
January 1991

Interpreting Section 170(A)(3) of CERCLA: When Has a Person Arranged for Disposal

Jeffrey M. Gaba
Southern Methodist University, Dedman School of Law

Recommended Citation

Jeffrey M. Gaba, *Interpreting Section 170(A)(3) of CERCLA: When Has a Person Arranged for Disposal*, 44 Sw L.J. 1313 (1991)
<https://scholar.smu.edu/smulr/vol44/iss4/3>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

INTERPRETING SECTION 107(A)(3) OF CERCLA: WHEN HAS A PERSON "ARRANGED FOR DISPOSAL?"

by

Jeffrey M. Gaba*

THE Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) contains extensive authority to assure the clean up of hazardous substances.¹ The government may compel a large class of persons, known as "potentially responsible parties" or "PRPs," to clean up hazardous substances or to pay for the cost of such a cleanup. This group of PRPs, defined in section 107(a) of CERCLA, includes the current and in many cases the past owners or operators of sites from which there has been or may be a release of hazardous substances, and certain transporters who hauled substances to the site. Additionally, section 107(a)(3) provides that persons who "arranged for disposal or treatment" of hazardous substances may also be liable.

The scope of persons who are liable because they "arranged for disposal" remains an uncertain and evolving issue. At a minimum, liability extends to generators who create a hazardous waste and arrange for its disposal at another facility. Courts, however, increasingly have been confronted with questions of whether persons who sell materials containing hazardous substances are liable under section 107(a)(3). Liability under section 107(a)(3), for example, has been asserted against persons who sold transformers when, years later, purchasers disposed of PCBs in the transformers.² Similarly, liability has been asserted against companies selling chemicals used by others in commercial operations when those chemicals were spilled at the purchas-

* B.A., University of California, Santa Barbara, 1972; J.D., Columbia University, 1976; M.P.H., Harvard University, 1989. Of Counsel, Gardere & Wynne, Dallas, Texas. Associate Professor, Southern Methodist University School of Law.

1. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675 (1988)); Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613-1782 (amending CERCLA of 1980). For a review of the limited, but confusing, legislative history of CERCLA, see ENVTL. L. INST., 1 SUPERFUND: A LEGISLATIVE HISTORY xiii-xxii (1982); Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1 (1982); Eckhardt, *The Unfinished Business of Hazardous Waste Control*, 33 BAYLOR L. REV. 253 (1981).

2. See *United States v. Westinghouse Elec. Co.*, 22 Env'tl. Rep.-Cas. (BNA) 1230 (S.D. Ind. 1983).

ers' facilities.³

In general, courts have concluded that sales of products containing hazardous substances do not constitute "arranging for disposal."⁴ As one court noted, "Congress never intended to make a supplier liable for the subsequent action of a purchaser in the ordinary course of a business other than waste disposal."⁵ Given the complexity of business transactions, however, courts have engaged in case-by-case assessments to determine whether a transaction constituted a true sale or was in fact an arrangement involving the disposal of a hazardous substance. These ad hoc assessments undertaken by the courts, however, have left parties with considerable uncertainty as to when a transaction will result in potential liability under CERCLA.

This Article assesses the developing case law to determine when a transaction will be considered to be "arranging for disposal." Section I gives a brief overview of the structure of CERCLA and the liability of PRPs. Section II examines the existing case law dealing with the scope of section 107(a)(3) and describes the factors that courts have considered in their case-by-case assessment of liability under this section. Section III suggests an alternate test for determining when a transaction involves "arranging for disposal."

This Article suggests that liability under section 107(a)(3) should be limited to parties who engage in transactions involving solid wastes as defined under the Resource Conservation and Recovery Act (RCRA).⁶ Although the scope of materials that are hazardous substances under CERCLA is broader than the class of hazardous wastes under RCRA, this Article suggests that strong reasons exist both in the language and legislative history of CERCLA to limit liability. Given the need for certainty in this area and the fact that the Environmental Protection Agency (EPA) already has struggled with the concept of disposal in its definition of solid waste under RCRA, this Article suggests that it is foolish for courts to "reinvent the wheel" through an ad hoc assessment of liability of persons who may have "arranged for disposal."

I. LIABILITY UNDER CERCLA

A. Structure of CERCLA

Under CERCLA, a broadly defined class of people are potentially liable

3. See *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 685 F. Supp. 651 (N.D. Ill. 1988), *aff'd on other grounds*, 861 F.2d 155 (7th Cir. 1988).

4. See *infra* notes 34-54 and accompanying text.

5. *New York v. General Elec. Co.*, 592 F. Supp. 291, 297 (N.D.N.Y. 1984).

6. Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§ 6901-6992k (1988), is the basic federal statute dealing with the prospective disposal of hazardous wastes. RCRA establishes requirements for generators, transporters and facilities that treat, store or dispose of those wastes and, among other things, requires the disposal of such wastes in facilities that have received RCRA permits. See generally *LAW OF ENVIRONMENTAL PROTECTION*, ch. 13 (S. Novick, D. Steven, & M. Mellon eds. 1990) (detailed account of hazardous waste management, with its regulations and effects). RCRA and CERCLA interrelate in a complex manner. For example, RCRA establishes requirements similar to CERCLA for the cleanup of hazardous waste sites, 42 U.S.C. § 6924(h), and CERCLA uses some RCRA standards to define the required level of cleanup of hazardous substances, 42 U.S.C. § 6921(d).

for the cleanup of a site when there is a "release or threatened of release" of a "hazardous substance" from a "facility."⁷ None of these terms is a significant limitation on the scope of liability. The definition of "hazardous substance" is particularly broad and includes substances designated as hazardous under a variety of federal statutes.⁸

CERCLA provides the government with two basic mechanisms for responding to the release or threat of release of a hazardous substance.⁹ First, the government may clean up the site itself pursuant to section 104 of the Act.¹⁰ The government is authorized to recoup these expenses by bringing a cost recovery action against a broadly defined group, discussed below, of "potentially responsible parties" (PRPs).¹¹ The EPA's ability to recover its costs is subject to the requirement that the clean up was "not inconsistent with the National Contingency Plan."¹² The National Contingency Plan (NCP), promulgated by EPA, specifies the substantive and procedural requirements for a proper clean up action.¹³ Additionally, the EPA has published a list of the worst sites in the country, the National Priorities List (NPL),¹⁴ and the EPA can undertake long term remedial actions in most cases only at an NPL site.¹⁵

7. 42 U.S.C. § 9607(a).

