



Summer 1991

Reasonable Inference of Authority to Control Hazardous Waste Disposal Results in Potential Liability: United States v. Aceto Agricultural Chemicals Corporation

Anita Letter

Recommended Citation

Anita Letter, *Reasonable Inference of Authority to Control Hazardous Waste Disposal Results in Potential Liability: United States v. Aceto Agricultural Chemicals Corporation*, 31 Nat. Resources J. 673 (1991). Available at: <https://digitalrepository.unm.edu/nrj/vol31/iss3/9>

This Student Article is brought to you for free and open access by the Law Journals at UNM Digital Repository. It has been accepted for inclusion in Natural Resources Journal by an authorized editor of UNM Digital Repository. For more information, please contact amywinter@unm.edu, lsloane@salud.unm.edu, sarahrk@unm.edu.

COMMENT

Reasonable Inference of Authority to Control Hazardous Waste Disposal Results in Potential Liability: *United States v. Aceto Agricultural Chemicals Corporation*.¹

INTRODUCTION

Contaminated soil and groundwater caused by corrosion and leakage at toxic waste sites threatens people and the environment. The hazardous conditions at numerous waste sites induced Congress to enact the Resource Conservation and Recovery Act of 1976 (RCRA)² and the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA).³ These overlapping laws regulate hazardous waste transportation, disposal, cleanup, and in addition, place liability on responsible parties. The Eighth Circuit Court of Appeals in *United States v. Aceto Agri. Chem. Corp.*⁴ broadens and clarifies the interpretation of responsible persons under RCRA and CERCLA. The *Aceto* court found that authority to control production steps gives rise to a reasonable inference of authority to dispose of the waste, sufficient for liability under both RCRA and CERCLA⁵ as persons who "contributed to" and "arranged for" the disposal of hazardous substances.⁶

STATEMENT OF FACTS

Aidex Corporation formulated, packaged, and distributed pesticides for pesticide manufacturers⁷ at a site in the Missouri River floodplain near Glenwood, Iowa. Aidex conducted its operation at this site from 1974 until 1981 when the company filed for liquidation under Chapter 7 of the Bankruptcy Code.⁸ Contracting with formulators for a single step in the production process is a common practice in the pesticide industry.⁹

In the formulation process, Aidex mixed concentrated pesticides, such

1. 872 F.2d 1373 (8th Cir. 1989), *reh'g denied* (July 9, 1989).

2. Resource Conservation and Recovery Act of 1976, 43 U.S.C. §§ 6901-6987 (1988) [hereinafter RCRA].

3. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9657 (1988) [hereinafter CERCLA].

4. 872 F.2d at 1373.

5. *Id.* at 1374.

6. *Id.* at 1379, 1383.

7. The defendants are Aceto Agricultural Chemicals Corp., the Dow Chemical Co., Farnam Companies, Inc., Mobay Corp., Velsical Chemical Corp., CIBA-Geigy Corp., Mobil Oil Corp., and Platte Chemical Corp. *Id.* at 1373.

8. *United States v. Aceto Agr. Chemicals Corp.*, 699 F.Supp. 1384, 1385 (S.D.Iowa 1988).

9. *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1375 (8th Cir. 1989), *reh'g denied*, (July 9, 1989).

as technical grade pesticides, with inert materials to form a commercial grade product. The formulation process generated pesticide-containing waste through spills, mixing and grinding, equipment cleaning, and the disposal of substandard batches.¹⁰ The commercial grade product was either shipped back to the pesticide manufacturers for distribution, or shipped directly to the pesticide manufacturers' customers. Aidex carried out the formulation process to meet the specifications of the pesticide manufacturers.¹¹ While formulation progressed at Aidex, the pesticide manufacturers continued to own both the technical and commercial grade pesticide.¹²

The Aidex site includes: four metal buildings, an 8,000 gallon underground storage tank, two waste burial trenches, the foundation of a liquid formulator building, and hundreds of storage drums and tanks containing hazardous waste. Investigation by the Environmental Protection Agency (EPA) in the early 1980s revealed a highly contaminated site.¹³ The storage tank was deteriorating and hazardous waste was leaking from many of the storage drums causing widespread soil contamination.

The EPA determined that the site was a threat to the groundwater source for irrigation and area residents' drinking water. The EPA, empowered under CERCLA and RCRA to clean up sites in response to imminent and substantial dangers to the public health or welfare,¹⁴ spent over \$10,000,000 in response costs to clean up the Aidex site.¹⁵ Soil was collected and transported to EPA-approved sites for incineration, disposal, or storage. Additional remedial actions were taken in 1986, and future actions may be necessary.¹⁶

The United States and Iowa¹⁷ brought suit against the eight pesticide

10. *Id.* at 1375 (United States Complaint para. 47).

