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Reconciling the CERCLA Useful Product and Recycling Defenses

INTRODUCTION

The waste status of a material is in the eye of the beholder. Spent materials used by one industry may become useful products for other industries, through little or no processing. The same approach holds true in the hazardous waste context. Many hazardous materials, such as lead, mercury, industrial chemicals, and solvents are valuable commodities, used as products themselves. Industries may combine them to form other products or employ them in a manufacturing process. Even when used in one industry, a business collecting such materials may recycle them and return them to other industries or to the industries from which they came.

In the context of a legal scheme that imposes liability on parties who dispose of a hazardous substance but exculpates parties who merely transfer a useful product, the distinction between reuse of a product and disposal of a product is perilously sharp. Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in 1980 to ensure that all parties who contribute to the contamination of hazardous waste sites would be held responsible for the cleanup costs. Accordingly,


2. See S. REP. NO. 96-848, at 10 (1980) (recognizing that in the chemical industry “waste from one company is feedstock to another”).


4. Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986) (stating that the purpose of CERCLA was to provide the tools to deal with the cleanup of hazardous waste, and to have those responsible bear the costs); S. REP. NO. 96-848, at 13 (stating that Congress’s goals in enacting CERCLA were to provide for the cleanup of hazardous substances and to hold parties liable for the clean up costs). For examples of hazardous waste sites concerning Congress in 1980, see S. REP. NO. 96-848, at 8–9, noting the disposal of 17,000 drums of hazardous waste in the “Valley of the Drums” outside Louisville, Kentucky; the discharge of kepone, a hazardous insecticide, into the James River in Virginia; the
CERCLA imposes liability on those who "arrange for disposal" of hazardous substances\(^5\) at a site that released\(^6\) contaminants.\(^7\) At the same time, the CERCLA liability provisions implicitly alleviate liability for those who send hazardous substances to a site for recycling, use, or re-use as a product.\(^8\) Courts have consequently developed a body of case law that addresses, with some trepidation, the distinction between a transaction for disposal and a transaction involving a "useful product" or recyclable material.\(^9\) Additionally, a new amendment to CERCLA, the Superfund Recycling Equity Act

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6. § 9601(22).
7. § 9607(a)(3). Those who "arrange for disposal" are one of four classes of potentially liable persons under the statute, along with owners of the site, past owners of the site, and persons who transported materials to the site. Id. § 9607(a). The four categories of covered persons delineated by the statute "reach back through the causal chain from those who ultimately dispose of a hazardous substance to those who transport and generate it." Pneumo Abex Corp. v. High Point Thomasville & Denton R.R. Co., 142 F.3d 769, 774 (4th Cir. 1998). CERCLA imposes strict liability on all parties jointly and severally. Id. The government may bring a civil action against any liable party to recover response costs. Id. Defendants will be liable for "costs" and "damages" associated with releases of hazardous substances or remedial actions designed to protect against such releases. § 9607(a)(4)(A)-(D). Whichever party pays for the costs is permitted by CERCLA to seek contribution from other responsible parties. Id. § 9613(f) (authorizing contribution suits and giving settlement guidelines).

8. § 9607(a). Because the statute imposes liability for those who arrange for disposal or treatment, by negative implication it does not impose liability for other arrangements, such as arrangements to recycle or reuse a hazardous material. For a discussion of the definitions of the statutory terms leading to this implication, see infra notes 28-35.

9. See Dep't of Toxic Substances Control v. Interstate Non-Ferrous Corp., 99 F. Supp. 2d 1123, 1151 (E.D. Cal. 2000). After an extensive review of the case law, the Interstate Non-Ferrous court noted that courts have developed several variations to the "so-called recycling exemption" to CERCLA liability. 99 F. Supp. 2d at 1151. The combination of rationales "has produced conflict, ambiguity and uncertainty in recycling cases." Id. The "useful product" defense began as a way to distinguish transactions in products that were still marketable from wastes. Most cases focus on products that were still useful for their originally intended purpose. See Ekotek Site PRP Comm. v. Self, 881 F. Supp. 1516, 1526 (D. Utah 1995) (citing numerous cases involving products in working order); California v. Summer Del Caribe, Inc., 821 F. Supp. 574, 581 n.4 (N.D. Cal. 1993) (citing cases involving sale of useable products). Nevertheless, the "useful product" defense is also considered in conjunction with recycling. See Interstate Non-Ferrous, 99 F. Supp. 2d at 1150 (citing Chatham Steel Corp. v. Brown, 858 F. Supp. 1130, 1138 (N.D. Fla. 1994)) (focusing on whether batteries sent to a recycler were useful products). For a more detailed survey of useful product fact scenarios, see infra notes 29-31. The "useful product defense" and recycling defenses are not enumerated defenses in CERCLA. Enumerated defenses include: "an act of god, an act of war" and an act or omission of a third party not involved in a contractual relationship with the defendant. § 9607(b)(1)–(3).
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(SREA), responding to alleged judicial confusion over the recycling distinction, explicitly exempts certain recycling transactions from CERCLA liability. Nevertheless, the new amendment does not address all recycling transactions or other transactions involving reuse of a product.

A second statute addressing the handling of wastes, the Resource Conservation and Recovery Act of 1976 (RCRA), is also especially relevant to distinctions between disposal, recycling and reuse. Generally, while CERCLA addresses the liability and cleanup resulting from hazardous substance contamination, RCRA regulates the handling of hazardous wastes from production to disposal. Despite their different approaches, the two statutes provide a comprehensive hazardous waste management legal framework. Several of RCRA's definitional sections relevant to the useful product and recycling analysis are incorporated directly into CERCLA. Moreover, RCRA was the only available source of

11. Interstate Non-Ferrous, 99 F. Supp. 2d at 1151-52 (stating that, given the circumstances surrounding the passage of the SREA, Congress clearly meant to "eliminate ambiguity and conflict, and bring uniformity and certainty to recycler liability" in the case law) (citing 145 CONG. REC. S15028 (1999)) (statement of Sen. Lincoln); Id. at 1143 (stating that Congress passed the SREA to "bring uniformity to federal court decisions" involving recycler liability).
13. § 9627 (a)(2) (stating that liability determinations for any other materials will be made without regard to the provisions of the SREA); § 9627(I) (stating that the SREA should not affect characterization of other defenses); see also 145 CONG. REC. S10391-01, *S10433 (statement of Sen. Lincoln) (discussing limitations of the SREA exemption to liability).
14. 42 U.S.C. §§ 6901-6992k (1994). Given that RCRA was originally enacted as an amendment to the SWDA, it is occasionally referred to as SWDA. See, e.g., United States v. Wedzeb Enters., 844 F. Supp. 1328, 1334-35 (S.D. Ind. 1994). Nevertheless, commentators, practitioners, and courts analyzing the statute as a whole generally use the RCRA acronym. PERCIVAL, supra note 3, at 204 (using RCRA acronym throughout and stating that practitioners and courts do so as well).
15. PERCIVAL, supra note 3, at 201 (comparing the two statutes at their broadest levels). Although RCRA is generally perceived as a regulatory scheme and CERCLA is labeled a liability or response legal scheme, there are areas of overlap. See id. at 207. With the enactment of the CERCLA recycling amendments, this overlap is augmented, given that the amendments focused on the minutiae of correct handling of recycled hazardous materials. As such, they regulate certain aspects of hazardous materials management as much as RCRA.
16. Id. (stating that in practice, the two statutory programs are "closely linked," and that their interrelationship has become increasingly important given the effect of management practices on future contamination).
17. For example, the definitions of the terms "disposal," "hazardous waste," and "treatment," are to have the meaning provided in RCRA. (The terms RCRA and SWDA are interchangeable; hereinafter this piece uses the term RCRA.). § 9601(29). The definition of
statutory analysis of the recycling and reuse of hazardous substances for CERCLA cases prior to the enactment of the new CERCLA recycling amendments.\textsuperscript{18} The new CERCLA amendments reaffirm many of the concepts found in RCRA,\textsuperscript{19} and RCRA remains relevant for useful product and recycling issues outside the scope of the new amendments.\textsuperscript{20} Consequently, even if RCRA does not address all aspects of the CERCLA arranger liability issue,\textsuperscript{21} RCRA provides additional structure and unity for judicial analysis when the reuse or continued use of a hazardous substance is at issue.\textsuperscript{22}

This Comment reconciles the disparate sources of law relating to the recycling and reuse of hazardous substances. Part I isolates the useful product and recycling issues within the overall context of CERCLA liability, highlighting the statutory and regulatory definitions of terms relevant to the distinction between wastes and products.\textsuperscript{23} Part II examines judicially created factors for deciphering the nature of the arrangement between parties to a hazardous substance transaction and analyzes the crucial factor of intent within

\footnote{\textsuperscript{18} See, e.g., Catellus Dev. Corp. v. United States, 34 F.3d 748, 751–52 (9th Cir. 1994) (looking to RCRA (referred to in the case as SWDA) to help determine whether recycling battery parts should be considered an arrangement to dispose under CERCLA); Stevens Creek Assocs. v. Barclay’s Bank, 915 F.2d 1355, 1361 (9th Cir. 1990) (looking to RCRA definitions in recycling case). Although RCRA is the primary statutory source of law on the issue of asbestos recycling, common law provides further justifications as well. See Dep’t of Toxic Substances Control v. Interstate Non-Ferrous Corp., 99 F. Supp. 2d 1123, 1151 (E.D. Cal. 2000) (reviewing the multiple guises of the “so-called recycling exemption” before 1993, including both the RCRA “administrative definition” of “recycling” and other non-RCRA rationales).}

\footnote{\textsuperscript{19} See infra notes 165–69 and accompanying text.}

\footnote{\textsuperscript{20} The new amendments apply only to the recycling of certain enumerated recyclable materials but do not explicitly affect liability for other types of arrangements or materials. 42 U.S.C.A. § 9627(e) (West Supp. 2001). Presumably, RCRA continues to be relevant, as it always has been, for legal issues associated with the management of recycling activities at currently operating facilities. See, e.g., Owen Elec. Steel Co. v. Browner, 37 F.3d 146, 148–49 (4th Cir. 1994) (addressing the recycling of slag from a steel mill under RCRA); United States v. ILCO, Inc., 996 F.2d 1126, 1130–32 (11th Cir. 1993) (addressing the recycling of batteries under RCRA).}

\footnote{\textsuperscript{21} Those who arrange for the disposal or treatment of hazardous substances are said to be subject to “arranger liability” or “generator liability” interchangeably. See PERCIVAL, supra note 3, at 295.}

\footnote{\textsuperscript{22} It should be noted, now that all of the relevant sources of law have been introduced, that a concise unified statement of legal rules on the issue of CERCLA arranger liability is impossible. Courts and commentators have searched often and in vain for unifying principles. This Comment will prove to be no exception. Ultimately, Congress is in the best position to provide uniform principles for the handling, disposal and cleanup of hazardous waste.}

\footnote{\textsuperscript{23} See infra notes 26–116 and accompanying text.}
the strict liability framework of CERCLA. Part III analyzes the potential effect of the new amendments on the judicial factors and RCRA analysis, and concludes by examining the consequences and wisdom of these narrow amendments.

