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Using RCRA’s Imminent Hazard Provision in Hazardous Waste Emergencies

The growing menace of improper hazardous waste\(^1\) disposal is receiving increased public attention as Love Canal and similar events command national media coverage\(^2\) and increasing numbers of hazard-

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1. “Hazardous waste” is defined in the Resource Conservation and Recovery Act of 1976 (RCRA) as:

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

2. The Love Canal disposal site in Niagara Falls, New York has been the most dramatic and visible hazardous waste emergency to date. The short history of Love Canal that follows is drawn from Senate discussion of the Superfund legislation (see note 5 infra), including a Senate report that based its discussion on one article of over 100 pages about Love Canal written by a New York Times Magazine reporter. This history evidences the unfortunate lack of attention, until recently, directed to the serious problems such sites present.

   In 1894, a would-be entrepreneur named William Love began digging a canal to connect Lake Ontario with the Niagara River, but the work was never completed. S. REP. NO. 848, 96th Cong., 2d Sess. 9 (1980). The site was used as an industrial dumpsite in the 1930's until Hooker Electrochemical Corporation purchased the site in 1947.
ous waste dumpsites are being discovered. Serious legislative attention to the hazardous waste problem began with the Resource Conservation and Recovery Act of 1976 (RCRA), and has continued with the recently enacted "Superfund" legislation. Section 7003 of RCRA allows the Environmental Protection Agency (EPA) to respond to imminent hazards. This Development discusses the danger that must exist before the EPA Administrator may act, the actions authorized by section 7003, and the scope of liability that may be imposed on hazardous waste producers and handlers under that provision. Section 7003 of RCRA provides that the Administrator,

upon receipt of evidence that the handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, . . . may bring suit . . . in the appropriate district court to immediately restrain any person [from] contributing to [these activities]. The Administrator may also . . . take any other action . . . in-

S14,969 (daily ed. Nov. 24, 1980) (remarks of Sen. Moynihan). Hooker disposed of more than 80 deadly chemicals in the canal. Id. at S14,974. In 1953, Hooker sold the site, filled and covered, for $1.00 to the Niagara County Board of Education. Id. at S14,969. The city and private citizens bought parcels of the land from the Board and built an elementary school and homes on the property. Id.

In the early 1970's, residents began to notice chemical odors, prompting the City of Niagara Falls to drill monitoring wells and analyze samples. Id. In 1978, the New York State Department of Health began investigations of the many health problems reported, including birth defects, miscarriages, epilepsy, and liver abnormalities. S. REP. No. 848, 96th Cong., 2d Sess. 9 (1980). Later that year, the State Health Commissioner declared a state of emergency and recommended the evacuation of children under two years old and pregnant women in homes within two streets of the canal site. 126 CONG. REC. S14,969 (daily ed. Nov. 24, 1980) (remarks of Sen. Moynihan). In August 1978, President Carter declared a state of emergency, and New York Governor Carey announced that the State would evacuate 236 families. Id. at S14,970. In June 1980, Governor Carey signed a bill providing $5 million in state appropriations and called for $20 million in federal loans to relocate families permanently and clean up the site. Id. at S14,970-71.

For a discussion of Love Canal and other hazardous waste disposal sites engendering public concern, see TIME, Sept. 22, 1980, at 58-69. An ABC News-Harris poll conducted after the news blitz on Love Canal found that 76% of those surveyed considered toxic chemical dumping "a very serious problem," and 93.6% wanted "federal standards prohibiting such dumping made much more strict than they are now." Id. at 63.

3. Since it began its search in mid-1979, and as of January 31, 1981, EPA had discovered 8,842 "potential hazardous waste sites." EPA is now uncovering such sites at the rate of approximately 400 per month. Telephone conversation with Margie Russell, Program Assistant, Office of Hazardous Waste Enforcement, EPA (Feb. 23, 1981).


cluding, but not limited to, issuing such orders as may be necessary to protect public health and the environment.\textsuperscript{7}

EPA has made frequent use of this section. Since it filed its first case in February 1979,\textsuperscript{8} the Agency has filed fifty-six cases relying at least in part on section 7003.\textsuperscript{9}


There is also a "Violations" subsection, added as part of SWDAA 1980, which provides:

Any person who willfully violates, or fails or refuses to comply with, any order of the Administrator under subsection (a) may, in an action brought in the appropriate United States district court to enforce such order, be fined not more than $5000 for each day in which such violation occurs or such failure to comply continues.\textsuperscript{10} Id. § 25(b), 94 Stat. 2334 (amending 42 U.S.C. § 6973 (1976)). For a general discussion of RCRA and its imminent hazard provision, see Anderson, The Resource Conservation and Recovery Act of 1976: Closing the Gap, 1978 Wis. L. Rev. 633; Weiland, Enforcement Under the Resource Conservation and Recovery Act of 1976, 8 ENVTL AFF. 641 (1980).


Section 7003 is an important part of the federal statutory scheme regulating hazardous waste. First, this provision allows the Federal Government to take emergency action where a state cannot or will not take such action.  

Although RCRA encourages states to develop their own hazardous waste disposal programs, many states do not have adequate resources, information, or statutory authority to deal with hazardous waste emergencies.