11. *Id.* (United States Complaint para. 46).

12. The Complaint alleges that Aceto Agricultural Chemicals Corp. contracted with Aidex to formulate technical Phorate into an insecticide, Phorate 15G; Dow Chemical Co. contracted with Aidex to formulate Technical Dursban M into an insecticide, Dursban 2,5G; Farnam Co, Inc. contracted with Aidex to formulate products containing lindane, methoxychlor, and toxaphene; Mobay Chemical Corp. contracted with Aidex to formulate technical Di-Syston into DI-SYSTON 15%; Platte Chemical Co. contracted with Aidex to formulate technical Phorate into Phorate 15G; Velsicol Chemical Corp. contracted with Aidex to formulate products containing Chlordane and Heptachlor; CIBA-Geigy Corp. contracted with Aidex to formulate a herbicide known as Conquer LVK from Prometon, and Aatrex 4L from Atrazine; and Mobile Oil Corp. contracted with Aidex to formulate a nematocidal-insecticide known as MOCAP 10G from Ethoprop. *Id.* at 1378, ns. 5 and 6.

13. *Id.* at 1375.

14. *Id.* (United States Complaint paras. 5-12, 46, 48); CERCLA, § 121-25, 42 U.S.C. §§ 9621-25 (1988); and RCRA § 7003, 42 U.S.C. 6973 (1988).

15. As of November 30, 1986, EPA has expended approximately \$10,013,700 on these response actions (United States Complaint para. 27). As of March 1, 1987, the State of Iowa has expended \$95,780, and is committed by contract with the EPA to pay an additional \$780,000 (Iowa Complaint para. 7).

16. *United States v. Aceto Agric. Chem. Corp.* 872 F.2d 1373, 1376, *reh'g denied* (July 9, 1989).

17. The United States filed the initial complaint on February 26, 1987 and the State of Iowa filed its complaint in intervention on April 29, 1987. *Id.* at 1375 n. 1.

manufacturers who contracted with Aidex Corporation to recover cleanup costs under RCRA and CERCLA.¹⁸ The pesticide manufacturers moved to dismiss the complaints for failure to state a claim under Federal Rules of Civil Procedure 12(b)(6).¹⁹ The United States District Court for the Southern District of Iowa granted the motion in part and denied it in part.²⁰ The District Court granted the defendants' motion under RCRA, because failure to allege control by pesticide manufacturers precluded recovery, but denied the motion under CERCLA, finding that sufficient control by manufacturers could allow recovery.²¹ On interlocutory appeal, the Eighth Circuit Court of Appeals held that the allegations properly stated claim against the manufacturers under both RCRA and CERCLA.²²

BACKGROUND

Comprehensive Environmental Response, Compensation, and Liability Act of 1980.

History and Structure of CERCLA.

CERCLA is Congress's response to pollution produced by hazardous waste that threatens the environment and public health.²³ CERCLA's main objectives are to provide prompt, effective cleanup of inactive hazardous waste sites and place liability for response costs on responsible parties.²⁴

In reaction to a hazardous situation, CERCLA has three procedural means that are designed to achieve its objectives.²⁵ The first mechanism authorizes response action whenever there is a release or threatened release of hazardous substance into the environment.²⁶ Section 104 of CER-

18. CERCLA's sweep in this case was considered more limited than RCRA's in terms of the substances it covers. CERCLA liability attaches only to those responsible for hazardous substances as defined in the statute, 42 U.S.C. § 9601(14). *Id.* at 1378. Three of the toxic wastes found at the Aidex site were not alleged to be hazardous substances under CERCLA. *Id.* at 1378, n. 4. All eight of the defendants were prosecuted under RCRA while only six of the defendants were sued under both RCRA and CERCLA: Aceto Agricultural Chemicals Co., Dow Chemical Co., Farnam Co, Inc., Mobay Chemical Corp., Platte Chemical Co., and Velsical Chemical Corp. under both RCRA and CERCLA; and CIBA-Geigy Corp. and Mobil Oil Corp. under only RCRA. *Id.* at 1378, ns. 5 and 6.

19. *Id.* at 1376, (citing Fed. R. Civ. P. 12(b)(6): In order for a motion to dismiss for failure to state a claim to succeed, the defendants must show beyond a doubt that the plaintiffs cannot prove the necessary set of facts in support of their claim, moreover, the allegation of the plaintiffs are assumed to be true and are construed in their favor).

