1991

Liability of Responsible Parties for Hazardous Waste Cleanup: CERCLA Section 107 Liability after One Decade

Jill E. Aversa

Follow this and additional works at: http://digitalcommons.law.villanova.edu/elj

Part of the Environmental Law Commons

Recommended Citation

Available at: http://digitalcommons.law.villanova.edu/elj/vol1/iss2/6

This Casenote is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Environmental Law Journal by an authorized editor of Villanova University Charles Widger School of Law Digital Repository. For more information, please contact Benjamin.Carlson@law.villanova.edu.
LIABILITY OF RESPONSIBLE PARTIES FOR HAZARDOUS WASTE CLEANUP: CERCLA SECTION 107
LIABILITY AFTER ONE DECADE

I. INTRODUCTION

Congress created the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) in response to the rapidly increasing amount of hazardous substances being released into the environment. CERCLA grants the President the authority to identify hazardous waste sites and compel potentially liable parties to pay for and conduct remediation.


2. Under CERCLA section 101(14), a "hazardous substance" is defined as a substance that has been identified as hazardous in other environmental statutes. CERCLA § 101(14), 42 U.S.C. § 9601(14) (Supp. V 1987).


4. CERCLA section 103(d)(1) provides:
   (1) The Administrator of the Environmental Protection Agency is authorized to promulgate rules and regulations specifying, with respect to-
   (A) the location, title, or condition of a facility, and
   (B) the identity, characteristics, quantity, origin, or condition (including containerization and previous treatment) of any hazardous substances contained or deposited in a facility; the records which shall be retained by any person required to provide the notification of a facility set out in subsection (c) of this section. Such specification shall be in accordance with the provisions of this subsection.

5. CERCLA section 107(a) specifies who potentially may be held liable as a party responsible for cleaning up a hazardous waste site. 42 U.S.C. § 9607(a). See infra note 22 for text of CERCLA section 107(a).

(563)
Although application of the statute appears to be routine, questions arise concerning who is a "responsible party," and thus potentially liable under CERCLA section 107. Included among potentially responsible parties are current and past owners and operators of facilities at which hazardous substances have been released. A major source of controversy has arisen among different courts with regard to interpreting CERCLA's use of the terms "owner or operator." How a court interprets "owner or operator" determines whether a party may or may not be liable for clean up expenses. For example, in Edward Hines Lumber Co. v. Vulcan Materials Co., the Seventh Circuit construed the definition of "owner or operator" narrowly in holding that a chemical supplier to a wood processing facility was not liable as an owner or operator.

This Note discusses the creation and structure of CERCLA, and then examines the interpretation of "owner or operator" in light of recent court decisions. Finally, this Note illustrates the possible effects a broad reading of section 107 would produce and suggests means by which the statute may be clarified.

II. BACKGROUND

A. Historical Overview and Structure of CERCLA

CERCLA was enacted in response to the large number of...
HAZARDOUS WASTE CLEANUP

13. For purposes of this Note, the terms "toxic waste," "hazardous waste" and "hazardous substances" are used interchangeably. See supra note 2 for the definition of "hazardous substance" under CERCLA.

14. For an overview of CERCLA's legislative history see generally 126 Cong. Rec. 26,336-61; Id. at 30,897-987; Id. at 31,950-82. See also Grad, A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund”) Act of 1980, 8 COLUM. J. ENVTL. L. 1 (1982).


First, Congress intended that the federal government be immediately given the tools necessary for a prompt and effective response to problems of national magnitude resulting from hazardous waste disposal. Second, Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility forremedying the harmful conditions they created.

Id.


18. CERCLA section 103(d)(1) vests the EPA with authority to identify hazardous waste sites. 42 U.S.C. § 9603(d)(1). See supra note 4 for text of section.

19. The term "releases" include any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment any pollution or contaminant. CERCLA § 103(d)(1), 42 U.S.C. § 9601(22).

20. See supra note 2 for CERCLA's definition of a hazardous substance.


22. CERCLA section 107(a) imposes liability on four groups of persons:
ders those parties to cleanup the site.\textsuperscript{23}

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 of 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:

\begin{itemize}
  \item All costs of removal or remedial action incurred by the United States Government or a State or an Indian Tribe not inconsistent with the national contingency plan;
  \item Any other necessary costs of response incurred by any other person consistent with the national contingency plan;
  \item 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 a release; and
  \item The costs of any health assessment or health effects study carried out under section 9604(i) of this title.
\end{itemize}

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.


