INTERPRETING "OWNER" AND "OPERATOR" LIABILITY UNDER CERCLA: *EDWARD HINES LUMBER COMPANY V. VULCAN MATERIALS COMPANY*, 861 F.2D 155 (7TH CIR. 1988)

The inadequacy of methods for the treatment and disposal of hazardous waste has become an issue of national concern.[1] In response, Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA).[2] CERCLA imposes

1. *Hazardous and Toxic Waste Disposal: Joint Hearings Before the Subcommittees on Environmental Pollution and Resource Protection of the Committee on Environment and Public Works* (Part 1), 96th Cong., 1st Session 82-83 (1979) (statement of Thomas C. Jorling, Ass't. Admin., Water and Hazardous Materials, EPA). *See also* Rich, *Personal Liability for Hazardous Waste Cleanup: An Examination of CERCLA Section 107*, 13 B.C. ENV'T AFF. L. REV. 643, 645-46 (1986) (the large number of inactive hazardous waste sites is a serious threat to the environment and public health). *See infra* note 2 for discussion of CERCLA's legislative history. Thomas C. Jorling, testified in 1979:

> Most of the solid wastes, and in particular hazardous waste, produced in the United States in the past have been disposed of using environmentally unsound methods. Given a relative surplus of land, an economic system which failed to incorporate environmental damages into product costs, and ignorance of what was occurring underground at disposal sites, past disposal practices have created a large number of situations in which the environment and public health are threatened.

Id. See generally Belthoff, *Private Cost Recovery Actions Under Section 107 of CERCLA*, 11 COLUM. J. ENVTL. L. 141 (1986) (the inadequate disposal of hazardous waste is a problem of epic proportions).

2. 42 U.S.C. §§ 9601-9675 (1982 & Supp. IV 1986). Prior to CERCLA, Congress passed the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§ 6901-6991 (1982 & Supp. II 1986). RCRA focused on the management and regulation of hazardous waste disposal. RCRA, otherwise referred to as "cradle-to-grave" legislation, authorized the regulation of hazardous waste from the time of its creation to the time of its disposal. But RCRA did not address the problem of abandoned hazardous waste sites. RCRA's omission prompted Congress to complete the regulatory scheme with CERCLA. H. Rep. No. 1016, 96th Cong. 2d Sess. 22, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119-6125. *See* Rich, *supra* note 1, at 646-649 (discussing RCRA's provisions and deficiencies). *See, e.g.*, United States v. Shell Oil Co., 605 F. Supp. 1064, 1071 (D. Colo. 1985) ("Deficiencies in RCRA have left regulatory gaps."); United States v. Northeastern Pharmaceutical and Chemical Co., 579 F. Supp. 823, 839 (W.D. Mo. 1984), *aff'd*, 810 F.2d 726 (8th Cir. 1986) ("It was the

liability upon "owners" and "operators" of facilities which must dispose of hazardous waste.[3] In 1986, Congress amended CERCLA with the Superfund Amendments and Reauthorization Act (SARA) to provide the government with a right to contribution from liable parties.[4]

---

precise inadequacies resulting from RCRA's lack of applicability to inactive and abandoned hazardous waste disposal sites that prompted the passage of CERCLA."); United States v. A&F Materials Company, Inc., 578 F. Supp. 1249, 1252 (S.D. Ill. 1984) ("CERCLA was enacted because Congress realized there were serious gaps in RCRA."); United States v. Price, 577 F. Supp. 1103, 1109 (D.N.J. 1983) ("CERCLA was promulgated in response to deficiencies in RCRA."); United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 n.2 (D. Minn. 1982) ("Both the House and the Senate Committee Reports express the need for prompt action, concern over inadequacies of existing legislation, and detail the magnitude of the problems caused by hazardous waste disposal in this country.").

3. 42 U.S.C. § 9607(a) (Supp. IV 1986) provides:

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 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 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.

42 U.S.C. § 9607(a). Congress assigned to persons listed in section 107(a) the liability for all costs incurred in cleaning up hazardous waste sites. Congress enacted this liability scheme to ensure "that those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their action." S. REP. NO. 848, 96th Cong., 2d Sess. 13 (1980). *See also* State of Ohio ex rel. Brown v. Georgeoff, 562 F. Supp. 1300, 1312 (N.D. Ohio 1983) (discussing the legislative history to § 107(a) and concluding that Congress intended for those who create hazardous waste to bear the cleanup costs).