20. *United States v. Aceto Agric. Chemicals Corp.*, 699 F.Supp. 1384, 1392 (S.D.Iowa 1988).

21. *Id.* at 1390.

22. 872 F.2d 1373, 1374 (8th Cir. 1989), *reh'g denied*, (July 9, 1989) .

23. See Comment, *Generator Liability Under Superfund for Clean-up of Abandoned Hazardous Waste Dumpsites*, 130 U. Pa. L. Rev. 1229, 1229-31 (1982).

24. Stoll, Freedman, Levy, Kroll & Simonds, *Comprehensive Environmental Response Compensation, and Liability or Superfund*, 3 Environmental Law Handbook 75 (10th ed. 1989).

25. *United States v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 810 F.2d 726, 731 (8th Cir. 1986), *cert. denied*, 484 U.S. 848, 108 (1987).

26. CERCLA, § 104, 42 U.S.C. 9604 (1988).

CLA grants the EPA power to investigate, monitor and test potential hazardous waste sites and further grants the EPA power to clean up the sites.²⁷ The National Contingency Plan guides the response action.²⁸ The second mechanism provides authority under Section 221 of CERCLA to establish the Hazardous Substance Response Fund (Superfund) to provide money for cleaning up the environment.²⁹ The third mechanism consists of a liability scheme that allows the government to allocate and collect response costs from the responsible parties, or by injunction, compel the responsible parties to conduct the cleanup themselves.³⁰

CERCLA Liability.

Under CERCLA, membership in a certain class defines potential liability. Section 107(a)(1)-(4) describes four classes of responsible parties who are potentially liable for all necessary response costs due to a release or a threatened release of hazardous substances.³¹ The categories of liable parties consist of: (1) owners and operators of a facility; (2) persons who owned or operated any facility at the time of disposal of the hazardous substance; (3) any person who—by contract, agreement or otherwise—arranged for disposal, treatment, or transport of a hazardous substance; and (4) any person who accepts or accepted any hazardous substance for transport to a site.³² Section 107(a) of CERCLA, in conjunction with common law liability, imposes strict liability upon responsible parties, and joint and several liability where the harm arising from a release or threatened release of hazardous substances is indivisible.³³

CERCLA allows the three affirmative defenses which are listed in Section 107(d)(1)-(3). No liability will be assigned to a person if it can be shown that the danger was caused solely by: (1) an act of God; (2) an act of war; or (3) an act of a third party who is not an employee, nor an agent and is not contractually related to the potentially liable person, providing due care was exercised and precautions were taken against foreseeable acts.³⁴

CERCLA, Section 107(a)(3).

Under Section 107(a)(3), the responsible party is the person who “by contract, agreement or otherwise arranged for” the disposal of hazardous

27. *Id.*

28. CERCLA, § 105, 42 U.S.C. § 9605 (1988).

29. CERCLA, § 111, 42 U.S.C. § 9611 (1988).

30. CERCLA, § 107(a), 42 U.S.C. § 9607(a) (1988).

31. *Id.*

32. *Id.*

33. *United States v. Conservation Chemical Co.*, 619 F.Supp. 162, 190-91 (D.C.Mo. 1985); *New York v. Shore Realty Corp.* 759 F.2d 1032, 1044 (2d Cir. 1985).

34. CERCLA, § 107(b)(1)-(3), 42 U.S.C. § 9607(b)(1)-(3).

waste.³⁵ Since term is not defined in CERCLA, the courts construe this term based on several considerations.³⁶ Legislative history indicates that CERCLA is designed to give government the necessary tools to clean up hazardous waste sites, and make those responsible bear the cost.³⁷

In general, courts use standard rules of statutory construction to construe "by contract agreement or otherwise arranged for" in such a way that the words do not become surplusage.³⁸ The usage of past tense indicates the retroactive nature of CERCLA; thus CERCLA encompasses all past responsible parties who caused present hazardous conditions.³⁹ The plain meaning of the broad language in the term "or otherwise arranged for" combined with the congressional purpose that CERCLA "protect and preserve public health and the environment" mandates CERCLA's overwhelmingly remedial function.⁴⁰ In general, the courts construe the statute liberally so as not to frustrate CERCLA's goals.⁴¹

United States v. Wade provides a test to find a prima facie case against a responsible waste generator.⁴² If the generator disposed of its hazardous substances at a facility which now contains hazardous substances of the sort disposed of by the generator from which a release or a threatened release of a hazardous substance has occurred or is occurring, and the threatened release has resulted in response costs, then the generator is a responsible person and is held liable for the costs.⁴³

Scope of CERCLA, Section 107(a)(3) as construed by the courts.