23. CERCLA section 106 authorizes the EPA to seek an injunction to force a responsible party to cleanup a site that poses an imminent danger to public health or the environment. 42 U.S.C. § 9606. If a private party refuses to conduct such a cleanup, CERCLA section 104(a)(1) authorizes the EPA to cleanup the site:

Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time, . . . , or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment. . . .
B. Liability Under CERCLA Section 107

CERCLA section 107(a) holds four groups\(^{24}\) of "persons\(^{25}\) potentially liable for cleanup costs: present owners and operators of hazardous waste facilities,\(^{27}\) past owners and operators of facilities at the time of disposal,\(^{28}\) generators of hazardous waste who arrange for the transportation, disposal or treatment at a facility owned or operated by another person\(^{29}\) and transporters of hazardous waste.\(^{30}\) Responsible parties are subject to three types of costs: costs incurred by the federal government in hazardous waste site remediation, costs incurred by private parties to cleanup a site, and damages to natural resources. The responsible party is held strictly liable\(^{31}\) unless it can successfully raise one


The government may then seek reimbursement from the party responsible for the waste disposal. CERCLA § 107(a), 42 U.S.C. § 9607(a). This allows the government to immediately cleanup the waste, and later shift financial responsibility to others. See e.g., New York v. Shore Realty Corp., 759 F.2d 1032, 1041 (2d Cir. 1985).

24. See supra note 22 for full text of the section.

25. CERCLA section 101(21) provides:
The term "person" means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body.

26. Under CERCLA, cleanup costs are referred to as "response costs." "Response" is defined as "remove, removal, remedy and remedial action." CERCLA § 101(25), 42 U.S.C. § 9601(25).

27. Id. § 107(a), 42 U.S.C. § 9607(a)(1). The term "facility" means "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located..." Id. § 101(9), 42 U.S.C. § 9601(9). See supra note 22 for full text of section 107(a). This section holds liable current owners and operators, regardless of whether they knew of the hazardous waste at the time of purchase. See, e.g., United States v. Maryland Bank & Trust Co., 632 F. Supp. 573 (D. Md. 1986) (bank was held liable as responsible party for lending money to hazardous waste facility).

28. CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2). The scope of this section is more limited than section 107(a)(1). See supra note 22 for full text. This section insures that past owners and operators can not escape liability by selling their properties. See also Comment, The Liability of Financial Institutions for Hazardous Waste Cleanup Costs Under CERCLA, 1988 Wis. L. Rev. 139, 152.

29. CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3). This section covers generators of hazardous waste who, by contract or agreement, arrange for the disposal of treatment of hazardous waste. See supra note 22 for full text.

30. CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4). This section includes persons who accept or have accepted hazardous substances for transport to disposal or treatment facilities, incineration vessels, or selected sites. See supra note 22 for full text.

31. Comment, The Liability of Financial Institutions for Hazardous Waste Cleanup Costs Under CERCLA, 1988 Wis. L. Rev. 139, 154. "Congress intended that responsible parties be held strictly liable, even though an explicit provision for
of the three affirmative defenses available within the statute: an act of God, an act of war, and an act or omission of a third party not an agent of the defendant.\textsuperscript{32}

The term "owner or operator"\textsuperscript{33} as stated by CERCLA is vague at best. To date, the United States Supreme Court has not interpreted the issue of owner and operator liability under CERCLA.\textsuperscript{34} Therefore, one must look to the lower federal courts for judicial interpretation of owner and operator liability under section 107(a).\textsuperscript{35} In interpreting this statute, the federal courts have reached quite different decisions regarding the definition of "owner" and "operator."\textsuperscript{36}


\textsuperscript{32} See CERCLA § 107(b), 42 U.S.C. § 9607(b) for full text of the section.

\textsuperscript{33} CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A). See supra note 7 for text of statute. For purposes of this Note, "owner or operator" refers to the term as stated in section 101(20)(A)(ii).

\textsuperscript{34} The United States Supreme Court has not interpreted CERCLA section 107(a), leading to inconsistent results among the lower federal courts, with courts holding owners and operators liable depending on whether they interpret the statute broadly or narrowly. See infra notes 42-81 and accompanying text.

\textsuperscript{35} CERCLA § 107(a), 42 U.S.C. § 9607(a). See supra note 22 for full text of this provision.

