

## Federal Liability for Transporters of Hazardous Wastes

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## I. INTRODUCTION

In the past 18 months, federal courts have published more than 120 opinions dealing with claims made under two federal environmental statutes that impose strict liability and potentially catastrophic penalties and clean-up costs.

The two statutes are of critical interest to persons who transport or arrange for the transportation of hazardous wastes. Penalties and clean-up costs are imposed for environmental damages resulting from activities that occurred even before the statutes were enacted—regardless of whether such activities were lawful when they occurred, and regardless of whether the environmental problems stem from intentional dumping or accidental spills. Most common law defenses, such as the exercise of due care, are inapplicable. Carriers and brokers can find themselves sharing equal liability with the generators of the waste and the owners of the damaged sites.

This article outlines the principal areas of potential liability under the two statutes, namely, the Resource Conservation Recovery Act ("RCRA")<sup>1</sup> and the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("the Superfund Act")<sup>2</sup>. The article does not discuss potentially overlapping liability under certain other federal environmental statutes, international law, or state statutes. Nor does it cover in any details the claims that may be asserted under common law theories.

## II. LIABILITY UNDER THE RESOURCE CONSERVATION RECOVERY ACT ("RCRA")

### A. BACKGROUND AND PURPOSE OF RCRA

In 1976, Congress enacted RCRA in an attempt to close the "last remaining loophole in environmental law," unregulated land disposal of hazardous and non-hazardous wastes.<sup>3</sup> The Act creates a cradle-to-grave regulatory scheme to ensure that hazardous wastes are properly disposed of. Generators of waste are required to identify hazardous

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1. 42 U.S.C. §§ 6901-6987 (1982).

2. 42 U.S.C. §§ 9601-9675 (1982).

3. H.R. Rep. No. 1491, 94th Cong., 2d Sess. 4, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6238, 6241.

wastes<sup>4</sup> and use a manifest system to ensure that wastes are disposed of only in facilities possessing a permit.<sup>5</sup> The Environmental Protection Agency ("EPA") is authorized to set standards applicable to transporters of hazardous waste,<sup>6</sup> conduct inspections and collect samples;<sup>7</sup> and exercise broad enforcement powers.<sup>8</sup> RCRA also contains a citizen suit provision which empowers any person to commence a civil suit to stop violations of the Act.<sup>9</sup>

#### B. POTENTIAL PENALTIES UNDER RCRA

*Civil Penalties.* The Act imposes civil penalties of up to \$25,000 per day for violations.<sup>10</sup> It authorizes not only the federal government, but also state, municipal and private plaintiffs to bring suits to enforce these penalties and obtain injunctions requiring cleanup of contaminated facilities.<sup>11</sup> The prevailing party can recover its costs of litigation, including attorney fees and expert witness fees.<sup>12</sup>

*Criminal Penalties.* Criminal penalties of up to \$50,000 per day and up to two years imprisonment can be imposed on persons who *knowingly* commit or cause to be committed the following acts: transportation of hazardous waste to an unlicensed disposal facility, or without a proper manifest; omission or alteration of information on a hazardous waste manifest; transportation, disposal or other handling of used oil in violation of the provisions of the Act.<sup>13</sup> Additional fines of up to \$1,000,000 and imprisonment can be imposed for knowingly placing another person in imminent danger of death or serious bodily injury.<sup>14</sup>

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4. 42 U.S.C. § 6922(1) (1982).

5. 42 U.S.C. § 6922(5) (1982).

6. 42 U.S.C. § 6923 (1982).

7. 42 U.S.C. § 6927 (1982).

8. 42 U.S.C. §§ 6928 (1982), 6972 (1982), *as amended by* Act of Nov. 8, 1984.

9. 42 U.S.C. § 6972 (1982), *as amended by* Act of Nov. 8, 1984.

10. 42 U.S.C. §§ 6928(a)(3), (c), (g) (1982); *see also* 42 U.S.C. § 6973(b) (1982) (authorizing fines of up to \$5,000 per day for willful refusal to comply with any EPA order).

