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What's Inluded in the Exclusion

Christopher D. Knopf*

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WHAT'S INCLUDED IN THE EXCLUSION: UNDERSTANDING SUPERFUND'S PETROLEUM EXCLUSION

*CHRISTOPHER D. KNOPF**

INTRODUCTION

IN 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act[1] (CERCLA or Superfund) in recognition of the threat to the environment posed by sites contaminated with hazardous substances.[2] Although now more than a decade old, the liability provisions of CERCLA continue to remain a source of confusion.[3] One of the enduring questions in this regard is the scope of the exclusion within CERCLA for releases of "petroleum,"[4] a term which Congress did not define in the statutory language.

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* B.S.F.S., Georgetown University, 1985; J.D., University of Virginia, 1989.

1. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (1980), *amended by* the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified in scattered sections of the Internal Revenue Code and Titles 10, 29, 33, and 42 of the United States Code).

2. See H.R. REP. No. 253 (III), 99th Cong., 2d Sess. 15 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3038 ("CERCLA has two goals: (1) to provide for clean-up if a hazardous substance is released into the environment or if such release is threatened, and (2) to hold responsible parties liable for the costs of these clean-ups."); *see also* Artesian Water Co. v. Government of New Castle County, 659 F Supp. 1269, 1277 (D. Del. 1987) (noting the broad purposes of Congress in enacting CERCLA), *aff'd*, 851 F.2d 643 (3d Cir. 1988); for an overview of the legislative history of CERCLA, see generally Frank P Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1 (1982).

3. For a discussion of the various CERCLA liability issues, see, e.g., Christopher D. Knopf, *Breaking New Ground: Recovery of Transaction Costs in Private CERCLA Cost-Recovery Actions*, 28 WILLAMETTE L. REV 495 (1992) (recovery of attorneys' fees and other transaction costs as CERCLA response costs); James A. King, *Kayser-Roth, Joslyn, and the Problem of Parent Corporation Liability Under CERCLA*, 25 AKRON L. REV 123 (1991) (analyzing parent corporation liability under CERCLA for response costs caused by subsidiaries); Elizabeth A. Wolford, Note, *Lender Liability Under CERCLA. Interpreting the Security Interest Exemption Using Common-Law Principles of Lender Liability*, 67 NOTRE DAME L. REV 1161 (1992) (lender liability under CERCLA); Randall J. Burke, Note, *Much Ado About Lending: Continuing Vitality of the Fleet Factors Decision*, 80 GEO. L.J. 809 (1992) (lender liability under CERCLA); Arlene E. Mirsky et al., *The Interface Between Bankruptcy and Environmental Laws*, 46 BUS. LAW. 623, 634-65 (1991) (analyzing CERCLA liability issues in bankruptcy); Note, *Liability of Parent Corporations for Hazardous Waste Cleanup and Damages*, 99 HARV L. REV 986 (1986) (arguing for parent corporation liability for CERCLA response costs of subsidiaries).

4. CERCLA § 101(14) (providing for an exclusion from CERCLA liability for petroleum in the definition of the term "hazardous substance").

The Environmental Protection Agency (EPA) and courts have been left with the task of determining the scope of the petroleum exclusion.[5] A broad understanding is emerging from the regulatory and judicial interpretations of the petroleum exclusion that uncontaminated gasoline and other fuels are within the petroleum exclusion, such that CERCLA liability does not attach to releases of these substances.[6] A consensus also is emerging that used oil,[7] solvents and other petroleum products to which hazardous substances have been added or increased in concentration during use are outside the petroleum exclusion; accordingly, releases of these substances result in CERCLA liability.[8]

There remains, however, an enormous gap in this analytical framework for releases of used oil at a Superfund site where no direct evidence exists on the contaminants present in the used oil. This situation arises where used oil was managed at a Superfund site and there was evidence of contamination by hazardous substances at the site, but there is no evidence which identifies the contaminants in the used oil as hazardous substances. Although the owner or operator of the site is liable under CERCLA for the contamination by hazardous substances,[9] the owner or operator may be bankrupt[10] or otherwise unable to finance the clean-up of the site. CERCLA liability also attaches to generators and transporters[11] of hazardous substances released at a site. However, if the generators, the transporters, or the

5. *See infra* notes 44-86 and accompanying text (reviewing EPA's interpretation of the petroleum exclusion) and notes 87-138 and accompanying text (reviewing the judicial treatment of the petroleum exclusion).

6. *See infra* notes 46-56 and accompanying text (EPA interpretations) and 87-100 (judicial interpretations).

7. This Article uses the term "used oil" to refer to oil that has been used and/or contaminated such that it is unfit for its intended use without recycling or processing. This understanding of the meaning of "used oil" is consistent with EPA's definition for "used oil" under the hazardous waste statute, which defines "used oil" to mean "any oil which has been — (A) refined from crude oil, (B) used, and (C) as a result of such use, contaminated by physical or chemical impurities." Used Oil Recycling Act of 1980, Pub. L. No. 96-463 § 3, 94 Stat. 2055 (codified at 42 U.S.C. § 6901(a) (1988)).

EPA interprets the term "waste oil" to include "both used and unused oils that may no longer be used for their original purpose." *See* Hazardous Waste Management System; Identification and Listing of Hazardous Waste; Recycled Used Oil Management Standards, 57 Fed. Reg. 41,566, 41,567 n.1 (1992) (to be codified at 40 C.F.R. pt. 279) [hereinafter Hazardous Waste Management System]. For purposes of analyzing the scope of the petroleum exclusion, this Article includes "waste oil" within the meaning of "used oil." In doing so, this Article effectively treats these terms as synonyms.

8. *See infra* notes 57-65 and accompanying text (EPA interpretations) and notes 101-110 and accompanying text (judicial interpretations).

9. *See* 42 U.S.C. § 9607(a)(1) (1988). For further discussion of the parties liable under CERCLA, *see infra* notes 22-30 and accompanying text.

10. For a discussion of the interaction of bankruptcy law and CERCLA, *see Bankruptcy and Environmental Law*, *supra* note 3.

11. 42 U.S.C. § 9607(a)(3)-(4) (1988). For further discussion of the categories of parties liable under CERCLA, *see infra* notes 22-30 and accompanying text.

site owner or operator did not maintain documentation on the composition of used oil brought to the site, there is the possibility that the used oil generators and transporters will escape CERCLA liability under the petroleum exclusion due to the inability to link these generators and transporters to the hazardous substances at the site. Given the significant number of Superfund sites at which used oil has been managed,[12] this analytical gap has significant repercussions on the clean-up and allocation of liability at many Superfund sites.

This Article analyzes the scope of the petroleum exclusion and argues for the creation of a rebuttable presumption that used oil is contaminated with a hazardous substance, so that CERCLA liability attaches to releasers of used oil, despite the lack of evidence of contaminants in the oil. This Article demonstrates that congressional policy, fairness, and probability support the creation of such a presumption. Part I of this Article reviews the liability provisions of CERCLA. Parts II and III summarize the EPA and judicial interpretations of the petroleum exclusion. Part IV uses the plain meaning of the statutory language and the legislative history of CERCLA to support the framework created by both EPA and the courts that uncontaminated gasoline and other fuels are within the exclusion, while used oil and other petroleum products contaminated by hazardous substances remain outside the exclusion. Part V provides the basis for creating a rebuttable presumption that used oil is contaminated with a hazardous substance so that the petroleum exclusion will not apply where there is no evidence of the identity of contaminants in the used oil.

I. LIABILITY UNDER CERCLA

To understand the importance of the petroleum exclusion, it is necessary to review the statutory framework of CERCLA. CERCLA is intended to fill in the gaps left by the Resource Conservation and Recovery Act (RCRA),[13] which Congress enacted in 1976 to establish a "cradle to grave" approach to the management of hazardous waste.[14]

12. *See generally* SCIENCE APPLICATIONS INTERNATIONAL CORP., *Summary of Superfund Sites with Used Oil Damages*, (Aug. 3, 1992) (summarizing the damages from used oil at fifty six Superfund sites). This study was prepared for EPA in conjunction with EPA's determination on the listing status of used oil under the hazardous waste regulations. *See* Hazardous Waste Management System, *supra* note 7, at 41,576 n.5 (referring to a draft of the study noting the environmental problems caused by the mismanagement of used oil). Congress has found that "used oil constitutes a threat to public health and the environment when reused or disposed of improperly." Used Oil Recycling Act of 1980, Pub. L. No. 96-463, § 2, 94 Stat. 2055.

13. Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified at 42 U.S.C. §§ 6901-6992(h) (1988) [hereinafter RCRA].

14. *See* H.R. REP. No. 1491, 94th Cong., 2d Sess. 11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6249; *see also* Note, *Developments in the Law—Toxic Waste Litigation*, 99 HARV. L. REV 1458, 1470-71 (1986) [hereinafter *Toxic Waste Litigation*] (reviewing the regulation of hazardous waste under RCRA).

Whereas RCRA is prospective in nature, CERCLA is retrospective and provides for the clean up of sites already contaminated by hazardous substances.[15] Under CERCLA, the federal or state government or private parties may undertake to clean the Superfund sites.[16] Private parties may clean up Superfund sites either voluntarily or under compulsion of a government order.[17]

To finance government-sponsored clean ups, CERCLA establishes a "Superfund,"[18] which is financed primarily through excise taxes.[19] Because the Superfund is adequate to finance the clean up of only a fraction of the sites contaminated by hazardous substances,[20] CERCLA section 107(a) enables the federal and state governments and private parties to bring actions against poten-

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15. *See* Richard C. Belthoff, Jr., *Private Cost Recovery Actions Under Section 107 of CERCLA*, 11 COLUM. J. ENVTL. L. 141, 142 (1986) (noting that CERCLA was intended to address regulatory gaps left by RCRA).

16. *See* Ambrogi v. Gould, Inc., 750 F Supp. 1233, 1238 (M.D. Pa. 1990) (observing that "response costs" can be incurred under CERCLA by two groups, the "government" and any "other person," including any "individual, firm, corporation, association, partnership, consortium, joint venture [or] commercial entity"); Prudential Ins. Co. of America v. United States Gypsum, 711 F Supp. 1244, 1251 (D.N.J. 1989).

> The statute embodies a bifurcated scheme to promote the cleanup of hazardous sites, spills and releases. First, through the creation of Superfund, the federal government is provided with the tools to respond to the growing problems resulting from hazardous waste disposal. Second, the statute also authorizes private parties to institute civil actions to recover the costs involved in the cleanup of hazardous wastes from those responsible for their creation.

Id. (citations omitted).

17. *See* 42 U.S.C. § 9606(a) (1988) (enabling the President of the United States to secure such relief as is necessary to protect the public health or welfare or the environment from an "imminent and substantial endangerment" due to "an actual or threatened release of a hazardous substance from a facility"). For the government to maintain a claim under § 9606(a), it must establish the elements of liability required by § 9607(a), and show that the contamination by a hazardous substance poses an "imminent and substantial endangerment to the public health or welfare or the environment. " *Id.* United States v. Bliss, 667 F Supp. 1298, 1313 (E.D. Mo. 1987); United States v. A & F Materials Co., 578 F Supp. 1249, 1257-58 (S.D. Ill. 1984); *see infra* notes 26-30 and accompanying text (discussing the prima facie elements of liability under § 9607(a)).

18. The Hazardous Substance Response Trust Fund, or Superfund, was originally funded pursuant to CERCLA § 221, 94 Stat. at 2801 (1988). SARA § 517(c), 100 Stat. at 1774, repealed this provision, and established a Hazardous Substance Superfund under the Subchapter A of Chapter 98 of the Internal Revenue Code (I.R.C.). SARA § 517(a), I.R.C. § 5907(a) (1988).

19. SARA § 517(a), I.R.C. § 5907(b) (1988); *see Artesian Water*, 659 F Supp. at 1277 (discussing uses of Superfund).

20. *See* Robert C. Eckhardt, *The Unfinished Business of Hazardous Waste Control*, 33 BAYLOR L. REV 253, 263 (1981) ("the amount of the [Super]fund provided for in the Act is too small to handle the gargantuan problem of controlling chemical wastes"); Kelley v. Thomas Solvent Co., 717 F Supp. 507, 518 (W.D. Mich. 1989) ("while CERCLA authorizes governmental cleanup of hazardous waste sites using money provided by the Superfund, the Superfund is limited and cannot finance cleanup of all the many hazardous waste sites nationwide"); United States v. Price,

tially responsible parties (PRPs).[21] Liability under CERCLA section 107(a) is strict,[22] joint and several,[23] and retroac-

577 F Supp. 1103, 1112 & n.8 (D.N.J. 1983) (discussing the inadequacies of the Superfund).

21. 42 U.S.C. § 9607(a) (1988). While a private right of contribution under § 9607(a) was, and is, nearly universally recognized by the courts, SARA amended CERCLA section 113 to expressly codify this private right of contribution. SARA 42 U.S.C. § 9613(b) (1988). *See, e.g.*, Colorado v. ASARCO, Inc., 608 F Supp. 1484, 1491-92 (D. Colo. 1985) (prior to enactment of SARA, holding that private party may seek contribution under CERCLA)); Jones v. Inmont Corp., 584 F Supp. 1425, 1428-29 (S.D. Ohio 1984) (private party has right to recover response costs from third parties).

22. CERCLA does not expressly impose strict liability. Instead, CERCLA section 101(32) provides that "[t]he terms 'liable' and 'liability' under this subchapter shall be construed to be the standard of liability which obtains under section 1321 of title 33 [the Federal Water Pollution Control Act]." 42 U.S.C. § 9601(32) (1988). The liability provision of the Federal Water Pollution Control Act, 42 U.S.C. § 1321 (1988), has been interpreted as imposing strict liability. *See, e.g.*, Steuart Transp. Co. v. Allied Towing Corp., 596 F.2d 609, 613 (4th Cir. 1979) (imposing unlimited liability where willful negligence or willful misconduct can be shown). Courts have repeatedly concluded that CERCLA imposes strict liability. *See* United States v. R.W Meyer, Inc., 889 F.2d 1497, 1507 (6th Cir. 1989) (imposing strict liability under CERCLA to the owner of a facility), *cert. denied*, 494 U.S. 1057 (1990); New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985) (Congress intended that responsible parties be held strictly liable); *Artesian Water*, 659 F Supp. at 1277 ("[c]ourts have uniformly imposed strict liability in construing the terms of [CERCLA] section 107(a)"); United States v. Maryland Bank & Trust Co., 632 F Supp. 573, 576 (D. Md. 1986) (finding that CERCLA section 107 imposes strict liability); Violet v. Picillo, 648 F Supp. 1283, 1290 (D.R.I. 1986) ("[c]ourts have universally acknowledged that Congress created a strict liability scheme [in enacting CERCLA]"); United States v. Northeastern Pharmaceutical & Chem. Co., 579 F Supp. 823, 843-44 (W.D. Mo. 1984) (applying strict liability to CERCLA section 107(a)) [hereinafter *NEPACCO*], *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986); *Price*, 577 F Supp. at 1114 ("the strict liability standard fits most closely with the legislative aims of CERCLA ") (citations omitted). For a discussion of the strict liability standard under CERCLA, *see* Michael P Healy, *Direct Liability for Hazardous Substance Cleanups Under CERCLA: A Comprehensive Approach*, 42 CASE W RES. L. REV 65, 86 (1992).