4. Superfund Amendments and Reauthorization Act, Pub. L. 99-499, 100 Stat. 1613, 1647 (codified at 42 U.S.C. §§ 9601-9675 (1982 & Supp. IV 1986)). *See* Colorado v. A.S.A.R.C.O., 608 F. Supp. 1484, 1492 (D. Colo. 1985) (explaining that this provi-

While several federal district courts have attempted to define the degree of involvement necessary to hold a person liable as an "operator" under CERCLA,[5] only two federal appellate courts have squarely addressed the issue.[6] In *Edward Hines Lumber Co. v. Vulcan Materials*

sion codifies the federal common law principle, recognized by courts in the context of CERCLA, that contribution can be obtained only from parties liable under the governing law).

5. *See, e.g.*, United States v. Stringfellow, 661 F. Supp. 1053 (C.D. Cal. 1987) (holding a parent corporation that merged with its wholly owned subsidiary and assumed all the subsidiary's obligations under California law liable for response costs resulting from the release or threatened release of hazardous substance from toxic waste disposal site); United States v. Northernaire Plating Co., 670 F. Supp. 742 (W.D. Mich. 1987) (holding a corporate officer who arranged for the disposal of hazardous waste personally liable under CERCLA); United States v. Vertac Chem. Corp., 671 F. Supp. 595 (E.D. Ark. 1987) (holding a chemical company which owned and operated the chemical liable for the removal of toxic waste); Sunnen Pro. Co. v. Chemtech Ind., Inc., 658 F. Supp. 276 (E.D. Mo. 1987) (holding a chemical company which once produced and disposed of hazardous wastes liable under CERCLA § 107(a)(2) to transferee of property for necessary response costs incurred in decontamination efforts); United States v. Bliss, 667 F. Supp. 1298 (E.D. Mo. 1987) (holding plant supervisor and chief executive officer who had ultimate authority for decisions regarding disposal liable for clean up costs under § 107(a)(3)); Idaho v. Bunker Hill, 635 F. Supp. 665 (D. Idaho 1986) (holding that a parent corporation may not invoke the "corporate veil" to protect itself against its subsidiary's CERCLA liability when the parent owned and operated the subsidiary's facilities).

See also United States v. Maryland Bank & Trust Company, 632 F. Supp. 573 (D. Md. 1986) (holding a bank which held a mortgage on land and then purchased it at a foreclosure sale liable for the cost of hazardous waste cleanup.); *In re* T.P. Long Chem. Inc., 45 Bankr. 278 (Bankr. N.D. Ohio 1985) (holding that the trustee of a bankruptcy estate which includes a hazardous waste producer is the "operator" of that facility liable under § 9607(a)(1) for CERCLA response costs); United States v. Mirabile, 23 Env't Rep. Cas. (BNA) 1511 (E.D. Pa. 1985) (holding a shareholder who personally managed a facility owned by his corporation personally liable as an "owner" or "operator" under CERCLA); United States v. South Carolina Recycling and Disposal Co., 653 F. Supp. 984 (D.S.C. 1984) (holding parties to a joint venture liable as "operators" under CERCLA); United States v. Mottolo, 22 Env't Rep. Cas. (BNA) 1026 (D.N.H. 1984) (holding that persons who arranged for disposal or transport of hazardous substances need not own or possess waste to be liable under CERCLA).

6. New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985) (holding a corporate officer who managed a facility personally liable under CERCLA) (*see infra* notes 33-38 and accompanying text for a discussion of *Shore Realty*); United States v. Northeastern Pharmaceutical and Chemical Co. (NEPACCO), 810 F.2d 726 (8th Cir. 1985) (holding a corporate officer with authority to handle and dispose of hazardous waste liable under § 107(a)(3)) (*see infra* notes 40-44 and accompanying text for discussion of *NEPACCO*). *See also* United States v. Dart Ind., Inc., 847 F.2d 144 (4th Cir. 1988) (holding a state environmental agency not liable as an "owner" or "operator" of hazardous waste site under CERCLA because the agency did not manage or participate in the activities that contributed to the release of hazardous wastes); Joslyn Manufacturing Co. v. T. L. James & Co., 893 F.2d 80 (5th Cir. 1990) (following *Hines*' approach).

Co.,[7] the Seventh Circuit held a chemical supplier to a lumber plant not liable for cleanup costs because it was not an "owner" or "operator."[8]

Edward Hines Lumber Co., a wood preserving company, contracted with Osmose Wood Preserving, Inc. to build a processing plant in Mena, Arkansas.[9] Pursuant to the agreement, Osmose designed and constructed the facility and installed the wood treatment system. Osmose also trained the personnel and supplied the hazardous chemicals for the system.[10] Osmose licensed Hines to use its trademark, and reserved a right to inspect ongoing operations.[11] Hines, however, operated the plant.[12] After two years of operation Hines sold the plant to the current owner, Mid-South Wood Products, Inc.[13] The Environmental Protection Agency[14] (EPA) subsequently declared the site contaminated by toxic substances[15] and ordered Hines and Mid-South to

7. 861 F.2d 155 (7th Cir. 1988). The Fifth Circuit has followed the Seventh Circuit's decision and did not extend CERCLA liability to a parent corporation whose wholly owned subsidiaries were offenders. Joslyn Manufacturing Co. v. T. L. James & Co., Inc., 893 F.2d 80 (5th Cir. 1990).