I. DEFINITIONAL FOUNDATION OF THE USEFUL PRODUCT AND RECYCLING DEFENSES

A. Key Terms Isolated

In order to determine the scope of the useful product and recycling defenses to CERCLA liability, it is helpful to isolate the elements that these particular defenses negate. To establish a *prima facie* case of arranger liability, the government must show that the defendant is 1) any person, 2) who by contract, agreement, or otherwise, arranged for, 3) the disposal or treatment, 4) of hazardous substances, 5) owned at the time of the transfer by the 6) at any facility from which a release of that hazardous substance, and 7) which incurred response costs.

The useful product and recycling defenses negate the third element of this *prima facie* case: that the defendant arranged for "disposal or treatment" of a hazardous substance. In raising these defenses, defendants argue that the arrangements were actually sales or transfers of useful products, raw materials, or recyclable materials, but not disposals.

24. *See infra* notes 118–58 and accompanying text.
25. *See infra* notes 159–220 and accompanying text.

The defendant can escape liability with the useful product defense even if the other elements are established. *See*, e.g., Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co., 142 F.3d 769, 775–76 (4th Cir. 1998) (concluding that a railroad company had arranged for the legitimate processing of a useful product where it shipped used lead bearings (containing hazardous substances) to a processing facility that released the hazardous substances into the environment, causing the government to incur cleanup costs); United States v. Wedzeb Enters., 844 F. Supp. 1328, 1334–37 (S.D. Ind. 1994) (finding that although the defendants were persons who transferred hazardous substances to a facility where a release of that hazardous substance occurred causing the government to incur response costs, the transfer of capacitors containing PCBs was of a useful product and thus not an arrangement for disposal).

28. *See, e.g.*, Freeman v. Glaxo Wellcome, Inc., 189 F.3d 160, 162 (2d Cir. 1999) (sale of unwanted but unused chemicals); G.J. Leasing Co. v. Union Elec. Co., 54 F.3d 379, 384 (7th Cir. 1995) (addressing argument that a sale of a building containing asbestos insulation is the sale of a
The key to the useful product and recycling defenses lies, therefore, in distinguishing disposal and treatment of hazardous material from other innocent arrangements. Although the other elements of the *prima facie* case may be disputed in their own right, they do not bear directly on the issue of disposal or treatment. Even re-usable product); Florida Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1315 (11th Cir. 1990) (sale of new electrical transformers); United States v. Pesses, No. CIV.A.90-0654, 1998 WL 937235, at *11 (W.D. Pa. May 6, 1998) (addressing the defendant's argument that it sold "newly manufactured" metals "of first class quality" to a secondary manufacturer and thus should not be held liable as an arranger to dispose); *Wedzeb*, 844 F. Supp. at 1332 (noting defendant's argument that it had shipped capacitors to a site that were still functioning and re-useable, and thus had not arranged for their disposal).

30. *See, e.g.*, A & W Smelter and Refiners, Inc. v. Clinton, 146 F.3d 1107, 1112 (9th Cir. 1998) (noting the defendant's argument that the ore shipped as a raw product was not waste and thus should be considered a useful product for purposes of CERCLA arranger liability); A.M. Int'l, Inc. v. Int'l Forging Equip., 982 F.2d 989, 999 (6th Cir. 1993) (discussing sale of chemicals to be used in electroplating process was not an "arrangement to dispose"); Edward Hines Lumber Co. v. Vulcan Materials Co., 861 F.2d 155, 156 (7th Cir. 1988) (accepting arguments that the sale of newly manufactured wood treating solvents and chemicals to a wood treatment facility was not an arrangement to dispose of the solvents); *Kelley v. ARCO Indus. Corp.*, 739 F. Supp. 354, 355-56 (W.D. Mich. 1990) (sale of neoprene for use in the manufacture of rubber goods).


32. Liability for arranging for "treatment" of a hazardous substance is less common, and this Comment will address it secondarily. The term "treatment" has a narrower meaning than in plain usage. In the context of CERCLA, treatment refers generally to the act of making a hazardous substance *nonhazardous*. 42 U.S.C. §§ 9601(29), 6903(34) (1994). Like disposal, "treatment" requires the existence of a "waste." Consequently, much of the discussion of the term "disposal" relating to the useful product analysis applies to "treatment" as well. *See, e.g.*, Pneumo Abex Corp. v. High Point Thomasville & Denton R.R. Co., 142 F.3d 769, 774 n.3, 775 (4th Cir. 1998) (addressing a treatment under the facts of the case, but applying principles gleaned from cases that address disposals).

33. For example, whether a person is involved, whether the defendant contributed hazardous substances under its ownership to the site, and whether a release of those substances did in fact occur at a facility incurring response costs provide separate, independent grounds for defenses. CERCLA defines "person" as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity ... or any interstate body." § 9601(21). This definition of "person" is broad enough to cover most conceivable entities and individuals. This issue of whose wastes are at a site is litigated in cases in which wastes shipped to a facility have become commingled. *See, e.g.*, United States v. Davis, 31 F. Supp. 2d 45, 61-62 (1st Cir. 1998) (addressing the issue of whether the defendant's waste, which was admittedly disposed somewhere as waste, can be identified at the site in question). Courts have also held parties liable if they own or control the hazardous substance at the time of the transfer. *See, e.g.*, Florida Water Mgmt. Dist. v. Montalvo, 84 F.3d 402, 409 (11th Cir. 1996) (holding that landowners who contracted to have their land sprayed with pesticides were not
the more technical issue of whether the substance transferred was hazardous is not directly relevant in useful product litigation. Additionally, the parties usually have no grounds upon which to dispute that some arrangement has been made with regard to the hazardous substance.

As the crucial term for the useful product defense, "disposal" has a technical definition. CERCLA provides that "disposal" is to have the meaning provided in section 6903 of RCRA. In RCRA, disposal has two main components: 1) action or inaction and 2) a material defined as a "solid waste." This definition is confusing because it is

liable when sprayers contaminated their own facilities with those pesticides—on the theory that the landowners never owned or controlled the hazardous substances).

"Release" means "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment" and includes the abandonment or discarding of receptacles containing any hazardous substance. The difference between the definitions of "release" and "disposal" is a subtle one. Moreover, the difficult distinction between the release of substances and the arrangement to dispose of substances lies at the heart of the useful product inquiry. Evidence of how a release occurred, who caused it and when it occurred are important issues to be considered later in the analysis. Nevertheless, the fact that a release occurred is not at issue. See, e.g., Ekotek Site PRP Comm. v. Self, 881 F. Supp. 1516, 1519 (D. Utah 1995) (recognizing that the parties stipulated that the materials were "released" but determining nonetheless whether the defendant had arranged for the disposal of the hazardous substances at the time materials were transferred onto the property). The definition of the term "facility" is so broad that any property or building counts as a facility under CERCLA. See § 9601(9).

34. Parties may attempt to argue that a material is not hazardous as an alternate defense to arranger liabilities but the hazardousness of the substance has no bearing on whether the product is useful. A material can be a hazardous substance without being a hazardous waste or solid waste. For example, the Wedzeb court determined that the chemicals were hazardous, but not wastes. United States v. Wedzeb Enters., 844 F. Supp. 1328, 1332 (S.D. Ind. 1994). The scientific issues of what constitutes a hazardous substance is distinguishable from the issue of what makes a material a waste or a product. The useful product and recycling defenses turn on the waste/non-waste issue. See, e.g., United States v. Pesses, No. CIV.A.90-0654, 1998 WL 937235, at *6-7 (W.D. Pa. May 6, 1998) (rejecting defendant's argument that a small portion of copper wire was not a hazardous waste). Under CERCLA, the term "hazardous substance" has a very broad and scientifically delineated definition. In defining the term "hazardous substance," CERCLA incorporates by reference the substances designated as hazardous or toxic under several other environmental law statutes. § 9601(14). It includes, as hazardous, "any element, compound, mixture, solution or substance designated pursuant to" CERCLA, 42 U.S.C. § 9602(a) (1994), "which, when released into the environment may present substantial danger to the public health or welfare or the environment." Id.

35. It is the scope and nature of the arrangement, rather than whether an arrangement existed at all, that is crucial in useful product cases. See, e.g., Amcast Indus. Corp. v. Detrex Corp., 2 F.3d 746, 751 (7th Cir. 1993) (recognizing that some arrangement had taken place between the defendant and a facility, but questioning whether the arrangement was for a disposal).


37. 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 . . . waste . . . may enter the environment." § 6903(3) (1994) (emphasis added).
inconsistent when read alongside parallel terms in CERCLA. CERCLA's definition of "disposal," incorporated from the RCRA, conflicts with its definition of "hazardous substance." The RCRA definition requires the disposal of a "waste," not a "substance." CERCLA instead contemplates the disposal of a "hazardous substance." Furthermore, under CERCLA, there is an overlap between the definitions of "release" and "disposal." Despite the fact that Congress intended for a "release" of substances to include situations where the substances are transferred to an acquiring party, because "release" is defined as any "disposal," it may arguably also include the act of disseminating the substance into the environment. Both instances have markedly different characteristics. These definitional paradoxes are at the forefront of the useful product and recycling defenses and thus merit further analysis.

B. The Role of Waste in the Definition of Disposal

Under CERCLA, determining whether a defendant transferred a "waste" is an important first step in determining whether a defendant made an arrangement for "disposal." According to the statutory

38. This raises questions of whether CERCLA, in a useful product case, would impose liability only for disposal of a waste product, or whether it would impose liability for disposal of a substance that is not a waste. This difference is crucial to the useful product defense because it requires a precise definition of waste in order to determine whether a substance has been disposed. See infra notes 42-43; Dep't of Toxic Substances Control v. Interstate Non-Ferrous Corp., 99 F. Supp. 2d 1123, 1149 (E.D. Cal. 2000) (discussing two circuits' different approaches to the statutory ambiguity between hazardous substances and wastes).

39. Compare the definition of "disposal," § 6903(3), to that of "release," § 9601(22). They are similar in the type of actions involved (though, oddly, "release" lists some similar verbs such as "leaking" but not others, such as "emptying"), but "release" lacks any mention of "waste" in its definition. See § 9601(22). While a release can occur with any substance, a disposal can only occur with a waste.

40. Importantly, a release can occur without having had a disposal. See § 9601(22); see, e.g., United States v. Wedzeb Enters., Inc., 844 F. Supp. 1328, 1337 (S.D. Ind. 1994) (fire destroyed building containing hazardous substances). Additionally, a disposal can occur without an immediate release into the environment. Disposal requires only some action or omission that places a waste into a position such that it may enter the environment. § 6903(3); see infra notes 148-51 (discussing Amcast Indus. Corp. v. Detrex Corp., 2 F.3d 746, 751 (7th Cir. 1993)).

41. The timing aspect of the disposal and release is further complicated by the fact that an arrangement for disposal theoretically can occur without an immediate disposal or release of the substance. These nuances are especially relevant in an analysis of intent to dispose. See infra notes 118-59 and accompanying text.