The court in *United States v. Conservation Chemical Co.* defined the term "or otherwise arranged for" to include a sale of chemical substances.⁴⁴ In that case, fly ash, which is a by product of coal combustion, was sold and subsequently used to neutralize other hazardous substances at a disposal site. The court determined that this sale could not be distinguished from an arrangement for disposal of the chemical byproducts.⁴⁵ Similarly, in *New York v. General Electric*, the court held that the sale of waste oil containing hazardous substances for use as dust control on a drag strip was a disposal of hazardous substances.⁴⁶ Even though the

35. CERCLA, § 107(a)(3), 42 U.S.C. § 9607(a)(3).

36. 619 F.Supp. at 190-91.

37. Stoll, Freedman, Levy, Kroll & Simonds, *supra* note 24.

38. *United States v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 810 F.2d 726 (8th Cir. 1986), *cert. denied* 484 U.S. 848 (1987).

39. *Id.* at 732-33; *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986), *revs'd*, 889 F.2d 1146 (1989), 901 F.2d 3 (1989).

40. *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044-45 (2d Cir. 1985).

41. *United States v. Conservation Chem. Co.*, 619 F.Supp. 162, 192 (D.C.Mo. 1985).

42. 577 F.Supp. 1326, 1332-34 (1983).

43. *Id.*; 619 F.Supp. at 235.

44. 619 F.Supp. at 237-41.

45. *Id.*

46. 592 F.Supp. 291, 297 (N.D.N.Y. 1984).

waste products were sold and put to use, an arrangement for disposal of hazardous substance was made in both cases. Merely characterizing the disposal of hazardous substances as a sale is insufficient to avoid liability.

The scope of liability under Section 107(a)(3) is not limitless, however. Certain acts are too remote to give rise to liability. In *Florida Power & Light v. Allis Chalmers Corp.*, the court held that the sale of new electrical transformers containing polychlorinated biphenyls (PCBs) did not constitute an arrangement for disposal of hazardous substance.⁴⁷ Allis Chalmers Corporation sold new transformers to Florida Power & Light, and after forty years of use, Florida Power & Light made the arrangement to dispose of the spent product which had become hazardous waste.⁴⁸ Likewise, in *United States v. Westinghouse Electric Corp.*, the court held that the sale of PCBs by Monsanto to Westinghouse for use as dielectric fluid was not a disposal arrangement.⁴⁹ Rather, Westinghouse made the actual arrangement for disposal of the waste by dumping PCB containing waste from the used electrical equipment.⁵⁰ The court noted that the sale of a product *per se* is not a disposal arrangement giving rise to liability under CERCLA.⁵¹

The court in *United States v. A & F Materials Co., Inc.* focused on who made the decision to place the hazardous substance at the waste facility.⁵² McDonnell Douglas Corporation sold spent caustic solution for a nominal price to A & F Materials to be reused as a neutralizing agent. The relevant inquiry in *A & F Materials* is "who decided to place the waste" at the facility.⁵⁴ Liability "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."⁵⁵ *United States v. Northeastern Pharmaceutical & Chemical Co., Inc.*⁵⁶ extended this analysis by finding that under the statutory scheme of CERCLA, "the authority to control the handling and disposal of hazardous substances" is critical in the determination of responsible persons.⁵⁷

Resource Conservation and Recovery Act of 1976.

History and Structure of RCRA.

Industrial expansion and increased public awareness of industry's use of the environment as a cheap dumping ground, led to congressional

47. 27 *Envtl. Rep. Cas.* (BNA) 1558 (S.D.Fla. 1988).

48. *Id.*

49. 22 *Envtl. Rep. Cas.* (BNA) 1230 (S.D.Ind. 1983).

50. *Id.* at 1233.

51. *Id.*

52. 582 *F.Supp.* 842 (S.D.Ill. 1984).

53. *Id.*

54. *Id.* at 845.

55. *Id.*

56. 810 *F.2d* 726, 743 (8th Cir. 1986), *cert. denied*, 484 *U.S.* 848 (1987).

57. *Id.*

enactment of the Clean Water Act and the Clean Air Act.⁵⁸ Later, in response to public health dangers posed by a slowly developing and less apparent groundwater contamination, Congress enacted RCRA.⁵⁹ While RCRA is concerned with the loss of large quantities of recoverable materials, the overwhelming concern of the reviewing House Committee was with the deleterious effect of hazardous waste on the population and the environment.⁶⁰

RCRA is a multifaceted approach to regulating the disposal of hazardous waste, which is being produced at an ever increasing volume.⁶¹ The statute provides "cradle-to-grave" monitoring of the production and disposal of hazardous waste.⁶² RCRA empowers the EPA to identify and maintain a list of hazardous wastes.⁶³ Once listed, waste generators must keep records and report to governmental authorities concerning the movement, quantity and disposal of that chemical.⁶⁴ The high cost of cleanup acts as an encouragement to conserve and recycle waste.

