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# NOTES

## PUTTING RECOVERY BACK INTO RCRA: AN EFFECTIVE ADDITION TO THE RESOURCE CONSERVATION AND RECOVERY ACT

### INTRODUCTION

Although the Resource Conservation and Recovery Act (RCRA)<sup>1</sup> exists to regulate and enforce environmentally sound hazardous waste disposal practices,<sup>2</sup> RCRA has failed to achieve its goals.<sup>3</sup> One reason for RCRA's ineffectiveness

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1. Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6991 (1988) [hereinafter RCRA]. RCRA was designed to eliminate the "last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous wastes." H.R. Rep. No. 1491, 94th Cong., 2d Sess. 4, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6238, 6241. RCRA is an amendment to the first piece of federal solid waste regulations called the Solid Waste Disposal Act of 1965. For a discussion of RCRA's legislative history, see Kovacs & Klucsik, *The New Federal Role in Solid Waste Management: The Resource Conservation and Recovery Act of 1976*, 3 COLUM. J. ENVTL. L. 205, 216-20 (1977).

Subtitle C of RCRA regulates only hazardous wastes and has resulted in the most comprehensive regulations that the United States Environmental Protection Agency (EPA) has ever developed. UNITED STATES OFFICE OF SOLID WASTE RCRA ORIENTATION MANUAL, § 1-8 (Jan. 1986). RCRA's "cradle to grave" approach enables the EPA to monitor and control hazardous waste at every point in the waste cycle, thereby protecting human health and the environment from the dangers of hazardous waste mismanagement. UNITED STATES OFFICE OF SOLID WASTE, SOLVING THE HAZARDOUS WASTE PROBLEM 6 (Nov. 1986).

2. RCRA exists to promptly and effectively respond to the disposal problems of the huge volumes of solid waste generated nationwide. The goals set by RCRA are 1) to protect human health and the environment, 2) reduce waste and conserve natural resources, and 3) reduce or eliminate the generation of hazardous waste as expeditiously as possible. The EPA enforces Subtitle C of RCRA to ensure proper management of hazardous waste from the moment the waste is generated until its ultimate disposal. UNITED STATES OFFICE OF SOLID WASTE, RCRA ORIENTATION MANUAL I-10-11 (Jan. 1986).

3. 1988 United States General Accounting Office (GAO) report indicates that EPA and state enforcement actions were both timely and appropriate in only 37 percent of the 836 cases reviewed by the GAO. U.S. GENERAL ACCOUNTING OFFICE (GAO/RCED-88-140), HAZARDOUS WASTE: MANY ENFORCEMENT ACTIONS DO NOT MEET EPA STANDARDS 2 (June 1988)[hereinafter EPA STANDARDS]; A 1986 GAO report states, "Federal agency performance in implementing RCRA has not been exemplary." U.S. GENERAL ACCOUNTING OFFICE (GAO/RCED-86-76), HAZARDOUS WASTE: FEDERAL CIVIL AGENCIES SLOW TO COMPLY WITH REGULATORY REQUIREMENTS 3 (May 1986). The 1986 GAO report indicates that over 70 percent of the identified hazardous waste handlers reviewed by the GAO had not been inspected, and of those that had been inspected, almost half had violations. *Id.* A 1985 GAO report indicated that the consensus of EPA and state officials in California, Illinois, Massachusetts, and New Jersey was that illegal disposal of waste continues and that "regulations designed to prevent illegal disposal from happening *have not been fully*

results when parties held liable under RCRA are insolvent and cannot pay for necessary environmental cleanup of imminent dangers.<sup>4</sup> However, financiers who knowingly invest in improperly run hazardous waste facilities can escape liability under RCRA.

When a hazardous waste cleanup fails because of a lack of solvent liable parties, the costs of a RCRA cleanup necessarily fall on the United States Environmental Protection Agency.<sup>5</sup> However, without the financial assistance of the private sector, environmental contamination often remains unabated.<sup>6</sup> Because of this nation's production of hazardous waste, a lack of financing for proper hazardous waste disposal<sup>7</sup> and cleanup of hazardous waste contamination

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*effective.*" (emphasis added). U.S. GENERAL ACCOUNTING OFFICE (GAO/RCED-85-2), *ILLEGAL DISPOSAL OF HAZARDOUS WASTE: DIFFICULT TO DETECT OR DETER* 13 (Feb. 1985).

4. For example, when a liable party files for bankruptcy, environmental contamination may remain unabated due to the lack of solvent liable parties to satisfy a judgment ordering environmental cleanup. See *infra* notes 36-39 and accompanying text.

5. The United States Environmental Protection Agency [hereinafter EPA]. See *infra* note 30. Under certain conditions, when cleanup efforts fail under RCRA, the costs of the cleanup may be transferred to Superfund. Established in the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601-9675 (1980), the Superfund consists of an \$8.5 billion fund to be used for, among other things, cleaning up abandoned hazardous waste sites. The Superfund is financed from three sources. Eleven percent of the Superfund comes from the general fund of the United States Treasury, 73 percent is from taxes levied on petroleum and chemical related businesses, and about 16 percent of the fund comes through penalties, recoveries, and interest earned on the balance of the Superfund. U.S. GENERAL ACCOUNTING OFFICE (GAO/RCED-85-2) *ILLEGAL DISPOSAL OF HAZARDOUS WASTE: DIFFICULT TO DETECT OR DETER* 12 (Feb. 1985). Factors considered in determining when costs not recoverable under RCRA may transfer to Superfund include 1) when the facility owner or operator is bankrupt; 2) the facility has lost authorization to operate under RCRA; or, 3) on a case by case basis, the owner or operator is deemed unwilling to clean up the facility under RCRA. See U.S. GENERAL ACCOUNTING OFFICE (GAO/RCED-88-48), *HAZARDOUS WASTE: CORRECTIVE ACTION CLEANUPS WILL TAKE YEARS TO COMPLETE* 5 (Dec. 1987).

6. EPA STANDARDS, *supra* note 3, at 2. "Because RCRA does not provide either funds or a management framework for the clean up of environmentally contaminated sites, the EPA is required to proceed against private parties." R. ZENER, *GUIDE TO ENVIRONMENTAL LAW* 196 (1981). Budget statistics reflect the need for the public and private sectors to together develop plans for pollution control. For example, a 1988 GAO report states that the EPA's operating budget (in real terms) declined 15 percent between 1978 and 1987 while the federal budget deficit rose 248 percent during the same period. Due to a lack of funds and resources the EPA cannot correct all presently existing environmental contamination. U.S. GENERAL ACCOUNTING OFFICE (GAO/RCED-88-101) *ENVIRONMENTAL PROTECTION AGENCY: PROTECTING HUMAN HEALTH AND THE ENVIRONMENT THROUGH IMPROVED MANAGEMENT* 36-37 (Aug. 1988).

7. For the purposes of this Note, "proper disposal" shall mean disposal that is in compliance with RCRA. "Proper disposal" implies landfilling practices with a probability of future toxic releases that is negligible in comparison with the risks created by many of the disposal practices that have, heretofore, been in common use. See S. Rep. No. 848, 96th Cong., 2d Sess. 3 *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 5019-46.

will pose serious and continuing environmental problems.<sup>8</sup>

High initial capital costs<sup>9</sup> involved in the operation of a hazardous waste disposal facility often demand that financiers provide all or most of the initial capital.<sup>10</sup> Although financiers play an essential role in the hazardous waste disposal industry, they do so without being expressly listed as potentially liable parties under RCRA.<sup>11</sup> The need for the economic force of financiers to

8. RCRA aims to solve the problems associated with the three to four billion tons of discarded materials generated each year, and the problems resulting from the anticipated 8 percent annual increase in the volume of such waste. See H.R. REP. No. 1491, 94th Cong., 2d Sess. 2, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6238-39. However, the General Accounting Office (GAO) reported in 1987 that significant data gaps and methodological problems precluded the GAO from assessing the actual generation of hazardous waste or the exact need for future capacity. U.S. GENERAL ACCOUNTING OFFICE (GAO/PEMD-87-11BR), HAZARDOUS WASTE: UNCERTAINTIES OF EXISTING DATA 7-9 (February 1987). Recent estimates of annual generation of hazardous waste range from 40 million metric tons to 1 billion metric tons. See Note, *Hazardous Waste in Interstate Commerce: Minimizing the Problem After City of Philadelphia v. New Jersey*, 24 VAL. U.L. REV. 77, 78 n.6 (1989). One source helps us conceptualize the extent of hazardous waste production in the United States. Annually the U.S. produces in excess of 264 million metric tons of hazardous waste, enough to fill the New Orleans Superdome 1,500 times over. Some six billion tons have accumulated since 1950. F. ANDERSON, D. MANDELKER & A. TARLOCK, ENVIRONMENTAL PROTECTION: LAW AND POLICY 602 (2d ed. 1990). See generally Blomquist, *Beyond the EPA and OTA Reports: Toward a Comprehensive Approach to Hazardous Waste Reduction in America*, 18 ENVTL. L. 817 (1988) (sets forth other alternatives for more environmentally sound alternatives to current hazardous waste disposal practices).

9. See *infra* note 138 which sets forth a sampling of cost estimates of proper RCRA requirements and operation of a hazardous waste landfill.

10. Burcat, *Environmental Liability of Creditors: Open Season on Banks, Creditors, and Other Deep Pockets*, 103 BANKING L. J. 509 (1986) (Commentator sets forth the inextricable and dependent roles of creditors and hazardous waste industry.). See also note 43, which gives an example of an instance where a financier enabled a hazardous waste disposal facility to continue operation.

11. For example, RCRA currently provides that suit to redress imminent endangerment may be brought against

... any person (including any past or present *generator*, past or present *transporter* of hazardous waste, past or present *owner or operator* of a treatment, storage or disposal facility) who has contributed or is contributing to such handling, storage, treatment, transportation, or disposal.

42 U.S.C. § 6973(a) (1988) (emphasis added).

This language in Section 6973(a), which could potentially hold financiers liable, is vague. Although, in at least one recent case, the provision for liability for any person who "has contributed or is contributing to" such handling, storage, treatment, transportation or disposal has allowed one court to hold that manufacturers of herbicides liable based on their contractual relationship with the facility. *United States v. Aceto Agricultural Chem. Corp.*, 872 F.2d 1373 (8th Cir. 1989). In *Aceto*, the contract with the hazardous waste facility "inherently" resulted in the generation and disposal of hazardous waste. The court denied the defendant's motion to dismiss because the defendant's contract agreement and the inherent nature of the process required by the contract were sufficient to qualify as "contributing to" environmental harm caused at the other contracting party's site.

facilitate compliance with RCRA and to pay for cleanup of environmental contamination caused by improper hazardous waste disposal mandates a change in RCRA.<sup>12</sup>

Section I of this Note examines a recent environmental case tried in the United States District Court for the Northern District of Indiana, which demonstrates RCRA's ineffectiveness in recovering the costs needed for cleanup of the environmental hazards caused by RCRA violations.<sup>13</sup> Section II analyzes the present standards of liability under RCRA and how the statutory language of RCRA necessarily precludes holding most financiers liable for environmental recovery costs.<sup>14</sup> Section III draws upon the principles of the EPA Civil Penalty policy and the National Stolen Property Act to offer a legal rationale in support of amending RCRA to expressly impose liability on controlling financiers.<sup>15</sup> Section IV presents the economic analysis in support of an amendment to RCRA that would hold controlling financiers liable.<sup>16</sup> Finally, Section V proposes a statutory amendment to RCRA<sup>17</sup> expressly providing for

12. "Evolution is a central concept in environmental law." Blomquist, *Beyond the EPA and OTA Reports, Toward A Comprehensive Theory and Approach to Hazardous Waste Reduction in America*, 18 ENVTL. L. 817, 818 n.1 (1988) (Commentator states, "Environmental law does damage to the prominent Austinian view of legislation as a command suspended in time, dependable in content, and resistant to summary change. The environmental laws, instead, teach lessons of dynamics and flux where a regulation is inseparable from revision, a statute not far from an amendment." *Id.* at 819. RCRA has been amended twice since its adoption in 1976, once in 1980 and most recently on November 8, 1984. The 1984 amendments, called the Hazardous and Solid Waste Amendments (HSWA), significantly expanded on both the scope and detailed requirements of RCRA. The Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (1984). *See also* UNITED STATES OFFICE OF SOLID WASTE, RCRA ORIENTATION MANUAL § 1 (Jan. 1986). [hereinafter RCRA ORIENTATION MANUAL]. For a discussion of the Congressional rationale for the last RCRA amendments, see Ottinger, *Strengthening of the Resource Conservation and Recovery Act in 1984: The Original Loopholes, the Amendments, and the Political Factors Behind Their Passage*, 3 PACE ENVTL. L. REV. 1 (1985). For purposes of this note, an improperly run landfill is one which is being operated out of compliance with RCRA standards. Examples of improper disposal include indiscriminate dumping on public or private land, improperly created landfills, and accumulation of drums stored improperly above ground.

13. *See infra* notes 20-47 and accompanying text.

14. *See infra* notes 48-84 and accompanying text.

15. *See infra* notes 85-122 and accompanying text. For the purposes of this note, "controlling financier" is one who knowingly invests in an improperly operated hazardous waste facility, thereby contributing to the facility being operated in a manner unauthorized by the federal regulations and the resulting environmental harm.

16. *See infra* notes 123-68 and accompanying text.

17. The proposal of this Note also may apply to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) 42 U.S.C. §§ 9601-9675 (1980). A significant link exists between RCRA and CERCLA. CERCLA addresses problems at facilities no longer operating, while RCRA regulates present and future waste management. However, the acts often overlap and are often treated similarly by the courts. *See United States v. Northeastern Pharmaceutical & Chem. Co.* (NEPACCO), 579 F. Supp. 823, (W.D. Mo. 1984), *rev'd in part, aff'd in part* 810 F.2d 726, 745 (8th Cir. 1986). The NEPACCO court stated "analysis of the scope of individual liability under

controlling financier<sup>18</sup> liability and outlines the potential limitations of the proposed amendment.<sup>19</sup>

### I. UNITED STATES V. ENVIRONMENTAL WASTE CONTROL: A CASE ANALYSIS OF THE PROBLEM

In *United States v. Environmental Waste Control, Inc.*,<sup>20</sup> the United States District Court for the Northern District of Indiana held the landfill<sup>21</sup> owners<sup>22</sup> of the Four County Landfill<sup>23</sup> in violation of RCRA.<sup>24</sup> Reflecting the current aggressiveness in enforcing ever stricter environmental regulations, the court imposed a series of severe sanctions and the Seventh Circuit affirmed the district

RCRA is similar to our analysis of the scope of individual liability under CERCLA." *Id.* See *supra* note 11, *United States v. Aceto Agricultural Chem. Corp.*, 872 F.2d 1373 (8th Cir. 1989) (held that RCRA and CERCLA provisions were analogous and treated CERCLA and RCRA provisions with the same analysis).

18. See *supra* note 15, which defines the term "controlling financier" for the purposes of this Note.

19. See *infra* notes 169-188 and accompanying text.

20. *United States v. Environmental Waste Control, Inc.*, 710 F. Supp. 1172 (N.D. Ind. 1989), *aff'd*, Nos. 89-1865 and 89-2197 (7th Cir. Oct. 31, 1990).