42. In the useful product and recycling context, a finding that the transferred material was not a waste precludes a finding that an arrangement for disposal took place under CERCLA. See Freeman v. Glaxo Wellcome Inc., 189 F.3d 160, 164 (2d Cir. 1999) ("Because the definition of 'disposal' refers to 'waste,' only transactions that involve 'waste' constitute arrangements for disposal within the meaning of CERCLA."); A&W Smelter and Refiners, Inc. v. Clinton, 146 F.3d 1107, 1112 (9th Cir. 1998) (holding that if a material is "not waste" it is "not subject to
definition of these terms, it is not possible to have a disposal without having made some arrangement with regard to a waste. Nevertheless, this premise leads to two further issues that have proved divisive in arranger liability case law. First, courts have wrestled with various methods for determining whether a material is a "waste." Second, once courts make their waste status determinations, they vary on the role they allow this to play in the overall arranger liability finding.

Catellus Development Corporation v. United States, a landmark opinion for the useful product issue, addressed the waste status determination in a seminal way. Due to its influence, Catellus provides a template upon which to address waste status issues. The

[CERCLA”]; Catellus Dev. Corp. v. United States, 34 F.3d 748, 750 (9th Cir. 1994) (stating that a party "could be said to have arranged for ... disposal" only if the material "could be characterized as a waste."); Wedzeb, 844 F. Supp. at 1335 (stating that before a transaction can be considered a ‘disposal’ under CERCLA, “the material exchanged must be a 'solid waste' or 'hazardous waste' ”) (citing § 6903(3)). A first step in finding “treatment” is also determining the waste status of the material treated. Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co., 142 F.3d 769, 774 (4th Cir. 1998) (rejecting the appellee’s argument that treatment can occur whether or not hazardous substances are wastes, stating that “ ‘treatment’ presupposes discard") (citing § 9601(29)); A&W Smelter, 146 F.3d at 1112 (noting that the defendant “treated the [product] only if it was waste”).

43. “Disposal” is the “discharge ... of any solid waste or hazardous waste” such that it may enter into the environment. § 6903(3) (emphasis added). “Hazardous waste” is defined as “a solid waste” with hazardous characteristics. § 6903(5). The definition of “treatment” also necessitates the existence of “waste.” See § 6903(29).

44. See, e.g., Gould Inc. v. A&M Battery & Tire Serv., 933 F. Supp. 431, 435-36 (M.D. Pa. 1996) (declining to use the statutory or regulatory definition of waste, and employing instead the “originally intended purpose” test to distinguish products from disposed hazardous substances); Catellus, 34 F.3d at 751–52 (using RCRA and RCRA regulations to define “waste”); Wedzeb, 844 F. Supp. at 1335 (using RCRA, but not the RCRA regulations, to define “waste”).

45. See, e.g., Pneumo Abex, 142 F.3d at 774–75 (recognizing the waste issue, but deciding the case on other factors such as intent); Catellus, 34 F.3d at 752 (looking primarily to whether the substance had the characteristic of waste to determine liability); United States v. Am. Cyanamid Co., No. CIV.A.2:93-0654, 1997 U.S. Dist. LEXIS 4413, at *16–*17 (S.D. W. Va. Jan. 27, 1997) (applying multiple factors including waste status to arrive at finding that defendant was liable).

46. 34 F.3d 748 (9th Cir. 1994).

47. Amongst those generally accepting the Catellus approach are RSR Corp. v. Avanti Dev., Inc., 68 F. Supp. 2d 1037, 1046–48 (S.D. Ind. 1999) (noting that Catellus and similar cases "provide guidance in the present case," and recognizing Catellus’s use of the RCRA regulations); EPA v. TMG Enter., 979 F. Supp. 1110, 1122 n.13 (W.D. Ky. 1997) (applying Catellus); Douglas County v. Gould, Inc., 871 F. Supp. 1242, 1246–47 (D. Neb. 1994) (distinguishing Catellus, but finding the opinion “instructive” and supportive of its own conclusion). Those cases generally wary of the Catellus approach are: Wedzeb, 844 F. Supp. at 1335 (employing RCRA as Catellus later would, but declining to use regulations); Dep’t of Toxic Substances Control v. Interstate Non-Ferrous Corp., 99 F. Supp. 2d 1123, 1148 (E.D. Cal. 2000) (outlining Catellus’s RCRA approach and claiming that such an approach “has been expressly disavowed by other courts”).
court stated the premise that, under CERCLA, a disposal requires a transfer of a waste.\textsuperscript{48} It also looked to whether the transferred material, used batteries containing useful lead, were wastes according to RCRA and accompanying RCRA regulations.\textsuperscript{49} The court found that the materials were wastes under the RCRA regulations,\textsuperscript{50} thereby holding the defendant liable for arranging for a disposal of hazardous substances.\textsuperscript{51} The court relied on RCRA to make its waste determination,\textsuperscript{52} which largely supported its finding of liability.\textsuperscript{53} These two aspects of the opinion are best analyzed in succession.

Despite the misgivings of several courts,\textsuperscript{54} Catellus arguably was correct in looking to the RCRA regulations to define waste. In the context of useful product and recycling cases, RCRA and its accompanying regulations provide uniform definitions of concepts associated with disposal, such as recycling, reuse and waste production. These concepts help to distinguish between arrangements to transfer wastes and useful or recycled products. RCRA defines "solid waste"\textsuperscript{55} as "any garbage, refuse, sludge . . . and other discarded material."\textsuperscript{56} The United States Environmental Protection Agency (EPA) has issued regulations further defining solid waste, which specifically address recycled, reused, and reincorporated products.\textsuperscript{57} Specifically, the RCRA regulations exempt from the definition of "solid waste" any material that has been recycled in accordance with the regulations.\textsuperscript{58} To qualify, recycled materials must be used, in their current state, in an

\begin{itemize}
\item \textsuperscript{48} Catellus, 34 F.3d at 750.
\item \textsuperscript{49} Id. at 751–52.
\item \textsuperscript{50} Id. at 752.
\item \textsuperscript{51} Id. at 753.
\item \textsuperscript{52} Id. at 752.
\item \textsuperscript{53} Id. There is room to debate whether the decision was based entirely on the waste status of the material transferred or not. See discussion infra notes 107–111 and accompanying text.
\item \textsuperscript{55} Notably, solid waste, under this definition, need not be solid at all, thus the definition of solid waste covers waste in all physical states. See 42 U.S.C. § 6903(27) (1994) (including liquids and gases as examples of solid wastes in the definition).
\item \textsuperscript{56} Id.
\item \textsuperscript{57} 40 C.F.R. § 261.2 (2001) (defining "solid waste").
\item \textsuperscript{58} Id. § 261.2(e).
\end{itemize}
"industrial process to make a product," as "effective substitutes for commercial products," or as substitutes for raw materials in an industrial process. At the same time, the regulations include as waste any recycled materials that are not used in that manner, or are otherwise used in a manner "constituting disposal."

According to *Chevron v. Natural Resources Defense Council*, courts facing the question of statutory interpretation should defer to agency regulations where the agency's statutory interpretation "fills a gap" or defines a term in a way that is reasonable in light of the legislature's revealed design. On the other hand, where Congress has "directly spoken to the precise question at issue," then "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Finally, where neither Congress nor the agency has directly addressed an issue, the court must rely on its own reasonable construction on the statute.

When deciding whether the action at issue is within the scope of CERCLA liability, the court must interpret both statutes. Because CERCLA directly incorporates the RCRA definition of disposal, the issue of how to interpret CERCLA demands an interpretation of RCRA as well. The first question is whether Congress has addressed all of what constitutes a "disposal" under the RCRA. While the RCRA statutory terms address the kinds of activities associated with

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59. *Id.* § 261.2(e)(1)(i).

60. *Id.* § 261.2(e)(1)(ii).

61. *Id.* § 261.2(e)(1)(iii). The materials must be returned "to the original process from which they are generated . . . as a substitute for feedstock materials." *Id.* Certain traditionally recycled materials, such as scrap metals, are not explicitly wastes, notwithstanding the above factors. *Id.* § 261.4(a).

62. *Id.* § 261.2(c)(1), (e)(2)(i). This illustrates the limits of the regulations, as they do not further elaborate on the actions that would constitute "disposal," thus leaving this task to the courts. If anything, the regulations are close to circular in this respect. RCRA defines "disposal," among other things, as the "dumping" of a "solid waste" into the environment. 42 U.S.C. § 6903(3). The regulations define "solid waste" as any "discarded material," which can be defined as "any material which is abandoned," including those "disposed of." 40 C.F.R. § 261.2(a)-(b). In one sense, then, the word "disposal" has been defined as the "dumping" of a "discarded material" which is nearly redundant.


64. *Id.* at 843–44 (discussing the rationale behind agency deference). According to *Chevron*, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

65. *Id.* at 842–43.

66. *Id.* at 844. Agency guidance, practice and opinions, if available, may still carry persuasive weight, but would not be entitled to the same judicial deference as final rules and regulations. *See* Christensen v. Harris County, 529 U.S. 576, 586–87 (2000).
disposal,67 and provide examples of materials that are clearly subject to disposal,68 they leave a gap for situations in which materials are disposed or transferred in less typical ways.69 Courts must determine whether materials are transferred for recycling or reuse in some further process or product. The regulations provide a reasonable answer.70 Because Congress did not directly address this aspect of the definitions, applying the Chevron analysis, a court should defer to the EPA's regulations in cases where they help distinguish between a waste and a product.

Concerns of several courts about the applicability of RCRA to useful product and recycling cases are misguided. After outlining in detail Catellus' application of the RCRA regulations in a CERCLA case, the court in Department of Toxic Substances Control v. Interstate Non-Ferrous Corporation71 averred that the "Catellus approach has been expressly disavowed by other courts."72 This is not true. The

67. See § 6903(3) (listing among actions constituting disposal, "discharge, deposit, injection, dumping, spilling, leaking, or placing" of waste such that it may be "discharged," "emitted," or otherwise "enter" the environment).

68. See § 6903(27) (noting that garbage, refuse and sludge constitute solid wastes).

69. For example, the statutory definitions do not further define what would constitute "other discarded material." Id. Nor do they provide examples of what constitutes "refuse." Id.

70. Portions of the regulations have been scrutinized and characterized by the Court of Appeals for the District of Columbia Circuit in American Mining Congress v. EPA ("AMC I"), 824 F.2d 1177, 1193 (D.C. Cir. 1987) (holding that materials intended for future recycling should not be considered solid wastes and should be exempt from RCRA); Am. Petroleum Inst. v. EPA, 906 F.2d 729, 741-42 (D.C. Cir. 1990) (distinguishing AMC I and holding that only recycling involved in an ongoing process within one industry should be exempt from RCRA); and American Mining Cong. v. EPA, 907 F.2d 1179, 1186-87 (D.C. Cir. 1990) (distinguishing AMC I and holding that only materials intended for immediate onsite recycling should not be considered wastes). These decisions interpreted portions of the regulations, but ultimately did not strike them down as unreasonable interpretations of RCRA. Commentators note that as a group, these decisions essentially ratify the regulations. See R. Michael Sweeney, Reengineering RCRA: The Command Control Requirements of the Waste Disposal Paradigm of Subtitle C and the Act's Objective of Fostering Recycling—Rethinking the Definition of Solid Waste, Again, 6 DUKE ENVTL. L. & POL'Y F. 1, 25-30 (1996) (discussing the impact of the three D.C. Circuit Court of Appeals opinions together, quoting supporting views from other commentators). The RCRA regulations have been further characterized, but by no means struck down, in more recent decisions. See, e.g., Am. Petroleum Inst. v. EPA, 216 F.3d 50, 58 (D.C. Cir. 2000) (remanding to EPA for correct particular application of regulations). The myriad issues associated with administrative oversight are well beyond the scope of the Comment. For purposes of the present CERCLA analysis, suffice it to say that the regulations are open to criticism, and as such, could be improved to better address recycled materials issues. Sweeney, supra, at 70 (arguing that treating recycling within the definition of solid waste creates a "regulatory folly"). Nevertheless, courts should apply the regulations currently in force and not those applicable at the time of the alleged disposal. Catellus Dev. Corp. v. United States, 34 F.3d 748, 751-52 (9th Cir. 1994).