RCRA Liability Under Section 7003(a).

Prior to the 1984 amendment to RCRA, the courts required proof of fault or negligence⁶⁵ and rejected retroactive application of the law.⁶⁶ Early legislative history was contradictory and gave courts little help in making decisions.⁶⁷ Only present waste generators were held liable for response cost.⁶⁸ Consequently, the courts' narrow interpretation of RCRA relieved past waste generators, and other responsible persons of liability.

After the enactment of the 1984 amendment to RCRA, the new language clarified the scope of liability.⁶⁹ Additional words in Section 7003(a) using past tense explicitly state that persons who contributed to handling, storage, treatment, transportation or disposal are liable.⁷⁰ The accom-

58. Clean Water Act, 33 U.S.C. §§ 1251-1387 (1988); Clean Air Act, 42 U.S.C. §§ 7402-7642 (1988); see also Comment, *Developments in the Law, Toxic Waste Litigation*, 99 Harv. L. Rev. 1458, 1466-76 (1986).

59. See generally, H.R. Rep. No. 1491, Part 1, 94th Cong., 2d Sess. 9-11, reprinted in 1976 U.S. Code Cong. & Admin. News 6238, 6246-49.

60. Comment, *supra*, note 58.

61. *Id.*

62. H.R. Rep. No. 1016, Part 1, 96th Cong., 2d Sess. 17 (1980).

63. RCRA, § 3001-05, 42 U.S.C. §§ 6921-25; RCRA, § 7003, 42 U.S.C. § 6973 (1988).

64. RCRA, § 3001, 42 U.S.C. § 6921 (1988).

65. *United States v. Northeastern Pharmaceutical & Chemical Co.*, 579 F.Supp. 823 (W.D.Mo. 1984).

66. *Id.*; *United States v. Price*, 523 F.Supp. 1055, 1071-72 (D.N.J. 1981) aff'd. 688 F.2d 204 (2d Cir. 1982).

67. *United States v. Northeastern Pharmaceutical & Chem. Co.* 810 F.2d 726, 738-39 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987).

68. *Id.*

69. H.R. Rep. No. 198 (Part 1), 98th Cong., 2d Sess. 47-49, reprinted in 1984 U.S. Code Cong. & Admin. News 5576, 5606-09.

70. "[T]he administrator may bring suit on behalf of the United States in the appropriate district court against any person . . . who has contributed or who is contributing to such handling, storage, treatment, transportation or disposal. . . ." RCRA, § 7003(a), 42 U.S.C. 6973(a) (1988).

panying House Conference Report states that when RCRA was enacted, Congress intended to abate present conditions threatening public health and the environment, and that RCRA has "always reached those persons who have contributed in the past or are presently contributing to the endangerment."⁷¹

Under RCRA certain elements must be met before the generator may be held liable for the cost of cleaning up the damage to the environment. The court in *United States v. Bliss* outlines the elements for a prima facie case of liability under RCRA, Section 7003(a), as follows:

- 1) that the conditions at the site present an imminent and substantial endangerment; 2) that the endangerment stems from the handling, storage, treatment, transportation, or disposal of any solid or hazardous waste; and 3) that the defendant has contributed or is contributing to such handling, storage, treatment, transportation or disposal.⁷²

Scope of RCRA Section 7003(a) Liability as Construed by the Courts.

Consistent with the 1984 amendment, the Eighth Circuit Court of Appeals in *United States v. Northeastern Pharmaceutical & Chemicals Co. (NEPACCO)* held that past off-site contributors to hazardous waste are strictly liable for cleanup cost under Section 7003(a) of RCRA.⁷³ In *NEPACCO*, Northeastern Pharmaceutical & Chemicals Co. manufactured the disinfectant, hexachlorophene, and in the process produced various hazardous and toxic byproducts which were dumped on a nearby farm.⁷⁴ Northeastern Pharmaceutical & Chemicals Co. was held liable for cleaning up the dump site which had created an imminent and substantial endangerment to the public.⁷⁵

For similar reasons, the court in *United States v. Conservation Chemical Co.* imposed non-negligent, strict liability standards on contributors even though the actions occurred prior to RCRA's enactment.⁷⁶ Conservation Chemical Co. operated an industrial chemicals waste disposal facility located in the floodplain of the Missouri river where many generators disposed of over 50 million gallons of hazardous waste. The court likened section 7003 of RCRA to a codification of the common law of nuisance. Liability under section 7003 of RCRA "applies to inactive sites and that past generators and transporters may be held to a standard of strict liability

71. H.R. Conf. Rep. No. 1133, 98th Cong., 2d Sess.119, reprinted in 1984 U.S. Code Cong. & Admin. News 5649, 5690.

72. *United States v. Bliss*, 667 F.Supp. 1298, 1313 (E.D.Mo. 1987).