8. Section 101(14) of CERCLA defines "hazardous substances" to include substances designated as hazardous or toxic under 1) § 311 of the Clean Water Act, 33 U.S.C. § 1321(b)(2)(A); 2) § 102 of CERCLA, 42 U.S.C. § 9602; 3) § 3001 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6921; 4) § 307(a) of the Clean Water Act, 33 U.S.C. § 1317(a); 5) § 112 of the Clean Air Act, 42 U.S.C. § 7412; and 6) § 7 of the Toxic Substances Control Act, 15 U.S.C. § 2606. CERCLA does not, however, apply to the release of petroleum or crude oil. 42 U.S.C. § 9601(14). See Baller, *The Petroleum Exclusion - Stronger Than Ever After Wilshire Westwood*, 43 Sw. L.J. 915 (1990).

9. The Administrator of the EPA has been delegated the President's authority to implement CERCLA. See Exec. Order No. 12,580, 52 Fed. Reg. 2923 (1987).

10. 42 U.S.C. § 9604. The money for these cleanups comes from the "Superfund," a fund of approximately eight and a half billion dollars created by a tax falling largely on petrochemical companies. Superfund, properly known as the "Hazardous Substances Superfund," is established under 26 U.S.C. ch. 98A. Hazardous Substances Superfund, 26 U.S.C. § 9507 (1988). Appropriation and use of the fund are specified in § 111 of CERCLA, 42 U.S.C. § 9611. For a general discussion of the Superfund tax mechanism, see Carlson & Bausell, *Financing Superfund: An Evaluation of Alternative Tax Mechanisms*, 27 NAT. RESOURCES J. 103 (1987).

11. 42 U.S.C. § 9607(a)(4)(A).

12. *Id.*

13. Section 105 of CERCLA requires the EPA to promulgate revisions to the National Contingency Plan in order to establish "procedures and standards for responding to releases of hazardous substances, pollutants and contaminants." 42 U.S.C. § 9605(a). The EPA recently promulgated major revisions to the NCP. 55 Fed. Reg. 8666 (1990) (to be codified at 40 C.F.R. §§ 300.1-920).

14. The National Priorities List is published separately from the National Contingency Plan at 40 C.F.R. Part 300, Appendix B (1989). See CERCLA § 105(a)(8)(B), 42 U.S.C. § 9605(a)(8)(B). As of October 26, 1989, the NPL listed 1219 proposed and final sites. 54 Fed. Reg. 43,778 (1989).

15. The National Contingency Plan expressly provides that fund-financed remedial action, excluding remedial planning activities pursuant to CERCLA § 104(b), may be taken only at sites listed on the NPL. 55 Fed. Reg. 8845 (1990) (to be codified at 40 C.F.R. § 300.425(b)(1)).

The EPA is also authorized to undertake "removal" actions. Removal actions are relatively short term cleanup actions designed to deal with immediate threats to human health and the

Second, the government may under section 106 of the Act simply issue an order, potentially to any person, requiring that such person clean up the site themselves.¹⁶ These orders are not limited to the clean up of sites on the NPL. Penalties for noncompliance with the order include daily penalties of up to \$25,000 per day¹⁷ and treble the final amount of the clean up.¹⁸ Adding insult to injury, parties have only very limited ability to obtain pre-enforcement judicial review of these orders.¹⁹

Under section 107(A)(4)(B), private parties, including those who are themselves PRPs, may sue potentially responsible parties to recover costs incurred in the cleanup of a site.²⁰ Private cost recovery actions are not limited to clean up of sites on the NPL, and the government is not required to approve a private clean up plan.²¹ The only limitation is that the plaintiffs must have incurred costs undertaking a clean up that is "consistent with the National Contingency Plan." Costs are allocated among PRPs based on principles of contribution or equitable apportionment.²²

B. Liability of Potentially Responsible Parties

Section 107(a) of CERCLA establishes four classes of persons who are potentially responsible for the costs of cleaning up a site. These PRPs include (1) the current "owner and operator" of the site,²³ (2) any person

environment. 42 U.S.C. § 9601(23). CERCLA provides that removal actions may not, in most cases, cost more than two million dollars or last more than 12 months. *Id.* § 9604(c)(1).

16. 42 U.S.C. § 9606(a).

17. *Id.* § 9606(b)(1).

18. *Id.* § 9607(c)(3).

19. *Id.* § 9613(h).

20. *Id.* § 9607(a)(4)(B). See generally Gaba, *Recovering Hazardous Waste Cleanup Costs: The Private Cause of Action under CERCLA*, 13 *ECOLOGY L.Q.* 181 (1986). The 1986 SARA amendments also added a new citizen suit provision to CERCLA that authorizes citizen suits for injunctive relief and civil penalties against any person who is "alleged to be in violation of any standard, regulation, condition, requirement, or order" under CERCLA. 42 U.S.C. § 9659(a)(1). Since the owner of a site with hazardous wastes is under no duty to clean up the site until the owner receives a § 106 order or enters into an agreement with EPA, the significance of this section remains unclear. See Gaba & Kelly, *The Citizen Suit Provision of CERCLA: A Sheep in Wolf's Clothing?*, 43 *Sw. L.J.* 929 (1990). At a minimum, the citizen suit provision certainly allows citizens to monitor compliance with an effective cleanup order issued by EPA.

RCRA also contains a citizen suit provision that allows private parties to bring actions against parties in violation of the Act and specifically against past or present generators or owners of hazardous waste facilities where an imminent and substantial endangerment to health or the environment potentially exists. 42 U.S.C. § 6972(a)(1). Unlike the private party cost recovery actions under CERCLA, this section does not require the plaintiff first to have spent money on a cleanup. Consequently, the RCRA provision could be a potentially significant provision to compel cleanup of a site alleged to be an unpermitted disposal site.

21. 55 *Fed. Reg.* 8858 (1990) (to be codified at 40 C.F.R. § 300.700).

22. See *International Clinical Laboratories, Inc. v. Stevens*, 710 F. Supp. 466 (E.D.N.Y. 1989); *Southland Corp. v. Ashland Oil, Inc.*, 696 F. Supp. 994 (D.N.J. 1988). The 1986 SARA amendments added an express right of contribution among PRPs. 42 U.S.C. § 9613(f).

