been filed against New Castle County and two other defendants. \textit{Id.} These claims, will not be discussed as they are irrelevant to the state’s CERCLA liability. The third-party plaintiffs also asserted a claim arising under section 107(a)(4), alleging that the state was liable as a “transporter.” However, the court denied their motion for summary judgment on this issue based on insufficient facts. \textit{Id.} at 876. As the court’s holding does not involve any analysis under section 107(a)(4), it will not be addressed.
  \item \textsuperscript{107} \textit{Id.} at 869.
  \item \textsuperscript{108} \textit{New Castle}, 727 F. Supp. at 869.
\end{itemize}
control at the facility; and 4) conferred or received any commercial or economic benefit from the facility, other than the payment of taxes.\textsuperscript{109} The court stated, however, that this list is not exhaustive, and the "totality of circumstances" surrounding the PRP's involvement should be taken into account.\textsuperscript{110}

The district court asserted that to look at the question of state liability in terms of whether or not the state was regulating a site entirely "misses the point."\textsuperscript{111} The court stated it is not the fact that the state was regulating that compels the conclusion that it is not liable under CERCLA.\textsuperscript{112} The appropriate question instead, is whether the state acted as an "owner or operator" or "arranger" with regard to its participation in and control of the facility.\textsuperscript{113} The court explained:

\begin{quote}
[W]hen a State is, in fact, an owner or operator of a facility or an arranger of the disposal of hazardous wastes, it clearly would be responsible under CERCLA; and the fact that it may have been doing so pursuant to state statute or regulation would not necessarily alter the situation.\textsuperscript{114}
\end{quote}

Based on the facts in this case, the court held that Delaware had not controlled the Tybouts Site but had acted merely in its regulatory capacity as protector of the health, safety, and welfare of its citizens.\textsuperscript{115} The court explained that requiring the submission of various reports of the conditions at the Site and implementing a monitoring program as part of the permit approval process were merely "day-to-day operational mandates" that amounted to nothing more than the implementation by the State

\textsuperscript{109} Id. at 869. The court justified imposing liability on those with a financial interest in the hazardous substance as consistent with the congressional mandate that those who caused the problems bear the responsibility for cleanup costs. See supra note 1-6 and accompanying text.

\textsuperscript{110} Id. at 869. The court also explained that operator status will not automatically attach upon a finding of any one of these factors. Id. Instead, each case must be determined based on its own unique factual situation. Id.

\textsuperscript{111} Id. at 874. The court rejected the third-party plaintiff's proposition that a state should not avoid CERCLA liability merely because it was regulating, stating that it was as an irrelevant question.

\textsuperscript{112} New Castle, 727 F. Supp. at 875.

\textsuperscript{113} Id.

\textsuperscript{114} Id. at 875 n.46.

\textsuperscript{115} Id. at 866. The court explained that after the initial groundwater tests had been conducted at the Site, the States had only limited involvement at the Site. Id. at 868.
of its regulatory requirements. 116

The court also held that the State was not an “arranger” under section 107(a)(3) because its regulatory actions did not establish a nexus between the State and the owners of the hazardous substances. 117 Analogyzing the State’s attempt to solve the problem of safely disposing of the hazardous substances to New York’s similar remedial efforts in Johnstown, 118 the court held that the nexus was not demonstrated by Delaware’s actions. 119

According to the New Castle court then, liability appears to attach at the point at which the state, through its participation in the various employment, management, and financial activities at a site becomes an “owner or operator” or “arranger,” and the fact that the state was regulating does not necessarily change the outcome. 120 The court stated that imposing liability upon a state which acts as an “owner or operator” or “arranger” rather than looking to whether or not the state was regulating, best comports with the mandate, set forth in CERCLA and affirmed in Union Gas, that states be liable along with everyone else. 121

IV. SEARCHING FOR A WORKABLE TEST OF LIABILITY

This Article turns once again to the question posed at the outset. 122 If, as the Supreme Court held in Union Gas, states are to be held liable in any situation in which a nongovernmental entity is liable, will state action taken pursuant to a regulatory program expose it to liability under CERCLA section 107(a)?

Dart, CPC International, and Stringfellow responded to this

117. Id. at 871-72, 874. The court noted in footnote, however, that potential liability as an “arranger” may have been established by the undisputed fact that the State Highway Department’s trucks transported some amount of waste. Id. at 872 n.38. Nevertheless, the court concluded this fact did not bind the court to grant the third-party plaintiff’s cross-motion for summary judgment on its status as an “arranger” since the record was insufficient to address the allegation. Id.
118. Id. at 874. For a discussion of the Johnstown decision, see supra notes 66-71 and accompanying text.
119. Id. at 874. The court rejected the contention that the State should be liable under section 107(a)(3) merely because it had the authority to control disposal. Id. at 873. It concluded that the relevant inquiry is one that looks to the presence or absence of a nexus between the owner of the hazardous substance and the PRP, and that this relationship could be shown in many ways, all in keeping with the broad remedial purposes of CERCLA. Id. at 873-74.
120. See supra notes 111-15 and accompanying text.
121. New Castle, 727 F. Supp. at 875. See supra notes 1-6 and accompanying text for a discussion of CERCLA’s broad remedial goals.
122. See supra text accompanying note 14.
question by suggesting that liability under CERCLA is not imposed until the state's actions exceed "mere regulation." 123 While none of these courts define precisely what activities constitute "mere regulation," they each looked at a state's involvement at the site in terms of its participation in financial, managerial, and operational activities to determine whether it had assumed control of site operations. 124 The analyses in these cases seem to indicate that where a state acts pursuant to its regulatory authority, its actions will not expose it to CERCLA liability so long as this regulatory activity does not amount to control over the hazardous waste facility as evidenced by these activities.

