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Gregory A. Robins

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Notes

Catellus Development Corporation v. United States: A "Solid" Approach to CERCLA "Arranger" Liability, or a "Waste" of Natural Resources?

by

GREGORY A. ROBINS*

Introduction

In 1980 Congress responded to the inability of existing legislation to deal effectively with the growing threat posed to society by abandoned and inactive hazardous waste sites by passing the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Since the Act's hurried enactment during the waning days of the 96th Congress, courts have faced the daunting task of interpreting CERCLA's complex statutory and regulatory framework. The initial version of the statute was harshly criticized as being poorly drafted, and despite a major legislative

* J.D. Candidate, 1996; B.A. University of California, Berkeley, 1992. I would like to thank Professor Jeffrey M. Gaba for his comments on the manuscript of this Note.


overhaul in 1986, courts have found the statute "as inscrutable as ever." Nowhere have these interpretive problems been more pronounced than in connection with CERCLA section 107(a)(3), which imposes liability for hazardous waste cleanup upon parties who "arranged for [the] disposal or treatment . . . of hazardous substances." Congress's failure to define the crucial term "arrange" in the provision left courts with little or no guidance as to its intended scope. Not surprisingly, subsequent decisions have produced widely disparate interpretations of section 107(a)(3) liability, especially with regard to the potential liability attaching to commercial transactions in recyclable materials that either are, or contain, hazardous substances. The line of demarcation between legitimate liability-exempt "sales" and liability-inducing "arrangements for disposal" is often difficult to discern, resulting in ad hoc, haphazard decision-making by the federal courts.

The Ninth Circuit has not been immune to the problems posed by the vague provision. Faced with arguably contradictory precedents, the Ninth Circuit recently established an apparently unprecedented litmus test for determining when a party has "arranged for disposal" of a hazardous substance. In Catellus Development Corp. v. United States, the court held that the question of whether section 107(a)(3) liability attaches to the sale of a hazardous substance turns on whether the subject of the sale is defined as "solid waste" under the Environ-

5. In re Acushnet River & New Bedford Harbor Proceedings, 716 F. Supp. 676, 681 n.6 (D. Mass. 1989). Frustration led one court to vent: Depending on what definitions are accorded to various words and phrases within the statute, sections, subsections, and even sentences within CERCLA seem to contradict themselves with little or no internal consistency. Indeed those courts which have attempted to unravel CERCLA's definitions have found no solace in either the "plain meaning" of the statute or the reams of legislative history. Instead, in an attempt to glean legislative intent, courts seem to resort to a sort of "Purkinje phenomenon," hoping that if they stare at CERCLA long enough, it will burn a coherent afterimage on the brain.
7. See United States v. New Castle County, 727 F. Supp. 854, 871 (D. Del. 1989) ("Congress did not, to say the least, leave the floodlights on to illuminate the trail to the intended meaning of arranger status and liability.").
11. 34 F.3d 748 (9th Cir. 1994).
mental Protection Agency's (EPA) regulations implementing the Solid Waste Disposal Act (SWDA). This approach arguably creates a much needed bright line for the determination of the potential liability attaching to the sale of a hazardous substance under section 107(a)(3). But use of the EPA regulatory scheme in making this determination is hardly free of problems. Indeed, because the breadth of the rule could serve as a disincentive to recycling, support by commentators has been less than unanimous. Moreover, several courts have found such a limited approach to be inconsistent with the language of CERCLA itself.

Rising from the ashes of 1994's failed Superfund Reform Act, the Superfund Recycling Equity Act currently sits before Congress. The proposed legislation could eliminate some of the problems associated with the section 107(a)(3) liability scheme and the Catellus rule. Under the rubric of "recycling transactions," the Superfund Recycling Equity Act would shield the sellers of certain "recyclable materials" from liability under section 107(a)(3) in particular circumstances. Importantly, the Act provides clear standards for distinguishing a legitimate recycling transaction from a liability-inducing arrangement for disposal, something section 107(a)(3) fails to accomplish as it currently stands.

12. Id. at 751. The current version of the Solid Waste Disposal Act of 1965 (SWDA), is codified as amended under RCRA, 42 U.S.C. §§ 6901-6992k (1988). RCRA subtitle C establishes a prospective scheme regulating the management of hazardous wastes from "cradle to grave." See Robert V. Percival et al., Environmental Regulation 209, 224 (1992). Specifically, the subtitle C regulatory scheme applies to hazardous "solid wastes." See 40 C.F.R. § 261.1(b)(1) (1994). The EPA's regulatory definition of "solid waste" under RCRA subtitle C, found at 40 C.F.R. § 261.2 (1993), is the foundation for the Catellus decision, the primary focus of this article. The courts often still refer to the statute as the Solid Waste Disposal Act or the SWDA, while commentators and legislators generally refer to the statute as the Resource Conservation and Recovery Act or RCRA. For purposes of clarity, this Note will refer to the statute as the SWDA, the acronym chosen by the Catellus court.


18. Id.
This Note proposes the legislative adoption of the recycling exemption to arranger liability for "recyclable materials" as proposed in the Superfund Recycling Equity Act, and the judicial adoption of the *Catellus* rule with regard to the sale of recyclables which are not legislatively exempted. Simultaneous adoption of the parallel rules will provide courts with a comprehensive scheme for determining arranger liability, and encourage responsible recycling without compromising CERCLA's broad environmental goals. Part I provides a brief overview of CERCLA's structure, response mechanisms, and liability provisions. Part II examines the courts' struggle to establish a coherent doctrine for determining arranger liability. Part III focuses on the Ninth Circuit's attempt to solve this problem, culminating with the *Catellus* decision. Part IV examines the recycling "clarification" proposal in this year's Superfund Recycling Equity Act and endorses its adoption in conjunction with the judicial rule recently established by the Ninth Circuit.

**I. CERCLA Overview**

A district court once observed that "[f]or fundamental and deeply rooted psychological reasons, as well as more mundane utilitarian considerations, it is characteristic of man to bury that which he fears and wishes to rid himself of." However, the court continued, "[i]n today's industrialized society... the routine practice of burying highly toxic chemical wastes has resulted in serious threats to the environment and to public health." In 1976 Congress responded to these threats by passing the Resource Conservation and Recovery Act (RCRA), an overhaul of the SWDA establishing a prospective scheme regulating the management and disposal of hazardous wastes. RCRA, however, failed to properly address an important facet of the hazardous waste problem: abandoned and inactive hazardous waste sites. A 1979 EPA study found between 30,000 and 50,000 such sites in the United States, at least 1200 of which posed a serious threat to human health. Incidents such as the discovery of

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21. *Id.*
23. While the RCRA's "imminent hazard" provision authorized abatement of an active leak at a hazardous waste site, it did not authorize the EPA to take general remedial cleanup action at abandoned or inactive hazardous waste sites. *See* H.R. Rep. 1016(I), *supra* note 1, at 6124 (RCRA "is prospective and applies to past sites only to the extent they are posing an imminent hazard.").
24. *Id.* at 6120.
the toxic quagmire at New York’s Love Canal demonstrated the potential gravity of the EPA’s findings.\textsuperscript{25}

In 1980 Congress directly addressed the “inactive hazardous waste problem” by passing CERCLA.\textsuperscript{26} The comprehensive statutory scheme authorizes and finances the cleanup of inactive and abandoned hazardous waste sites and establishes a broad liability scheme to shift the costs of cleanup to the responsible parties.\textsuperscript{27}

Specifically, CERCLA authorizes several methods of governmental response to threatened or actual release\textsuperscript{28} of a hazardous substance\textsuperscript{29} into the environment.\textsuperscript{30} Pursuant to CERCLA section 104,\textsuperscript{31}

\begin{itemize}
\item H.R. Rep. 1016(I), supra note 1, at 6120.
\item 42 U.S.C. § 9601(22) defines “release” as follows:
\begin{itemize}
\item Any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant), 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 of a motor vehicle, rolling stock, aircraft, or pipeline pumping station engine, (C) release of source, byproduct, or special nuclear material from a nuclear incident, as those terms are defined in the Atomic Energy Act of 1954 [42 U.S.C. 2011 et seq.], if such release is subject to requirements with respect to financial projection established by the Nuclear Regulatory Commission under section 170 of such Act [42 U.S.C. 2210], or, for the purposes of section 9604 of this title or any other response action, any release of source byproduct, or special nuclear material from any processing site designated under section 7912(a)(1) or 7942(a) of this title, and (D) the normal application of fertilizer.
\item 42 U.S.C. § 9601(22) (1988).
\item 42 U.S.C. § 9601(14) defines “hazardous substance” as follows:
\begin{itemize}
\item 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 under the Solid Waste Disposal Act [42 U.S.C. 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under 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. The term does not include petroleum, including crude oil and any fraction thereof which is not otherwise specifically listed or designated as a hazardous
\end{itemize}
\end{itemize}
the EPA may clean up the site itself in a manner consistent with the terms of the National Contingency Plan (NCP). Alternatively, the EPA may issue "such orders as may be necessary to protect the public health and welfare and the environment." This statutory language permits the EPA simply to order someone, potentially anyone, to clean up the contaminated site. Finally, under the language of section 107(a)(4)(B), private parties may take response action independent of the EPA and may recover necessary costs from liable parties provided the costs prove "consistent with the National Contingency Plan."

