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ABATING AN IMMINENT HAZARD: INJUNCTIVE RELIEF UNDER THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT OF 1980

[T]he principle of 'innocent until proven guilty' applies to persons and not to chemicals. Chemical substances should be judged guilty until proven innocent, with the burden of proof on the chemical and the benefit of the doubt extended to the people.[1]

INTRODUCTION

The production of synthetic chemical substances ranging from pesticides to plastics has brought with it the accumulation of massive amounts of toxic waste.[2] These substances, unavoidable by-products of the modern chemical manufacturing process, are either known to cause or suspected of causing a host of serious medical ailments.[3] Disposing of this hazardous waste is a problem currently vexing both the business community and legislative policy makers. Unfortunately, no safe and effective method of disposal accompanied the appearance of these toxic compounds.[4] Rather, chemical

1. New Jersey State Senate Commission on the Incidence of Cancer, quoted in M. BROWN, LAYING WASTE: THE POISONING OF AMERICA BY TOXIC WASTE 138 (1980).

2. It has been estimated that as much as 255 to 275 million metric tons of hazardous waste is generated in the United States per year. This represents a ratio of about one ton of hazardous waste produced for every person in the United States. N.Y. Times, Mar. 17, 1983, at B14, col. 1 (recounting statistics reported in OFFICE OF TECHNOLOGY ASSESSMENT, TECHNOLOGIES AND MANAGEMENT STRATEGIES FOR HAZARDOUS WASTE CONTROL (1983)).

3. *See* SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS OF THE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 96TH CONG., 1ST SESS., HAZARDOUS WASTE DISPOSAL 15 (Comm. Print 1979) (medical problems associated with Love Canal included increased rates of miscarriage and birth defects, central nervous system disorders, nervous breakdowns, hyperactivity, epilepsy, urinary disease, and respiratory problems) [hereinafter SUBCOMM. ON OVERSIGHT].

4. Much of the hazardous waste produced in the United States has been deposited in landfills and other surface impoundments. *See infra* notes 20-26 and accompanying text. Often these depositories leak and contaminate groundwater. *See* Cameron, *Hope for a Less Toxic Future*, 100 CHRISTIAN CENTURY 747, 748 (1983). *See also* Highland, *Hazardous Waste: What Is Proper Waste Disposal?*, 241 CURRENT 16, 18-19 (1982). The National Academy of Sciences has issued a report, "Management of Hazardous Industrial Wastes," in which the academy concludes that the use of even modern landfills should be minimized because many toxic chemicals remain hazardous for centuries and it is impossible to prevent migration of chemicals into groundwater. N.Y. Times, Mar. 17, 1983, at B14, col. 1.

Scientists believe, however, that technologies already exist which are capable of either

waste usually has been simply dumped, either directly or in tanks, into landfills. These sites, which often provide no structures to trap the chemical waste, justifiably have become the focus of significant concern.

Over the last decade, Congress has attempted to legislate a program by which chemical waste will be tracked and regulated from its inception through its disposal,[5] but until recently environmental protection laws contained no provisions addressing problems caused by *past* hazardous waste disposal. Finally, in 1980, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[6] was enacted to provide a solution to the problem of cleaning up toxic sites. The statute, commonly referred to as the Superfund Act, provides a mechanism by which the federal government pays for the removal and relocation of dangerous chemical waste; the costs of the cleanup are then recovered from those determined to be responsible parties.[7] Use of Superfund monies, however, is contingent upon state cooperation and other factors possibly beyond the control of the federal government.[8] Thus, dangerous sites may exist which cannot be cleaned up by use of the Superfund.

When a toxic waste disposal site presents an imminent hazard, however, CERCLA provides an alternate remedy to that of using Superfund monies. The imminent hazard provision, section 106(a), authorizes the United States Attorney General to secure such relief as may be necessary to abate an "imminent and substantial endangerment to the public health . . . because of an actual or

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containing or eliminating every hazardous waste in a manner that eliminates the need for perpetual storage. *Id.* Alternatives include changes in industrial processes so as to reduce the generation of waste; recovery and recycling of waste materials for use in other products; incineration on land or at sea; physical, chemical and biological treatments to reduce the volume or toxicity of chemical waste; and injection of toxic waste into deepwells. N.Y. Times, Mar. 16, 1983, at A20, col.1. The costs of these treatments, however, are far greater than for landfills. *Congress is Narrowing the Choices on Toxic Wastes*, Business Week, July 4, 1983, at 36.

5. *See* Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6987 (1976), *amended by* 42 U.S.C. §§ 6901a, 6911a, 6914a, 6932, 6933, 6934, 6941a, 6955, 6956 (Supp. IV 1980).

6. 42 U.S.C. §§ 9601-9657 (Supp. IV 1980).

7. 42 U.S.C. §§ 9604(a), 9607(a)(1) (Supp. IV 1980). *See infra* note 54 and accompanying text.

8. *See infra* notes 67-68 and accompanying text.

threatened release of a hazardous substance . . . ."[9] Modeled after other environmental imminent hazard statutes,[10] section 106(a) provides authority for district courts to grant such relief "as the public interest and the equities of the case require."[11] The Justice Department contends that this section provides a mechanism by which parties responsible for the imminent danger, though not actually present owners of the dump site, may be ordered by mandatory injunction to clean up the substances causing the hazard.[12]

This Comment will consider the use of section 106(a) as a mechanism for abating such imminent hazards. In several actions brought under section 106(a), the federal government has requested that mandatory injunctions be granted against generators of hazardous waste.[13] These requested injunctions, which if granted would order generators to abate the hazard, in practice would require enjoined parties to reimburse the government for costs incurred or to be incurred in planning and implementing a site cleanup.

This Comment focuses upon two problems present in pursuing such an injunction. One problem which occurs when attempting to

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9. 42 U.S.C. § 9606(a) (Supp. IV 1980).

10. Other imminent hazard and emergency provisions in environmental response statutes include: Resource Conservation and Recovery Act of 1976 § 7003, 42 U.S.C. § 6973 (Supp. IV 1980); Federal Water Pollution Control Act § 504, 33 U.S.C. § 1364 (Supp. IV 1980); Clean Air Act § 302(a), 42 U.S.C. § 7603 (Supp. IV 1980); Safe Drinking Water Act § 1431, 42 U.S.C. § 300(i) (1976); and Toxic Substances Control Act § 7, 15 U.S.C. § 2606 (1976), *amended by* 15 U.S.C. § 2606 (Supp. IV 1980). For an explanation of the provisions of these sections, see Note, *Inactive or Abandoned Hazardous Waste Disposal Sites: Coping With a Costly Past*, 53 S. CAL. L. REV. 1709, 1722-26 (1980).

11. 42 U.S.C. § 9606(a) (Supp. IV 1980).

12. *See* Guidelines for Using the Imminent Hazard Enforcement and Emergency Response Authorities of Superfund and Other Statutes, 47 Fed. Reg. 20,664-65 (1982).

13. The federal government requested an injunction in United States v. Wade, 546 F. Supp. 785 (E.D. Pa. 1982), *appeal dismissed*, 713 F.2d 49 (3d Cir. 1983); United States v. Reilly Tar, 546 F. Supp. 1100 (D. Minn. 1982); United States v. Outboard Marine Corp., 556 F. Supp. 54 (N.D. Ill. 1982); United States v. Hardage, No. Civ-80-1031-W (W.D. Okla. Dec. 13, 1982) (unpublished).

On November 3, 1983, the government filed a notice of appeal from the initial *Wade* decision. The appellees filed a motion to dismiss the appeal for lack of jurisdiction. United States v. Wade, 713 F.2d 49, 52 (3d Cir. 1983). The government appeal was brought pursuant to 28 U.S.C. § 1292(a)(1) (Supp. IV 1980), which states that the court of appeals has jurisdiction of appeals from: "(1) Interlocutory orders of the district courts of the United States . . . refusing or dissolving injunctions . . . ." The Court of Appeals for the Third Circuit held that the government had not made a showing sufficient to warrant an appeal under § 1292(a)(1).

use an injunction to rectify the danger of toxic waste release arises from the very precepts of equity itself. Because of the common law limitation that injunctions are to be granted only where an irreparable harm may exist absent its issuance,[14] use of section 106(a) has been questioned since alternate cleanup mechanisms are available under the Superfund. Thus, it has been argued that an adequate remedy at law exists and that section 106(a) cannot be used to enjoin those responsible to pay for a cleanup.[15] Additionally, because it is an equitable action, an injunction which provides for the payment of money has been questioned as being analogous to a remedy at law.

A second difficulty in securing a section 106(a) injunction follows from the ambiguity of the statute itself; the section does not specify to whom it may be directed. While the imminent hazard section does provide for securing such relief as may be necessary, there is no mention of the possible defendants to such an action. Thus, a question arises whether the statute was intended to be used against all those deemed responsible parties for other purposes of the Act,[16] or whether the injunction provision is only applicable to the last in the chain of waste disposal—the site owner.

