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TO: First Response Agencies and their Attorneys
FROM: Tim Gablehouse and Melanie Granberg
SUBJECT: Recovering Response Costs from Meth Labs

For some time we have noted that response agencies can use the federal CERCLA (Superfund) statute to recover response costs. It is a very powerful tool which can reach persons not otherwise liable for the actual meth lab criminal conduct.

To a degree this approach is not fair to persons that are completely innocent. On the other hand, these persons have typically profited from rental or other sorts of income from the individuals that did run the meth lab. In any event, the response agency is not responsible and should not itself bear the costs of disposal and cleanup of these labs.

What follows is a memo from a DU law school 3rd year student working as an intern in our office. We asked him to research and prepare an outline of the elements of this approach focused on meth labs. It is targeted primarily at attorneys that do not routinely practice in the environmental arena or who do not have experience with CERCLA.

The action is brought in Federal Court using federal question jurisdiction. The Judges and Magistrates sitting on the federal bench in Denver are quite familiar with these actions.

We have used precisely this approach in successfully recovering response costs from a property owner that was renting to the meth lab operators. There is no particular reason that this approach cannot be used more widely especially as local agency budgets come under increasing pressure.

We would be happy to answer questions on any of the issues addressed in these documents.

Memorandum

METH LABS - RESPONSE AGENCY RECOVERY OF RESPONSE COSTS FOR USING CERCLA

From: Bernardo Correa

Re: Basic elements of the CERCLA cause of action

I.- FACILITY:

The section 101 (9) of CERCLA define the term “**facility**” as:

- A) Any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling rock, or aircraft or
- B) Any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

We have multiple cases where the term “facility” is defined, some of these are:

- a) Area is a “facility”, within meaning of CERCLA, if hazardous substance is placed there or has otherwise come to be located there.¹
- b) To show that an area is a “facility” for purposes of establishing liability for response cost under CERCLA, plaintiff need show only that a hazardous substance has been placed there or has otherwise come to be located there.²
- c) In order to show that an area is a “facility”, for purposes of determining whether the U.S. is entitled to recover response costs incurred in cleaning up hazardous waste site, the U.S. need only show that a hazardous substance has been placed there or has otherwise come to be located there.³
- d) Under CERCLA, laboratory was not distinct “facility” from subsurface soils and groundwater in which hazardous substances had come to be located, but rather entire property was covered “facility”.⁴
- e) “Facility” includes almost every place hazardous substance can find its way into.⁵

¹ 3550 Stevens Creek Associates v. Barclay Bank of California, 915 F.2d 1355 C.A.9. Cal., 1990.

² U.S. v. Bliss, 667 F. Supp. 1298 E.D. Mo.E.Div., 1987.

³ U.S. v. Conservation Chemical Co., 619 F. Supp. 162 W.D. Mo. W.Div., 1985.

⁴ Clear Lake Properties v. Rockwell Intern. Corp., 959 F. Supp. 763 S.D. Tex.Galveston.Div., 1997.

II. Release

The statutes define “release” broadly: “Any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discharging of barrels, containers, and other closed receptacles containing any hazardous substances or pollutant or contaminant)...”

According with the courts the presence of hazardous substances in soil or groundwater⁶, deteriorating or leaking drums⁷, or any other environmental presence from any known industrial, manufacturing, or storage facility may be sufficient evidence to establish a release.⁸

The language of section 107 (a) requires only that there be a *threat*, not an actual release.⁹

In the case of *clandestine methamphetamine labs* the *release* of such materials can produce contamination of some areas:

- Processing or “cooking” areas: The contamination may be caused by spills, boil-overs, explosions etc. Indoor areas affected may include floors, walls, ceilings, furniture, carpeting, draperies, heating and air-conditioning vents etc.
- Disposal areas: Indoor areas include sinks, toilets, bathtubs, plumbing traps, vents, chimney flues etc. Outdoor areas may include soil, surface water, groundwater, dumpsters, sewer or storms systems etc.
- Storage areas: Contamination may be caused by leaks, spills or open containers.

Congress has also expressly excluded the following activities and releases from the definition of a “release”:

- A) Any release which results in exposure to persons solely within a workplace, with respect to a claim which such persons may assert against the employer of such persons
- B) emissions from the engine exhausts of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine

⁵ T&E Industries, Inc. v. Safety Light Corp., 680 F.Supp.698 D.N.J., 1988.