Section 107(a) imposes liability for the costs incurred during the cleanup of a contaminated site on four classes of individuals known as "potentially responsible parties" (PRPs). They are as follows:

30. 42 U.S.C. § 9601(8) defines "environment" as follows:
(A) the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States under the Magnuson Fishery Conservation and Management Act [16 U.S.C. 1801 et seq.], and (B) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States.

32. The NCP, promulgated by the EPA pursuant to CERCLA section 105, provides procedures and standards for a proper cleanup operation. Currently codified at 40 C.F.R. § 300.1 (1994).
34. Gaba, supra note 9, at 1315.
36. 42 U.S.C. § 9607(a) reads, in part, as follows:
Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section-
(1) the owner and operator of a vessel or a facility,
(2) any person who at the time of the disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable.

37. Gaba, supra note 9, at 1313.
the current owner or operator of the site;\(^\text{38}\) any person who owned or operated the site "at the time of [the] disposal of any hazardous substance";\(^\text{39}\) any person who "arranged for disposal or treatment"\(^\text{40}\) of the hazardous substance disposed of at the site; (4) and, under certain circumstances, any person who transported the hazardous substances to the site.\(^\text{41}\)

An individual falling into one of the above four categories is subject to strict liability.\(^\text{42}\) And, where environmental harm is indivisible, a PRP's liability is joint and several.\(^\text{43}\)

The language of section 107(a)(3) is inartfully drafted and inherently more complex than the other section 107 liability provisions. The designations of a past or present "owner or operator" and a "transporter" are both specific and more easily conceptualized than one who "arrange[s] for disposal or treatment."\(^\text{44}\) Compounding the problem is the fact that despite providing definitions for "disposal" and "treatment,"\(^\text{45}\) Congress inexplicably failed to provide a definition for the crucial terms "arrange for" in the statute. This inherent ambiguity and lack of guidance left the courts to formulate the meaning of section 107(a)(3) on their own, which—as the next section demonstrates—has proven to be a most difficult task.

42. United States v. Monsanto, 858 F.2d 160, 167 (4th Cir. 1988) ("We agree with the overwhelming body of precedent that has interpreted [CERCLA] as establishing a strict liability scheme."), cert. denied, 490 U.S. 1106 (1989).

The SWDA 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.\(^\text{42}\) U.S.C. § 6903(3) (1988).

The SWDA defines "treatment," when used in connection with hazardous waste, as:
any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport, amendable [sic] for recovery, amenable for storage, or reduced in volume. Such term includes any activity or processing designed to change the physical form or chemical composition of hazardous waste so as to render it nonhazardous.\(^\text{42}\) U.S.C § 6903(34) (1988).
II. The Courts' Struggle to Interpret Section 107(a)(3)

Section 107(a)(3) liability clearly attaches to an individual who disposes of hazardous waste at an off-site facility at which there is a subsequent release or threatened release of hazardous substances. But difficulties arise where a court is forced to distinguish between the sale of a "product" containing hazardous substances—for which the courts have generally found no liability—and a liability-inducing "arrangement for disposal." In the context of these "sale of a useful product" transactions, courts have struggled to find a test consistent with both the language and the remedial objectives of CERCLA.

The so called "useful products" doctrine establishes that the "sale of a new useful product containing a hazardous substance—as opposed to the sale of a substance merely 'to get rid of it'"—does not give rise to CERCLA liability. Accordingly, courts have refused to impose section 107(a)(3) liability for the sale of asbestos-containing construction materials, the subsequent sale of a building containing such materials, the sale of new and used electrical transformers containing hazardous polychlorinated biphenals (PCBs), the sale of wood treatment chemicals to a wood treatment facility, the sale of PCBs for use as dielectric fluid in electrical equipment, the sale of neoprene compounds for use in the manufacture of rubber goods, and the transfer of hazardous chemicals for use in electroplating, heat treating, and waste water treatment.

Conversely, courts have almost unanimously imposed liability on the transfer of industrial byproducts or other waste for which the seller had no further use, notwithstanding the fact that the transaction

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46. See, e.g., United States v. Parsons, 723 F. Supp 757, 762 (N.D. Ga. 1989); see also Gaba, supra note 9, at 1318.
47. Gaba, supra note 9, at 1318.
48. See, e.g., Louisiana Pac. Corp. v. ASARCO, Inc., 24 F.3d 1565, 1575 (9th Cir. 1994) ("CERCLA is to be broadly interpreted to achieve its remedial goals.").
50. Id. Nor does the mere installation of such materials constitute "disposal." 3550 Stevens Creek Assocs. v. Barclay's Bank of Cal., 915 F.2d 1355 (9th Cir. 1990).
56. AM Int'l. v. Int'l. Forging Equip., 982 F.2d 989, 998 (6th Cir. 1993). Here, there was some question as to whether ownership of the chemicals at issue was actually transferred between the parties. Id. at 998 n.10.
involved the sale of a substance in which the recipient placed residual value. However, courts have utilized what can be described best as a hodgepodge of factors in determining when liability attaches to transactions in hazardous substances falling outside the shelter provided by the "useful products" doctrine. Perhaps the most oft-cited of these factors is what has become known as the "crucial decision" test. Born in United States v. A&F Materials Co., the "crucial decision" test states that "[g]iven the scope of the language of 'otherwise arranged' in [§ 107(a)(3)], the relevant inquiry is who decided to place the waste into the hands of a particular facility that contains the hazardous wastes . . . [Liability] ends with that party who both owned the hazardous waste and made the crucial decision how it would be disposed of or treated, and by whom." In A&F Materials, the government initiated a cost-recovery action against McDonnell Douglas Corporation (MDC) for costs incurred in the cleanup of A&F Materials' site in Greenup, Illinois. For a short period of time in 1978, MDC sold A&F Materials a caustic solution that was a byproduct of MDC's production of jet fuel. A&F Materials, in turn, would use the caustic solution as a neutralizer in its oil reclamation process. The government alleged that MDC was liable for cleanup costs because it "arranged for the disposal" of the caustic solution. After looking to the regulations implementing the SWDA and determining that the caustic solution was a "waste," the court held that MDC had "arranged for the disposal" of the solution by deciding to place it "in the hands of A&F Materials to be used and disposed of at A&F's Greenup site." While frequently cited in support of arranger liability, the "crucial decision" test has not been universally accepted.


60. Id. at 845.
61. Id. at 843.
62. Id. at 843-44.
63. Id. at 844.
64. Id. at 843.
65. Id. at 844-45. In doing so, the court relied on the EPA's 1980-1985 regulatory solid waste definition. See infra notes 114-116.
66. Id. at 845.
68. Several courts have expressly rejected the "crucial decision" test. See Florida Power & Light, 893 F.2d at 1318 (noting that even though a "manufacturer does not make
Courts have also disagreed as to whether a party must intend to dispose of the hazardous substance by means of the sale at issue. Several courts have looked to the motivation of the seller in determining whether liability would attach to the sale of a given hazardous substance. Other courts, however, have refused to recognize such a requirement, noting that to do so would require the court to ignore the strict nature of CERCLA liability.