11. 42 U.S.C. §§ 6972, 6973 (1982), *as amended by* Act of Nov. 8, 1984; *Environmental Defense Fund v. Lamphier*, 714 F.2d 331, 337 (4th Cir. 1983) (environmental group); *Jones v. Inmont Corp.*, 584 F. Supp. 1425 (S.D. Ohio 1984) (private individuals); *United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361 (D. N.H. 1985) (EPA, state and municipality).

12. 42 U.S.C. § 6972(e) (1982), *as amended by* Act of Nov. 8, 1984.

13. 42 U.S.C. § 6928 (1982). *See United States v. Hayes Int'l Corp.*, 786 F.2d 1499 (11th Cir. 1986) (criminal conviction of carrier and shipper under 42 U.S.C. § 6928 (1982) for knowingly transporting hazardous waste to unlicensed facility and failure to use RCRA manifest); *United States v. Greer*, 850 F.2d 1447 (11th Cir. 1988) (criminal conviction for dumping without permit and failure to report dumping activities).

14. 42 U.S.C. § 6928(e) (1982).

## C. DEFINITIONS UNDER RCRA

Terms used in the Act are broadly defined to include carriers and brokers, as well as their owners. For example:

*Person* is defined to include individuals, partnerships and corporations.<sup>15</sup> Consequently, managers and principal owners of carriers and brokers have been found liable for civil penalties, damages and even criminal penalties.<sup>16</sup>

*Disposal* is defined to include the "discharge, . . . *spilling, leaking, or* placing of hazardous waste . . . onto any land or water."<sup>17</sup> If a truck spills hazardous waste—even by accident—it constitutes a "disposal" and thus a violation under the Act. Moreover, liability arises from environmental damages caused by *spilling and leaking* that occurred before the effective date of the Act.<sup>18</sup>

*Facility* is defined to include any "equipment, . . . *storage container, motor vehicle, rolling stock . . . or . . . any site or area where a hazardous substance has been deposited, . . . or otherwise come to be located. . . .*"<sup>19</sup> A truck, trailer, or barge holding hazardous waste therefore can be considered to be a hazardous waste "facility."<sup>20</sup>

*Hazardous Waste* is broadly defined to include (1) numerous substances listed by EPA regulations;<sup>21</sup> and (2) any substance which has certain toxic or other dangerous characteristics.<sup>22</sup>

*Endangerment* (as used in both RCRA and the Superfund Act) is construed liberally to mean merely threatened or potential harm, without any requirement of proof of actual harm.<sup>23</sup> Thus, a trucking company or other defendant can be penalized and assessed for past and future cleanup costs even if there has been no demonstrable damage to the

15. 42 U.S.C. § 6903(15) (1982).

16. See *United States v. Charles George Trucking Co.*, 642 F. Supp. 329 (D. Mass. 1986) (trucking company and its owners found liable for penalties for failure to provide information to EPA under 42 U.S.C. § 6927 (a) (1982)); *United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361, 1400 (D.N.H. 1985) (a transportation company and its owner were found liable under 42 U.S.C. § 6973 (1982), as amended by Act of Nov. 8, 1984); *United States v. Hayes Int'l Corp.*, 786 F.2d 1499, 1501 n.2 (11th Cir. 1986) (owner of trucking company convicted of unlawful transportation of hazardous waste under 42 U.S.C. § 6928 (1982)); *United States v. Greer*, 850 F.2d 1447 (11th Cir. 1988) (criminal conviction for dumping without permit and failure to report dumping activities).

17. 42 U.S.C. § 6903(3) (1982).

18. *United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361, 1393 (D.N.H. 1985).

19. 42 U.S.C. § 9601(9) (1980).

20. See *Allied Towing Corp. v. Great Eastern Petroleum Corp.*, 642 F. Supp. 1339 (E.D. Va. 1986) (barge loaded with hazardous waste treated as a "facility").