8. 861 F.2d at 158-59.

9. *Id.* at 156. Hines had no experience with using chromated copper arsenate (CCA) to preserve wood, but Osmose represented to Hines that it could handle both the CCA treatment process and the marketing of the treated product. Appellant's Opening Brief at 7, Edward Hines Lumber Co. v. Vulcan Materials Co., 861 F.2d 155 (7th Cir. 1988) (No. 85-1142).

10. 861 F.2d at 156. Hines paid Osmose $135,840 and promised to purchase all of its requirements of chromated copper arsenate from Osmose for the next five years. *Id.*

11. *Id.*

12. *Id.* at 156. As an operator of the facility, Hines controlled daily operations, hired employees, decided how much wood to produce, where to sell it, and at what price. *Id.* at 158.

13. *Id.* at 156. As a result of the sale, Hines assigned its interest in the agreement to Mid-South. Appellant's Opening Brief at 12, Edward Hines Lumber Co. v. Vulcan Materials Co., 861 F.2d 155 (7th Cir. 1988) (No. 85-1142).

14. "Although the Act grants most of the substantial authority to the President, he has delegated these and other superfund implementation authority to the EPA, the Coast Guard, and various other agencies." United States v. Northeastern Pharmaceutical & Chemical Co., 579 F. Supp. 823, 838 n.14 (W.D. Mo. 1984) (citing Exec. Order No. 12,316, 46 Fed. Reg. 42,237 (1981)).

15. 861 F.2d at 155. The EPA investigated the CCA plant in November 1985. The investigation consisted of collecting and analyzing surface and subsurface soils and groundwater immediately adjacent to the plant. The EPA found the largest amount of arsenic-contaminated soil within a 200-foot radius of the plant. Appellant's Opening Brief at 13, Edward Hines Lumber Co. v. Vulcan Materials Co., 861 F.2d 155 (7th Cir. 1988) (No. 85-1142).

remove the offending chemicals.[16] Hines filed suit in the District Court for the Northern District of Illinois to recover decontamination costs from its various chemical suppliers.[17] The district court granted the suppliers' summary judgment motion, holding Osmose not liable as an "operator" for purposes of CERCLA liability because it did not control or manage the Mena facility.[18] On appeal, the Seventh Circuit affirmed, holding Osmose not liable as an "owner" or "operator" under CERCLA.[19]

In 1980, Congress enacted CERCLA to: (1) facilitate the prompt cleanup of hazardous dumpsites by providing financing for both governmental and private responses, and (2) place the ultimate financial burden upon those responsible for the waste.[20] CERCLA created the Hazardous Substance Response Trust Fund, commonly known as "Superfund," to finance the cleanup of hazardous waste sites.[21] Section 104 of CERCLA permits the EPA to use Superfund moneys to clean up the hazardous waste sites and to recover costs from responsible parties pursuant to section 107.[22]

---

16. 861 F.2d at 155. CERCLA authorizes the EPA to respond or compel response to actual or threatened releases of hazardous materials. Belthoff, *supra* note 1, at 144.

17. Edward Hines Lumber Co. v. Vulcan Materials Co., 685 F. Supp. 651 (N.D. Ill. 1988). Hines initially filed a cause of action against his suppliers based on state tort law. The district court found the three year statute of limitations expired and dismissed Hine's claims. Edward Hines Lumber Co. v. Vulcan Materials Co., 669 F. Supp. 854 (N.D. Ill. 1987).

18. 685 F. Supp. at 657.

19. 861 F.2d 155, 158-59 (7th Cir. 1988).

20. Rich, *supra* note 1, at 671. The 96th Congress hastily passed CERCLA during its closing days. Consequently, CERCLA's legislative history is very scant. Nonetheless, the congressional members who favored CERCLA viewed it as speedy resolution to the major problems associated with hazardous waste. CERCLA proponents feared that waiting to pass similar legislation until the next Congressional session would only result in a weaker version of CERCLA. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL L. 1, 34 (1982). *See also* Belthoff, *supra* note 1, at 144 (by hastily drafting CERCLA, Congress created many uncertainties in the statute).