This Comment will demonstrate that section 106(a) was intended to provide for the use of injunctions regardless of the availability of Superfund monies to provide for a cleanup, and that section 106(a) is available for use against all those deemed potentially liable under the Act. Consideration of antecedent environmental legislation as well as the factual setting which led to the statute's passage will be discussed to provide insight into the purposes for which CERCLA was enacted. A discussion of the statutory language and the interaction of the statute's various sections will then be undertaken to demonstrate that these sections of the Act should be given a broad interpretation. Finally, consideration of the recent case law construing CERCLA as well as case law concerning the use of mandatory injunctions will provide the basis for the interpretation that the adequate remedy at law limitation does not bar the use of CERCLA section 106(a), and that the section

14. *See infra* notes 133-40 and accompanying text for a discussion of irreparable harm and the common law adequate remedy at law restriction.

15. *Wade*, 546 F. Supp. at 794.

16. Potentially liable parties are defined in CERCLA § 107, 42 U.S.C. § 9607(a) (Supp. IV 1980).

was intended to be both broadly construed and readily available as a weapon against all parties responsible for the hazards which toxic waste pose.

I. POLICIES AND PURPOSES OF CERCLA

A. *The Setting for the Statute's Enactment: The National Hazardous Waste Problem and Lessons from Past Congressional Efforts*

When considering the proper construction of section 106(a), a review of the circumstances leading to the statute's enactment is particularly revealing. In 1979 and 1980, the problem of hazardous waste disposal was brought to the forefront of public attention by media coverage of the much publicized catastrophe at the Love Canal in Niagara Falls, New York.[17] It became apparent to both the general public and Congress that the dimensions of the national hazardous waste problem were staggering: approximately ten to fifteen percent of the fifty-seven million tons of industrial waste

17. Work on the Love Canal commenced in the late nineteenth century by William T. Love. He undertook the project for the purpose of creating a navigable power channel. The project was never completed and was left as a mile long trench ten to forty feet deep and approximately fifteen yards wide. M. BROWN, *supra* note 1, at 7-8. Hooker Electrochemical Corporation, later known as Hooker Chemical and Plastics Corporation, purchased the site in 1947 and by 1953 had disposed of approximately eighty deadly chemicals at the site. 126 CONG. REC. 30,937 (1980) (remarks of Sen. Daniel Moynihan) (recounting the chronology of events that followed the discovery of hazardous substances in the Love Canal area in mid-1977). *See also* 126 CONG. REC. at 30,942 (1980) (remarks of Sen. George Mitchell) (recounting one Love Canal resident's testimony as to the health problems which developed in the area).

Among these buried chemicals were benzene and dioxin. The chemical 2,3,7,8 - TCDD, a dioxin isomer, has been described as "perhaps the most poisonous synthetic chemical." Trilling, *Painstaking Negotiation Leads to Landmark Court Order Approving Settlement Agreement in Hyde Park Hazardous Waste Cleanup Litigation*, 12 ENVTL. L. REP. (ENVTL. L. INST.) 15,013 n.5 (1982), *citing* M. ESPOSITO, T. TIERNANI & F. DRYDEN, DIOXINS 187 (Cincinnati, Nov. 1980) (U.S. Environmental Protection Agency, Industrial Environmental Research Laboratory). The site was purchased by the Niagara County Board of Education for an elementary school; private homes also were built on the property. 126 CONG. REC. 30,937 (1980). In 1978, reports of birth defects, miscarriages, liver abnormalities, sores, rectal bleeding, and headaches led the New York State Department of Health to investigate the Love Canal situation. S. REP. No. 848, 96th Cong., 2d Sess. 8-9 (1980), *citing* Brown, *Love Canal, USA*, in N.Y. Times, Jan. 20, 1979 (Magazine), at 23. Eventually, the State Health Commissioner declared a state of emergency within a two block area around the canal site. 126 CONG. REC. 30,937 (1980). In August, 1978, New York Governor Hugh Carey announced that the state would evacuate 236 families; this announcement came immediately after President Jimmy Carter declared a state of emergency for the area. *Id.* at 30,938.

produced per year in the United States is hazardous.[18] Estimates of the amount of this toxic waste improperly disposed of run as high as ninety percent.[19] Much of this material is dumped at sites not authorized to contain hazardous substances,[20] and in fact even the refuse disposed of in authorized hazardous waste depositories represents a health threat.[21]

Experts have estimated that approximately 1,200 to 2,000 of the 30,000 to 50,000 waste disposal sites in the United States pose a potential threat to the public health.[22] Compounding the problem is the fact that hazardous waste disposal sites are located close to major population centers[23] as well as adjacent to water supply sources for many urban communities.[24] Also, many closed disposal sites are subsequently used for other purposes.[25] Indeed, known disposal sites have been used for residences, private farms, parking lots, cemeteries, botanical gardens and nurseries.[26]

Facts and figures alone failed to illustrate the tragedy resulting from the unsafe practices of the past. With increasing frequency, the public became aware of the health cost associated with living near a hazardous waste disposal site.[27] By the time CERCLA

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18. *See* S. REP. No. 848, 96th Cong., 2d Sess. 3 (1980).

19. *Id.*

20. *See, e.g., Hazardous and Toxic Waste Disposal: Joint Hearings Before the Subcomms. on Envtl. Pollution and Resource Protection of the Senate Comm. on Env't and Public Works*, 96th Cong., 1st Sess. pt. 1, 82 (1979) (statement of EPA Assistant Administrator Thomas C. Jorling) (illegal spraying of polychlorinated biphenyls (PCBs) along 210 miles of roadway in North Carolina); *id.* at 84 (haphazard storage, including illicit dumping and improper storage accounts for approximately half the hazardous waste problem) [hereinafter *Hazardous Waste Hearings pt. 1*]. *See also* SUBCOMM. ON OVERSIGHT, *supra* note 3, at 10 (illegal dumping in Kentucky).

21. *Hazardous Waste Hearings pt. 1*, *supra* note 20, at 83 (statement of Thomas C. Jorling).

22. SUBCOMM. ON OVERSIGHT, *supra* note 3, at 87 (statement of Thomas C. Jorling citing data from a survey conducted by Fred Hart and Co.). *But see id.* at 23 (suggesting that the Hart survey is speculative and not scientifically relevant).

23. Among the areas discussed in the legislative history are populated communities in New Jersey and Michigan. *See Hazardous and Toxic Waste Disposal: Joint Hearings Before the Subcomms. on Envtl. Pollution and Resource Protection of the Senate Comm. on Env't and Public Works*, 96th Cong., 1st Sess. pt. 4, 217-40, 246-50 (1980) [hereinafter *Hazardous Waste Hearings pt. 4*].

24. *See The Poisoning of America*, Time, Sept. 22, 1980, at 58, 60.

25. For example, the Love Canal was sold by Hooker Chemical to the Niagara Falls School Board which used the property as the site of an elementary school. Trilling, *supra* note 17, at 15,013.

26. 10 ENV'T REP. (BNA) 1497 (1979).

27. An ABC News-Harris Poll conducted after news of Love Canal was first publicized

was considered, the name Love Canal had become synonymous with the health concerns associated with these sites;[28] numerous other incidents of disposal site health disasters were documented as well.[29] The public outcry following the discovery of the "Love Canals" throughout the United States prompted the ninety-sixth Congress to enact CERCLA in 1980.

CERCLA was not the first attempt made by Congress to regulate hazardous waste production and disposal through environmental legislation. Prior to the enactment of CERCLA, however, legislative attempts to protect the public from the dangers of toxic disposal sites were, at best, fragmented. Emergency powers provisions, which include authorization to bring civil actions for equitable relief from an imminent and substantial endangerment,[30] have been an integral part of many environmental protection statutes. These statutes, however, are of limited scope, and as a consequence are only marginally effective. For example, the Solid Waste Disposal Act of 1965 provided assistance to local governments only in the regulation of open dumpsites.[31] Other acts treated hazardous substance disposal only as an incident to general regulation of air or water quality.[32] In 1970, Congress enacted the Resource Recov-

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found that 76% of those surveyed considered toxic chemical dumping to be a very serious problem. *The Poisoning of America*, *supra* note 24, at 63.

The health costs of living near a hazardous chemical waste site include both physical and mental illness. *See Love Canal Residents Under Stress*, 208 SCIENCE 1242 (1980); *Neighborhood of Fear*, Time, June 2, 1980, at 61; *Our Fear Never Ends*, McCall's, June 1980, at 94.

28. Indeed, in the *Readers Guide to Periodical Literature* issues for March 1979 through February 1980, all articles under the classification of "Pollution—NY" concerned the Love Canal. The Love Canal later became a separate listing.

29. These deposit sites can be found throughout the country in both rural and urban areas. *See* M. BROWN, *supra* note 1, at 99-225. *See also The Poisoning of America*, *supra* note 24, at 61.