Second, there is every reason to assume that hazardous waste emergencies will continue to occur. Although the recently enacted RCRA regulations add detailed standards to RCRA's regulatory framework, these standards do not eliminate the need for federal intervention in cases where states are unable or unwilling to respond.


10. See Developments, Hazardous Substances in the Environment, 9 ECOLOGY L.Q. 579 (1981), for a discussion of tenth amendment issues presented by federal-state relations under RCRA generally. Lee concludes that a tenth amendment challenge to RCRA probably would be unsuccessful. Id. Section 7003 presents even less of a constitutional problem than other RCRA provisions, because the Administrator's actions under this provision are less likely to intrude on integral state governmental functions than are the ongoing regulatory activities authorized by other RCRA provisions.


12. In a survey of all 50 States, 29 had environmental emergency contingency plans, 15 had contingency funds, 10 had adequate equipment, and 12 had authority for cleanup and cost recovery. ARTHUR D. LITTLE, INC., ENVIRONMENTAL EMERGENCY RESPONSE—SURVEY OF STATE RESPONSE CAPABILITIES, A REPORT TO EPA (1978), cited in TOXIC SUBSTANCES STRATEGY COMM., TOXIC CHEMICALS AND PUBLIC PROTECTION: A REPORT TO THE PRESIDENT 88 (1980).

framework and thus will help to control hazardous waste problems arising in the future,\textsuperscript{14} many disposal sites with waste accumulated before the regulations took effect pose continuing hazards.\textsuperscript{15}

Third, the Federal Government's fiscal policies will prevent the emergency response provisions of the Superfund\textsuperscript{16} from supplanting RCRA's emergency provision. The high costs of cleanup and monitoring of hazardous waste sites\textsuperscript{17} dictate that Superfund's $1.6 billion contingency fund be used sparingly. Although EPA has not yet made public its strategy for deciding when to use Superfund, the agency must establish priorities if the fund is not to be depleted.\textsuperscript{18}

The legislative history of RCRA sheds little light on the intended scope of the imminent hazard provision. Probably because a large portion of the statute was drafted, negotiated, and passed by Congress within a short period near the end of a legislative session,\textsuperscript{19} the official legislative history of the Act's imminent hazard provision is, in the words of one judge, "quite sketchy."\textsuperscript{20} No discussion of section 7003

\begin{footnotes}
\item[14] These regulations set forth standards effective November 19, 1980 for hazardous waste generators, transporters, and owners and operators of treatment, storage, and disposal facilities. See id.
\item[15] For example, a congressional report describes 58 sites located in 20 states in which improper hazardous waste disposal practices have created hazards. H.R. REP. No. 1491, 94th Cong., 2d Sess. 17-24 (1976), reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6238, 6254-61 [hereinafter cited as RCRA HOUSE REPORT]. At some sites, improper waste disposal has occurred over many years. For example, waste chemicals were disposed over a 50-year period at a New Jersey site, causing widespread groundwater contamination. Id. at 18, reprinted in [1976] U.S. CODE CONG. & AD. NEWS at 6255.
\item[18] A study by Fred C. Hart Associates estimates that the total cost of cleaning up approximately 1,200 improperly managed hazardous waste sites will be $13.1-22.1 billion, far exceeding Superfund's $1.6 billion fund. [1979] 9 ENVIR. REP. (BNA) 2085. Barbara Blum, Deputy Administrator, EPA, estimated that the cost will total $26-42 billion. Id.
\item[19] Kovacs & Klucsik, The New Federal Role in Solid Waste Management: The Resource Conservation and Recovery Act of 1976, 3 COLUM. J. ENV'TL L. 205, 219 (1977). Sponsors of the bill wanted to push it through both houses before Congress adjourned on October 1, 1976, but House debate was scheduled for September 27. Id. This left little time for the normally lengthy process of winning House approval, working out a compromise bill with the Senate, and obtaining both houses' approval of the compromise version. Id. Consequently, staff members from both houses negotiated a compromise bill over the weekend of September 25. Id. Both houses overwhelmingly approved the final compromise version with little if any time to read it, and RCRA was signed into law three weeks later. Id. For an excellent, more expanded discussion of RCRA's legislative history, see id. at 216-20.
\end{footnotes}
appears in the only congressional report on the Act.\textsuperscript{21}

\textbf{I}

\textbf{WHEN THE ADMINISTRATOR MAY EXERCISE EMERGENCY POWERS}

American industry is manufacturing and disposing of many types and increasing amounts of chemically complex substances whose long-term effects are often unknown.\textsuperscript{22} Courts interpreting RCRA's emergency powers provisions must grapple with a problem common in environmental and public health: how to make legal decisions in the face of scientific uncertainty about the nature and extent of the risk in question.\textsuperscript{23} This Part discusses the probability and magnitude of harm that must be found before the Administrator may act.

When Congress amended RCRA in October 1980,\textsuperscript{24} it expanded the authority of the Administrator to act under the imminent hazard

\textsuperscript{21} RCRA House Report, supra note 15, at 69, reprinted in [1976] U.S. Code Cong. & Ad. News at 6308. The report is dated September 9, 1976, indicating that it deals with H.R. 14496 as it existed before the House-Senate compromise was reached on September 27, 1976. The House report mentions the provision only in its section-by-section analysis, where it paraphrases the provision without comment. \textit{Id.} Also, the report's paraphrase omits crucial language: This section provides that notwithstanding any other provision of this act, upon receipt of evidence that the handling, storage, treatment, [language omitted here] an imminent and substantial endangerment to health and the environment then the Administrator may bring suit in the United States District Court, for appropriate relief.