⁶ United States V. Northenair Plating Co., 670 F. Supp. 742, 746-47,28 ER Cases 1494 (W.D. Mich. 1987)

⁷ Emhart Indus., Inc., v. Duracell Intl, Inc., 665 F. Supp. 549, 574, 26 ER Cases 1314 (M.D. Tenn. 1987)

⁸ Vermont v. Staco, Inc., 684 F. Supp.822, 832-34,27 ER Cases 1084 (D. Vt.1988)

⁹ United States v. Hooker Chems. & Plastics Corp, 680 F. Supp. 546, 555, 27 ER Cases 1296 (W.D.N.Y. 1988)

- C) any release of source, by product, or special nuclear material from a nuclear incident ... if such release is subject to requirements with respect to financial protection established by the Nuclear Regulatory commission, or, for the purposes of section 9604 of this title or any other response action, any release of source byproduct, or special nuclear material from any processing site designated under section 7912(a)(1) or 7942(a) of this title, and
- D) the normal application of fertilizer.

The alleged release or threat of release is a release into the “*environment*”. CERCLA defines environment broadly to include land, sea and air: “The navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States... [and] any other surface water, ground water, drinking water supply, land surface or subsurface strata or ambient air within the United States or within the jurisdiction of the United States”.¹⁰

Despite the exclusions in section 101 described above, the term *release* may include indoor spills that have the potential to migrate outside.¹¹

Release, defined in section 101, expressly includes any “*disposing* into the environment”, what it means “*disposal*” is within the definition of “release”. Nevertheless, the *release* may not be limited to the original disposal site. The court in *Missouri v. Independent Petrochemical Corp.*¹² has construed the term *release* in holding that a release occurred when waste was removed from its original disposal site to a second site thereby finding that the person who had arranged for disposal at the original site may retain liability for the wastes after they were moved.

Other courts have adopted the conclusion of the *Independent Petrochemical* Case and held that generators could be held liable for wastes that had been transported from the original disposal site.¹³

Some illustrative cases regarding the term “release” include:

¹⁰ See CERCLA section 101(8).

¹¹ *Amland Properties Corp. v. Aluminum Co. of Am.*, 711 F. Supp. 784, 792-93, 29 ER Cases 1538 (D.N.J. 1989); *BCW Associates, Ltd. V. Occidental Chem. Co.*, 1988 U.S. Dist. LEXIS 11,275, No. 86-5947 (E.D. Pa. Sept.29, 1988)

¹² *Missouri v. Independent Petrochem. Corp.*, 610 F. Supp.4, 5, 22 ER Cases 1167 (E.D. Mo. 1985)

¹³ *United States v. Cannons Eng. Corp.*, 720 F. Supp. 1027, 1046 (D. Mass. 1989) *aff’d*, 899 F.2d 79 (1st. Cir. 1990); *United States v. Conservation Chemical Co.*, 619 F. Supp. 162, 234 (W.D. Mo. 1985)

- a) Plaintiff under CERCLA who has incurred response costs meets liability requirement of Act if it is shown that any release of hazardous substances violates, or any threatened release is likely to violate, any applicable state or federal standard, including the most stringent.¹⁴
- b) Government established prima facie case to recover its response costs under CERCLA, in connection with cleanup of manufacturer's property, based on evidence that drums containing various hazardous materials were stored on property and that drums were leaking onto the soil.¹⁵
- c) Passive leaching or migration of hazardous substances constitutes "disposal" within the meaning of CERCLA provisions imposing liability upon those who dispose of hazardous substances.¹⁶

III. - Hazardous Substances

In section 101(14), CERCLA defines "hazardous substance" with reference to a wide variety of other environmental statutes: The term "hazardous substance" means:

- A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33,
- B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title,
- C) any hazardous waste having the characteristic identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act (but not including any waste the regulation of which under the Solid Waste Disposal Act has been suspended by Act of Congress),
- D) any toxic pollutant listed under section 1317(a) of Title 33,
- E) any hazardous air pollutant listed under section 112 on the Clean Air Act, and
- F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A)

¹⁴ Amoco Oil Co. v. Borden, Inc., 889 F.2d 664 C.A.5. Tex., 1989.

¹⁵ U.S. v. Chapman, 146 F.3d 1166 C.A.9. Cal., 1998.