23. *See* O'Neil v. Picillo, 883 F.2d 176, 178-79 (1st Cir. 1989) (adopting the Restatement (Second) of Torts approach to joint and several liability in a CERCLA action), *cert. denied sub nom.*, American Cyanamid Co. v. O'Neil, 493 U.S. 1071 (1990); United States v. Monsanto Co., 858 F.2d 160, 171 (4th Cir. 1988) (upholding the imposition of joint and several liability), *cert. denied*, 490 U.S. 1106 (1989); United States v. Chem-Dyne Corp., 572 F Supp. 802, 808 (S.D. Ohio 1983) (concluding that the deletion from an earlier version of the bill of a proposed requirement that liability under CERCLA be joint and several was not intended as a rejection of joint and several liability, but instead was a decision to have the scope of liability determined under common law principles). SARA confirmed that liability under CERCLA is joint and several. *See* H.R. REP. NO. 253(I), 99th Cong. 2d Sess. 79-80 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2861-62 ("nothing in this bill is intended to change the application of the uniform federal rule of joint and several liability enunciated by the *Chem-Dyne* court").

Typically, courts have relied on the Restatement (Second) of Torts for guidance in applying joint and several liability under CERCLA. *Id.* For example, in considering the scope of CERCLA liability, the court in United States v. Alcan Aluminum Corp., 964 F.2d 252, 268 (3d Cir. 1992), observed that Section 433(A) of the Restatement provides that "when two or more joint tortfeasors acting independently cause a distinct or single harm for which there is a reasonable basis for division according to

tive,[24] subject to the defenses that the release was caused solely by an act of God, an act of war, or an act or omission by a third party unrelated to the defendant.[25]

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each, each is subject to liability only for the portion of the harm that the individual tortfeasor has caused." United States v. Alcan Aluminum Corp., 964 F.2d 252, 268 (3d Cir. 1992) (referring to Section 433(A) of the Restatement (Second) of Torts).

Under Section 433(B) of the Restatement, a joint tortfeasor has the burden of demonstrating that the harm can be apportioned. *See* Restatement (Second) of Torts § 433(B) (1965). Courts have repeatedly recognized the right of CERCLA defendants to attempt to demonstrate that environmental harm is divisible. *See, e.g.*, United States v. Alcan Aluminum Corp., 990 F.2d 711, 722-23 (2d Cir. 1993); *Alcan*, 964 F.2d at 269-70; *O'Neil*, 883 F.2d at 181-82; *Monsanto*, 858 F.2d at 171-72; United States v. Stringfellow, 661 F Supp. 1053, 1060 (C.D. Cal. 1987); United States v. Conservation Chem. Co., 619 F Supp. 162, 223 (D. Mo. 1985); *Chem-Dyne*, 572 F Supp. at 810. However, there are no reported cases in which a CERCLA defendant has been successful in making this demonstration. In *O'Neil* and *Monsanto*, the First and Fourth Circuits, respectively, rejected the defendants' argument that the volume of waste disposed at a CERCLA site provided a reasonable basis for apportioning liability. *O'Neil*, 883 F.2d at 183 n.11; *Monsanto*, 858 F.2d at 172. In *Monsanto*, the Fourth Circuit concluded that the defendants failed to show a relationship between waste volume, the release of hazardous substances, and the harm at the site. *Monsanto*, 858 F.2d at 172. The *Monsanto* court noted that the relative toxicity, migratory potential, and the synergistic capacity of the hazardous substances at the site would be relevant to establishing the divisibility of harm. *Id.* at 172 n.26. Similarly, in *O'Neil*, the First Circuit rejected the defendants' attempt to allocate liability on a volumetric basis, stating that the position would require the "untenable" position that the cost of removing the barrels did not vary depending upon their content. *O'Neil*, 883 F.2d at 182-83 & n.11. The *O'Neil* court also found that because of the commingling of waste in the soil, any attempt to apportion the costs of removing the contaminated soil would be arbitrary. *Id.*

24. *See NEPACCO*, 810 F.2d at 732-33 (applying CERCLA retroactively); United States v. Hooker Chem. & Plastics Corp., 680 F Supp. 546, 556-57 (W.D.N.Y. 1988) (applying CERCLA retroactively). *Cf. Meyer*, 889 F.2d at 1506 (applying SARA retroactively).

25. 42 U.S.C. § 9607(b) (1988). *See* United States v. Reilly Tar & Chem. Corp., 546 F Supp. 1100, 1118 (D. Minn. 1982) ("[l]iability for the specified response costs under [§ 9607(a)] is absolute, subject only to the defenses listed in [§ 9607(b)]. ").

Courts have been nearly unanimous in rejecting the defense of unclean hands to CERCLA liability. *See* AM Int'l, Inc. v. International Forging Equip., 743 F Supp. 525, 530-31 (N.D. Ohio 1990) (plaintiff's fault in a CERCLA cost-recovery action is not a defense, but is a factor that may be considered in equitably apportioning the amount of contribution), *rev'd on other grounds*, 982 F.2d 989 (6th Cir. 1993); Allied Corp. v. Acme Solvents Reclaiming, Inc., 691 F Supp. 1100, 1119 (N.D. Ill. 1988) ("application of the doctrine of unclean hands would defeat the policies underlying CERCLA"); *but see* Mardan Corp. v. C.G.C. Music, Ltd., 600 F Supp. 1049, 1058 (D. Ariz. 1984) (applying the doctrine of unclean hands), *aff'd in part*, 804 F.2d 1454 (9th Cir. 1986). In affirming the court's decision in *Mardan*, the Ninth Circuit did not reach the merits of raising the unclean hands defense. However, the Ninth Circuit noted in a footnote that most courts have interpreted CERCLA section 107 as imposing joint and several liability with a right of contribution. *Id.* at 1457 n.3. The opinion of the district court in *Mardan* has been criticized repeatedly. *See* Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 90 (3d Cir. 1988) ("[d]octrines such as caveat emptor and '[un]clean hands,' which in some cases could bar relief regardless of the degree of culpability of the parties, do not comport with congressional objectives [in enacting CERCLA]"), *cert. denied*, 488 U.S. 1029 (1989); *AM Int'l*, 743 F Supp. at 530 ("[a]s plaintiff points out, the opinion of the district court in *Mardan*

The elements of a prima facie claim[26] against a private party under CERCLA section 107(a) are: (1) the defendant is within one of four categories of "covered persons;"[27] (2) there was a "release or threatened release"[28] of a "hazardous substance;" (3) the plaintiff in-

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has been strongly criticized"); *Allied*, 691 F Supp. at 1119 ("[t]he [district court] ruling in *Mardan* goes too far").

26. For an overview of the prima facie elements of liability under § 9607(a), see *Dedham Water*, 889 F.2d at 1150; Amland Properties Corp. v. Aluminum Co. of America, 711 F Supp. 784, 789-90 (D.N.J. 1989). *See also* Versatile Metals v. Union Corp., 693 F Supp. 1563, 1574 (E.D. Pa. 1988); T & E Indus. v. Safety Light Corp., 680 F. Supp. 696, 708 (D.N.J. 1988); *Artesian Water*, 659 F Supp. at 1278-79.

27 The four categories of covered persons are: 1) the owner or operator of a facility; 2) a person who owned or operated a facility during which time the disposal of a hazardous substance occurred; 3) any person who arranged for the disposal, treatment or transportation of hazardous substances that contaminated the facility, and 4) any person who accepted for disposal, treatment or transportation the hazardous substances that contaminated the facility. 42 U.S.C. § 9607(a)(1)-(4) (1988) (establishing four categories of "covered persons"). *See infra* notes 200-02 and accompanying text (discussing the categories of parties liable under CERCLA); *see also Dedham Water*, 889 F.2d at 1150-51 (discussing the categories of "covered person" under CERCLA and concluding that "current owners, former owners, generators, or transporters, may be held liable if there is a release or threatened release of a hazardous substance from the relevant facility").

With respect to the second category of covered persons, prior owners or operators are liable only if they owned or operated the facility at the time the disposal of a hazardous substance occurred. Thus, in Cadillac Fairview/California, Inc. v. Dow Chem., 21 Env't Rep. Cas. (BNA) 1108, 1113 (C.D. Cal. 1984), *modified*, 21 Env't Rep. Cas. (BNA) 1584 (C.D. Cal. 1984), *rev'd in part, aff'd in part*, 840 F.2d 691 (9th Cir. 1988), the court granted defendant's motion to dismiss the complaint for failure to state a claim where the plaintiff did not allege that the defendant was the owner of the facility during the time that disposals of hazardous substances were made. *See* Richard C. Belthoff, Jr., *Private Cost Recovery Actions Under Section 107 of CERCLA*, 11 COLUM. J. ENVTL. L. 141, 159-60 (1986) (discussing the *Cadillac Fairview* decision).

The statutory language requires the release to occur from a "facility." CERCLA defines the term "facility" broadly to encompass "almost every place that a hazardous substance could find its way into." T & E Indus. v. Safety Light Corp., 680 F Supp. 696, 708 (D.N.J. 1988) (citation omitted). *See* CERCLA § 101(9) (1988) (defining "facility" to mean any "pit, pond, lagoon, impoundment, ditch, landfill [or] storage container" or "any site or area where a hazardous substance has been deposited, stored, disposed of or placed, or otherwise come to be located. "); *see also* United States v. Vertac Chem. Corp., 671 F Supp. 595, 613 (E.D. Ark. 1987) ("courts have read this definition [of facility] broadly"), *aff'd*, United States v. Hercules, Inc., 961 F.2d 796 (8th Cir. 1992).

28. The term "release" includes virtually any means by which a hazardous substance might enter the environment, including spilling, leaking, pouring, emitting, discharging or disposing. 42 U.S.C. § 9601(22) (1988) (defining the term "release"). Reflecting the broad liability provisions of CERCLA, a party may be liable for a *threatened* release. *See* United States v. Northernaire Plating Co., 670 F Supp. 742, 747 (W.D. Mich. 1987) (concluding that large quantities of abandoned hazardous wastes and chemicals constitute a threatened release), *aff'd sub nom.* United States v. R.W Meyer, Inc., 889 F.2d 1497 (6th Cir. 1989), *cert. denied*, 494 U.S. 1057 (1990).

See discussion *supra* note 11, where the prior owner or operator is liable if the "disposal" of a hazardous substance occurred during its ownership or operation of the facility. 42 U.S.C. § 9607(a)(2) (1988). CERCLA defines the term "disposal" separately from the term "release." *See* 42 U.S.C. § 9601(29) (1988) (defining "disposal"

curred "response costs;"[29] and (4) the response costs were consistent with the National Contingency Plan (NCP).[30] The petroleum exclusion is an exclusion from the definition of "hazardous substance," which is a component of the third prima facie element of CERCLA liability. CERCLA section 101(14) defines "hazardous substance" by referencing several other environmental statutes,[31] including the

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by cross-referencing 42 U.S.C. § 6903). "Disposal" is broadly defined to include the discharge, 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 into or on any land or water that such waste may enter the environment. " 42 U.S.C. § 6903(3) (1988). Thus, the term "disposal" can be equated with the term "release" for purposes of CERCLA liability.

29. The terms "respond" and "response" mean "remove, removal, remedy, and remedial action. " 42 U.S.C. § 9601(25) (1988). CERCLA defines the terms "remove" and "removal" to mean cleanup actions taken in the event of a release or threatened release of hazardous substances, including actions necessary to monitor and assess the release, actions to secure or limit access to the site, and the evacuation of threatened individuals. 42 U.S.C. § 9601(23) (1988). CERCLA defines "remedy" and "remedial action" to mean those actions consistent with a permanent remedy for releases or threatened releases of hazardous substances, such as actions to confine the release through dikes, trenches, or ditches, dredging or excavation operations, monitoring to assure that the public health is protected and the permanent relocation of residences and businesses. 42 U.S.C. § 9601(24) (1988).

In short, removal actions are intended for the short-term abatement of hazardous waste contamination, whereas remedial actions are intended to restore the long-term environmental quality of the site. City of New York v. Exxon Corp., 633 F Supp. 609, 614 n.7 (S.D.N.Y. 1986) (citing *Shore Realty*, 759 F.2d at 1040). For an analysis of the basis for recovery of attorneys' fees and other transaction costs as CERCLA response costs, *see* Knopf, *supra* note 3.

30. The National Contingency Plan (NCP) establishes specific requirements that the government and private parties must follow before they can recover response costs. *See* 40 C.F.R. § 300.700 (1992) (establishing criteria for determining when private-party response action is consistent with the NCP).

Much of the case law analyzing the burden of proof in CERCLA cost-recovery actions has involved consideration of the fourth element. The widely accepted rule established by these cases is that, in a cost-recovery action brought by private party, the plaintiff bears the burden of proving that the costs are consistent with the NCP, whereas, in a cost-recovery action brought by the government, the defendant bears the burden of proving that the response costs were inconsistent with the NCP *See NEPACCO*, 810 F.2d at 746 (in a government-sponsored CERCLA cleanup, the defendant has burden of demonstrating that response costs are inconsistent with the NCP); United States v. Hardage, 733 F Supp. 1424, 1433 (W.D. Okla. 1989) (defendant in a CERCLA cost-recovery action brought by the federal government has the burden of demonstrating that the response costs were arbitrary and capricious); City of Philadelphia v. Stepan Chem., 713 F Supp. 1484, 1486-87 (E.D. Pa. 1989) (defendant in a government-sponsored CERCLA cost-recovery action has the burden of demonstrating that the response costs were inconsistent with the NCP; whereas a private party must prove as an element of its prima facie case that the response costs were consistent with the NCP). *See also Artesian Water*, 659 F Supp. at 1278-79.

31. In particular, § 101(14) provides that

> [t]he term "hazardous substance" means (A) any substance designated pursuant to section 1321(b)(2)(A) of title 33 [section 311(b)(2)(A) of the Federal Water Pollution Control Act (Clean Water Act)], (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identi-

Clean Water Act,[32] the Clean Air Act[33] and RCRA.[34] Pursuant to these statutory grants of authority, EPA has promulgated several lists of "hazardous" or "toxic" substances.[35] CERCLA section 101(14) requires that a substance be designated as hazardous or toxic only under one of the referenced statutory provisions to be a hazardous substance under CERCLA.[36] CERCLA section 101(14) also provides that the term "hazardous substance" includes those hazardous substances designated by EPA under CERCLA section 102.[37] Pursuant to CERCLA section 102, EPA has promulgated a list of hazardous substances and reportable quantities that is codified at 40 C.F.R. Table 302.4.[38] The list of substances codified by EPA at 40 C.F.R. Table 302.4 is an effort to provide a comprehensive compilation of CERCLA "hazardous substances."[39] Nevertheless, in the event that EPA inadvertently omitted a substance identified as hazardous or toxic under one of the other environmental statutes referenced in CERCLA section 101(14) from Table 302.4, this substance would be a "hazardous substance" for

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> fied under or listed pursuant to section 3001 of the Solid Waste Disposal Act [which amended RCRA] ., (D) any toxic pollutant listed under section 1317(a) of title 33 [section 307(a) of the Clean Water Act], (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C. § 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator [of U.S. EPA] has taken action pursuant to section 2606 of title 15 [the Toxic Substances Control Act (TSCA)].