23. The class of parties liable as owners or operators has been held to extend to, among others, current owners who were not involved in the disposal of the hazardous substance; see, e.g., *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985), lessees and sublessors, *United States v. South Carolina Recycling and Disposal, Inc.*, 21 *Env't'l Rep. Cas.* (BNA) 1577 (D.S.C. 1984), successor corporations, *U.S. v. Vertac Chem. Corp.*, 489 F. Supp. 870 (E.D. Ark. 1980), *Squire, Ingram & Frost, Corporate Successor Liability Under CERCLA: Who's*

“who at the time of disposal of any hazardous substance” owned or operated a site, (3) persons who “arranged for disposal” of the waste disposed of at the site, and (4) in some cases, the person who transported the substances to the site.²⁴ Under CERCLA, PRPs are subject to strict liability for clean up costs without regard to fault or negligence;²⁵ liability is joint and several.²⁶ Section 107(b) of CERCLA provides for the basic statutory defenses of acts of god, acts of war, and acts of third parties.²⁷

II. INTERPRETING THE SCOPE OF LIABILITY UNDER SECTION 107(A)(3)

The crucial language of section 107(a)(3) establishes liability on the potentially responsible party who “arranged for disposal or treatment” of the hazardous substance.²⁸ CERCLA does not contain a definition of “arranged,” but it does provide that both “disposal” and “treatment” are to be given their meaning provided in RCRA.²⁹

Next?, 43 Sw.L.J. 887 (1990), parent corporations, Note, *Liability of Parent Corporations for Hazardous Waste Cleanup and Damages*, 99 HARV. L. REV. 986 (1986).

The scope of liability of operators is less clear. The statutory definition, circularly, defines an “owner or operator” as “any person who owned, operated or otherwise controlled activities . . .” 42 U.S.C. § 9601(20)(A). It is clear, however, that operator status is distinct from owner status, and persons who have some level of operational control at a facility may be liable even if they are not an owner. See, e.g., *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990) (secured creditor may be liable as operator of facility even though not actual operator); *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155 (7th Cir. 1988) (supplier potentially liable if found to be an “owner or operator”); *Ametek Inc. v. Pioneer Salt & Chem. Co.*, 29 Env’tl. Rep. Cas. (BNA) 1492 (E.D. Pa. 1988) (focus on the degree of control exercised over a facility in construing the terms “operate” or “operator”).

24. 42 U.S.C. § 9607(a).

25. See *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985); *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823 (W.D. Mo. 1984).

26. See, e.g., *Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823, 844-55 (joint and several liability should be imposed unless defendants establish a reasonable basis for apportioning the harm among themselves); *United States v. A & F Materials Co.*, 578 F. Supp. 1249, 1254-55 (S.D. Ill. 1984) (same); *United States v. Wade*, 577 F. Supp. 1326, 1338 (E.D. Pa. 1983) (same). See generally Note, *Joint and Several Liability for Hazardous Waste Releases Under Superfund*, 68 VA. L. REV. 1157 (1982).

27. 42 U.S.C. § 9607(b).

28. Under § 107(a)(3), one class of PRPs includes “any person who by contract, agreement, or otherwise arranged for disposal or treatment, . . . of hazardous substances owned or possessed by such person, by any other party or entity, at any facility, . . . owned or operated by another party or entity and containing such hazardous substances”. 42 U.S.C. § 9607(a)(3). Section 107(a)(3) also extends liability, of course, to persons who arranged for “treatment.” Although the question of the scope of liability for “treatment” of hazardous substances raises its own distinct issues, courts have generally focused on the issue of disposal. *Id.*

29. CERCLA provides that “[t]he terms ‘disposal,’ ‘hazardous waste,’ and ‘treatment’ shall have the meaning provided in § 1004 of the Solid Waste Disposal Act [42 U.S.C. § 6903].” 42 U.S.C. § 9601(29).

RCRA, which amended the Solid Waste Disposal Act, defines “disposal” as: the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

42 U.S.C. § 6903(3). “Treatment” is defined as:

At a minimum, section 107(a)(3) imposes liability on generators who send waste off-site for disposal.³⁰ Thus, a generator who sends its wastes to an off-site waste disposal facility may be liable under section 107(a)(3) for releases from that facility. Courts have imposed this liability on generators who did not select the site for disposal of their wastes³¹ and have held persons liable based on their authority to control the disposal of their wastes, even if such persons did not own the waste.³² In these cases, however, there was no dispute that the transaction involved an arrangement to dispose of the hazardous substances.

More difficult questions about the scope of section 107(a)(3) arise when the transaction has characteristics of a sale of a product. In such a case, has a person "arranged for disposal" of a hazardous substance? Courts have consistently held that persons who sell legitimate products containing hazardous substances are not liable under section 107(a)(3). As a result, courts have sought to develop a test that distinguishes the sale of products from transactions that constituted an arrangement for disposal.

A. *Liability for Sale of Legitimate Products*

The legislative history of section 107(a)(3) is sparse and sheds little insight on the extent of liability of persons who engage in transactions involving hazardous substances.³³ Although the remedial objectives of CERCLA have led courts to interpret the statute broadly, courts generally have concluded that liability under section 107(a)(3) does not extend to persons who merely sell products containing hazardous substances subsequently released by third parties who purchased the products.³⁴ Thus, the sale of new transformers containing PCBs,³⁵ the sale of used but usable transformers,³⁶ the

when used in connection with hazardous waste, means any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport, amenable for recovery, amenable for storage, or reduced in volume. Such term includes any activity or processing designed to change the physical form or chemical composition of hazardous waste so as to render it nonhazardous.

Id. § 6903(34).

30. See *United States v. Parsons*, 723 F. Supp. 757 (N.D. Ga. 1989); *United States v. Cannons Engineering Corp.*, 720 F. Supp. 1027 (D. Mass. 1989).

31. See *Parsons*, 723 F. Supp. at 761-62.

32. See *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987).

33. See Buskin & Reed, "Arranging for Disposal" under CERCLA: When is a Generator Liable?, 15 ENVTL. L. REP. (Envtl. L. Inst.) 10160 (1985); *United States v. Aceto Agricultural Chem. Corp.*, 872 F.2d 1373, 1380 n.8 (8th Cir. 1989).

34. The court in *United States v. A & F Materials Co.*, noted that "liability for releases under § 9607(a)(3) [107(a)(3)] is not endless; it ends with that party who both owned the hazardous waste and made the crucial decision how it would be disposed of or treated, and by whom." 582 F. Supp. 842, 845 (S.D. Ill. 1984).