¹⁶ Stanley Works v. Snydergeneral Corp., 781 F.Supp. 659 E.D. Cal., 1990.

through (F) of this paragraph , and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas)

This provision has been construed to bring within the definition of “hazardous substance” *any material on any of the lists in the section*. A material containing traces of toxics may be considered a hazardous substance for CERCLA purposes even though the material itself is not listed¹⁷

Household waste is not exempt for CERCLA.¹⁸ A number of potentially hazardous substances are nevertheless excluded from the CERCLA definition. The most important is *petroleum*¹⁹.

According to medical studies is well known that the chemicals that we can find in a *clandestine meth lab* are “hazardous substances” because they present a *substantial danger to the public health or welfare or the environment* if they are release. Just as an example, chemicals as acetone, benzene, formic acid, methanol, phosphine gas, phosphorous etc. may produce nausea, diarrhea, eyes and skin irritant, anemia, dermatitis, eye and skin burns, shortness of breath, loss of consciousness etc., and even death.

Some illustrative cases where the term hazardous substances is described are:

- a) “When mixture of waste solution contains hazardous substances, that mixture is itself hazardous for purposes of determining CERCLA liability.”²⁰
- b) “Quantity or concentration is not a factor in determining whether a substance is hazardous for purposes of CERCLA.”²¹
- c) “A waste is a ‘hazardous substance’ under CERCLA if it contains substances listed as hazardous under any of statutes referenced in the Act statutory definition section regardless of volume or concentrations of those substances.”²²

¹⁷ Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 669, 30 ER Cases 1745 (5th Cir. 1989); Eagle-Picher Indus., Inc. v. EPA, 759 F.2d 922, 930-31, 22 ER Cases 1657 (D.C. Cir. 1985); City of New York v. Exxon, 744 F.Supp. 474, 484, 31 ER Cases 1963 (SDNY 1990)

¹⁸ B.F Goodrich v. Murtha, 754 F.Supp. 960 (D. Conn. 1991); Transportation Leasing Co. v. California, 32 ER Cases 1499 (C.D. Calif. 1990).

¹⁹ Wilshire Westwood Associates v. Atlantic Richfield Corp., 881 F2d 801 C.A.Cal., 1989; U.S. v. Alcan Aluminum Corp., 755 F.Supp. 531 N.D.N.Y., 1991; Cose v. Getty Oil Co., 4 F.3d 700 C.A.9Cal., 1993.

²⁰ B.F. Goodrich Co. v. Murtha, 958 F.2d 1192 C.A.2. Conn., 1992.

²¹ Supra footnote 4.

²² U.S. v. Conservation Chemical Co., 619 F.Supp.162 W.D. Mo. W.Div., 1985.

IV.- Incurrence of Response Costs

A CERCLA plaintiff seeking the recovery of cleanup costs under section 107 must have *incurred costs* in order to state a cause of action.²³ “*Response*” is broadly defined in CERCLA and its implementing regulations to include any *removal* or *remedial* action taken in the event of a release or threat of release of a hazardous substance.²⁴ Both removal and remedial actions must be consistent with the National Contingency Plan (NCP).²⁵

As a matter of pleading to state a claim, alleging the incurrence of *one type of response* is enough, and merely alleging the incurrence of “*response costs*” in general may suffice.²⁶

Response costs include site security²⁷, investigation, monitoring, testing and evaluation of the site²⁸, government oversight of cleanups²⁹, and cleanup costs themselves. The fact that cleanup costs may be costs of environmental compliance under another statute does not bar recovery.³⁰

SARA amendments of CERCLA at government behest added a reference to “enforcement activities related thereto”, to the relevant definitions, apparently to ensure the recoverability of *government attorney fees*.³¹ In relation with private CERCLA plaintiffs it’s not clear enough whether they may also recover their attorney fees and litigation-related costs under

²³ McGregor v. Industrial Excess Landfill, Inc., 856 F.2d 39,42,28 ER Cases 1765 (6th Circuit. 1988); States v. BFG Electroplating and Mfg. Co., 31 ER Cases 1350 (W.D. Pa. 1990); Artesian Water Co. v. New Castle County, 659 F. Supp. 1269, 1285, 27 ER cases 2039 (D. Del. 1987), aff’d, 851 F.2d 643, 27 ER Cases 2064 (3d Cir. 1988)

²⁴ CERCLA section 101 (23)(24)(25)

²⁵ CERCLA section 104 (a)(1)

²⁶ Ascon Properties, Inc. v. Mobil Oil Co., 866 F.2d 1149, 1153-54, 29 ER Cases 1001 (9th Cir.1989); Cadillac Fairview/Cal., Inc. v. Dow. Chem. Co., 840 F.2d 691, 694-95, 27 ER Cases 1313 (9th Cir. 1988); Alloy Briquetting Corp. v. Niagara Vest, Inc., 756 F. Supp. 713 (W.D.N.Y. 1991)

²⁷ Amoco v. Borden Inc., 889 F.2d 664, 669, 30 ER Cases 1745 (5th Cir. 1989); Cadillac Fairview/Cal v. Dow, supra note 4.