\textsuperscript{36} See United States v. Conservation Chem. Co., 619 F. Supp. 162 (W.D. Mo. 1985) (corporation that owned and operated site where hazardous wastes were disposed of is among "covered persons" liable under section 107(a)); United States v. Stringfellow, 661 F. Supp. 1053 (C.D. Cal. 1987) (parent corporation of subsidiary corporation responsible for hazardous waste disposal was considered "owner and operator" of waste disposal site and was held liable under section 107(a)). But c.f. FMC Corp. v. Northern Pump Co., 668 F. Supp. 1285 (D. Minn. 1987) (former owner of site on which toxic wastes were disposed was not liable as "owner or operator" under CERCLA when corporation's subsidiary disposed of hazardous wastes); Cadillac Fairview/California, Inc. v. Dow Chem. Co., 840 F.2d 691 (10th Cir. 1988) (past owners of land on which hazardous waste was disposed of, who did not participate in the disposal, were not liable as "owners or operators" under section 9607(a)). See also infra notes 42-81 and accompanying text for discussion of other cases interpreting the terms of "owner or operator."

\textsuperscript{37} See infra notes 42-81 and accompanying text.
under section 107(a), past and current owners and operators have little chance of escaping liability. However, depending upon whether the courts have broadly or narrowly interpreted the statute, they have reached different conclusions.

1. Liability of Owners and Operators of Hazardous Waste Sites

Increasingly, subsequent owners of hazardous waste sites have been held liable for cleanup of contaminated sites, although they are not the “generators” of the waste as stated by the statute.

In 1984, the United States District Court for the District of New Mexico broadly interpreted section 107(a) to hold a lessor of property liable for his lessee’s contamination of the property. In *United States v. Argent Corp.*, the federal court denied the lessor’s motion for summary judgment and held that a landowner/lesser may be held liable as an owner and operator under CERCLA section 107(a). The defendant, an individual property owner, leased a warehouse to Argent Corporation, which utilized hazardous substances in its business operations. The defendant argued that his ownership interest in the property, without any

38. Section 2 *The Law of Hazardous Waste* 12.03(6) (S. Cooke, ed. 1987). “It is reasonable to assume that on most liability issues under CERCLA, defendants face a low likelihood of success, irrespective of the apparent merits of their legal arguments.” *Id.*


40. Other federal courts have read section 107(a) narrowly and have not imposed liability. In *United States v. Dart Industries*, Inc., 847 F.2d 144 (4th Cir. 1988), the 4th Circuit ruled that the South Carolina Department of Health and Environmental Control (DHEC), a government agency, was not liable as an owner or operator under section 107(a) when it gave a company waste disposal permission. *Id.* The court reasoned that the DHEC was acting within its supervisory government powers, and thus could not be held liable. *Id.* at 146.

41. 42 U.S.C. § 9607(a).


43. *Id.* at 1356. The issue in the case was whether the defendant-lessee may be held liable for response costs for the lessee’s contamination of the property. *Id.* at 1355.

44. The manufacturer, Argent Corporation, used hazardous chemicals to recover silver from used photographic film. *Id.* at 1355.
involvement in the business,\textsuperscript{46} did not bring him within the pur-
view of section 107(a)\textsuperscript{47} as a liable owner or operator.\textsuperscript{48} The dis-

tric court disagreed, holding the defendant liable as an owner
under section 107(a),\textsuperscript{49} and basing its decision on case law prece-
dent,\textsuperscript{50} CERCLA's legislative history\textsuperscript{51} and section 107(a)'s statu-
tory language.\textsuperscript{52} The court primarily relied on United States v.
South Carolina Recycling \& Disposal, Inc.,\textsuperscript{53} where a lower federal
court held a lessee that sublet part of its property to a waste dis-
posal business liable for response costs.\textsuperscript{54} That court reasoned,
and the Argent Corp. court agreed, that the lessee maintained con-

trol over the use of the property.\textsuperscript{55}

In Tanglewood East Homeowners v. Charles-Thomas, Inc.,\textsuperscript{56} the
Fifth Circuit Court of Appeals ruled, inter alia, that current par-
ties\textsuperscript{57} involved in a subdivision development were liable as owners
and operators under section 107(a).\textsuperscript{58} The court imposed liability
notwithstanding the fact that a previous owner was responsible
for the accumulation of the hazardous waste on the property.\textsuperscript{59}
The court reasoned that section 107(a) does not specifically ex-