35. *United States v. Westinghouse Elec. Corp.*, 22 Env'tl. Rep. Cas. (BNA) 1230 (S.D. Ind. 1983).

36. *C. Greene Equip. Corp. v. Electron Corp.*, 697 F. Supp. 983 (N.D. Ill. 1988).

sale of property containing equipment with hazardous substances,³⁷ the manufacture and sale of asbestos materials for use in building construction,³⁸ the sale of chemicals for use in wood treatment,³⁹ and the sale of chemicals for use in the manufacture of rubber products⁴⁰ have been held not to create liability under section 107(a)(3). As one court noted: “[I]t is clear that liability attaches to a party who has taken an affirmative act to dispose of a hazardous substance, . . . as opposed to convey a useful substance for a useful purpose.”⁴¹

The first case to consider this issue was *United States v. Westinghouse Electric Corp.*⁴² The government sued Westinghouse under CERCLA for sending PCB contaminated waste to a landfill. Westinghouse then brought a third-party complaint against Monsanto who originally supplied the PCBs to Westinghouse for use as a dielectric fluid in electrical equipment manufactured by Westinghouse. The court considered one of the purposes of CERCLA to be insuring that present and future hazardous waste activity are carried out safely, and noted that the government based its claims not on Monsanto’s control of the product it sold but rather on Westinghouse’s waste disposal practices. Rejecting Westinghouse’s claim that Monsanto was liable under CERCLA, the court concluded that Monsanto did not generate or dispose of a hazardous waste and did not contract for the “disposal” of waste.⁴³

In *Edward Hines Lumber Co. v. Vulcan Materials Co.*,⁴⁴ the plaintiff operated a wood treatment facility from which there had been a release of pentachlorophenol, creosote, and copper arsenate. The plaintiff brought the action to establish the liability of, among others, the suppliers of the hazardous substances used in the wood treating process. The plaintiff claimed that these parties were liable under section 107(a)(3) as persons who had “arranged for disposal” of the hazardous substance at the facility. The plaintiff argued that section 107(a)(3) “reaches all chemical manufacturers, . . . who sell a hazardous substance to a party who uses the substance in its manufacturing or commercial process and then disposes of process run-off containing the substance”⁴⁵

The court rejected the plaintiff’s argument concluding that it would read the language “arranged for disposal” out of the statute.⁴⁶ The phrase “arranged for disposal,” the court wrote, “clearly circumscribes the types of

37. *Amland Properties Corp. v. Aluminum Co. of America*, 711 F. Supp. 784 (D.N.J. 1989).

38. *Prudential Ins. Co. v. United States Gypsum*, 711 F. Supp. 1244 (D.N.J. 1989).

39. *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 685 F. Supp. 651 (N.D. Ill. 1988), *aff’d on other grounds*, 861 F.2d 155 (7th Cir. 1988).

40. *Kelley v. Arco Indus.*, 739 F. Supp. 354 (W.D. Mich. 1990).

41. *United States Gypsum*, 711 F. Supp. at 1253.

42. 22 Env’tl. Rep. Cas. (BNA) 1230 (S.D. Ind. 1983).

43. *Id.* at 1233.

44. 685 F. Supp. 651 (N.D. Ill. 1988), *aff’d on other grounds*, 861 F.2d 155 (7th Cir. 1988).

45. *Id.* at 654.

46. *Id.*

transactions in hazardous substances to which liability attaches, narrowing liability to transactions in the disposal or treatment of such substances."⁴⁷ The court concluded that nothing in the legislative history or the case law warranted the "surgical removal" of the statutory language and held that liability under section 107(a)(3) "attaches only to parties who transact in a hazardous substance in order to dispose of or treat the substance."⁴⁸ Since evidence indicated that the defendants sold the chemicals solely for use in wood treatment and did not decide how the substances would be disposed of after their use, the court concluded that they were not liable parties under section 107(a)(3).⁴⁹

In *Prudential Insurance Co. of America v. United States Gypsum*⁵⁰ the owners of commercial and residential structures sought damages from the manufacturers, designers, and suppliers of asbestos-containing materials that had been used in the construction of various buildings. Among other things, the plaintiffs argued that the defendants arranged for disposal of the material. Reviewing the definition of the term "disposal" and the existing case law, the court concluded that "the sale of a hazardous substance for a purpose other than its disposal does not expose defendant to CERCLA liability."⁵¹ The court concluded that the allegations indicated that the defendants manufactured, processed, marketed, distributed, supplied, and sold asbestos-containing products for use in a variety of building materials. On these facts, however, the court found that there was "indeed a sale of a substance for the use in the construction of a building," and, therefore, "there was no affirmative act to get rid of the asbestos beyond the sale of it as part of a complete, useful product, for use in a building structure . . ."⁵²

B. The Case-by-Case Approach

It is one thing to conclude that liability does not extend to the true sale of a product; it is quite another to distinguish such sales from other transactions that have some characteristics of a sale but should be treated as arrangements for disposal under section 107(a)(3). Courts have noted that persons cannot escape CERCLA liability by contracting away their responsibility.⁵³ As one court stated, "[A] waste generator's liability under CERCLA is not to be so facilely circumvented by its characterization of its arrangements as 'sales.'"⁵⁴

47. *Id.*

48. *Id.*

49. *Id.* at 656.

50. 711 F. Supp. 1244 (D.N.J. 1989).

51. *Id.* at 1254.

52. *Id.* (footnote omitted)

53. See, e.g., *Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313 (11th Cir. 1990) (manufacturer may be liable for making the critical decisions concerning disposal); *New York v. General Elec. Co.*, 592 F. Supp. 291 (N.D.N.Y. 1984) (CERCLA liability cannot be escaped by contracting away responsibility); *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373 (8th Cir. 1989) (defendant's characterizations not determinative of whether a transaction involves a disposal arrangement).

54. *New York v. General Elec. Co.*, 592 F. Supp. at 297.