30. For example, temporary restraining orders have been given under § 303 of the Federal Water Pollution Control Act in United States v. U.S. Steel Corp., No. 71-1041 (S.D. Ala. filed Nov. 18, 1971); § 504 of the Federal Water Pollution Control Act in State Water Control Bd. v. Washington Suburban Sanitary Comm., No. 1813-73 (D.D.C. filed Feb. 6, 1974); and § 1431(a) of the Solid Waste Disposal Act in United States v. FMC Corp., No 77-3061 (S.D.W. Va. filed Mar. 9, 1977). *See* Skaff, *The Emergency Powers in the Environmental Protection Statutes: A Suggestion for a Unified Emergency Provision*, 3 HARV. ENVTL. L. REV. 298, 306-11 (1979).

31. Dore, *The Standard of Civil Liability for Hazardous Waste Disposal Activity: Some Quirks of Superfund*, 57 NOTRE DAME LAW. 260, 264 (1981).

32. For example, the dumping of hazardous wastes into navigable waters is regulated by the Clean Water Act. *See* Federal Water Pollution Control Act, § 1321, 33 U.S.C. 1321 (Supp. IV 1980) (oil and hazardous substance liability). It has been suggested that the Clean Air Act's emergency powers provisions might also be used against hazards resulting from

ery Act[33] which expanded the federal role slightly by authorizing grants for the construction of facilites which would recover usable waste materials, but until 1976 no statute specifically focused on the problem of hazardous waste disposal.

Recognizing the magnitude of the threat, Congress enacted the Resource Conservation and Recovery Act (RCRA) in 1976.[34] But while RCRA provides for "cradle to grave"[35] control of hazardous wastes to ensure adequate disposal practices, it only applies to the generation and disposal of present and future hazardous waste.[36] Release of toxic material generated in the past and disposed of at sites which are now inactive or abandoned was not addressed under RCRA.[37] Herein lies the gap which section 106(a) of CERCLA was designed to fill. While both statutes contain an imminent hazard provision,[38] RCRA is confined to the dangers posed by waste *disposal.*[39] In contrast, CERCLA was enacted to address

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waste releases into the air. *See* Note, *supra* note 10, at 1725.

33. Pub. L. No. 91-512, 84 Stat. 1127 (1970), 42 U.S.C. §§ 3251-3254(f), 3256-3259 (1970) (omitted in the general amendment of the Solid Waste Disposal Act by Pub. L. No. 94-580, § 2, 90 Stat. 95 (1976)).

34. 42 U.S.C. §§ 6901-6987 (Supp. IV 1980).

35. One commentator has explained the view that the RCRA provides "cradle to grave" control as such:

> The RCRA directs the EPA to identify types, quantities, and concentrations of hazardous wastes. The RCRA also requires the EPA to establish minimum standards applicable to all who generate, transport, treat, store, or dispose of hazardous wastes. States are authorized to adopt, administer, and enforce their own standards in lieu of the minimum federal standards, if the EPA determines that the state standards are equivalent or superior to the federal standards, as well as consistent with standards in neighboring states. Under either federal or state standards, permits are required for the treatment, storage, or disposal of hazardous wastes. The Act authorizes government inspections and the issuance of compliance orders to aid enforcement. Also, the Act authorizes citizens to sue for injunctions and for recovery of the costs of litigation.

Note, *supra* note 10, at 1716.

36. *See Hazardous Waste Hearings pt. 4, supra* note 23, at 1 (statement of Sen. John Culver). *See also RCRA Authorization Hearings before the Subcomm. on Transportation and Commerce of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 1st Sess. 9, 11 (1979) (statement of Rep. John LaFalce).

37. SUBCOMM. ON OVERSIGHT, *supra* note 3, at 47-50.

38. 42 U.S.C. § 6973 (Supp. IV 1980). CERCLA's imminent hazard provision appears at 42 U.S.C. § 9606(a) (Supp. IV 1980).

39. RCRA § 7003 states that:

> upon receipt of evidence that the handling, storage, treatment, transportation or disposal of any . . . 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 to immediately

the hazards presented by waste *release*,[40] which includes materials escaping both from waste presently produced and improperly stored *and* from waste produced in years past and disposed of in a careless manner. It was the recognition of RCRA's limitations that led to the creation of CERCLA section 106(a). The scope of the imminent hazard provision indicates that it was drafted broadly to allow greater coverage than had been provided previously by similar provisions.

B. *Legislative History and Statutory Language of CERCLA—Congressional Intent*

When Congress became aware of the tremendous health problems resulting from the careless disposal of hazardous waste, it attempted to provide legislation which would address the dangers of toxic waste release and allocate the liability for the harm to those responsible. It was clear that past environmental initiatives had created disharmonious actions where loopholes and red tape were prevalent. Accordingly, Congress enacted CERCLA in an attempt to provide a new statute which would both complement other environmental laws and provide for comprehensive regulation to cover a wide range of situations arising when disposed hazardous waste threatened to create a health problem. At the same time, however, it cannot be denied that the Act represents a compromise.[41] While Congress attempted to draft a comprehensive bill, the political realities of enacting legislation in the waning days of a

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restrain any person contributing to such handling, storage, treatment, transportation or disposal to stop such handling, storage, treatment, transportation, or disposal or to take such other action as may be necessary.

Id.

40. Release is defined in CERCLA § 101(22) as:

[S]pilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment, but excludes (A) any release which results in exposure to persons solely within a workplace, with respect to a claim which such persons may assert against the employer of such persons, (B) emissions from the engine exhaust . . . (C) release of source, by-product, or special nuclear material from a nuclear incident . . . (D) the normal application of fertilizer.

42 U.S.C. § 9601(22) (Supp. IV 1980).

41. *See generally* Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. LAW 1 (1982).

lame duck Congress[42] necessitated numerous concessions to ensure the Act's ratification.[43]

It is significant that despite the dilution of the statute's liability sections, the imminent hazard provision emerged unscathed. In fact, the lack of discussion regarding the use of section 106(a) is striking. Concerned that delay would result in further weakening of the Act, the Democratic sponsors of CERCLA along with House and Senate Republican leaders produced a compromise statute which was then presented to the Congress with only limited debate.[44] The resulting legislative history therefore is equivocal.[45] However, since interpretations of all ambiguous statutes focus upon congressional intent,[46] detailed consideration of the legislative history is still useful.

1. *Liability of responsible parties.* The lengthy congressional hearings on waste disposal disasters[47] which preceded the enactment of CERCLA illustrated that the scope of the hazardous waste problem was enormous; consideration of the proper allocation of the costs of site cleanup thus was a primary focus of this legisla-

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42. *Id.* at 35. The bill was presented to President Jimmy Carter on December 1, 1980, only weeks before the inauguration of President Ronald Reagan. *Id.*

43. The compromise legislation deleted many of the provisions of the original bill including joint and several liability, a federal cause of action for medical expenses or property or income loss, and special medical causation provisions. *See* Grad, *supra* note 41, at 21-22.

44. In the House of Representatives, Congressman James Florio moved to suspend the rules of the House. Accordingly, the bill could only be passed in the form in which it was brought to the House floor and there was only limited debate. This parliamentary device was utilized by design because of the fragile nature of the compromise, which had been worked out by the two political parties. *See* 126 CONG. REC. 31,950 (1980). *See also* Grad, *supra* note 41, at 29-30.

45. The legislative history of CERCLA is voluminous. An early version of the Act was considered and passed by the House of Representatives on September 20, 1980. A somewhat different bill subsequently was considered and passed by the Senate in lieu of the House-passed bill. On December 3, 1980, the House concurred in the Senate amendments. *See generally* Grad, *supra* note 41, for a description of the progress of the legislation through the House and Senate.

46. *See* Middlesex County Sewage Auth. v. National Sea Clammers Ass'n, 453 U.S. 13 (1981) (noting that "[t]he key to [an] inquiry is the intent of the Legislature. We look first, of course, to the statutory language . . . [t]hen we review the legislative history and other traditional aids of statutory interpretation to determine congressional intent"). *See also* Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 639 (1981); California v. Sierra Club, 451 U.S. 287, 293 (1981); Universities Research Ass'n v. Coutu, 450 U.S. 754, 770 (1980); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1978).

47. *See* S. REP. No. 848, 96th Cong., 2d Sess. 1 (1980).

tion.[48] A major policy objective of the Act was to place the costs of handling hazardous wastes upon those generating the waste products as well as upon site owners and those responsible for transporting waste. Members of Congress expressed justifications ranging from cost effectiveness to deterrence and simple notions of justice as rationales for the decision to make all these parties responsible for cleanup costs.[49] For example, the logic of holding generators liable was expressed by Thomas Jorling, Assistant Administrator for the Environmental Protection Agency (EPA), who stated at Senate hearings that "[w]e have, in effect, adopted a rather ancient common law principle that someone who puts into existence a very hazardous substance can not insulate himself from the consequences."[50]

Congress' intent to hold generators liable was clearly codified in the Superfund Act. The Act allocates costs to generators in two ways. Generators are taxed on a per ton basis for the chemical waste they produce;[51] this tax money is incorporated into the Superfund[52] to be used to pay for the hazardous waste cleanup under the provisions of the general response mechanism, section 104.[53] Payment of this tax, however, does not protect generators

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48. Throughout the legislative history there are indications that generators should be liable under a strict liability standard, and this desire led to enactment of the liability provisions of section 107. *See* Grad, *supra* note 41, at 9, 21-22.