\textsuperscript{46} The defendant maintained that he had no connection at any time with
Argent Corporation's business. \textit{Id.} at 1355. With no genuine issue of material
fact raised at trial, the defendant's contentions may be assumed true.
\textsuperscript{47} 42 U.S.C. § 9607(a).
\textsuperscript{48} \textit{Argent}, 21 Env't Rep. Cas. at 1355-56.
\textsuperscript{49} \textit{Id.} at 1356.
\textsuperscript{50} \textit{Id.} at 1356. The court relied on United States v. South Carolina Re-
cycling \& Disposal, Inc., et al., 21 Env't Rep. Cas. (BNA) 1577 (August 28, 1984)
(NEPACCO) 579 F. Supp. 823, 848 (W.D. Miss. 1984). For a discussion of
NEPACCO, see infra notes 76-79 and accompanying text.
\textsuperscript{51} \textit{Argent}, 21 Env't Rep. Cas. at 1356. The court noted that the legislative
history of the statute showed language omitted from the proposed House ver-
sion which would have required participation in management or operation as a
prerequisite to owner liability. \textit{Id.}
\textsuperscript{52} \textit{Id.} CERCLA section 107(a) explicitly holds owners or operators of a
hazardous waste facility liable, with no prerequisite of participation in manage-
ment for a finding of liability. 42 U.S.C. § 9607(a).
\textsuperscript{53} SCRDI, 21 Env't Rep. Cas. (BNA) 1577 (August 28, 1984).
\textsuperscript{54} \textit{Id.} at 1584. In \textit{SCRDI}, the United States District Court for the District
of South Carolina held a lessee that sublet part of its property to a waste disposal
business liable for response costs. \textit{Id.}
\textsuperscript{55} \textit{Id.} at 1581. The court based its decision on section 107(a)(2) of CER-
CLA, and reasoned that the defendant, "as lessee of the site, maintained control
over and responsibility for the use of the property. . . . " \textit{Id.}
\textsuperscript{56} Tanglewood East Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568
(5th Cir. 1988).
\textsuperscript{57} The defendants were a lending institution, residential developers, con-
struction companies, real estate agents and real estate agencies. \textit{Id.} at 1571.
\textsuperscript{58} \textit{Id.} at 1572-73.
\textsuperscript{59} \textit{Id.} The court denied defendants' motion to dismiss, rejecting their
clude current owners of contaminated property from liability. In so doing, the court interpreted section 107(a) broadly and extended potential liability to entities that have absolutely no involvement in the hazardous waste disposal.

In light of these decisions, ownership of a hazardous waste disposal site is sufficient to find owner or operator liability under CERCLA. This ownership may occur either at the time of disposal of the waste or at the time of cleanup.

2. Liability of Corporate Officers as Owners and Operators

Corporations may incur liability for hazardous waste disposal as “persons” under CERCLA section 107(a). Recently, courts have extended owner and operator liability to the officers of corporations involved in hazardous substance disposal. This has occurred because of a recognition that officers participate in the disposal of hazardous waste by authorizing the generation or

60. Id. at 1572. The court discussed United States v. Maryland Bank & Trust Co., 632 F. Supp. 1573 (D. Md. 1986), where a bank that held a mortgage on a property and later bought the property at a foreclosure sale, was liable for cleanup costs incurred from the previous owner’s dumping on the property. Id. at 1574.

61. In another case not relied on by the Hines court, a federal district court broadly interpreted owner/operator liability under CERCLA. United States v. Mirabile, 15 Env'tl. L. Rep. (Envtl. L. Inst.) 20,994 (E.D. Pa. 1985). The Mirabile court ruled that a landowner who had purchased land subsequent to the disposal of hazardous wastes was liable as an owner and operator under section 107(a). Id. at 20,997. However, the court held that subsequent landowners may escape liability if they are able to establish a third party defense under section 107(b)(3). Id.

62. CERCLA § 107(a) & (b), 42 U.S.C. § 9607(a) & (b). However, it should be noted that intervening landowners, owners of the land after disposal but before cleanup, may be held liable under CERCLA. Under section 101(35)(C), as added by SARA, if an intervening landowner has “obtained actual knowledge of a release or threatened release of a hazardous substance at such facility when the defendant owned the real property, and then subsequently transferred ownership... without disclosing such knowledge, such defendant shall be treated as liable under section 9007(a)(1) and no defense under section 9007(b)(3) shall be available to such defendant.” Id. § 101(35)(C), 42 U.S.C. § 9601(35)(C).

63. For CERCLA’s definition of “person”, see supra note 25.

64. 42 U.S.C. § 9607(a).