21. See 40 C.F.R. § 261.30 (1988); 40 C.F.R. § 261 App. VII (1988).

22. See 40 C.F.R. § 261.20 (1988); 40 C.F.R. § 261 App. VIII (1988).

23. *United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361, 1394 (D.N.H. 1985) (construing term for purposes of CERCLA).

environment.<sup>24</sup>

*Contribute* (as used in the statutory phrase in 42 U.S.C. § 6973(a), "contributing to" disposal) is interpreted much more broadly than the verb "cause."<sup>25</sup> That is, RCRA penalties apply not only to shippers and storage site owners; but also to persons who have "contributed" to any resulting endangerment, including past off-site carriers and brokers—even if such contributing acts occurred many years ago.<sup>26</sup>

#### D. EMERGENCY PROVISION OF RCRA

*Scope of Emergency Provision.* RCRA's emergency provision (42 U.S.C. § 6973(a)) is a codification of the common law of nuisance.<sup>27</sup> It allows the federal government to sue in federal district court whenever the transportation or other handling of hazardous wastes "may present an imminent and substantial endangerment to health or the environment."<sup>28</sup> Alternately, the EPA may "issue such orders as may be necessary to protect public health and the environment," backed by civil fines for failure to obey.<sup>29</sup>

*Elements of Proof.* To recover against a defendant under the emergency provision, the federal government must establish that: (1) the conditions present an imminent and substantial endangerment; (2) the endangerment stems from the transportation, handling, storage, treatment, or disposal of any solid or hazardous waste; and (3) the defendant has contributed to such transportation, handling, storage, treatment, or disposal.<sup>30</sup>

*Liability Without Negligence.* The statute imposes liability without fault or negligence and applies to present conditions resulting from past activities of past off-site operators, transporters and others who contributed to improper disposal.<sup>31</sup>

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24. *Id.* at 1398; *see also* Environmental Defense Fund, Inc. v. Lamphier, 714 F.2d 331, 338 (4th Cir. 1983) (open-ended injunction imposed by court under RCRA).

25. United States v. Ottati & Goss, Inc., 630 F. Supp. 1361, 1393 (D.N.H. 1985); United States v. Bliss, 667 F. Supp. 1298, 1313 (E.D. Mo. 1987); United States v. Price, 523 F. Supp. 1055, 1073 (D.N.J. 1981).

26. United States v. Northeastern Pharmaceutical and Chemical Co., 810 F.2d 726, 741 (8th Cir. 1986).

27. Jones v. Inmont Corp., 584 F. Supp. 1425, 1434 (S.D. Ohio 1984). *See* S. Rep. No. 172, 96th Cong., 2d Sess. 5, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 5019, 5023.

28. 42 U.S.C. § 6973(a) (1980) (although the statute is termed an "emergency" provision, it does not require an emergency to be applicable).

29. *Id.*

30. United States v. Bliss, 667 F. Supp. 1298, 1313 (E.D. Mo. 1987); United States v. Ottati & Goss, Inc., 630 F. Supp. 1361, 1393 (D.N.H. 1985).

31. United States v. Northeastern Pharmaceutical and Chemical Co., 810 F.2d 726, (8th Cir. 1986) (statute used against non-negligent carriers even though the dumping practices were state-of-the-art at the time); United States v. Ottati & Goss, Inc., 630 F. Supp. 1361 (D.N.H. 1985)

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*Joint and Several Liability.* The harm is presumed to be indivisible and the liability is therefore joint and several for all defendants, unless one of the defendants successfully shows that the damage should be apportioned among the defendants.<sup>32</sup>

*Liability for Past, Present and Future Cleanup Costs.* Recoverable damages under RCRA include not only the costs incurred up to the time of trial, but also such future costs as it reasonably can be shown will be incurred after trial.<sup>33</sup>

#### E. "CITIZEN SUIT" PROVISION OF RCRA

For carriers and brokers, perhaps the most dangerous liability provision of RCRA is the "citizen suit" provision in 42 U.S.C. § 6972. That section allows any person—including private citizens, municipalities and states—to bring an action under RCRA's emergency provision (§ 6973, discussed above) and to recover attorney fees and other costs if successful.<sup>34</sup>

One recent article labeled § 6973 as the "real wildcard liability under RCRA" and hypothesized that:

Presumably, under this authority [§ 6972], any aggrieved individual could compel a non-negligent transporter to clean up a leaky abandoned dump to which it had brought wastes, even if the transporter's practices were acceptable at the time of disposal.<sup>35</sup>

#### F. ADDITIONAL CLAIMS AND DAMAGES

*Additional Theories of Liability.* Plaintiffs suing under RCRA generally have brought additional claims under other state and federal environmental statutes,<sup>36</sup> as well as claims under common law theories, such as pub-

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(held that it is "improper" to read a negligence standard into 42 U.S.C. § 6973 (1982)); *Jones v. Inmont Corp.*, 584 F. Supp. 1425, 1437 (S.D. Ohio 1984) (applied "to enjoin present leaking resulting from the passive inaction of those (including a carrier) whose past acts were the source of the present imminent hazard").