49. *See* S. REP. No. 848, *supra* note 47, at 33 (analogizing generators' liability to that imposed on manufacturers in ultrahazardous activity cases, and discussing policy considerations). The report contends that

> society should not bear the costs of protecting the public from hazards produced in the past by a generator, transporter, consumer, or dumpsite owner or operator who has profited or otherwise benefited from commerce involving these substances and now wishes to be insulated from any continuing responsibilities for the present hazards to society that have been created . . . . Relieving industry of responsibility establishes a precedent seriously adverse to the public interest.

Id. at 98. *See also* 126 CONG. REC. 30,933 (1980); *id.* at 30,971; *id.* at 30,939 (remarks of Sen. Paul Tsongas); *id.* at 30,939-40 (remarks of Sen. Bill Bradley); *id.* at 31,978 (remarks of Rep. James Jeffords).

50. *Hazardous Waste Hearings pt. 4, supra* note 23, at 30.

51. 42 U.S.C. § 9631 (Supp. IV 1980); 126 CONG. REC. 30,932 (1980).

52. I.R.C. §§ 4611, 4612, 4661, 4662, and 4882 (Supp. IV 1980).

53. 42 U.S.C. § 9604 (Supp. IV 1980). Section 104(a)(1) states:

> Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger . . . , the President is authorized to act . . . to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance . . . which the President

from further liability. Under section 107 of the Act,[54] generators as a class are specifically defined as potentially liable for the necessary costs of response to a waste depository hazard, including any removal[55] and remedial action,[56] as well as damages for injury, destruction, or loss of natural resources. By including generators, past and present site owners, and hazardous waste transporters as potentially liable parties under section 107, the drafters of CERCLA attempted to assure that the government would be able to secure the money necessary for toxic waste cleanup from all those responsible for the dangerous conditions.

The policy objective of allocating the cost of necessary removal and remedial action to those responsible for the dangerous condition is clearly illustrated throughout CERCLA's legislative history. While section 106(a) does not define explicitly toward whom the imminent hazard provision is aimed, the construction most consistent with the legislative history is that the statute section should be used in conjunction with section 107. The language of section 107 does not limit the instances to which it is applica-

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deems necessary to protect the public health or welfare or the environment, unless the President determines that such . . . action will be done properly by the owner or operator . . . or by any other responsible party.

54. 42 U.S.C. § 9607(a)(1) (Supp. IV 1980).

55. Removal is defined as:

[T]he cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief Act of 1974.

42 U.S.C. § 9601(23) (Supp. IV 1980).

56. Remedy or remedial action is defined as:

[T]hose actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment.

42 U.S.C. § 9601(24) (Supp. IV 1980).

ble;[57] hence, a consistent approach to the interpretation of CERCLA necessarily would lead to the conclusion that the section defines those responsible under all liability provisions of the Act. The imminent hazard section therefore should be considered authority for allowing courts to order any potentially liable party, as defined by section 107, to abate an imminent hazard in any manner consistent with the rules of equity.

2. *Harmonious use of the statutory remedies.* Evidence that CERCLA was to be considered a complement to other environmental statutes and that the various provisions were to be read in a harmonious manner is indicated by both the Senate report and the limited explanation of CERCLA given on the floor of the Senate. Senator Jennings Randolph, Chairman of the Committee on Environment and Public Works, explained to the members of the Senate that the Superfund legislation was intended to complement other environmental laws.[58] For example, when questioned by Senator Bill Bradley about certain preemptive language in the bill, Chairman Randolph indicated that any such language was only intended to prohibit states from creating a duplicate fund to pay damages compensable under CERCLA,[59] and that it was the sponsors' intent that CERCLA's cleanup and containment capacity be considered an appeal of last resort to be used in the absence of any other adequate response.[60]

The Congress addressed the issue of the interaction of the various statute sections as well. Indeed, Senator Randolph, when explaining sections of CERCLA to the Senate,[61] indicated that the

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57. The text of § 107 states only that:

> 1) the owner or operator of a vessel . . . or facility,
> 2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
> 3) any person who by contract . . . or otherwise arranged for disposal . . .
> 4) any person who accepts or accepted any hazardous substances for transport . . . from which there is a release, or a threatened release, shall be liable for—
>
> A) all costs of removal or remedial action . . . ;
> B) any other necessary costs of response . . . ;
> C) damages for injury to, destruction of, or loss of natural resources . . . .

42 U.S.C. § 9607(a) (Supp. IV 1980).

58. 126 CONG. REC. 30,933 (1980).

59. *Id.* at 30,949.

60. *Id.*

61. *Id.* at 30,933.

section 106(c)[62] requirement that the Administrator of the EPA develop guidelines for the use of section 106(a) and other sections was included for two reasons: "First, existing statutory authority is often underutilized; second, it reflects . . . [the fact] that this legislation creates additional authorities that complement these laws."[63] This explanation indicates that Congress did not intend that section 106(a) be used only when it was the sole available authority, but rather that the section be read and invoked in conjunction with other available law. Other portions of the Act's legislative history lend support to the notion that the statute is to be read harmoniously. The Senate report states: "It should in addition be noted that the legal remedies in this Act are cumulative and not exclusive. Nothing in this Act requires pursuit of any claim against the Fund as a condition precedent to any other legal right."[64] This language is a clear indication that remedies other than the use of the Fund are available, and that the Fund is to be used only as a remedy of last resort.

Analysis of the various sections of CERCLA similarly reveals a varied approach to solving the problems caused by hazardous waste. CERCLA sets forth a mechanism to accomplish disposal site cleanup in section 104 of the Act. This section enables the executive branch to implement a wide range of measures to provide for waste removal and remedial action.[65] The government's author-

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62. Section 106(c) states that the EPA shall "establish and publish guidelines for using the imminent hazard, enforcement, and emergency response authorities of this section . . . to effectuate the responsibilities and powers created by this Act." 42 U.S.C. § 9606(c) (Supp. IV 1980).

63. 126 CONG. REC. 30,933 (1980).

64. S. REP. No. 848, *supra* note 47, at 83.

65. Section 104(a)(1) provides the authority for the president to

> act, consistent with the national contingency plan, to remove or arrange for the removal of and provide for remedial action . . . or take any other response measure . . . necessary to protect the public health . . . unless the President determines that such removal and remedial action will be done properly by the owner or operator . . . or by any other responsible party.

42 U.S.C. § 9604(a)(1) (Supp. IV 1980). Section 105 of CERCLA mandates the creation of the national contingency plan to be used under § 104. 42 U.S.C. § 9605 (Supp. IV 1980). Hazardous substance is defined in the Act as:

> (A) any substance designated pursuant to section 1321(b)(2)(A) of title 33, (B) any element, compound, mixture, solution or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act (42 U.S.C. 6921) (but not including any waste the regulation of which . . . has been suspended by Act of Congress), (D) any toxic pollutant listed under

ity is limited, however, by the fact that it must first determine whether any responsible party will assume the costs for the cleanup without government intervention.[66] Similarly, a limitation on the government's power to take remedial action exists under section 104.[67] While it is empowered to commence such steps as are necessary, the executive branch's ability to act is restricted by statute should the individual states choose not to cooperate in the federal government's effort.[68] This mechanism prevents the federal government from removing toxic waste from a dangerous site if the state provides no alternative disposal area.

Section 106(a), however, does not contain the stringent limiting conditions which may preclude the use of section 104. Section 106(a) empowers the executive branch to "require the Attorney General of the United States to secure such relief as may be necessary to abate"[69] an imminent hazard. In order to invoke the use of section 106(a), the EPA must only determine that "there may be an imminent and substantial endangerment to the public health . . . because of an actual or threatened release of a hazardous substance . . . ."[70] Thus, this section provides the government with authority to secure relief in situations where the stringent conditions of section 104 are not met. The different limiting conditions for use of the respective sections, along with the congressional intent as evinced from the legislative history, clearly support the contention that possible use of section 104 does not bar use of section 106(a).

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section 1317(a) of title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act (42 U.S.C. 7412) and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of title 15 . . . .

42 U.S.C. § 9601(14) (Supp. IV 1980). *See also supra* notes 55-56.

66. 42 U.S.C. § 9604(a) (Supp. IV 1980).

67. 42 U.S.C. § 9604(c)(3) (Supp. IV 1980).

68. Subsection 104(c)(3) states that the president shall not provide remedial action unless the state in which the release occurs enters into a contract assuring future maintenance, the availability of a proper disposal facility, and state payment of ten percent of the cost of remedial action or at least fifty percent of the response expenditures if the state owned the site at the time of the hazardous waste disposal. 42 U.S.C. § 9604(c)(3) (Supp. IV 1980). Subsection (c)(4) requires that remedial actions be "cost-effective." 42 U.S.C. § 9604(c)(4) (Supp. IV 1980).

69. 42 U.S.C. § 9606(a) (Supp. IV 1980).