42 U.S.C. § 9601(14) (1988).

32. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1988).

33. Clean Air Act, 42 U.S.C. §§ 7401-7671 (1988).

34. 42 U.S.C. §§ 6901-6992(k) (1988).

35. *See* 40 C.F.R. § 61.01(a) (1992) (list of "hazardous air pollutants" under the Clean Air Act § 112); Table 116.4 (list of "hazardous substances" under the Clean Water Act § 311(b)(2)(A)); §§ 261.30-261.33 (list of "hazardous wastes" under RCRA § 3001); and § 401.15 (list of "toxic pollutants" under the Clean Water Act § 307).

36. United States v. Carolawn Co., 21 Env't Rep. Cas. (BNA) 2124, 2125 (D.S.C. 1984); *accord* Eagle-Picher Indus. v. EPA, 759 F.2d 922, 927 (D.C. Cir. 1985) (a "substance is a 'hazardous substance' within the meaning of CERCLA if it qualifies under *any* of" the statutory definitional requirements).

37 42 U.S.C. § 9601(14)(B) (1988).

38. 40 C.F.R. Table 302.4 (1992).

39. In analyzing the meaning of the term "hazardous substance" under § 9601(14), the court in United States v. Alcan Aluminum Corp., 755 F Supp. 531 (N.D.N.Y. 1991), *aff'd in part, rev'd in part on other grounds*, 990 F.2d 711 (1993) observed that

> each of the elements, compounds and hazardous wastes appear on the Table 302.4 List of Hazardous Substances by virtue of one or more of four statutory sources — to wit, sections 307(a) and 311(b)(4) of the Clean Water Act, section 112 of the Clean Air Act and section 3001 of the Resource Conservation and Recovery Act. Table 302.4, then, appears to be nothing more than a compilation of hazardous substances so designated already under the Clean Water Act, the Clean Air Act and the Resource Conservation and Recovery Act.

755 F Supp. at 537 (citations omitted). *See Cose*, 1993 U.S. App. LEXIS 20399 at *8 (9th Cir. Aug. 11, 1993) (referring to 40 C.F.R. § 302.4 as a "comprehensive listing of CERCLA hazardous substances").

the purpose of determining CERCLA liability.[40] Furthermore, although certain statutes referenced in section 101(14) of CERCLA and Table 302.4 set forth "reportable quantities" or "effluent standards" for the substances listed, courts have repeatedly concluded that CERCLA section 101(14) does not require a substance be present in a certain amount or concentration before it is deemed to be a "hazardous substance."[41] After defining the term "hazardous substance" by

40. *Carolawn*, 21 Env't Rep. Cas. (BNA) at 2125 (D.S.C. 1984); *Eagle-Picher Indus.*, 759 F.2d at 922 (D.C. Cir. 1985); City of New York v. Exxon, 744 F Supp. 474 (S.D.N.Y. 1990).

41. *Alcan*, 990 F.2d at 721 (the reportable quantities at 40 C.F.R. Table 302.4 "only go to reporting requirements, they do not address the issue of CERCLA liability"); *Alcan*, 964 F.2d at 262 (the absence of reportable quantities for some compounds listed at 40 C.F.R. Table 302.4 is irrelevant to CERCLA liability); Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 669 (5th Cir. 1989); Arizona v. Motorola, Inc., 774 F Supp. 566, 571 (D. Ariz. 1991) ("CERCLA does not impose any quantitative requirement on what constitutes a 'hazardous substance'"); United States v. Western Processing Co., 761 F Supp. 713, 722 (W.D. Wash. 1991) (quoting *Western Processing Co.*, 734 F Supp. at 936) ("CERCLA does not impose any quantitative requirement on the term 'hazardous substance'"); *Exxon*, 744 F Supp. at 484 (There is no indication in CERCLA that liability does not attach to concentrations below the reportable quantities"); Louisiana-Pacific Corp. v. ASARCO, Inc., 735 F Supp. 358, 361 (W.D. Wash. 1990) ("CERCLA fails to impose any quantitative requirement on what constitutes a 'hazardous substance'"); Hassayampa Steering Comm. v. Arizona, 32 Env't Rep. Cas. (BNA) 1385, 1391 (D. Ariz. 1989) and *Carolawn*, 21 Env't Rep. Cas. at 2126 n.3 ("if Congress had intended the definition of hazardous substances to be contingent upon the presence of a certain amount or concentration of a hazardous substance, it would have so provided); United States v. Wade, 577 F Supp. 1326, 1340-41 (E.D. Pa. 1983) (refusing to read the Clean Water Act's effluent standards and reportable quantities into CERCLA's definition of "hazardous substance").

The *Carolawn* court also observed that "CERCLA's legislative history further supports the conclusion that the listing of a substance as hazardous, not its concentration or amount, was to control in identifying hazardous substances under CERCLA." 21 Env't Rep. Cas. (BNA) at 2126. As support, the *Carolawn* court cited the Senate Report to the CERCLA legislation:

> [s]ubstances *listed* as hazardous or toxic under certain other Federal laws are incorporated by reference and *upon the date of enactment of this bill such substances become statutorily defined as hazardous substances for purposes of this bill.* And the release of any of them or *any constituent of them* invokes the response provisions and any costs of removal or remedial action or any damages are subject to the liability provision of the bill. As substances are added to [the] lists they would be automatically designated as hazardous substances.

21 Env't Rep. Cas. (BNA) at 2126 (quoting S. REP. No. 96-848, 96th Cong., 2d Sess. at 24-27 (1980)), *reprinted in* 1980 U.S.C.C.A.N. 6119 (emphasis added by the court); *see Exxon*, 744 F Supp. at 484 (quoting *Carolawn*, 21 Env't Rep. Cas. (BNA) at 2125).

A related issue (but separate from the question of whether a substance must be present in a certain quantity to be a CERCLA "hazardous substance") is determining whether a substance is "listed" in 40 C.F.R. Table 302.4 as a hazardous substance. This issue arises because Table 302.4 contains generic listings for substances such as "chromium and compounds", "copper and compounds", "lead and compounds" and "zinc and compounds" without providing reportable quantities for these substances. Courts which have considered this issue have determined that, although no reportable quantities are specified for these generic categories of substances, these substances

referencing other environmental statutes, section 101(14) of CERCLA provides the following exclusion for petroleum:

> [t]he term [hazardous substance] 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) 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).[42]

CERCLA does not provide definitions for the terms "petroleum," "crude oil," "fraction" or "natural gas."[43] Thus, the difficult task of determining the scope of the petroleum exclusion has been left to EPA and the courts.

II. EPA Interpretation of the Petroleum Exclusion

EPA has issued a series of rulemakings and memoranda interpreting the scope of the petroleum exclusion. In the first of these interpretations, the 1981 Policy Statement[44] issued shortly after the enactment of CERCLA, EPA noted that several process wastestreams related to petroleum refining are specifically listed under RCRA as hazardous waste, but concluded that petroleum wastes, such as waste oil, which are not specifically listed as a hazardous waste under RCRA, are within CERCLA's petroleum exclusion.[45]

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are nevertheless "hazardous substances" under CERCLA. *See Exxon*, 766 F Supp. at 177, 181-85 (S.D.N.Y. 1991); *Alcan*, 755 F Supp. at 538.

This conclusion is supported by the rulemaking establishing Table 302.4 in which EPA found that a person is "liable for the cleanup of releases of hazardous substances which fall under any of the broad, generic classes, but does not have to report such releases when the specific compounds, and hence the [reportable quantities], are not listed in Table 302.4." Notification Requirements; Reportable Quantity Adjustments, 50 Fed. Reg. 13,456, 13,461 (EPA final rule 1985). The rationale for this determination is that it would be inappropriate to establish single reportable quantities for each of the generic categories of substances because each category could encompass hundreds or even thousands of compounds with varying toxicity characteristics. *Id.*

42. 42 U.S.C. § 9601(14) (1988).

43. James Baller, *The Petroleum Exclusion - Stronger Than Ever After Wilshire Westwood*, 43 Sw. L.J. 915, 918 (1990); *see Cose*, 34 Env't Rep. Cas. (BNA) at 1311 ("[t]here is no CERCLA definition of 'petroleum' ").

44. CERCLA section 103(c) Reporting Requirements, 46 Fed. Reg. 22,144, 22,145 (EPA policy statement 1981).

45. The relevant portion of the 1981 Policy Statement provides that

> [o]ther petroleum wastes, including waste oil, are not specifically listed in the RCRA regulations, but they may exhibit the characteristics of hazardous waste and therefore be subject to full RCRA regulation. However, because these wastes are excluded form the definition of "hazardous substance" by the specific language of Superfund, regardless of their RCRA status, they are not hazardous substances for purposes of the notification requirement of [CERCLA] Section 103(c).

46 Fed. Reg. 22,145.

A December 2, 1982 EPA memorandum[46] concluded that the petroleum exclusion includes diesel oil spills[47] and hazardous substances inherent in petroleum.[48] Nevertheless, the 1982 Memorandum noted that hazardous substances which are added to, or mixed with, petroleum products are covered by CERCLA, even though these hazardous substances are otherwise indigenous in petroleum.[49] Thus, the 1982 Memorandum found that polychlorinated biphenyls (PCBs) mixed with oil, pesticides contained in an oil-based carrier or propellant, and oil-based paints and solvents are outside the petroleum exclusion.[50]

Consistent with the 1982 Memorandum, an August 13, 1983 EPA memorandum[51] determined that the petroleum exclusion covers gasoline spills.[52] On the basis of the plain meaning[53] of the term "petroleum,"[54] the 1983 Memorandum found that the petroleum exclusion covers blended gasoline used as automotive fuel.[55] The 1983 Memorandum rejected a narrow interpretation of the petroleum exclusion which would have limited the exclusion to raw gasoline separated from crude oil during the first stage of the refining process.[56]

An April 4, 1985 rulemaking[57] clarifying the CERCLA reporting requirements observed that the petroleum exclusion covers "crude oil, petroleum feedstocks, and refined petroleum products," even if a hazardous substance is indigenous in such products.[58] However, the 1985

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46. Memorandum from Robert M. Perry, EPA Associate Administrator and General Counsel, to Dick Whittington, EPA Region VI Administrator (Dec. 2, 1982) [hereinafter 1982 Memorandum].

47 *Id.* at 1.

48. In particular, the 1982 Memorandum states that:

> [b]ecause the exemption does not apply to fractions of oil which are hazardous substances, an argument could be made that all fractions of petroleum which are hazardous substances would come under CERCLA's jurisdiction. Since some hazardous substances such as benzene and toluene are present in all petroleum products and are often virtually impossible to separate from those products, no oil or petroleum product would be exempted under such an approach. This result would virtually nullify the petroleum exemption.

Id. at 2.

49. *Id.*

50. *Id.*

51. Memorandum from A. James Barnes, EPA Acting General Counsel, to Sheldon M. Novick, EPA Region III Counsel (Aug. 13, 1983) [hereinafter 1983 Memorandum].

52. *Id.* at 3-4.

53. *See infra* notes 142-55 and accompanying text (analyzing the plain meaning of the petroleum exclusion).

54. *See infra* notes 146-48 and accompanying text (discussing the definition of the terms "petroleum" and "petroleum fractions").

55. 1983 Memorandum, *supra* note 51, at 5.

56. *Id.* at 3.

57. Notification Requirements; Reportable Quantity Adjustments, 50 Fed. Reg. 13,456, 13,460 (1985) [hereinafter 1985 Rulemaking].

58. In the pertinent portion, the 1985 Rulemaking provides that:

Rulemaking did not consider "materials such as waste oil to which listed CERCLA substances have been added to be within the petroleum exclusion."[59] In addition, the 1985 Rulemaking noted that pesticides are outside the petroleum exclusion, even if the active ingredient of a pesticide is contained in a petroleum product.[60] Consequently, the 1985 Rulemaking narrowed the 1981 Policy Statement which could have been interpreted to include within the petroleum exclusion all "waste oil," even waste oil contaminated with listed hazardous substances.

After reviewing the legislative history of CERCLA[61] and considering prior EPA interpretations of the petroleum exclusion, a July 31, 1987 EPA memorandum[62] determined that:

> the petroleum exclusion is explained as an exclusion from CERCLA for spills or releases *only* of oil. The legislative history clearly contemplates that the petroleum exclusion will not apply to mixtures of petroleum and other toxic materials since these would not be releases "strictly of oil."[63]

The 1987 Memorandum rejected the argument that petroleum contaminated during normal use is within the petroleum exclusion;[64] thus, the 1987 Memorandum is consistent with the 1985 Rulemaking and repudiates the interpretation of the petroleum exclusion in the 1981 Policy Statement. In a footnote, the 1987 Memorandum stated that in the 1985 Rulemaking it had interpreted the term "waste oil" as including "only unadulterated waste oil."[65] While this interpretation is a broad gloss on the actual language of the 1985 Rulemaking, the effect of this footnote is to provide a basis for concluding that EPA has created a presumption that used oil is not contaminated with hazardous substances.

> EPA interprets the petroleum exclusion to apply to materials such as crude oil, petroleum feedstocks, and refined petroleum products, even if a specifically listed or designated hazardous substance is present in such products. However, EPA does not consider materials such as waste oil to which listed CERCLA substances have been added to be within the petroleum exclusion. Similarly, pesticides are not within the petroleum exclusion, even though the active ingredient of the pesticide may be contained in a petroleum distillate. . .

Id.

59. *Id.*

60. *Id.*

61. *See infra* notes 151-78 and accompanying text (analyzing the effect of the legislative history of CERCLA on the scope of the petroleum exclusion).

62. Memorandum from Francis S. Blake, EPA General Counsel, to J. Winston Porter, EPA Assistant Administrator for Solid Waste and Emergency Response (July 31, 1987) [hereinafter 1987 Memorandum].

63. *Id.* at 7-8.

64. *Id.* at 10.

65. *Id.* at 3 n.2.

A. *Regulation of Used Oil*

In 1980, Congress enacted the Used Oil Recycling Act[66] to encourage the recycling of used oil.[67] Since the enactment of the Used Oil Recycling Act, EPA has struggled with establishing management standards for used oil, while at the same time providing incentives for recycling used oil. Pursuant to the Used Oil Recycling Act and RCRA, in November 1985, EPA proposed[68] to list all used oil[69] as hazardous waste. EPA noted that the "proposed listing of used oil as a hazardous waste will, upon final promulgation, also result in its classification as a hazardous substance under section 101(14) of CERCLA."[70]

Due to concerns that the stigmatic effects associated with a hazardous waste listing might discourage the recycling of used oil, thereby resulting in an increased improper disposal of used oil, EPA issued a decision in 1986 not to list used oil as a hazardous waste to be recycled.[71] EPA observed that this decision would mean that recycled used oil would not be subject to CERCLA, but that any hazardous substances in used oil which are not normally found in refined petroleum factors, or are present in levels exceeding those generally found in petroleum, would result in CERCLA liability.[72] This conclusion

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66. Used Oil Recycling Act of 1980, Pub. L. No. 96-463, 94 Stat. 2055 (1980).