21. A landfill is a disposal facility or part of a facility where waste is placed in or on land. RCRA ORIENTATION MANUAL glossary 5 (Jan. 1986). Landfilling is the cheapest, and thus commercially preferred, means of disposing of hazardous waste. *Id.* at IV-57. Until the last decade, landfilling practices often focused only on burying the waste to get it out of sight and on the control of surface problems such as blowing litter. *Id.* at IV-58. Experiences at Love Canal in New York and other burial operations have demonstrated the potential for severe human health and environmental impacts from improper landfilling. *Id.* The problems that hazardous waste landfills have presented can be divided into two broad classes. The first includes fires, explosions, production of toxic fumes, and similar problems resulting from the improper management of ignitable, reactive, and incompatible wastes. The second problem concerns the contamination of surface and groundwaters. RCRA ORIENTATION MANUAL, IV-Subpart N (1986). Groundwater is water below the land surface in a zone of saturation. Landfilling is especially harmful to human health and the environment when precautions are not taken to divert toxins from the landfill from migrating to drinking water sources. *Id.* See OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, PUB. NO. OTA-ITE-317, SERIOUS REDUCTION OF HAZARDOUS WASTE: FOR POLLUTION PREVENTION AND INDUSTRIAL EFFICIENCY (1986) (definitions of key hazardous waste policy terminology).

22. Although "owner" is not defined in the definitions section of RCRA 42 U.S.C. § 6903, "owner" is defined as "the person who owns a facility or part of a facility" in RCRA ORIENTATION MANUAL glossary 6 (Jan. 1986).

23. The Four County Landfill is located near the communities of Culver, DeLong, and Leiters Ford in Fulton County, Indiana. The site on which the landfill is located consists of approximately 61.5 acres. The area surrounding the landfill is rural and agricultural, consisting of open fields, wetlands, wooded lots, cultivated land, and homes. The Tippecanoe River and Kings Lake are in the very near vicinity to the landfill. The groundwater beneath the landfill is susceptible to risk of migration of toxins to neighboring residential land. *Environmental Waste Control, Inc.*, 710 F. Supp. at 1181.

24. See *supra* note 1.

court in all respects.<sup>25</sup>

In spite of the landfill owners' violations of RCRA, the ensuing litigation, and the district court's holding, the plaintiffs' victory was Pyrrhic.<sup>26</sup> Recovery costs from the owners have been delayed by the owners' filing for bankruptcy.<sup>27</sup> The landfill's financiers cannot be reached under RCRA, and the environmental contamination at the Four County Landfill remains unabated.<sup>28</sup> The Four County Landfill litigation exemplifies the nationwide problem of RCRA's ineffective recovery of the costs needed to clean up environmental harms caused by improper transportation, storage and disposal of hazardous waste.<sup>29</sup>

25. In *United States v. Environmental Waste Control, Inc.*, 710 F. Supp. 1172 (N.D. Ind. 1989), *aff'd*, Nos. 89-1865 and 89-2197 (7th Cir. Oct. 31, 1990), federal district court Judge Miller wrote, "The matter of remedies presents the most troubling issues in this case.... This court appears to write on a clean slate with respect to these issues." *Id.* at 1240. Judge Miller ordered the landfill permanently closed, ordered corrective action, and imposed a civil penalty in the amount of \$2.78 million plus attorney fees. *Id.* at 1240-49. The court cited from *United States v. T. & S. Brass and Bronze Works, Inc.* 681 F. Supp. 314, 322 (D.S.C. 1988) and asserted that "assessment of the amount of a civil penalty is committed to the informed discretion of the Court." *Environmental Waste Control*, 710 F. Supp. at 1242. Judge Miller then proceeded to implement the court's discretion. Although the EPA civil penalty policy allows for penalties of \$25,000 per day, the court held that "a civil penalty of more than \$2,000 per a day would be overly punitive." *Id.* at 1245. The court arrived at the \$2.78 million figure because the amount was a "modest assessment, but appropriate in light of the purposes of a civil penalty." *Id.* The complete order for corrective action is set forth following the opinion. *Id.* at 1249. Consequently, the *Environmental Waste Control* litigation resulted in the first permanent closure of a RCRA-regulated facility under the injunctive remedies provided by RCRA's primary enforcement provision, 42 U.S.C. § 6928. *A Tougher Less Gentle EPA Emerges*, NAT'L L. J., Dec. 3, 1990, at 5, 34. Additionally, *Environmental Waste Control* resulted in the largest civil penalty to date under RCRA. *Id.*

26. A victory of success gained at great cost. The term Pyrrhic victory is an allusion to the exclamation of Pyrrhus, King of Epirus, after his victory over the Romans in 279 B.C., a battle in which he lost a large part of his army: "One more such victory over the Romans and we are utterly undone." WEBSTER'S NEW INTERNATIONAL DICTIONARY 1855 (3rd ed. 1961).

27. See *infra* notes 37-39 and accompanying text regarding the ramifications of liable parties filing for bankruptcy.

28. The district court issued a corrective order to the landfill owners on March 29, 1989 and at this writing of February 28, 1990, no corrective action had been taken by the defendants or the government. Testing done on October 30, 1989 confirmed serious contamination of groundwater below the landfill. Letter to Robert Blomquist from John C. Hamilton, attorney for the citizens group STOP, *infra* note 32 (Nov. 14, 1989) (discussing recently discovered groundwater contamination levels and pending appeal of *United States v. Environmental Waste Control, Inc.*, 710 F. Supp. 1172, 1240 (N.D. Ind. 1989), *aff'd*, Nos. 89-1865 and 89-2197 (7th Cir. Oct. 31, 1990).

29. Hazardous waste is defined in RCRA 42 U.S.C. § 6903(5) as:

a solid waste, or combination of solid wastes, which because of its quantity concentration or physical, chemical, or infectious characteristic may (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible illness; or (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

The Environmental Protection Agency (EPA)<sup>30</sup> alleged many RCRA violations<sup>31</sup> and sought corrective action from the Four County landfill owners in filing suit against Environmental Waste Control, Inc. After the EPA initiated

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42 U.S.C. § 6903(5)(1988).

A national survey conducted by the EPA estimates that 264 million metric tons of hazardous waste are generated per year. Most hazardous waste, about 80%, has been disposed of into or on land at a variety of disposal locations including landfills, surface impoundments, waste piles, lagoons, and underground injection wells. See *infra* note 30 discussing the role and responsibilities of the EPA in enforcing environmental regulations. See also Angelo & Berguson, *The Expanding Scope of Liability for Environmental Damage and its Impact on Business Transactions*, 8 CORP. L. REV. 101, 103 (1985) (The writers note that the problem and regulation of hazardous waste also occurs beyond land designated as a hazardous waste site. Such problem areas include leakage from underground storage tanks and pipelines, areas of frequent spills (such as loading and unloading areas), and treatment and holding ponds. These non-traditional hazardous waste sites and their regulation are beyond the scope of this Note).

30. The EPA is a federal agency created in 1970 that is authorized by Congress to develop regulations to enforce the comprehensive waste management program set forth in RCRA. Other environmental laws enforced by the EPA are: the Clean Air Act, 42 U.S.C. §§ 7401-7642 (1970), which regulates the emission of harmful air pollutants; the Clean Water Act, 33 U.S.C. §§ 1251-1387 (1972), which regulates the discharge of pollutants into the nation's surface waters; the National Environmental Policies Act, 42 U.S.C. §§ 4321-4370 (1969), which declares the national policy to encourage productive and enjoyable harmony between man and his environment; the Safe Drinking Waters Act, 42 U.S.C. §§ 300f-300j-11 (1977), which regulates contaminant levels in drinking water; the Toxic Substances Control Act, 15 U.S.C. §§ 2601-2654 (1977), which regulates the manufacture use and disposal of chemical substances, and the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund), 42 U.S.C. §§ 9601-9675 (1980), which provides for the cleanup of inactive and abandoned hazardous waste sites. The EPA also publishes guidance documents and policy directives to clarify issues related to the implementation of the environmental regulations.

There are many circumstances under which a hazardous waste site regulated by RCRA must comply with one or more of the other environmental Acts enforced by the EPA. For example, a hazardous waste facility governed by RCRA that has pollutant emissions must also meet the performance standards set forth in the Clean Air Act, a RCRA facility that discharges wastes into navigable waters must also abide by the Clean Water Act, and any RCRA facility that handles hazardous wastes that contain more than 50 parts per million of PCB's is also subject to regulation of the Toxic Substances Control Act. RCRA ORIENTATION MANUAL III-128-29 (1986).

31. The EPA claimed that the landfill should be temporarily closed and civil penalties assessed because the landfill lost its interim status to operate a land disposal facility. The EPA sought additional civil penalties for alleged violations of RCRA's "minimum technology" requirements and groundwater monitoring standards. Lastly, the EPA sought corrective action for an alleged release of hazardous waste or hazardous waste contaminants. *Environmental Waste Control*, 710 F. Supp. at 1180-81. Among the violations found were the failure to provide sufficient information to define the extent of contamination, failure to provide a schedule of implementation of groundwater monitoring, and failure to determine the rate, extent or concentrations of migration of hazardous waste or hazardous waste constituents. *Id.* at 1197.

Counsel for all litigants in *United States v. Environmental Waste Control*, agreed that the Indiana regulations pertinent to the case at bar differed in no material respect from the federal regulations (RCRA); accordingly, the court and this Note limit all references to RCRA while recognizing that the landfill's operation may have been controlled by virtually identical state regulations. See *Environmental Waste Control*, 710 F. Supp., n. 6 at 1183.



its suit, a citizen's group, Supporters to Oppose Pollution (STOP),<sup>32</sup> intervened on the behalf of the residents living near the contaminated Four County Landfill and sought permanent closure of the landfill.<sup>33</sup> STOP's allegations of RCRA violations stemmed from the landfill owners' practices of disposing hazardous waste in unlined cells.<sup>34</sup> After a lengthy trial, the district court found that the hazardous wastes had migrated, causing contamination of the groundwater underlying the landfill as well as potentially contaminating nearby private

32. [Hereinafter STOP]. STOP is a non-profit corporation including individuals whose homes are in the vicinity of the landfill, who draw their drinking water from an aquifer at risk due to the releases of hazardous waste and hazardous waste contaminants from the landfill, and whose property received polluted dust and surface water from the landfill. STOPS's complaint in a derivative action against the Heritage Group, financier's of the Four County Landfill, *Supporters to Oppose Pollution, Inc. (STOP) v. The Heritage Group*, No. S89-00534 (N.D. Ind., filed Nov. 17, 1989).

Acting as private attorney general, STOP intervened in the original suit pursuant to CERCLA 42 U.S.C. § 9613(i), which provides for citizen intervention in an EPA action and for the recovery of costs of litigation and attorney fees, respectively. *United States v. Environmental Waste Control, Inc.*, 710 F. Supp. 1172, 1247 (N.D. Ind. 1989). Note that intervention to a RCRA action is maybe gained through a CERCLA provision. RCRA and its 1984 amendments provide ongoing opportunities for public participation in all facets of implementation. RCRA provides that citizens have access to information obtained by the EPA or the states during a facility inspection, that citizens are allowed to participate in the permitting process from the beginning, that citizens may bring suit against anyone whose hazardous waste management activities constitute an imminent hazard or substantial endangerment, or against anyone who may be violating a RCRA permit, standard, or requirement. UNITED STATES OFFICE OF SOLID WASTE, SOLVING THE HAZARDOUS WASTE PROBLEM 27 (1986).

33. STOP joined the four claims brought by the EPA but sought "nothing short of permanent closure." *Environmental Waste Control*, 710 F. Supp. at 1181. STOP has subsequently filed a derivative action against financiers of EWC. The derivative action, *Supporters to Oppose Pollution, Inc. (STOP) v. The Heritage Group*, No. S89-00534 (N.D. Ind., filed Nov. 17, 1989), may be unsuccessful due to the lack of specific language in RCRA holding controlling financiers liable. See *supra* note 11. The derivative action seeks an order directing Heritage Group to pay for all costs of permanently closing the landfill, all corrective action ordered by the court in the judgment, imposing joint and several liability on each financier, and STOP's court fees and expenses incurred in both the original and the derivative action. *Supporters to Oppose Pollution v. The Heritage Group* No. S89-00534 (N.D. Ind., filed Nov. 17, 1989).

34. RCRA's minimum technological requirements section requires that every hazardous waste landfill install two or more liners and a leachate collection system above and between each liner around each landfill unit. RCRA 42 U.S.C. § 6924(o). The liners prevent hazardous leachate, the gas or liquid residue of the hazardous waste, from migrating. Unlined cells are inadequate to protect the health and the environment. RCRA ORIENTATION MANUAL, III-58-59. Also required under RCRA's minimum technological requirements section is an "approved leak detection system." RCRA 42 U.S.C. § 6924(o). RCRA defines this as a system or technology that the EPA Administrator determines to be capable of detecting leaks of hazardous constituents at the earliest practicable time. The liners, leachate collection systems, and leak detections systems prevent the contamination of surface and groundwaters. See UNITED STATES OFFICE OF SOLID WASTE, RCRA ORIENTATION MANUAL glossary 5 (Jan. 1986).

drinking wells.<sup>35</sup>

After the federal district court held the landfill owners liable, the landfill owners claimed they lacked the necessary funds to fulfill the judgment<sup>36</sup> and each petitioned for bankruptcy.<sup>37</sup> While the owners' pending bankruptcy actions do not ensure a complete immunity from the imposed judgment,<sup>38</sup> the bankruptcy actions succeeded in delaying any payment from the landfill owners to correct the environmental contamination.<sup>39</sup>

A solvent financier of the Four County landfill may remain untouched by

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35. The aquifer located directly below the landfill is a major source of groundwater for the surrounding area. Private drinking wells and irrigation wells are located within one mile of the landfill and the groundwater below the landfill discharges into the Tippecanoe River, less than one mile away. During the trial, an expert hydrologist testified that "72,000 gallons of groundwater leave the landfill's boundaries daily." *United States v. Environmental Waste Control, Inc.*, 710 F. Supp. 1172, 1223 (N.D. Ind. 1989), *aff'd*, Nos. 89-1865 and 89-2197 (7th Cir., Oct. 31, 1990). The court concluded that the "release [of contamination from the Four County Landfill] requires corrective action to protect human health and the environment." *Id.* at 1228.

36. See *supra* note 25 and accompanying text regarding the district court's judgment.

37. Within ten business days of the district court judgment against the landfill owners, each of the Four County Landfill owners filed for reorganization under Chapter 11 of the Federal Bankruptcy Code. *Supporters to Oppose Pollution v. The Heritage Group No. S89-00534* (N.D. Ind., filed Nov. 17, 1989). Recent Supreme Court cases involving hazardous waste cleanup and bankruptcy show the increasing conflict between the interests protected by the bankruptcy laws and those protected by federal and state environmental laws. Bankruptcy law seeks to provide a fresh start for the bankrupt by discharging outstanding debts while environmental law aims to make responsible parties pay for environmental remediation. The power of a bankruptcy suit to frustrate environmental law lies in the automatic stay provision of the Bankruptcy Code. 11 U.S.C. § 362(a) (1978). The dispute centers on whether the environmental litigation qualifies as a proper exercise of a governmental regulatory power or whether such action is really tantamount to a money judgment that is subject to the automatic stay. 11 U.S.C. 363(b)(4), 363(b)(5) (1978). In *Ohio v. Kovacs*, 469 U.S. 274 (1985) the court held that the bankruptcy interests prevailed and discharged a bankrupt's obligation to an injunctive order requiring cleanup and \$75,000 in wildlife damages. See *Angelo & Berguson, supra* note 29 at 112. See also G.Z. NOTHSTEIN, *TOXIC TORTS - LITIGATION OF HAZARDOUS SUBSTANCE CASES* (1984) Trial Practice Series (Supp. 1989).