70. *Id.*

C. *Principles of the Superfund and Possible Problems*

Two basic tenets of the Superfund may be gleaned from the statute's sections and legislative history. Perhaps the most important principle for the purpose of a discussion of injunctive relief is that generators, transporters, and past as well as present site owners are all liable for costs of removal or remedial action.[71] The statute specifically declines to distinguish between on-site and off-site generators, and between past owners and present owners. Liability is statutorily conferred by section 107[72] upon all these parties, at least when section 104 is used.[73] Arguably, section 107's mandate applies to section 106(a) actions as well.[74]

A second underlying directive of CERCLA is that responsible parties should pay for cleanups whenever possible; the Fund is intended to be used only when responsible parties are unidentifiable or without funds.[75] This underlying policy is expressed in the statute by the proviso that the government shall provide removal and remedial action unless such action will be undertaken by a responsible party.[76] The Act also provides that claims must be made to responsible parties,[77] that court actions may be commenced before the Fund is used,[78] and that the President may secure injunctive relief and issue orders.[79] Any liable party who fails to act upon a presidential order will become liable for punitive damages.[80] Taken together, these statute sections set up a statutory mechanism which provides the executive branch with authority to order and enforce orders so that responsible parties initially pay for the cleanup; those responsible parties by definition include any and all of those whose actions created the danger.

While the above mentioned principles are clearly illustrated in

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71. *See supra* notes 47-57 and accompanying text.
72. *See supra* note 57 and accompanying text.
73. *See infra* notes 94-106 and accompanying text.
74. *See infra* notes 128-30 and accompanying text.
75. *See supra* notes 47-50 and accompanying text.
76. 42 U.S.C. § 9604(a) (Supp. IV 1980).
77. 42 U.S.C. § 9612(a) (Supp. IV 1980) (stating that "claims . . . shall be presented . . . to the owner, operator, or guarantor of the vessel or facility from which a hazardous substance has been released, if known to the claimant, and to any other person known to the claimant who may be liable under section 9607 . . .").
78. 42 U.S.C. § 9612(a) (Supp. IV 1980).
79. 42 U.S.C. § 9606(a) (Supp. IV 1980).
80. 42 U.S.C. §§ 9606(b), 9607(c)(3) (Supp. IV 1980).

both the statutory language and the legislative history of CERCLA,[81] some difficulties exist with the implementation of these principles through the use of sections 104 and 107. Fortunately, use of section 106(a) provides a solution to some of these problems.

One problem in implementing a cleanup through the use of the Superfund is the fact that the fund is limited.[82] Not all cleanups, regardless of necessity, can be undertaken by the government. This problem was recognized by Congress and led to the inclusion of section 111(e) under which claims are to be paid in full in the order of final determination, should the total claims be greater than the balance of the Fund.[83] Similarly, Congress felt it necessary to formulate a list of top priority sites[84] from which fact it can be reasonably inferred that the legislature itself recognized the limited nature of the Fund. In practice, sites not on this list have little chance of being cleaned up through use of Fund monies.

Aware of the limitations of the Fund, Congress also provided the mechanism by which responsible parties should be ordered to provide the cleanup;[85] compliance therewith is encouraged through the threat of punitive damages.[86] The availability of funds is still a concern, however, because the government must commence a civil suit to recover these punitive damages; CERCLA funds still are necessary to initially remedy the hazard.[87] Thus, by using sections 104 and 107, the scenario exists in which a hazard of great magnitude is present, but only limited and inadequate funds are available for remedial action.

The second difficulty in implementing a cleanup action through the use of the Fund relates to the necessity of state action. As enunciated in section 104(c)(3),[88] the President may not provide any remedial action unless the state agrees to accept certain re-

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81. *See supra* notes 48-70 and accompanying text.

82. The Act creates a $1.6 billion Fund; however, estimates indicate that from $26.2 to $44.1 billion will be needed to clean up potentially dangerous sites. *Hazardous Waste Hearings pt.4, supra* note 23, at 37-38.

83. 42 U.S.C. § 9611(e) (Supp. IV 1980).

84. 42 U.S.C. § 9605(8)(A) (Supp. IV 1980).

85. 42 U.S.C § 9606(a) (Supp. IV 1980).

86. 42 U.S.C § 9607(c)(3) (Supp. IV 1980).

87. *Id.*

88. 42 U.S.C. § 9604(c)(3) (Supp. IV 1980).

sponsibilities.[89] This proposition does not auger well for remedial cleanup because past hazardous waste difficulties at times have elicited something less than cooperative, concerned help from state and local officials.[90] Of course, removal actions such as evacuation of threatened individuals and security fencing may still be authorized,[91] but other measures involving the cleanup cannot be undertaken. Thus, a situation might develop where, because of the inability of a state government to cooperate, the hazard from a waste site leads to evacuation, but Superfund monies are not available for general cleanup action.[92] Migration of waste would continue

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89. *See supra* notes 67-68 and accompanying text.

90. Indeed, Michael Brown, in LAYING WASTE, discusses several instances where government officials have hampered private individuals' efforts to expose practices of chemical generators. Some state officials feel they are faced with a dilemma of trading off jobs for health. This sentiment was expressed by Louisiana Governor Edwin Edwards: "We've made tradeoffs, accomodations, compromises, if you will. Need for jobs, industrial development, and stimulation for our economy justify temporary tradeoffs, in some instances some serious tradeoffs. We did what we thought was the best for the people and the economy of Louisiana." M. BROWN, *supra* note 1, at 166.

91. Removal actions and remedial actions are considered two distinct areas of reaction to hazardous waste emergency. *See supra* notes 55-56 and accompanying text.

92. The inability of state governments to meet the cost burden which CERCLA places on local government has materialized already. For example, the inability of local government in Seymour, Indiana, to allocate the funds necessary to receive Superfund assistance was one factor which led to the possibly inadequate settlement agreed to by 24 companies and the government. These companies agreed to provide $7.7 million for the cleanup of 60,000 leaking drums containing cyanide, C-56, naphthalene, phenol, arsenic and PCBs. The Seymour Recycling site had been originally leased from the town in 1969. In 1976 the recycling company, which had stockpiled waste at the site, was sold to the Environmental Processing Corp. Environmental Processing abandoned the site in 1980; the corporation was declared bankrupt. N.Y. Times, Mar. 3, 1983, at B12, col. 1.

In the Seymour case, the municipality owned the land; under CERCLA § 104(c)(3) the state therefore would be required to provide 50% of the response costs. 42 U.S.C. § 9604(c)(3) (Supp. IV 1980). In this instance, matching funds were not available. N.Y. Times, Mar. 3, 1983, at B12, col. 4.

Similar financial difficulties plagued Illinois in its quest to clean the Waukegan River when CERCLA was enacted; Illinois hoped to be able to use Superfund money for its cleanup. "Governor James Thompson and his staff concluded that because of budget constraints the money [10% of the total cost of the cleanup] could not be obtained from the Legislature." N.Y. Times, Feb. 21, 1983, at A14, col. 4. In this instance the major polluter, Outboard Marine Corp., later was sued under CERCLA § 106(a). United States v. Outboard Marine Corp., 556 F. Supp. 54 (N.D. Ill. 1982).

The EPA appears to be quite aware that the state funding requirement is a serious impediment to cleanups. N.Y. Times, Apr. 19, 1983, at A7, col. 4 (recounting testimony of William N. Hedeman, Jr., director of the EPA toxic waste cleanup program, at a hearing of the Senate Environment and Public Works Committee, where Mr. Hedeman noted that "the requirement of the law that the State pay 10 percent of cleanup costs was in many instances a major obstacle").

until an even greater hazard exists. Use of section 106(a), rather than section 104, may be a viable alternative in this case in order to "secure such relief as may be necessary to abate the danger or threat . . . ."[93] Relying specifically on the authority to abate public hazards, section 106(a) provides a means by which the government may at least ensure that responsible parties act to prevent the most serious threats, such as the migration of chemicals into groundwater,[94] even if the section cannot be used to authorize full removal and remedial action.

The discussion above demonstrates that section 106(a) must be read in conjunction with the other sections of CERCLA, and that the use of section 106(a) is necessary to fully effectuate the principles and policies of the Act. For the Act's policies to be implemented, the imminent hazard provision must be construed broadly. Section 106(a) should be available even when alternative methods of action are possible, and the section should be read in harmony with section 107's mandate concerning liability.

II. JUDICIAL INTERPRETATIONS OF SECTION 106(A)

While the legislative history suggests that Congress intended a broad construction of section 106(a), judicial interpretations of the section have not always viewed the imminent hazard provision in this manner. For example, a more restrictive construction was assigned to the imminent hazard provision in *United States v. Wade*.[95] In *Wade*, Judge Newcomer, district court judge for the Eastern District of Pennsylvania, was presented with a motion to dismiss the federal government's cause of action arising under CERCLA section 106(a). Judge Newcomer considered the motion

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93. 42 U.S.C. § 9606(a) (Supp. IV 1980).