67. In the Used Oil Recycling Act, Congress defined "used oil" to mean any oil which has been:

> (A) refined from crude oil,
> (B) used, and
> (C) as a result of such use, contaminated by physical or chemical impurities.

RCRA § 1004(36) (1988).

68. Used Oil Management System and Listing as a Hazardous Waste, 50 Fed. Reg. 49,258 (EPA proposed rulemaking 1985).

69. The November 1985 proposed rulemaking defined "used oil" as:

> petroleum-derived or synthetic oil including, but not limited to, oil which is used as a: i) Lubricant (engine, turbine, or gear); ii) Hydraulic fluid (including transmission fluid); iii) Metalworking fluid (including cutting, grinding, machining, rolling, stamping, quenching, and coating oils;) [sic] or iv) Insulating fluid or coolant, and which is contaminated through use or subsequent management.

50 Fed. Reg. 49,261, 49,269 (proposed for codification at 40 C.F.R. § 260.10).

70. 50 Fed. Reg. 49,267.

71. Identification and Listing of Used Oil as Hazardous Waste, 51 Fed. Reg. 41,900, 41,901-02 (EPA decision not to adopt proposed rule 1986).

72. In particular, EPA stated:

> recycled oil will not itself become a listed CERCLA hazardous substance. However, hazardous substances present in any used oil which are either not normally found in refined petroleum fractions or are present at levels exceeding those normally found in petroleum are subject to CERCLA. Used oil being disposed of may yet be listed as a hazardous waste. Such used oil would then itself become a hazardous substance under CERCLA.

51 Fed. Reg. 41,904. Prior to making this determination, in a request for public comments, EPA also stated: "even if used oil were not listed as a hazardous waste, but contained hazardous substances at levels exceeding those normally found in petro-

was consistent with EPA's determination in the 1985 Rulemaking that used oil which has been contaminated with listed hazardous substances is not within the petroleum exclusion.[73]

In 1988, in *Hazardous Waste Treatment Council v EPA*,[74] the Court of Appeals for the District of Columbia Circuit held that the stigmatic effect was an illegitimate criterion for determining not to list used oil as a RCRA hazardous waste.[75] The court ruled that EPA must use technical criteria for determining whether to list used oil as a hazardous waste.[76] The *HWTC* decision forced EPA to reconsider its 1986 decision not to list used oil as a hazardous waste.

In 1992, EPA finally reached a determination on the status of used oil.[77] In May 1992, EPA issued final regulations[78] under which oil destined for disposal is not a listed hazardous waste. In September 1992, EPA promulgated regulations[79] under which used oil destined for recycling also is not listed as a hazardous waste. The effect of the May and September 1992 Rulemakings is to adopt the approach taken by EPA in its 1986 decision.[80] In both of these rulemakings, EPA took care to state that its decision was the result of its determination that used oil managed in compliance with standards provided greater disincentives for the mismanagement of used oil.[81] Thus, EPA has attempted to provide a rationale for its rulemakings based on technical criteria, rather than the illegitimate "stigmatic effect" criterion struck down by the *HWTC* decision.[82]

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leum, the used oil would be (and currently is) subject to Superfund liability." Identification and Listing of Hazardous Waste, 51 Fed. Reg. 8206 (1986 EPA notice of data availability and request for comments).

73. *See* 50 Fed. Reg. 13,460.

74. Hazardous Waste Treatment Council v. EPA, 861 F.2d 270 (D.C. Cir. 1988) [Hereinafter *HWTC*].

75. *Id.* at 277

76. *Id.*

77. In September 1991, EPA responded to the mandate of the *HWTC* court by proposing three options for the regulation of used oil: (1) list all used oil as hazardous waste; (2) list only that used oil which typically and frequently exhibits a hazardous characteristic at the point of generation; and (3) do not list used oil as hazardous and rely on management standards to prevent mishandling. Used Oil Management System and Listing of Hazardous Waste, 56 Fed. Reg. 48,000, 48,019-21 (EPA notice of proposed rulemaking) (Sept. 23, 1991).

78. Management System for Used Oil Destined for Disposal, 57 Fed. Reg. 21,524 (1992) [hereinafter May 1992 Rulemaking].

79. Hazardous Waste Management System; Identification and Listing of Hazardous Waste; Recycled Used Oil Management Standards, 57 Fed. Reg. 41,566 (1992) [hereinafter September 1992 Rulemaking].

80. *See* 51 Fed. Reg. 41,900, 41,901-02.

81. *See* 57 Fed. Reg. 21,524, 41,575.

82. In EPA's discussion of its decision not to list used oil destined for recycling as a hazardous waste, EPA stated that it

> wishes to reemphasize that its decision not to list recycled used oil as a hazardous waste is based solely upon its evaluation of the technical listing criteria contained in 40 CFR 261.11(a)(3). In particular, EPA has not taken into

Although the effect of the May and September 1992 Rulemakings is that used oil cannot be a CERCLA hazardous substance, these rulemakings do not mean that used oil cannot be a hazardous waste if other conditions are present. On the contrary, in the May 1992 Rulemaking, EPA observed that used oil destined for disposal which exhibits the characteristics of hazardous waste[83] would itself be considered a hazardous waste.[84] As a hazardous waste, this used oil would be a CERCLA hazardous substance.[85] In the September 1992 Rulemaking, EPA reiterated its prior conclusion that the petroleum exclusion does not include hazardous substances which are added to petroleum or increased in concentration as a result of contamination.[86] Consequently, although EPA's decision not to list used oil as a hazardous waste removes one means for concluding that used oil is outside the petroleum exclusion, the agency's decision does not preclude a determination that releases of used oil can result in CERCLA liability.

III. JUDICIAL INTERPRETATIONS OF THE PETROLEUM EXCLUSION

The judicial interpretations of the petroleum exclusion follow the broad analytical framework established by EPA that uncontaminated gasoline and other petroleum fuels are within the exclusion, but that used oil and other petroleum products to which hazardous substances have been added or increased in concentration are outside the exclu-

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account the potential stigma associated with classifying used oil as hazardous waste.

57 Fed. Reg. 41,576. However, environmental and industrial groups have challenged EPA's determination, alleging that the Office of Management and Budget improperly pressured EPA to classify recyclable used oil as non-hazardous waste. *See Environmentalists, Industry Continue Push for Court to Overturn Recyclable Used Oil Rule*, Env't Rep. (BNA) at 1540-41 (Oct. 9, 1992).

83. The characteristics of a hazardous waste are: ignitability, corrosivity, reactivity and toxicity. 40 C.F.R. §§ 261.21-261.24 (1992).

84. In particular, the May 1992 Rulemaking provides that

> [u]sed oils exhibiting one or more of the characteristics of hazardous waste and which are destined for disposal continue to be regulated as hazardous wastes. Mixtures of used oils and listed hazardous wastes are listed hazardous wastes.

57 Fed. Reg. 21,528 (1992).

85. *See* 50 Fed. Reg. 49,267 (1985) (classification of used oil as a hazardous waste would result in classification as a CERCLA hazardous substance).

86. The September 1992 Rulemaking provides that

> [t]he Agency has interpreted the petroleum exclusion to include crude oil and fractions of crude oil, including hazardous substances that are indigenous in petroleum substances. However, hazardous substances that are added to petroleum or that increase in concentration solely as a result of contamination of the petroleum are not part of the petroleum and thus are not excluded. Therefore, used oil that contains a hazardous substance due to contamination is subject to CERCLA reporting, response, and liability provisions.

57 Fed. Reg. 41,606 (1992) (to be codified at 40 C.F.R. Section 279).

sion. The discussion below begins by reviewing the case law interpreting the petroleum exclusion where the release has involved gasoline or other fuels. The discussion then summarizes the case law interpreting the petroleum exclusion where there is a release of used oil with evidence of contamination by hazardous substances. This discussion concludes by examining the split in the courts where there is no direct evidence that used oil at a Superfund site was contaminated with hazardous substances.

A. *Gasoline And Other Fuels*

In *Wilshire Westwood Association v. Atlantic Richfield Corp.*,[87] the Ninth Circuit held that the petroleum exclusion includes unrefined and refined gasoline, even though certain components and additives in gasoline have been designated as CERCLA hazardous substances.[88] The *Wilshire* court noted that a contrary interpretation of the petroleum exclusion would be incompatible with the plain meaning of the statute and would render the exclusion a nullity.[89] The court found that the limited legislative history of CERCLA and post-CERCLA legislative developments supported its interpretation of the petroleum exclusion.[90] The court also noted that its decision was consistent with EPA's interpretation of the petroleum exclusion.[91] In following the reasoning of *Wilshire*, a Michigan federal district court in *Niecko v. Emro Marketing Co.*[92] and a Florida federal district court in *Bunger v. Hartman*[93] found that the petroleum exclusion included contamination from a gasoline station's leaking underground storage tanks. *Wilshire*, *Niecko*, and *Bunger* are consistent with an earlier decision by a Pennsylvania federal district court which found that the petroleum exclusion included a release of diesel fuel.[94]

87. 881 F.2d 801 (9th Cir. 1989).

88. *Id.* at 810. In Ulvestad v. Chevron U.S.A., Inc., 818 F Supp. 292, 296-97 (C.D. Cal. 1993), a California federal district court adopted the reasoning of the Ninth Circuit in *Wilshire* in holding that the petroleum exclusion in California's "mini-Superfund" statute includes refined petroleum, such as gasoline.

89. *Wilshire*, 881 F.2d at 804.

90. *Id.* at 807-08.

91. *Id.* at 808.

92. 769 F Supp. 973, 982 (E.D. Mich. 1991), *aff'd*, 973 F.2d 1296 (6th Cir. 1992). Another Michigan federal district decision followed the reasoning of *Niecko* in holding that leaking refined gasoline and other petroleum fuel from an underground storage tank is within the petroleum exclusion. *See* Zoufal v. Amoco Oil Co., 1993 U.S. Dist. LEXIS 4920, at *9-*10 (E.D. Mich. Mar. 18, 1993).

93. 797 F Supp. 968, 972-73 (S.D. Fla. 1992).

94. *See* Equitable Life Assurance Soc'y v. Greyhound Corp., 31 Env't Rep. Cas. (BNA) 1079, 1080 (E.D. Pa. 1990). In New York v. United States, 620 F Supp. 374, 386 (E.D.N.Y. 1985), the court denied the defendants' summary judgment motion with respect to plaintiff's CERCLA section 107(a) claim for a release of jet fuel. The court found that a genuine factual dispute existed with respect to whether benzene, toluene, and xylene were original constituents of the jet fuel or non-petroleum products. *Id.* Since the court did not hold that fuel was outside the petroleum exclusion,

In reversing a district court decision which had held that "crude oil tank bottoms" are within the petroleum exclusion,[95] the Ninth Circuit in *Cose v Getty Oil Co.*[96] clarified its holding in *Wilshire*. In *Cose*, the Ninth Circuit determined that "crude oil tank bottoms" are not "petroleum" or petroleum "fractions" because they consist of water and sedimentary solids which accumulate at the bottom of storage tanks without being exposed to the refining process.[97] The Ninth Circuit noted that crude oil tank bottoms are not used for "producing useful products" and, in view of CERCLA's overall purpose to clean-up hazardous waste dump sites,[98] concluded that the disposal of crude oil tank bottoms "should not find protection under CERCLA's petroleum exclusion."[99] *Cose* suggests that the Ninth Circuit will limit the scope of the petroleum exclusion to useful products, such as "natural gas, natural gas liquids, liquefied natural gas or synthetic gas usable for fuel" which are specifically enumerated in statutory language of the exclusion.[100]

B. *Used Oil Contaminated With a Hazardous Substance*

The *Wilshire* court did not consider whether the petroleum exclusion included used oil or petroleum products that have been contaminated with hazardous substances during use.[101] However, consistent with EPA's 1985 Rulemaking and 1987 Memorandum, several courts have found that the petroleum exclusion does not apply where used

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the *New York* decision is not inconsistent with the subsequent decisions in *Wilshire*, *Niecko*, and *Bunger*

95. *Cose v. Getty Oil Co.*, 34 Env't Rep. Cas. (BNA) 1308 (E.D. Cal. 1991). The district court characterized "crude oil tank bottoms" as "used oil," concluding that "not all releases of used oil will be subject to CERCLA since used oil does not necessarily contain non-indigenous hazardous substances or increased concentrations of hazardous substances. Moreover, the impurities in used oil may not be CERCLA hazardous substances." *Id.* at 1311-12. The district court found that, in the 1985 Rulemaking, EPA "interpreted 'waste oil' to include only unadulterated waste oil. 'Adulterated waste oil' is waste oil to which listed CERCLA substances have been added." *Id.* at 1311 n.6. Thus, the district court created a presumption that used oil does not contain hazardous substances in concentrations greater than those inherent in oil prior to usage. *See infra* notes 111-19 and accompanying text (reviewing cases holding that used oil is within the petroleum exclusion). Under this reasoning, there must be direct evidence of contamination by a hazardous substance before CERCLA liability attaches to the release of used oil. Finding that the site at which the crude oil tank bottoms had been disposed did not contain hazardous substances in concentrations greater than those indigenous to petroleum, the district court held that CERCLA liability did not attach because of the petroleum exclusion. *Cose*, 34 Env't Rep. Cas. (BNA) at 1312.

96. No. 91-16575, 1993 U.S. App. LEXIS 20,399 (9th Cir. Aug. 11, 1993).

97 *Id.* at *13.

98. *Id.* at *18 (citing 1987 EPA Memorandum, *supra* note 62).

99. *Id.* at *18-*19.

100. *See* 42 U.S.C. § 9601(14) (1988) (providing for the petroleum exclusion to the definition of "hazardous substance").

101. *Wilshire*, 881 F.2d at 805 n.5.

oil has been mixed with a listed hazardous substance or where there is evidence that the concentration of hazardous substances in used oil increased as a result of contamination during use. For example, in *City of New York v. Exxon Corp.*,[102] the Southern District of New York held that the petroleum exclusion does not apply to waste oil emulsion containing concentrations of lead, chromium, and cadmium which increased during the industrial process.[103] In a similar decision, the court in *United States v. Alcan Aluminum Corp.*[104] held that the petroleum exclusion does not apply to oil emulsion that has become contaminated with chromium, copper, lead, and zinc.[105]

In denying the defendant's motion for summary judgment, the court in *Mid Valley Bank v. North Valley Bank*[106] held that waste oil containing elevated levels of zinc, lead, and thallium was not within the petroleum exclusion.[107] Similarly, in *United States v. Western Processing Co., Inc.*,[108] the court denied the defendant's summary judgment motion where the plaintiff had presented evidence that tank bottom waste sludges contained elevated levels of lead, chromium, and nickel.[109] These decisions are consistent with an earlier decision by a Pennsylvania federal district court denying a defendant's motion for summary judgment against a CERCLA plaintiff where the plaintiff presented evidence of hazardous substances in the defendant's waste.[110]

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102. 766 F Supp. 177 (S.D.N.Y. 1991).