21. 42 U.S.C. § 9611 (Supp. IV 1986). Congress imposed a tax on oil and chemical producers to finance Superfund. *See* 26 U.S.C. § 9507 (Supp. IV 1986). CERCLA § 221 authorized Congress to appropriate $44 million per year from 1981 to 1985 to Superfund. 42 U.S.C. § 9631(b)(2) (1982). CERCLA § 207(o) authorized Congress to appropriate $212.5 million to the fund from 1987 to 1991. 42 U.S.C. § 9611 (Supp. IV 1986). *See generally* Rich, *supra* note 1, at 650-51 (discussing CERCLA's regulatory tools for protecting the public from hazardous waste).

22. Rich, *supra* note 1, at 651. Section 104(a)(1) of CERCLA provides:

Whenever (A) any hazardous substance is released or there is a substantial threat

Section 107 of CERCLA establishes "owners" and "operators" as one group of potentially responsible parties.[23] However, the statutory definition of "owner" and "operator" is circular.[24] Neither CERCLA nor its legislative history clearly identifies when one is liable as an "owner" or "operator."[25] Consequently, courts interpret the Congressional intent[26] and the statutory language[27] to impose liability[28] upon

---

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 contaminate 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 contaminate . . . or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment. . .

42 U.S.C. § 9604(a)(1) (1982 & Supp. IV 1986).

23. *See supra* note 3 for text of CERCLA's potentially responsible parties.

24. 42 U.S.C. § 9601(20)(A) defines owner or operator as:

(i) in the case of a vessel, any person owning, operating or chartering by demise, such vessel, (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.

42 U.S.C. § 9601(20) (A) (1982 & Supp. IV 1986).

25. Edward Hines Lumber Co. v. Vulcan Materials Co., 861 F.2d 155, 157 (7th Cir. 1988).

26. *See generally* Grad, *supra* note 20, at 1 (discussing the problems congressional leaders tried to solve with CERCLA). *See also* Rich, *supra* note 1, at 650 (Congress intended to respond to problems posed by hazardous waste sites and finance the cleanup).

27. CERCLA's language did not resolve issues of liability. Rather, Congress intended for traditional and evolving principles of common law to govern issues of liability under CERCLA. State of Colorado v. Asarco, 608 F. Supp. 1484, 1489 (D. Colo. 1985). *See also* United States v. Chem-Dyne, 572 F. Supp. 802, 808-10 (S.D. Okla. 1983) (holding that CERCLA mandates development of a uniform federal common law rather than reference to the common law of each state).

28. Courts base liability upon the parties' relationship to the contaminated site or to the hazardous substances themselves, regardless of fault. *See* Garber, *Federal Common Law of Contribution Under the 1986 CERCLA Amendments*, 14 ECOLOGY L.Q. 365, 367-68 (1987). Further, Congress intentionally omitted a standard of liability under CERCLA. Courts addressing the issue have followed one of two positions: (1) the Restatement which allows joint and several liability whenever the harm is indivisible; or (2) the Gore Amendment which allows a court to impose either joint and several liability or apportionment according to a number of different factors including: (1) the abil-

persons who (1) control and manage the facility,[29] (2) discover the contamination and have authority to implement abatement measures,[30] or (3) are joint venturers in the enterprise which causes the contamination.[31]

Only two circuit courts have thoroughly examined liability as an "operator" under CERCLA.[32] In *New York v. Shore Realty Company*,[33] the Second Circuit held Shore Realty's only shareholder and officer personally liable for the State's response costs under CERCLA section 107(a)(1).[34] The court emphasized that CERCLA's definition of "owner" or "operator" excludes a person who, without participating in the management of a facility, "holds indicia of ownership primarily to protect his security interest in the facility."[35] The court held that this exception implies that an owner who manages a facility is personally liable under CERCLA.[36] Furthermore, the court held that the

---

ity of parties to distinguish their relative contribution to the release; (2) the amount of waste involved; (3) the degree of toxicity of wastes involved; (4) the degree of involvement of the parties in disposal decisions; (5) the degree of care exercised by the parties; and (6) the degree to which the parties cooperated with the government in prevention of the harm. The Senate, unlike the House of Representatives, did not pass the Gore Amendment. *See generally Developments in the Law — Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1496 (1986) (discussing the advantages and disadvantages of the different standards of liability); Moore & Kowalski, *When Is One Generator Liable For Another's Waste?*, 33 CLEV. ST. L. REV. 93 (1984-85) (discussing joint and several liability under CERCLA).

29. *See infra* notes 33-38, 47-63 and accompanying text for a discussion of State of New York v. Shore Realty, Inc., 759 F.2d 1032 (2d Cir. 1985); United States v. Carolawn, 21 Env't. Rep. Cas. (BNA) 2124 (D.S.C. 1984); Idaho v. Bunker Hill, 635 F. Supp. 665 (D. Idaho 1986).