32. *United States v. Conservation Chemical Co.*, 589 F. Supp. 59, 63 (W.D. Mo. 1984).

33. *Environmental Defense Fund, Inc. v. Lamphier*, 714 F.2d 331, 338 (4th Cir. 1983) (opened injunction imposed upon defendant); *United States v. Northeastern Pharmaceutical and Chemical Co.*, 810 F.2d 726, 741 (8th Cir. 1986) (held RCRA "imposes liability for the present and future conditions resulting from past acts").

34. 42 U.S.C. § 6972(a) (1982) provides, in part:

Any person may commence a civil action on his own behalf . . . against any person . . . including any . . . past or present *transporter* . . . who has contributed or who is contributing to the past or present handling, storage, treatment, *transportation*, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment . . .

(Emphasis added).

35. *Miller & Gutter, Liability of Transporters of Hazardous Materials under RCRA and CERCLA*, 32 FEDERAL BAR NEWS & JOURNAL 293 (Sept. 1985).

36. Claims often are filed under CERCLA.

lic nuisance;<sup>37</sup> breach of warranty;<sup>38</sup> intentional tort theories such as products liability, trespass, assault and battery and infliction of emotional distress;<sup>39</sup> and various theories of negligence, including negligence *per se*.<sup>40</sup>

*Civil Damage Claims.* Civil damages claimed by plaintiffs have included general compensatory damages and punitive damages;<sup>41</sup> as well as special damages, such as medical costs, loss of property value, and loss of use of water sources.<sup>42</sup>

### G. CRIMINAL LIABILITY UNDER RCRA

*Transportation to Non-Authorized Site.* At least one federal court has convicted a carrier and a shipper (and their principal employees) under 42 U.S.C. § 6928(d)(1) for unlawfully transporting paint wastes and solvents to a non-authorized disposal site.<sup>43</sup> The convictions were based on evidence that the defendants knew (1) what the waste was; and (2) that the disposal site had no permit.<sup>44</sup> The court held that ignorance of the law was no defense.<sup>45</sup>

The court acknowledged that in certain circumstances, a defendant might have a valid defense if he in good faith believed that the wastes were being disposed of properly.<sup>46</sup> But the court rejected that defense based on the circumstantial evidence presented at trial.

*Other Criminal Offenses.* At least one other federal appeals court<sup>47</sup> has upheld the criminal conviction of a management employee of a carrier for dumping of hazardous waste without an EPA permit<sup>48</sup> and failure

37. *Environmental Defense Fund, Inc. v. Lamphier*, 714 F.2d 331, 335 (4th Cir. 1983); *United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361 (D.N.H. 1985).

38. *Allied Towing Corp. v. Great Eastern Petroleum Corp.*, 642 F. Supp. 1339 (E.D. Va. 1986).

39. *United States v. Hooker Chems. & Plastic Corp.*, 749 F.2d 968, 973 (2d Cir. 1984).

40. *Id.*

41. *Id.*

42. *Jones v. Inmont Corp.*, 584 F. Supp. 1425, 1427 (S.D. Ohio 1984).

43. 42 U.S.C. § 6928(d)(1) (1982) provides that any person who:

Knowingly transports or causes to be transported any hazardous waste . . . to a facility which does not have a permit under [RCRA] . . . shall, upon conviction, be subject to a fine of not more than \$50,000 for each day of violation, or imprisonment not to exceed two years . . . or both. . . .

(Emphasis added).

44. *United States v. Hayes Int'l Corp.*, 786 F.2d 1499, 1504 (11th Cir. 1986).