In general, courts have engaged in an ad hoc, case-by-case assessment of a variety of factors to determine whether a transaction constituted a sale of a product or an arrangement for disposal.⁵⁵

1. *Intent of the Party*

Some courts have focused on the intent of the party selling the material to determine whether the sale was, in essence, a surrogate for disposal. In *Edward Hines Lumber Co. v. Vulcan Materials Co.*, for example, the court concluded "liability for environmental damage under section 9607(a)(3) attaches only to parties who transact in a hazardous substance *in order to dispose of or treat the substance*."⁵⁶ Similarly, in *United States v. Westinghouse Electric Corp.* the court found it significant that the party had not sold the substance in order to dispose of its own wastes.⁵⁷

Several courts, however, have questioned the appropriateness of an intent test. In *United States v. Conservation Chemical Co.*,⁵⁸ the defendants argued that a determination of liability required an "examination of the primary nature of the transaction from the defendant's viewpoint to determine whether the defendant was acting with the intent to dispose."⁵⁹ The court, however, stated that the "argument is misguided to the extent that it asserts an intent requirement under CERCLA because CERCLA requires neither intent nor even negligence, but provides for strict liability."⁶⁰ Similarly, in *Prudential Insurance Co. v. United States Gypsum* the court stated that CERCLA holds violators strictly liable and "hence the court need not examine the intent or knowledge with which the transaction occurred."⁶¹

Other courts have criticized the rejection of an intent requirement. The court in *Edward Hines Lumber Co. v. Vulcan Materials Co.* stated that the reasoning of the court in *Conservation Chemical* "at times seems contradictory" and concluded that "[t]o the extent that *Conservation Chemical* . . . would attach liability to any transaction in a hazardous substance, regardless of the motivation behind the transaction, we respectfully disagree with the decision."⁶²

Although an intent test creates considerable uncertainty in determining whether a transaction will result in liability, it seems equally clear that a court must employ some analysis beyond the mere fact of the transaction to determine if the sale served as a surrogate for disposal. Courts' reliance on the strict liability provisions of CERCLA seems a particularly weak basis for

55. See *Florida Power and Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1311, 1318 (11th Cir. 1990) ("We reject any attempt to establish a *per se* rule in determining a manufacturer's liability under CERCLA.").

56. 685 F. Supp. at 654 (emphasis added).

57. 22 Env't. Rep. Cas. (BNA) 1230, 1233 (S.D. Ill. 1983). See also *Prudential Ins. Co. v. United States Gypsum*, 711 F. Supp. 1244 (D.N.J. 1989) (substance was sold as part of a useful product).

58. 619 F. Supp. 162 (W.D. Mo. 1985).

59. *Id.* at 241.

60. *Id.*

61. 711 F. Supp. at 1254.

62. 685 F. Supp. at 655-56.

rejecting the use of intent in making this distinction. An inquiry into intent is relevant in characterizing whether a transaction involved an "arrangement to dispose," not an inquiry into the negligence of the parties. Inquiry for this purpose does not seem inconsistent with the strict liability provisions of CERCLA.

2. *Receipt of Valuable Consideration for the Sale*

Courts universally have concluded that the fact that a seller received money for its sale of hazardous substances does not per se mean that the transaction did not involve an arrangement to dispose.⁶³ *United States v. Conservation Chemical Co.*,⁶⁴ involved, among other issues, the liability of parties who sold fly ash, a byproduct of coal combustion, and lime slurry for use in neutralizing acid and alkaline wastes. The defendants argued that they were not liable under section 107(a)(3) since they sold useful products and not wastes. The court rejected an argument that defendants were not liable because they received monetary consideration in the transaction and held that "[t]he direction of flow of monetary consideration is not the test of liability under CERCLA."⁶⁵

3. *Sale of a "Useful" and "Useable" Product*

In concluding that a transaction did not constitute an arrangement for disposal, courts generally have referred to the fact that the transaction involved the sale of a "useful" product. As one court noted, "[I]t is clear that liability attaches to a party who has taken an affirmative act to dispose of a hazardous substance . . . as opposed to convey a useful substance for a useful purpose."⁶⁶ This assertion, however, is more a conclusion than a useful factor in analyzing liability under section 107(a)(3). Does the sale of used oil as a dust suppressant involve the sale of a useful product?⁶⁷

One interesting twist on this issue, however, involved a claim that the sale of a product containing unnecessary hazardous contaminants constituted an arrangement for disposal. In *Kelley v. ARCO Industries Corp.*,⁶⁸ ARCO, the manufacturer of rubber products which used neoprene in its manufacturing process, sued a supplier of neoprene. ARCO attempted to distinguish earlier case law limiting liability of persons selling useful products by arguing that in this case the product contained hazardous constituents unneces-

63. See, e.g., *United States v. Conservation Chem. Co.*, 619 F. Supp. at 240 (liability does not depend upon the flow of monetary consideration); *United States v. A & F Materials Co.*, 582 F. Supp. 842, 845 (S.D. Ill. 1984) (irrelevant fact that hazardous material was sold); *New York v. General Elec. Co.*, 592 F. Supp. at 297 (liability cannot be contracted away). Although receipt of money may not be dispositive in determining whether a transaction constituted a sale of a product, absence of consideration should be relevant in determining that a party intended to dispose of its hazardous substances.

64. 619 F. Supp. 162 (W.D. Mo. 1985).

65. *Id.* at 240.

66. *Prudential Ins. Co. v. United States Gypsum*, 711 F. Supp. at 1253.

67. *Cf. New York v. General Elec. Co.*, 592 F. Supp. 291 (N.D.N.Y. 1984) (seller found to be responsible party under CERCLA).

68. 739 F. Supp. 354 (W.D. Mich. 1990).

sary for its function. The rationale behind the earlier cases, ARCO argued, was that "useful products would undoubtedly be kept out of the market entirely if liability were imposed under these circumstances."⁶⁹ Here, ARCO argued the manufacturers sold products containing hazardous substances with no vital purpose. Characterizing the argument as a clever distinction, the court nonetheless rejected ARCO's motion to dismiss after finding nothing in the earlier case law or language of the statute to support its argument.⁷⁰

4. Decision to Place Substances at the Facility

Several courts have suggested that a relevant factor in determining whether a party is liable under section 107(a)(3) is "*who decided to place the waste into the hands of a particular facility that contains hazardous wastes.*"⁷¹ The relevance of this "decision to place" factor is unclear. If courts are focusing on the person who selected the facility where the release occurred, its significance is hard to understand. Other courts have determined that generators are liable if the generator did not select the waste disposal site or if the generator selected a different site than the one where the wastes were actually disposed.⁷² Furthermore, this factor simply begs the question of whether the transaction represented the sale of a product or an arrangement for disposal. In many cases, the sale of a useful product will involve the decision to sell to a particular facility; the fact that the seller knew the destination of the product is hardly relevant in determining whether it was sale or disposal.⁷³

The "decision to place" factor may be relevant, however, in two other ways. First, some courts have suggested that persons may be liable under

69. *Id.* at 360.