65. Corporate officers have argued that their actions have been on the behalf of the corporation, and thus they are protected from liability under the doctrine of limited liability. United States v. Northeastern Pharmaceutical & Chem. Co., Inc. 579 F. Supp. 823, 847 (W.D. Miss. 1984). In some cases courts have rejected this argument and imposed personal liability anyway. See notes 63-81 and accompanying text.
transportation of hazardous waste.\textsuperscript{66}

In \textit{United States v. Carolawn Co.},\textsuperscript{67} the court maintained that the three individuals who owned, operated and were officers of a company operating a hazardous waste facility were liable under section 107(a).\textsuperscript{68} The Federal District Court of South Carolina denied defendants' motion for summary judgment and held defendants liable as owners of a hazardous waste site.\textsuperscript{69} In addition, the court imposed further liability on two of the defendants based on their role as operators of the facility.\textsuperscript{70} The court stated that "to the extent an individual has control or authority over the activities of a facility from which hazardous substances are released or participates in the management of such facility, he may be held liable for responses incurred at the facility notwithstanding the corporate character of the business."\textsuperscript{71}

The Second Circuit has ruled that a stockholder and officer of a property can be liable as an operator under CERCLA.\textsuperscript{72} In \textit{New York v. Shore Realty Corp.},\textsuperscript{73} the defendant, an officer and major stockholder of a corporation which operated a hazardous waste disposal site, argued that section 107(a) required a showing of participation in the generation of hazardous waste to impose liability, and thus he was not liable since the plaintiff failed to establish causation.\textsuperscript{74} The court rejected the defendant's contentions and maintained that since the defendant knew hazardous waste was stored on the site he should be held strictly liable as an operator, regardless of the fact that he had not participated in the generation or transportation of the waste.\textsuperscript{75}


\textsuperscript{67} Id.

\textsuperscript{68} Id. at 2130. The court ruled that unless one of the defendants could assert a defense under section 107(b), they would be held liable. \textit{Id.}

\textsuperscript{69} Id. The three individuals incorporated a company and thereafter owned, operated and were officers of the company which disposed of hazardous substances. \textit{Id.}

\textsuperscript{70} Id. at 2131. The court found operator liability based on two theories: first, corporate officials who participated in hazardous waste disposal are subject to individual liability under section 107(a); and second, circumstances of the case mandated piercing the corporate veil to reach the individuals and hold them liable. \textit{Id.}

\textsuperscript{71} \textit{Id.}

\textsuperscript{72} New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985).

\textsuperscript{73} \textit{Id.}

\textsuperscript{74} \textit{Id.} at 1044.

\textsuperscript{75} \textit{Id.} at 1037. The court rejected the defendant's causation requirement based on the structure of the statute and interpretation of legislative history. The \textit{Shore} court maintained that section 107(a)(1) "unequivocally imposes strict
In *United States v. Northeastern Pharmaceutical & Chemical Corp.*,\(^76\) the 8th Circuit reversed the District Court of Mississippi and held that officers and shareholders of a chemical manufacturing company were not liable as "owners or operators" of a facility under section 107(a)(1).\(^77\) The district court had imposed liability on the officers because of their authority over the plant and participation in the management of the corporation.\(^78\) The appeals court maintained that because the officers neither owned nor operated the hazardous waste site, they could not be held liable under CERCLA.\(^79\) The court's holding is noteworthy, since many subsequent courts based their findings of owner/operator liability on the *NEPACCO* court's decision.

Since a "person" who may be held liable includes both individuals and corporations,\(^80\) courts have imposed liability on corporations. Moreover, some courts have extended this liability to corporate officers, depending on the level of their involvement with site activities. Ownership is not a prerequisite for imposing liability on corporate officers; personal liability may be imposed where an officer authorizes or participates in the disposal of hazardous waste.\(^81\)

### III. *HINES LUMBER CO. v. VULCAN MATERIALS CO.*

In *Hines*, the Seventh Circuit held that a chemical supplier was not liable as an "owner or operator" under CERCLA section 107(a)(1).\(^82\) Further, the court found that "Congress specifically rejected including a causation requirement in section 9067(a)." \(^83\) Other courts have imposed strict liability on owners and operators of hazardous waste sites. See *NEPACCO*, 810 F.2d at 743 ("CERCLA § 107(a)(3) . . . imposes strict liability upon any person who arranged for the disposal or transportation for disposal of hazardous substances."); *Tanglewood East Homeowners*, 849 F.2d at 1572 ("We hold that section 9607(a)(1) imposes strict liability on the current owners of any facility which releases or threatens to release a toxic substance."). The *Shore* court also stated the landowner could reasonably foresee the lessee's continued disposal of waste on the property, and took no preventive action. *Shore Realty Corp.*, 759 F.2d at 1049.