38. For example, in *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494, 507 (1986), the Supreme Court held that a bankruptcy trustee may not abandon property in contravention of state statute or regulation that is reasonably designed to protect human health and safety from identified hazards. Under § 554(a) of the Bankruptcy Code, a trustee is authorized to "abandon property of the estate that is burdensome to the estate." 11 U.S.C. § 554(a) (1878). The *Midlantic* Court held that before authorizing abandonment under Federal Bankruptcy law, the court must formulate conditions that will adequately protect the public's health and safety. *Midlantic*, 474 U.S. at 507.

39. A 1986 GAO Report noted that while the bankruptcy law provides for the enforcement of environmental regulations over creditor claims, various courts have given EPA and state environmental interests equal status with other unsecured creditors, thereby hindering efforts to force responsible parties to properly close their facilities. See U.S. GENERAL ACCOUNTING OFFICE (GAO/RCED-86-77), *HAZARDOUS WASTE: ENVIRONMENTAL SAFEGUARDS JEOPARDIZED WHEN FACILITIES CEASE OPERATING* 3-7 (Nov. 1986).

the EPA's and STOP's quest for injunctive and monetary relief for the environmental contamination present at the Four County landfill.<sup>40</sup> The Heritage Group,<sup>41</sup> a controlling financier,<sup>42</sup> invested in the Four County landfill during the years immediately preceding the Four County litigation.<sup>43</sup> The financial arrangements between the Four County landfill owners and the Heritage Group resulted in substantial profits<sup>44</sup> for both parties as well as the

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40. The statutory provisions and case law supporting the possibility that the Four County Landfill's financiers will escape potential liability are discussed at length in Section II of this Note. See *infra* notes 48-84 and accompanying text.

41. As alleged in STOP's complaint against Heritage Group, the Heritage Group is a partnership consisting of Asphalt Materials, Inc. (Asphalt), Heritage Environmental Services (HES), Resources Unlimited Inc. (RUI), and EMS Laboratories (EMS). Asphalt, HES, RUI and EMS are Indiana corporations. RUI and EMS are each subsidiary corporations of HES and HES is a subsidiary corporation of Asphalt. Each of the foregoing entities share the others' officers and directors. These allegations were set forth in the Complaint re Liability Under Resource Conservation and Recovery Act and Pendant Claims, filed by STOP in the derivative action against Heritage Group at pages 3-4. Supporters to Oppose Pollution v. The Heritage Group, No. S89-00534 (N.D. Ind. filed Nov. 17, 1989). See *supra* note 33.

42. See *supra* note 15, which defines controlling financier for purposes of this Note. STOP contends that Heritage Group's business dealings with the landfill owners were made with the knowledge that the landfill was being run out of compliance with RCRA. STOP's allegations are set forth in its Complaint re Liability Under Resource Conservation and Recovery Act and Pendant Claims, filed by STOP in the derivative action against Heritage Group at page 6. Supporters to Oppose Pollution v. The Heritage Group, No. S89-00534 (N.D. Ind., filed Nov. 17, 1989).

43. Since 1985, Heritage Group has loaned EWC no less than \$1.065 million. Supporters to Oppose Pollution v. The Heritage Group, No. S89-00534 (N.D. Ind., filed Nov. 17, 1989). In a motion to dismiss STOP's action, Heritage Group alleged that this loan agreement expressly precluded RUI from operational control of the facility. Heritage Group's Motion to Dismiss at page 21. The Heritage Group also established a checking account with funds in excess of \$1.975 million of deposits from the landfill, which could be drawn upon by EWC or Heritage Group. Heritage Group served as a broker and accountant for EWC and arranged for delivery of hazardous waste to the landfill. Also, Heritage Group paid \$500,000 for entering into an "Option and Loan Agreement" with EWC. STOP also alleges in the complaint that the agreement gave Heritage Group the option to purchase control and operation of the landfill for any amount between five and ten million dollars. *Id.* The "Option and Loan Agreement" also provided that the Heritage Group would advance loans to EWC of up to \$1.85 million "solely for payment of legal and environmental expenses directly related to environmental litigation." *Id.*

44. For example, in *United States v. Environmental Waste Control*, the district court found that EWC had received gross receipts of approximately \$18 million to \$20 million from the landfill's operation during fiscal 1987, 1988, 1989 and through the thirty day trial. See *United States v. Environmental Waste Control, Inc.*, 710 F. Supp. 1172, 1244-45 (N.D. Ind. 1989), *aff'd*, Nos. 89-1865 and 89-2197 (7th Cir. Oct. 31, 1990). In the derivative action against Heritage Group plaintiffs allege that as a result of Heritage Group's financial and other involvement in the Landfill, the Landfill's receipt of hazardous waste and, correspondingly, its income, increased dramatically from July 1986 through March 1989. Supporters to Oppose Pollution v. The Heritage Group, No. S89-00534 (N.D. Ind. filed Nov. 17, 1989).

continuing operation<sup>45</sup> of the improperly run Four County Landfill.<sup>46</sup> Heritage Groups' involvement arguably contributed to the environmental contamination now present at the Four County Landfill. Yet, because the financiers do not fall among the potentially responsible parties expressly listed in RCRA,<sup>47</sup> Heritage Group may escape liability.

## II. PRESENT EVALUATION OF LIABILITY UNDER RCRA

To deter environmental harm caused by improper waste disposal practices, RCRA provides permit procedures for required compliance,<sup>48</sup> federal enforcement against violators of RCRA standards, and civil penalties.<sup>49</sup> RCRA also provides for criminal penalties to be imposed on those individuals who knowingly act in violation of RCRA and doubles the penalties for repeat offenders.<sup>50</sup> Additionally, RCRA provides for civil suits and criminal prosecutions against any person<sup>51</sup> who contributes to improper waste disposal

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45. STOP alleges that "without such loans and without RUI's other involvement in the Four County Landfill, EWC, Shambaugh and Wilkins [the landfill owners] would have failed to keep the Landfill open". *Id.*

46. *See supra* notes 31-32.

47. *See supra* note 11, which sets forth applicable statutory language of RCRA.

48. 42 U.S.C. § 6925.

49. RCRA 42 U.S.C. § 6928(a)(1) provides:

... [W]henever on the basis of any information the Administrator [The Administrator of the United States Environmental Protection Agency, or his designee] determines that any person has violated or is in violation of any requirement of this subchapter, the Administrator may issue an order assessing a civil penalty, . . . requiring compliance immediately or within a specified time period, or both, or the Administrator may commence a civil action in the United States district court in the district in which the violation occurred for appropriate relief, including a temporary or permanent injunction.

42 U.S.C. § 6928(a)(1)(1988).

50. RCRA 42 U.S.C. § 6928(d)-(e) provides:

... upon conviction, [criminal violators of RCRA] shall be subject to a fine of not more than \$50,000 for each day of violation, or imprisonment not to exceed two years (five years in the case of a violation of paragraph (1) or (2)), or both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment under the respective paragraph shall be doubled with respect to both fine and imprisonment.

42 U.S.C. § 6928(d)(e)(1988).

The statute further provides that if the violator knowingly puts another person in imminent danger of serious bodily injury or death, the maximum criminal penalties are further increased. 42 U.S.C. § 6928(e)(1988).

51. The term "person" is defined in RCRA's definition section, 42 U.S.C. § 6903(15), as "an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body.

that results in an imminent and substantial danger<sup>52</sup> to health or the environment.<sup>53</sup>

The imminent danger provision<sup>54</sup> addresses responsibility and liability for the costs of environmental cleanup by identifying four broad classes of potentially responsible parties including generators,<sup>55</sup> transporters<sup>56</sup> and

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52. Guidance as to the meaning of the phrase "imminent and substantial danger" may be found in the legislative histories of other statutes using the phrase. See e.g., H.R. Rep No. 1185, 93d Cong., 2d Sess. 35-36, *reprinted in* 1974 U.S. CODE & CONG. ADMIN. NEWS 6454, 6487-88. The House Report, which accompanies the Safe Water Drinking Act, discusses at length the meaning of the phrase "imminent and substantial endangerment." The phrase is used in § 1431 of the Safe Water Drinking Act. The House Report states:

In using the words, "imminent and substantial endangerment to the health of persons", the Committee intends that this broad administrative authority not be used when the system of regulatory authorities provided elsewhere in the bill could be used adequately to protect the public health.... Administrative and judicial implementation of this authority must occur early enough to prevent the potential hazard from materializing.... Furthermore, while the risk of harm must be "imminent" for the Administrator to act, the harm itself need not be.... Among those situations in which the endangerment may be regarded as "substantial" are the following: (1) a substantial likelihood that contaminants capable of causing adverse health effects will be ingested by consumers if preventative action is not taken; (2) a substantial statistical probability that disease will result from the presence of contaminants in drinking water; or (3) the threat of substantial or serious harm (such as exposure to carcinogenic agents or other hazardous contaminants).

H.R. REP NO. 1185, 93d Cong., 2d Sess. 35-36, *reprinted in* 1974 U.S. CODE & CONG. ADMIN. NEWS 6454, 6487-88.

53. RCRA 42 U.S.C. § 6973(a) [hereinafter imminent danger provision] provides in relevant part:

[U]pon receipt of evidence that the past or present handling storage treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States in the appropriate district court against any person (including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage or disposal facility) who has contributed or is contributing to such handling, storage, treatment, transportation, or disposal to restrain such person from such handling, storage, treatment, transportation, or disposal, to order such person to take such other action as may be necessary, or both.

*Id.* (emphasis added).

54. *Id.*

55. A generator is any person who first creates a hazardous waste, or any person who first makes the waste subject to regulation under RCRA (e.g., imports a hazardous waste, initiates shipment of a hazardous waste from a RCRA facility, or mixes different hazardous wastes by placing them in a single container). RCRA ORIENTATION MANUAL glossary 3 (Jan. 1986).

56. A transporter is any person engaged in the transportation of hazardous waste within the United States, by air, rail, highway, or water, if such transportation requires a manifest under RCRA regulations. The manifest required by RCRA is a shipping document, EPA form 8700-22, used for identifying the quantity, composition, origin, routing, and destination of hazardous waste during its transportation from the point of generation to the point of treatment, storage, or disposal. RCRA ORIENTATION MANUAL glossary 5-9 (Jan. 1986).

owners<sup>57</sup> or operators.<sup>58</sup> These four broad classes of persons are held strictly liable for imminent dangers resulting from RCRA violations.<sup>59</sup> Financiers are not specifically included in the four classes of potentially responsible parties (PRPs)<sup>60</sup> set forth in RCRA's imminent danger provision. Therefore, unless

57. See *supra* note 22 defining "owner."

58. Although "operator" is not defined in the definitions section of RCRA 42 U.S.C. § 6903, "operator" is defined as "the person responsible for the overall operation of a facility" in RCRA ORIENTATION MANUAL glossary 6 (Jan. 1986). Judicial interpretation of what constitutes an operator for RCRA purposes is discussed at length in this Note, see *infra* notes 66-76 and accompanying text.

59. Thus, if a party is found to be a generator, transporter, owner, or operator of a hazardous waste facility, that entity will be strictly liable for any corrective action necessary to remediate any hazardous waste contamination regulated under RCRA. See, *United States v. Northeastern Pharmaceutical & Chem. Co.*, (NEPACCO), 579 F. Supp. 823, *rev'd in part, aff'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987). In *NEPACCO*, the appellate court explained that prior to the 1984 amendment of RCRA, a conflict existed concerning the subject of strict liability. 810 F.2d at 739. The Eighth Circuit then explained that in 1984 Congress amended the scope of liability in RCRA 42 U.S.C. § 6973 to include no fault. *Id.*

Congressional intent with respect to the standard of liability under RCRA is set forth in H.R. Rep. No. 198 (Part I), 98th Cong., 2d Sess. 47-49 (1983), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 5576, 5606-09. The House Report states that "[t]he amendments [1984 RCRA amendments] clearly provide that anyone who has contributed or is contributing to the creation, existence, or maintenance of an imminent and substantial endangerment is subject to the equitable authority of Section 7003 [Section 7003 refers to the Solid Waste Disposal Act. Section 7003 corresponds with RCRA 42 U.S.C. § 6973.] without regard to fault or negligence." (emphasis added). *Id.* The House Report further states that the 1984 amendments reflect "the longstanding view that generators and other persons involved in the handling, storage, treatment, transportation, or disposal of hazardous waste must share in the responsibility for the abatement of the hazards arising from their activities." *Id.* at 5607. See also *United States v. Bliss*, 667 F. Supp. 1298 (E.D. Mo. 1987). The *Bliss* court sets forth the elements of a prima facie case for liability under RCRA's imminent hazard provision 42 U.S.C. § 6973 as: (1) conditions at the site present an imminent and substantial endangerment; (2) that the endangerment stems from the handling, storage, treatment, transportation, or disposal of any solid or hazardous waste; and (3) that the defendant has contributed or is contributing to such handling, storage, treatment, transportation, or disposal. *Id.* at 1313. Under CERCLA, an environmental statute analogous to RCRA, the defenses to strict liability are narrow, including only an act of God, an act of war or certain acts or omissions of third parties. CERCLA 42 U.S.C. § 9607 (1980). Whether these enumerated defenses under CERCLA are exclusive is unsettled law. Compare, e.g., *United States v. Reilly Tar & Chem. Corp.* 546 F. Supp. 1100, 1117-18 (D. Minn. 1982) (which holds that the defenses listed in 107(b) are the only available defenses to a CERCLA action). But see *Mardan Corp. v. C.G.C. Music, Ltd.*, 600 F. Supp. 1049, 1056 n. 9 (D. Ariz. 1984) (which holds that defenses in subsection (b) cannot be exclusive since that would preclude such defenses as laches, res judicata, payment, accord and satisfaction, waiver, and the statute of limitations).

60. "Potentially responsible party" is not formally defined in RCRA or in any of the implementing regulations, but is used frequently to denote parties who should be liable under RCRA. See, e.g. 49 Fed. Reg. 29, 937-942 (1984) (Recommendation of the Administrative Conference) (Potentially responsible parties are identified as "site owners and operators and users of sites such as transporters and generators."). Potentially responsible parties [hereinafter PRPs] are commonly known as PRPs and, for the purposes of this Note, will be referred to as PRPs.

a financier holds title to the waste facility,<sup>61</sup> transports hazardous waste,<sup>62</sup> generates hazardous waste products,<sup>63</sup> or operates a hazardous waste facility,<sup>64</sup> the financier may not be subject to liability under RCRA's imminent danger provision.<sup>65</sup>

A. *The Operational Control Standard Limit of Financier Liability*

Currently, the operational control standard dictates a requisite level of involvement for a party to be considered an operator under RCRA.<sup>66</sup> The federal courts' broad interpretation of federal environmental statutes' remedial nature<sup>67</sup> has resulted in the category "operator" including parties other than

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61. See *United States v. Carolawn*, 21 Env't Rep. Cas. (BNA) 2124, 2128-9 (D.S.C. 1984) (the federal district court held that a lessor was liable under CERCLA as an "owner" of a contaminated site even though the lessor was merely acting as a conduit in the transfer of the property and held title to the property for less than one hour).

62. See *United States v. Bliss*, 667 F. Supp. 1298, 1307 (E.D. Mo. 1987) (held that a company that arranged for the transportation of hazardous wastes was liable under RCRA).

63. See *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373 (8th Cir. 1989) (Aceto contracted with another company for the formulation of its hazardous substances, technical grade pesticides, into commercial grade pesticides. The *Aceto* court held that this formulation process inherently resulted in the generation of hazardous wastes containing Aceto's hazardous substances. The *Aceto* court held that these facts defeated Aceto's motion to dismiss and that Aceto was a potentially responsible party.).