²⁸ Amoco v. Borden, supra note 5, at 672; Tanglewood East Homeowners v. Charles Thomas, Inc., 849 F.2d 1568, 1573, 28 ER Cases 1260 (5th Cir. 1988); New York v. Shore Realty Corp., 759 F.2d 1032, 1042-43 (2d. Cir. 1985).

²⁹ New York v. Shore Realty Corp., supra note 6, at 1042-43; United States v. Ottati & Gross, 694 F. Supp. 977, 988, 28 ER Cases 1683 (D.N.H. 1988)

³⁰ Mardan corp. v. C.G.C. Music, Ltd., 600 F.Supp. 1049, 1054, 22 ER Cases 1223 (D. Ariz. 1984)

³¹ United States v. Mottolo, 695 F.Supp. 615, 631 (D.N.H. 1988)

this provision.³² The government may, under certain circumstances, recover punitive damages where a defendant fails to comply with an administrative cleanup order, but private parties may not because punitive damages are outside the definition of response costs.³³

The plaintiff must actually *incur some response costs* before commencing the action.³⁴ The costs already incurred, however, may consist entirely of costs of investigation and need not include cleanup costs.³⁵ A CERCLA plaintiff may seek a declaratory judgment to recover additional response costs to be incurred in such a cost-recovery action.³⁶

In the case of a clandestine meth lab the local fire department or local health authorities not only they can incur in *response costs* when they clean up the site of hazardous substances but also when they do a preliminary assessment in order to determine what chemicals are involved, the manufacturing method or whether the property is fit or unfit for use as is. The later is done in order to evaluate the potential contamination and health risk.

V. Consistency with National Contingency Plan (NCP)

Section 107 of CERCLA requires that response costs incurred by the U.S. government, a state, or an Indian tribe be “not inconsistent with the NCP.”³⁷ Response costs incurred by any other person must be “consistent with the NCP.”³⁸ This difference in wording has been construed to mean that in government enforcement cases the burden of proof is *on defendants*

³² General Elec. Co. v. Litton Indus. Automation Systems, Inc., 920 F.2d 1415, 32 ER Cases 1433 (8th Cir. 1990), cert. denied, No. 90-1221 (U.S. Mar. 1991)(attorneys fees recoverable); Gopher Oil Co. v. Union Oil Co., 757 F. Supp. 998 (D. Minn. 1991)(recoverable), but also we have United States v. Hardage, 750 F. Supp. 1460 (W.D. Okla. 1990)(attorney fees not recoverable); Water Supply District of Acton v. W.R. Grace & Co., No. 81-710-G (D. Mass. Aug.19, 1985(not recoverable)

³³ Regan v. Cherry Corp., 706 F. Supp. 145, 151-52 (D.R.I. 1989)

³⁴ Marmon Group, Inc. v. Rextord, Inc., 822 F.2d 37, 26 ER Cases 1230 (7th Cir. 1987); Cook v. Rockwell Int'l Corp., 755 F.Supp. 1468 (D. Conn. 1991)

³⁵ Wickland Oil Terminals v. ASARCO, Inc., 792 F.2d 887, 892, 24 ER Cases 1545 (9th Cir. 1986); City of New York v. Exxon, 633 F. Supp. 609, 617-18, 24 ER Cases 1361 (S.D.N.Y. 1986)

³⁶ O'Neil v. Picillo, 883 F.2d 176, 183, 30 ER Cases 1137 (1st. Cir. 1989), cert. denied, 110 S.Ct. 1115, 58 USLW 3526 (1990); Wickland Oil v. ASARCO, supra note 13, at 893.; Alloy Briquetting Corp. v. Niagara Vest, supra note 4, at 713.