\textit{Id.} Even when the report lists many hazardous waste disposal sites "illustrative of the problem" and describes past and continuing damages that could present an imminent hazard, it does not mention using the Act's imminent hazard provision to deal with the sites. \textit{Id.} at 17-23.

There are several possible reasons why § 7003 received so little attention before its enactment. Similar provisions in the Safe Drinking Water Act, 42 U.S.C. § 300i(a) (1976), Clean Water Act, 33 U.S.C. § 1364 (1976), and Clean Air Act, 42 U.S.C. § 7603(a) (Supp. III 1979), had been little used, so there was no reason to expect that RCRA's provision would be used extensively. As of 1976 when RCRA was enacted, the Administrator had brought only two actions under emergency powers provisions. State Water Control Bd. v. Washington Suburban Sanitary Comm'n, No. 1813-73 (D.D.C., July 29, 1974) (consent decree), appeal docketed, Nos. 78-1671, 78-1672 (D.C. Cir., July 18, 1978); United States v. U.S. Steel Corp., No. 71-1041 (S.D. Ala., Nov. 18, 1971) (temporary restraining order).

\textsuperscript{22} Comment, Imminent Irreparable Injury, 45 S. Cal. L. Rev. 1025, 1027 (1972).


The Administrator's authority to act when hazardous waste activity "is presenting" an imminent and substantial endangerment was expanded to cover instances where it "may prevent" such endangerment. This new language makes clear that the Administrator need not wait until harm has occurred before taking action. The possibility of harm is sufficient grounds for EPA action, assuming the other statutory prerequisites have been met. Also, the Administrator may now act to enjoin not only "the alleged disposal" but also the "handling, storage, treatment, [and] transportation" of hazardous waste.

Section 7003 requires that the harm that "may [be] present[ed]" by hazardous waste activity be "an imminent and substantial endangerment." This phrase may be better understood by examining legislative and judicial interpretation of the same language as found in three other environmental statutes. The House committee report accompanying the Safe Drinking Water Act (SDWA) discusses at length the probability and magnitude of harm that must exist before the Administrator may act under the emergency powers provisions of SDWA. Because the SDWA House report is the only legislative history of a federal

26. Id.
27. See text accompanying notes 30-51 infra.
28. The Administrator may act under § 7003 if there is evidence that health or the environment may be endangered and that the endangerment is caused by the handling, storage, treatment, transportation, or disposal of a hazardous waste. SWDAA 1980, Pub. L. No. 96-482, § 25, 94 Stat. 2334 (amending 42 U.S.C. § 6973 (1976)).

(a) [T]he Administrator, upon receipt of information that a contaminant which is present in or is likely to enter a public water system may present an imminent and substantial endangerment to the health of persons . . . may take such actions as he may deem necessary in order to protect the health of such persons . . . . The action which the Administrator may take may include (but shall not be limited to) (1) issuing such orders as may be necessary to protect the health of persons who are or may be users of such system . . . and (2) commencing a civil action for appropriate relief, including a restraining order or permanent or temporary injunction.

(b) Any person who willfully violates or fails or refuses to comply with any order issued by the Administrator under subsection (a)(1) of this section may, in an action brought in the appropriate United States district court to enforce such order, be fined not more than $5,000 for each day in which such violation occurs or failure to comply continues.
statute using the phrase "imminent and substantial endangerment" to
discuss the meaning of that language, the report is a key to understand-
ing that phrase in section 7003 of RCRA.

The SDWA House report’s discussion of the SDWA emergency
powers provision first considers the meaning of “imminent.” According
to the report, the Administrator may act when the risk of harm is
imminent and need not wait until the harm itself is imminent.34 Because
early action is necessary “to prevent the potential hazard from
materializing,”35 the imminence of the endangerment “must be consid-
ered in light of the time it may take to prepare administrative orders or
moving papers, to commence and complete litigation, and to permit
issuance, notification, implementation, and enforcement of administra-
tive or court orders to protect the public health.”36 Allowing these pro-
cedural factors to enter into the determination of imminence gives the
Administrator considerable latitude in deciding when to act. The re-
port cautions, however, that emergency authority cannot be used when
“the risk of harm is remote in time.”37

This report also discusses the requirement that threatened harm be
“substantial,” commenting that the emergency provision does not au-
thorize agency action when “the risk of harm is de minimis in degree.”38
The report suggests that the term “substantial,” like the term “immi-
nent,” refers to the probability that harm will occur as well as to the
degree of the harm threatened.39 Thus, “substantial” endangerment
exists where there is “a substantial likelihood . . . of adverse health
effects . . . ; a substantial statistical probability that disease will result
. . . or the threat of substantial or serious harm.”40

Similarly, courts interpreting “endangerment” in environmental
legislation have held that the Administrator may act to prevent
threatened harm instead of waiting for that harm to materialize. In
Reserve Mining Co. v. EPA,41 the court considered whether the dis-
charge of taconite tailings into Lake Superior was “endangering the
health and welfare of persons” within the meaning of a provision of the

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35. Id.
36. Id.
37. Id.
38. Id.
41. 514 F.2d 492 (8th Cir. 1975) (en banc).
Federal Water Pollution Control Act (FWPCA). The court concluded: "[W]e believe that Congress used the term 'endangering' in a precautionary or preventive sense, and, therefore, evidence of potential harm as well as actual harm comes within the purview of that term." The court quoted with approval Judge Wright's interpretation of "endanger" in the Clean Air Act: "Caselaw and dictionary definition agree that endanger means something less than actual harm. When one is endangered, harm is threatened; no actual injury need ever occur." Judge Wright concluded that "[d]anger is a risk, and so can only be decided by assessment of risks."