103. *Id.* at 188.

104. 755 F Supp. 531, 539 (N.D.N.Y. 1991), *aff'd in part, rev'd in part on other grounds*, 990 F.2d 711 (2d Cir. 1993).

105. *Id.* at 539. In a similar case in the Third Circuit, the court vacated the district court's decision, but agreed with the district court that the petroleum exclusion did not apply to the defendant's waste where the defendant admitted that hazardous substances were added to waste oil emulsion. *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 266-67 (3d Cir. 1992).

106. 764 F Supp. 1377, 1385 (E.D. Cal. 1991). The court distinguished its denial of summary judgment regarding the lead content of the waste oil because the source of the lead was a question of fact. The court stated that if the lead level exceeded the amount that would have occurred in petroleum during the refining process, then the petroleum exclusion would not apply.

107. *Id.* at 1385.

108. 761 F Supp. 713, 715-17, 724 (W.D. Wash. 1991).

109. *Id.* at 719-20.

110. *See* City of Philadelphia v. Stepan Chem. Co., No. 81-0851, 1988 U.S. Dist. LEXIS 14,219, at *8-*9 (E.D. Pa. December 19, 1988) (defendant's summary judgment motion denied where plaintiff created a genuine issue of material fact with respect to the composition of defendant's waste). A recent unreported case from a Michigan federal district court also found that waste oil contaminated with hazardous substances is outside the petroleum exclusion. *See* Lockhart Chem. Co. v. Moreco Energy, Inc., No. 89-CV-40160-FL, 1992 U.S. Dist. LEXIS 19,404 (E.D. Mich. Feb. 5, 1992) (granting summary judgment to plaintiff where waste oil was contaminated with trichloroethylene and 1,1,1 - trichloroethane).

C. *Used Oil Without Direct Evidence of the Composition of the Oil*

There is a split in the courts when there is no direct evidence that used oil was contaminated with hazardous substances. The discussion below first reviews the case law holding that used oil is within the petroleum exclusion where there is no direct evidence pertaining to the contaminants in the used oil. These courts, in effect, have created a presumption that used oil is not contaminated with hazardous substances. The discussion then considers the case law which has found that used oil is outside the petroleum exclusion, even where there is no direct evidence on the identity of contaminants in the oil. These decisions have created a presumption that used oil is contaminated with hazardous substances.

1. Within the Scope of the Petroleum Exclusion

Where there is no evidence of the presence of a hazardous substance in used oil, four courts have concluded that used oil is within the petroleum exclusion. In *Marmon Group, Inc. v. Rexnord, Inc.*,[111] an Illinois federal district court referred to the dictionary definition of "cutting oil" in holding that "waste cutting oil" is within the petroleum exclusion.[112] The *Marmon* court reasoned that, since cutting oil as a form of oil is excluded from the definition of hazardous substance, "waste cutting oil" is also within the petroleum exclusion.[113]

The *Marmon* court did not distinguish "waste cutting oil" from "cutting oil," nor did it examine the legislative history or EPA's interpretation of the petroleum exclusion. In reversing the case on other grounds, the Seventh Circuit observed that the "district court dismissed the CERCLA count on the ground that the 'cutting oil' was not a substance regulated by CERCLA."[114] Consequently, both the district court and the Seventh Circuit failed to recognize any distinction between "waste cutting oil" and "cutting oil." Similarly, in *Niecko* the court asserted that the "spill" involved was "nothing more nor less than leaking gasoline."[115] However, the *Niecko* court also noted that the underground storage tanks on the property contained "waste oil," thus suggesting that the petroleum exclusion includes "waste oil."[116]

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111. No. 85 C7838, 1986 WL 7070 (N.D. Ill. June 16, 1986), *rev'd and remanded on other grounds*, 822 F.2d 31 (7th Cir. 1987).

112. *Id.* at *6.

113. In particular, the *Marmon* court determined that: "waste cutting oil is a form of oil; it is 'an oil or oily preparation used as a cutting fluid.' As a form of oil or petroleum, cutting oil is specifically excluded from CERCLA in section 9601(4)'s [sic] definition of the term 'hazardous substance.'" *Id.* (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 562).

114. *Marmon*, 822 F.2d at 33.

115. *Niecko*, 769 F Supp. at 982.

116. In particular, the *Niecko* court observed that: "According to the Plaintiff [the Defendant] never disclosed to him that there were previously underground

In *Southern Pacific Transportation Co. v. California Department of Transportation*,[117] the Central District of California referred to EPA's 1981 Policy Statement and 1987 Memorandum in concluding that used petroleum products mixed with soil are within the petroleum exclusion.[118] The *Southern Pacific* court noted, however, that EPA has determined "that hazardous substances which are added to petroleum or which increase in concentration solely as a result of contamination during use are *not* part of 'petroleum' and thus are not excluded from CERCLA."[119] As with *Marmon* and *Niecko*, the *Southern Pacific* court implicitly recognized a presumption that used oil does not contain non-indigenous hazardous substances.

2. Outside the Petroleum Exclusion

Two courts have effectively created a rebuttable presumption that used oil is contaminated with non-indigenous hazardous substances, such that releases of used oil are outside the petroleum exclusion. The first of these decisions is the ruling by the Southern District of New York in *City of New York v. Exxon Corp.*[120] As previously discussed,[121] the *Exxon* court found that oil emulsion containing concentrations of lead, chromium, and cadmium which increased during the industrial process was outside the petroleum exclusion.[122] However, the *Exxon* court also stated that "[b]y its plain language, this exclusion for petroleum does not include waste oil."[123] Thus, the *Exxon* court presumed that CERCLA liability attaches to releases of used oil.

In the other decision, the court in *United States v Western Processing Co.*[124] held that sludge from petroleum storage tanks was not within the petroleum exclusion.[125] Although the *Western Processing* plaintiff did not have information about the precise chemical composi-

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storage tanks on the property which contained gasoline and *waste oil*. [The Defendant] further failed to disclose that the storage tanks sat unused with gasoline and *oil* in them. " *Id.* at 976 (emphasis added).

117. 790 F Supp. 983 (C.D. Cal. 1991).

118. In particular, the *Southern Pacific* court observed that

> [T]he EPA has consistently maintained that used petroleum products are covered by the petroleum exclusion. In 1981, for example, the EPA determined that "petroleum wastes, including waste oil are excluded from the definition of 'hazardous substance' by the specific language of [CERCLA]." (citation omitted) This determination was reiterated by the EPA in 1987: "[N]o petroleum substance, including used oil can be a 'hazardous substance' except to the extent that it is listed as a hazardous waste. "

Id. at 985-86.

119. *Id.* at 986 (quoting Scope of the CERCLA Exclusion Under Sections 101(14) and 104(a)(2), EPA Gen. Counsel Memo, July 31, 1987, at 5).

120. 766 F Supp. 177 (S.D.N.Y. 1991).

121. *See supra* note 102 and accompanying text.

122. *Exxon*, 766 F Supp. at 188.

123. *Id.* at 186.

124. 761 F Supp. 713 (W.D. Wash. 1991).

125. *Id.* at 724.

tion of the defendant's sludge, it used two approaches to address the burden-of-proof issue. First, the plaintiff presented evidence that the defendant's steel tanks which held the sludge prior to disposal at the plaintiff's facility likely contained additives of chromium and nickel,[126] which are listed hazardous substances.[127] The plaintiff contended that the scale which developed on the interior walls of the steel tanks and became part of the sludge likely contained oxides of chromium and nickel from constituents in the steel tanks.[128] The plaintiff asserted that the precise constituents of the tanks were peculiarly within the knowledge of the defendant and that the defendant should have the burden of identifying these constituents.[129] After the defendant failed to present evidence on the constituents in the steel tanks,[130] the *Western Processing* court agreed with the plaintiff and found that the petroleum exclusion did not apply, observing that the defendant, although in the best position to provide the information on the precise composition of its steel tanks, had not done so.[131]

The plaintiff's second approach in *Western Processing* was to assert that there is a presumption that the defendant's tanks contained hazardous substances.[132] To support this assertion, the plaintiff used as evidence a 1990 internal memorandum[133] from an EPA regional office which discusses the toxicity of materials in underground storage tanks.[134] The 1990 Memorandum states that waste in underground storage tanks is presumed to be hazardous waste, unless the waste is tested to determine that it does not exhibit a characteristic of a hazardous waste.[135] The plaintiff further contended that waste from underground storage tanks is indistinguishable from waste in aboveground storage tanks, such as the defendant's, for purposes of determining whether hazardous substances are present.[136] The *Western*

126. *Id.* at 717, 720.

127 *See* List of Hazardous Substances and Reportable Quantities, 40 C.F.R. § 302.4 (1992).

128. *Id.*

129. Specifically, the plaintiff asserted that "[i]t is well settled that in the interest of fairness the burden of proof ordinarily resting upon one party as to a disputed issue may shift to his adversary when the true facts relating to the disputed issue lie peculiarly within the knowledge of the latter." *Western Processing*, 761 F. Supp. at 720 (quoting United States v. Hayes, 369 F.2d 671, 676 (9th Cir. 1966)).

130. *Id.* at 720.

131. *Id.* at 723.

132. *Id.* at 720.

133. Memorandum from Chet McLaughlin, EPA Region VII Office, to John Heffelfinger & Steve Cochran, EPA Region VII Office (Dec. 13, 1990) [hereinafter 1990 Memorandum].

134. *Western Processing*, 761 F Supp. at 720.

135. The 1990 Memorandum states: "wastes from the interior of the tank [which] include unrecovered product, water, sludge, scale, etc., are presumed to be hazardous. The only method to remove the presumption is to test the waste for the characteristics of a hazardous waste." 1990 Memorandum, *supra* note 133, at 2.

136. *Western Processing*, 761 F Supp. at 720.

Processing court agreed with this argument,[137] thus establishing a presumption that the petroleum exclusion does not apply.[138]

IV. Determining the Scope of the Petroleum Exclusion

In standard statutory analysis, one or more of the following factors are typically used to determine the meaning of a statute: (1) the plain meaning of the statutory language,[139] (2) the legislative history,[140] and (3) the underlying objectives of the statute.[141] The discussion below demonstrates that consideration of the first two factors supports the conclusions of the EPA and courts that uncontaminated gasoline and other fuels are within the scope of the petroleum exclusion, but that used oil and other petroleum products to which hazardous substances have been added are outside the exclusion. This discussion will also demonstrate that these two factors do not provide guidance in determining whether used oil should be within the petroleum exclusion

137 *Id.* at 724. In particular, the *Western Processing* court found that

> [t]he toxicity of the sludge being key, there is no rational basis for distinguishing underground from above-ground tanks. While underground tanks may have the additional problem of corrosion from outside, the focus of the memorandum is, nevertheless, on the toxicity of the sludge, and that has been the focus of the analysis in this case. It is the attachment to the [1990 Memorandum] that stated the presumption that the tank wastes were hazardous and that the only way to remove the presumption was by testing the waste. The information provided with the [1990 Memorandum] was of assistance in construing the meaning of the petroleum exclusion.

Id.

138. *Western Processing* is distinguishable from the Ninth Circuit's decision in *Cose* in that *Western Processing* involved tank bottom material contaminated by sand and rust from the sides of storage tanks, whereas in *Cose* the plaintiffs did not allege that contaminants had been added to the bottoms. *See Cose*, 1993 U.S. App. LEXIS 20,399, at *14 n.5. Thus, *Cose* is broader than *Western Processing* in that it concluded that tank bottoms were not within the meaning of "petroleum" and, hence, not within the petroleum exclusion. By contrast, *Western Processing* found that tank bottoms were "petroleum," but not within the petroleum exclusion because of the presumption that CERCLA hazardous substances had been added to the bottoms. *Western Processing*, 761 F Supp. at 724.

139. *See* Caminetti v. United States, 242 U.S. 470, 485 (1917) ("Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meaning need no discussion.") (citing Hamilton v. Rathbone, 175 U.S. 414, 421 (1899)).

140. While courts first look to the language of the text to interpret a statute, courts invariably refer to the legislative history to confirm the plain meaning of the words of the statute. *See, e.g.*, United States v. Clark, 454 U.S. 555, 561 (1982) ("[a]lthough the language of the statute is clear, any lingering doubt as to its proper construction may be resolved by examining the legislative history of the statute"); Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 574 (1982) (the legislative history "confirms that Congress intended the statute to mean exactly what its plain language says").

141. *See* J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964) ("[i]t is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose"). However, statutory interpretation is not "an opportunity for a judge to use words as 'empty vessels into which he can pour anything he will' " *See* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 529 (1947).

when no direct evidence exists regarding the identity of the contaminants in the oil. In the next section, this Article uses the third factor — the objectives of CERCLA — in conjunction with general principles of civil litigation to demonstrate the appropriateness of creating a rebuttable presumption that used oil is contaminated with a hazardous substance so that CERCLA liability attaches.

A. *Plain Meaning of the Statute*

In analyzing the scope of the petroleum exclusion, the Ninth Circuit in *Wilshire* noted that "[t]he plain language of a statute is the starting point for its interpretation."[142] As previously noted, CERCLA's exclusion for petroleum provides that:

> [t]he term [hazardous substance] does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance . and the term does not include natural gas, natural gas liquids, liquified natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).[143]

However, CERCLA does not define the terms "petroleum," "crude oil," "fraction" or "natural gas."[144] Where possible, words of a statute should be interpreted according to their ordinary meaning.[145] A standard dictionary defines "petroleum" as

> an oily flammable bituminous liquid that is a complex mixture of hydrocarbons with small amounts of other substances, and is prepared for use as gasoline, naphtha, or other products by various refining processes.[146]

This definition is consistent with the definition for "petroleum" in a standard chemical dictionary.[147] In defining "petroleum," a standard chemical dictionary identifies "petroleum fractions" as substances derived by distilling crude oil such as gasoline, hydrocarbon gases, naphtha, kerosene, fuel oils, gas oil, lubricating oils, paraffin wax, and asphalt.[148] Thus, the plain meaning of the statutory language supports

142. 881 F.2d at 803 (quoting American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982)).

143. 42 U.S.C. § 9601(14) (1988).

144. Baller, *supra* note 43, at 918; *Cose*, 34 Env't Rep. Cas. (BNA) at 1311.

145. Malat v. Riddell, 383 U.S. 569, 571 (1966).

146. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 880 (1985); *see* 1987 Memorandum, *supra* note 62, at 6-7 (quoting the definition of "petroleum" in WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY).