³⁷ Section 107 (a)(4)(A)

³⁸ Section 107 (a)(4)(B)

to show that specific response costs are not consistent with the plan to prevent their recovery.³⁹ Private plaintiffs, however, must show consistency.⁴⁰

Essentially all releases of pollutants to the air, land and water are potentially subject to the NCP unless excluded by law. The NCP includes such matters as:

- Methods for discovering, reporting and evaluating hazardous substance facilities or sites
- Determining appropriate response methods, removal or remedial action and equipment
- Determining and assigning appropriate roles and responsibilities to various levels of government and governments entities in carrying out the plan
- Determining priorities among releases or threatened releases for the purpose of taking effective remedial action

Private cost-recovery actions

Consistency is determined with reference to the NCP in effect when the response costs were incurred, not when the response action was commenced or when the claim for cost recovery is evaluated.⁴¹ The courts are divided as to whether strict compliance with the NCP is required or whether substantial compliance is sufficient. In some cases, recovery has been denied in its entirety because of plaintiff failure to comply with the NCP procedural requirements.⁴² In other cases, substantial costs have been disallowed because of procedural infirmities or excessive costs.⁴³ Failure to report a release as required by the NCP, however, does not, in and of itself, bar recovery.⁴⁴

Government Cost-Recovery Actions

The NCP says virtually nothing about the “not inconsistent” standard for government cost-recovery actions. The government’s litigation position is based on the text of section 107(a). The government reads the “plain language” of this section to confine judicial review of implementation decisions and costs incurred under the statute to proof that the response

³⁹ United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 748, 25 ER Cases 1385 (8th Cir. 1986); Hopkins v. Elano Corp., 30 ER Cases 1782, 1784 (S.D. Ohio 1989).

⁴⁰ Cadillac Fairview/Cal. V. Dow Chem. Co., 840 F.2d 691, 695 27 ER Cases 1313 (9th Cir. 1988); Versatile Metals, Inc. v. Union Corp., 693 F. Supp. 1563, 1574 (E.D. Pa. 1988)

⁴¹ City of Philadelphia v. Stephan Chem. Co., 748 F. Supp. 283, 285, 32 ER Cases 1412 (E.D. Pa. 1990)

⁴² County Line Inv. Co. v. Wagco Land Dev. Co., Nos. 89-5118, 89-5119, 1991 U.S. App. 10465 (10th Cir. May.24 1991); Metrop. Serv. Dist. Oregon Metal Finishers, Inc., 32 ER Cases 1102 (D.Or. 1990)

⁴³ Colorado v. Idarado Mining Co., 916 F.2d 1486, 32 ER Cases 1001 (10th Cir. 1990); Versatile Metals Inc. v. Union Corp., supra note 4, at 1575.

⁴⁴ NL Indus. Inc. v. Kaplan, 792 F.2d 896, 898, 899 24 ER Cases 1550 (9th Cir. 1986)

action was performed, and that the claimed costs were actually incurred. In essence, the government asserts that inclusion of the term “*all costs*” and absence of the term “*reasonable*” in CERCLA section 107 (a)(4)(A) precludes discovery into the reasonableness, prudence, efficiency, or cost-effectiveness of the costs it alleges to have incurred in response to the release of hazardous substances at a Superfund site.

In *United States v. Bell Petroleum Services, Inc.*, a district court adopted the government approach, stating that under section 113 of CERCLA “only when inequities rise to a level of gross misconduct” should a court “considering taking away the Government’s right to reimbursement” and allow full recovery because “defendants have not shown arbitrary or capricious decisions or pointed to specific costs that are not in keeping with the NCP.”⁴⁵

VI.- Potentially Responsible Parties (PRP)

According to the section 107 (1)(2)(3)(4)(A)(B)(C)(D):

- 1) The owner and operator of a vessel or a facility
- 2) Any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of
- 3) Any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances
- 4) Any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incinerations vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substances, shall be liable for:
 - A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the National Contingency Plan (NCP)
 - B) any other necessary costs of response incurred by any other person consistent with the NCP

⁴⁵ *United States v. Bell Petroleum Servs., Inc.*, 734 F. Supp. 771, 31 ER Cases 1372 (W.D. Tex.1990)

- C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
- D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

Under CERCLA, a person becomes a PRP by becoming an *owner or operator* at the time of disposal or the time of a response action, *by arranging for treatment or disposal* of substances that are sent to a facility, or *transporting* substances to the site that it selected for disposal.