30. *See infra* notes 40-46 and accompanying text for a discussion of United States v. Northeastern Pharmaceutical and Chemical Co., 810 F.2d 726 (8th Cir. 1986).

31. *See infra* notes 64-68 and accompanying text for a discussion of United States v. South Carolina Recycling and Disposal, Inc., 653 F. Supp. 984 (D.S.C. 1986).

32. *See* cases cited *supra* note 6. *See infra* notes 33-41 and accompanying text for a discussion of the federal appellate decisions.

33. 759 F.2d 1032 (2d Cir. 1985).

34. *Id.* at 1053. In *Shore Realty*, the State of New York sued the corporation and Donald LeoGrande, its officer and stockholder for cleanup costs. *Id.* at 1037. LeoGrande controlled and directed all corporate decisions. *Id.* at 1038. At the time Shore Realty acquired the property in question, LeoGrande knew about the storage of more than 700,000 gallons of hazardous waste on the premises. Nevertheless, the corporation acquired the site from the state to develop land. *Id.* at 1037. The court held the corporation liable in addition to LeoGrande. *Id.* at 1042.

35. *Id.* at 1052. 42 U.S.C. § 9601(20)(A) (1982 & Supp. IV 1986) excludes owners who merely own security interests without participating in management.

36. 759 F.2d at 1052.

shareholder was an "operator" of the facility because he was in charge of its daily operations.[37] Thus, the court expanded the definition of "owner" and "operator" by imposing individual liability upon persons who are involved in corporate misconduct.[38]

In 1986, the Eighth Circuit followed the Second Circuit's lead and broadened the scope of "owner" or "operator" liability further.[39] In *United States v. Northeastern Pharmaceutical and Chemical Co.*[40] (NEPACCO), the court affirmed a district court decision that held a corporate officer who arranged for the disposal of hazardous substances personally liable under section 107(a)(1) of CERCLA.[41] The

37. *Id.*

38. *Id.* CERCLA defines "person" to mean "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." 42 U.S.C. § 9601(21) (1982 & Supp. IV 1986). Courts have imposed personal liability on corporate officers and owners who incur CERCLA liability while acting within the scope of their employment. United States v. Northeastern Pharmaceutical and Chemical Co., 810 F.2d 726 (8th Cir. 1986) and United States v. Carolawn, 21 Env't. Rep. Cas. (BNA) 2124 (D.S.C. 1984). *See infra* notes 40-45, 48-52, and accompanying text for a discussion of these cases. *See also* Escude Cruz v. Ortho Pharmaceutical Co., 619 F.2d 902, 907 (1st Cir. 1980) (holding corporate officer of an employer corporation liable when the officer "directs or participates actively in the commission of a tortious act"); United States v. Conservation Chemical Co., 619 F. Supp. 162 (W.D. Mo. 1985) (holding corporation president who stored, treated, and disposed of numerous varieties of chemical wastes in six soil basins personally liable); United States v. Mottolo, 629 F. Supp. 56 (D.N.H. 1984) (holding president and principal shareholder of a small chemical firm personally liable under CERCLA as a "person" who arranged for the disposal of hazardous waste).

39. United States v. Northeastern Pharmaceutical and Chemical Co. (NEPACCO), 810 F.2d 726 (8th Cir. 1986); *see* Comment, *Officer and Shareholder Liability Under CERCLA: United States v. Northeastern Pharmaceutical and Chemical Co. Inc.*, 34 WASH. U.J. URB. & CONTEMP. L. 461 (1988) (questioning the *NEPACCO* decision to expand CERCLA liability). *But see* United States v. Dart Industries, Inc. 847 F.2d 144 (8th Cir. 1988) (state environmental agency was not "owner" or "operator" of hazardous waste site under CERCLA, because it did not manage or participate in any activities that contributed to release of hazardous wastes).

40. 810 F.2d 726 (8th Cir. 1986).

41. In *NEPACCO*, the United States government sued Michaels, its president, and Lee, its vice president, both of whom arranged for the disposal of hazardous waste. The government also sued Mills, the transporter of the hazardous substances, and Syntax Agribusiness, the owner and lessor of the plant, to recover response costs under CERCLA. Michaels and Lee knew that NEPACCO's manufacturing process produced various toxic byproducts which were pumped into a holding tank and emptied by waste haulers. Subsequently, NEPACCO, with the approval of Lee, entered into an agreement with Mills to store the drums at Denney farm. Eight years later, the EPA learned about the hazardous waste disposal at the Denney farm, and ordered a cleanup of the site. The EPA sued to recover response costs and the court held the defendants liable

District Court for the Western District of Missouri defined "owners" and "operators" as persons who maintain: (1) the capacity to discover discharges in a timely fashion; (2) the power to manage others in control of mechanisms that cause pollution; and (3) the authority to prevent and abate damage.[42]