147. HAWLEY'S CONDENSED CHEMICAL DICTIONARY 540 (11th ed. 1987) [hereinafter HAWLEY'S].

148. *Id.* at 892; *see Exxon*, 766 F Supp. at 186 (referencing HAWLEY'S in concluding that waste oil is not within the petroleum exclusion); *Western Processing*, 761 F Supp. at 719 (citing HAWLEY'S in finding that used oil is not within the petroleum exclusion).

the conclusion of the Ninth Circuit in *Wilshire* that gasoline is within the petroleum exclusion.[149]

As noted by the *Wilshire* court, if the petroleum exclusion did not include gasoline, the exclusion would be rendered a virtual nullity,[150] since almost every petroleum spill or leak would be actionable under CERCLA.[151] The plain meaning of the statute also supports the determination by EPA and the courts that used oil, solvents, and other petroleum products to which listed hazardous substances have been added or increased in concentration during use are outside the petroleum exclusion. A contrary reading of the statute would provide an enormous loophole from CERCLA liability for PRPs responsible for releases of mixtures of hazardous substances and oil or gasoline. Under such a reading, the mere addition of oil or gasoline to a hazardous substance would render the mixture immune from CERCLA liability. This reading of the statute would eviscerate CERCLA.[152]

Nevertheless, the plain meaning of the statute does not provide guidance on whether a presumption should exist that used oil is contaminated with a hazardous substance so that CERCLA liability attaches. Although CERCLA does not define the term "used oil," the Used Oil Recycling Act defines it to mean "any oil which has been — (A) refined from crude oil, (B) used, and (C) as a result of such use, contaminated by physical or chemical impurities."[153] However, this definition does not provide any assistance on whether the "physical or chemical impurities" in used oil are presumed to be hazardous substances.

The courts which have used the plain meaning of the statutory language to allocate the burden of proving the identity of impurities in used oil have been disingenuous. In particular, the *Marmon* court concluded that "waste cutting oil" is within the petroleum exclusion

149. 881 F.2d at 804.

150. *Id.*

151. *Id.* at 805 n.5.

152. *See* Marsano v. Laird, 412 F.2d 65, 70 (2d Cir. 1969)("[A]n interpretation which emasculates a provision of a statute is not to be preferred. ").

153. RCRA § 1004(36) (1988). In 1990, Congress enacted the Oil Pollution Act (OPA) to provide a mechanism for cleaning up discharges of oil. 33 U.S.C. §§ 2701-61 (1990). Among other things, OPA makes a "responsible party" liable for "removal costs" incurred by any person in response to the responsible party's discharge of "oil" into "navigable waters." 33 U.S.C. § 2702(a)-(b) (1990). OPA defines the term "oil" to mean: "[A]ny kind or in any form, including petroleum, fuel oil, sludge, oil refuse but does not include petroleum which is specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of [CERCLA]. . ." 33 U.S.C. § 2701(23) (1990). The House Conference Report that accompanied the legislation that became OPA explained that this definition for oil "ensures that there will be no overlap in the liability provisions of CERCLA and the Oil Pollution Act." H.R. CONF. REP. No. 101-653, 101st Cong., 2d Sess. 102 (1990), *reprinted in* 1990 U.S.C.C.A.N. 722, 780. Thus, OPA does not address CERCLA's petroleum exclusion and does not provide insight into the scope of the exclusion except perhaps to reinforce that unused oil products are not within the exclusion.

on the basis of the dictionary definition of "cutting oil."[154] However, the court ignored the modifier "waste" and any hazardous substances which may have been present in this "waste." In reaching a contrary result, the Southern District of New York in *Exxon* boldly stated that "[b]y its plain language, this exclusion for petroleum does not include waste oil."[155] However, the court did not provide guidance on how the plain meaning of the statute results in a presumption that contaminants in "waste oil" include hazardous substances. Consequently, the allocation of the burden of proof regarding contaminants must be ascertained from going beyond the plain meaning of the statute.

B. *Legislative History*

There is little legislative history[156] associated with the enactment of CERCLA,[157] and almost none which addresses the scope of the petroleum exclusion.[158] This limited legislative history of CERCLA provides guidance only in interpreting the broad parameters of the

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154. *Marmon*, No. 85 C 7838, 1986 WL 7070 at *2.

155. *Exxon*, 766 F Supp. at 186.

156. Although legislative history is frequently used to determine the intent of Congress in enacting legislation, many courts and commentators have expressed reservations about using the legislative history as a device for statutory interpretation. *See, e.g.*, Hirschey v. Federal Energy Regulatory Comm'n, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J., concurring) ("I frankly doubt that it is ever reasonable to assume that the details, as opposed to the broad outlines of purpose, set forth in a committee report come to the attention of, much less are approved by, the house which enacts the committee's bill.") (footnote omitted);

> In general, little legislative history is helpfully relevant. Much of it is unreliable or unreliably revealed. Most if not all of it is of questionable practical availability to typical members of the legislative audience. Besides, little or none of it is relied on by typical members of the legislative audience as conditioning the language of the statute.

Reed Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11 HOFSTRA L. REV. 1125, 1130 (1983).

The primary concern with using the legislative history as an interpretive device is that it may be manipulated to lead courts to construe a statute in a way that contravenes the plain meaning of statutory language.

> The fact of the matter is that legislative history can be cited to support almost any proposition, and frequently is. The propensity of judges to look past the statutory language is well known to legislators. It creates strong incentives for manipulating legislative history to achieve through the courts results not achievable during the enactment process.

Wallace v. Christensen, 802 F.2d 1539, 1559 (9th Cir. 1986).

157. Grad, *supra* note 2, at 1.

158. In *Wilshire*, the Ninth Circuit observed that

> [T]here is virtually no legislative history contemporaneous with the enactment of CERCLA directly relevant to the scope of the petroleum exclusion. This dearth is probably because CERCLA was enacted as a compromise among three competing bills, H.R. 7020, H.R. 85, and S. 1480, after very limited debate under a suspension of the rules. . Of these three bills, only H.R. 85 addressed oil spills. H.R. 85 was reported to the Senate but no further action was taken on it.

881 F.2d at 805-06 (citations omitted).

petroleum exclusion, and does not aid in determining the allocation of the burden of proving whether used oil is contaminated with hazardous substances.[159]

CERCLA was the product of a compromise among three competing bills: House Bill 7020, House Bill 85, and Senate Bill 1480.[160] Of these three bills, only House Bill 85 provided for compensation for oil spills.[161] House Bill 85 passed the House and was reported to the Senate where it died.[162] Ultimately, it was the language of an amended Senate Bill 1480 that became the basis for the bill enacted as CERCLA.[163] The discussion of the petroleum exclusion in the Senate report[164] which accompanied Senate Bill 1480 mirrors the statutory language providing for the petroleum exclusion and sheds little insight into the actual scope of the exclusion, except to reaffirm that "oil" is within the exclusion.[165]

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159. The traditional rule of statutory interpretation is that the legislative history should only be considered if the language of the statute is ambiguous. *See* WILLIAM N. ESKRIDGE & PHILIP P FRICKEY, CASES AND MATERIALS ON LEGISLATION 616-88 (1988). In light of CERCLA's failure to define the term "petroleum" and the lack of clarity associated with the plain meaning of the statutory language establishing the petroleum exclusion, it is appropriate to consider the legislative history in determining the meaning of the exclusion. *Contra Wilshire*, 881 F.2d at 810 (Reinhardt, J., concurring) ("I agree with the substance of the court's treatment of CERCLA'S [sic] legislative history . and write separately only to emphasize that we need not go beyond the language of the statute itself in order to reach our result. In my view, the language of CERCLA'S [sic] 'petroleum exclusion' . plainly applies to gasoline, even when, as here, that gasoline contains lead additives.").

160. *See supra*, note 158. The Superfund bill originally advanced by President Carter's administration, S. 1341, died in Senate Committee. *See* 1 HELEN COHN NEEDHAM & MARK MENEFEE, SUPERFUND: A LEGISLATIVE HISTORY xii (1983) [hereinafter SUPERFUND LEGISLATIVE HISTORY].

161. *See Wilshire*, 881 F.2d at 805-06; SUPERFUND LEGISLATIVE HISTORY, *supra* note 160, at XIV.

162. *See Wilshire*, 881 F.2d at 805-06; SUPERFUND LEGISLATIVE HISTORY, *supra* note 160, at XIV-XV.

163. *See* Grad, *supra* note 2, at 29-30 (noting that, although the Superfund legislation was formally treated as a measure originating in the House, the language of S. 1480 was inserted for the language of H.R. 7020 and approved by both the Senate and the House); *see also* SUPERFUND LEGISLATIVE HISTORY, *supra* note 160, at XXI (noting that when the Senate considered H.R. 7020, it inserted the language of the amended S. 1480).

164. S. REP. NO. 848, 96th Cong., 2d Sess. 30 (1980), *reprinted in* SUPERFUND LEGISLATIVE HISTORY, *supra* note 160, at 12-13.

165. In particular, the Senate Report stated that

> petroleum, including crude oil and including fractions of crude oil which are not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of the definition, is excluded from the definition of a hazardous substance. The reported bill does not cover spills or other releases strictly of oil. It is also important to note that natural gas, liquefied natural gas (LNG), and high BTU synthetic gas of pipeline quality (or mixtures of natural gas and such synthetic gas) are not considered hazardous substances within the purposes of S. 1480.

Id.

The floor debate during consideration of Senate Bill 1480 reflects congressional intent for CERCLA liability to attach to releases of mixtures of oil and hazardous substances.[166] There is additional support in the floor debate for concluding that Congress intended CERCLA liability to attach to releases of petroleum products containing additives of hazardous substances, such as polychlorinated biphenyls (PCBs)[167] and dioxin.[168] The floor debate also indicates that Congress intended releases of strictly oil to be within the petroleum exclusion.[169] However, as with the plain language of the statute and the committee report which accompanied Senate Bill 1480, the floor debate does not provide guidance in determining whether Congress intended to create a presumption that used oil is contaminated with hazardous substances.

The post-CERCLA legislative history also does not provide assistance in determining the allocation of the burden of proving that used

166. Supporting the conclusion that the petroleum exclusion does not cover oil contaminated with hazardous substances, Representative Edgar made the following statement during the House consideration of CERCLA.

> [H]azardous substances problems have been discovered at an alarming rate in recent years. In the summer of 1979, an oil slick appeared on the Susquehanna River near Pittston, Pa. When EPA officials responded they learned that the slick contained a variety of highly poisonous chemicals in addition to the oil.
>
> Officials estimate that more than 300,000 gallons of acids, cyanide compounds, industrial solvents, waste oil and other chemicals remain at this site.

126 CONG. REC. H11,798 (daily ed. Dec. 3, 1980) (statement of Rep. Edgar), *reprinted in* SUPERFUND LEGISLATIVE HISTORY, *supra* note 162, at 179; *see* 1987 Memorandum, *supra* note 62, at 9 (quoting statement of Rep. Edgar).

167. *See* 126 CONG. REC. 30,931 (1980) (statement of Sen. Randolph) (discussing PCB-contaminated transformer fluids), *reprinted in* SUPERFUND LEGISLATIVE HISTORY, *supra* note 162, at 259; 126 CONG. REC. 30,942 (1980) (statement of Sen. Mitchell) (discussing PCB-contaminated waste oil), *reprinted in* SUPERFUND LEGISLATIVE HISTORY, *supra* note 162, at 270.

168. *See* 126 CONG. REC. 30,942 (1980) (statement of Sen. Mitchell), *reprinted in* SUPERFUND LEGISLATIVE HISTORY, *supra* note 162, at 270.

169. Supporting the conclusion that the purpose of the petroleum exclusion was to exclude releases of "oil" from CERCLA liability is the following comment made by Representative Mikulski during consideration of CERCLA.

> [I]t is disappointing to see no oil-related provisions in the bill, but we must also realize that this is our only chance to get hazardous waste dump site cleanup legislation enacted.
>
> Moreover, there is already a mechanism in place that is designed to deal with spills in navigable waterways. There is not however, any provision currently in our law that addresses the potentially ruinous situation of abandoned toxic dump sites. I, therefore, believe that it is imperative that we pass the Senate bill as a very important beginning in our attempt to defuse the ticking environmental time bomb of abandoned toxic waste sites.

Id. at 178; *see* 1987 Memorandum, supra note 62, at 8 (quoting statement of Rep. Mikulski).

oil is contaminated with a hazardous substance.[170] During the reauthorization of RCRA in 1984,[171] Congress adopted a management program for underground storage tanks, including those containing hazardous substances and petroleum,[172] but declined to amend CERCLA's petroleum exclusion.[173] While there is language in the legislative history of the 1984 RCRA amendment to suggest that Congress intended gasoline and other fuels to be within CERCLA's petroleum exclusion,[174] there is no discussion addressing the more difficult burden-of-proof issues associated with the petroleum exclusion.

In 1986, Congress enacted the Superfund Amendments and Reauthorization Act (SARA),[175] which significantly revised CERCLA, but did not alter the language of the petroleum exclusion. SARA added to CERCLA a definition for the term "pollutant or contaminant"[176] and included in this definition an exclusion for petroleum identical to the petroleum exclusion contained in the definition of "hazardous substance."[177] However, this statutory language does

170. *See Wilshire*, 881 F.2d at 806-08, which used the legislative history of RCRA and SARA to interpret the petroleum exclusion, although noting the Supreme Court's admonition in Russello v. United States, 464 U.S. 16, 26 (1983), that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."

171. The Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (codified in scattered sections of 42 U.S.C.).

172. The section of the 1984 RCRA amendments which provides for the regulation of underground storage tanks defines the term "regulated substance" to mean "(A) any substance defined in section 9601(14) of this title (but not including any substance regulated as a hazardous waste), and (B) petroleum." RCRA § 9001(2) (1988). Thus, hazardous substances, other than RCRA hazardous wastes, are regulated by the underground storage tank provisions. The 1984 RCRA amendments also define the term "petroleum" to mean "petroleum, including crude oil or any fraction thereof which is liquid at standard conditions of temperature and pressure (60 degrees Fahrenheit and 14.7 pounds per square inch absolute)." *Id.*

173. During the reauthorization of RCRA, Senator Durenberger, the Senate sponsor of the 1984 RCRA amendments stated that:

> [u]nderground storage tanks are seldom regulated. At present, Federal regulation of storage tanks covers only above-ground tanks containing chemical wastes. And, if a tank is leaking, the Federal government cannot under Superfund authority respond or clean up a spill if it involves petroleum products. . . . The tank storage of one of the most common underground water contaminants — gasoline — is unregulated because it is not a waste product (and thus not under the authority of [RCRA]), and spills of the fuel cannot be cleaned up under the Superfund law because it is a petroleum product.

130 CONG. REC. S2028, S2080 (daily ed. Feb 29, 1984)(statement of Sen. Durenberger). *See* Baller, *supra* note 43, at 919 (discussing the impact of reauthorization of the RCRA on the petroleum exclusion; *Wilshire*, 881 F.2d at 806-07.

174. 130 CONG. REC. S2028, S2080 (daily ed. Feb. 29, 1984)(statement of Sen. Durenberger).

175. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified in scattered sections of the Internal Revenue Code and Titles 10, 26, 29, 33, and 42 U.S.C.).