CERCLA is among the few environmental statutes to identify liable persons other than owners or operators.⁴⁶ CERCLA subjects to liability not only past and present owners and operators but also generators and certain transporters.

The government has been especially successful in getting courts to hold corporate officers personally liable for the acts of their companies.⁴⁷ The general test for whether an individual or corporation associated with a liable entity will be held individually liable under CERCLA is *control*. This does not mean, however, that the individual or affiliated corporation held liable must have caused or contributed to the acts or omissions causing environmental harm. The control that can make a shareholder, employee, or affiliated corporation individually liable is not necessarily control over the activity causing environmental harm. Ownership of the polluted facility may be enough.⁴⁸ An individual's control over the company operating the polluted facility may be the basis⁴⁹. More remarkably, an individual can be liable for cleanup of a polluted facility owned or operated by others because of his control of a company that arranged for disposal of wastes that ended up at that facility.⁵⁰

- a) Present owner and operator: Section 107(a)(1) is interpreted to bring within the class of potentially liable persons any owner or operator of the vessel or facility

⁴⁶ United States v. Johnson & Towers, Inc., 741 F.2d 662, 665 n.3, 21 ER Cases 1433 (3d Cir. 1984), *cert denied*, 469 U.S. 1208 (1985)

⁴⁷ Vermont V. Staco, Inc., 684 F.Supp. 822, 831-32, 31 ER Cases 1815 (D. Vt. 1988); United States v. Conservation Chem. Co., 619 F.Supp. 162, 186-87, 24 ER Cases 1008 (W.D. Mo.1985)

⁴⁸ New York v. Shore Realty, 759 F.2d, 1043-44 22 ER Cases 1625 (2d. Cir. 1985); United States v. Stringfellow, 661 F.Supp. 1053, 1063, 26 ER Cases 1624 (C.D. Cal.1987)

⁴⁹ United States v. Mexico Feed and Seed Co., No. N89-0132-C, 1991 WL 81112 (E.D. Mo. May 16, 1991)j

⁵⁰ CPC International, Inc. v. Aerojet-General Corp., Nos. g89-10503, 89-961 (W.D. Mich.Mar. 26, 1991); United States v. Northernair Plating Co., 670 F.Supp. 742, 747-48, 28 ER Cases 1494 (W.D. Mich, 1987)

*at the time of the cleanup.*⁵¹ Plaintiffs need not to prove any causal nexus between owner or operator and activities leading to environmental harm.⁵²

- b) Past owner at time of disposal: As with section 107(a)(1), past owners and operators are liable under section 107(a)(2) regardless of their degree of participation in the disposal of hazardous wastes.⁵³ Instead, it must be determined whether hazardous substances were disposed of on the site during the period of ownership or operation.⁵⁴

A lessee may be liable as an owner or as an operator.

- c) Generators: More appropriately, this PRP might be called the “*arranger*”. The principal liability question under section 107(a)(3) is whether the defendant’s alleged act was an *arrangement* for disposal or a treatment of a hazardous substance. No CERCLA generator liability applies where the defendant “did not specifically transact with regard to” any substance. The defendant must take some *affirmative action* to dispose of the substance at issue.⁵⁵

- d) Transporters: The principal issue of statutory construction presented by the section 107 (a)(4) language in case law is whether a transporter must have selected a disposal or treatment facility in order to be within the category. The consensus appears to be that only transporters who in fact chose the facility are liable.⁵⁶

EPA has acquiesced in this view.

⁵¹ U.S. v. Fleet Factors Corp., 901 F.2d 1550, 1554, 31 ER Cases 1465 (11th Cir.1990), *cert denied*, 111 S. Ct. 752 (1991).

⁵² Tanglewood East Homeowners v. Charles-Thomas , Inc., 849 F.2d 1572, 28 ER cases 1260,(5th Cir. 1988)

⁵³ U.S. v. Moore, 698 F.Supp. 622, 624, 27 ER Cases 1796 (E.D. Va. 1988)

⁵⁴ U.S. v. Mexico Feed & Seed, Inc., 729 F.Supp. 1250 (E.D. Mo. 1990)

⁵⁵ U.S. v. Consolidated Rail Corp., 729 F.Supp. 1461, 1462, 31 ER Cases 1060 (D. Del. 1990)

⁵⁶ U.S. v. Hardage, 761 F. Supp. 1501, 1511, 32 ER Cases 1073 (W.D. Okla. 1990)