Some courts have considered the seller's actual or imputed knowledge of the disposal-like manner in which the product was to be used. This factor seemed especially important in a recent Seventh Circuit decision. In *G.J. Leasing Co. v. Union Electric Co.*, the court found that arranger liability did not attach to the sale of an industrial facility containing asbestos because the defendant "could not know whether the sale of the 52 acre tract would ever result in the release of asbestos fibers. That would depend on the buyer's intentions and how these intentions were implemented." In contrast, in *New York v. General Electric Co.*, the court imposed liability based in part on the seller's actual or imputed knowledge that the PCB-laden oil that was

the critical decisions as to how, when and by whom a hazardous substance is to be disposed, the manufacturer may be liable); *Maryland Sand*, 1994 WL 541069 at *12 (rejecting the "crucial decision" test as an appropriate basis for determining arranger liability); see also Alice T. Valder, *The Erroneous Site Selection Requirement for Arranger and Transporter Liability Under CERCLA*, 91 Colum. L. Rev. 2074 (1991) (criticizing the "crucial decision" test).

69. In *G.J. Leasing Co. v Union Elec. Co.*, 54 F.3d 379, 385 (7th Cir. 1995), the court concluded, "[w]e may assume that had a primary purpose and likely effect of the sale . . . been to bring about the removal of asbestos in circumstances that would make the release of fibers . . . inevitable or at least highly likely, Union Electric could be found, through the sale, to have disposed of, or arranged for the disposal of a hazardous substance." In fact, the court categorized sales of hazardous substances as falling into three categories: 1) the sale of a useful product; 2) "mixed-motive"; and 3) intentional disposal by subterfuge. Id. The court distinguished *Catellus* as a mixed-motive case involving a degree of seller knowledge. *Id.* See also *Florida Power & Light*, 893 F.2d at 1319 (finding no evidence "that manufacturer intended to otherwise dispose of hazardous waste") (emphasis added); *Kelley*, 739 F. Supp. at 360-61 (finding summary judgment inappropriate where motivation was to dispose of waste); *Edward Hines*, 685 F. Supp. at 654-55 & n.3 (holding that the crucial inquiry is the reason for the transaction); United States v. Ward, 618 F. Supp. 884, 895 (E.D.N.C. 1985) ("Ward clearly intended to have Burns 'get rid of' the PCB-laden oil which had become a problem for him to maintain on WTC premises.") (emphasis added). *But see* Catham Steel Corp. v. C. Brown, 858 F. Supp. 1130, 1140 n.4 (N.D. Fla. 1994) (refusing to read an intent requirement into the above language in *Florida Power & Light*).


71. 54 F.3d 379 (7th Cir. 1995).

72. *Id.* at 384 (emphasis added).

the subject of the transaction was to be spread on the ground as a dust suppressant. 74 Again, several courts have expressly indicated that such knowledge is not a requirement for arranger liability. 75

In the context of tolling agreements between chemical or pesticide manufacturers and the formulators with whom they contract, courts have found continued ownership of the materials by the manufacturer during the formulation process sufficient to trigger section 107(a)(3) liability for the costs associated with the contamination of the formulator's facility. 76 Seemingly important to the imposition of liability in these cases was the fact that release or spillage constituted an inherent part of the formulation process. 77 Indeed, one court emphasized the fact that the formulation contract at issue contemplated a 2% spillage of materials. 78

In Jones-Hamilton Co. v. Beazer Materials & Servs., 79 the Ninth Circuit followed the Eighth Circuit's lead in United States v. Aceto Agricultural Chemicals Corp. 80 and rejected arguments by the manufacturer defendants that they were not liable because they had no authority to control the formulator's operations. 81 But courts have not necessarily ignored the measure of control the defendant has over the party and the process responsible for the release. 82 In United States v. Consolidated Rail Corp., 83 the district court, while purporting to apply the A&F Materials "crucial decision" test, found the defendant not liable under section 107(a)(3) when it transported raw material to a formulation facility and purchased the resulting product. 84 In doing so, the court emphasized that there was no indication that the defendant "controlled or had the authority to control the hazardous substances disposed or treated" at the site. 85 In contrast, a district court has held

74. Id. at 297. Conservation Chem. may also fall into this category. Gaba, supra note 9, at 1324. There the seller knew the fly ash it was marketing was to be used to neutralize waste and was later to be disposed of at a landfill. Conservation Chem., 619 F. Supp. at 240-41. Reliance on this factor, however, is somewhat more difficult to discern than in General Electric, where the court emphasized the point.
78. Jones-Hamilton, 973 F.2d at 695.
79. 973 F.2d 688 (9th Cir. 1992).
80. 872 F.2d 1373, 1381-82 (8th Cir. 1989).
81. Id. at 1381-1382.
82. Gaba, supra note 9, at 1324.
84. Id. at 1470-71.
85. Id. at 1471. While these courts have found "control" to be a factor in determining liability, other courts have been quick to point out that "there is no such requirement."
the government liable for cleanup costs under section 107(a)(3) based on the level of control exercised during the production of rayon yarn at the contaminated site during World War II.\(^86\)

Lastly, there has been some discussion by commentators that the identity of the plaintiff may play a role. The government is apparently more successful in obtaining relief in a cost-recovery action asserting arranger liability than are private parties making similar arguments in a contribution action.\(^87\) Several commentators believe this disparity may be linked to a lack of sympathy for private parties who have the option of allocating liability contractually through "hold harmless" or indemnification clauses.\(^88\)

In sum, section 107(a)(3) presents courts with a most difficult task: distinguishing legitimate commercial "sales" from liability tainted "arrangements for disposal." As the above discussion demonstrates, the nation's federal courts have been unable to fashion a consistent standard for doing so. Instead, liability determinations have been made on what can best be described as an ad hoc, case-by-case basis.

III. Searching for a Standard in the Ninth Circuit

Like other courts, the Ninth Circuit has struggled to formulate a coherent standard for determining the scope of arranger liability. Until recently, this area of Ninth Circuit jurisprudence was particularly unclear due to two arguably inconsistent, if not contradictory, decisions.\(^89\)


\(^86\) FMC Corp. v. United States Dep't of Commerce, 786 F. Supp. 471 (E.D. Pa. 1992), aff'd, 29 F.3d 833 (1994). For a more detailed discussion of the FMC case see Lan nan, supra note 44, at 14-16. The Eighth Circuit recently endorsed this test with regard to § 107(a)(2) liability, but refused to extend it to arranger liability where the government had the legal authority to control disposal and treatment, but failed to exercise such control. See United States v. Vertac Chem. Corp., 46 F.3d 803 (8th Cir. 1995) (endorsing the new "control" test for § 107(a)(2) liability determination, but finding lack of requisite control by the government), cert. denied, 115 S. Ct. 2609 (1995).


\(^88\) Id. The potential protection afforded a private party through such a contractual arrangement is beyond the scope of this article.

\(^89\) See Goodman, supra note 8, at 6.
A. The Stevens Creek Decision: The First Step Towards Catellus

In 3550 Stevens Creek Ass'n. v. Barclay's Bank of California, the plaintiff building owner brought an action to recover costs incurred as a result of voluntary asbestos removal during the remodeling of a commercial building against the owner of the property at the time of the installation of the asbestos-containing materials. The complaint stated that by installing asbestos, the previous owner was in fact disposing of a hazardous substance, thus exposing himself to potential CERCLA liability under section 107(a)(2).

In rejecting this argument, the Ninth Circuit laid much of the groundwork for the rule ultimately announced in Catellus. As a first step the court had to grapple with one of the glaring inconsistencies in the plain language of the statute: the patently contradictory definitions of "disposal" and "hazardous substance." Section 107(a)(2) imposes liability on a person who "at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." The term "hazardous substance" is defined in CERCLA with reference to substances designated by the Clean Water Act, the Clean Air Act, the SWDA, the Toxic Substances Control Act, as well as those substances designated by the administrator pursuant to CERCLA section 102. However, in defining "disposal," CERCLA cross-references the definition from the SWDA. There, "disposal" is defined 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... may enter the environment." Asbestos, designated as a "toxic pollutant" under the Clean Water Act, a "hazardous air pollutant" under the Clean Air Act, and a "hazardous substance" under section 102 of CERCLA, unquestionably qualifies as a hazardous substance as defined in CERCLA section 101(14). But when installed as insulation and fire retardant in the construction of a building, asbestos is not a solid or hazardous waste as defined in the SWDA or the regulations promulgated by the EPA.

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90. 915 F.2d 1355 (9th Cir. 1990).
91. Id. at 1356-57.
The plaintiff argued that the language of section 107(a)(2), imposing liability for the disposal of hazardous substances, prevailed over the definition of disposal borrowed from the SWDA which is limited to solid or hazardous wastes.