Judge Wright's interpretation of the term "endanger" in the context of the Clean Air Act was also relied on in a recent discussion of the "imminent and substantial endangerment" provisions of RCRA and the Clean Water Act in United States v. Vertac Chemical Corp. Vertac is one of the earliest published decisions involving RCRA's imminent hazard provision. The Federal District Court issued a preliminary injunction requiring containment and continued monitoring of toxic materials that had been entering a creek and the air. The court quoted extensively from Reserve Mining to support its finding of "im-

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42. Pub. L. No. 845, § 2(d)(1), 62 Stat. 1156 (1948). This section enabled the Administrator to request that the Attorney General bring suit for abatement in the case of water pollution that "endangers the health or welfare of persons in a State other than that in which the discharge originates." Id. The current Clean Water Act contains an emergency powers provision providing that:

> [T]he Administrator upon receipt of evidence that a pollution source or combination of sources is presenting an imminent and substantial endangerment to the health of persons or to the welfare of persons . . . may bring suit on behalf of the United States in the appropriate district court to immediately restrain any person causing or contributing to the alleged pollution to stop the discharge of pollutants causing or contributing to such pollution or to take such other action as may be necessary.


43. Reserve Mining Co. v. EPA, 514 F.2d 492, 528 (8th Cir. 1975) (en banc).

44. The Clean Air Act provision (current version at 42 U.S.C. § 7545(c)(1)(A) (Supp. III 1979)) allows the Administrator to control or prohibit the manufacture or use of any motor vehicle fuel or fuel additive "if in the judgment of the Administrator any emission product of such fuel or fuel additive causes, or contributes, to air pollution which may reasonably be anticipated to endanger the public health or welfare." Id.

45. Reserve Mining Co. v. EPA, 514 F.2d 492, 529 (8th Cir. 1975) (en banc) (quoting Ethyl Corp. v. EPA, No. 73-2205 at 11, 31-33 (D.C. Cir. Jan. 28, 1975) (dissenting opinion)). Although the language quoted is from Judge Wright's dissenting opinion in Ethyl, on rehearing en banc Judge Wright delivered the majority opinion.

46. Id.


minent and substantial endangerment." Using language from *Reserve Mining*, the court balanced the "imminence" against the "substantiality" of the endangerment in question on the theory that even a slight probability of harm was a sufficient endangerment if very serious harm could result: "While there may be a low probability of harm from dioxin as defendants contend, there is a serious and dire risk from exposure to dioxin should the hypothesis advanced by the plaintiffs prove to be valid." The court also emphasized that findings of imminent and substantial harm can rest legitimately on uncertain data: "[A risk may be assessed] from suspected, but not completely substantiated, relationships between facts, from trends among facts, from theoretical projections from imperfect data, or from probative preliminary data not yet certifiable as 'fact.'"

In view of the SDWA legislative history and the judicial interpretation of language in other acts similar to that found in section 7003, it is likely that courts will allow the Administrator to act when there is a substantial likelihood of endangerment, and that when a greater harm is threatened, less likelihood of harm need be demonstrated before the Administrator can act.

II

ACTIONS AUTHORIZED BY SECTION 7003

The 1980 amendments to RCRA clarified and expanded the Administrator's power to take action to alleviate harm in hazardous waste emergencies. As originally enacted, section 7003 allowed the Administrator to bring suit or to "take such other action as may be necessary" to stop the disposal of hazardous waste where it presented an "imminent and substantial endangerment." While this authority ostensibly was broad, the 1980 amendments more specifically provide that the Administrator may issue "such orders as may be necessary to protect public health and the environment" and impose a fine of $5000 per day for willful violations of such orders. The amendments increase

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49. 489 F. Supp. at 885. The *Vertac* court's heavy reliance on *Reserve Mining* is curious in view of the *Reserve Mining* court's observation that the term "endangering" connoted a lesser risk than the phrase "imminent and substantial endangerment," which superseded "endangering" in the 1972 amendments to the Clean Water Act, Pub. L. No. 92-500, § 2, 86 Stat. 888 (codified in 33 U.S.C. § 1364 (1976)). Reserve Mining Co. v. EPA, 514 F.2d 492, 528 (8th Cir. 1975) (en banc).
51. Id.
55. Id. This fine increases the efficacy of § 7003 not only by increasing the deterrent
the resemblance among the emergency powers provisions of RCRA, SDWA, and the Clean Air Act. Because judicial interpretation of language in one emergency statute is often used to interpret emergency provisions in other statutes, a more unified approach to environmental pollution emergencies could contribute to more effective administrative and judicial resolution of emergency situations.