72. Id. at 1148.
courts to which Interstate refers in support of this proposition do not address the application of RCRA regulations to the CERCLA recycling or useful product inquiry. In those cases, courts did not determine whether the material in question was a waste because its characterization was not at issue. Instead, those cases addressed the vital "statutory and regulatory distinction" between RCRA and CERCLA in the definition of "hazardous substances." Interstate incorrectly expanded this distinction concerning the definition of "hazardous substances" into a broader distinction between the approach of RCRA and CERCLA in general. While CERCLA and RCRA differ in their definitions of hazardous substances, they do not differ in how they distinguish between wastes and products.


74. See B.F. Goodrich, 958 F.2d at 1201-02 (discussing whether material that was admitted to be municipal solid waste can be considered a "hazardous substance" under CERCLA). The other courts relied upon by B.F. Goodrich (and in turn cited by Interstate Non-Ferrous) only stand for the proposition that CERCLA does not require a substance to be listed as "hazardous" under RCRA or any other statute to be a "hazardous substance." B.F. Goodrich, 958 F.2d at 1200, 1203 (citations omitted) (highlighting examples where CERCLA's hazardous substance definition does not match the regulatory definition of hazardous waste). Additionally, given that all the cited cases were decided before Catellus, one cannot easily say that they expressly disavow the Catellus approach.

75. See, e.g., B.F. Goodrich, 958 F.2d at 1196 (acknowledging that the case concerns a disposal of a solid waste and that the issues on appeal are whether the particular solid waste is a hazardous waste and whether a municipality can be liable for the disposal, given its status as a municipality); Transp. Leasing Co., 1990 U.S. Dist. LEXIS 18193, at *1-*2 (considering four limited issues, none relating to the waste/product distinction or the issue of disposal). This Comment seeks to avoid the type of mischaracterization of the issues in arranger liability case law (as seen in Interstate Non-Ferrous) by showing, in detail, which elements of the prima facie case are applicable to the useful product and recycling inquiry. See supra notes 26-32.

76. B.F. Goodrich Co., 958 F.2d at 1202-03.

77. See, e.g., Dep't of Toxic Substances Control v. Interstate Non-Ferrous Corp., 99 F. Supp. 2d 1123, 1148 (E.D. Cal. 2000) (discussing the importance of the statutory and regulatory distinction between wastes and substances).

78. RCRA and CERCLA are unified through the shared definition of "disposal" and the related concept of "waste." See supra notes 43-45. Moreover, the broad statements of these courts are debatable as universal truths concerning the nature of the RCRA and CERCLA programs. For instance, the court in B.F. Goodrich states that RCRA applies to wastes whereas CERCLA applies to substances. 958 F.2d at 1202. From the simple standpoint of the most fundamental statutory purpose of CERCLA, the cleanup of contaminated facilities, this statement should strike the reader as odd. While admittedly CERCLA does concern liability associated with the misuse of hazardous substances, it also concerns the cleanup of sites where hazardous substances have been discarded and become wastes. RCRA and CERCLA are not so diametrically opposed as B.F. Goodrich might have us believe. See United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1376 (8th Cir. 1989) (stating that RCRA was enacted "to deal with problems posed by the general disposal of wastes in this country, as well as the particular
The RCRA regulations need not dominate a court’s analysis, but they should play a specific role in characterizing disposals when recycling or reuse is at issue. If the regulatory analysis is misdirected to other issues within CERCLA this can lead to confusion and mistrust in the regulations. The court in *RSR Corp. v. Avanti Development, Inc.* ("RSR Corp. II"), 79 struggled to find a place for the RCRA regulations in the arranger liability analysis. Although it recognized RCRA as the source of the definition for the term “disposal,” the court later was uncertain how the RCRA regulations should “govern the court’s determination of the nature of the substances” delivered by the party. 80 The *RSR Corp. II* court cautioned that the RCRA regulations only “relate to management and regulation of solid wastes under RCRA.” 81 That statement, unsupported as it is, not only misstates the role of the RCRA regulations within RCRA, 82 but also oversimplifies the relationship between RCRA and CERCLA within the concept of disposal. 83

Rather than abandon RCRA and its regulations in their CERCLA analysis, courts should understand that the regulations need to serve only a limited role in useful product and recycling litigation. RCRA should not be used in the CERCLA context to define what materials are *hazardous.* 84 Nor should it be sufficient to

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80. id.
81. id. Consider a related statement in *United States v. Mountain Metal Co.*, 137 F. Supp. 2d 1267, 1277 (N.D. Ala. 2001), which states that cases “interpreting the regulations under the RCRA are not controlling in CERCLA cases.”
82. See Sweeney, supra note 70, at 13, 15–16 (explaining that the RCRA regulations are more applicable to wastes that are hazardous than wastes that are not).
83. Although it is true that the RCRA regulations only relate to the management of solid wastes, we have seen already that all materials that are “disposed” under CERCLA must also be solid wastes. See supra notes 42–43 and accompanying text. Moreover, the way in which the facility in question “manages” materials for recycling or reuse is central to the judicial recycling inquiry. See, e.g., *Catellus*, 34 F.3d 748 (9th Cir. 1994) (examining whether, in the process of recycling lead from batteries, the facility would inevitably have to discard certain parts of the battery). Management practices are even more central to the more recent statutory recycling inquiry under the 1999 CERCLA Amendments. See infra notes 169–71.
84. This seemed to be the focus of concern for the court in *RSR Corp. II*, and also the argument of one of the parties in that case. See *RSR Corp. II*, 2000 U.S. Dist. LEXIS 14190, at *32 (claiming that the party in the case failed to demonstrate why the court should “rely only on the [RCRA] regulations for defining ‘hazardous substances’ ”). The court was right that RCRA should not be the sole source of the definition of “hazardous substances.” CERCLA’s definition is broader. Nevertheless, RCRA is, and should be, the sole source for the definition of “disposal.”
determine the full scope of the arrangement between parties. Rather, the RCRA and its regulations are useful in the CERCLA context only for distinguishing wastes that are disposed from products or materials that are reused or recycled.

Recognizing the usefulness of RCRA in certain aspects of CERCLA analysis, several courts have cited the Catellus analysis of the RCRA regulations or employed the regulations. In RSR Corp. v. Avanti Development, Inc. ("RSR Corp. I"), the court noted that lead plates previously extracted from batteries were not wastes under the RCRA regulations. This interpretation meant that the transfer was not a disposal of a hazardous substance according to the RCRA/CERCLA definition of disposal. In United States v. Pesses, the court applied the RCRA regulations and rejected the defendant's argument that the materials transferred were not wastes. Under the RCRA regulations, the materials were wastes. This fact, along with other factors lead the court to find the defendant guilty of arranging to dispose of hazardous substances.

Other courts have at least accepted the interrelationship between RCRA and CERCLA in the useful product and recycling context.

85. See discussion of intent, infra notes 118–39.
88. Id. at 1047–48. The court reasoned that "[m]aterials are not solid waste when they can be shown to be recycled by being ... used or reused as ingredients in an industrial process to make a product, provided that the materials are not being reclaimed." Id. (quoting Catellus Dev. Corp. v. United States, 34 F.3d 748, 752 (9th Cir. 1994) (citing 40 C.F.R. § 261.2(e) (1993) (regulations defining solid waste)). In this case, the material sent to the smelter was not being reclaimed at the smelter. According to the regulations, "[a] material is ‘reclaimed’ if it is processed to recover a usable product, or if it is regenerated." 40 C.F.R. § 261.1(c)(4) (2001). Examples of reclamation are the "recovery of lead values from spent batteries." Id. at 1048 (quoting § 261.1(c)(4)). In this case the lead was recovered from the spent batteries before it was sent to the facility where the release occurred, and they were in need of no further recovery before recycling. Id. at 1048. Thus, the court reasoned, the transaction was not an arrangement for treatment. Id.
91. Id. (citing § 261.4(a)(13); § 261.2(c)).
92. Id. at *14–15, *17 (noting that materials required processing before they could be recycled and that the defendant knew the materials would require treatment).
93. See Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co., 142 F.3d 769, 774 (4th Cir. 1998) (reasoning that if Congress had not wished to apply the RCRA definitions to CERCLA issues it would not have directly referenced them in the meaning of disposal and
Nevertheless some of the same courts that interpret RCRA independently of the regulations risk ignoring the nuances in the RCRA distinction between “wastes” and “recycled” or “reused” materials.\textsuperscript{94} For example, the court in \textit{United States v. Wedzeb},\textsuperscript{95} characterized the terms of the RCRA without consulting the regulations.\textsuperscript{96} By using a dictionary and its own reasoning, it determined that a waste must be “the worthless or useless part of something.”\textsuperscript{97} In turn, the court held that “the marketplace provides a reasonable objective gauge of product worth.”\textsuperscript{98} This definition of waste proved determinative because the court determined that the product\textsuperscript{99} had a market. As such, the court held that the transfer of the product was not an arrangement to dispose.\textsuperscript{100} The court failed to complete its analysis, because material value in the marketplace alone should not distinguish wastes from products.\textsuperscript{101} When the definition of waste proves dispositive, courts should employ the detailed RCRA definitions of waste, which depend on \textit{more} than a marketability

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\textsuperscript{94} \textit{Pneumo Abex Corp.}, 142 F.3d at 775–76 (scrutinizing the treatment process, but not applying the regulations); \textit{Wedzeb}, 844 F. Supp. at 1335–36.

\textsuperscript{95} 844 F. Supp. 1328 (S.D. Ind. 1994).

\textsuperscript{96} \textit{Id.} at 1334–35.

\textsuperscript{97} \textit{Id.} at 1335 (quoting \textit{WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED} 935, 1910 (1993) (definition of garbage and refuse)) (reasoning that garbage and refuse were synonymous and that the dictionary definition of refuse would serve as an adequate definition).

\textsuperscript{98} \textit{Id.} at 1336.

\textsuperscript{99} \textit{Id.} at 1331–32 (describing surplus electrical capacitors).

\textsuperscript{100} \textit{Id.} at 1336 (holding that consumer demand for Wedzeb’s capacitors was sufficient to support a finding that they were not “waste” or “refuse”).