70. *Id.*

71. *United States v. A & F Materials Co.*, 582 F. Supp. at 845 (emphasis added). *See also United States v. Conservation Chem. Co.*, 619 F. Supp. at 240 (defendants decided to place hazardous substance into a facility containing hazardous waste).

72. *See Missouri v. Independent Petrochemical Corp.*, 15 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 20161 (E.D. Mo. 1985); *United States v. Wade*, 577 F. Supp. 1326 (E.D. Pa. 1983). *But see Moorman & Kirsch, A Response to "Arranging for Disposal" Under CERCLA*, 15 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10274 (1985) (liability under § 107(a)(3) limited to generators who selected "particular facility" where substance was disposed and generators are not liable if disposal does not occur at facility which they own or with which they have contracted).

73. In many cases, persons selling a product will in fact know the ultimate location of its use by the buyer. For example, in *Amland Properties Corp. v. Aluminum Co.*, 711 F. Supp. 784 (D.N.J. 1989), the court found that the sale of property containing PCB laden transformers did not constitute an arrangement for disposal. Presumably the seller knew of the existence of the transformers and their location.

Cases in which courts have raised the issue generally have involved transactions constituting clear surrogates for disposal. For example, in *United States v. A & F Materials Co.*, 582 F. Supp. at 844-45, the court concluded that the "spent caustic soda" sold to neutralize wastes was itself a hazardous waste under the existing RCRA regulations. In focusing on "who decided to place" the "waste" into the hands of the facility containing hazardous wastes, the court assumed that the transaction involved the disposal of a waste. Similarly, in *United States v. Conservation Chem. Co.*, 619 F. Supp. at 240-41, the court based liability on the decision to "sell" fly ash, a byproduct of coal combustion, for the purpose of "treatment" and land disposal of other wastes.

section 107(a)(3) if they send a material to a site for processing with knowledge that a release is inherent in the process. Both *United States v. Aceto Agricultural Chemical Corp.*⁷⁴ and *United States v. Velsicol Chemical Corp.*⁷⁵ involved the liability of pesticide manufacturers who sent industrial grade chemicals to a facility for reformulation. In both cases, the fact that releases were inherent in the reformulation process seemed significant in the courts' determinations that the companies should be liable as persons who "arranged for disposal." The courts appeared concerned that parties could circumvent CERCLA if they could contract away their liability for dirty jobs by sending the work to an independent facility.⁷⁶

Additionally, the "decision to place" factor may involve the question of whether the seller knew that the manner in which the "product" was to be used was a form of disposal. In *United States v. Conservation Chemical Co.*,⁷⁷ for example, the sellers of fly ash knew that the materials would be used to neutralize waste and then disposed of at a landfill. Similarly, in *United States v. General Electric Co.*,⁷⁸ evidence indicated that the seller of used PCB containing oil had actual or imputed knowledge that the "product" was to be spread on the ground at a dragstrip as a dust suppressant. In both cases, the courts found that the sellers could be liable under section 107(a)(3) and, in part, relied on the fact that the sellers knew that the immediate use of its "product" involved application to land in a manner that obviously appeared to be a form of disposal.⁷⁹

5. *Ownership and Control Over the Disposed Substances*

Some courts have looked to the extent of control over the party and process that were responsible for the release. For example, in *United States v. Consolidated Rail Corp.*,⁸⁰ the defendants in a government CERCLA action sought to impose liability on a third-party defendant, BPB, who arranged for the shipment of raw material to the facility and purchased the output. In assessing BPB's liability under section 107(a)(3), the court considered the issue to be "who made the crucial decision to dispose of hazardous substances."⁸¹ The court concluded that although BPB both arranged for transportation of materials to the facility where a release occurred and purchased the output from the facility at below market prices, these facts constituted "no support for the inference that BPB controlled or had the authority to control the hazardous substances disposed of or treated at the

74. 872 F.2d 1373 (8th Cir. 1989).

75. 701 F. Supp. 140 (W.D. Tenn. 1987).

76. The scope of such liability is, however, unclear. Companies, for example, frequently send samples to laboratories for evaluation; are they liable for releases from the laboratory if some spills or releases are likely to occur at the lab?

77. 619 F. Supp. 162 (W.D. Mo. 1985).

78. 592 F. Supp. 291 (N.D.N.Y. 1984).

79. *United States v. Conservation Chem. Co.*, 619 F. Supp. at 240-41; *United States v. General Elec. Co.*, 592 F. Supp. at 296-97.

80. 729 F. Supp. 1461 (D. Del. 1990).

81. *Id.* at 1469.

Sealand site."⁸² Thus, BPB was not liable under section 107(a)(3).

In *United States v. Aceto Agricultural Chemicals Corp.*,⁸³ however, the court found that parties who sent chemicals for processing at an independent facility could be liable under section 107(a)(3) for releases at that facility. The government claimed that eight pesticide manufacturers who had contracted with a pesticide formulator to reformulate technical grade pesticides into commercial grade pesticides were liable as persons who had "arranged for disposal." The government alleged that the manufacturers maintained ownership of the pesticide throughout the reformulation process and that the generation of wastes was "inherent" in the reformulation process. Although the defendants claimed that they had no authority to control the activities of the formulator, the court stated that the reformulator "is performing a process on products owned by defendants for defendants' benefit and *at their direction*; waste is generated and disposed of contemporaneously with the process."⁸⁴

Several factors seemed significant in imposing liability on the manufacturers. First, as discussed above, the court was concerned that the parties could circumvent the goals of CERCLA if they could by contract shift responsibility to independent contractors. Further, this case lacked the characteristic of an independent sale since the defendants maintained ownership of the chemicals throughout the process.⁸⁵ Finally, the releases of the hazardous substances were both inherent and contemporaneous with the reformulation process.⁸⁶

III. BRIGHT LINE ANALYSIS: IS IT A SOLID WASTE?

Through the case-by-case analysis under section 107(a)(3), courts have attempted to distinguish true sales of products from transactions possessing some characteristic of disposal. This ad hoc approach has created uncertainty and confusion. Consequently, it can be difficult to determine whether a transaction will subject the seller to liability under CERCLA.