The district court reasoned that imposing liability upon only the corporation, and not upon the individuals responsible for decisions about handling and disposing hazardous substances, would frustrate the statutory scheme.[43] Thus, the court concluded that ownership or actual possession of those substances by the officer was not necessary for liability.[44] Rather, a corporate officer's authority to control the handling and disposal of the hazardous substances warranted personal liability as an "operator."[45]

Although only a few federal appellate courts[46] have addressed "owner" or "operator" liability under CERCLA, several other federal district courts have formulated definitions to impose liability.[47] In *United States v. Carolawn*,[48] the District Court for the District of South Carolina held that a corporate officer responsible for the day-to-day operations of hazardous waste disposal is an "operator" for pur-

---

under CERCLA under § 107, 42 U.S.C. § 1907 (1982 & Supp. IV 1986). United States v. Northeastern Pharmaceutical and Chemical Co., 579 F. Supp. 823 (W.D. Mo. 1984). The district court found Mills liable as a transporter of hazardous substances. *Id.* at 846-47. The district court held Lee liable as an owner or operator and also as a person who by contract, arranged with a transporter for transport for disposal of hazardous substances. *Id.* at 847-49. The district court also held Michaels liable as a person who arranged for the transport and disposal of hazardous substances. *Id.* at 849-50.

42. 579 F. Supp. 823, 848 (W.D. Mo. 1984), *aff'd*, 810 F.2d 726 (8th Cir. 1986) (quoting United States v. Mobil Oil Corp., 464 F.2d 1124, 1127 (5th Cir. 1972)).

43. 810 F.2d at 743. *See supra* note 38 and accompanying text discussing individual liability under CERCLA.

44. 579 F. Supp. at 849. *See also* United States v. Mottolo, 629 F. Supp. 56 (D.N.H. 1984) (person who arranges for transportation or disposal of hazardous waste need not own or possess the hazardous waste to be liable).

45. 579 F. Supp. at 847. The court imposed personal liability upon Lee under CERCLA § 107(a)(3) because he arranged for the transportation and disposal of hazardous substances and thus actually participated in NEPACCO's CERCLA violations, even though Lee did the work on behalf of NEPACCO. *Id.*

46. *See supra* notes 33-41 and accompanying text for a discussion of the federal appellate decisions.

47. *See* cases cited *supra* note 5. *See infra* notes 48-68 and accompanying text discussing federal district court cases which have examined liability as an "operator" under CERCLA.

48. 21 Env't Rep. Cas. (BNA) 2124 (D.S.C. 1984).

poses of CERCLA liability.[49] In making its determination, the court adopted the test used by the *NEPACCO* district court.[50] Furthermore, the *Carolawn* court noted that the CERCLA definition of "owner" and "operator" contemplated personal liability of corporate officials who maintained control or authority over hazardous waste disposal.[51] Thus, the imposition of CERCLA liability as an "operator" turned on whether the person managed or controlled the activities of the facility in question.[52]

In *Idaho v. Bunker Hill Company*,[53] the United States District Court for the District of Idaho further expanded the scope of CERCLA liability to include parent corporations which control and manage the subsidiary's facility.[54] Following the analysis of the courts in *NEPACCO*[55] and in *Carolawn*,[56] the *Bunker Hill* court identified control of hazardous waste disposal, releases, and management of the facility as the requisite factors for liability as an "operator."[57] The court interpreted section 107(a)(2)[58] to impose liability upon those persons who owned and operated the facilities at the time of the disposal of hazardous substances.[59] The court rejected the defendant's contention that Congress intended to limit liability to only those "owners" and

49. *Id.* at 2131.

50. *Id. See supra* note 43 and accompanying text (outlining the *NEPACCO* district court test).

51. 21 Env't. Rep. Cos. (BNA) 2124, 2131-32 (D.S.C. 1984). The court noted that the statutory use of "who" and "his" rather than "which" or "its," in 42 U.S.C. § 9601(20)(A) (1982 & Supp. IV 1986) connotes individual personal involvement. *Id. See supra* note 24 for text of 42 U.S.C. § 9601(20)(A) (1982 & Supp. IV 1986).

52. *Id.*

53. 635 F. Supp. 665 (D. Idaho 1986).

54. *Id.* at 671-72. In *Bunker Hill*, the court held a parent corporation liable as an "operator" under CERCLA because it: (1) controlled a majority of the subsidiary's board of directors; (2) had the authority to control hazardous waste disposal and releases; (3) could make decisions and implement actions to prevent damage caused by waste disposal; (4) received $27 million in dividends from the subsidiary between 1968 and 1974; (5) consolidated federal income tax returns with the subsidiary corporation. *Id.* at 672.