\textsuperscript{101} \textit{See} Cadillac Fairview/Cal., Inc. v. United States, 41 F.3d 562, 566 (9th Cir. 1994) (rejecting the defendant’s argument that simply because the transferred materials had value on the market, they were not waste subject to treatment); Ekotek Site PRP Comm. v. Self, 881 F. Supp. 1516, 1526 (D. Utah 1995) (stating that the focus in useful product cases is not whether the material has economic value, but whether the material is fit to perform its original function); United States v. Summit Equip. & Supplies, Inc., 805 F. Supp. 1422, 1431 (N.D. Ohio 1992) (stating that the key inquiry is whether material is sold for a purpose to dispose, and if the purpose is to dispose, the material’s actual value or use is irrelevant). Although some courts have looked to a material’s value to distinguish wastes from non-wastes, generally this is not the sole factor in the decision. \textit{See, e.g.}, A.M. Int’l, Inc. v. Int’l Forging Equip. Corp., 982 F.2d 989, 999 (6th Cir. 1993) (looking at the value and usefulness of materials sold in addition to the intended purpose of parties); United States v. Petersen Sand & Gravel, Inc., 806 F. Supp. 1346, 1354 (N.D. Ill. 1992) (focusing on the continued usefulness of product, valuable consideration \textit{and} intent that the product would be entirely used for the purpose for which it was sold).
analysis, rather than relying solely on its own "common sense" interpretation of material worth or marketability.

Without mentioning RCRA, some courts employ concepts, but not the exact language, found in the RCRA regulations as factors to distinguish between waste and non-waste materials. The regulations may suggest ways of relaxing these factors or adjusting them in ways that accommodate recycled materials markets. For example, a court that allows the useful product defense to succeed only if the product transferred "is a new product, manufactured for the purpose of sale," or a product that "remains useful for its normal purpose in its existing state," might be taking an approach narrower than what the RCRA regulations suggest. Even courts that require a transfer of a product that "requires no further processing to be productively used," may not have accommodated the breadth of the RCRA exceptions. The RCRA regulations provide that when materials are being recycled by "being returned to the original process from which they are generated...as a feedstock material," or "used or reused as ingredients in an industrial process to make a product"

102. See 40 C.F.R. § 261.2 (2000). The regulations do consider the concept of marketability, but within the overall context of reuse. Materials will not be considered solid wastes if they are recycled by being "used or reused as effective substitutes for commercial products." Id. (emphasis added). If materials can be recycled in that manner, then no components of the materials end up as waste products that must be discarded.

103. See, e.g., Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co., 142 F.3d 769, 775 (4th Cir. 1998) (noting that other courts looked to whether materials "were to be reused entirely or reclaimed and then reused" and to "the state of the product at the time of transferal" and their usefulness without reconditioning) (emphasis added); Chatham Steel Corp. v. Brown, 858 F. Supp. 1130, 1140 (N.D. Fla. 1994) (discussing the factors courts use to distinguish between wastes and products, such as whether a receiving party would use the product in the manner for which it was manufactured).


105. Gould, 933 F. Supp. at 436 ("The test for successfully asserting what has become known as the 'useful product' defense is whether the commodity being sold will continue to be used for its originally intended purpose."); see also Freeman v. Glaxo Wellcome Inc., 189 F.3d 160, 164 (2d Cir. 1999) (finding no waste, thus no disposal, when materials transferred were "unused" chemicals that the manufacturer "could ordinarily use in its laboratories" that the purchaser could "use...in their unadulterated form"); Chatham Steel Corp., 858 F. Supp. at 1140 ("When a party sells a product incidentally containing a hazardous substance but having value as being useful, for the purpose for which it was manufactured, then the transaction is less likely to be an 'arrangement' to dispose of a hazardous substance.").
they are not wastes.\textsuperscript{106} The RCRA regulations go a step beyond allowing only immediate reuse. They allow transformation \textit{then} reuse.

Despite the merit of the RCRA analysis, the common use of a "multi-factor" analysis by courts\textsuperscript{107} should raise concerns that \textit{Catellus} did not address in enough detail all the aspects of CERCLA arranger liability.\textsuperscript{108} Even if a material can be characterized as a waste, the defendant's actions with regard to the material may not have been an arrangement for disposal at the time of transfer. \textit{Catellus} did not clearly delineate multiple steps in its analysis.\textsuperscript{109} The last substantive sentence of the opinion stated that "it is \textit{sufficient}" that the batteries had the characteristic of waste, as defined under RCRA, at the time that it was delivered to the other party.\textsuperscript{110} Earlier, however, the court stated that the fact that the battery parts would "have to be gotten rid of" at some point in the recycling process provided "further support" for its holding.\textsuperscript{111}

Other courts, however, cite the \textit{Catellus} holding with approval without mentioning the RCRA analysis.\textsuperscript{112} This raises questions

\begin{itemize}
\item \textsuperscript{106} § 261.2 (emphasis added).
\item \textsuperscript{107} See Concrete Sales & Servs., Inc. v. Blue Bird Body Co., 211 F.3d 1333, 1336–37 (11th Cir. 2000) (noting additional factors such as the transferring party's knowledge and intent, and whether the party made the "crucial decision" to place hazardous substances with a particular facility); Pneumo Abex, 142 F.3d at 775 (discussing both materials-related factors and others, such as the intent of parties); United States v. Am. Cyanamid Co., Inc., No. CIV.A. 2:93-0654, 1997 U.S. Dist. LEXIS 4413, at *16–*17 (S.D. W. Va. Jan. 27, 1997) (citing factors considered by courts in determining arranger liability in addition to those related to the status of the material, including "knowledge of and control over" disposal, "intent of the party," and the seller's business practices in transferring similar materials).
\item \textsuperscript{108} For example, one court applying multiple factors (including the waste status factor) emphasized that "none of the factors" is "dispositive." Concrete Sales, 211 F.3d at 1336. This implies that, in the Eleventh Circuit's view, no court should rely on just the waste status of a material transferred to determine liability.
\item \textsuperscript{109} See supra notes 50–53 (discussing \textit{Catellus}’s holding).
\item \textsuperscript{110} Catellus Dev. Corp. v. United States, 34 F.3d 748, 752 (9th Cir. 1994) (emphasis added). This implies that the finding is sufficient to hold liability. Another court interpreted \textit{Catellus} as imposing liability based on the waste status of the material alone. See Douglas County v. Gould, Inc., 871 F. Supp. 1242, 1246 (D. Neb. 1994) (recognizing that, under \textit{Catellus}, "disposal" necessarily included the concept of waste, and that "because spent batteries could be defined as waste, [the \textit{Catellus} defendant] could be held liable for arranging for their disposal"); see also Cadillac Fairview/Cal., Inc. v. United States, 41 F.3d 562, 565–66 (9th Cir. 1994) (quoting \textit{Catellus} to support the proposition that waste status is sufficient for a finding of summary judgment).
\item \textsuperscript{111} In other words, the court is implying by its use of passive voice that someone would have to take action with regard to the wastes. The defendant, knowing this, was thus arranging for a disposal.
\item \textsuperscript{112} See, e.g., Pneumo Abex, 142 F.3d at 775 (stating that \textit{Catellus} focused on the intent of the parties to determine that the seller might be liable); American Cyanamid, 1997 U.S. Dist. LEXIS 4413, at *17 (citing \textit{Catellus}’s holding that parties would need to "get rid of" waste); Sea
though about what exactly supported the holding in *Catellus*. Several courts state that *Catellus* was decided based on other factors. For example, *Gould, Inc. v. A&M Battery* cited *Catellus* for the proposition that a material used for its “originally intended purpose” is not a waste that is being disposed.\(^\text{113}\) *Douglas County v. Gould, Inc.* relied on the proposition in *Catellus* that a waste material is one that had to be “gotten rid of.”\(^\text{114}\) Ultimately, however, these factors can be reconciled with *Catellus*’s analysis, as they relate back to the RCRA distinction between waste and product within the definition of disposal.

Whether a material is used for its “original intended purpose,” the question from *A&M Battery*, is simply another way of asking whether it meets the RCRA requirements of being a “commercial substitute” or “feedstock” in an industrial process. As with the previous factors discussed earlier,\(^\text{115}\) the original intended purpose test could be unified and more precise if couched in RCRA terms. Similarly, the *Douglas County* “got rid” of analysis is only a more conversational way of saying that a party “disposed” of it.\(^\text{116}\)

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\(^\text{113}\) *Lion, Inc. v. Wall Chem. Corp.*, 974 F. Supp. 589, 599 n.17 (S.D. Tex. 1996) (noting that *Catellus* found an arrangement for disposal based on “the inherent generation of hazardous waste” in the transaction at issue).


\(^\text{115}\) *Douglas County*, 871 F. Supp. at 1246–47. Under the *Catellus* facts, in other words, there was always a useless part of the battery that would have to be removed and discarded before valuable lead could be recovered. That discarded portion of the battery was thus definable as a waste product.

\(^\text{116}\) One court that carried out this replacement of terms admitted that it was doing nothing more than replacing one term with another. In *Ekotek Site PRP Comm. v. Self*, 932 F. Supp. 1328, 1336 (D. Utah 1996), the court stated that in order to hold a person responsible for arranger liability, the person must have intended to ‘get rid of its hazardous wastes.’” *Id.* It explained that it used the word “dispose” in its “ordinary sense, not in any statutory sense.” *Id.; see also Louisiana Pac. Corp. v. Asarco, Inc.*, 24 F.3d 1565, 1575 (9th Cir. 1994) (holding a producer of slag as a by-product liable where the by-product was a material that “the producers wanted to get rid of whether they could sell [it] or not”); Reger, *supra* note 27, at 1253–54 (suggesting that “‘arranged for’ disposal” should mean “participat[ing] in the decision to ‘get rid’ of a substance”) (citing *Ekotek Site PRP Comm. v. Self*, 948 F. Supp. 994, 997 (D. Utah 1996)). The phrase “get rid of” is extremely problematic in the context of a technical environmental statute. This is because, in common usage, “get rid of” is not always synonymous with “disposal,” and does not preclude the possibility of reuse. For example, a retail manager might say to salespersons “we need to get rid of last year’s model or designs before we order any more of this year’s.” In contrast, a homeowner might say “let’s get rid of this old carpet.” The second usage is closer to the statutory definition of disposal than the first. However, in all cases the material in question may or may not be reused. The “get rid of language” does not expand on the analysis of whether and how the material is ultimately used.
But not all factors employed by courts can be reduced solely to a waste product analysis. The phrasing of the CERCLA arranger liability provision logically requires further findings beyond the general nature of the product at the time the hazardous substances are released into the environment. Namely, CERCLA imposes liability only on those “who by contract, agreement, or otherwise arrange” for disposal, and not, for example, simply on those “who dispose.” Once a court determines that a waste has been transferred, the key remaining question is how to link the defendant to the waste. To do this the court must characterize what it means to “contract, agree or otherwise arrange” for the disposal of a waste.

II. THE PARADOX OF INTENTIONAL ACTION IN CERCLA ARRANGER LIABILITY

Given that CERCLA does not define the phrase “arranged for,” courts must find an equitable means to distinguish arrangements to dispose of substances from arrangements to recycle or reuse them. Looking first at the plain language of the statute, a court has several choices in construing the phrase “contract, agree or otherwise arrange for disposal.” The phrase is open to a strict liability interpretation, a specific intent interpretation, and an intermediate interpretation.