176. 42 U.S.C. § 9601(33) (1988) (defining "pollutant or contaminant").

177. In particular, the term "pollutant or contaminant" does not include:

not provide additional insight into the scope of the petroleum exclusion.

SARA's legislative history is of limited assistance in determining the scope of the petroleum exclusion. The conference report that accompanied H.R. 2005,[178] the legislation which became SARA, discusses the term "petroleum" in connection with the petroleum response fund under RCRA for leaking underground storage tanks. This conference report explains that the fund covers tanks containing used oil contaminated with hazardous substances, in addition to tanks containing uncontaminated petroleum.[179] As noted by EPA, this is not inconsistent with the conclusion that CERCLA liability attaches to releases of used oil contaminated with hazardous substances.[180] Indeed, floor statements by members of Congress during consideration of SARA reflect an understanding that CERCLA liability could attach to releases of used oil.[181] However, this legislative history does not suggest a method for proving whether used oil is contaminated with a hazardous substance.[182]

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petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of paragraph (14) [of 42 U.S.C. § 9601] and shall not include natural gas, liquefied natural gas, or synthetic gas of pipeline quality (or mixtures of natural gas and such synthetic gas).

42 U.S.C. § 9601(33) (1988).

178. H.R. REP. NO. 962, 99th Cong., 2d Sess. 228 (1986).

179. *Id.*

180. 1987 Memorandum, *supra* note 62, at 11.

181. *See, e.g.*, 132 CONG. REC. S14,928 (daily ed. Oct. 3, 1986) (statement of Sen. Chaffee) (noting that nothing in SARA § 114 relating to liability for releases of recycled oil "shall affect or impair the authority of the President to take a response action pursuant to § 104 or 106 of CERCLA with respect to any release of used oil or recycled oil"); 132 CONG. REC. H9611 (daily ed. Oct. 8, 1986) (statement of Rep. Schneider) (noting that contaminated waste oil has been identified at 153 Superfund sites).

In *Cose*, 1993 U.S. App. LEXIS 20,399, at *23-*24, the Ninth Circuit rejected the defendants' assertion that a statement by Senator Simpson during the 1986 consideration of SARA supported the inclusion of "crude oil tank bottoms" within the scope of the petroleum exclusion. *See* 132 CONG. REC. S14,931-32 (daily ed. Oct. 3, 1986) (statement of Sen. Simpson). The *Cose* court concluded that "[p]ost-enactment legislative history merits less weight than contemporaneous legislative history. Senator Simpson's stray comment was made six years after the enactment of CERCLA's petroleum exclusion, which remains unaltered to this date. Hence, we confer little, if any, weight to the comment." *Id.* at *24 (citation omitted).

182. In 1990, Congress enacted the Oil Pollution Act of 1990 (OPA), Pub. L. No. 101-380, 104 Stat. 486 (codified at 33 U.S.C. § 2701 (Supp. III 1991)), to provide a mechanism for cleaning up discharges of oil. Among other things, OPA makes a "responsible party" liable for "removal costs" incurred by any person in response to the responsible party's discharge of "oil" into "navigable waters." 33 U.S.C. § 2702(a)-(b). OPA defines the term "oil" to mean "oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, but does not include petroleum . which is specifically listed or designated as a hazardous substance under [CERCLA § 101(14)(A)-(F)]." 33 U.S.C. § 2701(23). OPA does not address CERCLA's petroleum exclusion, but the House Conference Report that accompanied the legislation that became OPA explains that this definition for oil "ensures that there will be no

V. CREATING A PRESUMPTION THAT USED OIL IS CONTAMINATED WITH A HAZARDOUS SUBSTANCE

A challenging issue arises when there exists evidence of contamination by hazardous substances at a Superfund site at which used oil was managed, but no direct evidence that the used oil was contaminated with hazardous substances. That is, should CERCLA liability attach to those PRPs who would otherwise be liable, but for the lack of evidence identifying the contaminants in the used oil as hazardous substances? Because the question has not been addressed within either the plain meaning or the legal history of CERCLA, the discussion below uses traditional principles of civil litigation to demonstrate that a rebuttable presumption should exist that used oil is contaminated with a hazardous substance. The result of this presumption is that CERCLA liability would attach to releases of used oil, unless a PRP could demonstrate that the used oil was not contaminated with hazardous substances.

A. *The Burden of Proof and Presumptions*

Before discussing the appropriateness of creating a presumption that used oil is contaminated with a hazardous substance, it is first necessary to review the general principles for allocating the burden of proof in civil litigation. The term "burden of proof" consists of two distinct burdens.[183] One burden is that of producing evidence to demonstrate that a particular fact is in issue.[184] If the party with the burden of producing evidence does not meet this burden, it should receive an adverse ruling.[185] The second burden is the "burden of persuading the trier of fact that the alleged fact is true."[186]

The burden of production may shift from party to party.[187] Under Rule 301 of the Federal Rules of Evidence, the burden of persuasion remains throughout the trial upon the party on whom it was originally cast.[188] In most cases, the party with the burden of pleading a fact will have the burdens of producing evidence and of persuading the trier of

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overlap in the liability provisions of CERCLA and the Oil Pollution Act." H.R. REP. No. 653, 101st Cong., 2d Sess. (1990), *reprinted in* 1990 U.S.C.C.A.N. 722, 780. Thus, OPA does not provide insight into the scope of CERCLA's petroleum exclusion.

183. GRAHAM LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 3.1, at 48 n.2 (2d ed. 1987) [hereinafter LAW OF EVIDENCE]; EDWARD W CLEARY, MCCORMICK ON EVIDENCE § 336, at 947 (3d ed. 1984) [hereinafter MCCORMICK]; Flemming James, Jr., *Burdens of Proof*, 47 VA. L. REV 51 (1961) [hereinafter *Burdens of Proof*]; Edward W Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5, 15-16 (1959) [hereinafter *Presuming and Pleading*].

184. MCCORMICK, *supra* note 183, § 336, at 947; *Burdens of Proof*, *supra* note 183, at 51; *Presuming and Pleading*, *supra* note 183, at 15-16.

185. MCCORMICK, *supra* note 183, § 336, at 947.

186. *Id.*, *See also Burdens of Proof*, *supra* note 183, at 51; *Presuming and Pleading*, *supra* note 183, at 15-16.

187. MCCORMICK, *supra* note 183, § 336, at 947.

188. *Id.*

fact of the existence of the proposition in question.[189] In most civil cases, the party who has the burden of persuasion of a fact must prove that fact by a preponderance of evidence.[190]

A presumption is a device for allocating the burden of proof between litigants.[191] A presumption can be viewed as an inference of one fact from the existence of another.[192] In 1988, the Supreme Court in *Basic Inc. v. Levinson*,[193] observed that

> [p]resumptions typically serve to assist courts in managing circumstances in which direct proof, for one reason or another, is rendered difficult. . Arising out of considerations of fairness, public policy, and probability, as well as judicial economy, presumptions are also useful devices for allocating the burdens of proof between parties.[194]

The factors identified by the *Basic* court for creating a presumption — difficulty in obtaining direct proof, fairness, public policy, and probability — are widely recognized by the courts and other authorities as grounds for creating a presumption.[195]

A presumption generally shifts only the burden of production.[196] In these situations, the presumption disappears upon introduction of evi-

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189. *Id.* § 337, at 948.

190. *Id.* § 339, at 956; *Burdens of Proof, supra* note 183, at 53.

191. Keeler Brass Co. v. Continental Brass Co., 862 F.2d 1063, 1066 (4th Cir. 1988).

192. *Burdens of Proof, supra* note 183, at 63; *see* Amtorg Trading Corp. v. Higgins, 150 F.2d 536, 538 n.2 (2d Cir. 1945).

193. 485 U.S. 224 (1988).

194. *Id.* at 245 (citations omitted). After considering these factors, the *Basic* court upheld a presumption that the securities market relies on publicly available information, including misrepresentations. *Id.* at 245-46; *see* Howing Co. v. Nationwide Corp., 927 F.2d 263 (6th Cir. 1991) (following the reasoning of *Basic* in denying a defendant's summary judgment motion where there was a presumption that information not disclosed by defendant corporation was material).

195. *See* McCORMICK, *supra* note 183, § 343, at 968-73; *Presuming and Pleading, supra* note 183, at 11-14; 1 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 68, at 541-42 (1977) [hereinafter FEDERAL EVIDENCE]. *See e.g.*, Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp., 702 F Supp. 1317 (E.D. Mich. 1988) (court considered probability, fairness and policy factors in allocating the burden of proof) (citations omitted).

196. *See, e.g.,* Keeler Brass Co. v. Continental Brass Co., 862 F.2d 1063, 1065-66 (4th Cir. 1988). In *Keeler* the court found that the plaintiff had established a presumption of copyright infringement, but concluded that the plaintiff retained the burden of persuading the trier of fact that the proposition was true:

> [r]egardless of these proof schemes, the burden of persuasion normally remains on the plaintiff for his claim throughout the trial. In the usual civil case, therefore, the plaintiff has the burden to persuade the trier of fact that the existence of the proposition to be proved is more probably true than not true.

Id. at 1066; *see* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254-56 (1980) (establishment of a prima facie case creates a presumption of unlawful discrimination, but the plaintiff retains the burden of persuasion); Lew v. Moss, 797 F.2d 747, 751 (9th Cir. 1986) (recognizing a presumption in favor of an established domicile against a newly created one, but observing that this presumption only shifted the burden of production and did not shift the burden of persuasion).

dence sufficient to sustain a finding of nonexistence of the presumed fact.[197] In other situations, courts have determined that a presumption also shifts the burden of persuasion.[198] This additional effect given to a presumption is of importance only in those rare cases where the trier of fact is equipoised at the end of its deliberation.[199] In those cases, shifting the burden of persuasion means that the trier will render a verdict against the party who had the burden of rebutting the presumption.

B. *The Burden of Proving the Prima Facie Elements of CERCLA Liability*

As previously discussed, the prima facie elements of a CERCLA cost-recovery claim which the plaintiff must establish are: (1) the defendant is within one of the four categories of "covered persons;" (2) there was a "release or threatened release" of a "hazardous substance;" (3) the plaintiff incurred "response costs;" and (4) the response costs were consistent with the NCP.[200] At a used oil Superfund site where there is evidence of contamination, but no direct evidence that the used oil at the site was contaminated by hazardous substances, a CERCLA plaintiff probably will not have difficulty establishing the second, third, and fourth elements. With respect to the second element, since there is contamination by hazardous substances at the site, the plaintiff will be able to prove that a release of hazardous substances has occurred.[201] Similarly, since the plaintiff will have incurred costs in responding to this contamination, the plaintiff will have satisfied the requirement that "response costs" be incurred.[202]

197. *See* Presbyterian/St. Luke's Medical Ctr. v. NLRB, 653 F.2d 450 (10th Cir. 1981); FEDERAL EVIDENCE, *supra* note 195, § 69, at 554-55.

198. *See, e.g., Presbyterian* 653 F.2d at 455 (finding that presumption in favor of a single bargaining unit shifted both the burdens of production and persuasion); *Burdens of Proof, supra* note 183, at 68 (noting that a presumption may sometimes shift the burden of persuasion).

199. *Burdens of Proof, supra* note 183, at 69.

200. *See supra* notes 26-30 and accompanying text (discussing the prima facie elements of CERCLA liability); *see, e.g.*, General Elec. Co. v. Litton Business Systems, 715 F Supp. at 955; *Artesian Water*, 659 F Supp. at 1278-79.

201. At first blush, one might assume that the plaintiff at a used oil Superfund site would have difficulty establishing that a release of a "hazardous substance" has occurred, since there is an issue as to whether CERCLA liability should attach to releases of used oil. At these Superfund sites, however, contamination by hazardous substances in the environment has already been documented. There probably is also documentation that the used oil at the site was contaminated with hazardous substances. The documentation gap occurs in linking specific sources of used oil managed at the site with the hazardous substances in the used oil. That is, generators and transporters of used oil managed at a Superfund site will assert there is no proof linking the used oil which they generated or transported with the hazardous substances at the site. This documentation gap occurs when neither the used oil generators/transporters nor the used oil management facility tested the specific shipments of used oil brought to the site.

202. *See supra* note 29 and accompanying text (defining "response costs").

The fourth element also will have been satisfied provided the plaintiffs followed certain requirements to ensure the cost-effectiveness of the clean-up.[203]

Without a presumption that used oil is contaminated with hazardous substances, a CERCLA plaintiff will have difficulty establishing the first element — that certain PRPs are "covered persons" under CERCLA. The four categories of covered persons are: (1) the owner or operator of the site; (2) prior owners or operators of the site during which time the release of hazardous substances occurred; (3) any person who arranged for the disposal, treatment, or transportation of hazardous substances which contaminated the site; and (4) any person who accepted for disposal, treatment, or transportation the hazardous substances which contaminated the site.[204] Even without a presumption that used oil is contaminated with hazardous substances, CERCLA liability will attach to the current and past owners or operators of a used oil Superfund site. However, the current or past owners or operators of used oil Superfund sites may be bankrupt or otherwise unable to pay for the clean-up of the site.[205]

The presumption will have a profound effect on the liability of generators and transporters of used oil managed at a Superfund site. These generators and transporters will contend that they did not arrange or accept for disposal, treatment, or transportation the hazardous substances which contaminated the site.[206] In other words, without documentation of the contaminants in the specific shipments of used oil which they generated or transported, these parties will assert that there is no evidence that the used oil at the site which they generated or transported was contaminated with hazardous substances. Those courts which have found that used oil is within the petroleum exclusion where no direct evidence exists on the identity of the contaminants in the used oil, in effect, have adopted this reasoning.[207]

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203. *See supra* note 30 (discussing the effect of the requirement that a CERCLA cleanup be consistent with the NCP).

204. 42 U.S.C. § 9607(a)(1)-(4) (1988).

205. *See Bankruptcy and Environmental Law*, *supra* note 3.

206. 42 U.S.C. § 9607(a)(3)-(4) (1988).

207. *See supra* notes 111-119 and accompanying text (discussing the cases where the court effectively created a presumption that used oil was not contaminated with a hazardous substance).

Other courts which have considered the allocation of the burden of proof with respect to the first element also have found that the plaintiff bears the burden of proving that the defendant's waste contained a hazardous substance, such that the defendant was a "covered person" for purposes of CERCLA liability. For example, in *Exxon*, 633 F Supp. at 609 (S.D.N.Y. 1986), the court observed that

> [f]or purposes of its complaint, the [private-party plaintiff] has alleged a sufficient basis for its claim, which is that [the defendant] generated and contracted for the transport of industrial waste containing substances which are defined as hazardous substances under the Act [CERCLA]. *In order for*

C. *Basis For the Presumption*

Consideration of the basic principles for establishing presumptions results in the conclusion that a rebuttable presumption should exist that used oil is contaminated with a hazardous substance to which CERCLA liability attaches. This presumption will require a CERCLA defendant to prove that used oil managed at a Superfund site was not contaminated with a hazardous substance. In demonstrating the appropriateness of this presumption, the analysis below considers factors identified by the Supreme Court in *Basic*[208] for evaluating the appropriateness of presumptions: congressional policy, fairness, and probability.[209]

1. Probability

One authority has observed that generally "the most important consideration in the creation of presumptions is probability."[210] With respect to this factor, a recent EPA analysis of the composition of used oil[211] performed in conjunction with EPA's rulemakings governing used oil management standards[212] demonstrates the high probability that used oil from a variety of sources is contaminated with hazardous

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[the defendant] to be liable, the [plaintiff] must prove that the wastes did in fact contain such hazardous substances .