---


\(^77\) *NEPACCO*, 810 F.2d 726, 742-43 (8th Cir. 1986).

\(^78\) *NEPACCO*, 579 F. Supp. 823, 848.

\(^79\) *NEPACCO*, 810 F.2d at 743.

\(^80\) See supra note 25 for definition of "person" under CERCLA.

From 1976 to 1978 the plaintiff, Edward Hines Lumber Company (Hines Lumber), operated a wood processing plant. Hines Lumber contracted with the defendant, Osmose Wood Preserving Inc. (Osmose) to design a second plant for Hines Lumber, supply a wood preservant chemical to Hines Lumber, train Hines Lumber's employees to operate the plant's equipment, and license Hines Lumber to use its trademark. In 1981, the Arkansas Department of Pollution Control and Ecology discovered toxic chemicals in the groundwater near the facility, and four years later the EPA confirmed the finding. The EPA placed the site on the National Priorities List and ordered Hines Lumber to remove the waste.

Hines Lumber brought an action for contribution under CERCLA section 113(f)(1), claiming Osmose was liable as an 82, Edward Hines Lumber Co. v. Vulcan Materials Co., 861 F.2d 155 (7th Cir. 1988). 83, Id. at 156. Hines Lumber operated the plant from 1976 to 1978, at which time it sold the plant to Mid-South Wood Products, Inc. (Mid-South) Id. After the EPA placed the site on the National Priorities List, it asked both Hines Lumber and Mid-South to conduct a cleanup, after which Hines Lumber instituted this action. Id. at 155. 84, All other defendants had settled or been adjudicated at the trial court level. See Hines, 685 F. Supp. 651 (N.D. Ill. 1988). 85, Hines, 861 F.2d at 156. In return, Hines Lumber agreed to buy its next five years' requirements of chromated copper arsenate from Osmose and gave Osmose full access to the plant. Id. At all times, Hines Lumber controlled the plant's daily operations and was in charge of employees, production and cost. Id. at 158. 86, Id. at 156-57. 87, Id. at 155. The EPA placed the site on the National Priorities List pursuant to CERCLA section 105(a)(8)(B). 42 U.S.C. § 9605(a)(8)(B). 88, Id. at 155. Hines Lumber and Mid-South signed a consent decree to cleanup the site. By the time of trial the parties had almost completed the cleanup at a cost of $5 million. Id. See supra notes 18-23 and accompanying text for description of EPA's power to order a liable party to cleanup a hazardous waste disposal site. 89, CERCLA section 113(f)(1) provides:

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 or section 9607 of this title.

HAZARDOUS WASTE CLEANUP

owner or operator of the site. Hines Lumber relied on section 113(f)(1) which states that contribution costs may be sought from "any other person who is liable or potentially liable under section 9607(a) of this title . . . ." Based on the foregoing section, the court determined that Osmose's liability arose, if at all, under section 107(a)(2) of CERCLA.

On appeal, the Hines court's primary task was to assess whether Osmose was an "owner or operator" of the site within the meaning of section 107(a)(2). This section provides, in part, that "any person who at the time of disposal of any hazardous substance owned or operated such facility at which such hazardous substances were disposed of" must pay for a cleanup of the facility. The Hines court found the definition of "owner or operator" ambiguous and sought to interpret the phrase using another source.

The Hines court stated that Osmose was definitely not an "owner," so it was potentially liable only if it was an "operator" of the site. The court turned to common law analogies to aid it

Co. v. Vulcan Materials Co., 669 F. Supp. 854 (N.D. Ill. 1987). The district court found Hines Lumber's suit was untimely and granted the defendants' motion for summary judgment. Id. at 855. In a subsequent suit in the United States District Court for the Northern District of Illinois, Hines Lumber sought contribution from the chemical suppliers for the cost of removing the contaminants. Hines, 685 F. Supp. 651. The district court held that Osmose was not a responsible party under section 107(a)(2) and granted Osmose's motion for summary judgment. Id. at 657. The present case is Hines Lumber's appeal from that judgment.