Strict liability lies at one end of the statutory interpretation spectrum. Under this view, to be liable, a party must simply make any arrangement that leads to the release of a hazardous substance. At first glance, CERCLA would seem to require such an interpretation of arranger liability. Courts and commentators have invariably labeled CERCLA a “strict liability” statute. Policy

117. Most notably, the factor of intent, cannot, on its face, be reduced to waste-definition analysis. Intent, after all, addresses a party’s state of mind and not the nature of the product. See, e.g., Pneumo Abex, 142 F.3d at 775. Nevertheless, the nature of the product often depends on the party’s state of mind. See infra notes 156–59 and accompanying text.

118. See South Fla. Water Mgmt. Dist. v. Montalvo, 84 F.3d 402, 406 (11th Cir. 1996) (stating that Congress has left the task of defining “arranged for” to the courts, some of which have considered intent of parties to determine whether an arrangement took place); United States v. New Castle County, 727 F. Supp. 854, 871 (D. Del. 1989) (noting that Congress did not “illuminate the trail” to the intended scope and meaning of arranger liability); Reger, supra note 27, at 1253 (“The most effective way to improve the national uniformity of CERCLA’s liability determinations for arrangers would be for Congress to expressly define the term ‘arranged for.’ ”).

119. See United States v. Cello-Foil Prods., 100 F.3d 1227, 1231 (6th Cir. 1996) (“At first blush, discussing state of mind . . . appears inappropriate.”).

120. See Pneumo, 142 F.3d at 774 (citing Bell Petroleum, 3 F.3d 889, 897 (5th Cir. 1993)) (stating that “CERCLA imposes strict liability”); United States v. Monsanto Co., 858 F.2d 160, 167 (4th Cir. 1988) (noting “the overwhelming body of precedent has interpreted [CERCLA] section 107(a) as establishing a strict liability scheme”); Levin Metals Corp. v. Parr-Richmond
reasons, reflecting common law treatment of abnormally dangerous activities, support the imposition of strict liability. Nevertheless, simply labeling CERCLA a strict liability statute does not provide a clear rule of application in all cases given that strict liability can mean different things to different sources. Depending on the court or commentator, "strict liability" under CERCLA can mean liability "without fault," liability "without intent," or liability "without regard to causation."
At the opposite end of the statutory construction spectrum would be an interpretation that isolates the phrase “contract, agree or otherwise arrange for disposal” from the broader CERCLA context. Such a specific intent approach would require that a party intentionally and knowingly called for the disposal of a hazardous substance in order to be liable. No court has explicitly adopted the view that specific intent is required before liability can be imposed.¹²５ Rather, courts have generally adopted what amounts to a hybrid between the specific intent and strict liability views, looking to intent as a factor in the overall arranger liability analysis.¹²６ Therefore, even though CERCLA is a strict liability statute, courts have accepted that intent must play some role in arranger liability analysis.

By stating simply that “intent” is a factor, without indicating the level of intent required, many courts leave the intent issue determination ambiguous.¹²７ Nevertheless, in a more instructive

_Causation, and Responsibility, 78 Minn. L. Rev. 1493, 1507–08 (1994) (noting that CERCLA does not require a finding of causation).

¹²５. The court in _United States v. Vertac Chem. Corp._, 966 F. Supp. 1491, 1501 (E.D. Ark. 1995) specifically noted that CERCLA does not require “proof of specific intent to arrange for the disposal of hazardous substances.” See also _United States v. TIC Inv. Corp._, 68 F.3d 1082, 1089 (8th Cir. 1995) (rejecting the defendant’s argument that CERCLA requires “specific intent” to arrange for the disposal of hazardous substances). There is room to debate whether another court, _Amcast Indus. Corp. v. Detrex_, 2 F.3d 746 (7th Cir. 1993), which stated in curt terms that intent is an integral part of arranger liability analysis, implying that specific intent to arrange to dispose was required. However, the _Amcast_ court stated simply that “[t]he words ‘arrange for’ imply intentional action,” and did not mention “specific intent” per se. Id. at 751. For a more complete analysis of the opinion, see infra notes 140–50 and accompanying text. One commentator stated that _Amcast_ adopted a “specific intent approach” without explaining what it meant. Lannetti, _supra_ note 120, at 296.

¹²６. The Eleventh Circuit Court of Appeals, in _Concrete Sales and Servs, Inc. v. Blue Bird Body Co._, 211 F.3d 1333 (11th Cir. 2000), stated that a factor in arranger liability is whether “the party intended to dispose of a substance at the time of the transaction.” Id. at 1336–37 (citing _South Fla. Water Mgmt. Dist. v. Montalvo_, 84 F.3d 402, 406–07 (11th Cir. 1996)). While this does not mean that intent to dispose is required, it does imply that liability will be less likely if such an intent is not present. See also _Pneumo_, 142 F.3d at 775 (citing several decisions in which intent is a factor in courts analysis); _United States v. Am. Cyanamid Co., Inc._, No. CIV.A.2:93-0654, 1997 U.S. Dist. LEXIS 4413, at *16–*17 (S.D. W. Va. Jan. 27, 1997) (citing knowledge, intent and purpose among several factors in determining liability).

¹²７. For example, in _American Cyanamid_, the court simply states that a factor for determining whether there was an arrangement for disposal is “the intent of the party.” 1997 U.S. Dist. LEXIS 4413, at *17. This leaves open the question, “intent of the party to do what?” Ambiguity does have its benefits in this area of law because it arguably enables a better “fact-specific inquiry into the nature of the transaction.” _Pneumo Abex_, 142 F.3d at 775 (citation omitted). Nevertheless, it does not encourage uniformity across courts that Congress and commentators might like to see. The fluidity and complexity of strict liability and the specific intent analysis complicates the interpretation and application of environmental laws. See Susan F. Mandiberg, _The Dilemma of Mental State in Federal Regulatory Crimes: The Environmental Example_, 25 Envtl. L. 1165, 1179–1204 (1995) (discussing the development of strict liability laws).
opinion, the *Cello-Foil* court explained the role of intent in arranger liability determinations.\(^{128}\) Inherent in the act of arranging is an intention to arrange *for* something. In determining whether that party arranged or contracted for something, the court must determine exactly what that "something" is.\(^{129}\) Given that an essential issue in contract law is what the parties to a contract or arrangement intended,\(^{130}\) intent must play a role in determining arranger liability.\(^{131}\)

The *Cello-Foil* court also used language that more closely resembled the strict liability outlined above. For example it stated that once the court determines that the party has the requisite "intent to be an arranger," then "strict liability" takes effect.\(^{132}\) Notably the court did not require intent to dispose, but only intent to arrange.\(^{133}\)

At another point it stated, with careful wording, that the inquiry in arranger liability cases is whether “the party intended to enter into a transaction that included” an ‘arrangement for’ the disposal of a...
hazardous substance.”134 By wording the rule in such a way, the Cello-Foil court implies that a party need not intend a disposal at the time of the transaction.135 Rather, the party need only intend to enter into a transaction that can be characterized as an arrangement for disposal of a hazardous substance.136 Explaining the application of the rule, the Cello-Foil court noted that courts should not require a “specific intent” to arrange for a disposal in a “particular manner or at a particular site.”137 The party who made the arrangement is liable for damages caused by the disposal, “regardless of the party’s intent that the damages not occur.”138 Likewise, a party can be responsible for “arranging for” disposal, even when it has no control over the process leading to the release of substances.139

The Cello-Foil court’s discussion of intent is the most complete in arranger liability case law, but it is not the only view on the subject. The full extent of the intent inquiry is debatable given the ambiguity in the CERCLA statutory terms.140 If the intent inquiry is taken too far in favor of defendants, however, the strict liability nature and purpose of CERCLA seems in jeopardy.141

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134. 100 F.3d at 1231.
135. Compare, for example, the wording of a contrasting rule announced by another court, Concrete Sales, when it stated that a factor is “whether the party intended to dispose” of a hazardous substance. Concrete Sales & Serv., Inc. v. BlueBird Body Co., 211 F.3d 1333, 1336-37 (11th Cir. 2000). Note how the intent is more directly applied to the disposal itself, rather than to the arrangement or the mere transaction, as in Cello-Foil.
136. The passive voice is essential in this phrase. It is not the party making the transaction who necessarily intends to characterize the transaction as a disposal. Naturally, many parties transferring hazardous substances wish to have the transaction considered merely a sale of a useful material.
137. 100 F.3d at 1232.
138. Id.
139. Id. (citing Cadillac Fairview/California, Inc. v. United States, 41 F.3d 562, 565 (9th Cir. 1994)).
140. See supra notes 118–119 and accompanying text. See generally United States v. Wade, 577 F. Supp. 1326, 1331 (E.D. Pa. 1983) (“It leaves much to be desired from a syntactical standpoint ... [and] the legislative history CERCLA has acquired a well-deserved notoriety for its unusually riddled by self-serving and contradictory statements.”).
141. The complexity of the intent analysis in arranger liability cases results from the conjunction of two vastly different inquiries, one based on the mere status of a party as “one who arranges” and the other based on a strict liability connection between the defendant and response costs. Above both inquiries, however, CERCLA calls for devotion to an overall statutory purpose, namely ensuring that those responsible for disposing pay the costs of cleanup. See United States v. Mountain Metal Co., 137 F. Supp. 2d 1267, 1274 (N.D. Ala. 2001) (citing CERCLA’s “overwhelmingly remedial” statutory scheme); United States v. Mottolo, 605 F. Supp. 898, 902 (D.N.H. 1984) (“Given the remedial nature of CERCLA, its provisions should be afforded a broad and liberal construction so as to avoid frustration of prompt response efforts or so as to limit the liability of those responsible for cleanup costs beyond the limits expressly provided.”).
v. Union Electric Co., the court stated that it would not “attribute the negligent unforeseeable conduct of the buyer’s agents to the seller.” Instead, the court focused on whether the seller “knew or could ever have known” what the buyer intended to do with the product, and whether “the primary purpose and likely effect” of the sale were to bring about a release. Similarly, in Amcast Industrial Corp. v. Detrex Corp., the court arguably applied a negligence standard when it could have used a more appropriate strict liability standard to reach the same result. In overly cautious terms, the court refused to hold a selling party liable for an “accidental spilling” of hazardous substances en route to a buyer.

CERCLA calls for a much broader interpretation than that stated by G.J. Leasing or Amcast. Both courts’ rule of law would be incorrect under CERCLA if the initial transfer to put the products in the buyer’s hands had itself been an arrangement for disposal. If that

142. 54 F.3d 379 (7th Cir. 1995). In G.J. Leasing, a landowner sold a parcel of land on which stood a decommissioned factory, insulated by asbestos. Id. at 382. The asbestos insulation was not being released into the environment at the time of transfer, as the building and its materials were intact. Id. at 382–83. However, the buyer demolished a portion of the building, causing a release of asbestos. Id.

143. Id. at 385. The court would not do so even “in Superfund Cloudcuckooland.” Id. That the court would use such an expression to describe this area of law is a concession that it is venturing into murky legal waters, and that often CERCLA calls for results that run counter to common law equitable principles.

144. Id.

145. 2 F.3d 746 (7th Cir. 1993).