55. 810 F.2d 726 (8th Cir. 1986). *See supra* notes 40-45 and accompanying text for a discussion of *NEPACCO.*.

56. 21 Env't Rep. Cas. (BNA) 2124 (D.S.C. 1984). *See supra* notes 48-52 and accompanying text for a discussion of *Carolawn.*

57. 635 F. Supp. at 665.

58. 42 U.S.C. § 9607(a)(2) (1982 & Supp. IV 1986). *See infra* note 60 for text of statute.

59. 635 F. Supp. at 671.

"operators" who had abandoned the facility.[60] Rather, Congress intended that all responsible parties pay decontamination costs.[61] Thus, the court employed the *NEPACCO* test[62] to extend the definition of "operator" for purposes of CERCLA liability to a parent corporation which exhibited control and management over the subsidiary's facility.[63]

In 1986, the District Court of South Carolina extended its *Carolawn*[64] decision in *United States v. South Carolina Recycling and Disposal, Inc.*,[65] by holding parties to a joint venture as common law equivalents to "operator" for purposes of CERCLA liability.[66] Consequently, both parties were held vicariously liable for acts within the scope of the venture, including decontamination costs.[67] Thus, the

60. *Id.* The court noted that the plain language of § 107(a)(2) eliminates any possibility that all past owners and operators are exempt from liability for hazardous waste releases except those who abandoned their facilities. *Id.* Section 107(a)(2) provides "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 . . ." is liable. 42 U.S.C. § 9607 (1982 & Supp. IV 1986).

61. 635 F. Supp. at 672 (citing United States v. Mobil Oil Corp., 464 F.2d 1124, 1127 (5th Cir. 1972)). *See generally* Rich, *supra* note 1, at 668.

62. 635 F. Supp. at 672 (citing United States v. Northeastern Pharmaceutical and Chemical Company, 579 F. Supp. 823 (W.D. Mo. 1984)). *See supra* note 43 and accompanying text for *NEPACCO* text.

63. 635 F. Supp. at 672. The court cautions, however, that "care must be taken so that 'normal' activities of a parent with respect to its subsidiary do not automatically warrant finding the parent an owner or operator." *Id.*

64. 21 Env't Rep. Cas. (BNA) 2124 (D.S.C. 1984). *See supra* notes 48-52 and accompanying text for a discussion of *Carolawn*.

65. 653 F. Supp. 984 (D.S.C. 1986).

66. *Id.* at 1004. The court defined joint venture as "a special combination of two or more persons, where in some specific venture a profit is jointly sought without any actual partnership or corporate designation . . . ." *Id.* (citing Dexter and Carpenter v. Houston, 20 F.2d 647, 651 (4th Cir. 1927)). The court determined that a joint venture existed when "persons embark in an undertaking without entering on the prosecution of the business as partners strictly, but engage in a common enterprise for their mutual benefits." 653 F. Supp. at 1004 (citing Aiken Mills v. United States, 144 F.2d 23, 25 (4th Cir. 1944)). The court applied a test established by the Fourth Circuit in Rowe v. Brooks, 329 F.2d 35, 40 (4th Cir. 1964), to determine the creation of a joint venture. The test formulated by the *Rowe* court includes: (1) an oral agreement between the parties to the venture, (2) the planned venture was for mutual advantage and profit, (3) each party to the venture was to have a measure of control over and responsibility for the enterprise, and (4) harm was caused by activities within the scope of the enterprise. *Id.*

67. *South Carolina Recycling*, 653 F. Supp. at 1004-05. The parties, McClure and COCC, entered into a written agreement to reclaim and recycle chemical waste prod-

court continued to expand the scope of CERCLA liability through the application of the common law theory of joint venture.[68]

Edward Hines Lumber Co. v. Vulcan Materials Co. presented the Seventh Circuit with its first opportunity to examine the definition of "operator" for purposes of CERCLA liability.[69] The court held that Osmose was not liable for decontamination costs to Hines as an "owner" or "operator" under CERCLA.[70] The unclear definition of "operator" in CERCLA[71] led the court to apply the common law theories of independent contractor and joint venture to determine liability.[72] The *Hines* court held that Osmose acted as an independent construction contractor and thus should not be accountable for Hines' liabilities.[73] The court also found that the parties did not form a joint venture.[74] In applying these principles, the court reasoned that Osmose did not make operational decisions, control the facility on a daily

---

ucts. McClure procured the waste products and deposited them, while COCC provided office space and secretarial service while retaining authority to veto McClure's actions. The parties split the profits equally. *Id.* at 1000.

68. *Id. See supra* note 27 and accompanying text (discussing the general application of common law theories to determine CERCLA liability).

69. 861 F.2d 155 (7th Cir. 1988).