64. See *infra* notes 66-76 and accompanying text, which discusses operator liability under RCRA at length.

65. See *United States v. Carolawn Co.*, 698 F. Supp. 616 (D.S.C. 1987) (Defendants who were found liable as owners under CERCLA filed a third party complaint against the South Carolina Department of Health and Environmental Control alleging that the agency was also a responsible party under CERCLA because of its alleged act of participation in operation of the hazardous waste site. The Department moved to dismiss. The district court held that the agency was not an "owner or operator" of the hazardous waste site, and thus, was not a responsible party.).

66. This standard of control reflects attaching personal liability in the corporate context. See *infra* notes 71-76 and accompanying text. For example, traditional corporate law principles limit shareholders' liability to the value of their investment in the stock of the corporation. However, the shield of liability is lost if a shareholder "exhibits excessive control over the corporation and commits a wrong through the use of the corporate form which results in an unjust loss or injury." See McMahon & Moerdl, *The Erosion of Traditional Corporate Law Doctrines in Environmental Cases*, 3 NAT. RESOURCES & ENV'T 29 (1988).

67. In *United States v. Reilly Tar & Chem. Corp.*, the district court stated,

First, Congress intended that the federal government be immediately given the tools necessary for a prompt and effective response to problems of national magnitude resulting from hazardous waste disposal. Second, Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created. To give effect to these congressional concerns, CERCLA [and by analogy, RCRA] should be given a broad and liberal construction. The statute should not be narrowly tailored to frustrate the government's ability to respond promptly and effectively, or to limit the liability of those responsible for cleanup costs beyond the limits expressly provided.

*United States v. Reilly Tar & Chemical Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982).

those obviously and directly responsible for the overall operation of the hazardous waste facility.<sup>68</sup> Judicial standards currently determining control in the corporate context are analogous to the judicial standards used to determine the degree of control necessary to be an operator under RCRA.<sup>69</sup> In the corporate context, if a parent corporation exercises the requisite control over a subsidiary, the courts allow a piercing of the corporate veil<sup>70</sup> to attach liability to the parent for the subsidiary's illegal acts.<sup>71</sup>

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See also *Aceto*, 872 F. Supp. at 1373. The *Aceto* court cited *Northeastern Pharmaceutical & Chem. Co. (NEPACCO)*, 579 F. Supp. 823 (W.D.Mo. 1984) *rev'd in part, aff'd in part* 810 F.2d 726 (8th Cir. 1986) *cert. denied*, 484 U.S. 848 (1987) and concluded that a liberal interpretation is consistent with CERCLA's "overwhelmingly remedial" statutory scheme. 872 F. Supp. at 1380.

68. See, e.g., *United States v. McGraw-Edison Co.*, 718 F. Supp. 154 (W.D.N.Y. 1989). The *McGraw-Edison* court did not excuse a minority shareholder from potential liability until more was known about the company's involvement in the management and operation of a plant suspected of contaminating groundwater in Olean, New York. See also *Rockwell Int'l Corp. v. I U Int'l Corp.*, 702 F. Supp. 1384 (N.D. Ill. 1988). The *Rockwell* court held that the parent corporation's hiring of subsidiary corporate officers, the fact that the parent corporation established and approved operational plans and procedures, and the fact that the defendant parent corporation publicly stated that it owned the facility, provided basis for operator liability (emphasis added) consequently, the *Rockwell* court denied the defendant's motion for summary judgment). *Id.* at 1390.

69. In the parent-subsidiary context, the primary focus of the courts has been on the degree of operational control exercised by the parent over the subsidiary. In *United States v. Kayser-Roth Corp.*, 724 F. Supp. 15 (D.R.I. 1989), *aff'd*, 910 F.2d 24 (1st Cir. 1990), the parent corporation was held liable because it exercised "pervasive control" over the subsidiary. 724 F. Supp. at 24. In *Kayser-Roth*, "pervasive control" consisted of the parent's control over environmental matters, its total monetary control including collection of accounts payable, the parent's mandatory approval of capital expenditures above \$5,000, and its "stranglehold" on the subsidiary's income and expenses. *Id.* at 22-24. See also *United States v. Mirabile*, C.A. No. 84-2280, slip op. at 4-5 (E.D.Pa. June 6, 1985) (1985 WL 97) (The *Mirabile* court stated that "under various circumstances the corporate shield may not be interposed" to protect individuals from environmental liability. *Id.* The *Mirabile* court held that a defendant who owned 95 percent of the stock of a company that in turn had owned property at which hazardous wastes were deposited, was liable. The defendant was president of the company and as such "had the capacity and opportunity to control the disposal of waste. He personally participated in the creation of a waste condition at the ... site ... and failed to require proper removal and disposal." *Id.*).

70. This doctrine is also known as "disregarding the corporate entity," the "alter ego," and the "instrumentality" theories. This doctrine applies when to recognize the corporate form results in unjust protection from individual liability. See Note, *Liability of Parent Corporations for Hazardous Waste Cleanup and Damages*, 99 HARV. L. REV. 986 (1986). See also *United States v. Mottolo*, 695 F. Supp. 615, 624 (D. N.H. 1988) (held that the corporate veil may not be employed to "avoid overriding federal legislative policies, and federal courts will disregard it if the interests of public convenience, fairness, and equity so demand.").

71. In *United States v. Nicolet, Inc.*, 712 F. Supp. 1193 (E.D. Pa. 1989), the federal government sought to hold a parent corporation liable under CERCLA. *Id.* at 1204-05. The parent owned all the stock of a company that owned and operated two asbestos disposal sites. The government asserted that traditional veil piercing should apply or, alternatively, that there should be direct parent liability as an "owner of operator" under CERCLA. *Id.* The court held that both theories were legally valid. *Id.* at 1202-05.



Applying the corporate veil doctrine in the environmental context, courts have attached liability to entities outside of the traditional definition of the term "operator."<sup>72</sup> For example, if the financier is the parent corporation of an improperly run hazardous waste landfill, the corporate veil can be pierced as to the financier/parent and RCRA liability will attach. However, if the financier is not a parent corporation, piercing the corporate veil fails as a means to hold financiers liable. Inequity results when a financier contributes to environmental contamination amounting to imminent endangerment by investing in a hazardous waste landfill known to be run out of compliance with RCRA and escapes RCRA liability while a parent corporation that exercised traditional "control" over its subsidiary landfill is held liable.<sup>73</sup>

Courts have not attached liability to financiers who make a "pure investment" in a hazardous waste facility.<sup>74</sup> Unless the financier demonstrates the requisite level of operational control,<sup>75</sup> the financier will not be considered an operator and will be protected by the corporate shield and thereby evade

72. See McMahon & Moertle, *supra* note 66 at 29, which states, "In situations where the liable corporation insolvent or defunct, recent court decisions construing CERCLA and RCRA have sliced through the corporate entity and have imposed both derivative ("piercing") and direct liability on officers and shareholders of corporations. Additionally, the decisions suggest that the courts are willing to extend liability to successor/purchaser corporations for the acts of the predecessor/seller corporations under certain conditions. Both of these developments in the courts significantly erode traditional corporate law protection of shareholders and successor corporations."

73. *Id.* The authors indicate that while most state courts continue to follow the traditional approach even in environmental cases and therefore opt to protect the shareholders rather than permit corporate veil piercing, federal courts are willing to pierce the corporate veil "more easily to implement federal environmental policies."

74. See, e.g. *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990) (Held that a secured creditor of a bankrupt cloth printing facility may be held liable because the creditor, although not an actual operator, participated in the financial management of the facility to the degree indicating capacity to influence the facility's treatment of hazardous waste. *Id.* at 1557. This holding significantly narrowed the district court's interpretation of CERCLA's secured creditor exemption, which essentially required that the creditor be involved in the operations of a facility to incur liability. *Id.* However, this holding does not attach liability to all financiers who make an investment in a facility.); *Rockwell Int'l Corp. v. IU Int'l Corp.* 702 F. Supp. 1385, 1390 (N.D. Ill. 1988) (Court granted partial summary judgment to two defendants because plaintiffs failed to present any evidence of establishing status as owners and operators as to those defendants. The court held that the "mere ability to exercise control as result of financial relationship of parties is insufficient for liability to attach for costs to clean up hazardous substances; entity must actually exercise control." *Id.*). *United States v. Mirabile*, No. 84-2280, slip op. at 4-5, (E.D. Pa. June 6, 1985) (1985 WL 97) (One of two creditors held not liable for cleanup costs under CERCLA because the creditor had "not become overly entangled in the affairs of the actual owner or operator of the facility."); *United States v. Bunker Hill*, 635 F. Supp. 665, 672 (D. Idaho) (The *Bunker Hill* court noted that "care must be taken so that "normal" activities of a parent with respect to its subsidiary do not automatically warrant finding the parent an owner or operator.").

75. See notes 66-76 and accompanying text setting forth judicial standards regarding operational control.

direct liability under RCRA.<sup>76</sup>

### B. *The Preclusive Suit Provision As Another Guard Against Financier Liability*

RCRA's preclusive subsequent suit provision<sup>77</sup> prevents citizen action<sup>78</sup> against financiers for environmental liability if a suit or other remediation has already been commenced by the EPA or by the state.<sup>79</sup> Even the relatively narrow application of the preclusive suit provision defeats the purposes of RCRA when applied to financiers. For example, attempting to hold financiers liable as operators would reasonably be triggered by knowing that the currently recognized PRPs are unable to pay for the corrective costs. However, information regarding the financial status of currently recognized PRPs may not be available until well after the initial suit is commenced by the EPA.<sup>80</sup>

The preclusive suit provision exists to avoid repetitive claims and claim-

76. Compare, *United States v. Kayser-Roth*, 724 F. Supp. 15 (D. R.I. 1989), *aff'd*, 910 F.2d 24 (1st Cir. 1990) (The *Kayser-Roth* court held that because the parent had exerted "pervasive control" over the subsidiary the parent was an operator and therefore liable for the environmental contamination of the groundwaters caused by its subsidiary. 910 F.2d at 24. In a footnote, the *Kayser-Roth* court states, "One version of the 'Golden Rule' is that he who has the Gold rules. The circumstances [of this case] comport completely with this version of the 'Golden Rule.'" *Id.* at 24, n.7) with *United States v. Nicolet*, 712 F. Supp. 1193, 1203 (E.D. Pa. 1989) (the court held that "if an individual stockholder can be liable [for damages] under CERCLA for his corporation's disposal, a corporation which holds stock in another corporation (e.g. a subsidiary) and actively participates in its management can be held liable for cleanup costs incurred as a result of that corporation's disposal.") and *United States v. Northeastern Pharmaceutical & Chem. Co.*, (NEPACCO), 579 F. Supp. 823, (W.D. Mo. 1984) *rev'd in part, aff'd in part* 810 F.2d 726 (8th Cir. 1986), *cert denied*, 484 U.S. 848 (1987) (The *NEPACCO* court stated that "[I]t is 'the authority to control the handling and disposal of hazardous substances that is critical under the statutory scheme.'" 810 F.2d at 743.

77. RCRA 42 U.S.C. § 6972 (b)(2)(B) [hereinafter preclusive suit provision]. The preclusive suit provision states that no action may be commenced under the citizen suit provision "if the Administrator, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present an imminent and substantial endangerment" has commenced and is diligently prosecuting an action under the imminent danger provision or if remedial action is underway." See *supra* note 53 (sets forth RCRA's imminent danger provision in relevant part).

78. See *supra* note 32 and accompanying text discussing the scope and importance of citizen action in environmental cases.

79. See, *McGregor v. Indus. Excess Landfill, Inc.*, 709 F. Supp. 1401 (N.D. Ohio 1987) *aff'd*, 856 F.2d 39 (6th Cir. 1988) (The *McGregor* court dismissed a private citizens action against a landfill pursuant to the preclusive suit provision. In *McGregor*, the EPA had already commenced an action against the landfill. 709 F. Supp. at 1407.).

80. For example, after district court trial in *United States v. Environmental Waste Control* concluded, STOP alleged that it had no basis on which to obtain knowledge of a comprehensive loan agreement between Heritage Group and EWC until the middle of the *Environmental Waste Control* trial. *Supporters to Oppose Pollution, Inc. (STOP) v. The Heritage Group*, No. S89-0534 (N.D. Ind., filed Nov. 17, 1989).

splitting.<sup>81</sup> However, the procedural gains diminish when the parties originally sued by the EPA are insolvent.<sup>82</sup> The preclusive suit provision leaves the EPA without a satisfied judgment and concerned citizens are barred from suing financiers of the liable parties for the cleanup costs of the environmental contamination. For example, if a PRP avoids paying cleanup costs with a bankruptcy action, the preclusive suit provision precludes citizen action suits against other parties, such as financiers, which may have the financial capacity to ameliorate the harm.<sup>83</sup>

81. In *McGregor v. Indus. Excess Landfill, Inc.* the district court set forth reasons for the preclusive suit provision. The *McGregor* court stated that:

[t]he desired result of remedying the environmental hazard could best be handled by avoiding conflicting litigation and having either the Administrator of the EPA or the State bring the suit on behalf of the public. Only when the federal and state government fail to remedy the situation or file suit in either State or federal courts due to inadequate public resources did Congress envision the need for private citizens to commence actions to correct environmental hazards.

709 F. Supp. at 1407.

The legal basis for the preclusive suit provision, apart from the procedural bar set forth in the statute, springs directly from the *res judicata* principle, which requires litigants to raise all possible claims that arise from the same set of facts. See RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982). The Seventh Circuit has set forth the essential elements of *res judicata* as "(1) a final judgment on the merits in an earlier action; (2) an identity of the cause of action in both the earlier and later suit; and (3) an identity of parties or privies in the two suits." *Brown v. J.I. Case Co.*, 813 F.2d 848, 854 (7th Cir. 1987), *cert. denied*, 484 U.S. 912 (1987). See, e.g. *Lowell Staats Mining Co. v. Philadelphia Elec. Co.*, 878 F.2d 1271 (10th Cir. 1989). After being unable to receive the judgment due to the bankruptcy of the liable defendant, the plaintiff in *Staats* brought a second suit against new defendants on the basis of partnership, joint venture and receipt of fraudulent conveyances. The second suit was dismissed based on *res judicata* because the plaintiff did not name the new defendants, who were in privity with the original defendants, in the first action. *Id.* at 1280.

82. The GAO determined that hazardous waste facilities filing for bankruptcy avoided payment closure and post-closure costs for their facilities required under RCRA. U.S. GENERAL ACCOUNTING OFFICE (GAO/RCED-86-77), HAZARDOUS WASTE: ENVIRONMENTAL SAFEGUARDS JEOPARDIZED WHEN FACILITIES CEASE OPERATING 40 (Feb. 1986). Although the EPA has implemented financial assurance requirements that are designed to ensure that hazardous waste firms are financially secure enough to pay RCRA closure and post-closure costs, the GAO could not assess the adequacy of the financial assurance requirements and found that assessing the financial condition of the facility remained difficult for the state and the EPA. *Id.* The GAO also reported that only 46 percent of the operators in the states reviewed had submitted financial assurance documents, that 34 percent of the financial assurance documents submitted were deficient and that, in many cases the EPA did not take adequate enforcement actions against operators committing financial assurance or closure violations. *Id.* at 41.