When faced with this predicament, several other courts have decided that the liability provisions for the disposal of a hazardous substance in sections 107(a)(2) and (3) are not limited to transactions in solid or hazardous wastes by the limited definition of disposal incorporated into CERCLA from the SWDA. To do so, according to one court, would "completely ignore the plain language" of the statute and, according to another, "would serve to make portions of CERCLA moot or contradictory." In Stevens Creek itself, Judge Pregerson adhered to this view in his dissent, arguing that the "questionable proposition that 'disposal' refers only to the placement of 'hazardous wastes,' not of 'hazardous substances' . . . . . . fails to take into account the very language of the statute which refers repeatedly to the 'disposal of hazardous substances.'"

98. See 42 U.S.C. § 6903(27) (1988) (defining solid waste as "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material"); 42 U.S.C. § 6903(5) (1988) (defining hazardous waste as solid waste or combination of solid wastes posing a particular threat to human health or the environment); 40 C.F.R. § 261.2(a) (1994) (defining solid waste as "discarded material" which is "abandoned . . . recycled . . . or inherently wastelike").

99. Stevens Creek, 915 F.2d at 1362.


101. CP Holdings, Inc. v. Goldberg-Zoino & Assocs., 769 F. Supp. 432, 436 (D.N.H. 1991); see also State of California v. Summer Del Caribe, Inc., 821 F. Supp. 574, 579 (N.D. Cal. 1993). Interestingly, the Summer Del Caribe court was forced to make a tortured reading of the Stevens Creek decision in order to avoid coming to the opposite conclusion. There, the defendant argued that the Stevens Creek court limited the scope of liability under § 107(a)(2) to the disposal of wastes as defined in the SWDA, and in dictum indicated that the same analysis was to be applied to potential § 107(a)(3) transactions. Summer Del Caribe, 821 F. Supp at 579. Indeed, this seems to be the plain meaning of the Stevens Creek decision. See Ferland & Cage, supra note 87, at 479-80 (noting that the "court made it clear" that liability under § 107(a)(2) or § 107(a)(3) is to be construed identically with respect to the act at issue). Judge Pregerson, in dissent in Stevens Creek, also understood the majority decision this way. See Stevens Creek, 915 F.2d at 1366 n.5 (Pregerson, J., dissenting). Nevertheless, the Summer Del Caribe court refused to reach this conclusion because "[s]uch a reading would be illogical in light of the use of the word 'hazardous substance.'" Summer Del Caribe, 821 F. Supp. at 579. To avoid this problem, the court limited Stevens Creek to its facts:

[A] close reading of Stevens Creek reveals that . . . the Ninth Circuit did not intend its decision to be read as defendant urges. The Stevens Creek court was not asked to decide whether a hazardous substance must be a "hazardous waste" under the SWDA for disposal liability under CERCLA to attach. Rather, it was deciding whether installation of insulation containing asbestos constitutes "disposal."

Id.

102. Stevens Creek, 915 F.2d at 1366 n.5 (Pregerson, J., dissenting).
But the *Stevens Creek* majority took the road less traveled. "On its face," they reasoned, "‘disposal’ pertains to ‘solid waste or hazardous waste,’ not to building materials which are neither."\(^\text{103}\) After noting that the section 107(a)(2) and (3) incorporated the same definition of ‘disposal,’ the court, citing several of the section 107(a)(3) “useful product” cases as authority,\(^\text{104}\) explained that disposal referred “only to an affirmative act of discarding a substance as waste, and not to the productive use of the substance.”\(^\text{105}\) Because asbestos, when used as a building material, could not be characterized as “discarded material . . . abandoned . . . recycled . . . or inherently wastelike,” liability could not be predicated on section 107(a)(2).\(^\text{106}\)

### B. The *ASARCO* Decision: Charting a Different Course

In *Stevens Creek*, the Ninth Circuit seemed to indicate that the scope of arranger liability would be limited to transactions in solid wastes as defined by the SWDA and the EPA regulations promulgated thereunder.\(^\text{107}\) However, the court changed course in early 1994

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The *Farber* court employed a clever analogy to make this point. Assume there was a Federal Fruit Statute which made it illegal for one to peel a fruit in public. “Fruit” is defined within the statute to include apples, oranges, bananas, plums, and peaches. The statute, however, does not define “peel,” but, instead, directs the reader to another statute, the Federal Orange Statute. Within the Federal Orange Statute “peel” is defined as:

> “holding the orange in one hand and pulling back its skin from the center to expose the inner portion of the orange.”

Would [defendant] then argue that one would only be liable under the Federal Fruit Statute if they peeled an orange? . . . Such a narrow reading completely ignores the plain language of the Fruit Statute.


Notably, the definitions of “disposal” and “treatment” in the now defunct Superfund Reform Act of 1994 would have cured this apparent inconsistency. Section 606(6) would have amended the definition of disposal in § 9601(29). The new definition would still have cross-referenced the RCRA definition "except that the term ‘hazardous substance’ shall be substituted for the term ‘hazardous waste’ in the definitions of ‘disposal’ and ‘treatment.’”\(^\text{H.R. 3800, supra note 15, at § 606(6).}\)

It is worth noting here, however, that such a change was not necessary, as the utilization of the SWDA’s definition of “solid waste” to determine the scope of the phase “arrange for disposal” does no violence to the language of the statute. Both § 107(a)(2) and (a)(3) are limited to acts of “disposal.” As one court pointed out: “[H]ow can a manufacturer arrange for the disposal or treatment of anything but a waste?”\(^\text{Edward Hines Lumber Co. v. Vulcan Materials Co., 685. F. Supp. 651, 654 n.2 (N.D. Ill. 1988), aff’d on other grounds, 861 F.2d 155 (7th Cir. 1988).}\)” The limitation on liability complained of by these courts is thus inherent in the language of the statute itself. See *infra* note 181.

103. *Stevens Creek*, 915 F.2d at 1361.


105. *Stevens Creek*, 915 F.2d at 1362.

106. *Id.* at 1361; 40 C.F.R. § 261.2(a) (1993).

107. *See Ferland & Cage, supra* note 87, at 480-481.
in *Louisiana Pac. Corp. v. ASARCO*.\textsuperscript{108} For more than half a century, ASARCO ran a copper smelting plant near Tacoma, Washington.\textsuperscript{109} The process, which separates copper from copper ore, produces large amounts of byproduct known as slag.\textsuperscript{110} During the early 1970s ASARCO began marketing its slag as “ballast” for log yards through a middleman corporation known as Black Knight.\textsuperscript{111} The log yards would lay the slag like gravel in order to provide firmer ground for the use of heavy equipment and the storage of logs.\textsuperscript{112} When a load of slag became too diluted with wood waste and other debris to serve its intended purpose, it would be collected and sent to a local landfill.\textsuperscript{113} The log yard would then lay a new load of slag in its place.\textsuperscript{114}

In 1980 the EPA discovered heavy metal contamination in the water runoff from one of the log yards.\textsuperscript{115} State investigation soon determined that the copper slag sold by ASARCO was the likely culprit.\textsuperscript{116} By the time the Washington Department of Ecology formally began to require cleanups in 1986, contamination from ASARCO slag had been discovered at five additional log yards as well as the local landfill.\textsuperscript{117} ASARCO’s liability as an arranger soon became an issue, as the owner of the log yards sought both response costs for the cleanup of its own log yards and indemnity or contribution for the response costs associated with the cleanup of the landfill.\textsuperscript{118} The district court found ASARCO liable on the CERCLA claims.\textsuperscript{119}

On appeal, the Ninth Circuit determined that the sale of the slag constituted an “arrangement for disposal,” despite a jury determination that the slag was a “product with intrinsic value” under the Washington Products Liability Act (WPLA).\textsuperscript{120} The court found that the slag could simultaneously constitute a “product” under the WPLA and a “waste” for the purposes of CERCLA.\textsuperscript{121} However, in determining that the slag sales were in fact arrangements for the disposal of a waste, the court emphasized three factors: (1) the slag was an industrial byproduct, (2) that had nominal commercial value, and (3) was

\begin{itemize}
  \item 108. 24 F.3d 1565 (9th Cir. 1994).
  \item 109. Id. at 1570.
  \item 110. Id.
  \item 111. Id.
  \item 112. Id.
  \item 113. Id. at 1571.
  \item 114. Id.
  \item 115. Id.
  \item 116. Id.
  \item 117. Id. at 1570 n.1.
  \item 118. Id. at 1571.
  \item 119. Id.
  \item 121. 24 F.3d at 1575.
\end{itemize}
something that the producers wanted to "get rid of." In using these three factors, the Ninth Circuit seemed to enunciate a new test for making the all important determination of when a substance is a "waste" for purposes of statutory arranger liability under CERCLA.