Court orders and consent decrees under section 7003 have provided for broad remedial and preventive relief. For example, the court in Vertac issued an injunction requiring the defendants to repair the clay covering on a waste burial site, construct waste-containment walls, and submit to EPA monthly samples from monitoring wells and a detailed plan for a wastewater treatment system with timetables for its installation. Settlement decrees in other actions have included similar provisions for short- and long-term cleanup, containment, and monitoring.

The type of relief the Administrator may order under section 7003 is still uncertain. While Superfund details the activities for which contingency funds can be spent and the costs for which defendants can be held liable, RCRA's section 7003 leaves to the Administrator the task of determining on a case-by-case basis what actions are "necessary" to protect the environment and public health. More troublesome is that the 1980 amendments fail to clarify whether and how the cost of cleanup and the waste handler's ability to pay should be considered in structuring relief. An answer to this question was indicated when the

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force of the provision, but also by providing the Administrator with leverage in settlement negotiations. In an interview with Anthony Z. Roisman, Chief, Hazardous Waste Section, U.S. Department of Justice, Mr. Roisman reported:

Before [RCRA was amended to include a $5000 per day fine], when we got into a discussion about settlement all we could offer the defendant was: "If you settle with us when the suit is filed, we won't say nasty things about you. We'll say you've been very responsible." But some companies would say: "Yeah, that and 55 cents and I can ride the subway during rush hour." It didn't count for a lot. Now we can say that if you don't settle with us, we will sue you not only to do the work, but from the day you haven't done it we will get a $5,000 a day fine.


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58. See text accompanying notes 44-47 supra.
Vertac court expressed concern about the economic impact of the requested relief on the defendant and the community: "Vertac must be given a reasonable opportunity and a reasonable time to accomplish an abatement of its pollution and the health risk created thereby. In this way, hardship to employees and great economic loss incident to an immediate plant closing may be avoided." Thus, the high cost of effective relief may influence the courts in deciding what relief may be ordered under section 7003.

III
LIABILITY

A. Effect of Section 7003 on Substantive Standards of Liability

United States v. Midwest Solvent Recovery, Inc. (Midco) was the first published decision involving section 7003. The court carefully considered whether the section imposes substantive liability and concluded that it does nothing more than set forth "evidentiary tests which, if satisfied, permit the Administrator to petition in some situations for immediate injunctive relief." The court based its conclusion on the language and organization of RCRA. First, the court noted that section 7003 is found among RCRA's miscellaneous provisions rather than in the subchapter that imposes liability for failure to fulfill prescribed duties. Second, the court observed that section 7003 is found in the Act following a private attorney general provision allowing any person, not including the Administrator in an official capacity, to sue to enforce the Act. The proximity of section 7003 to the citizen suit provision supports the view that the section's main purpose is to allow the Administrator to bring suit in federal court. Because section 7003 authorizes the Administrator to take action against all those who contribute to the disposal of hazardous wastes, without regard to the nature or extent of their waste handling activities, it is unlikely that Congress intended this section to serve as a substantive standard of liability. Finally, the court noted that other provisions of the Act establish standards of conduct for handling wastes.

Because section 7003 does no more than provide jurisdiction in the

65. See note 17 supra.
67. Id. at 144.
68. Id. at 143.
69. Id. at 143-44.
70. Id. at 144.
71. Id.
72. Id. The provisions referred to by the court, 42 U.S.C. §§ 6922-6924 (1976), authorize the Administrator of EPA to establish standards governing monitoring and reporting practices.
federal district courts once the “evidentiary test” of “imminent and substantial endangerment to health or the environment” is satisfied, Midco held that courts must apply common law principles and the Federal Rules of Civil Procedure to determine whether preliminary injunctive relief should be granted. The government argued that the requirement in Rule 65 of the Federal Rules of Civil Procedure that injunctive relief can be granted only if irreparable harm is threatened was superseded by section 7003’s test of “imminent and substantial endangerment to health or the environment.” The court rejected this contention and squarely held that section 7003 was not intended to supplant the requirement of the Federal Rules of Civil Procedure, though it acknowledged that there would be little practical difference between the two standards in most hazardous waste emergency cases.

B. Section 7003 and the Federal Common Law of Nuisance

Midco’s holding that section 7003 creates an evidentiary test rather than standards for substantive liability raises the question of what substantive law to apply in suits filed under that section. Because Midco involved a preliminary injunction, it focused on the relevant requirements of the Federal Rules of Civil Procedure and referred only briefly to common law principles. United States v. Solvents Recovery Service, however, addressed the issue of substantive liability and applied the federal common law of nuisance.

A federal common law of nuisance exception to the doctrine of Erie Railroad Co. v. Tompkins was first recognized in 1972 when the Supreme Court held in Illinois v. City of Milwaukee that a federal court could hear a common law nuisance claim in an action to enjoin

73. Id. at 143.
74. Id.
75. The court stated:
   In the great majority of controversies that the Court can envision that involve the disposal, storage, and treatment or handling of solid or hazardous wastes, if an endangerment of the sort described in § 7003 can be made out, the common law prerequisite to the issuance of preliminary injunctive relief will also be existent. But in those actions in which plaintiff shows a § 7003 endangerment but fails to demonstrate that in the absence of preliminary injunctive relief irreparable harm will result, a preliminary injunction cannot issue.