83. A bankruptcy action in itself will not stop suit against the other parties, but the fact that the EPA is "actually engaging in a removal action" or is "diligently proceeding with a remedial action" will preclude a citizen's suit under the imminent hazard provision. See *McGregor v. Indus. Excess Landfill, Inc.*, 856 F.2d 39 (6th Cir. 1988) (court denied citizens' suit provision); *O'Leary v. Moyer's Landfill*, 677 F. Supp. 807 (E.D. Pa. 1988) (the *Moyer* court held that because remedial action was begun, the citizen's suit was barred). *But see Merry v. Westinghouse Electric Corp.*, 697 F. Supp. 180 (M.D. Pa. 1988) (the *Merry* court held that because the EPA was not diligently

Together, the operational control standard and the preclusive subsequent suit provision of RCRA have a net effect of exempting a large class of potentially responsible parties who are uniquely qualified to assume the burdens imposed by RCRA. By exempting all financiers as a class of PRPs, RCRA also exempts financiers who knowingly invest in improperly run hazardous waste facilities. Because most financiers do not meet the operational standard of control currently recognized by the courts, many financiers can knowingly invest in an improperly run hazardous waste facility without the threat of direct liability under RCRA. The absence of liability for controlling financiers under RCRA contravenes Congress' intent when it enacted and amended RCRA<sup>84</sup>

### III. LOOKING BEYOND RCRA--LEGAL RATIONALE FOR HOLDING CONTROLLING FINANCIERS LIABLE UNDER RCRA

#### A. *The EPA's Civil Penalty Policy*

The EPA civil penalty policy exists to achieve the goals of deterrence, fair and equitable treatment of the regulated community,<sup>85</sup> and swift resolution of environmental problems.<sup>86</sup> Substantially affecting many areas of environmental enforcement, civil penalties encourage compliance with federal environmental regulations.<sup>87</sup> The EPA civil penalty policy provides a framework for federal

proceeding with a remedial action, but was merely gathering data, the citizen's suit against Westinghouse was not precluded.).

84. The objectives of [RCRA] are to promote sound hazardous waste management practices conducted in a manner that protects human health and the environment and establishing a cooperative effort among the Federal, State, and local governments and *private enterprise*. 42 U.S.C.A. § 6902 (a)(4) and (11). (Emphasis added). See *United States v. Bunker Hill Co.*, 635 F. Supp. 665, 672 (D. Idaho 1986). The *Bunker Hill* court relied on Congress' intent that "those who bore the fruits of hazardous waste disposal will also bear the costs of cleaning it up." *Id.*

85. The regulated community includes privately owned or operated sources of potential environmental violation, publicly owned utilities, investor owned, regulated utilities, state and municipal facilities, and federal facilities. Miller, *Environmental Protection Agency Civil Penalty Policy for Major Source Violators of the Clean Air Act and the Clean Water Act*, [Federal Laws Binder] *Env't Rep.* (BNA) 41:1101, 1108 (July 8, 1980).

86. A report by the EPA's assistant administrator for enforcement and compliance monitoring sets forth a consistent Agency-wide approach to the assessment of civil penalties. The report consists of two documents. The first document, *Policy on Civil Penalties*, focuses on the general philosophy behind the penalty policy. The accompanying document, *A Framework for Statute Specific Approaches to Penalty Assessment: Implementing EPA's Policy on Civil Penalties*, provides guidance on how to further and administer the civil penalty policy. Price, *Environmental Protection Agency Civil Penalty Policy* [Federal Laws Binder] *Env't Rep.* (BNA) 41:2991, 2992-93 (Feb. 16, 1984).

87. The civil penalty policy was designed for agency enforcement personnel in both regional and headquarters offices but the policy has "had a substantial effect" in citizens suits as well. JORGENSEN & KIMMEL, *ENVIRONMENTAL CITIZEN SUITS: CONFRONTING THE CORPORATION* 12 (1988).

and state agencies to assess penalties against a violator of federal environmental regulations<sup>88</sup> without regard to distinct classes of PRPs, form of ownership, or organization.<sup>89</sup> In calculating the amount of the civil penalty policy that would remove significant economic benefits gained from failure to comply with environmental laws,<sup>90</sup> the EPA weighs a benefit component and a gravity component.<sup>91</sup> The benefit component determines the extent to which the violator profited from failure to comply with the environmental regulations.<sup>92</sup> In determining the benefit derived, the EPA assesses the costs that the violator has delayed paying,<sup>93</sup> the costs that the violator was able to completely avoid by nonpayment,<sup>94</sup> and the gains received in terms of the competitive advantage

88. A 1980 EPA civil penalty policy report addresses the civil penalty provisions of § 309(b) of the Clean Water Act and § 113(b) of the Clean Air Act. The policy set forth in this report is analogous to the policy applied to RCRA's provision for civil penalties, 42 U.S.C. § 6928(g), because the language of RCRA is virtually identical to the Clean Air Act addressed in the EPA report. Compare RCRA 42 U.S.C. § 6928(g) ("Any person who violates any requirement of this subchapter shall be liable to the United States for a civil penalty in an amount not to exceed \$25,000 for each such violation. Each day of such violation shall, for the purposes of this subsection, constitute a separate violation.") with Clean Water Act § 309(b), 33 U.S.C. § 1319(d) (1987) ("Any person who violates ... this title shall be subject to a civil penalty not to exceed \$25,000 per day for each violation") and with Clean Air Act 42 U.S.C. § 7413(c) (1981) ("Any person who knowingly violates ... this title shall be punished by a fine of not more than \$25,000 per day of violation"). The EPA report notes that the national response to the civil penalty policy as a deterrent to non compliance has been encouraging. The report states that "The overwhelming majority of citizens, private firms and public bodies have met with the deadlines [of the Clean Air and Water Acts] and complied with what was required of them. A minority have not. This penalty policy will keep faith with those who joined the common effort. It will help maintain the voluntary compliance on which achievement of our environmental goals depends." *Environmental Protection Agency Civil Penalty Policy for Major Source Violators of the Clean Air Act and the Clean Water Act*, [Federal Laws Binder] *Env't Rep.* (BNA) 41:1101, 1108 (July 8, 1980).

89. The 1980 EPA report states, "Congress, in enacting the civil penalty provisions ... made no exemptions or distinctions for classes or types of violators on the basis of ownership or form of organization. This civil penalty policy seeks to carry our Congress' fair, evenhanded, consistent approach, but recognizes obstacles in a few situations." *Environmental Protection Agency Civil Penalty Policy for Major Source Violators of the Clean Air Act and the Clean Water Act*, [Federal Laws Binder] *Env't Rep.* (BNA) 41:1101, 1108 (July 8, 1980).

90. See *infra* notes 93-95.

91. The EPA's framework for penalty assessment includes calculating a preliminary deterrence amount based on the measure of economic benefit received by the violator for various types of violations and evaluating the gravity of harm caused or potentially caused by the violation. Price, *Environmental Protection Agency Civil Penalty Policy* [Federal Laws Binder] *Env't Rep.* 41:2991, 2995 (BNA) (February 16, 1984).

92. *Id.*

93. For example, the one time costs of installing pollution control equipment or failing to properly dispose of the waste. *Id.* at 41:2996.

94. For example, savings gained by failing to operate and maintain pollution treatment equipment, failing to conduct adequate monitoring and testing of hazardous waste, and savings from failing to employ a sufficient number of adequately trained staff. *Id.* at 41:2997.

obtained through noncompliance.<sup>95</sup>

The benefit component analysis can easily be applied to a financier who knowingly invested in a noncomplying hazardous waste facility. In avoiding the high costs of compliance,<sup>96</sup> the noncomplying facility has lower costs of operation and can transfer the savings to the financier in the form of a higher return of investment or profit. If knowingly investing in an improperly run hazardous waste facility was a RCRA violation, the significant economic gains could only be had with the threat of RCRA liability. Currently however, RCRA fails to hold liable financiers who knowingly invest in hazardous waste facilities.

The gravity component constitutes the second prong of the EPA's analysis determining the amount of the civil penalty. Essentially, the EPA considers the seriousness of the act that caused the environmental harm.<sup>97</sup> The gravity component considers the size of the violator, the toxicity level of the pollutants, the length of time of the violative conduct,<sup>98</sup> and the sensitivity of the surrounding environment.<sup>99</sup> Like the benefit component, the gravity component can easily be applied to financiers in carving out a new group of PRPs, controlling financiers.

Assessing the gravity component of a financier's investment provides guidance to defining a potentially liable class of financiers. By knowingly investing in an improperly run facility instead of a properly run facility, the financier's investment has a higher likelihood of causing environmental contamination. The seriousness of knowingly investing in an improperly run hazardous waste facility distinguishes controlling financiers from general financiers. The amount of the financier's investment, the extent of the financier's knowledge of noncompliance and the precautionary measures taken by the financier could be factors of the gravity component. Just as the EPA's civil penalty policy penalizes a facility for actual or potential harm caused by a

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95. For example, profits on the sale of products or services that may have been banned or less profitable had they been approved through regulatory channels. *Env't'l Rep.* at 41:2997.

96. See *infra* note 138 and accompanying text regarding the high costs of operating a hazardous waste landfill facility in compliance with the administrative and technical requirements of RCRA.

97. See *Env't'l Rep.* at 41:2999.

98. "In most circumstances, the longer a violation continues uncorrected, the greater the risk of harm." *Id.* at 41:2999.

99. The EPA report states that "assigning a dollar figure to represent the gravity of a violation is essentially a subjective process." *Id.* at 41:2998. The report suggests that by referencing the goals of the regulatory scheme with the facts of each particular violation, one can accurately determine the seriousness of different violations. *Id.* Linking the dollar amount of the gravity component to objective factors of the goals of the regulatory scheme and the facts of the violation thus ensures that violations of approximately equal seriousness are treated the same way. The resulting consistency strengthens the EPA's position both in negotiation and before a trier of fact. "This approach consequently also encourages swift resolution of environmental problems." *Id.*

facility's violations, controlling financiers should be held liable under RCRA for the environmental harms caused by their investment.<sup>100</sup>

*B. The National Stolen Property Act*

The National Stolen Property Act (NSPA) provides a legal analogy to hold controlling financiers liable under RCRA.<sup>101</sup> The NSPA aims to restrict the trade of stolen property by sanctioning those who receive stolen property and thereby indirectly contribute to theft.<sup>102</sup> The NSPA imposes criminal sanctions on those who knowingly receive stolen property.<sup>103</sup> Holding controlling financiers liable under RCRA would deter illegal hazardous waste disposal practices by sanctioning financiers who contribute to environmental contamination by investing in a hazardous waste facility known to be run out of compliance with RCRA.

Three elements of the NSPA provide further guidance in defining a controlling financier as one who knowingly invests in an improperly run hazardous waste facility.<sup>104</sup> Taken individually, each element of the NSPA reflects a rationale embodied in the statutory amendment proposed by this Note.<sup>105</sup> This section will show how the NSPA provides a useful analogy to

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100. In addition to considering the actual or potential harm caused by the facility's violation, the EPA considers other factors in assessing the gravity component. The factors are helpful in elucidating the breadth of inquiry that determines the seriousness of a violation. The gravity components are: importance to the regulatory scheme, availability of data from other sources, size of the violator, amount of pollutant, toxicity of pollutant, sensitivity of the environment, and the length of time a violation continues. *Id.* at 41:2999.

101. The National Stolen Property Act, [hereinafter NSPA] 18 U.S.C. § 2315(1976) provides in relevant part:

Whoever receives, possesses, conceals, stores, barter, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of \$5,000 or more, ... which have crossed a State or United States boundary after being stolen, unlawfully converted or taken, *knowing* the same to have been stolen, unlawfully converted, or taken ... shall be fined not more than \$10,000 or imprisoned not more than 10 years.

*Id.* (emphasis added).

102. *See* United States v. Moore, 571 F.2d 154, *cert. denied*, 485 U.S. 956 (1988) (In applying the NSPA, the court held that this section aimed not only at discouraging interstate transportation and receiving stolen property, but also at deterring the original theft.). *See also* Moore, *Enforcing Foreign Ownership Claims In The Antiquities Market*, 97 YALE L.J. 466, 471 (1988) (Commentator documents the magnitude of the trade in stolen antiquities and suggests economic and legal justification for upholding statutes like the NSPA, which effectively halt the theft of antiquities.).

103. *See supra* note 101, which sets out the NSPA in relevant part.

104. The elements of the NSPA are that the person receive goods that are transported over a State or United States boundary and the person knows that such goods are stolen. *See supra* note 101.

105. *See supra* text accompanying notes 171-72, setting forth the amendment proposed by this Note.

defining controlling financiers as an additional liable party under the imminent danger provision of RCRA.

### 1. Element I--Receipt

The NSPA applies to a person who "receives, possesses, conceals, stores, barter, sells, or disposes" of stolen property.<sup>106</sup> The NSPA does not require that the individual who received the stolen property benefit or profit from the receipt, only that the stolen property is in some manner received by the individual.<sup>107</sup> To require that the receiver profit or benefit from the receipt of stolen property would limit the NSPA's effectiveness in deterring the trade of stolen property because only those who profitted would be punished by the NSPA. The rationale of deterring the trade of stolen property demands that the NSPA not be limited to those who receive economic benefit from the illegal acts of others.<sup>108</sup>

Investment in an improperly run hazardous waste facility contributes to the illegal operation of hazardous waste facilities like the receipt of stolen goods contributes to the trade of stolen property. To achieve the purposes of RCRA, expanding liability to financiers need not be limited to those financiers who actually profit or benefit from investing in improperly run hazardous waste facilities.<sup>109</sup> Holding controlling financiers liable under RCRA would be analogous to the NSPA because the absence of profit does not preclude liability.<sup>110</sup>

### 2. Element II--Goods

The NSPA requires that an individual receive<sup>111</sup> "goods, wares, or merchandise, securities or money of the value of \$5,000 or more."<sup>112</sup> A general and comprehensive term including tangible and intangible property,

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106. For the purposes of this Note, all of these manners of receiving encompassed by the NSPA will be referred to as receipt.

107. See *supra* note 101.

108. The NSPA exists to deter the *trade* of stolen property, not merely profiting from the trade of stolen property. Thus, to deter all trade of stolen property, the NSPA does not limit its scope to those who profit. See Moore, *supra* note 102 at 472. Writer asserts that the NSPA effectiveness with regard to antiquities hinges on the term "stolen." *Id.*

109. See text accompanying notes 171-72 setting forth the proposed amendment in full.

110. See *infra* notes 171-72 and accompanying text.

111. See *supra* note 106 and accompanying text, which defines the term "receive" for the purposes of this Note's discussion of the NSPA.

112. For the purposes of this Note these terms of the NSPA will be referred to collectively as goods. See *supra* note 101.



"goods" has been interpreted broadly by the federal courts.<sup>113</sup> By requiring that goods be received to bring a person within the scope of the NSPA,<sup>114</sup> the NSPA provides a standard identifying a contribution to the trade of stolen property. An analogy exists between the "goods" element of the NSPA and the concept of holding controlling financiers liable under RCRA.

The act of receiving "goods" connects an individual to the crime of theft and brings the receiver within the ambit of the NSPA. Knowingly investing in an illegally run hazardous waste facility connects the controlling financier to illegal hazardous waste disposal.<sup>115</sup> Essentially, the "goods" affected by the controlling financier are the environment and its resources.<sup>116</sup>

### 3. Element III--Scienter

To come within the purview of the NSPA, the prosecution must prove beyond a reasonable doubt that the accused knew that the goods were stolen.<sup>117</sup> Judicial interpretation of the term "stolen" has, like "goods",<sup>118</sup> also been

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113. See *Johnson v. American Airlines*, 834 F.2d 721, 723 (9th Cir. 1987) (held that human remains that were transported by air from the United States to Ireland were "goods" within the meaning of the section of the Warsaw Convention containing the term "goods"). See also *United States v. Gallo*, 599 F. Supp. 241, 245 (W.D.N.Y. 1984) (held that intangible rights can be the basis of a prosecution for the interstate transportation of stolen "goods"); *American Cyanamid Co. v. Sharff*, 309 F.2d 790, 796 (3d Cir. 1962) (held that microorganisms and sample drugs were within the scope of the NSPA); *United States v. Lester*, 282 F.2d 750, 755 (3d Cir. 1960) (held that even photostatic copies of geophysical maps are goods because the idea embodied in the copies was what gave value to the articles); *United States v. Seagraves*, 265 F.2d 876, 880 (3d Cir. 1959) (held that geophysical maps of discoveries embodying trade secrets constitute "goods, wares or merchandise" within the meaning of the NSPA). See generally 18A Words and Phrases "Goods" (1956 & Supp. 1990).