The origin of these factors proves very interesting indeed. Rather than looking to the EPA's definition of solid waste under the SWDA, as had been suggested by Stevens Creek dictum, the ASARCO court relied heavily on the district court decision in A&F Materials. In the penultimate paragraph on the issue, the court, quoting A&F Materials, stated:

In deciding whether this was a waste disposal for CERCLA purposes, the [A&F Materials] court said "the definition of waste was intended to cover those hazardous materials which are of nominal commercial value and which were sometimes sold or reused and sometimes discarded."

The definition of waste to which the A&F Materials court was referring was in fact the 1980-1985 EPA definition of solid waste under the SWDA. Thus, in deriving its three factor test, the ASARCO court was in essence applying the test suggested by the Stevens Creek court. But in doing so, the court relied on an earlier, substantially different version of the suggested definition. Thus, the ASARCO decision left the Ninth Circuit with two definitions of "waste" for purposes of determining arranger liability: one based on the current regulatory definition of solid waste, and the other derived from an earlier regulatory definition of the same.

C. The Catellus Decision: A Bright Line Analysis?

Catellus Development Corp. v. United States provided the Ninth Circuit with the opportunity to reconcile the arguable differences between Stevens Creek and ASARCO. Depending on how the Catellus opinion is interpreted, the court may or may not have done so. The litigation involved more than six million dollars in response costs incurred by Catellus during the required cleanup of its Point Isa-

122. Id.
123. Goodman, supra note 8, at 7.
125. ASARCO, 24 F.3d at 1575 (quoting A&F Materials, 582 F. Supp. at 842) (emphasis added).
126. See A&F Materials, 582 F. Supp. at 844 (citing 40 C.F.R. § 261.2 (1993)).
127. Cf. 1 JOHN-MARK STENSVAAK, HAZARDOUS WASTE LAW AND PRACTICE §§ 2.9-2.11, with 1 STENSVAG, supra, at §§ 3.1-3.49.
128. Despite the disparity between the two definitions, the outcome in ASARCO would have been the same under either test, as the copper slag would also have qualified as a solid waste under the current regulatory scheme.
129. 34 F.3d 748 (9th Cir. 1994).
The Point Isabel property and surrounding bay waters had been contaminated by lead from crushed lead-acid battery casings dumped at the site. A substantial portion of the casings had been dumped at the Point Isabel property by a battery reclaimer, Morris P. Kirk & Sons, Inc. (MPK). MPK reclaimed lead from dead lead-acid batteries obtained through various sources. General Automotive’s (General) Grand Auto Parts Stores were one source, selling MPK the dead batteries they received from customers as trade-ins. Accordingly, Catellus sought to hold General, among others, liable for response costs as a statutory “arranger.”

Each side claimed one of the two aforementioned Ninth Circuit decisions to be dispositive on the issue of liability. The defendant placed talismanic significance on the language of Stevens Creek relating to “productive use.” The plaintiff, on the other hand, argued that under ASARCO, the sale of any byproduct by nature constituted an “arrange[ment] for disposal.” Neither argument prevailed.

Instead, the court returned to the path suggested by Stevens Creek, considering the dispositive issue to be whether the batteries could be characterized as “solid waste” under the SWDA regulatory definition. Accordingly, the court looked at the “regulations implementing SWDA to explain the scope of the term ‘waste’ as it informs the definition of ‘disposal’ in CERCLA.” Realizing that a return to this approach appeared patently inconsistent with the approach taken in ASARCO, the court made several attempts at reconciliation. First, the court noted that ASARCO was distinguishable from Stevens Creek in that ASARCO involved the sale of a byproduct rather than the sale of a principal business product. The court then limited ASARCO to its facts: namely, a situation where “the byproduct being sold will have to continue to be used in its identical state until it is disposed of.” Lastly, the court explained that the use of the SWDA regulations was

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131. Id.
132. Id.
133. Id.
134. Catellus, 34 F.3d at 749.
135. Id.
136. Stevens Creek, 915 F.2d at 1362 (explaining that disposal refers “only to an affirmative act of discarding a substance as waste, and not to the productive use of the substance.”). Relying in part on this argument, the district court granted defendant’s motion for summary judgment. Catellus, 828 F.Supp. at 768.
137. Catellus, 34 F.3d at 751.
138. Id. at 750.
139. Id. at 751 (citations omitted).
140. Id.
141. Id.
not inconsistent with the approach taken by the *ASARCO* court because *ASARCO* was based on *A&F Materials*,142 which itself relied on the EPA regulations implementing the SWDA.143

Before turning to the regulations themselves, the court first had to determine which regulations applied—"the current ones or those in force at the time of the charged acts."144 Given the retroactive nature of CERCLA liability, the court determined that it was proper to apply the current regulatory solid waste definition to section 107(a)(3) construction regardless of when the actual contaminating acts occurred.145

The court then turned to the current regulations under the SWDA for "a more detailed discussion of when a recycled material should be considered a waste."146 The regulations define solid waste as any discarded material which is "[a]bandoned ... [r]ecycled ... or [c]onsidered inherently wastelike."147 An exception to this broad rule exists for recycled products "[u]sed or reused as ingredients in an industrial process to make a product, provided the materials are not being reclaimed . . . ."148 As the regulations clearly include the recovery of lead values from spent batteries as reclamation, General’s batteries fell outside this narrow exception, and were thus "solid waste."149

The *Catellus* court rounded out its treatment of disposal by discussing the transaction in terms of *ASARCO*. The court noted that the battery casings, as opposed to the lead plates found therein, were something that General would have needed to get "rid of."150 The court also cited *ASARCO* in rejecting General’s assertion that lack of control over the eventual disposition of the battery casings absolved them of liability.151

Finally, the court rejected the assertion that General was liable as a party who arranged for the treatment of the batteries.152 The court, basing its analysis on the plain language of the statute, explained that

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142. *ASARCO*, 24 F.3d at 1575.
144. *Catellus*, 34 F.3d at 751.
145. *Id.*
146. *Id.*
149. *Catellus*, 34 F.3d at 752 (construing 40 C.F.R. § 261.1(c)(4) (1993), which cites recovery of lead values from spent batteries as an example of reclaimed material). The court also relied on United States v. ILCO, 996 F.2d 1126 (11th Cir. 1993), which found that spent batteries reasonably constituted waste under the EPA regulations. *Catellus*, 34 F.3d at 752.
150. *Id.*; cf. *ASARCO*, 24 F.3d at 1575 (finding that a by-product could be considered both a "product" and "waste" if composed of "materials it’s producers wanted to get rid of whether they could sell them or not").
151. 34 F.3d at 752.
152. *Id.* at 753.
for liability to attach under the treatment provision, the treatment must have taken place at the cleanup site itself. Because the cleanup was not at MPK’s battery-cracking facility, but rather at Catellus’ Point Isabel property, treatment liability could not attach to the transaction.

Finding the sale of dead lead acid batteries to a battery reclaimer to be an arrangement for disposal for the purposes of section 107(a)(3) is not a novel concept. Numerous courts have found liability in similar situations. The hallmark of the Catellus decision could be the method taken in achieving this result. However, whether such a bold statement can be made depends on how Catellus is interpreted, both in the Ninth Circuit and elsewhere.

Catellus could be read to create a bright line rule limiting liability under section 107(a)(3) to transactions in materials containing hazardous substances that fall within the EPA’s current regulatory definition of “solid waste.” At least one commentator has tentatively understood the decision to create such a rule. However, if the decision did create such a rule, it hardly did so with model clarity. First, the language used by the court is patently ambiguous. The Catellus court found the regulations “useful” in that they “give us a more detailed discussion of when a recycled material should be considered a waste.” This is hardly the powerful language one would expect from a court establishing a bright line rule. Moreover, if Catellus is to be read as creating such a rule, it is unclear why the court found it necessary to garner “further support” for its holding by recasting its decision in terms of ASARCO. As discussed above, the ASARCO factors were derived from the EPA’s earlier regulatory definition of solid waste. Given the court’s determination that the current regulations rather than the regulations in force at the time of the charged acts controls the disposal determination, ASARCO should have been expressly disapproved.