An alternative, however, exists to this case-by-case development. The EPA already has been forced to develop a regulation that distinguishes between the sale of products and the disposal of wastes. Under RCRA, solid waste by statute is defined to include "other discarded material."⁸⁷ In implementing this provision, the EPA promulgated a regulatory definition that attempts to distinguish between discarded materials and materials that are used like commercial products.

82. *Id.* at 1471.

83. 872 F.2d 1373 (8th Cir. 1989).

84. *Id.* at 1381 (emphasis added).

85. The court in *United States v. Consolidated Rail Corp.*, 729 F. Supp. 1461, 1470 (D. Del. 1990), distinguished *Aceto* based on the fact that the party who both arranged for the sale of raw materials to a facility and bought its output did not own or even have a contractual obligation to purchase the output.

86. *See also United States v. Velsicol Chem. Corp.*, 701 F. Supp. 140, 142 (W.D. Tenn. 1987) (defendants found liable where wastes would be generated in the reformulating process).

87. 42 U.S.C. § 6903(27) (1988).

Liability under section 107(a)(3) should be limited to those who transact in solid wastes, as defined in RCRA, containing hazardous substances. Although no one who has ever worked with the "solid waste" definition under RCRA would ever describe it as bright line, using the definition to define liability under CERCLA allows use of a pre-established set of factors and creates a greater degree of consistency and certainty of application. Although the definition of hazardous substances under CERCLA is more inclusive than the definition of hazardous waste under RCRA, several reasons exist for concluding that CERCLA contemplates limiting liability under section 107(a)(3) to sale of solid wastes as defined under RCRA.

1. *The Common Sense Meaning of Section 107(a)(3).*

Unlike landowner liability that extends to persons who currently own land where a release of a hazardous substance occurs, section 107(a)(3) only extends liability to persons who arranged for "disposal or treatment" of hazardous substances. This language implies that liability is limited to sale of substances that are to be disposed of. It is hard to imagine a construction of this section that extends to disposal of materials that are not wastes. The common sense meaning of disposal suggests some act of discarding that is limited to wastes. As the EPA learned in the D.C. Circuit's review of the "solid waste" definition, courts have been willing to look at the plain or common sense meaning of words in interpreting statutes.⁸⁸

At least one court has noted that the language of section 107(a)(3) impliedly limits liability to transactions involving wastes. In *Edward Hines Lumber Co. v. Vulcan Materials Co.*, the court wrote "[t]he broad definition of 'hazardous substance' to include more than wastes appears inconsistent with the narrowing language of section 9607(a)(3)[107(a)(3)]. Specifically, how can a manufacturer arrange for the disposal or treatment of anything but wastes?"⁸⁹ Noting that under CERCLA hazardous substances included RCRA defined hazardous waste, the court responded by suggesting that hazardous substances could mean wastes in a "broader non-technical sense" than the specific definition of hazardous waste in RCRA. This inconsistency, however, can also be resolved by limiting liability under section 107(a)(3) to those disposing or treating solid wastes that contain hazardous substances. This category is still far broader than the class of hazardous wastes defined in RCRA.⁹⁰

88. See *American Mining Congress v. EPA*, 824 F.2d 1177 (D.C. Cir. 1987) (Congress used the term "discarded" in its ordinary sense). See also *Prudential Ins. Co. v. United States Gypsum*, 711 F. Supp. at 1253 (in construing § 107(a)(3), "[a]n analysis of the term 'disposal' calls for an examination of its everyday meaning, the purpose of the legislation of which it is a part and the context and structure of the legislation").

89. 685 F. Supp. at 654 n.2.

90. Additionally, for a wide variety of "solid wastes," EPA has elected to suspend or issue limited regulatory requirements under RCRA. See 40 C.F.R. § 261.6(a)(3) (1989). Parties who transacted in these "solid wastes" that contained hazardous substance would still be liable under CERCLA notwithstanding the suspension of regulatory requirements under RCRA.

2. *The Express Language of Section 107(a)(3)*

In addition, CERCLA itself expressly defines the term "disposal" in terms of "waste." Section 101(29) provides that these terms will have the meaning provided in RCRA.⁹¹ Under RCRA, disposal is defined as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any *solid waste or hazardous waste* into or on any land or water"⁹² Thus, the express language of CERCLA limits the term disposal to the discharge of wastes.

This issue has also arisen in construing section 107(a)(2) which extends liability to any person who "at the time of *disposal* of hazardous substances owned or operated any facility at which such hazardous substances were *disposed of*."⁹³ In *3550 Stevens Creek Assoc. v. Barclays Bank*⁹⁴ the Ninth Circuit concluded that prior building owners were not liable for the costs of removal of asbestos containing materials since installation of the material was not disposal of a waste. The court noted that "[o]n its face disposal pertains to 'solid or hazardous waste,' not to building materials which are neither."⁹⁵ The court rejected arguments that the reference to hazardous substances in 107(a)(2) superseded the reference to wastes contained in the definition of disposal. The court wrote "Congress could have defined 'disposal' for purposes of CERCLA any way it chose; it chose to import the meaning provided in SWDA [RCRA]. That meaning is clear."⁹⁶ Thus, liability under CERCLA for acts involving disposal should be limited to the disposal of wastes as defined under RCRA.

3. *The Legislative History of Section 107(a)(3)*

Although the legislative history of CERCLA is sparse, the history indicates that Congress intended to apply section 107(a)(3) to generators of hazardous waste. Describing the purpose of extending liability to generators under CERCLA, a relevant Senate Report stated:

In correcting the historic neglect of hazardous substance disposal, it is essential that this incentive for greater care focus on the initial *generators of hazardous wastes* since they are in the best position to control the risks. Generators create the hazardous wastes and know how to avoid them, and they determine whether and how to *dispose of these wastes* - on their own site or at locations controlled by others.⁹⁷

Thus Congress clearly indicated that imposition of liability on generators through section 107(a)(3) was premised on the need to regulate their practices in disposing of wastes. Defining section 107(a)(3) liability in terms of the definition of solid waste ensures that liability is imposed on this broad and relevant class of parties.

91. 42 U.S.C. § 9601(29).

92. 42 U.S.C. § 6903(3) (emphasis added).

93. 42 U.S.C. § 9606(a)(2) (emphasis added).

94. 915 F.2d 1355 (9th Cir. 1990).

95. *Id.* at 1361.