146. In Amcast, a manufacturer, Detrex, regularly arranged with a transportation service to have its newly manufactured triclylethylene (TCE), a hazardous substance, shipped to a purchasing secondary manufacturer. 2 F.3d at 747–48. As a part of the transfer to the second manufacturer the transport vehicle occasionally would spill TCE on the ground at the plant by accident, thereby causing a release of hazardous substances. Id. at 748. The court held that Detrex was not liable under CERCLA for the cleanup costs associated with the accumulated spills. Id. at 751.

147. Id. at 751. The court stated that “no one arranges for an accident” unless it is, in the rare case, a staged accident. Id. Consequently, the court reasoned that in the context of a party who is arranging for the transportation of a product, “disposal” excludes accidental spillage. This contrasts with the context of the operator of a hazardous waste dump, when “disposal” includes accidental spillage. Id. Essentially, then, the court would not attribute the unforeseen conduct of an independent contractor to the seller, and accordingly held the seller not liable for an accidental release of hazardous substances. Id.

148. To make a bright-line rule which releases a defendant from liability simply because the release was unforeseen would negate the entire strict liability scheme of the statute. CERCLA does not impose liability on those who “arrange for a release of hazardous substances;” as the Amcast court would have us believe. Id. (focusing on the ultimate release of hazardous substances, not necessarily on a disposal which might have taken place earlier). Rather, CERCLA imposes liability on those who have arranged for a disposal of hazardous substances, where, and however, a release of such hazardous substances occurs. An arranger simply need not know or intend how the substances will be released in order to be liable. See United States v. Cello-Foil, 100 F.3d 1227, 1231 (6th Cir. 1996).
were the case, the seller could be held liable for a later accidental or negligent release of hazardous substances. Consequently, \textit{G.J. Leasing} and \textit{Amcast} focus on the wrong legal issue, even though the outcome of the cases might have been warranted on the facts.\footnote{See, \textit{e.g.}, \textit{Freeman v. Glaxo Wellcome}, 189 F.3d 160, 164 (2d Cir. 1999) (finding that when chemicals were negligently released at buyer's plant, seller was not held liable for arranging for a disposal on grounds that the material transferred was initially not a waste); \textit{United States v. Wedzeb Enters., Inc.}, 844 F. Supp. 1328 (S.D. Ind. 1994) (describing how General Electric sold unused working transformers to Wedzeb, who was a broker for surplus, unused, fully operational electrical components, and who did not change the state of the capacitors in any way, and when a fire destroyed the Wedzeb warehouse causing the release of PCB's, General Electric was not liable as an arranger to dispose on grounds that the transformers were transferred as a useful product); \textit{cf. Catellus Dev. Corp. v. United States}, 34 F.3d 748, 750–52 (9th Cir. 1994) (holding a buyer liable when it sold unusable batteries to a battery breaker which negligently placed bits of battery casings on the land surrounding the plant).} The more accurate inquiry is simply whether the initial transfer from seller to buyer was an arrangement for disposal, and not whether the actual release of the materials transferred into the environment was accidental. This is because, in many cases, it is presumably a negligent act of a buyer or a buyer's agents that ultimately causes the release of the substances.\footnote{For example, if a release is foreseeable, this is evidence that the transferor made an arrangement to dispose. Likewise, if a release is unforeseeable, this is evidence that the transferor did not make such an arrangement. Still, other factors could tend to show that the transferor made an arrangement to dispose. Even if the release was caused by an unforeseeable negligent act, the material may have had no use as a product and may have been abandoned by the transferor.} Consequently, the nature of the act causing the release should not be the dispositive factor for determining whether the original transferor should be liable as an arranger. Rather, the ultimate release should be considered only insofar as it plays a role in shaping the initial arrangement to transfer hazardous substances.\footnote{\textit{A.M. Int'l, Inc. v. Int'l Forging Equip. Corp.}, 982 F.2d 989 (6th Cir. 1993); \textit{Amcast}, 2 F.3d at 751 (announcing that the term "arranged for . . . implies intentional action").}

The \textit{Cello-Foil} discussion illustrates that one cannot simply say that arranger liability "requires intent," as several courts and commentators have done.\footnote{\textit{Amcast}, 2 F.3d at 751 (announcing that the term "arranged for . . . implies intentional action").} If courts accept intent as an element in arranger liability, the issue becomes how courts are to measure and characterize such intent. As in any case in which courts must determine a party's intent, evidence describing the subjective state of mind of the actor, such as testimony of the actor himself, will not
necessarily be the most probative.\textsuperscript{153} For example, many courts accept the premise that by merely framing a transaction as a sale a party will not automatically free itself from arranger liability.\textsuperscript{154} Rather, frequently the most probative evidence of intent will be the “objective evidence of what actually happened,” given that “normally, the actor is presumed to have intended the natural consequences of his deeds.”\textsuperscript{155}

Consequently, courts, in their intent analysis, may look at whether the transferring party could have otherwise used the materials in its own business,\textsuperscript{156} whether the purchasing party could use the materials without transforming them first,\textsuperscript{157} whether the selling party sold the product on the open market, and whether a party transferring a product for treatment intentionally left residue of hazardous substances inside the product.\textsuperscript{158} These factors overlap with the prior inquiry into whether the material transferred was a waste,\textsuperscript{159} thereby illustrating a common link in the useful product and recycling analysis. This overlap shows that the state of the material at the time of transfer will often be the determinative factor in finding liability.

\begin{itemize}
\item \textsuperscript{153} \textit{Cello-Foil}, 100 F.3d at 1233 (rejecting the lower court’s “overly restrictive view on what is necessary to prove intent, state of mind, or purpose” based solely on evidence of the transferring party’s indicated purpose).
\item \textsuperscript{155} \textit{Cello-Foil}, 100 F.3d at 1233 (inferring intent “from the indirect action of the parties”) (citations omitted).
\item \textsuperscript{156} \textit{See, e.g.}, Freeman v. Glaxo Wellcome, Inc., 189 F.3d 160, 164 (2d Cir. 1999) (noting that the chemicals were ordinarily used in the buyer’s laboratories).
\item \textsuperscript{157} \textit{See, e.g.}, A.M. Int’l, Inc. v. Int’l Forging Equip. Corp., 982 F.2d 989, 999 (6th Cir. 1993) (looking to whether “both [the buyer] and [the seller] intended that the chemicals would be used for the purposes for which they had been bought”—the electroplating and heat treating business); United States v. Petersen Sand & Gravel, 806 F. Supp. 1346, 1354 (N.D. Ill. 1992) (focusing on whether the arrangement called for the buyer to entirely use up the product for the purpose for which it was sold).
\item \textsuperscript{158} \textit{Cello-Foil}, 100 F.3d at 1233–34 (remanding the case to the trier of fact to determine whether the defendants took “affirmative acts to dispose” of unused solvent by leaving amounts of solvents in drums sent to the supplier to be returned and reused when emptied and filled with new solvents).
\item \textsuperscript{159} \textit{See supra} notes 57–61 and accompanying text.
\end{itemize}
The arrangement to dispose in any given case and the "waste" product are intimately related. Materials vary in their waste status according to the way they are used. In turn, materials vary in the way they are used according to the nature of the arrangement between parties. Courts struggled to balance waste-processing standards under RCRA with other factors for characterizing arrangements to dispose. Although the new amendments only address recycled products and not all useful products, they nevertheless, help to unite judicial factors with waste-processing standards into a unified statutory provision.

III. FITTING THE RECYCLING AMENDMENTS INTO THE OVERALL LIABILITY SCHEME

The recycling amendments\textsuperscript{160} expound on both intent-based factors and regulatory waste status factors. They combine the analysis of the first two parts of this Comment and identify factors that Congress deems appropriate for exempting some arrangements from CERCLA liability. Nevertheless, although they validate concepts found in the RCRA regulations and the arranger liability case law, they are oddly limited to a specific class of materials and procedures.\textsuperscript{161} The amendments consequently raise the question of whether an exception to liability might result for other analogous materials and other similar processes. If so, Congress should have drafted the amendments using broader language to take advantage of the opportunity to clarify the CERCLA useful product and recycling defenses. If not, Congress has changed the law by limiting the explicit recycling exemption to only certain materials and processes.

The amendments to CERCLA explicitly carve out a statutory exemption to arranger liability that parallels certain aspects of the useful product and recycling defenses. One amendment sets out a "liability clarification" whereby a person who arranged for "recycling of recyclable material" will not be liable for arranging to dispose of or treat a hazardous substance.\textsuperscript{162} Concurrently the statute indicates that liability for all other types of processing and all other types of

\textsuperscript{160} 42 U.S.C.A. § 9627 (West Supp. 2001).
\textsuperscript{161} See infra notes 164–179 and accompanying text.
\textsuperscript{162} § 9627(a). Note a redundancy on the broadest level of this amendment, given the exception for "recycling of recyclable material." Id. § 9627(a)(1). Theoretically, Congress could have provided an exemption for the "recycling of any material." If a person successfully recycled such material, it would necessarily be a recyclable material.
materials should still be determined without regard to this section.163 The statute makes a bright-line distinction between “recycling transactions” and “non-recycling transactions” based on whether they involve specifically enumerated “recyclable materials:” such as scrap paper, plastic, glass, metal, rubber, and spent batteries.164

The amendments create rigid rules, paralleling concepts in the case law and RCRA regulations, as to what processing constitutes a recycling transaction.165 Under the amendments, the transferor of the materials must prove that “[a] market existed for the recyclable material;166 substantial portions of the recyclable material were made available for use as feedstock for the manufacture of a new saleable product;167 [the] recyclable material could have been replaced or substituted for a virgin raw material;”168 and that the person exercised reasonable care to determine that the facility handling the recyclable material complied with applicable environmental laws.169

163. Id. § 9627(a)(2). Additionally, the amendments assure that “[n]othing in this section shall be construed to affect any defenses or liabilities of any person to whom subsection (a)(1) ... does not apply.” Id. § 9627(e) (entitled “limitation on statutory construction”).

164. Id. § 9627(b). The term explicitly does not include “shipping containers of a capacity from 30 liters to 3,000 liters, ... having any hazardous substance ... contained in or adhering thereto.” Id. § 9627(b)(1). It also does not include “any item of material that contained polychlorinated biphenyls [PCB’s] at a concentration in excess of 50 parts per million.” Id. § 9627(b)(2).

165. Consider, in contrast, how courts have been willing to weigh various factors relating to a transfer of materials for recycling, without outright requiring that all factors be present. See Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co., 142 F.3d 769, 776 n.4 (4th Cir. 1998). For the comparative discussion of the judicial factors, see supra notes 92-103 and accompanying text.

166. § 9627(c)(2). This codifies the factor employed by the RCRA regulations in analyzing whether a particular material had a market. 40 C.F.R. § 261.2(e)(ii). The material must also meet a “commercial specification grade,” specified in 42 U.S.C.A. § 9627(c)(7), thereby enhancing its marketability. See Morton Int’l, Inc. v. A.E. Staley Mfg. Co., 106 F. Supp. 2d 737, 747 (D.N.J. 2000) (“[T]he burden falls on the arranger to show that all the statutory criteria are met.”).