94. Possible groundwater contamination by chemicals leaching from a hazardous waste disposal site is one of the major problems associated with these sites. Groundwater is water that lies buried "from a few feet to a half mile or more beneath the land's surface in stretches of permeable rock, sand and gravel known as aquifers." *The Poisoning of America, supra* note 24, at 66. Groundwater is almost impossible to purify once it has been chemically polluted because "[g]roundwater is not exposed to the natural purification systems that recycle and cleanse surface water; there is no sunlight, for example, to evaporate it and thereby remove salts and other minerals and chemicals. Nor can groundwater be counted upon to clean itself as it moves through the earth, for it scarcely 'flows' at all." *Id.* at 66. According to Eckardt C. Beck, former EPA Assistant Administrator for Water and Waste Management, "[g]roundwater can take a human lifetime just to traverse a mile. Once it becomes polluted, the contamination can last for decades." *Id.* at 66.

95. 546 F. Supp. 785 (E.D. Pa. 1982), *appeal dismissed*, 713 F.2d 49 (3d Cir. 1983).

as raising a narrow issue: whether CERCLA section 106(a) could be used to confer liability "upon the defendants . . . , non-negligent off-site generators of hazardous waste for past disposal of such waste which now creates an imminent hazard."[96] After considering the language of the statute and the applicable legislative history, the judge determined that non-negligent off-site generators of hazardous waste who are not currently dumping are not proper defendants under section 106(a).[97]

The court's holding is based upon several suspect conclusions: that sections 104 and 107 should be used because they constitute an adequate remedy at law;[98] that off-site generators are not the correct class of defendant;[99] and that section 106(a), because it is written in the present tense, is not to be used for hazards caused by past dumping.[100] The rationale used to support these questionable conclusions illustrates the problems encountered when attempting to discern the proper use of section 106(a). The court's reasoning, therefore, must be explored further.

Central to the court's opinion was the belief that the government should attempt to recover from past generators under sections 104 and 107, rather than under section 106(a). The court noted that the heart of CERCLA is contained in section 104, which gives the EPA authority to undertake emergency cleanup measures, and that section 107, working in tandem with section 104, clearly applies to past generators.[101] Thus, Judge Newcomer concluded that sections 104 and 107 provide for a remedy at law, and that section 106(a), providing for an action in equity, could not be applied. That the government would be required to pay for the cleanup first under these sections, according to the court, simply reflected the will of Congress.[102] The fact that section 106(a) does

96. *Wade*, 546 F. Supp. at 788.

97. *Id.* at 793-94.

98. *Id.* at 794 (noting that § 104 and § 107 clearly set forth the mechanism for site cleanup and for recovery of costs from responsible parties; § 106(a), according to the court, is a complement to these main sections).

99. *Id.* at 792 (noting that the government urged the court to interpret CERCLA § 106(a) as analogous to RCRA § 7003). The court held that under § 7003 off-site generators are not the correct class of defendant. *Id.* at 791.

100. *Id.* at 794.

101. *Id.* at 793.

102. The court noted that the purpose and method of implementing the statute were clearly indicated by the House of Representatives. *Id.* at 793 n.20, (citing H.R. REP. No. 96-1016, 96th Cong., 2d Sess. pt. 1, at 17) *reprinted in* U.S. CODE CONG. & AD. NEWS 6119,

not state that it is an alternative mechanism to section 104 was also relied on by the court in support of its conclusion.

In fact, Judge Newcomer went so far as to speculate about the underlying reason for the government's decision to pursue a section 106(a) claim.[103] Since the Superfund is not large enough to remedy the hazardous waste problem fully, the court viewed the government's section 106(a) action as an attempt to force generators to put forth the funds for the cleanup so that government money would not be expended.[104] Judge Newcomer contended that using section 106(a) for this purpose would be tantamount to judicial legislation.[105] The court rejected as contrary to legislative intent the government's contention that the sections be read harmoniously, an interpretation which would allow a choice of methods for addressing the problems of abandoned sites. Judge Newcomer concluded that "[w]here Congress . . . has clearly designated its choice,"[106] it is the duty of the court to follow that legislative intent.

The *Wade* court also concluded that off-site past generators should not be included as defendants in a section 106(a) action. Noting that the statute section "authorizes the government to seek immediate injunctive relief because of 'an actual or threatened release of a hazardous substance from a facility,' "[107] Judge Newcomer concluded that section 106(a) therefore is only applicable where waste is being discharged currently or threatened to be discharged from a *facility, and* "where such discharge could be stopped by an injunction."[108] This questionable reading of section 106(a) would restrict its applicability to those same situations cov-

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6119-20 (1980).

103. The court noted that "astonishingly" the government had pursued action under § 106(a) rather than § 107. *Wade*, 546 F. Supp. at 787, 793 n.22.

104. *Id.* at 793 n.22.

105. *Id.* at 794.

106. *Id.*

107. *Id.*

108. *Id.* "Facility" is defined in CERCLA § 101(9) as:

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

42 U.S.C. § 9601(9) (Supp. IV 1980).

ered under section 7003 of RCRA.[109] The court does not address the fact that CERCLA was enacted in order to allow government action where RCRA is inapplicable.

Finally, the court considered that an injunction could be granted only to restrain a party. "Since the complaint does not allege that any of the generators is currently disposing of waste on the Wade site or that there is any threat that they will resume their past practice of doing so, [the court] . . . cannot sensibly grant the government's prayer that they be permanently restrained . . . ."[110] The court rejected the notion that a court can " 'enjoin' the defendant among others, to pay for the cost of . . . implementing a plan to clean up the Wade site."[111] Citing two decisions which denied injunctive relief when such relief was arguably similar to money damages, *Jaffee v. United States*[112] and *United States v. Price*,[113] the court concluded that an injunction which would force the defendants to pay money is not a proper use of injunctive relief.[114]

Thus, *Wade* discussed two critical issues surrounding the use of section 106(a): 1) who are the possible defendants (present owners only or past generators also), and 2) can an injunction be granted to force a cleanup or force payment for a cleanup (i.e., is an injunction precluded if there is an alternative remedy and is a mandatory injunction which requires monetary payment a proper form of injunctive relief). Since *Wade*, other courts have considered the use of section 106(a).[115] These cases, as well as the recent

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109. For a discussion of the distinction between § 106(a) and RCRA § 7003, see *infra* text accompanying notes 117-20.

110. *Wade*, 546 F. Supp. at 792.

111. *Id.*

112. 592 F.2d 712 (3d Cir.), *cert. denied*, 441 U.S. 961 (1979).

113. 523 F. Supp. 1055 (D.N.J. 1981), *aff'd*, 688 F.2d 204 (3d Cir. 1982).

114. In Jaffee v. United States, 592 F.2d 712 (3rd Cir. 1979), the court ruled that a "plaintiff cannot transform a claim for damages into an equitable action by asking for an injunction that orders the payment of money." *Id.* at 715. In that case, however, a U.S. Army soldier had asked for a preliminary injunction requiring the government to pay medical expenses to treat his inoperable cancer. He contended that he developed cancer by following orders and standing in an open field where he was exposed to radiation without his knowledge or consent. The court denied the request for a preliminary injunction because it was actually for a traditional form of damages in tort. Hence, it was not a proper subject for equitable relief. *Id.* at 715.

115. United States v. Reilly Tar, 546 F. Supp. 1100 (D. Minn. 1982) and United States v. Outboard Marine Corp., 556 F. Supp. 54 (N.D. Ill. 1982).

circuit court of appeals decision of *United States v. Price*,[116] strongly suggest that the conclusions of the *Wade* court are incorrect. Consideration of these courts' views regarding the possible defendants to a section 106(a) action and the use of mandatory injunctions provides an explanation of the reason why the *Wade* decision concerning CERCLA 106(a) is inappropriate.

A. *Possible Defendants*

In holding that non-owners could not be considered responsible parties under CERCLA's imminent hazard provision, the *Wade* court seized upon the fact that the section is written in the present tense, as is section 7003 of RCRA.[117] Section 7003, which the government argued was also applicable in *Wade*, empowers the administrator of the EPA to bring suit and to stop and restrain immediately persons contributing to hazardous waste *disposal*.[118] Thus, section 7003 relates to terminating the action of disposing of waste. Unlike section 7003, section 106(a) is not specifically related to disposal. Section 106(a) considers "an actual or threatened release of a hazardous substance . . . ."[119] The section is to be used not to halt disposal, but to prevent release which is defined in CERCLA as "any spilling, leaking, . . . escaping, . . . [or] leaching . . . ."[120] These terms are those commonly used to describe the spreading and migrating of hazardous waste after it has been dumped. Thus, the language of section 106(a) is not analogous to that of section 7003 of RCRA. Section 106(a) is significantly broader than RCRA section 7003 because it emcompasses releases occurring from *past* disposal. Therefore, the *Wade* holding was contrary to the proper reading of the statute. Section 106(a) may be used against parties who are not associated with current dumping, but who contributed to past dumping which is currently endangering the public.