Id. at 144.
76. Id. at 143.
77. 496 F. Supp. 1127 (D. Conn. 1980).
78. Id. at 1134-35.
79. 304 U.S. 64 (1938). This landmark decision, overruling a Supreme Court case that had been followed for almost one hundred years, held that state and not federal law supplies the substantive standards to be applied in diversity cases in federal courts. The Court declared: “There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State . . . . And no clause in the Constitution purports to confer such a power upon the federal courts.” Id. at 78.
interstate water pollution. Although the remedy sought by the state was not provided by the Federal Water Pollution Control Act, the Court found that ""[i]he application of federal common law to abate a public nuisance in interstate or navigable waters is not inconsistent with the . . . Act.""81 The Court stated that federal law can be applied ""where there is an overriding federal interest in the need for a uniform rule of decision.""82

Decisions after City of Milwaukee have attempted to determine what federal interests are sufficiently important to justify application of the federal common law of nuisance. One line of cases,83 of which Committee for Jones Falls Sewage System v. Train84 is representative, reasoned that a federal forum should adjudicate cases in which a public nuisance arises in one state and causes harmful effects in another.85 These cases require a showing of interstate controversies or effects in order to apply the federal common law of nuisance.86

Illinois v. Outboard Marine Corp.87 represents a more liberal approach88 in its holding that interstate pollution is not the sole means of establishing a sufficient federal interest to apply federal common law.89 According to this case, federal pollution laws manifest a federal interest in abating intrastate water pollution sufficient to meet the City of Milwaukee test of overriding federal interest.90 Solvents, the only decision applying federal common law to suits brought under section 7003, followed this line of reasoning.

The Solvents court reasoned that a federal nuisance cause of action may be grounded in the ""strong federal interest in controlling cer-

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82. Id. at 105.
83. See National Sea Clammers Ass'n v. City of New York, 616 F.2d 1222 (3d Cir. 1980), rev'd sub nom. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 49 U.S.L.W. 4783 (1981); Committee for Jones Falls Sewage Sys. v. Train, 539 F.2d 1006 (4th Cir. 1976); Reserve Mining Co. v. EPA, 514 F.2d 492 (8th Cir. 1975) (en banc).
84. 539 F.2d 1006 (4th Cir. 1976).
85. Id. at 1008.
86. Id. at 1010. See also National Sea Clammers Ass'n v. City of New York, 616 F.2d 1222, 1233 (3d Cir. 1980), rev'd sub nom. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 49 U.S.L.W. 4783 (1981); (showing of interstate effects is typical, but perhaps not only, method of demonstrating federal interest in uniformity); Reserve Mining Co. v. EPA, 514 F.2d 492, 520 (8th Cir. 1975) (en banc) (requiring ""at a minimum, interstate pollution").
88. See also United States v. Ira S. Bushey & Sons, Inc., 346 F. Supp. 145, 149 (D. Vt. 1972), aI'd mem., 487 F.2d 1393 (2d Cir. 1973), cert. denied, 417 U.S. 976 (1974) (no interstate effects required in case of lake pollution because national interest in air and water quality ""has been manifested in executive statements, Congressional legislation, and administrative agency regulation").
90. Id. at 630.
tain types of pollution . . . manifested in several federal statutes concerning the preservation of clean waters." RCRA's legislative history indicates a strong federal interest in preventing and abating groundwater pollution caused by hazardous waste disposal. The court observed that, because groundwater pollution rarely crosses state lines, "conditioning a § 7003 claim on the allegation of . . . interstate effects would be fundamentally inconsistent with the character of the pollution which is the target of [RCRA] and incompatible with the nature and extent of the federal concern embodied in RCRA." Therefore, appears to establish the existence of a sufficient federal interest to apply federal nuisance law in section 7003 cases.

Another factor contributing to the Solvents court's rejection of an interstate-effects requirement in federal nuisance actions was the language of section 7003. The requirement that the Administrator give notice to the affected "State," rather than "states," of any section 7003 suit demonstrates congressional intent to authorize section 7003 actions involving only one state.

The Supreme Court's recent second decision in City of Milwaukee v. Illinois (Milwaukee II) raises another issue concerning the availability of a federal common law remedy in suits brought under section 7003. After the Court's initial decision establishing a federal common law remedy to abate health and environmental hazards resulting from interstate water pollution, Congress amended the Federal Water Pollution Control Act to establish a broad new system of regulation governing discharge of pollutants into the Nation's waters. In its second decision, the Court held that there was no longer any "'interstice' here to be filled by federal common law." While prior to the amend-

92. Id. at 1136.
93. Id. at 1138.
94. Id. at 1139.
101. The plaintiffs initially filed suit in the Supreme Court seeking to invoke its original jurisdiction over suits between two states. Illinois v. City of Milwaukee, 406 U.S. at 93-94. Although the Court held that a federal common law remedy was available in that case, it declined to exercise its original jurisdiction, holding instead that the common law remedy could be afforded by the federal district courts. Id. at 108. The second Supreme Court decision in the case was on certiorari, with the defendants seeking review of the lower court's decision. City of Milwaukee v. Illinois, 49 U.S.L.W. at 4446.
ments the available federal statutory remedies had been "inadequate to supplant federal common law," in the Court's view the amendments had created ample statutory procedures for states to seek redress from interstate water pollution.\textsuperscript{103}

\textit{Milwaukee II} raises the question whether RCRA leaves room for application of federal common law remedies in section 7003 suits, or whether the substantive standards to be applied in cases brought under that provision must be derived solely from the statute itself. An interpretation of the substantive standards of RCRA as entirely supplanting federal common law remedies in dealing with hazardous waste emergencies would be inconsistent with Congress's decision to create the special remedy afforded by section 7003. The decision to include such a provision specifically addressed to emergency situations indicates that Congress did not believe the general regulatory framework of the statute was sufficient to prevent or abate all hazardous substance emergencies. Because RCRA's general regulatory scheme is directed to the ongoing activities of hazardous waste handlers and does not address the continuing hazards created by past disposal activities,\textsuperscript{104} federal common law remedies made available through the statutory procedural device of section 7003 would seem particularly appropriate to fill this gap.