73. 810 F.2d 726, 738-42 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987).

74. *Id.* at 729-30.

75. *Id.* at 742-49.

76. 619 F.Supp. 162, 198-99 (D.C.Mo. 1985).

for their activities."⁷⁷ Furthermore, the scope of liability is joint and several where the endangerment is indivisible.⁷⁸ The courts in both *NE-PACCO* and *Conservation Chemicals* reasoned that the remedial nature of RCRA, and RCRA's goal of abatement of hazards resulting from waste disposal, clearly indicate that past generators involved in the disposal of hazardous waste must share in the response costs.⁷⁹

In RCRA, as well as CERCLA, there is a point when an actor's deeds are too remote to be held accountable for liability. The court in *United States v. Westinghouse Electric Corp.* concentrated on who contracted for disposal of the waste in order to determine liability under RCRA Section 7003(a).⁸⁰ In that case Monsanto sold PCBs to Westinghouse, which were then incorporated into electrical equipment. In this process, Westinghouse produced waste which was deposited in Neal's Dump.⁸¹ Westinghouse sought to obtain indemnity from Monsanto for the cleanup costs. However, the court found Westinghouse controlled the actual contract for disposal which made it liable as the person who contributed to the disposal of hazardous waste under section 7003(a) of RCRA.⁸² Similar analysis of control factors was used by the court in *NEPACCO* which found that the person with the "ultimate authority to control the disposal of . . . hazardous substances" is liable for the response costs.⁸³

ANALYSIS

General Liability Considerations.

The allegations in *Aceto* state certain elements of both RCRA and CERCLA liability against the pesticide manufacturers.⁸⁴ The defendants do not challenge that Aidex is a hazardous waste "facility" from which a "release or threatened release of hazardous substance occurred" which presents an "imminent and substantial endangerment to health or the environment," causing the EPA to incur response costs. The disputed issues of liability under CERCLA and RCRA, respectively, are whether the pesticide manufacturers "arranged for" the disposal of hazardous substance and whether the pesticide manufacturers "contributed to" the disposal of solid or hazardous waste.⁸⁵

The pesticide manufacturers contend that Aidex controlled the for-

77. *Id.*

78. *Id.*

79. 1986; *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 738-42 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1978).

80. 22 *Env'tl. Rep. Cas.* (BNA) 1230 (S.D.Ind. 1983).

81. *Id.* at 1232.

82. *Id.* at 1234.

83. 810 F.2d at 745.

84. *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1379-82 (8th Cir. 1989), *reh'g denied*, (July 9, 1989).

85. *Id.*

mulation process and that only Aidex owned and was responsible for the disposal and treatment of the hazardous waste resulting from the process. The pesticide manufacturers intended to produce a valuable product, not to dispose of the hazardous waste. *Aceto* rejects the defendants arguments finding their construction of RCRA and CERCLA too narrow, thereby frustrating congressional intent and the goals of the statutes.⁸⁶

Liability Under CERCLA.

The pesticide manufacturers argue that "to arrange" means to make an agreement which infers that intent must be proven. However, the *Aceto* court noted that Congress created a broad statute with the language in section 107(a) of CERCLA. Liability is assigned to persons who "by contract, agreement, or otherwise arranged for" the disposal of hazardous substances; thus indicating that the statute should be liberally construed.⁸⁷ The *Aceto* court incorporates the analytical reasoning from both *Conservation Chemical* and *NEPACCO* in determining that CERCLA is a remedial statute which should be broadly applied.⁸⁸

The term "or otherwise arranged for" in section 107(a) of CERCLA applies strict liability standards to the past generators of hazardous waste which presently poses danger to the public.⁸⁹ Like *Dedham Water Co.* and *Shore Realty Corp.*, the *Aceto* court applies standard rules of statutory construction and thus rejects an interpretation of section 107(a) that in any way would frustrate the statute's goals without specific congressional intent otherwise.⁹⁰ CERCLA was designed to promptly and effectively clean up the environment and make those responsible pay for the response costs. To relieve the pesticide manufacturers—the past generators of the hazardous waste—from the responsibility of cleaning up the present danger would frustrate the goals of CERCLA.⁹¹ The *Aceto* court reasoned that the statute authorized strict liability, and to require proof of intent in order to find liability would result in an unacceptably narrow interpretation of the statute.⁹²

Thus, *Aceto* rejected the contention that the pesticide manufacturers had no control over the hazardous waste disposal that resulted from the formulation process. The court reasoned that when making a determination of control over a process, such as pesticide formulation, the courts

86. *Id.*

87. *Id.* at 1380.