The determination of possible defendents to a CERCLA section 106(a) action has been addressed in opinions other than *Wade*. In *United States v. Reilly Tar*,[121] a Minnesota federal dis-

116. 688 F.2d at 204.
117. 546 F. Supp. at 794.
118. *See* RCRA, 42 U.S.C. § 6973 (Supp. IV 1980).
119. 42 U.S.C. § 9606(a) (Supp. IV 1980).
120. 42 U.S.C. § 9061(22).
121. 546 F. Supp. 1100 (D. Minn. 1982).

trict court was called upon to determine whether a prior disposal site owner who was no longer linked to the site was subject to an order for injunctive relief. The plaintiffs alleged that Reilly Tar spilled, leaked and discharged chemical wastes into the ground. These chemicals leached into groundwater linked to the drinking water system for parts of the Minneapolis-St. Paul metropolitan area. As a result of the chemical contamination from the dumping at the Reilly Tar site, in 1978 and 1979 the city of St. Louis Park, Minnesota, closed five drinking water wells.[122] At the time of the request for injunctive relief, these chemicals, many of which are potential carcinogens, were continuing to contaminate the groundwater of the area.[123]

On a motion to dismiss a government claim under section 106(a), defendant Reilly Tar contended that the section does not apply to prior owners of inactive sites. The court, in denying the motion, disagreed. This conclusion centered upon two facts: 1) the language of CERCLA contains no limitations on the classes of persons within its reach; and 2) the imminent hazard provision grants the courts broad equitable powers. Unlike the *Wade* court, Judge Magnuson in *Reilly Tar* concluded that since section 106(a) contains no specific limitation as to the classes of persons within its reach, there is no reason why injunctive relief cannot be sought against any class of responsible persons regardless of whether the acts were committed in the past or present.[124] Furthermore, noting that the statute confers broad equitable powers, the court considered itself empowered to grant any relief required by the public

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122. *Id.* at 1105-06.

123. Among the chemicals found at the site were the waste products from the refining of coal tar into creosote oil and other waste products resulting from the treatment of wood products with creosote oil. These products were either neutral oils, tar acids or tar base. *Id.* at 1106. They included flouranthene, acenaphthene, benzopyrene, benzathracene, pyrene, and chrysene along with other polynuclear aromatic hydrocarbons, phenolic compounds such as phenol and cresols, and nitrogen compounds such as acridines and naphtlamines. *Id.*

Creosote oil is a known carcinogen. It is easily absorbed through the skin or through the intestinal tract. Acute exposure to this chemical can cause vomiting, vertigo, respiratory difficulties, headaches, convulsions, and possible hypertension. Many waste products from the creation of creosote oil also produce a synergistic effect when incorporated into the body with other chemicals. These compounds are considered carcinogens and will enhance the carcinogenic activity of caucer-causing substances. Phenolic compounds for tar acids may also cause vomiting, paralysis, convulsions, coma and death. Phenol is also a tumor promoter; it enhances the tumor-forming ability of certain carcinogens. *Id.*

124. *Id.* at 1113.

interest and the equities of the case. The "variety of response actions available to the EPA under CERCLA and elsewhere, suggest that Congress intended to provide the EPA with flexibility to tailor response actions to fit the circumstances of the individual case."[125] The court thus considered both the statutory language and the legislative history; Judge Magnuson determined that section 106(a) must be broadly construed to assure effective use against all responsible parties.

More recently, the district court of the Northern District of Illinois had the opportunity to consider the use of section 106(a) with the guidance of the recently published opinions of *Wade* and *Reilly Tar.* In *United States v. Outboard Marine Corp.*,[126] the court held that section 106(a) was to be given the broad reach which the Minnesota district court applied in *Reilly Tar.*

The Illinois district court noted that section 106(a) does not indicate specifically who may be sued or enjoined or what one must do to be subject to suit or injunction. Judge Getzendanner discussed the difficulty of this perplexing situation, stating:

> This court is hesitant to rely only on 'the public interest and the equities of the case' in determining the reach of section 106(a). Recourse to the federal common law of nuisance seems to be foreclosed by *Milwaukee II.* On the other hand, Congress included this imminent hazard authority in its CERCLA design, and it should be given effect.[127]

Since section 107 indicates that the defendant is within the class which Congress intended to hold responsible, the court concluded that it is probable that those who would be liable under section 107 were intended to be liable under section 106(a) as well.[128]

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125. *Id.* at 1114. The court also noted that the EPA on May 13, 1982, had promulgated guidelines for using the imminent hazard, enforcement, and emergency response authorities of section 106(a), as Congress had mandated in section 106(c). "The guidelines state that the particular authority or authorities to be used, and whether to precede court action with administrative action, will be determined on a case-by-case basis depending upon the most effective approach for achieving the desired site cleanup." *Id.* (citing 47 Fed. Reg. 20,664 (1982)).

126. 556 F. Supp. 54 (N.D. Ill. 1982). The court in fact notes that the *Wade* decision had been brought to its attention. The court rejects the notion that *Wade* is controlling, appeals from: "(1) Interlocutory orders of the district courts of the United States . . . refusing or dissolving injunct here and by the district court in *Reilly Tar.*" *Id.* at 58 n.3.

127. *Id.* at 57. The court's statement concerning "*Milwaukee II*" refers to Illinois v. City of Milwaukee, 451 U.S. 304 (1981) (enactment of Federal Water Pollution Control Act supplants any previous federal common law remedy). *See* Dore, *supra* note 31, at 261.

128. 556 F. Supp. at 57.

Therefore, after consideration of the legislative history, the language of the statute, and judicial interpretation of the Act, the court concluded that section 106(a) should be broadly construed.

Thus, decisions other than *Wade* have taken into account the congressional admonition that "those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created."[129] After considering both a straightforward reading of the statute and the opinion of the *Wade* court, both the Illinois and the Minnesota federal district courts concluded that "[t]he statute should not be narrowly interpreted to frustrate the government's ability to respond promptly and effectively, or to limit the liability of those responsible . . . ."[130] All those who are classified as liable under section 107 of CERCLA are possible defendants in a section 106(a) action.

B. *Injunctive Relief to Abate an Imminent Hazard*

The second question regarding section 106(a) actions is whether the section may be used to grant a mandatory injunction even though the use of section 104 is available. The *Wade* court considered this question, and determined that injunctive relief was inappropriate both because sections 104 and 107, in combination, provided an alternative method of remedy, and because a grant of injunctive relief in this instance would be equivalent to ordering money damages.

These reasons for finding against the use of injunctive relief relate to basic doctrines concerning the use of this "extraordinary remedy."[131] Injunctive relief, an action in equity, may be ordered at the court's discretion.[132] To determine whether this relief should be granted, several factors must be weighed:

(1) the probability of irreparable injury to the moving party in the absence of relief;

(2) the possibility of harm to the non-moving party if relief is granted;

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129. *Reilly Tar*, 546 F. Supp. at 1112.

130. *Id. See also Outboard Marine*, 546 F.Supp. at 57.

131. Other remedies do not "offer the speed or the efficiency of judicial intervention for the protection of a public interest as does an injunction." State v. O.K. Transfer Co., 215 Or. 8, 18, 330 P.2d 510, 514 (1958).

132. *See* Stokes v. Williams, 226 F. 148, 156 (3d Cir. 1915).

(3) the likelihood of success on the merits; and
(4) the public interest.[133]

It is also a well recognized principle that injunctions will not be granted where there is a remedy at law which is complete and adequate.[134] The *Wade* court, in determining that sections 104 and 107 should be used, essentially concluded that these sections constitute an adequate remedy; therefore, injunctive relief could not be granted.

Nonetheless, the adequate remedy restriction is not without exception. Particularly when a statute authorizes injunctive relief, the requirement may be withdrawn.[135] When a statute provides for injunctive relief but says nothing about an adequate remedy at law requirement, the adequate remedy proviso is eliminated from consideration.[136] Similarly, where a statute specifically authorizes an agency to sue for injunctive relief, it is not necessary for that agency to show that it has no alternative means at its disposal.[137] Even where the adequate remedy provision is enforced, the mere existence of a legal remedy is not sufficient to defeat the action.[138] For the legal remedy to be considered adequate it must be as practical and efficient towards justice as would be injunctive relief.[139] Irreparable injury should be prevented. Since the use of sections 104 and 107 involves claims procedures and state agreements,[140]

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133. Goldhaber v. Foley, 519 F. Supp. 466, 473 (E.D. Pa. 1981). *See also* A. O. Smith Corp. v. F.T.C., 530 F.2d 515 (3d Cir. 1976).

134. D. DOBBS, REMEDIES 24, 27-34, 57-62 (1973). *See also* W. DE FUNIAK, HANDBOOK OF MODERN EQUITY 31 (2d ed. 1956); H. MCCLINTOCK, EQUITY 395-96, 426-39 (2d ed. 1948).

135. *See* UV Indus., Inc. v. Posner, 466 F. Supp. 1251 (D. Me. 1979) ("[w]here . . . a statute provides for injunctive relief upon the showing of a violation, the party seeking such relief need not make a showing of irreparable harm in the normal equity sense"). *Id.* at 1255. *See also* United States v. Spectro Foods Corp., 544 F.2d 1175, 1181 (3d Cir. 1976); Cox v. Cox, 84 Idaho 513, 373 P.2d 929 (1962); Goble v. New World Life Ins. Co., 57 Idaho 516, 67 P.2d 280 (1937); Conway v. Mississippi State Bd. of Health, 252 Miss. 315, 173 So. 2d 412 (1965).