45. In *Hayes*, 786 F.2d at 1503, the court stated: in a prosecution under 42 U.S.C. § 6928(d)(1) it would be no defense to claim no knowledge that the paint waste was a hazardous waste within the meaning of the regulations; nor would it be a defense to argue ignorance of the permit requirement.

46. *Id.* at 1506.

47. *United States v. Greer*, 850 F.2d 1447 (11th Cir. 1988).

48. Dumping without an EPA permit violates 42 U.S.C. § 6928(d)(2)(A) (1982), and carries a maximum penalty of \$50,000 per day or two years' imprisonment, or both.



to report its dumping activities.<sup>49</sup>

### III. LIABILITY UNDER THE SUPERFUND ACT

#### A. BACKGROUND AND PURPOSE OF SUPERFUND ACT

*History of Superfund Act.* In 1980, Congress enacted the Superfund Act.<sup>50</sup> The Superfund Act was enacted to fill gaps left by the Resource Conservation and Recovery Act of 1976 ("RCRA") in dealing with abandoned dump sites, in requiring notification of the existence of inactive sites, and in providing funds for state hazardous waste cleanup programs.<sup>51</sup>

*Liability Under Superfund Act.* Liability under the Superfund Act is a very real threat to carriers and brokers. Liability extends to the actual or threatened release of a hazardous substance from a "facility" (which is defined to include "motor vehicles" and "storage containers").<sup>52</sup> Thus, the government can be expected to take action against transporters whenever it takes action against waste generators and site owners.

#### B. CHARACTERISTICS OF LIABILITY UNDER SUPERFUND ACT

Suits involving claims under the Superfund Act often include claims made under RCRA. Following is a summary of several similarities and differences with respect to the two statutes:

*Scope of Relief Under Superfund Act.* The Act is essentially a federal codification of the equitable principle of restitution.<sup>53</sup> Like RCRA, the Act authorizes the EPA to seek injunctive relief, that is, an order directing the defendants to take action to remove the "imminent and substantial endangerment to the public health or welfare or the environment".<sup>54</sup> The Act also authorizes the EPA to pay for cleanup from the Superfund and then sue the potentially responsible parties to recover its "response costs"<sup>55</sup> incurred in cleaning up the sites.<sup>56</sup>

*Broad Investigative Power Vested in EPA.* Like RCRA, the Superfund

49. Failure to report dumping activities violates 42 U.S.C. § 9603(b)(3) (1982), and carries a maximum penalty of \$10,000 or one year's imprisonment, or both.

50. 42 U.S.C. § 9601(1)-(32) (1982).

51. S. REP. No. 848, 96th Cong., 2d Sess. 25, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6125.

52. 42 U.S.C. § 9601(9) (1982).

53. *United States v. Mottolo*, 695 F. Supp. 615, 626 (D.N.H. 1988).

54. 42 U.S.C. § 9606(a) (1982).

55. *See Artesian Water Co. v. Government of New Castle County*, 659 F. Supp. 1269, 1287 (D. Del. 1987) ("response costs" do not include damages for personal injury or private economic losses); *Brewer v. Ravan*, 680 F. Supp. 1176 (M.D. Tenn. 1988) (discussing scope of properly recoverable "response costs").

56. 42 U.S.C. § 9607 (1982).

Act authorizes the government to have reasonable access to private records of generators, transporters and site owners for purposes of information gathering.<sup>57</sup>

*Liability Without Negligence.* Like RCRA, the Superfund Act is imposed upon generators, carriers, brokers and facility owners without regard to whether they were negligent in handling wastes.<sup>58</sup>

*Joint and Several Liability.* Like RCRA, the Superfund Act imposes joint and several liability upon all parties involved, including successors to the original responsible parties,<sup>59</sup> unless the parties can show a reasonable basis for apportioning the response costs among the defendants.<sup>60</sup> It has been held that the Act allows crossclaims and third-party claims for contribution, but such claims may be virtually impossible to prove in most cases.<sup>61</sup>

*Liability for Owners and Principal Employees.* As with RCRA, liability under the Superfund Act extends beyond the corporate entity and attaches to the individuals who control a defendant's business, including directors, major shareholders and the managers of the company.<sup>62</sup>