88. *United States v. Conservation Chem. Co.*, 619 F.Supp. 162, 192 (D.C.Mo. 1985); *United States v. Northeastern Pharmaceuticals & Chem. Co.*, 810 F.2d 726, 733 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

89. 619 F.Supp. at 219-21.

90. *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044-45 (2d Cir. 1985).

91. *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1380 (8th Cir. 1989), *reh'g denied*, (July 9, 1989).

92. *Id.*

should "look beyond" the characterization of the process to determine what is actually involved.⁹³ The Aidex formulation process was performed with chemicals that were owned by the pesticide manufacturers, and the pesticide manufacturers specified the work to be done. Inherent in the formulation process was the production of hazardous waste. Consequently, the *Aceto* court could "reasonably" infer that the disposal of the hazardous waste was also under the control of the pesticide manufacturers.⁹⁴ The *Aceto* decision reaffirms the holding in *NEPACCO*, whereby those with the authority to control the disposal of hazardous waste were held liable.⁹⁵

The pesticide manufacturers could avoid liability by establishing that the hazardous waste release was caused solely by a third party. The *Aceto* court distinguished the facts in *General Electric, A & F Material*, and *Westinghouse*, and could find no application of the third party defense in this case.⁹⁶ CERCLA responsible parties cannot avoid liability by merely characterizing a disposal as a sale, nor by contracting out one step in the production process.⁹⁷ If the hazardous material is purchased for the purpose of producing another product, the seller is relieved of liability.⁹⁸

Aceto focused on which party had the power to control the hazardous waste disposal as did *Conservation Chemical* and *NEPACCO*.⁹⁹ The facts infer that the pesticide manufacturers had the implied power to decide the manner of hazardous waste disposal. Ultimately, the pesticide manufacturers made the waste disposal decision because they had the authority to control the formulation procedure. To find otherwise would frustrate the goals of CERCLA. Consequently, the *Aceto* court found the pesticide manufacturers potentially liable under CERCLA as persons who "by contract, agreement or otherwise arranged for" the disposal of hazardous waste.¹⁰⁰

Liability Under RCRA.

The pesticide manufacturers argued and the district court agreed that the government's allegations were insufficient to establish the element of control and, therefore, could not establish that they contributed to the

93. *Id.* at 1381-83.

94. *Id.* at 1379-83.

95. *United States v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 810 F.2d 726, 742-43 (8th Cir. 1986), cert. denied 484 U.S. 848 (1987).

96. *New York v. General Electric Co.*, 592 F.Supp. 291 (N.D.N.Y. 1984); *United States v. A & F Materials Co., Inc.*, 582 F.Supp. 842 (S.D.Ill. 1984); and *United States v. Westinghouse Elec. Corp.*, 22 Env'tl. Rep. Cas. (BNA) 1230 (S.D.Ind. 1983).

97. *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1049 (2d Cir. 1985).

98. *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1381 (8th Cir. 1989), reh'g denied, (July 9, 1989); 22 Env't Rep. Cas. (BNA) 1230 (S.D.Ind. 1983); *Florida Power & Light v. Allis Chalmers Corp.*, 27 Env't Rep. Cas. (BNA) 1558 (S.D.Fla. 1988).

99. 872 F.2d at 1382; *United States v. Conservation Chem. Co.*, 619 F.Supp. 162, 240-41 (D.C.Mo. 1985); 810 F.2d at 743-44.