In the same way, the New Castle court explains that state liability turns not on the question of whether the state has regulated, but on what the nature of that regulation is. 125 Activity by the state that amounts to hands-on, active control of the hazardous waste site will give rise to liability under section 107(a) despite the fact that the state has acted to protect the public health, welfare, and safety. 126

These decisions indicate that state regulation cannot be used either as a sword or a shield in questions of section 107(a) liability. As the Dart, CPC International, Stringellow, and New Castle opinions point out, a state cannot avoid liability merely by asserting that it has acted as a regulator when in effect it has controlled the activities at a hazardous waste facility. 127 Despite the presence of state regulation, the appropriate inquiry in each case remained the same: did the state act as an "owner or operator," or as an "arranger"?

The analyses applied in these recent cases are in accordance with both the Court's holding in Union Gas and the broad goals of CERCLA. As the Supreme Court stated, "[i]f States, which comprise a significant class of owners and operators of hazardous waste sites 128 . . . need not pay for the costs of cleanup, the overall effect on voluntary cleanups will be substantial." 129 Therefore, if the

123. See supra notes 74-103.
124. Id.
126. Id. at 875.
127. See supra notes 72-114.
128. States are now in control of at least sixteen percent (16%) of all contaminated sites on the National Priorities List. 40 C.F.R. 300 Appendix B (1986).
129. New Castle, 727 F. Supp. at 875 n.46 (citing Union Gas, 109 S. Ct. at 2285.)
federal government is to be able to compel all responsible parties to pay for the hazardous waste situations they had control over, then the courts must be able to subject all of those responsible parties to liability.\textsuperscript{130}

At the same time however, if states are to address claims of state liability under CERCLA by questioning whether they have acted as an "owner or operator" or "arranger" regardless of the regulatory nature of that activity, then a clarification of this test is needed. If, as \textit{New Castle} asserts, a state's claim of "mere regulation" will not in itself avoid CERCLA liability,\textsuperscript{131} the court's holding should not be based on finding the state not liable because "the actions taken by the State do not exceed 'mere regulation.'"\textsuperscript{132} Such circular language clouds the appropriate question the courts are to ask; namely, whether the state has acted as an "owner or operator" or "arranger."\textsuperscript{133}

Based on recent judicial interpretations of CERCLA section 107(a), it seems no clear test for determining when a state may be liable under CERCLA section 107(a) exists. However, these decisions and the framework of CERCLA provide some guidelines for assessing the boundaries of state liability. The courts have indicated the inquiry to be made includes taking into consideration the "totality of circumstances" surrounding the state's involvement at the hazardous waste site.\textsuperscript{134} From these decisions, the most relevant factors that the courts have taken into consideration include evidence that the state has managed employees, made other operational decisions, assumed control of the disposal of hazardous substances, and conferred or derived economic benefits from the facility.\textsuperscript{135}

In addition, the two exemptions set forth in CERCLA sections 107(d)(2)\textsuperscript{136} and 101(20)(D)\textsuperscript{137} also provide some further guidance for the states in setting forth that states will not be liable for actions taken at the contaminated site in responding to an emergency or when the state has involuntarily acquired title so

\begin{itemize}
\item \textsuperscript{130} See supra notes 1-6 and accompanying text.
\item \textsuperscript{131} \textit{New Castle}, 727 F. Supp. at 875.
\item \textsuperscript{132} Id. at 870.
\item \textsuperscript{133} See supra notes 34-71 and accompanying text.
\item \textsuperscript{134} \textit{New Castle}, 727 F. Supp. at 869. See supra note 110 and accompanying text.
\item \textsuperscript{135} See supra notes 34-71 and accompanying text for a discussion of the application of these facts by the courts in determining CERCLA liability.
\item \textsuperscript{136} 42 U.S.C. 9607(a)(2). See supra note 32 for the language of this section.
\item \textsuperscript{137} 42 U.S.C. § 9601(20)(D). See supra text accompanying note 27 for the language of this section.
\end{itemize}
long as it does not cause or contribute to the release of the hazardous materials.

The practical impact of these decisions appears to be that this type of ad hoc factual analysis may subject states to open-ended liability if the courts are not willing to closely examine the particular state's alleged involvement at a hazardous waste site. By virtue of regulatory programs, states frequently take preventative actions at such sites in terms of issuing permits and monitoring disposal of waste materials. To avoid jeopardizing states' efforts to promote proper disposal and treatment of hazardous substances, the courts should closely scrutinize alleged CERCLA claims. Parties seeking deep pockets should be discouraged by a careful judicial analysis that imposes liability only where the facts show the state actively participated in controlling disposal and making operational and other management decisions.

V. CONCLUSION

As these recent opinions evidence, states must now question their level of present and future involvement in site activities since there is no longer an automatic protection from liability. While the potential for liability may arguably lead states to more willingly enter into negotiations with private parties, resulting in fair settlements and speedy cleanups, 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. The courts must strike a balance between the need for state regulation and the recovery of cleanup costs by careful consideration of state liability claims arising under CERCLA section 107(a).

For now, states may continue to take necessary action to respond to emergency situations at hazardous waste sites without fearing CERCLA liability. Given the analysis applied in these recent decisions, activities such as permit approval and other routine processes appear to be actions that states may also take without causing liability to attach. The Eleventh Circuit's decision in Fleet Factors however, raises the possibility that "owner or operator" liability may continue to expand to include a greater number of PRPs which have a lesser degree of involvement in site activities. Given this uncertainty, and also the ad hoc factual analy-

139. See supra notes 54-59 for a discussion of this case.
sis employed by the courts to determine liability under CERCLA section 107(a), it appears that decisions concerning state involvement at hazardous waste facilities should be cautiously made.

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