*Liability Without Proof of Causation.* The elements of proof for a Superfund Act claim do not require a plaintiff to trace the damage done to any specific defendant. It is sufficient that the defendant has dumped or handled hazardous waste on the site.<sup>63</sup>

*Injunctive Orders and Claims to Recover Response Costs.* As under RCRA, the EPA can seek injunctive relief, that is, an order directing the defendants to take action to remove the "imminent and substantial endangerment or else the EPA can incur so-called "response costs" of cleanup and then sue to recover its response costs.<sup>64</sup> Recent amendments to the Act allow recovery of prejudgment interest on response

57. 42 U.S.C. § 9604(e) (1982); see also *United States v. Charles George Trucking Co.*, 642 F. Supp. 329 (D. Mass. 1986) (trucking company fined for failure to provide requested information to EPA); *United States v. Liviola*, 605 F. Supp. 96 (N.D. Ohio 1988) (civil penalties imposed on trucking company and other for failure to provide requested information to EPA).

58. *United States v. Monsanto*, 858 F.2d 160, 167 (4th Cir. 1988).

59. *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 92 (3rd Cir. 1988).

60. *O'Neil v. Picillo*, 682 F. Supp. 706, 724 (D. R.I. 1988); *United States v. Monsanto*, 858 F.2d 160, 172 (4th Cir. 1988); but see *Allied Corp. v. Acme Solvents Reclaiming, Inc.*, 691 F. Supp. 1100, 1116-17 (N.D. Ill. 1988) (setting out factors "which might persuade a court to reject joint and several liability [even] where the harm is indivisible").

61. *United States v. New Castle County*, 642 F. Supp. 1258 (D. Del. 1986) (Superfund Act creates a right to file crossclaims and third-party claims for contribution).

62. 42 U.S.C. § 9607(a)(3) (1982); see also *United States v. Northeastern Pharmaceutical and Chemical Co.*, 810 F.2d 726 (8th Cir. 1986); *Fishel v. Westinghouse Electric Corp.*, 640 F. Supp. 442 (M.D. Pa. 1986); *United States v. Bliss*, 667 F. Supp. 1298 (E.D. Mo. 1987).

63. *United States v. Monsanto*, 858 F.2d 160 (4th Cir. 1988).

64. 42 U.S.C. § 9607 (1982).

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costs incurred.<sup>65</sup>

*Retroactive Liability.* Like RCRA, the Superfund Act's response cost provisions apply retroactively to impose liability for response costs attributable to acts committed before the 1980 enactment of the Superfund Act.<sup>66</sup>

*Future Liability.* The court can compel responsible parties to remain subject to the court's injunctive order and liable for future response costs for as long as necessary to abate the environment problem.<sup>67</sup>

*Liability to Federal and Nonfederal Plaintiffs.* Any person (including states, municipalities and private citizens) can sue to recover response costs of cleaning up a site contaminated by hazardous wastes.<sup>68</sup> For example, local governments can turn to the Superfund Act as a means of shifting the costs of closing their landfills to industrial users of the landfills and their transporters. Likewise, water utilities, citizen groups and other nonfederal plaintiffs can bring environmental claims against carriers and others for contributing to pollution at landfills and other dumping sites.

*Recovery of Treble Damages and Other Costs.* The Act authorizes the EPA to sue for three times the actual response costs incurred where a defendant refuses to follow an EPA cleanup order.<sup>69</sup> Although the Superfund Act's operative provisions (42 U.S.C. §§ 9606 and 9607) do not specifically provide for the recovery of attorney fees, acts violating the Superfund Act generally also violate RCRA, and plaintiffs therefore can claim attorney fees under RCRA's attorney fee provisions.<sup>70</sup>

### C. INJUNCTIONS AND CLAIMS FOR RESPONSE COSTS UNDER SUPERFUND ACT

*Injunctive Actions.* Under the Act's injunctive provision, 42 U.S.C. § 9606, the EPA is granted broad powers—including the power to issue orders and to enforce them in the federal court—to stop actual or threatened releases of hazardous wastes. Persons who refuse to comply with federal orders issued under Section 9606 can be fined up to \$25,000

65. 42 U.S.C. § 9607(a) (1982); see *United States v. Monsanto*, 858 F.2d 160, 175-76 (4th Cir. 1988).