Id. at 620 (emphasis added).

Similarly, in *O'Neil*, 682 F Supp. at 706, the court found that the plaintiff failed to provide sufficient evidence that the defendant's materials contained CERCLA hazardous substances. *Id.* at 723-24. The *O'Neil* plaintiff provided no evidence as to the contents of the defendant's containers other than the assertions of a witness who had not performed an analysis of the contents. *Id.* at 723. By contrast, the defendant presented the testimony of a witness who testified that the contents were not nor would not form a hazardous substance. *Id.* From this, the court concluded that the plaintiff failed to meet its burden of production with respect to the presence of a hazardous substance. *Id.* at 723-24.

Other courts that have considered the first element have concluded that there is no requirement that a CERCLA plaintiff trace the defendant's waste to a specific release of a hazardous substance at a site. *See* United States v. Monsanto Co., 858 F.2d 160, 169 n.15 (4th Cir. 1988); United States v. Fairchild Indus., 766 F Supp. 405, 415 (D. Md. 1991); *Exxon*, 633 F Supp. at 620; United States v. Wade, 577 F Supp. 1326, 1333 (E.D. Pa. 1983). Instead, it is sufficient for the plaintiff to present evidence that the defendant shipped waste to a site and that a hazardous substance similar to those contained in the waste remained at the site at the time of the release or threatened release. *Id.* Nevertheless, these decisions still require the plaintiff to prove that the defendant's waste contained a hazardous substance. *Id.*

208. *Basic*, 485 U.S. at 245-46.

209. *Id.*

210. McCormick, *supra* note 183, § 343, at 969.

211. Used Oil Characterization Sampling and Analysis Program - Final Report, Science Applications International Corporation (August 30, 1991) [hereinafter Used Oil Analysis].

212. In 1989, EPA commissioned the Used Oil Analysis to provide updated information on the composition of used oils from various sources. *See* Hazardous Waste Management System; General; Identification and Listing of Hazardous Waste; Used Oil, 56 Fed. Reg. 48,000, 48,006 (EPA proposed rule 1991). The results of the Used

substances. This Used Oil Analysis contradicts EPA's statement in the 1987 Memorandum that used oil is not necessarily contaminated with hazardous substances.[213]

The Used Oil Analysis examined the composition of the following categories of used oil: automotive oil and fluids; diesel engine crankcase oil; marine oil; hydraulic oil and fluids; metalworking oil; electrical insulating oil; natural gas-fired engine oil; aircraft engine oil; and aircraft engine oil and fluids in storage tanks.[214] The Used Oil Analysis found that used oil from gasoline-powered engines (e.g., automotive crankcase, marine, and piston-engine aircraft) typically exhibited the toxicity characteristic[215] of a hazardous waste.[216] The Used Oil Analysis also found samples of hydraulic oil, metalworking oil, and

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Oil Analysis are discussed in EPA's September 1991 Proposal to list certain categories of used oil destined for recycling as hazardous waste. 56 Fed. Reg. 48,006-48,019.

In the 1987 Memorandum, EPA noted that used oil does not necessarily contain non-indigenous hazardous substances or hazardous substances in elevated levels. 1987 Memorandum, *supra* note 62, at 10. As support for this proposition, EPA cited data submitted by a commentator in response to EPA proposed rulemaking listing used oil as a hazardous waste. *Id.* at 10 n.7 (citing Comments of the Utility Solid Waste Activities Group, Appendix C (Feb. 11, 1986)). However, the Used Oil Analysis is a better measure of the likelihood of used oil containing hazardous substances given its more recent analytical data.

213. *See* 1987 Memorandum, *supra* note 62, at 10.

214. Used Oil Analysis, Table III.C.1; 56 Fed. Reg. 48,007

215. *See* 40 C.F.R. § 261.24 (1992) (establishing the requirements for satisfying the toxicity characteristic of a hazardous waste).

216. In particular, the number of used oil samples per used oil category that exhibited the toxicity characteristic of a hazardous waste were as follows:

Used Oil Category	Toxicity Characteristic
Automotive Crankcase Oil - Unleaded Gasoline Engines	75
Automotive Oils/Fluids - Storage Tank Samples	100
Diesel Trucks and Buses - Crankcase Oil	10
Diesel Trucks/Buses - Storage Tank Samples	70
Diesel Heavy Equipment - Crankcase Oil	0
Diesel Railroad Engine - Crankcase Oil	20
Marine Oil - Marina Used Oil Storage Tank Samples	86
Hydraulic Oils/Fluids	45
Metalworking Oils/Fluids	17
Electrical Insulating Oil	0
Natural Gas-Fired Engine Oil	20
Aircraft Engine Oil	
- Turbojet Aircraft	0
- Piston Engine Aircraft	100
Aircraft Oils/Fluids - Storage Tank Samples	86

Used Oil Analysis, Table III.C.5; *see* 56 Fed. Reg. 48,018.

natural gas-fired engine oil which exhibited the toxicity characteristic.[217] To exhibit the toxicity characteristic, these categories of used oil had to contain elevated levels of a hazardous substance.[218] Thus, probability supports creating a presumption that used oil is contaminated with a hazardous substance.

Establishing a presumption that used oil is contaminated with hazardous substances is analogous to EPA's decision to create a presumption that transformers containing mineral oil dielectric fluid are contaminated with PCBs.[219] PCB-contaminated electric equipment contains PCBs in concentrations of fifty or greater, but less than 500 parts per million (ppm).[220] EPA established its presumption in 1979 on the basis of data which indicated that thirty-eight percent of the mineral-oil transformers contained PCBs in concentrations between 50 and 500 ppm.[221] By contrast, the Used Oil Analysis found that half of the sixteen categories of used oil exhibited the toxicity characteristic of a hazardous waste.[222] Therefore, the data on the toxicity of used oil is more compelling than the data EPA used for creating its presumption that mineral-oil transformers are contaminated by PCBs.

2. Fairness to Litigants

There are two fairness grounds for creating a presumption that used oil is contaminated with a hazardous substance. First, requiring a CERCLA plaintiff to prove the identity of contaminants in a defendant's used oil places an unnecessarily high burden on the plaintiff.[223] As between a CERCLA plaintiff and a defendant who generated or transported used oil to a Superfund site, the defendant generator or

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217. *Id.*

218. *See* 40 C.F.R. § 261.24 (1992). However, it is not necessary for used oil to meet the toxicity characteristic in order to satisfy the requirements for becoming a hazardous substance under CERCLA. Rather, in order to result in CERCLA liability, it is sufficient that the used oil contains a hazardous substance at a level greater than that which was in the oil prior to usage. This is consistent with the determination by several courts that a hazardous substance does not have to be in a certain minimum concentration or toxicity level to result in CERCLA liability. *See Western Processing*, 761 F Supp. at 722; *Exxon*, 744 F Supp. at 484; *Carolawn*, 21 Env't Rep. Cas. (BNA) at 2126 n.3; United States v. Wade, 577 F Supp. 1326, 1340-41 (E.D. Pa. 1983).

219. *See* Disposal of Polychlorinated Biphenyls, 56 Fed. Reg. 26,738, 26,741 (EPA advanced notice of proposed rulemaking 1991); Polychlorinated Biphenyls (PCBs) Manufacturing, Processing, Distribution in Commerce and Use Prohibitions, 44 Fed. Reg. 31,514, 31,517 (EPA final rule 1979).

220. *See* 40 C.F.R. § 761.3 (1992).

221. *See* 44 Fed. Reg. 31,517.

222. *See* Used Oil Analysis, Tables III.C.3A-3D; 56 Fed. Reg. 48,009-11.

223. *See* Howing Co. v. Nationwide Corp., 927 F.2d 263, 266 (6th Cir. 1991) (creating a rebuttable presumption against the defendant because of the "unnecessarily unrealistic evidentiary burden" that would have been placed on the plaintiffs).

transporter is in a better position to determine the composition of the oil.[224] As stated by the Ninth Circuit in *United States v. Hayes*,[225]

> It is well settled that in the interest of fairness the burden of proof ordinarily resting upon one party as to a disputed issue may shift to his adversary when the true facts relating to the disputed issue lie peculiarly within the knowledge of the latter.[226]

The *Western Processing* court used this rationale to find that the petroleum exclusion did not apply to a defendant who had not provided information on the composition of its tanks which stored and may have contaminated used oil sludge with hazardous substances.[227] This reasoning was also followed in *Zands v. Nelson*[228] where a California federal district court shifted the burden to prior owners and operators of a contaminated property to show that contamination did not occur during their ownership or operation of the property.[229] The *Zands* court observed that prior owners and operators could have tested the property at the end of their ownership and operation to demonstrate the absence of contamination, whereas the current owner or operator did not have this option.[230] The court shifted the burden to the prior owners and operators to avoid the illogical and unjust result where a plaintiff could prove that contamination occurred prior to its acquisition of the property, but could be denied recovery be-

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224. In an economic analysis, the CERCLA defendant is the "cheapest cost avoider" who is best able to determine the composition of the used oil. *See* Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1066 (1972).

225. 369 F.2d 671 (9th Cir. 1966).

226. *Id.* at 676.

227. *Western Processing*, 761 F Supp. at 722. Without deciding the ultimate question of liability, a presumption that used oil is outside the scope of the petroleum exclusion places the burden of proving the composition of the used oil on the party who can do so most economically and efficiently. *See* United States v. Tex-Tow, Inc., 589 F.2d 1310 (7th Cir. 1978), which, in a water pollution case, observed that

> the party engaged in the potentially polluting enterprise is in the best position to estimate the risk of accidental pollution and plan accordingly, as by raising its prices or purchasing insurance. Economically, it makes sense to place the cost of pollution on the enterprise which statistically will cause pollution and in fact does cause pollution. We do not, however, here decide the question of ultimate liability.

Id. at 1314-15 (footnotes omitted).

228. 797 F Supp. 805 (S.D. Cal. 1992).

229. *Id.* at 815-17

230. *Id.* at 817 Specifically, the *Zands* court observed that

> the owner/operator defendants had the best opportunity to gather evidence that would have proven when the contamination occurred. Each defendant could have tested the soil at the end of his or her ownership and operation of the property. Such a test would potentially have proven the absence of contamination when a given defendant separated from the property, thereby enabling that defendant to prove he or she did not cause the contamination. The plaintiffs, on the other hand, did not have this option.

Id.

cause it was unable to prove which specific prior owner or operator caused the contamination.[231]

Second, the absence of a rebuttable presumption that used oil is contaminated with hazardous substances rewards CERCLA defendants for maintaining poor documentation on the composition of used oil. That is, the absence of a rebuttable presumption encourages parties to behave in a less environmentally responsible manner (e.g., avoiding determining the contaminants in their used oil). In addition, there is no disincentive to discourage used oil generators and transporters from having their used oil recycled or disposed at a poorly run facility, since the environmental contamination resulting from this poor management will not affect these generators and transporters. Indeed, facilities which do not take safeguards to provide for the environmentally sound management of used oil will experience a cost savings which they can pass on to the generators and transporters. By contrast, a rebuttable presumption that used oil is outside the petroleum exclusion encourages used oil generators and transporters to monitor the quality of used oil management facilities.[232]

3. Congressional Policy

Congress enacted CERCLA to achieve two broad objectives: to facilitate the prompt clean up of sites contaminated by hazardous substances and to hold those parties responsible for the contamination liable for the clean up costs.[233] Creating a presumption that used oil is contaminated with a hazardous substance is consistent with both of these objectives. With respect to the first objective, a presumption that used oil is contaminated with a hazardous substance provides an incentive for parties who generated, transported or otherwise managed used oil at a Superfund site to participate in the clean up of the site. In the absence of this presumption, these parties have little in-

231. *Id.* at 816. *See* FOWLER V HARPER ET AL., 4 THE LAW OF TORTS § 20.2, at 103 n.26 (2d ed. 1986) (in a discussion of negligence cases, observing that "[w]henever a procedural rule will consistently work to subvert substantive justice, it should be scrutinized to see whether any fundamental guarantee requires the rule to persist in such a form").

232. This argument for a rebuttable presumption that used oil is outside the petroleum exclusion parallels the argument favoring the imposition of strict liability under CERCLA, rather than negligence. In arguing for the imposition of strict liability under CERCLA, one commentator advanced the following argument, which applies equally to creation of the rebuttable presumption advocated in this Article:

> By forcing corporations involved in toxic waste disposal to internalize cleanup costs, strict liability serves as the most efficient means of encouraging the development of safer waste disposal techniques. If companies know in advance that they will be liable for any releases with which they are associated, they will continue to seek newer and safer methods of waste disposal.

Toxic Waste Litigation, *supra* note 14, at 1519-20.

233. H.R. REP. No. 253 (III), 99th Cong., 2d Sess. 15 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3038; *see Artesian Water*, 659 F Supp. at 1276-77.

centive to participate in the clean up of the Superfund site, thus delaying the clean-up process.

A rebuttable presumption that releases of used oil are outside the petroleum exclusion is also consistent with CERCLA's second policy objective. Without such a presumption, there is the potential for the anomalous situation where used oil at a Superfund site is known to be contaminated with hazardous substances, but the generators and transporters of this used oil escape CERCLA liability because there is no documentation that the specific used oil generated or transported by these parties was contaminated with hazardous substances. This poor documentation will shield the generators and transporters from CERCLA liability. This result undermines Congress' intent to hold the parties responsible for the contamination at Superfund sites liable for the clean up costs.

VI. Conclusion

Given the widespread presence of used oil at Superfund sites, litigation over the scope of the petroleum exclusion to CERCLA liability is likely to continue. This Article provides an analytical framework for understanding the scope of the petroleum exclusion. The conclusion of EPA and the courts that gasoline and other fuels are within the petroleum exclusion, but that used oil and other petroleum products containing non-indigenous hazardous substances are outside the exclusion, is supported by the plain meaning and legislative history of the statute.

The plain meaning of the exclusion and CERCLA's legislative history do not provide guidance for the more problematic situation involving releases of hazardous substances at a used oil Superfund site where there is no evidence of the contaminants in the used oil brought to the site. This Article proposes addressing this situation by creating a rebuttable presumption that used oil is contaminated by a hazardous substance. The practical effect of this presumption is that CERCLA liability will attach to releases of used oil, unless the defendant can put forth evidence demonstrating that the used oil was not contaminated by hazardous substances. This presumption places the burden of proving the absence of contaminants in used oil on the party in the best position to make this determination — the defendant. This presumption is consistent with the objectives of CERCLA, promotes fairness, and reflects the probability that used oil is contaminated by hazardous substances.