90. Hines, 861 F.2d at 156. Hines Lumber also claimed Osmose was liable under the theory of joint venturer. Id. at 158. The court maintained that the common law definition of joint venture has at least three elements which were missing from the relationship between Hines Lumber and Osmose: 1) willingness to be joint venturers, 2) shared control, and 3) division of profits. Id. at 158. The contract specifically stated that Osmose was not a joint venturer and assigned to Hines Lumber the responsibility for complying with environmental rules. Id. In addition, under the contract Osmose had no right to share in the profits and was not required to contribute to the losses. Id.

91. Id. at 156. See supra note 89 for complete text of section 113(f)(1).

92. The courts use section 107(a) and section 9607(a) interchangeably.

93. Hines, 861 F.2d at 156.

94. Id. The court indicated that the issue in this case was "whether Osmose 'owned or operated' the Mena plant." Id. The court stated early in its decision that Osmose was not an "owner" of the facility, therefore, potential liability arose only if Osmose was an "operator." Id.

95. Id. See supra note 22 for full text of CERCLA section 107(a)(2).

96. Id. at 157. The court looked at section 101(20)(A)(ii) to define "owner or operator", and concluded that the statutory definition was circular and therefore not helpful. Id.

97. Id.
in its determination of "operator" liability and analogized Hines Lumber and Osmose's relationship to that of employer and independent contractor. In an employer-independent contractor relationship, neither party is liable for the other's torts, and the independent contractor is in charge of the day to day control of its own operations. In Hines, Osmose was in control of its own operations; however, the court found that Hines Lumber controlled the day to day activities of the site. The court concluded, based on analogy, that Hines Lumber was the owner and operator of the plant, while Osmose was an independent contractor.

IV. ANALYSIS

As discussed earlier, the majority of the federal courts have construed section 107(a) to impose liability to parties indirectly involved in the ownership or operation of a hazardous waste facility. The Hines court's narrow holding is significant in that it is one of few rulings that depart from the trend toward a broad interpretation of section 107(a).

The Hines court's dissatisfaction with CERCLA's ambiguous definition of "owner or operator" is not unique; many courts that have assessed "owner or operator" liability under CERCLA have broadened the statute's application. Although the Hines decision was consistent with decisions of other courts in its dissatisfaction with the broad statutory construction of section 107(a), the court's reasoning and conclusion are improper in light of other courts' holdings and public policy considerations.


99. Id. The court also analogized Hines Lumber and Osmose to co-venturers. See supra note 90 for Hines Lumber's cause of action based on joint venturer theory.

100. Id.

101. Id. at 158. Hines Lumber had day to day control over employee hiring and dismissal, production quantities, sale location and product pricing. Id.

102. Id.

103. See supra notes 42-81 and accompanying text for a discussion of court decisions defining the terms "owner or operator.

104. Id.

105. See infra notes 114-17 and accompanying text for discussion of public policy considerations.
The *Hines* court indicated that as long as Osmose had not participated in the day to day operation of the facility, it could not be held liable as an "operator" under CERCLA.106 Other courts have rejected this restrictive prerequisite when determining a potentially responsible party's liability under section 107(a).107 In *Hines* the court only focused on whether the chemical supplier was directly and actively involved with the daily operations of the facility. Because Hines Lumber controlled all daily operations through management decisions, such as the hiring and firing of employees, production quantity and product cost, the court concluded that Hines Lumber, and not Osmose, was the "operator" of the facility.108 However, the court disregarded several relevant facts. Osmose built the hazardous waste disposal facility, trained Hines Lumber's employees in the use of the equipment, reserved the right to inspect ongoing operations, and authorized Hines Lumber to use its trademark.109 Most importantly, Osmose continually furnished the hazardous chemical that Hines Lumber utilized in its manufacturing process, and agreed to supply Hines Lumber's chemical requirements for the next five years.110

By turning owner/operator liability on whether Osmose had participated in the management of the facility, the court departed from other federal court analyses.111 Despite the factual differences in the federal cases, certain themes determining liability have emerged. First, courts have usually imposed liability based