153. Id.
154. Id. The case was remanded to the district court for trial on the issue of arranger liability in accordance with the decision. Id.
155. See Catham Steel Corp. v. C. Brown, 858 F. Supp. 1130 (N.D. Fla. 1994); Chesapeake and Potomac Tel. Co. v. Peck Iron & Metal Co., 814 F. Supp. 1269 (E.D. Va. 1992); United States v. Pesses, 794 F. Supp. 151 (W.D. Pa. 1992). In Catellus, the district court found dispositive the fact that in Pesses, Peck Iron, and Catham Steel the reclaimer’s facility itself was the subject of the cleanup, whereas in Catellus the cleanup was at a third property, notably one with which General had “no direct connection.” Catellus, 828 F. Supp. at 771.
156. Goodman, supra note 8, at 7 (“[T]he relevant inquiry would appear to be limited to a determination of whether the material that is the subject of the transaction is a solid waste, within the broad definition of the SWDA.”).
157. 34 F.3d at 750-51.
158. Id. at 752.
159. See supra notes 124-126.
Instead, ASARCO arguably provided an alternative basis for the Catellus holding. In light of the ambiguous language used, and the additional reliance on the ASARCO rule, it can easily be argued that Catellus merely established the use of the current SWDA regulations as a nonexclusive means of determining when an item has the all important characteristics of "waste" for the purposes of section 107(a)(3) liability. Worse, the Catellus decision could be read to set forth two rules: one that requires examination of a current regulatory scheme, and another that sets forth factors derived from a repealed scheme.

Nevertheless, language in a subsequent unpublished disposition by the same panel seems to bolster the argument that the Catellus court intended to create the limiting bright line rule. In United States v. Montana Refining Co., the Ninth Circuit vacated and remanded the district court's grant of defendant's motion for summary judgment in light of the Catellus decision. While the district court "properly analyzed the [disposal] issue by asking whether the . . . [hazardous recyclable] should be classified as discarded waste according to the approach of section 1004 of the SWDA," it failed to "look to the regulations of SWDA in the detail . . . recently approved in Catellus . . . to determine when recycling constitutes an arrangement for disposal or treatment of discarded waste." In fact, the disposition went on to label the use of the current SWDA regulations a "rule" established by Catellus that was to be followed. Unfortunately, the court was not nearly as lucid in published form, leaving open the question of whether Catellus in fact broke with convention and established the aforementioned rule. For the purpose of argument, this Note will
proceed under the assumption that *Catellus* did in fact limit arranger liability to transactions in goods containing hazardous substances that fall under the SWDA’s definition of solid waste.165

D. The *Catellus* Rule in Practice

Before any evaluation can be made with regard to the prudence of the apparent new rule, its actual nuts and bolts must be explored. The facts of *Catellus* required the court merely to graze the surface of the current SWDA regulations defining solid waste. Indeed, all that was required was an examination of three brief regulatory provisions. The spent lead acid batteries were solid waste in that they were “[a]bandoned . . . [r]ecycled . . . or [c]onsidered inherently waste-like.”166 The batteries did not fit into an exemption for recycled materials “used or reused as ingredients in an industrial process to make a product”167 due to the fact that the materials needed to be “reclaimed.”168

This relatively simple analysis, however, belies the incredible complexity of the EPA’s current regulatory definition of solid

that materials sold to reclamation . . . are to be deemed hazardous waste.” *Id.* at 384. In *Douglas County*, the court understood *Catellus* as nothing more than a reiteration of the basic principle of *Stevens Creek*. “The [Catellus] court held that ‘disposal’ necessarily includes the concept of waste and because spent batteries could be defined as waste, General could be held liable for arranging for their disposal.” 871 F. Supp. at 1246. The *Douglas County* court failed to mention the regulations at all. Had the court done so, it may well have reached the same result. In *Douglas County*, defendant reclaimed the lead plates from within spent batteries and sold the plates to a secondary smelter “in lieu of lead ore.” *Id.* at 1244. As the materials had already been reclaimed, they would no longer have been regulated as solid waste under the regulations. See 40 C.F.R. § 261.3(c)(2) (1994); Jeffrey M. Gaba, *Solid Waste and Recycled Materials Under RCRA: Separating Chaff from Wheat*, 16 ECOLOGY L.Q. 623, 640 (1989) (“In fact, reclaimed secondary materials are regulated as solid wastes only between the time they are generated and the time they are inserted into the reclamation process.”).

165. If *Catellus* did not create such a rule, but merely established the use of the SWDA regulations as a nonexclusive means of determining the dispositive issue of when a substance is waste, it did little to bring clarity to this area of the law. The unnecessary use of the ASARCO factors late in the opinion could indicate that more than one analysis may be used by Ninth Circuit courts to determine when a substance is “waste.” If so, the decision is hardly remarkable, joining the rank and file of cases setting forth individual factors for consideration in the determination of arranger liability. Viewing this as a possibility, Goodman states, “Following *Catellus*, it is difficult, if not impossible, to determine when a sale will lead to CERCLA liability.” Goodman, *supra* note 8, at 7.


168. “A material is reclaimed if it is processed to recover a useable product, or if it is regenerated. Examples are recovery of lead values from spent batteries and regeneration of spent solvents.” 40 C.F.R. § 261.1(e)(4) (1994).
waste. The definition itself covers more than a page and a half in the Code of Federal Regulations and has spawned substantial litigation in the federal courts. The types of transactions at issue in this Note, namely those in the gray area between clear “disposal” and the sale of a new product containing a hazardous substance, would be covered by a subset of the regulatory solid waste definition for “secondary” materials. Full examination of this area, with which the EPA has struggled for decades, is well beyond the scope of this Note.

Nevertheless, the following is a brief summary of the EPA regulations governing secondary materials as they stand. First, a recyclable material cannot be a solid or hazardous waste unless it is one of four types of “secondary materials” or a commercial chemical product. Once the material is identified as falling into one of these five categories, the inquiry turns to the way in which the material is recycled. The above listed material may be solid waste when recycled in

169. The EPA’s initial promulgation of the definition of solid waste required a fifty-four page preamble. 50 Fed. Reg. 614 (1985). John-Mark Stensvaag, in his treatise HAZARDOUS WASTE LAW AND PRACTICE, states that “the current regulatory solid waste definition is as complex as anything in the law of hazardous waste.” 1 STENSVAA, supra note 127, at § 3.1, S-46. Stensvaag provides a complex flowchart for determining when a material is a solid waste that is admittedly substantially different from that provided by the EPA. 1 id. at § 3.1, 3-4 to 3-5. Stensvaag finds the explanation provided by the EPA to be inadequate, although he notes that the existing regulatory definition is so complex that no flowchart would be perfect. 1 id. at § 3.1, 3-6 n.12. For an excellent summary see Gaba, supra note 164.

171. See Goodman, supra note 8, at 7.
172. 1 STENSVAA, supra note 127, at § 3.1, S-46. The D.C. Circuit’s decision in American Mining Congress v. EPA, 824 F.2d 1177 (D.C. Cir. 1987), could be read to throw much of this regulatory scheme into question, limiting the solid waste category to materials irreputably abandoned under a subjective intent standard. 1 STENSVAA, supra note 127, at § 2.6A, S-18 to S-19. However, the EPA has chosen to take a very limited view of the decision and the changes mandated by this limited view have a “final agency action” date of [00/00/00]. 1 id. at § 2.6A, S-21 to S-23; 55 Fed. Reg. 45134, 45181 (1990).
173. This summary is based in large part on the summary provided in Gaba, supra note 164 and Ferland & Cage, supra note 87, at 470-75. For a detailed analysis of the regulatory solid waste definition see 1 STENSVAA, supra note 127, at ch. 3 & 4.
174. Hazardous wastes are a subset of solid waste. See 42 U.S.C. § 6903(5) (1988) (defining hazardous waste as solid waste or a combination of solid wastes posing a particular threat to human health or the environment). Under the SWDA regulations, a solid waste may be categorized as a hazardous waste in one of two ways. The EPA may classify a solid waste as hazardous by “listing” the particular material. See 40 C.F.R. § 261.11 (1994). A solid waste is also classified as a hazardous waste if it exhibits certain hazardous characteristics such as reactivity, corrosivity, ignitability, or toxicity. See 40 C.F.R. §§ 261.20-.24 (1994); see also Gaba, supra note 164, at 625 n.15.
one of four specific ways. That is, "the same material can be a waste if it is recycled in certain ways, but would not be a waste if it is recycled in other ways." The regulations provide a matrix that matches the materials with the recycling methods, leaving some combinations outside the definition of solid waste. Under the matrix, use of a recycling method which "resembles disposal, storage, or treatment of hazardous waste" increases the likelihood of regulation as a solid waste.