136. 42 AM. JUR. 2D *Injunctions* § 38 (Supp. 1983).

137. Bowles v. Barde Steel Co., 177 Or. 421, 482, 164 P.2d 692, 717 (1945). This elimination of the irreparable harm factor is based upon the notion that suits by the government are suits undertaken in the public interest. *See* Hecht v. Bowles, 321 U.S. 321, 331 (1944) ("standards of the public interest, not the requirements of private litigation, measure the priority and need for injunctive relief . . ."). *See also* Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907) (where a sovereign state or nation is party plaintiff, "it is somewhat more certainly entitled to specific relief than a private party might be").

138. 42 AM. JUR. 2D *Injunctions* § 39 (Supp. 1983).

139. *Id.*

140. *See generally supra* notes 83-93 and accompanying text.

and the delays attendant therewith, where an imminent threat exists, this remedy is not sufficiently expedient. Therefore, the adequate remedy proviso to the granting of injunctive relief is not a bar to the use of the imminent hazard provision of CERCLA.

The second argument the *Wade* court accepted was that an injunction, as requested by the government, would be equivalent to an action at law. The court concluded that the government essentially was seeking monetary damages.[141] Recently, the Court of Appeals for the Third Circuit, in *United States v. Price*,[142] considered the same question when faced with a claim for injunctive relief under RCRA section 7003. The district court in this case[143] gave the impression that injunctive relief could not require the expenditure of money because, the court believed, it would be equivalent to an action for damages. Since compensatory damages are an action at law, the district court concluded that damages could not be granted in equity.[144] The court of appeals, while affirming the lower court's decision, disagreed with its characterization of the claim request as one for damages, and concluded that injunctive relief encompassed orders directing parties to pay monies owed.

The Third Circuit stated that an action requiring the expenditure of money is not necessarily equivalent to an action for damages since "[d]amages are awarded as a form of substitutional redress. They are intended to compensate . . . ."[145] Noting that in the case before the court the money expenditure would be for preventative measures rather than for compensation, the court stated that where money is used for "the first step in the remedial process of abating an existing but growing toxic hazard which, if left unchecked, will result in even graver future injury . . . ,"[146] it is not a traditional form of damages. In essence, the court reasoned that forcing a party to pay money to correct a hazardous condition is equivalent to ordering that party to clean up the waste site itself. The latter mandate is a more traditional action in equity.

The claims made in *Wade*, *Reilly Tar*, and *Outboard Marine*,

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141. *Wade*, 546 F. Supp. at 792.
142. *Price*, 688 F.2d at 204.
143. 523 F. Supp. at 1055.
144. *Id.* at 1067-68.
145. 688 F.2d at 212.
146. *Id.*

as well as in *Price*, are for mandatory,[147] rather than prohibitory, injunctions. The purpose of both a mandatory injunction and a restraining injunction is not to correct a past wrong, but to prevent further injury.[148] Mandatory injunctions, however, can compel affirmative performance which may require the expenditure of money.[149] The use of a mandatory injunction is appropriate particularly when the status quo is a condition of action rather than of rest.[150] Where inaction will cause the irreparable injury intended to be prevented and where the complainant's right to relief is clear and certain,[151] courts of equity should grant mandatory injunctions.[152]

The court of appeals in *United States v. Price* concluded that imminent threats from hazardous waste disposal present the types of situations where mandatory injunctions are appropriate.

> The facts of the present case show clearly that the status quo is a condition of action which, if allowed to continue or proceed unchecked and unrestrained, will inflict serious irreparable injury. Therefore, a mandatory pre-

147. Mandatory injunctions allow for the compulsion of some positive act in order to restore the status quo. *See generally* 42 AM. JUR. 2D *Injunctions* § 16 (Supp. 1983).

148. *E.g.*, United Bonding Ins. Co. v. Stein, 410 F.2d 483, 486 (3d Cir. 1969); United States v. Richberg, 398 F.2d 523, 524 (5th Cir. 1968); United Parcel Serv. Inc. v. Local 25 of Int'l Bhd. of Teamsters, 421 F. Supp. 452, 459 (D. Mass. 1976); Knutson v. Daily Review, Inc., 383 F. Supp. 1346, 1388 (N.D. Cal. 1974), *modified*, 401 F. Supp. 1374 (N.D. Cal. 1975); Gilmore v. James, 274 F. Supp. 75 (N.D. Tex.), *aff'd*, 389 U.S. 572 (1974); United States v. Packorp, Inc., 246 F. Supp. 963, 965 (W.D. Mich. 1965); Brooks v. Tallahassee, 202 F. Supp. 57, 58 (N.D. Fla. 1961).

149. *E.g.*, Texas & N.O.R. Co. v. Northside Belt Ry. Co., 276 U.S. 475 (1928). *See also* United Steelworkers of America v. Fort Pitt Steel Casting, 598 F.2d 1273 (3d Cir. 1979); United States v. Whiting Milk Co., 21 F. Supp. 321 (D. Mass. 1937), *aff'd sub nom.* H.P. Hood & Sons, Inc. v. United States, 97 F.2d 677 (1st Cir. 1938), *aff'd*, 307 U.S. 588 (1939). "Mandatory injunctions affirmatively compelling the doing of some act, rather than merely negatively forbidding continuation of a course of conduct, are a traditional tool of equity." Alabama v. United States, 304 F.2d 583, 590 (5th Cir. 1962).

150. *E.g.*, Toledo, A.A. & N.M. Ry. Co. v. Pennsylvania Co., 54 F. 730, 741 (C.C.N.D. Ohio 1893).

151. *See* Green v. Messer, 243 Ala. 405, 10 So. 2d 157 (1942); Alabama Power Co. v. Guntersville, 236 Ala. 503, 183 S. 396 (1938); Moss Indus. v. Irving Metal Co., 140 N.J. Eq. 484, 55 A.2d 30 (1947).

152. The *Toledo* court described a preliminary injunction's purpose to be:

> to preserve the status quo until, upon final hearing, the court may grant full relief. Generally this can be accomplished by an injunction prohibitory in form, but it sometimes happens that the status quo is a condition not of rest, but of action, and the condition of rest is exactly what will inflict the irreparable injury upon complainant. . . . In such a case courts of equity issue mandatory writs before the case is heard on its merits.

Id.

> liminary injunction designed to prevent that injury would [be] appropriate. . . . A preliminary injunction designed to prevent an irreparable injury is conceptually distinct from a claim for damages.[153]

Thus, both the legislative history of CERCLA and case law on mandatory injunctions as a remedy indicate that an injunction can be granted in claims such as that considered in *Wade*. It is important to note, however, that the grant of this injunctive relief remains at the discretion of the district court judge.[154] The decision may be overturned only if the district court has abused its discretion, committed an obvious error in applying the law, or made a serious mistake in considering the proof.[155] Therefore, while injunctive relief is available to abate an imminent threat to the public health, whether or not this relief should be granted is a policy decision to be decided by balancing the factors relevant to equitable relief. The circumstances[156] surrounding the imminent hazard thus will be crucial in determining the appropriate relief to be granted.

CONCLUSION

Coping with past hazardous waste disposal is and will continue to be a major concern for both the EPA and the courts. Congress enacted CERCLA to provide the EPA with both the authority and the mechanism to secure relief from dangers to the public health. Congress intended that those responsible for the production of these health hazards be held liable for their abatement, and that the Superfund be used as a last recourse.

Section 106(a) was enacted to provide the EPA with a means by which this congressional mandate could be fulfilled. In *Wade*,

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153. *Price*, 688 F.2d at 212.

154. *Id.* at 210 (citing Stokes v. Williams, 226 F. 148, 156 (3d Cir. 1915)).

155. *E.g.*, A.O. Smith Co. v. F.T.C., 530 F.2d 515 (3d Cir. 1976); Kennecott Corp. v. Smith, 637 F.2d 181 (3d Cir. 1980); Eli Lilly & Co. v. Premo Pharmaceutical Labs., Inc., 630 F.2d 120, 136 (3d Cir.), *cert. denied*, 449 U.S. 1014 (1980).

156. These circumstances should be considered in light of the factors listed *supra* text accompanying note 133. Of course the court's action should be controlled by congressional intent in enacting CERCLA. *See* Mitchell v. DeMario Jewelry, 361 U.S. 288 (1960).

> When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes. As this Court long ago recognized, "there is inherent in the Courts of Equity a jurisdiction to . . . give effect to the policy of the legislature."

Id. at 291 (citing Clark v. Smith, 38 U.S. 195, 203 (1938)).

the court frustrated the EPA's efforts through an erroneous reading of congressional intent. More recent decisions, however, have correctly held that injunctive relief under section 106(a) is available to abate hazards from toxic waste disposal. Based upon the congressional intent as well as the fact that mandatory injunctions can be granted which require money expenditures, these courts have concluded that the EPA should be provided with the flexibility and variety of legal approaches necessary for the successful cleanup of toxic waste sites. This avenue of recourse is certain to be both useful and necessary in the future as the nation struggles to come to grips with its toxic waste dilemma.

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