66. *United States v. Shell Oil Co.*, 605 F. Supp. 1064, 1072 (D. Colo. 1985); *United States v. Northeastern Pharmaceutical and Chemical Co.*, 810 F.2d 726, 732-37 (8th Cir. 1986); *United States v. Mottolo*, 695 F. Supp. 615 (D.N.H. 1988); *O'Neil v. Picillo*, 682 F. Supp. 706 (D.R.I. 1988); but see *United States v. Wade*, 546 F. Supp. 785, 793-904 (E.D. Pa. 1982).

67. *United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361, 1410 (D.N.H. 1985).

68. *City of Philadelphia v. Stepan Chemical Co.*, 544 F. Supp. 1135 (E.D. Pa. 1982); *Interchange Office Park v. Standard Industries, Inc.* 654 F. Supp. 166 (W.D. Tex. 1987); *Brewer v. Ravan*, 680 F. Supp. 1176 (M.D. Tenn. 1988).

69. 42 U.S.C. § 9607(c)(3) (1982).

70. See, e.g., *Fishel v. Westinghouse Electric Corp.*, 640 F. Supp. 442, 447 (M.D. Pa. 1986).

per day,<sup>71</sup> (in addition to the potential liability for treble damages, as described above<sup>72</sup>). Courts also can issue open-ended injunctive orders which obligate defendants to cooperate in cleanup and monitoring activities until some indefinite future date.<sup>73</sup>

*Actions for Response Costs.* Under 42 U.S.C. § 9607(a), a plaintiff can sue to recover for "all costs of removal or remedial action" taken to alleviate damage to natural resources. The plaintiff must prove four things:

- a. The defendants fall within one of four classes of potentially responsible persons described in the statute, namely:
  1. current owners and operators of the hazardous waste facility;
  2. past owners and operators of the hazardous waste facility;
  3. those who arranged for disposal of hazardous waste at the facility;
 and
  4. transporters of hazardous waste to the facility.
- b. The defendants placed hazardous waste at the site (or other facility) that is similar to the kind of waste found at the site (or sites).
- c. A "release" of that hazardous waste (or any hazardous waste) has occurred or threatens to occur at the facility.
- d. The release or threatened release has caused the plaintiff to incur response costs.<sup>74</sup>

*No Tracing of Waste Required.* The plaintiff is not required to prove that any defendant's hazardous waste caused specific damage at the site; nor must the plaintiff match the waste found to each defendant as if it were matching fingerprints.<sup>75</sup> The only required connection between the defendant and the site is that the defendant must have placed hazardous waste there and that similar hazardous waste must be found at the site.<sup>76</sup>

#### D. DEFENSES AVAILABLE UNDER SUPERFUND ACT

*Statutory Defenses.* Three limited statutory defenses are available under the Superfund Act. A carrier (or other defendant) can escape liability if it can show that the response costs were necessitated solely by: (1) an act of God; (2) an act of war; or (3) an act or omission of an unrelated third party.<sup>77</sup>

*Third-Party Defense.* To qualify for the third-party defense, a carrier

71. 42 U.S.C. § 9606(a) (1982).

72. 42 U.S.C. § 9607(c)(3) (1982).

73. See *United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361, 1410 (D.N.H. 1985).

74. 42 U.S.C. § 9607(a) (1982); see *United States v. Bliss*, 667 F. Supp. 1298, 1304 (E.D. Mo. 1987); *United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361, 1402 (D.N.H. 1985); *O'Neil v. Picillo*, 682 F. Supp. 706, 719 (D.R.I. 1988).

75. *United States v. Bliss*, 667 F. Supp. 1298, 1310 (E.D. Mo. 1987); *United States v. Wade*, 577 F. Supp. 1326, 1332 (E.D. Pa. 1983).

76. *United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361, 1402 (D.N.H. 1985).

77. 42 U.S.C. § 9607(b)(1)-(3) (1982).