This definition is limited somewhat by a set of exemptions, exclusions and variances, both statutory and regulatory. Direct use of unreclaimed secondary materials to make a product, or as an effective substitute for a commercially available product, and the return of such materials to the original or primary process from which they were generated in lieu of raw materials are all generally excluded from regulation as solid waste. These general exemptions may be denied by the EPA for two reasons. First, even these generally exempted materials are regulated where they are used as fuel, applied to land, or speculatively accumulated. Additionally, the EPA may deny the exemption upon the conclusion that the recycling activity is actually a sham. The regulations are rounded out by exemptions for materials designated as exempt, or excluded, by congressional or EPA decision, and potential individual exemptions based on a case-by-case variance procedure.

178. 40 C.F.R. § 261.2 tbl. 1 (1994). For example, commercial chemical products are not solid wastes when reclaimed.
179. Ferland & Cage, supra note 87, at 472.
181. See 40 C.F.R. § 261.4(a) (1994) (exempting certain materials that are effectively regulated by other federal programs, and materials which the EPA believes were never intended to be regulated as waste); 40 C.F.R. § 260.31(a)-(c) (1994) (granting variances under certain conditions with respect to substantially reclaimed materials, speculatively accumulated materials, and reclaimed and reused materials).
183. See 40 C.F.R. § 261.2(e)(2)(i)-(iii) (1994). But see 40 C.F.R. § 261.2(c)(2)(B)(ii) (1994) (stating that commercial chemical products are not waste when applied to land in their ordinary uses or when used as fuel where they are themselves fuel).
184. Ferland & Cage, supra note 87, at 472. The criteria are discussed by the EPA in the preamble to the regulations. 50 Fed. Reg. 614, 637-640 (1985). For example, recycling may be deemed a sham when the material is only marginally effective for its intended use or is used in amounts greater than is necessary for that purpose. Ferland & Cage, supra note 87, at 472.
185. See supra note 173.
Courts and commentators alike agree that these regulations are both complex and confusing. Nevertheless, several of these critics have endorsed the step apparently taken by the Catellus court. The advocates argue that, while not perfect, the use of the SWDA regulations to determine the scope of section 107(a)(3) liability is the best solution available under the current version of CERCLA. They may well be right.

Adoption of the Catellus rule would allow courts and potential litigants alike to reference a reasonably coherent pre-established set of factors for determining section 107(a)(3) liability. In bringing a degree of predictability to the area, adoption of the rule could eliminate much of the incentive to litigate. Additionally, adoption the Catellus rule, which focuses solely on the nature of the material involved in the transaction and its use, could make it more difficult for courts in the future to avoid the merits and make liability determinations based on the identity of the plaintiff.

These benefits, however, could result from the adoption of any bright line rule in an area so plagued with ad hoc decision making. Thus, supporters of the Catellus rule focus on the fact that the adoption of such a rule comports with the express language and the implied meaning of section 107(a)(3), as well as its sparse legislative his-

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186. See supra note 164.
187. See Gaba, supra note 9, at 1329. Specifically, Professor Gaba endorses a test that attaches arranger liability to the sale of a solid waste containing a CERCLA hazardous substance. Id. at 1328 & n.90. Ferland & Cage concur:

A simple explanation of the use of the words ‘hazardous substance’ in combination with the words ‘disposal’ and ‘treatment’ in section 107(a)(3) is that the use of those terms was intended to require that a transaction must involve an arrangement for the . . . disposal of a waste containing hazardous substances before that action can create liability.

Ferland & Cage, supra note 87, at 474. As discussed earlier, the Catellus court did not have to reach this second step in the analysis because the hazardous nature of the batteries was not in dispute. It can only be assumed that had the court faced this issue, it would have ruled accordingly.

188. See Gaba, supra note 9, at 1329; Ferland & Cage, supra note 87, at 475-76.
189. See id. at 481. This indeed would be a welcome change in a system plagued with litigation costs. More than one third of the 11.3 billion dollars spent on Superfund sites by the private sector through 1991 funded litigation. See Reform Bills Would Increase Some Suits, Decrease Overall Litigation, Study Says, Nat’l Env’t Daily (BNA) (Aug. 2, 1994) (citing RAND Superfund study).
190. Ferland & Cage, supra note 87, at 481.
191. See Gaba, supra note 9, at 1326-28 (arguing that common sense dictates that one can only “dispose” of “wastes”); cf. Edward Hines Lumber Co. v. Vulcan Materials Co., 685. F. Supp. 651, 654 n.2 (N.D. Ill.) (“[H]ow can a manufacturer arrange for the disposal or treatment of anything but wastes?”), aff’d, 861 F.2d 155 (1988). The fact that “disposal” is defined in terms of “waste” by the statute bolsters this argument. See supra notes 95-96 and accompanying text.
Such a rule apparently would also be consistent with existing case law. With certain notable exceptions, the transactions to which the courts have attached section 107(a)(3) liability have generally involved materials which would fall within the EPA's broad definition of solid waste. Likewise, transactions in which liability was not found generally did not involve materials constituting solid waste.

In defining solid waste, the regulations distinguish products from wastes, including in the latter secondary materials when recycled in ways which denote a disguised intent to dispose. Thus, while designed for a different purpose, the regulations provide a coherent framework for courts to distinguish the sale of a legitimate product from a transaction that constitutes an arrangement for disposal. In addition to the administrative benefits, use of the broad SWDA regulations to determine the scope of arranger liability would arguably effectuate CERCLA's environmental concerns and its indisputable remedial purpose. For these reasons, adoption of the Catellus rule would constitute a dramatic improvement over the historical ad hoc approach taken by courts in determining liability under section 107(a)(3).

Additionally, despite the complaints of several courts, see supra notes 100-102, this approach does no violence to § 107(a)(3)'s reference to the disposal of "hazardous substances." The rule utilizes the solid waste definition to determine the scope of the word "disposal." This is not the same as limiting arranger liability to the sale of "hazardous wastes" as defined in the SWDA, as "hazardous wastes" are a subset of "solid wastes," not their equivalent. See supra note 174. Rather, the Catellus court determined that one can only "dispose" of a "solid waste." Accordingly, the sale of any such material containing a "hazardous substance" gives rise to arranger liability. As Professor Gaba points out, "[t]his category is still far broader than the class of hazardous wastes defined in [the SWDA]."

Gaba, supra note 9, at 1326.

192. The legislative history discusses the need to focus on generators who "create hazardous wastes ... and ... determine whether and how to dispose of these wastes." S. REP. No. 848, 96th Cong., 2d Sess. 15 (1980).

193. The materials involved in the chemical formulator cases (Aceto, Jones-Hamilton, and Velsicol) clearly fall outside the SWDA definition of solid waste. However, there is a strong argument that the manufacturers in these situations should have been held liable as an "owner or operator" under § 107(a)(2) rather than an "arranger" under § 107(a)(3). See Gaba, supra note 9, at 13, 28 n.100.

194. See supra Part II; see also Gaba, supra note 9, at 1328. But see United States v. Petersen Sand & Gravel, 806 F. Supp. 1346 (N.D. Ill. 1992) (no liability for sale of commercial grade fly ash for use in road construction).


196. Gaba, supra note 9, at 1328; see also 1 STENSVAAK, supra note 127, at § 3.9 p. 3-23 (the categories of secondary materials subject to regulation are "designed to exempt from solid waste status primary products, co-products, and unrestricted raw materials . . . ").

197. See supra note 48.
IV. The Catellus Rule: Criticism and a Legislative Alternative

Despite these potential benefits, the sheer breadth of the regulations proves problematic in using them to define the boundaries of CERCLA arranger liability. As one commentator has noted, "virtually any material, under the right circumstances, can fall within the definition of solid waste." Indeed, with narrow exceptions for certain materials recycled in certain ways, recyclable materials fall within the EPA's definition for solid waste. Under Catellus, then, CERCLA arranger liability will attach to a significant number of transactions involving recyclable materials. While this result arguably effectuates CERCLA's broad remedial environmental purposes, it also creates a disincentive to recycling.