70. *Id.* at 157-59. The court interpreted all facts and inferences in favor of Hines, including the assumptions that Osmose negligently designed and built the facility, and inadequately trained Hines' employees. The court noted that finding additional entities liable would induce companies to take greater care in design, construction and instruction. *Id.* at 157.

The court, however, recognized its duty to enforce the statute and not create rules of common law. *Id.* Accordingly, the court could impose CERCLA liability on Osmose only if it was an "owner" or "operator" pursuant to § 107(a). *Id.* at 156.

71. *Id.* at 157. *See supra* note 24 and accompanying text for a discussion of CERCLA's circular definition of "owner" and "operator."

72. 861 F.2d at 157. *See supra* note 27 and accompanying text for a discussion of the general application of common law theories to CERCLA liability.

73. 861 F.2d at 157-58. The *Hines* court explained that the employer of an independent contractor is not liable for the contractor's torts, nor is the contractor liable for the employer's torts. *Id.* at 157. The court defined the common law independent contractor as one who controls his own day-to-day operations. *Id.* at 157 (citing United States v. Orleans, 425 U.S. 807, 815-16 (1976)). In *Hines*, Osmose acted as the independent contractor when it designed and constructed the plant. Hines controlled and managed the finished facility on a day-to-day basis, acting as the owner and the operator. 861 F.2d at 157-58.

74. 861 F.2d at 158. The court stated that the parties' relationship lacked three requisite elements for the common law definition of joint venture: (1) willingness to establish a joint venture, (2) shared control, and (3) participation in the division of profits and losses. The *Hines* court emphasized that the contract between Osmose and Hines specified that Osmose was not a joint venturer or partner with Hines. Further,

basis, or share in the division of profits and losses.[75] It further noted that Congress did not intend to provide unlimited liability under CERCLA.[76] Consequently, Osmose was not liable as an "operator" under CERCLA.[77]

Unlike the Second[78] and Eighth[79] Circuits and the several United States District Courts,[80] the Seventh Circuit defined limits for CERCLA liability.[81] The court implicitly balanced the need to impose cleanup costs[82] on responsible parties against the social need for chemical and waste management industries. Moreover, it wisely interpreted congressional intent by not construing CERCLA in the broadest sense possible. The other courts[83] which imposed CERCLA liability on "operators" found the requisite elements of control and management that are absent in *Hines*. Therefore, courts should adopt the principles set forth in *Hines* and not extend CERCLA liability beyond its logical limits.

The *Hines* decision exemplifies a judicial restriction of CERCLA liability to only those "owners" and "operators" who control or manage a facility for the disposal of hazardous waste. Although an expansion of

---

Osmose neither managed nor controlled the Hines plant. Finally, the contract required Hines alone to comply with environmental regulations. *Id.* at 158.

75. *Id.* at 158.

76. *Id.* at 157-59.

77. *Id.* at 157. Although courts could achieve "more" of CERCLA's legislative purpose by finding additional parties responsible for the response costs, the *Hines* court recognized that "statutes have not only ends but also limits . . . A court's job is to find and enforce stopping points no less than to implement other legislative choices." *Id.* Parties other than "owners" and "operators" must contribute only to the extent they have agreed to do so by contract. *Id.* The court criticized Hines for not insisting on warranties and indemnification from its suppliers in situations where Hines lacked expertise. *Id.* at 158-59.

78. *See supra* notes 33-38 and accompanying text discussing the Second Circuit case, *Shore Realty*, regarding "operator" liability under CERCLA.

79. *See supra* notes 40-45 and accompanying text discussing the Eighth Circuit case, *NEPACCO*, regarding "operator" liability under CERCLA.

80. *See supra* notes 5, 43-68 and accompanying text discussing federal district court cases regarding "operator" liability under CERCLA.

81. *See supra* note 77 and accompanying text for a discussion about the court's reluctance to expand CERCLA liability to Osmose.

82. *See* H.R. Rep. No. 1016, 96th Cong., 2d Sess. 17, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6120 (CERCLA would enable the government to pursue rapid recovery of costs incurred in financing response actions).

83. *Contra Developments in the Law*, *supra* note 28, at 1517 (explaining the importance of an expansive reading of the remedial provisions of CERCLA).

CERCLA's potentially responsible parties would dilute the financial burden for "owners" and "operators," it would provide a disincentive for "owners" and "operators" to carry out the safety measures contemplated by CERCLA. Moreover, that decreased financial burden would create an unnecessarily rigorous and punitive measure to the supplier who provides the necessary chemicals and services to a facility in good faith.[84] Thus, neither Congress nor the courts should broaden the universe of potentially responsible parties under CERCLA.

*Julie Mendel**

84. *Contra Id.*

* J.D. 1991, Washington University