114. See *supra* note 101.

115. RCRA currently provides language attaching liability to those who "contribute to" hazardous waste contamination of our environment. See *supra* note 11 and accompanying text. The proposed amendment expressly asserts that contributing to environmental contamination by knowingly investing in improperly run hazardous waste facilities will subject a financier to liability under RCRA.

116. See *Sporhase v. Nebraska*, 458 U.S. 941, 953 (1982) (held that ground water is an article of commerce requiring commerce clause analysis of state laws restricting its transfer to other states); *Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978) (held invalid a New Jersey statute banning the disposal of out of state garbage within state borders because the regulation violated the commerce clause).

117. See *United States v. Hollinshead*, 495 F.2d 1154, 1156 (9th Cir. 1974) (held that if the accused is aware that the goods were stolen from somewhere, conviction is possible; she need not be aware of exactly which law proclaimed the property as belonging to the foreign government).

118. See *supra* note 113 and accompanying text for federal decisions broadly interpreting the term "goods."

broadly interpreted by the federal courts.<sup>119</sup> The broad judicial interpretation of "stolen" permits courts to focus on the individual's knowledge as opposed to focusing on theoretical elements of what constitutes a "stolen" good. The scienter element also separates innocent receivers from those within the scope of the NSPA.<sup>120</sup>

Similar to the NSPA, by controlling financier liability RCRA would be limited to financiers who knowingly connect themselves with an illegal activity.<sup>121</sup> The rationale behind the scienter requirement in the NSPA and behind limiting financier liability to those financiers who know that the facility of their investment is being run out of compliance with RCRA seek the same goal: deterring illegal conduct by imposing sanctions against individuals who knowingly involve themselves with those who directly cause the harm.<sup>122</sup> A controlling financier should, like the individual who encourages theft by knowingly receiving stolen goods, bear the responsibility for harm caused.

#### IV. ECONOMIC RATIONALE FOR ATTACHING LIABILITY TO CONTROLLING FINANCIERS

A change in environmental law necessarily raises economic issues because environmental law affects the allocation of resources in our society by

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119. See *United States v. Vicars*, 465 F.2d 720, 724 (6th Cir. 1972) (held defendant who fraudulently traded a non-airworthy airplane for an airworthy airplane found to have "stolen" the latter); *United States v. Bottone*, 365 F.2d 389, 393 (2d Cir. 1966), *cert. denied*, 385 U.S. 974 (held photocopied documents that revealed technical data from documents were "stolen").

120. See *Liparota v. United States*, 471 U.S. 419, 433 (1985) (reversed a conviction of unlawfully acquiring food stamps on the basis that the NSPA offense had a mens rea requirement and that the Government did not prove that the defendant *knew* that his acquisition of food stamps was in a manner unauthorized by statute or regulation (emphasis added)).

121. See *infra* notes 171-72 and accompanying text, which set forth the proposal in full.

122. See Moore, *Enforcing Foreign Ownership Claims*, *supra* note 102, at 480. In support of Moore's proposal to amend the NSPA to impose liability on the buyers of antiquities in order to curtail the illicit trade of stolen antiquities, Moore sets forth the following case scenario: "[P]urchasers generally have the knowledge and the resources to investigate the validity of an antiquity title.... Collectors will be able to avert the purchase of stolen antiquities by carefully inspecting the 'title' of antiquities that are for sale. By determining the validity of items on the market, purchasers will deter sellers from dealing in 'stolen' works. The demand for stolen antiquities will diminish." *Id.* Moore's case scenario of the NSPA reflects the goals of the proposed amendment. Like Moore's "purchasers," financiers generally have the resources and the knowledge to investigate the compliance status of their investment facilities. By imposing liability on controlling financiers, financiers will be encouraged to investigate the facilities of their investment. This in turn will deter operators from operating out of compliance with RCRA and the demand for noncomplying facilities will diminish.

interfering with the free market exchange.<sup>123</sup> Thus, although explicitly expanding RCRA liability to controlling financiers is consistent with other federal environmental laws and policies,<sup>124</sup> such a change must be considered in light of its potential effects on the economy.<sup>125</sup> Although financiers are indirectly subjected to the effects of the growing body of environmental law,<sup>126</sup> attaching direct liability to controlling financiers will encourage all financiers to take on additional responsibility in response to environmental regulations.

The economic impact of holding controlling financiers directly liable under RCRA can be viewed from two perspectives, the environmental perspective and the economic perspective.<sup>127</sup> The environmentalist perceives that the environmental protection derived from government intervention justifies

123. See T. SCHOENBAUM, ENVIRONMENTAL POLICY LAW 18-30 (1985) (Author notes that the classic economic model for the allocation of resources is a free market exchange, where "value" is maximized by voluntary transactions. These transactions, with no government intervention, result in scarce resources gravitating toward their most valuable uses because the scarce resources will be acquired by those to whom they are most valuable. This state of efficiency is called the "Pareto optimum." Environmental law intervenes on this market efficiency, but the author investigates the economic justification of such government intervention by presenting excerpts of works of G. Hardin, *The Tragedy of the Commons* 162 SCIENCE 1243, 1244-1245 (1968) and R. Coase, *The Problem of Social Cost*, 3 J. OF L. AND ECON. 1, 1-8, 15-19 (1960).

124. See text accompanying notes 85-100 regarding the proposed amendment's consistency with the EPA civil penalty policy.

125. For example, extending liability to controlling financiers will encourage financiers to establish prudent loan policies and make financing more difficult and expensive for all hazardous waste facilities. The possibility of more restrictive investing policies in an industry that is necessary to society could deter ventures that would enable the industry to operate effectively. See Rashby, *United States V. Maryland Bank & Trust Co.: Lender Liability Under CERCLA*, 14 ECOLOGY L. Q. 569 (1987) (Writer examines the issues that are bound to arise when financial institutions are added to the growing list of those responsible for cleanup costs. He notes that extending liability to lenders will 1) prevent the lenders from unfairly profiting from the government's payment of cleanup costs by holding on to funds until the site is cleaned up and then reinvesting in the regulated and approved site, 2) deter shirking of responsibilities, 3) provide economic motivation to avoid unsound environmental practices, and 4) prompt financiers and private lender to investigate property for federal environmental law violations before investing.)

126. See Murphy, *The Impact of "Superfund" and Other Environmental Statutes on Commercial Lending and Investment Activities*, 41 BUS. LAW. 1133 (1986) (Commentator alerts the business community to the substantial risks now inherent in everyday commercial lending and investment habits due to the growing body of environmental law. The article focuses on the risks arising from the 'Superlien' statutes, which provide the EPA with a lien that supersedes all other liens on the liable party's property and the notice, disclosure, and cleanup requirements that must precede the transfer of a contaminated site.)

127. See HELLER, COMING TO TERMS WITH GROWTH AND THE ENVIRONMENT, in ENERGY, ECONOMIC GROWTH, AND THE ENVIRONMENT (1972) reprinted in, E. HANKS, A. TARLOCK & J. HANKS, ENVIRONMENTAL LAW AND POLICY 25-43 (1974). (Author presents the divergent perspectives of the ecologist and economist) [hereinafter COMING TO TERMS].

burdening economic growth.<sup>128</sup> To the environmentalist, the environmental harm avoided by imposing liability on another tier of PRPs justifies the extra costs incurred by the hazardous waste industry.<sup>129</sup> Even if such costs inhibit future investment and stunt economic growth,<sup>130</sup> the environmental imperative controls.<sup>131</sup>

The economist's perspective on government intervention differs from the environmentalist's because wealth maximization is the economist's imperative concern.<sup>132</sup> To the economist, government intervention unjustifiably impedes the smooth functioning of the free market, retarding economic growth.<sup>133</sup> Accordingly, imposing direct liability on controlling financiers unnecessarily induces cost prohibitive<sup>134</sup> protective measures, which raise financing costs above the free market demands.<sup>135</sup> However, the conflict between the environmental and economic imperatives does not preclude effectively meeting the concerns of both perspectives by achieving a rational balance between them.<sup>136</sup>

128. For the purposes of this section, "environmentalist view" means a view that lays down an environmental imperative that requires a sharp curtailment to economic growth as the price of biological survival. COMING TO TERMS at 25.

129. The actual compliance costs incurred by the hazardous waste industry due to RCRA's compliance standards are discussed at length, *infra* note 138.

130. Heller writes, "[W]e are well advised, first of all, to take [economic] growth out of the one dimensional context of the natural environment." COMING TO TERMS at 29. Among benefits of economic growth are 1) cleansing the social environment of the cancers of poverty, ignorance, malnutrition, and disease; 2) cleansing the human environment of the degradation and blight of the urban ghetto and the rural slum, and; 3) cleansing our personal environment of the fear of crime and violence. *Id.*

131. See COMING TO TERMS, *supra* note 128, regarding the environmental imperative of the environmentalist perspective.

132. See COMING TO TERMS, *supra* note 127.

133. Economist perspective, for the purposes of this Section, shall mean a view that sets an economic imperative that requires a continuation of economic growth as the price for social survival. COMING TO TERMS at 25.

134. The actual costs of these protective measures are discussed in detail later in this Note. See *infra* note 138 and accompanying text.

135. Markets have been called the "great reconcilers" of the private economy. R. HAVEMAN, *THE ECONOMICS OF THE PUBLIC SECTOR* 21 (2d ed. 1976). Haveman asserts that the process of forming prices, of setting exchange ratios, is one of accommodating the wishes of both buyers and sellers, of getting them both to agree at a single price. Haveman writes, "[t]he phenomenal thing about markets is that they undertake this reconciliation process automatically with no assistance from outside individuals or governments or other forces." *Id.* Thus, "the invisible hand" of the free market thus allows consumers and sellers to exchange for the most efficient prices, seek out the most economical production prices, and generate a search for new technologies and new processes of production. *Id.* at 28, n.7.

136. Environment and economics are not two Goliaths engaged in a struggle to the death. They are both sides of the same interdependent planet. Hanson, *Harmonizing the Law of the Environment*, reprinted in *ENVIRONMENTAL LAW: PRACTICE AND PROCEDURE HANDBOOK* 91, 94 (1976) [hereinafter *PRACTICE AND PROCEDURE*]. (The writer focusses on the interdependence of man and

Arguments have been set forth asserting that governmental environmental regulation reduces the profits of the targeted industry.<sup>137</sup> The costs of operating a properly run hazardous waste disposal facility exceeds the cost of operating an improperly run facility.<sup>138</sup> Ensuring a waste site's compliance

the environment and characterizes the modern environmental movement in three phases. Phase one is the Attention Getting phase, the awareness building that commenced with Earth Day, 1970. Phase Two is the Institutional Arrangement phase, which structured the legislation and agency framework to attack environmental problems. See *supra* note 30 which sets forth environmental legislation enforced by the EPA. Phase Three, and the focus of this Section, is the Harmonizing Phase, the effort to seek some "rational balance" between economic and environmental imperatives. PRACTICE AND PROCEDURE, at 93-4). This "rational balance" is not necessarily a balance between two extremes. See Greenwald, *Interdependence - The Law of the Environment "Promotive" and/or "Preventative" Law*, in PRACTICE AND PROCEDURE at 12, 13. Greenwald suggests a change in the traditional scale of justice when analyzing the justifications of environmental law. He notes that the traditional scale of justice, a center post with two plates across, may not provide a "just solution mode" for environmental solutions. Greenwald suggests that a scale of justice amenable to environmental solution modes should be one of a plate balanced on a centerpin. The change of perception is necessary because "[t]he objective is not to determine which of the two extreme alternatives prevails, but rather to seek equilibrium among all the interdependent weighing factors that belong to the single plate." *Id.*

137. For example, the increased costs of pollution control in the United States have been estimated as high as \$70 billion per year. Due to spending more for pollution abatement, our nation consequently spends less on consumer goods. U.S. General Accounting Office (GAO/RCED-88-101), *Protecting Human Health and the Environment Through Improved Management* 37 (1988). Presenting the government's view of industry and the environmentalist, an author quotes Roy Garrett, Jr., Chairman of the SEC. The author writes, "After recounting an extended imaginary dialogue between the environmentalists and the leadership of a publicly held industry, [Garrett] made two summary observations. The first is that large corporations are not managed by their owners, the owners are an amorphous and ever changing class of unknown people. Second, *most changes to achieve environmental goals are immediately unprofitable or at least unrelated to profit making policy.*" (emphasis added) See Greenwald, *Interdependence - The Law of the Environment "Promotive" and/or "Preventative" Law*, in ENVIRONMENTAL LAW: PRACTICE AND PROCEDURE HANDBOOK 11, 16 (1976). See also R. POSNER, *ECONOMIC ANALYSIS OF LAW* 352 (1986) (Judge Posner sets forth economic detriments of government regulation by suggesting that because the cost of compliance is cost prohibitive, imposing the extra costs on the industry will result in a decrease in productivity and/or a cut in overhead or employment costs, ultimately resulting in a fall in worker's incomes.).

138. Costs of compliance with RCRA are high because of the costly compliance standards covering interim and permitted facilities. Interim status facilities are those facilities that have not obtained a permit under RCRA. Because Congress recognized that it would take many years to issue all of the permits, RCRA 42 U.S.C. § 6925(3)(e) provides for interim permits. The second set of regulations, just as stringent as the first, regulates permitted facilities. In addition to the permitting costs, both interim status and permit standards impose costly administrative and technical requirements. The purposes and effectiveness of permitting is beyond the scope of this Note. See generally Fortuna, *HSWA Two Years Later: The RCRA Permit Process and the Status Quo*, in ENVIRONMENTAL LAW INSTITUTE, *HAZARDOUS WASTES, SUPERFUND, AND TOXIC SUBSTANCES* 261-75 (1986).

The administrative requirements imposed by RCRA ensure that owners and operators of disposal facilities establish the necessary procedures to properly run the facility and to handle an emergency. Examples of costly administrative requirements are: application for an EPA

with RCRA before investing in a hazardous waste facility will result in additional investigative costs to the financiers.<sup>139</sup> However, the additional costs to the hazardous waste disposal industry and ultimately its users do not necessarily make the the concept of controlling financier liability economically unsound. Conversely, direct liability to controlling financiers encourages a more cost efficient hazardous waste disposal industry.

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identification number, perform detailed chemical or physical analyses of the wastes and develop a written analysis plan, install security measures to minimize the unauthorized entry of people or livestock, and to conduct training to reduce the potential for mistakes that might threaten human health or the environment. See RCRA ORIENTATION MANUAL 41-68 (1986) (Chapter Four of the manual, entitled *Regulations Applicable to Treatment, Storage, and Disposal Facilities*, sets forth in plain English the requirements of a properly run disposal facility).