Proponents of a broad CERCLA liability scheme disagree. In general, they argue, the breadth of the CERCLA liability scheme has produced strong incentives for industry to improve its management of hazardous waste both through waste minimization and careful selection of transporters and disposal facilities that will not produce future CERCLA liability. One district court argued that section 107(a)(3) liability is not a disincentive to recycling altogether, but rather encourages responsible recycling. Indeed, as the court noted, a broad liability provision such as that established by Catellus may merely require recyclers to "diligently scrutinize the facilities to which they

198. Goodman, supra note 8, at 7.
199. See supra note 178 and accompanying text.
200. See 40 C.F.R § 261.2(a)(2) (1994) (defining solid waste as a material that is abandoned, recycled, or considered inherently wastelike) (emphasis added).
201. Goodman, supra note 8, at 7 (explaining that this will especially be true with regard to the sale of scrap metal and industrial byproducts). Needless to say, Catellus sets the same standard with regard to recyclable lead-acid batteries.
202. "[M]any materials which can be properly recycled are now not being captured for reuse because of Superfund liability exposure." 141 Cong. Rec. S4492, S4506 (1995) (statement of Senator Warner). See also Roberta G. Gordon, Legal Incentives for Reduction, Reuse, and Recycling: A New Approach to Hazardous Waste Management, 95 Yale L.J. 810, 826 n.105 (1986) (blaming the failure of North Carolina's "waste exchange" in part on waste generators' fear of arranger liability under CERCLA, and proposing liability exemption for sale to a bona fide purchaser through a "waste exchange"); Goodman, supra note 8, at 7 (stating that after Catellus, the "rule" in Ninth Circuit for sale of used products is "seller beware").
send their wastes . . . and demand assurances from recyclers that they will dispose of the . . . residues in an environmentally conscientious manner." 

While this may be so, a broad interpretation of section 107(a)(3), such as the *Catellus* rule, provides no protection for even the most diligent and scrupulous seller of hazardous recyclables. Should the materials contribute to a site requiring cleanup, the seller will be jointly and severally liable. Echoing these concerns, the Superfund Recycling Equity Act of 1995 would afford just such protection to sellers of certain recyclable materials under the proper circumstances.

In an effort to promote the reuse and recycling of scrap material, "level the playing field" between new and recycled materials, and remove the disincentives and impediments to recycling due to potential liability, proposed CERCLA section 127 would create a new CERCLA provision "clarifying" the status of certain recycling transactions with regard to arranger liability. Under the bill, if certain criteria are met, the sale of scrap paper, plastic, glass, textiles, rubber, metal, and spent lead-acid, nickel-cadmium, and other batteries would be deemed "arrangements for recycling" and thus exempt from liability under section 107(a)(3). The proposed qualifying criteria vary, depending on the specific material involved, and look to both the nature of the material itself and the nature of its use.

Certain requirements, however, would be common to all "recyclable materials." In order to qualify for the liability exemption, the material in question would have to meet a certain commercial speci-
cation grade. Additionally, the party seeking the exemption would have to demonstrate that a market exists for the material. On the use side of the equation, the provision requires that a substantial portion of the material be made available for use in the making of a new saleable product, and that the material, or the product made therefrom, be able to serve as a substitute for virgin raw material or a product made from such raw material. For future transactions, the provision further guards against sham sales by requiring the seller to exercise "reasonable care" to determine whether the recipient is in compliance with all substantive provisions of applicable environmental laws, regulations, and orders pertaining to the management of the material.

Sellers of scrap metal and spent batteries would be subject to certain additional requirements. Beyond the general requirements mentioned above, the seller of scrap metal would have to demonstrate compliance with regulations concerning the recycling of such scrap.
metal subsequently promulgated by the EPA under the SWDA.\textsuperscript{216} In addition, the scrap metal could not have been melted prior to the sale.\textsuperscript{217} Sellers of lead-acid batteries would be subject to a similar requirement of compliance with EPA regulations regarding the storage, transport, management, and other activities associated with the recycling of such batteries, currently found at 40 Code of Federal Regulations section 266.80.\textsuperscript{218} Recyclers of nickel-cadmium and other spent batteries would have to await promulgation of similar regulations by the EPA for the recycling of such batteries before they could take advantage of the liability exemption.\textsuperscript{219}

The proposed liability exception also includes several common safeguards against sham recycling. The exemption is not to be available where the seller has an "objectively reasonable basis to believe" that the material will not be recycled, or that the material will be burned as fuel, for energy recovery, or for incineration.\textsuperscript{220} The recycling exemption would also be inapplicable if the seller either adds hazardous substances to the material, other than for processing purposes, or fails to handle or manage the materials with reasonable care.\textsuperscript{221}

Adoption of the above described amendment could dramatically improve CERCLA's current treatment of transactions in hazardous recyclables in several ways. Substantively, it would help achieve twin environmental goals. The liability exemption would encourage recycling, thereby furthering the goals of waste minimization and natural resource conservation.\textsuperscript{222} And the stringent standards for the

\textsuperscript{216} H.R. 820, supra note 16, at § 127(d)(1)(B); S. 607, supra note 16, at § 127(b)(2)(F)(i). Prior to such promulgation by the EPA, a seller of scrap metal could qualify for the exemption by meeting the other qualifications for scrap metal, assuming there was no other exclusion. Id.; see also S. Rep. No. 349, supra note 213, at 166.

\textsuperscript{217} H.R. 820, supra note 16, at § 127(d)(1)(C); S. 607, supra note 16, at § 127(b)(2)(F)(ii). "Melting" was not to include the thermal separation of two or more materials due to differences in melting points, known as "sweating." H.R. 820 § 127(d)(1)(C)(2); S. 607 § 127(b)(3).

\textsuperscript{218} H.R. 820, supra note 16, at § 127(e)(1)(B)(i); S. 607, supra note 16, at § 127(b)(2)(G)(ii); 40 C.F.R. § 266.80 (1993). In addition, the Senate bill requires that the seller did not first recover the valuable portions of the battery. S. 607 § 127(b)(2)(G)(i).


\textsuperscript{220} H.R. 820, supra note 16, at § 127(f)(1)(A)(i)-(ii); S. 607, supra note 16, at § 127(c)(1)(A)(i)-(ii). The criteria for determining an "objectively reasonable basis" are to be the same as described in connection with past transactions in recyclable materials. See supra note 215.

\textsuperscript{221} H.R. 820, supra note 16, at § 127(f)(1)(B)-(C); S. 607, supra note 16, at § 127(c)(1)(B).

\textsuperscript{222} See H.R. 820, supra note 16, at § 2; S. 607, supra note 16, at § 2. The legislative history contains the following examples: the use of recycled steel results in a 90% reduction in use of virgin materials, a 40% reduction in water use, a 76% reduction in water pollu-
exemption would ensure that such recycling is conducted responsibly, accordingly reducing the possibility that later remedial action under CERCLA would be necessary. Procedurally, the proposal provides courts with clear guidelines for handling transactions in certain recyclable materials. The congressional guidelines in the provision are specific and coherent. The adoption of these uniform standards could bring some much needed predictability to decisions, thereby reducing the incentive to litigate.

But the scope of the proposed recycling provision is to be limited to transactions in certain specific materials. Without a companion rule, transactions in other recyclable materials will continue to suffer an uncertain fate at the hands of the federal courts and their ad hoc approach to arranger liability. This problematic dichotomy could be cured by pairing the recycling exemption from the Superfund Recycling Equity Act with the rule announced by the Ninth Circuit in Catellus. By coupling the two rules, courts and potential litigants alike will have the benefit of parallel comprehensive schemes for prospective pretransaction decisions, prelitigation settlement decisions, and, ultimately, liability determination.

...
Conclusion

Widespread judicial recognition of the *Catellus* rule, coupled with legislative adoption of the Superfund Recycling Equity Act's recycling exemption, could simultaneously encourage responsible recycling and lessen the incentives to engage in costly litigation, without doing violence to CERCLA's broad remedial goals. While congressional action on the issue is uncertain at this time, nationwide judicial adoption of the *Catellus* rule would, at the very least, bring some much needed clarity to the "murky realm" of CERCLA arranger liability.