\textbf{C. Liability for Past and Omissive Acts Under Section 7003}

Parties currently and directly contributing to the "handling, storage, treatment, transportation or disposal" of hazardous waste that may present an imminent hazard are clearly subject to section 7003 if the Administrator can show that the acts may endanger health or the environment.\textsuperscript{105} The full range of activities covered by RCRA's emergency provision is unclear, however. The Administrator's authority to obtain relief for present harm resulting from past acts, including those occurring prior to RCRA's enactment, and for omissive or nonvolitional acts, such as ownership of property containing waste presenting a hazard, has not yet been determined by Congress or the courts.

\textit{Solvents} held that a party can be held liable in a section 7003 suit for present effects of its past acts.\textsuperscript{106} The defendant in \textit{Solvents} was subject to suit under RCRA for its storage and disposal of toxic chemicals ending in 1979 and 1967, respectively,\textsuperscript{107} because those activities

\textsuperscript{103} Id. at 4449.
\textsuperscript{105} 42 U.S.C. § 6973 (1976).
\textsuperscript{106} United States v. Solvents Recovery Serv., 496 F. Supp. at 1140-41.
\textsuperscript{107} Id. at 1130.
HAZARDOUS SUBSTANCES DEVELOPMENTS

were the cause of existing groundwater pollution.108 The court gave several reasons for its rejection of a "continuing acts" limitation in section 7003 actions. First, the authority of the Administrator to go beyond seeking a restraining order by "tak[ing] such other action as may be necessary" implicitly refers to situations in which more than a restraining order is needed because the defendants have already ceased the disposal activity causing the hazard.109 Second, Solvents held that the federal common law of nuisance provides the substantive standard of liability for groundwater suits brought under section 7003;110 because the common law doctrine of nuisance is not limited to ongoing acts, it would be inconsistent to imply such a limitation in section 7003.111 Finally, the court read a 1979 congressional committee report as support for holding that section 7003 could be used to "remedy the effects of past disposal practices."112

The same factors that prompted the Solvents court to refuse to limit the application of section 7003 to "ongoing acts" probably influenced its decision to apply the section to acts that occurred before RCRA's enactment in 1976.113 A retroactive statute is one that "creates a new obligation, imposes a new duty or attaches a new disability, in respect to transactions already past."114 Because the court held that section 7003 is a jurisdictional provision incorporating federal common law rather than imposing new substantive liabilities,115 it found no retroactivity in the application of the provision to pre-R CRA activities "[i]n the absence of any indication that this federal body of nuisance law is likely to exceed significantly in scope or severity the state law of

108. Id. at 1129.
109. Id. at 1140.
110. Id.
111. Id.
112. Id. at 1140-41. The court cited Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 96th Cong., 1st Sess. 31, Hazardous Waste Disposal (Comm. Print 1979). Although the court noted that this report, which was issued after RCRA's enactment, "lacks the probative value as to legislative intent that contemporaneous statements of Congress' purpose would have," it stated nevertheless that the report was "entitled to considerable weight as a kind of 'expert opinion' concerning the meaning and proper interpretation of the statute, especially in view of Congress' contemporaneous silence on the question at issue here." United States v. Solvents Recovery Serv., 496 F. Supp. at 1140 n.18.
113. In Solvents, EPA sued Solvents Recovery Service to abate the hazards resulting from its dumping of toxic chemicals into unlined lagoons, a practice it had discontinued in 1967 (nine years before enactment of RCRA), and its storage of other chemicals in drums on its property, which it had continued until 1979. United States v. Solvents Recovery Serv., 496 F. Supp. at 1130. The court noted that the defendants' argument that § 7003 was being applied retroactively was "based on a faulty premise" since EPA had alleged that the hazard resulted from conduct occurring after, as well as before, RCRA's enactment. Id. at 1141. The court went on to address the retroactivity question nevertheless, and held the application of § 7003 valid with respect both to defendant's pre-RCRA and post-RCRA acts. Id. at 1141-42 & n.26.
114. Id. at 1141 (quoting Sturges v. Carter, 114 U.S. 511, 519 (1885)).
115. Id. at 1142. See also notes 66-78 supra and accompanying text.
nuisance to which the defendants were already subject when they engaged in their pre-RCRA disposal practices.”

This holding leaves open a possible finding of retroactivity if the rapidly developing federal common law of nuisance is found to afford relief beyond that provided under the nuisance law prevailing in the state whose law would have applied prior to the enactment of RCRA. It remains unclear what differences in scope between pre-RCRA state common law and current federal common law would be sufficient for a court to find the federal law extended “significantly” beyond state law.