The costly technical requirements of RCRA include sufficient ground-water monitoring. Costs of ground-water monitoring is a function of the number of wells on the facility and the depth of the wells. (Telephone interview with the project manager of a Northwest Indiana environmental engineering firm Feb. 23, 1990). Current estimated cost of replacing groundwater monitoring pipes is \$130 per linear foot. Under RCRA a hazardous waste landfill could be required to have up to 100 wells and the depth of the wells ranges from 25-100 feet. Thus, a medium sized landfill with 25 wells with an average depth of 50 feet would result in \$325,000 in initial groundwater monitoring costs. *Id.* To collect samples from these wells on a quarterly basis costs the facility around \$2,000 per well. *Id.*

RCRA also imposes costly closure and post-closure protective measures. Closure is the period when waste are no longer accepted at the facility. Post closure is the thirty year period after closure during which the owners or operators must continue monitoring the disposal facility. Like the groundwater monitoring systems, the closure cost is a function of the size of the landfill. The primary costs of closure and post closure result from the RCRA requirement that liners be placed beneath or on the sides of a landfill which restrict the escape of hazardous waste or hazardous waste constituents. At closure, the facilities must apply final caps or covers to landfills and decontaminate the equipment, structures, and soil. An estimated cost of the double liners required by RCRA is about \$450,000 dollars per acre. A 1989-90 closure cost of a hazardous waste landfill in New Jersey was \$28 million. (Telephone interview with project manager of a Northwest Indiana environmental engineering firm, February 23, 1990).

139. Financiers would be encouraged to take preventative measures similar to the preventative measures currently exercised by secured creditors. For the purposes of this Note, secured creditors are lenders whose loans are secured by facility sites, which may be contaminated with hazardous substances. To prevent liability under CERCLA, secured creditors are required to exercise due diligence in performing an inquiry. CERCLA 42 U.S.C. § 9601(35)(B). It is suggested that prior to granting the loan, the secured lender should 1) obtain an independent engineer to perform an environmental assessment or audit of the proposed security interest, 2) condition the borrower's receipt of funds for the loan on the completion of the environmental assessment and the submission of a satisfactory report from the engineer, 3) negotiate for indemnification in the event that property contamination is discovered in the future, 4) require a warranty from the borrower stating that the borrower does not have any knowledge of past environmental releases on the property, that the borrower will comply with all environmental laws, and that the borrower will not dispose any hazardous substances on the property, and in addition 6) after the loan is granted, the lender should administer subsequent environmental audits. Grodner, *Superfund Liability Issues*, in ICLEF Manual, *All you Need to Know About Environmental Law 12-14* (1988).

## A. Risk Avoidance

Potential liability encourages efficient precautions to reduce the risk of liability.<sup>140</sup> Potential direct liability under RCRA would encourage financiers to invest in properly<sup>141</sup> run hazardous waste disposal facilities as opposed to improperly run facilities. Although the costs of proper hazardous waste disposal are inherently high,<sup>142</sup> the costs necessary to clean up environmental harm caused by improper disposal are much higher.<sup>143</sup> In addition to the costs of the cleanup, the EPA can assess fines and prejudgment interest.<sup>144</sup> Currently, the risk of financiers is limited to indirect liability, likewise limiting financiers' interest in compliance with RCRA.

Holding controlling financiers liable under RCRA provides all financiers

140. This economic theory is called risk avoidance. See G. CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 35-129 (1970) (setting forth an economic framework for designing liability rules). Risk avoidance is particularly important in the hazardous waste disposal context because preventative measures are generally the most efficient way of addressing the risks and releases of hazardous substances. See Note, *Liability of Parent Corporations for Hazardous Waste Cleanup and Damages*, 99 HARV. L. REV. 986, 993 n.42 (1986) (Writer asserts that the risk avoidance criterion is "particularly important" in the hazardous waste disposal industry because cost preventative measures are generally the most efficient way of addressing the risk of releases of hazardous substances.).

141. See *supra* note 7 and accompanying text defining "proper disposal" for the purposes of this Note.

142. See *supra* note 138 which sets forth costly compliance standards imposed by RCRA. See also R. ZENER, *GUIDE TO ENVIRONMENTAL LAW* 196 (1981) (In section addressing liabilities of an existing RCRA site, writer sets forth examples of costs of the operation of a properly run facility. For example, the construction of impermeable barriers down to the bedrock.).

143. For example, the migration of toxicity through chemical degradation would require extensive cleanup of the groundwater. Cleanup would include digging up contaminated earth, treating the earth and reapplication costs, and pumping out and treating contaminated groundwater. *Id.* See also Note, *Allocating the Costs of Hazardous Waste Disposal*, 94 HARV. L. REV. 584 (1981) (proposes three categories of costs, avoidance, abatement, and compensation and suggests that avoidance costs, although high, are the most cost effective.); OFFICE OF TECHNOLOGY ASSESSMENT, *TECHNOLOGIES AND MANAGEMENT STRATEGIES FOR HAZARDOUS WASTE CONTROL* 6 (1983) (notes that the cost of cleaning up an unsafe hazardous waste disposal site and compensating victims of releases might be 10 to 1000 times the cost incurred to prevent releases).

144. Environmental cases imposing prejudgment interest on the costs of harm include *United States v. Hollywood Marine, Inc.*, 519 F. Supp. 688 (S.D. Tex. 1981). The federal court held in favor of plaintiff United States. The defendants were held liable in the amount of \$16,477.42 together with costs and interest at the rate of 9% from the date that the costs were incurred until the time of payment. *Id.* at 692. Defendants violated the Federal Water Pollution Control Act by discharging eight thousand gallons oil as a result of the defendant's vessel grounding. 33 U.S.C. § 1321(b)(3). 519 F. Supp. at 691-92. See also *United States v. M/V Zoe Colocotroni*, 602 F.2d 12, 14 (1st Cir. 1979) (held that the trial judge did not abuse his discretion in allowing prejudgment interest from the date the United States, plaintiff, first presented the cleanup bill to the defendants).

with a profit motive to monitor hazardous waste disposal sites.<sup>145</sup> Currently, enforcement of RCRA is restricted to those facilities investigated by the overburdened enforcement branch of the EPA.<sup>146</sup> Owners and operators may risk noncompliance and operate the facility to make a large enough short term profit to survive the inevitable cleanup costs imposed by the EPA.<sup>147</sup> The delay tactic is openly used in the hazardous waste disposal industry.<sup>148</sup> Imposing direct liability on controlling financiers is one means to curb hazardous waste facility operation out of compliance with RCRA for the short term profit gains. Adding financier investigation to the current EPA monitoring could deter owners and operators from taking advantage of the lower operational costs of noncompliance because the risk of detection is increased. Also, operators will more actively seek to comply with RCRA standards because of the immediate financial implications arising when financier investigation reveals noncompliance.<sup>149</sup>

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145. Private monitoring currently exists in the context of real estate transfers and sales of hazardous waste facilities. A detailed discussion of private monitoring is beyond the scope of this Note. See Vaughn & Shi, *Fiduciaries Tread Carefully on Contaminated Ground*, 129 TRUSTS & ESTATES 32 (Jan. 1990) (Writers suggest monitoring on the behalf of commercial fiduciaries in the absence of ameliorative legislation. To minimize the risk of liability, writers set forth a phased approach to "prudent assessment" of all land transfers. Writers emphasize that prudent assessment is necessary in light of the substantial increase in enforcement efforts among federal and state environmental agencies and the corresponding rise in the number of environmental lawsuits being brought by private individuals seeking recovery for costs incurred in cleaning up contaminated property.).

146. See *supra* note 6 and accompanying text addressing the current burden on the EPA and the ineffectiveness of the EPA in carrying out its responsibilities due to lack of resources. As of 1985, the United States General Accounting Office estimated that the EPA may bear the responsibility of cleaning up between 1,500 and 4,200 sites at a cost ranging from \$6.3 billion to \$39.1 billion. U.S. General Accounting Office (GAO/RCED-88-48) HAZARDOUS WASTE: CORRECTIVE ACTION WILL TAKE YEARS TO COMPLETE 22 (Dec. 1987). See *supra* note 5 discussing the Superfund available to the EPA to pay for environmental corrections. Currently, the fund consists of about \$1.6 billion. *Id.*

147. For example, in the Four County litigation, discussed at length in Section I of this Note, notes 20-47 and accompanying text, the landfill owners petitioned the Indiana Department of Environmental Management (IDEM) to reopen the landfill. The owners sought to dispose of a greater volume of hazardous waste than ever before, claiming that the profits earned could satisfy the judgment and be applied to the corrective action ordered from the district court. IDEM denied the Four County Landfill owners' petition concluding an administrative review held before an Indiana Department of Environmental Management administrative law judge. *Environmental Waste Control, Inc. d/b/a Four County Landfill v. IDEM* (Cause No. 88-S-J-154) (Administrative order available for public view at the IDEM building in Indianapolis, Indiana, 555 Chesapeake Building).

148. *Id.*

149. For example, financier investigation would regularly and directly affect the financing of the facility. In contrast, potential EPA detection, although costs are inevitable, would be imposed in the future and are thus less likely to encourage immediate response.



*B. Demand and Supply*

Imposing direct liability on controlling financiers under RCRA will stimulate a demand for proper and protective hazardous waste disposal practices.<sup>150</sup> Financiers will depend on properly run facilities to get a return on their investment and escape liability. Hazardous waste facility financing will depend to an even greater extent on compliance with RCRA if controlling financiers could face direct liability under RCRA. The operator's self interest and the financier's self interest will create internal pressure to operate facilities in compliance with RCRA.

Encouraging more private regulation of RCRA facilities and providing additional incentive to owners and operators to comply with RCRA creates a different genre of hazardous waste disposal market.<sup>151</sup> Our nation's well-being increasingly depends on properly run hazardous waste facilities as the generation of hazardous waste increases.<sup>152</sup> The market thus created will result in cost effective means to meet the high operating costs of hazardous waste disposal.<sup>153</sup> Further, the market demand for proper disposal of hazardous waste will justify these costs.

*C. Better Allocation of Resources*

The reallocation of the costs of environmental harm to those who cause and benefit from the harm is not a new force in the law.<sup>154</sup> The economic concept

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150. Imposing direct liability on controlling financiers reflect the 1984 RCRA amendments, which also worked to close the loopholes allowing the hazardous waste disposal industry to operate out of compliance with RCRA standards. The 1984 amendments *stimulated* the demand for proper hazardous waste capacity. (Emphasis in original). Fortuna, *HSWA Two Years Later: The RCRA Permit Process and the Status Quo*, in Environmental Law Institute, HAZARDOUS WASTES, SUPERFUND, AND TOXIC SUBSTANCES 261, 262 (1986).

151. CROCKER & ROGERS, ENVIRONMENTAL ECONOMICS 139 (1971) (Writers suggest that "it is not true that controls always inhibit the operation of markets. They [environmental controls] can also create markets." *Id.*).

152. See H. Rep. No. 94-1491, at 2, U.S. CODE CONG. & ADMIN. NEWS 1976, pp. 6238-9, which notes that RCRA aims to solve the problems associated with the three to four billion tons of discarded materials generated each year, and the problems resulting from the anticipated eight percent annual increase in the volume of such waste.

153. See *supra* note 138, which addresses the high costs of meeting the administrative and technological requirements of RCRA.

154. Concluding his article suggesting ways for effective federal regulation of environmental control, a commentator states, "Long before we set up administrative agencies to wrestle with water and air pollution or solid waste pollution, the courts were attempting, through a system of public and private rights, to protect people from at least the worse[sic] effects of the other fellow's residues. Without ever, so far as I know, using that pallid and abstract term 'externalities,' they have attempted to prevent the shifting onto innocent people at least the most obvious costs of pollution, costs which the courts see in terms of unhealthy, uncomfortable or unpleasant living, or perhaps of

of externalities reflects the rationale of shifting the costs of resources to those who benefit from their use. The exact nature and definition of externalities proves elusive to economists and environmentalists.<sup>155</sup> Basically, externalities are costs of market transactions that are unrecognized by the producer and consumer and as such, are borne by society.<sup>156</sup> Because the cost of externalities is not taken into account in the market price, the prices of the goods or services exchanged fail as accurate indicators of value.<sup>157</sup> Thus, externalities distort market values and reduce effective allocation of resources.<sup>158</sup> Often, remedying an externality is a matter of negotiation on the

sharp interference with desired uses of land or other resources." Beuscher, *Some New Machinery to Help do the Job* in ENVIRONMENTAL QUALITY IN A GROWING ECONOMY 156, 161 (1968).

155. See HAVEMAN, *supra* note 135, at 33. Haveman analyzes the concept of externalities, but uses the term "spillover" to refer to the result when "someone inflicts a 'harm' on another person without compensating him." *Id.* Writer recognizes that spillovers [externalities] result in benefits as well as costs and demonstrates the difference with the following example:

Spillover benefits, like spillover costs, abound in the real world. These external benefits occur when one party's action provides 'gain' to someone else for which payment is not required ... [C]onsider the case of a private electric utility which decides that the construction of a new reservoir for the production of hydropower would be a worthwhile investment. Building the reservoir makes available to recreationists a fine swimming, boating, an fishing area. They are the recipients of a spillover benefit. On the other hand, if the utility, by damming up the river, destroys a beautifully scenic view, those people who might otherwise have enjoyed the view are the objects of a spillover cost.

*Id.* Using Haveman's example as an analogy, controlling financiers are the recipients of the spillover benefit and society is the object of the spillover cost. See also W. HIRSCH, LAW AND ECONOMICS: AN INTRODUCTORY ANALYSIS (1989) (Writer sets forth a number of definitions of externalities and proposes his own. Hirsch states, "[A]n externality exists whenever the decision of such economic actors as a household or firm directly affects, through nonmarket transactions, the utility or production functions of other economic actors. An externality thus results as resources are exchanged in nonmarket situations commonly involving involuntary exchange." *Id.* at 10-11.).

156. Thus, one purpose of a legislative rule is to eliminate externalities from imposing costs on third parties and cause individuals and firms to internalize those costs. Haveman, *supra* note 135 at 39-40. For a more extensive critique of externality theory and the efficiency calculus method, see Kennedy, *Cost Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981).

157. HAVEMAN, *supra* note 135 at 34. ("When spillover costs and spillover benefits exist, inefficiencies are created in the economy. Producers and consumers who create these spillovers do not take them into account when they make their decisions. As a result, the market fails to reflect them and prices become distorted. Such spillovers, then, have serious efficiency consequences for the economy."). *Id.*

158. Externalities' effects on the allocation of goods results from the externality distorting the value of goods exchanged. The idea is that through voluntary exchange, scarce resources will gravitate toward their most valuable uses because they will be acquired by those to whom they are most valuable, i.e., those willing to pay the most for them. In this way "value" is maximized. When externalities distort the value, the market is no longer operating at the highest point of efficiency and resources are not allocated in the most efficient manner. See generally SCHOENBAUM, ENVIRONMENTAL POLICY LAW 18 (1985). See also HAVEMAN, *supra* note 135, at 34 (addressing the resource allocation and efficiency problems created by spillovers [externalities]).

open market.<sup>159</sup> Sometimes however, the problems of externalities are most effectively resolved by government intervention.<sup>160</sup>

Holding controlling financiers directly liable under RCRA will internalize the externality currently existing in the market exchange between controlling financiers and hazardous waste disposal facilities. Controlling financiers do not directly bear the costs of harm caused by their investment activity. The greatest impediment to an efficiently run hazardous waste disposal market is the high cost of monitoring all of the RCRA facilities in the United States and enforcing compliance with safety regulations.<sup>161</sup> Currently, RCRA thrusts the costs and incentives of monitoring on the PRPs listed in RCRA. These costs reach beyond the industry through higher manufacturing and product prices. Unfortunately, society's real cost is often in the form of a contaminated environment.<sup>162</sup>

The existing externality distorts the prices of the hazardous waste disposal industry and ultimately the prices of all goods and services connected with it. The prices of polluting products are lower than the actual cost of production because the cost of the cleanup of the environmental contamination resulting from the improper disposal of the hazardous waste is externalized from the market price.<sup>163</sup> By forcing financiers to take account of the costs of investing

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159. W. HIRSCH, *LAW AND ECONOMICS: AN INTRODUCTORY ANALYSIS* 216-218 (1989) (discussing liability rules for environmental externalities and concludes that "externality problems cannot be resolved by negotiated solution [in the free market] and other means must be applied, often involving the courts).