---

106. *Hines*, 861 F.2d at 158.
107. Tanglewood East Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568 (5th Cir. 1988) (parties involved in subdivision development held liable as owners and operators for previous owner's hazardous waste disposal); New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985) (officer and major stockholder of corporation which operated hazardous waste site held liable as an operator); United States v. South Carolina Recycling & Disposal, Inc., et al., 21 Env't Rep. Cas. (BNA) 1577 (August 28, 1984) (lessee that sublet part of its property to waste disposal business held liable for response costs); United States v. Carolawn Co., 21 Env't Rep. Cas. (BNA) 2124 (June 15, 1984) (three individuals who owned, operated and were officers of a company operating a hazardous waste facility held liable as owners and operators); United States v. Argent Corp., 21 Env't Rep. Cas. 1354 (May 4, 1984) (landowner/lessor held liable as owner and operator for lessee's contamination of property). *See supra* notes 41-77 and accompanying text for a full discussion of these cases.
108. *Hines*, 861 F.2d at 158.
109. *Id.* at 157. The court discussed these facts, but found they were insufficient to establish that Osmose was an "operator" of the site, within the meaning of section 107(a). *Id.*
110. *Id.*
111. *See supra* notes 42-81 and accompanying text for other federal court analyses.
upon operational control rather than ownership. Second, participation in management has not solely determined operational control; other factors, such as nature of the relationship between the parties, awareness of waste disposal and position of the individual sought to be held liable have also been considered in determining a potentially liable party.

In assessing Osmose's liability, the Hines court failed to consider public policy goals of corrective justice, compensation, and deterrence. One of CERCLA's most important goals is to affix liability on those parties responsible for damage. This "polluter-pays" approach reflects a goal of corrective justice. The court also failed to recognize the importance of compensating Hines Lumber for the damage caused by the hazardous chemical supplied by Osmose. The shift of the burden of cleanup costs from the "victim" to the potentially responsible party under CERCLA indicates the compensatory function of the statute. Finally, CERCLA's liability provisions serve a deterrent function. If a party knows it may be held liable for cleanup costs, it may exercise stricter control over its actions so as to minimize hazardous waste liability.

The Hines court based its determination that Osmose was not a potentially responsible party on its limited participation in the site's daily management. However, the court failed to take into account relevant factors discussed by other federal courts, as well as important public policy considerations. In so doing, the court's analysis was incomplete, and undermined CERCLA's policy goals.


113. See supra notes 42-81 and accompanying text.


115. See supra note 17 and accompanying text.


118. See supra notes 42-81 and accompanying text.
V. CONCLUSION

Congress enacted CERCLA in response to the growing hazardous waste disposal problem by placing liability and cleanup costs on parties responsible for such disposal. CERCLA authorizes the EPA to identify a potentially responsible party and order that party to cleanup a hazardous waste site. A responsible party may be an individual or a corporate officer. Given that the majority of federal courts have interpreted section 107 broadly, a current or past owner or operator of a hazardous waste facility has little chance of escaping liability. In addition, as the public has become increasingly aware of the growing problem of toxic waste disposal, courts have been more willing to broadly interpret the statute. The federal caselaw discussed in this Note demonstrates that courts are willing to expand the scope of liability under section 107 and hold a larger group of parties potentially liable for cleanup, even in cases where their contact with the site has been minimal. This expanded liability is beneficial to parties seeking redress, as it places the cost of cleanup on those responsible for the problem. However, interpreting section 107 broadly presents difficulties. First, businesses will be held liable, even if only distantly related to the waste disposal activity. This in turn may result in fewer businesses participating in ventures where hazardous wastes are involved. The fear of being held liable as an “owner or operator” of a facility may outweigh the potential business benefits, since full exposure to liability could place a company’s entire assets at risk.

A second, but related problem is section 107’s ambiguity. CERCLA’s definition of “owner or operator” is ambiguous and courts have interpreted the phrase in different ways, leading to inconsistent results and lack of predictability. This inconsistency makes it difficult for a business to conduct its affairs because it is unsure how a court may interpret its activities, with respect to potential causes of action under CERCLA.

To avoid future interpretational problems, it is submitted that section 107(a) be amended to more clearly define “owner or operator.” This definition should specifically state the extent to which an entity must be involved in the ownership or operation of

119. See supra notes 3-6 and accompanying text.
120. See supra notes 63-81 and accompanying text.
121. See supra notes 42-81 and accompanying text.
122. Id.
a facility before liability as a responsible party may be imposed. In redefining the statute, the purposes of CERCLA — prompt and efficient cleanup of hazardous waste sites and imposition of liability on responsible parties — would be better served.

Jill E. Aversa

123. In determining the extent of involvement necessary to impose liability, many factors must be considered. These factors may include whether the individual or corporation sought to be held liable as an owner or operator actively participates in decision-making and has knowledge of decisions involving hazardous waste disposal, among others.

124. See supra notes 15-17 and accompanying text.