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(or other defendant) has the burden of proving that (1) the third party is not an employee of the defendant; (2) the third party's actions or omissions did not occur pursuant to a "contractual relationship with the defendant, existing directly or indirectly;" and (3) the defendant:

(a) . . . exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) . . . took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.<sup>78</sup>

In short, the defendant must show that a totally unrelated third-party is the sole cause of the release.<sup>79</sup> Courts have been strict in reviewing the facts and circumstances under which defendants have claimed the third-party defense.<sup>80</sup>

*Failure to Prove That Defendant Selected Disposal Site.* It may be possible to carve out a defense from the language of 42 U.S.C. § 9607(a)(4), which defines a liable transporter as "any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites *selected by such person.*" Reading this definition literally, a carrier or broker may be able to avoid liability if it can prove that it did not select the site to which the hazardous wastes were delivered.<sup>81</sup> (In this regard, it may be useful for carriers to insert a clause in their transportation contracts stating that the shipper, not the carrier, is responsible for choosing the disposal or treatment facility to which the wastes are to be delivered.)

*Lack of Intent to Dispose of Hazardous Material.* In at least one case, a defendant was able to avoid liability under the Superfund Act by proving that it was supplying the hazardous materials to another defendant as part of a sale of the materials, and that it had no intention of delivering the materials for the purpose of disposal.<sup>82</sup> Any carrier delivering hazardous materials in a similar situation may be able to raise a similar defense.

*Response Costs Inconsistent With "National Contingency Plan".* The Superfund Act allows recovery of response costs only insofar as they are consistent with so-called "National Contingency Plan."<sup>83</sup> In certain instances, it may be possible for a defendant to reduce or defeat another

78. 42 U.S.C. § 9607(b) (1982).

79. *O'Neil v. Picillo*, 682 F. Supp. 706, 728 (D.R.I. 1988).

80. See *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1048-49 (2nd Cir. 1985); *United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361, 1400 (D.N.H. 1985).

81. See *United States v. South Carolina Recycling and Disposal, Inc.*, 21 E.R.C. 1577 (1984) (plaintiff must prove that transporter selected the facility to which wastes were delivered).

82. *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 685 F. Supp. 651, 655-56 (N.D. Ill. 1988).

83. 42 U.S.C. § 9607(a)(4) (1982).

party's claim for reimbursement or contribution of response costs if that party's remedial actions were ill-conceived, negligently carried out, not cost-effective, or otherwise inconsistent with the National Contingency Plan.<sup>84</sup>

*Other Possible Defenses.* Courts have acknowledged that the Superfund Act is a codification of the equitable remedy of restitution and that equitable defenses therefore can be raised<sup>85</sup> (although no cases have been found in which courts have allowed equitable defenses). In one case, a defendant unsuccessfully asserted equitable defenses of "waiver and release;" "estoppel;" and an alleged failure to consult with the defendant before and during the clean up process.<sup>86</sup> In another case, a defendant unsuccessfully raised the defense of "unclean hands," alleging that the government's clean up of the hazardous waste was so negligently conducted as to have caused more damage than was cleaned up.<sup>87</sup> Presumably, equitable defenses will be allowed in cases in which facts and circumstances justify them.

#### IV. CONCLUSION

The growing matrix of overlapping environmental statutes, regulations and caselaw is becoming so complex that no one can boast full knowledge of the field. Nor can anyone predict what the ultimate effect will be on the transportation industry.

All that can be said with certainty is that large numbers of claims under RCRA and the Superfund Act are being filed with regularity by government and private plaintiffs. Carriers and brokers are named as defendants in a good number of those cases. The potential penalties they face are severe.

Transportation practitioners therefore are well-advised to become as thoroughly familiar as possible with environmental laws and to make every effort to ensure that their companies are in compliance at federal, state, and local levels.

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84. See *Versatile Metals, Inc., v. Union Corp.*, 693 F. Supp. 1563, 1577-82 (E.D. Pa. 1988) (setting out standards used by EPA to determine if remedial actions are consistent with National Contingency Plan).

85. *United States v. Mottolo*, 695 F. Supp. 615, 626 (D.N.H. 1988).

86. *Id.*

87. *O'Neil v. Picillo*, 682 F. Supp. 706, 726 (D.R.I. 1988) ("unclean hands" defense rejected on ground that "mere negligence" by state in cleaning up a site was insufficient to bar the state from recovering under the Superfund Act).