160. HAVEMAN, *supra* note 135, at 45. Haveman concludes that externalities are a rationale for government activity. Haveman asserts that government intervention can achieve an "economic justice" that the free market cannot achieve due to a lack of efficiency and equity when externalities exist.

161. *See generally* Note, *Allocating the Costs of Hazardous Waste Disposal*, 94 *HARV. L. REV.* 584 (1981).

162. Due to the decrease in funds to the EPA and the ever increasing cleanups, this cost is born by a deteriorating environment rather than higher product costs. A 1987 GAO report states that "[b]ecause EPA has not specifically identified how many RCRA facilities will require corrective action, it does not know with certainty how long it will take to clean up facilities under the corrective action program." The report estimated that of 4,800 RCRA facilities, about 2,500 will require corrective action. The EPA's budget model showed that it will take until the fiscal year 2005 before corrective action is initiated at all of the facilities requiring clean up. In addition, the EPA estimates that many facilities will have cleanup actions that could take up to 20 years to complete. As a result, environmental contamination from *existing* RCRA facilities could be extended to fiscal year 2025. U.S. General Accounting Office (GAO/RCED-88-48) *HAZARDOUS WASTE: CORRECTIVE ACTION WILL TAKE YEARS TO COMPLETE* 24-27 (December 1987); *See generally* U.S. GENERAL ACCOUNTING OFFICE (GAO/RCED-88-140) *HAZARDOUS WASTE: MANY ENFORCEMENT ACTIONS DO NOT MEET EPA STANDARDS* (June 1988).

163. *See infra* notes 164-168 and accompanying text discussing the economic and equitable ramifications caused by externalities.

in improperly run hazardous waste facilities, an externality is internalized. Direct liability for controlling financiers under RCRA reflects the EPA's goal to impose on polluting firms the costs otherwise thrust on the public.<sup>164</sup>

No unique universal solution to RCRA's ineffectiveness exists, but holding controlling financiers directly liable under RCRA would be a step in the right direction.<sup>165</sup> Direct controlling financier liability under RCRA would constrain investors' indiscretion without adversely affecting the private sector's financial ability to comply with environmental regulation.<sup>166</sup> Holding controlling financiers liable, while imposing a marginal effect on the market, will create a more efficient hazardous waste disposal industry.<sup>167</sup> Direct controlling financier liability under RCRA effectively carries out the congressional intent to have those that bear the fruits of improper hazardous waste disposal to pay for the costs of cleanup.<sup>168</sup>

#### V. PROVIDING FOR CONTROLLING FINANCIER LIABILITY UNDER RCRA

The amendment proposed in this Note expressly includes controlling financiers within RCRA's scope of liability. First, the proposed amendment defines controlling financiers as a potentially responsible party in terms of investment and knowledge. The investment requirement recognizes that the control held by the financier derives not from RCRA's traditional interpretation of control<sup>169</sup> but rather, from the financier's economic investment in the

164. The proposed amendment reflects the goals of the EPA's civil penalty policy. *See supra* notes 85-100 and accompanying text. A 1980 EPA report states, "The [civil penalty] policy seeks to improve the operation of the market sector of our economy by more fully imposing on polluting firms costs otherwise thrust upon the public. By internalizing more of the social costs of producing goods or services, it makes prices of goods better reflect the resources used in their production, and allows the market system to better allocate resources." *Environmental Protection Agency Civil Penalty Policy for Major Source Violators of the Clean Air Act and the Clean Water Act*, ENV'T REP. 41:1101 (BNA) (July 8, 1980).

165. "In the complex and often baffling field of environmental control, no one — surely not the economist — has all the answers. But good economics is the handmaiden, not the enemy, of the good environment." COMING TO TERMS, *supra* note 127, at 41.

166. "The implication is that the environmental quality problem is basically a problem of finding the optimal set of constraints on individual discretion for each situation." CROCKER & ROGERS, ENVIRONMENTAL ECONOMICS 113 (1971).

167. *See HITE, THE ECONOMICS OF ENVIRONMENTAL QUALITY* 11 (1972) (The authors assert that substantial amounts of environmental control can be achieved without drastic or revolutionary modification in the private sector economy. The authors also claim that it is in the public interest to seek out ways to minimize the economic and political impacts of measures to protect and improve the environment.).

168. *See supra* note 84.

169. *See supra* notes 66-76 and accompanying text, which discusses the currently applied operational standard of control.

hazardous waste industry. The knowledge requirement narrows the definition to include only those financiers who knew or should have known that the facility of their investment was an illegally run hazardous waste facility.

Second, the proposed amendment allows suit against the controlling financier at any time before the corrective action has been implemented. To prevent a complete shifting of liability from those who have been traditionally held responsible for RCRA violations,<sup>170</sup> the proposed amendment contains limitations on the controlling financier's potential liability. The financier's liability will be limited to the costs of the corrective action, and the proposed amendment ensures that costs paid by a controlling financier will be recompensed by the first tier of potentially responsible parties if possible.

#### A. *The Proposed Amendment*

Following Section 6973(a) of RCRA, which lists the currently recognized potentially responsible parties,<sup>171</sup> the proposed amendment will add to that section:

... or (b) any controlling financier of the facility.

- 1) A controlling financier is a person or entity who invests in a hazardous waste facility and the investment is made or continued with knowledge that the facility is being run in a manner unauthorized by this Act.
- 2) Suit against a controlling financier shall not be subject to § 6972 (b)(2)(B) of this Act and may be initiated at any time before complete corrective action has been implemented.
- 3) The controlling financier shall be liable only to the extent of the costs of implementing the corrective action and shall not be held liable for any fines, fees or penalties.
- 4) If the costs of corrective action are satisfied by the parties or a party listed in subsection (a) of this Section, RCRA 42 U.S.C. § 6973,<sup>172</sup> the costs shall be paid by that party or parties and no liability will attach to controlling financiers.
- 5) If the controlling financier satisfies a judgment for corrective action under this Section and subsequent liability attaches to the parties or a party listed in subsection (a) of this Section, such parties shall recompense the controlling financier to the extent possible.
- 6) A determination of liability under the Section is not controlling or

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170. See *supra* note 60.

171. See *supra* note 53, which sets forth imminent danger provision in relevant part and lists owners, operators, generators, and transporters as potentially responsible parties.

172. See *supra* note 53.

evidence of liability under another Section of this Act.

*B. Evidentiary Standards for the Proposed Amendment*

Upon establishing investment in the hazardous waste facility and establishing that the financier made such investment with knowledge that the hazardous waste landfill is being run in a manner unauthorized by the federal regulations, a financier will become a PRP under the proposed amendment to RCRA. The investment requirement relaxes the operational control standard of liability currently applied to identify operators under RCRA.<sup>173</sup> The investment requirement also reflects the current trend to expand liability beyond those who have a close active involvement or direct supervision in the events leading to the environmental contamination.<sup>174</sup> The knowledge requirement limits the proposed amendment's extension of liability by rejecting the current trend of disregarding a knowledge element by holding all PRPs strictly liable.<sup>175</sup>

As to the burden of proof in establishing the two elements of controlling financier, the EPA<sup>176</sup> will carry the burden to prove each element by a preponderance of the evidence.<sup>177</sup> The evidentiary standards for proving the elements of controlling financier should include the use of circumstantial evidence.<sup>178</sup> For example, the prices of services at a hazardous waste facility

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173. *Supra* notes 66-76 and accompanying text.

174. In *United States v. Northeastern Pharmaceutical & Chem. Co. (NEPACCO)*, 579 F. Supp. 823, 847-48 (W.D. Mo. 1984), *rev'd in part, aff'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987), the president and major shareholder was held liable under RCRA despite a finding he had no knowledge of the plan to dispose of hazardous waste, nor was he present at the plant during waste disposal.

175. *Id.* See *supra* note 59 for discussion of the application of the theory of strict liability on environmental statutes and case law.

176. In the case in which the state is authorized to administer and enforce environmental regulations on the EPA's behalf, the state shall maintain the burden of proof. See *THE STATE AND FEDERAL PARTNERSHIP* (1988), a pamphlet published by the EPA, for an excellent synopsis of the relationship between state environmental agencies and the EPA in administering and enforcing hazardous waste regulations.

177. Because knowingly investing in an improperly run hazardous waste facility is analogous to a prior bad act, the standard of proof shall be the standard required of government when entering prior bad acts of the defendant into evidence in criminal prosecutions. The Sixth Circuit addressed the conflict between the circuits as to whether a clear and convincing standard or a preponderant standard should apply in *United States v. Huddleston*, 811 F.2d 974 (6th Cir. 1987). The *Huddleston* court adopted the preponderance of the evidence standard over the "clear and convincing" standard as the standard of proof of extrinsic evidence. *Id.* at 977.

178. For example, a determination of RCRA violations at an administrative hearing would be circumstantial evidence that could be used to prove that a financier knew of the site being run in a manner unauthorized by the statute regulations. In *United States v. Jones*, 797 F.2d 184 (4th Cir. 1986), the court held that circumstantial evidence that one defendant knew property was stolen was

being substantially less than fair market value<sup>179</sup> is circumstantial evidence. Such evidence could establish that the financier knew or should have known that the hazardous waste disposal facility was being run out of compliance with RCRA.

Financiers' knowledge of noncompliance will be assessed by an objective standard of reasonableness.<sup>180</sup> The objective standard will constrain financing of hazardous waste facilities with the unduly burdensome aspects of the subjective standard of knowledge.<sup>181</sup> The objective standard of a financier's knowledge will be measured primarily in terms of the presence of circumstantial evidence from which a reasonable financier would have known that the site was being run out of compliance with RCRA. An influential piece of circumstantial evidence will be the presence or lack of a good faith environmental audit.<sup>182</sup> By adopting an objective standard, the proposed amendment will allow financiers to make reasonable investments in hazardous waste facilities without the threat of liability. Because an environmental investigation revealing that the facility was being properly run establishes reasonable investment practices, a financier who takes this precaution in good faith would not be not be subject to the proposed amendment.

Applying an objective standard to determine financier's knowledge of a facility's noncompliance will give financiers confidence in carrying out their professional obligations and purposes.<sup>183</sup> Because of the dire need for private financing of hazardous waste disposal facilities,<sup>184</sup> the proposed amendment must not so impinge on financiers' practices or deterring reasonable investment

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sufficient to support her convictions.

179. In *United States v. Livingston* 816 F.2d 184 (5th Cir. 1987), the court held that selling property for less than market value may be evidence that seller knew the property was stolen.

180. In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Supreme Court used an objective good faith standard to assess good faith immunity as applied to government officials. A primary reason for rejecting the subjective good faith component was the "substantial costs attend[ing] the litigation of the subjective food faith standard of government officials." *Id.* at 816. The *Harlow* objective standard was refined in *Anderson v. Creighton*, 483 U.S. 635 (1987), which also held that the liability of allegedly unlawful actions "generally turns on the 'objective legal reasonableness of the action.'" *Id.* at 639.

181. In *Harlow*, 457 U.S. at 816, the Court noted other negative aspects of the subjective standard, such as distraction of officials from their duties, inhibition of discretionary action, and the deterrence of able people from public service.

182. Although market prices may serve as circumstantial evidence of a financier's knowledge, *see supra* notes 178-79, the presence or lack of a good faith environmental audit before investment seems most easily proved in a court of law and provides an effective measuring stick of the financier's knowledge.

183. Financiers should be allowed to go forth in their business "with independence and without fear of consequences." *Pierson v. Ray*, 386 U.S. 547, 554 (1967).

184. *See supra* note 6 and accompanying text regarding our nation's economic dependence on the private sector for environmental protection.

in hazardous waste disposal facilities.<sup>185</sup> The proposed amendment does not mandate the EPA to investigate all financiers of hazardous waste facilities. However, the objective standard of determining a financier's knowledge will encourage a good faith investigation<sup>186</sup> of a facility's compliance with RCRA. Thus, a good faith investigation revealing compliance would preclude EPA's ability to prove knowledge by a preponderance of the evidence. The suggested evidentiary standards comport with the proposed amendment's purpose of encouraging reasonable and responsible investment in hazardous waste disposal facilities.

### C. *Limitations of the Proposed Amendment*

The retroactive recovery provision of the proposed amendment limits the amendment's impact on the prevention of improper hazardous waste practices and the protection of the environment. First, the retroactive recovery provision denies the EPA the opportunity to disregard traditional actions against owners and operators in favor of controlling financier cause of action. Essentially, this provision ensures that controlling financiers will not substitute traditional PRPs. Without retroactive recovery provision, enforcement of environmental cleanups would be less complex. However, this limitation retains the focus of responsibility under RCRA on those ultimately and directly in control of the hazardous waste disposal facilities, the owners and operators. By providing that the owners and operators shall reimburse the controlling financiers for any costs if the owners or operators are able, the proposed amendment dissuades a complete shifting of liability to financiers. The burden of extended retroactive recovery litigation is outweighed by the fact that such litigation will only happen after the environmental clean up costs have been paid.

A second limitation of the proposed amendment provides that controlling financier liability will be limited to only the costs of corrective action. One approach, not suggested by this Note, could hold controlling financiers liable for attorney fees, court costs, civil penalties, or fines to deter all investment in hazardous waste facilities known to be out of compliance with RCRA. Although

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185. To prevent bare allegations from subjecting financiers to the costs of trial and the burdens of broad-reaching discovery, an opportunity to preclude the furtherance of such claims with a summary judgment is advisable. See *Hartlow*, 457 U.S. at 818, which sets forth procedural advantages of a summary judgment proceeding as a means of preventing undue disruption of a government official's duties.

186. For example, in *Hyatt v. Sellen*, 40 Wash. App. 893, 700 P. 2d 1164 (1986) the court allowed the defendants a reasonable opportunity to show due diligence as evidence to counter plaintiff's showing of negligence per se. Applying this concept to the proposed amendment, controlling financiers could counter plaintiff's showing of knowledge with evidence of a good faith environmental investigation of the landfill's operations revealing compliance with RCRA.



the limitation of liability may decrease a financier's risk avoidance behavior,<sup>187</sup> the limitation works to impose liability to serve directly the most essential goal of RCRA, protection of human health and the environment.<sup>188</sup>

## VI. CONCLUSION

Environmental contamination caused by improper hazardous waste disposal poses a serious threat to human health and our environment. When such contamination remains unabated, the potential environmental and health harms increase. RCRA exists to encourage sound hazardous waste disposal practices and to enforce environmental cleanup when contamination occurs. However, RCRA's effectiveness is limited when the currently recognized potentially responsible parties cannot pay for cleanup.

Because financiers are not currently listed as potentially responsible parties under RCRA, financiers currently escape liability for environmental contamination arguably caused by their investment. Even when a financier knowingly invests in an improperly run hazardous waste facility, the financier remains outside of RCRA's scope of potential liability. By including controlling financiers within RCRA's scope of liability, the proposed amendment will allow RCRA to more effectively meet its goals.

For reasons of environmental protection and promoting an economically sound hazardous waste industry, the proposed amendment merits consideration. Imposing potential liability on financiers who knowingly invest in improperly run hazardous waste facilities comports with the rationale and goals of RCRA by discouraging investment in improperly run hazardous waste facilities. The proposed amendment precludes financiers, operators of the hazardous waste disposal industry, and consumers of hazardous waste products from avoiding the environmental costs of improper hazardous waste disposal. In exchange, the proposed amendment offers society additional protection from unabated environmental contamination and long term economic health for the hazardous waste disposal industry.

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187. See *supra* notes 149-58 and accompanying text discussing limited liability as an incentive to take risks, while imposing liability encourages risk avoidance.

188. See *supra* note 2 setting forth the goals and purposes of RCRA.