Courts have interpreted section 7003 to encompass not only affirmative acts, such as disposal of waste in unlined lagoons, but also failures to act. In United States v. Ottati and Goss, Inc., the New Hampshire District Court, applying the grant of authority in section 7003 to the Administrator to sue “any person . . . contributing to the harmful activity,” held that a defendant lessor of land to a waste disposal company had contributed to its lessee’s harmful disposal of hazardous wastes by failing to prevent it.

Because the federal common law of nuisance supplies the substantive law in section 7003 suits, the court in Ottati and Goss used public nuisance principles to define the duty owed by the landowner parties in that case and held that liability could be imposed for a “failure to act, when that person was under a duty to act to prevent or abate the nuisance.” The court then found that the landowners had a duty to “exercise reasonable care to prevent the nuisance from arising.”

Ottati and Goss was a suit brought by the government under the original version of section 7003, which by its terms applied only to parties contributing to the “disposal” of hazardous waste. After the 1980 amendments to RCRA, parties contributing to the “handling, storage, treatment, [or] transportation” of hazardous waste are also subject to section 7003. Thus, Ottati and Goss does not make clear

117. Solvents avoided deciding this issue by defining “disposal” to include only affirmative acts, not continuing leaking or migration of waste, which the defendants failed to correct. Id. at 1139. RCRA defines “disposal” as the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.
119. Id. at 2.
120. Id. at 5-6.
121. Id. at 4.
122. Id.
123. Id. at 5-6.
whether parties contributing to activities listed in the Amendments other than disposal, who may often be less directly responsible for imminent hazards, are subject to the same duty of reasonable care held applicable to those contributing to "disposal" as used in the original version of section 7003.

The Senate report accompanying the 1980 amendments to section 7003 suggests that such parties contributing to handling, storage, treatment, or transportation would be "contributing to" an endangerment by breaching a duty of care defined under negligence or nuisance law:

[A] company that generated hazardous waste might be someone 'contributing to' an endangerment under section 7003 even where someone else deposited the waste in an improper disposal site . . . where the generator had knowledge of the illicit disposal or failed to exercise due care in selecting or instructing the entity actually conducting the disposal.

In the same paragraph, this report also states that "some terms and concepts of section 7003, such as "contributing to," should be construed "more liberal[ly] than their common law counterparts." The report suggests that principles "similar to strict liability under common law" may be applied. This suggested departure from the courts' consensus that section 7003 incorporates only common law liabilities presents some new questions. If the amendments authorize application of a body of law allowing more liberal recovery by injured plaintiffs than would the common law, the Solvents opinion suggests that section 7003 cannot be applied to situations involving activities that occurred before RCRA was enacted in 1976 without being impermissibly retroactive. However the standard-of-care issue is finally decided, it seems clear that Congress intended the 1980 amendments to expand the kinds of activities covered by section 7003.

Vertac raised the question of whether liability could be imposed in a section 7003 suit under a continuing nuisance theory on a party that improperly disposed of hazardous waste on its property and then sold and moved off the property. The Vertac court was able to avoid deciding whether the sale of property insulates a party from lia-

128. Id.
129. Id.
130. Id.
131. See notes 73, 114, & 115 supra and accompanying text.
132. See notes 106-09 supra and accompanying text.
134. Id. at 888.
ECOLOGY LAW QUARTERLY

bility, because the former owner in that case voluntarily agreed to pay its share of the cleanup costs. Although no court has determined whether nuisance law imposes liability on former landowners in section 7003 suits, pending cases will no doubt force the courts to confront the question.

CONCLUSION

EPA's reliance on section 7003 of RCRA in fifty-six lawsuits it has filed since 1979 demonstrates the important role this provision can play in abating hazardous waste emergencies. The sparse case law on section 7003 has interpreted it liberally, and the 1980 amendments further widen its scope. The Administrator need not wait until harm has materialized, but may act when a risk of harm to health or the environment exists. The relief the government may obtain is not limited to seeking injunctions; the Administrator may issue orders necessary to protect health or the environment. Although section 7003 does not create new substantive liability, it does incorporate the rapidly developing federal common law of nuisance, which has been held to apply in even those section 7003 suits that do not involve interstate waters or activities. The courts have imposed liability under section 7003 on landowners whose harmful activities were remote in time from the resulting hazard and parties that did not act affirmatively to cause the hazard but did fail to prevent it. Although the paucity of legislative history and decisional law on section 7003 leave unresolved significant issues concerning its scope, the section is a highly visible and important component of RCRA's "cradle-to-grave" hazardous waste disposal regulatory system.

Kathryn Saenz Duke

135. Id.
136. For example, the highly publicized Love Canal (see note 2 supra) case, United States v. Hooker Chem. and Plastics Corp. (Love Canal Landfill), No. 79-990 (W.D.N.Y., filed Dec. 20, 1979), presents the question of whether a landowner that sold and left its property in 1953 can be liable for a present danger. S. REP. No. 848, 96th Cong., 2d Sess. 8 (1980).
137. See note 9 supra and accompanying text.
138. See note 48 supra.
139. See notes 24-29 supra and accompanying text.
140. Reserve Mining Co. v. EPA, 514 F.2d 492, 528 (8th Cir. 1975) (en banc).
143. Id. at 1140-41.
145. See notes 19-21 supra and accompanying text.