96. *Id.* at 1362.

97. S. REP. NO. 848, 96th Cong., 2d Sess. 15 (1985) (emphasis added).

4. *The Case Law Implies that Section 107(a)(3) is Limited to Disposal of Wastes*

Virtually all of the existing case law is consistent with a construction of section 107(a)(3) that limits liability to those who sell solid wastes containing hazardous substances. *United States v. A & F Materials*⁹⁸ provides the most explicit example. Much of the court's analysis involved a determination of whether the material that was sold constituted solid waste as defined under a previous EPA RCRA definition. Many of the courts describing liability have spoken in terms of disposal of waste.⁹⁹

It appears that every case in which courts failed to impose liability under section 107(a)(3) involved transactions in substances that would not be classified as solid wastes under RCRA. Similarly, almost every case in which courts found liability involved transactions in materials constituting solid wastes.¹⁰⁰ For example, *New York v. General Electric Co.*¹⁰¹ and *United States v. Conservation Chemicals Co.*¹⁰² both involved the sale of secondary materials for ultimate application to the land which would result in their classification as solid wastes under RCRA.¹⁰³

98. 582 F. Supp. 842 (S.D. Ill. 1984).

99. See, e.g. *Amland Properties Corp. v. Aluminum Co.*, 711 F. Supp. at 793 n.8 ("the sale of the transformers by Alcoa did not satisfy the requirement there be a disposal, in that the transaction involved a sale of a useful product, rather than a sale of hazardous waste solely for the purpose of disposing of that waste"); *Jersey City Redevelopment Auth. v. PPG Indus.*, 655 F. Supp. 1257, 1260 (D.N.J. 1987), *aff'd*, 866 F.2d 1411 (3d Cir. 1988) ("Section 107(a)(3) requires that, in some manner, the defendant 'dumped' his waste on the site at issue"); *Prudential Ins. Co. v. United States Gypsum*, 711 F. Supp. at 1254 (CERCLA liability does not extend to the sale of a substance for a purpose other than its disposal). Indeed, in *Edward Hines Lumber Co. v. Vulcan Materials Co.*, the court stated that "[m]any courts discuss CERCLA as if it applies only to hazardous wastes." 685 F. Supp. at 654 n.2.

100. Only two cases might have extended liability to materials potentially not constituting solid wastes: *United States v. Aceto Agric. Chem. Co.*, 872 F.2d 1373 (8th Cir. 1989), and *United States v. Velsicol Chem. Corp.*, 701 F. Supp. 140 (W.D. Tenn. 1987). In both cases, pesticide manufacturers sent chemicals over to a reformulator for processing yet they retained ownership. Both courts held that the manufacturers could be liable for releases from the reformulator's facility as persons who "arranged for disposal." Although unclear as to what extent the courts relied on the manufacturers retention of some direction and control over the reformulator's operations, the manufacturers could also have been liable as "owners or operators" under § 107(a)(1) of CERCLA. Indeed, the court in *Aceto* implies that an independent basis might exist for finding the manufacturers liable under common law concepts used to define "operator" liability under CERCLA. *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d at 1382. Cf. *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155 (7th Cir. 1988) (court uses common law analogies to define "operator").

101. 592 F. Supp. 291 (N.D.N.Y. 1984) (sale of oil for use as a dust suppressant).

102. 619 F. Supp. 162 (W.D. Mo. 1985) (sale of fly ash a lime slurry for neutralizing wastes being disposed of in a landfill).

103. See 40 C.F.R. § 261.2(c)(1) (1988) (use of a secondary material, including sludges and byproducts, in a "manner constituting disposal" falls within the definition of solid waste). The *Conservation Chemical* court specifically declined to distinguish liability under CERCLA based on whether a transaction involved a waste or a primary product. The court stated that "CERCLA . . . applies uniformly to 'hazardous substances,' not just wastes." 619 F. Supp. at 241. In *Conservation Chemical*, however, the use of sludges and byproducts for treatment and land disposal would likely have resulted in classification of the materials as solid wastes and not products under 40 C.F.R. § 261.2.

5. *The Rationale of EPA's Solid Waste Definition is Consistent with Section 107(a)(3)*

The EPA's general rationale for its definition of solid waste is perfectly appropriate for use in interpreting section 107(a)(3) of CERCLA. Through its definition the EPA attempted to distinguish covered wastes from materials used in ways that are "very similar to normal production operations or to normal uses of commercial products."¹⁰⁴ The EPA's definition excludes products and co-products, but includes both abandoned materials and secondary materials that are recycled in ways suggesting an intent to discard.¹⁰⁵

6. *Don't Reinvent the Wheel*

The EPA has spent a considerable period of time in trying to develop a definition of solid waste under RCRA that distinguishes between products and wastes. The definition represents a considered attempt to deal with the very difficult distinctions that must be drawn. Not only is use of this definition appropriate under the language of CERCLA, but it also makes sense.

By defining liability under section 107(a)(3) in terms of the sale or disposal of a solid waste, the EPA can adopt a pre-existing set of criteria which provides substantial analysis and guidance. Use of this definition will guarantee the EPA and the regulated community with some certainty as to the scope of CERCLA and will allow the regulated community rationally to plan and address its statutory obligations.

III. CONCLUSION

Given the magnitude of the hazardous waste problem and the remedial objectives of CERCLA, courts have been willing to impose liability on a large class of potentially responsible parties. Although the extent of CERCLA liability is broad, it is not endless, and courts have consistently held that the sale of a product containing a hazardous substance will not in itself be sufficient to impose liability on the seller.

The courts' ad hoc approach to determining whether a transaction constitutes a sale or an arrangement for disposal has resulted in uncertainty and confusion. Courts should limit liability under section 107(a)(3) to parties who transact in solid wastes. Use of the established EPA definition of solid waste under RCRA provides an established and detailed set of criteria for assessing liability under CERCLA. Such a result is consistent with the language and purposes of CERCLA, for as one court asked: "How can you dispose of anything but wastes?"¹⁰⁶

104. 50 Fed. Reg. 617 (1985).

105. See generally Gaba, *Solid Waste and Recycled Materials under RCRA: Separating Chaff from Wheat*, 16 *ECOLOGY* L.Q. 623 (1989) (analysis of the EPA's definition of "solid waste").

106. See *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 685 F. Supp. at 654 n.2 ("how can a manufacturer arrange for disposal or treatment of anything but wastes?").