100. 872 F.2d at 1382-83.

disposal of the hazardous waste.¹⁰¹ However, the Eighth Circuit Court of Appeals rejected this argument and reversed the district court's holding. The *Aceto* court's analysis of RCRA liability is similar to that under CERCLA. The court considered the broad language and the plain meaning of the words in the statute, the intent of Congress, and the extent of control the pesticide manufacturers had over the formulation process.¹⁰²

The *Aceto* court found that under a broad construction of the term "contributed to" in section 7003(a) of RCRA, the pesticide manufacturers are potentially liable for response costs.¹⁰³ Noting that RCRA does not define the meaning of the term "contributed to," the *Aceto* court concluded that the plain meaning of the term is "to have a share in any act or effect."¹⁰⁴ The court also found that the statute used broad language, indicating liberal construction of the term is intended by Congress. Finally, the court found that the legislative history mandates a broad rather than a narrow interpretation. Relying on previous court holdings in *Conservation Chemical* and *Price*, the *Aceto* court found that RCRA, like CERCLA, should be liberally construed as a remedial statute.¹⁰⁵

In determining whether or not the pesticide manufacturers exercised the necessary control over the hazardous waste disposal, the *Aceto* court made relevant factual considerations. The court considered that ownership of the pesticide was retained by the pesticide manufacturers rather than Aidex. During the formulation process, Aidex followed the specifications of the pesticide manufacturers. Furthermore, the formulation process necessarily produced hazardous waste.¹⁰⁶ After examining the facts, the court concluded that the trier of fact could reasonably infer that the pesticide manufacturers had control over the disposal of the hazardous waste produced in the formulation process. Therefore, the Eighth Circuit Court rejected the defendants 12(b)(6) motion on the RCRA claim.¹⁰⁷

General Considerations.

The liability portions of RCRA and CERCLA overlap and correct inadequacies in both statutes, particularly in areas affecting the response recovery for cleanup of the environment. The end result of having this "wrap-around coverage" is that a combination of the statutes permits the fulfillment of congressional goals and are not easily thwarted by loopholes

101. *Id.* at 1383.

102. *Id.*

103. *Id.* at 1382-84.

104. *Id.*

105. *United States v. Conservation Chem. Co.*, 619 F.Supp. 162, 199 (D.C.M. 1985); *United States v. Price*, 688 F.2d 204, 211-14 (2d Cir. 1982).

106. *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1381 (8th Cir. 1989), *reh'g denied*, (July 9, 1989).

107. *Id.* at 1383.

in the law.¹⁰⁸ In *Aceto*, the combination of RCRA and CERCLA allowed the prosecution of eight pesticide manufacturers with a greater certainty of finding liability.

Aceto defines the language in RCRA and interprets the scope of liability under RCRA and CERCLA. Clearly, generators of hazardous waste in a contracted production step cannot insulate themselves from liability for their own decisions which they may reasonably control. The *Aceto* decision encourages responsible parties who control hazardous waste disposal to enter into settlement agreements and consent decrees.¹⁰⁹ When responsible parties bear the cleanup costs of their own hazardous waste disposal, Superfund is maintained at a higher amount. In addition, the *Aceto* decision encourages present hazardous waste producers to dispose of their hazardous substances now in an EPA approved manner, thus acting as a deterrence to future mishandling of hazardous waste.

To a certain extent *Aceto* relied on common law standards of strict liability. Responsible parties are held potentially liable for creating an abnormally dangerous situation. However, congressional intent expressed in RCRA and CERCLA is upheld by the *Aceto* court in finding "only those parties whose acts or omissions had become causal nexus to the release of hazardous waste" as potentially liable.¹¹⁰ Based on the remedial nature of RCRA and CERCLA, *Aceto* broadly construed the terms "contributed to" and "arranged for." The court focused on the facts to determine who had control of the process and reasoned that the pesticide manufacturers had sufficient control over the disposal of the hazardous waste to be held potentially liable for the present danger.¹¹¹

CONCLUSION

The purpose of CERCLA and RCRA is to clean up the environment. Congress intended that the person who is responsible for the hazard to society and the environment should pay the cleanup cost. Congress has emphasized this intent by amending the statutes to reinforce and broaden liability. The judicial trend is to follow the strong lead of Congress by enforcing laws pursuant to the amendments which expand liability. As exemplified by *Aceto*, companies who "contributed to" or "arranged for" the disposal of hazardous substances which pose an imminent present danger to society and the environment must pay the cost of cleaning up the dangerous sites. The court could reasonably infer that the pesticide

108. Stoll, Freedman, Levy, Kroll & Simonds, *supra* note 24.

109. H.R. Rep. No. 1019, 96 Cong., 2d Sess. 33-34, reprinted in 1980 U.S. Code Cong. & Admin. News 6119, 6136-37.

110. See generally, United States v. Aceto Agric. Chem. Corp., 872 F.2d 1373 (8th Cir. 1989), *reh'g denied*, (July 9, 1989).

111. *Id.*

manufacturers controlled the disposal of the hazardous wastes. The liability incurred by these companies cannot be contracted away by simply putting in place an independent contractor to perform the last step of the chemical production process.

ANITA LETTER