167. § 9627(c)(3). This accords with the factors found in the RCRA regulations, which provide that a recycled material is not a solid waste when it is “used or reused as ingredients in an industrial process to make a new product ... or used or reused as effective substitutes for commercial products.” Identification and Listing of Hazardous Wastes, 40 C.F.R. § 261.2(e)(i)-(ii) (2001).

168. § 9627(c)(4). Alternatively, to be exempt, the product made from the recyclable material “could have been a replacement or substitute for a product made, in whole or in part, from a virgin raw material.” Id. This accords with the factors found in the RCRA regulations, which provide that a recycled material is not a solid waste when it is “[r]eturned to the original process from which [it was] generated, and returned as a substitute for feedstock materials.” 40 C.F.R. § 261.2(e)(iii).

169. 42 U.S.C.A. § 9627(c)(3)-(6). One such set of laws is, of course, RCRA, and the RCRA regulations dealing with recycling.
The most striking component to the analysis is the requirement that the transferring party exercise "due care" when choosing the destination for the material. A party will not be exempt from liability if it had "an objectively reasonable basis to believe" that the recyclable material would not be recycled, or that a hazardous substances had been added to the recyclable material for purposes other than processing for recycling.\textsuperscript{170} To determine what is an "objectively reasonable basis" for this belief, the amendments suggest factors that courts previously had not explicitly considered.\textsuperscript{171} For instance, factors include "the size of the person’s business, customary industry practices, [and] ... the ability of the person to detect the nature of the consuming facility’s operations."\textsuperscript{172} Despite the abundance of new language, such as "due care" and "customary industry practices," the amendments do no more than affirm the trend in the law that began after CERCLA was enacted that allows a detailed inquiry into evidence of intent in CERCLA arranger liability.\textsuperscript{173}

The recycling amendments enumerate many factors found in arranger liability case law, and thus, the majority of established judicial rules are reconcilable with these new amendments. In determining arranger liability courts have considered factors such as: evidence of the party's intent at the time of the transfer;\textsuperscript{174} the purpose and inevitable consequences of the transaction;\textsuperscript{175} whether the substance was manufactured as a principal business product or a by-product;\textsuperscript{176} whether, before or after the transaction in issue, the

\textsuperscript{170} Id. § 9627(f)(1)(A)(i)-(B). This is striking in the same way that judicial analysis of a party's intent was striking, given the overwhelming strict liability nature of the statute.\textsuperscript{171} Id. § 9627(f)(2).\textsuperscript{172} Id.\textsuperscript{173} See supra notes 117–38 and accompanying text (discussing the relatively recent acceptance and understanding of the role of intent in "an arrangement to dispose"); see also Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, tit. I, § 101, 100 Stat. 1613, 1616 (1986) (codified in relevant parts at 42 U.S.C. § 9601(35) (1994)) (exempting owners of contaminated property who took “all appropriate inquiry” into whether the land was contaminated before purchase from liability).\textsuperscript{174} See, e.g., United States v. Cello-Foil Prods., Inc., 100 F.3d 1227, 1231 (6th Cir. 1996). This parallels the due care analysis of the amendments. § 9627(c)(6)(A)–(B).\textsuperscript{175} See, e.g., United States v. Am. Cyanamid Co., No. CIV.A.2:93-0654, 1997 U.S. Dist. LEXIS 4413, at *16 (S.D. W. Va. Jan. 27, 1997). Courts have measured inevitable consequences of the sale through customary industry practices. For example, the Cello-Foil court cited the "commercially employed methods" of parties in looking at whether defendants took reasonable care to recycle, just as the amendments measure a reasonable belief by looking at "customary industry practices." Cello-Foil, 100 F.3d 1227, 1234 n.6; see also § 9627(f)(C)(2).\textsuperscript{176} A&W Smelter and Refiners, Inc. v. Clinton, 146 F.3d 1107, 1113 (9th Cir. 1998) (noting that ore produced by a mining company was not "a by-product" because it had
seller regularly discarded the substance as waste,\textsuperscript{177} and whether the product had value on the market.\textsuperscript{178} Thus, courts applied standards of due care, marketability, and re-usability of useful products consistently in all situations in which materials might pass from one entity to another, and not just in situations involving "recycling" industries.\textsuperscript{179}

Nevertheless, the amendments should change the courts' views on which factors are determinative. For instance, in \textit{Gould, Inc. v. A&M Battery & Tire Service},\textsuperscript{180} dozens of companies sold lead-acid batteries that could no longer supply electric current to a recycling facility.\textsuperscript{181} Holding the companies liable for arranging to dispose of a hazardous substance,\textsuperscript{182} the court stated that "[t]he test for successfully asserting . . . the 'useful product' defense is whether the commodity being sold will continue to be used for its originally intended purpose."\textsuperscript{183}

The recycling amendments do not rely on this test and thus effectively disavow the reasoning in \textit{Gould} and any decisions decided wholly upon that test.\textsuperscript{184} The "original intended purpose" test is stated in a way that is harsher than the amendment's requirement that the material be a substitute for any product made up of any virgin raw material. For the amendments or the RCRA regulations, it does not matter whether recycled lead plates from a battery are used again in batteries or some completely different product.\textsuperscript{185} Under the "original intended purpose" case law, it does matter. Consequently, the early case law limits recyclers more than Congress intended.

\textsuperscript{177} Louisiana-Pac., Corp. v. ASARCO, Inc., 24 F.3d 1565, 1575 (9th Cir. 1994) (noting that the defendant would have had no use for the slag it produced as a result of its mining process and that it had previously dumped some in a bay). This parallels the statutory reasonable care inquiry. § 9627(c)(6)(B)–(C), (f)(2).

\textsuperscript{178} See, e.g., United States v. Wedzob Enters., Inc., 844 F. Supp. 1328, 1335 (S.D. Ind. 1994). This parallels the marketability inquiry described in section 9627(c)(2).

\textsuperscript{179} See \textit{supra} notes 100–03 and accompanying text.


\textsuperscript{181} \textit{Id.} at 434–36.

\textsuperscript{182} \textit{Id.} at 436.

\textsuperscript{183} \textit{Id.}

\textsuperscript{184} For similar applications of this rule, see \textit{supra} notes 102–04 and accompanying text (discussing other decisions employing similar language).

\textsuperscript{185} See, e.g., 40 C.F.R. § 261.2(e)(1)(ii) (2000) (allowing reuse in commercial products, and not just in the same type of product).
Contrary to the ruling of one appellate court, however, the outcome of Gould I is in accord with the new amendments. The Third Circuit vacated Gould I,\textsuperscript{186} holding instead that the amendments clearly exempt from liability all those who send batteries to be recycled, either in whole or in part.\textsuperscript{187} Superficially, the amendments seem to exempt all used-battery sellers from liability. But the amendments do not require such a broad reading; rather the amendment can be interpreted to allow recycling of whole batteries under only limited circumstances. As such, the amendments should not be read so broadly as to invalidate the Gould I court's analysis as two recent courts have done.\textsuperscript{188} The recycling amendments contain special provisions for the type of transaction involved in Gould: a transaction involving spent lead-acid batteries.\textsuperscript{189} If certain conditions are met, transactions involving spent lead-acid batteries "shall be deemed to be arranging for recycling" and thus not a transaction that leads to liability under section 9607(a)(3).\textsuperscript{190}

At the same time, however, exceptions to the amendments' broad exclusion legitimate the distinction between whole batteries and battery lead absent useless parts. The recycling liability exclusion does not apply in any case where the defendant fails to meet any of the objective criteria relating to: 1) the market for the product, 2) its substantial reuse in a new product, 3) the care exercised to determine that the facility was in compliance with environmental laws, or 4) any knowledge the person had that the material would not be recycled.\textsuperscript{191} The defendant in Gould should not have been able to establish the substantial reuse factor regarding reuse of the battery.

In Gould, and other "battery-breaking" cases in which the seller ships whole batteries to a facility knowing that only the lead inside

\textsuperscript{186} 232 F.3d 162 (3d Cir. 2000).
\textsuperscript{187} Id. at 170–71.
\textsuperscript{188} Id. (arguing that the amendments exempt from liability all those who send batteries to be recycled, either in whole or in part); United States v. Mountain Metal Co., 137 F. Supp. 2d 1267, 1281 (N.D. Ala. 2001) (refusing to find a seller of spent lead acid batteries liable).
\textsuperscript{189} 42 U.S.C.A. § 9627(b) (West Supp. 2001).
\textsuperscript{190} Id. § 9627(e).
\textsuperscript{191} Id. § 9627(c) (stating that the defendant must "demonstrate by a preponderance of the evidence that all of the ... criteria were met at the time of the transaction"). In this regard, the amendments do not speak to whether other "tests" or "rules" could be used in arranger liability cases not involving legitimately "recycled materials" under the amendments. They leave open the possibility, thus, that other judicial factors such as the "original purpose test" are applicable in cases not involving "recycled materials." Id. Moreover, the amendments also leave open the possibility that, just because the recycling amendment "does not apply" in some cases, id. § 9627 (f), some element of the original judicial recycling defense might still otherwise apply. Id.
would be reused, the battery is not being reused substantially as feedstock for a new product. Conceivably, if only one portion of the battery, the lead, is being reused, there is a significant portion of the battery that is not being reused. If that is the case, the amount being reused is not substantial and the exclusion in the amendment should not apply. A broad reading of the amendments, under which all battery recyclers are excluded, would effectively change CERCLA rather than clarify it. Reading the amendments broadly ignores the careful distinctions within the CERCLA/RCRA definition of disposal, which requires recycling without discarding.

Even if the amendments' factors are reconciled in their language with existing case law, they remain, however, unwisely limited in application to only certain materials. Given the express limitations of the rules of the act to recycling transactions, the new amendments imply that traditional recyclable materials should be subject to different standards. The statutory construction cannon "expressio unis est exclusio alterius" would suggest that an express application

192. See United States v. Atlas Lederer Co., 85 F. Supp. 2d 828, 835 (2000) (mirroring the facts and law of Gould). In Atlas Lederer, a company sold used batteries to the United Scrap Lead Company, who would thereafter remove the lead from the batteries for use in other products. Id. at 834. The defendant argued that it had no purposeful intent to dispose of the acids, scrap casings, and other hazardous substances contained in the batteries, it did not know what the "battery-breaker" was going to do with the substances, and it never intended for or assisted with putting them on the ground. Id. at 833. The court, without applying the recycling amendments, asserted that such ignorance could not exculpate the defendant. Id. at 834. So long as the facts show that the defendant knew that recovery of lead from a battery involves the disposal of unwanted hazardous materials, this was enough to infer that it should have known that a release of hazardous substances would occur at the facility. Id. In other words, the burden of proof on this issue was on the defendant to show that he had no reason to know that the hazardous substances would be subsequently released, just as it would be under the amendments, in order to benefit from the statutory exclusion.

193. § 9627(c)(3).

194. The amendments may force battery recyclers to find uses for other parts of the battery other than the lead. The recycling amendments leave open this possibility. However, at least for the pre-amendment practice of "battery-breaking," the assumptions about substantiality of the non-lead, non-reused, parts of the battery are true. See Atlas Lederer, 85 F. Supp. 2d at 834 (noting testimony in the case that the "battery-breaking" process typically involved "cutting off battery tops, draining the acid into a pit and grinding the contaminated casings for disposal at the...site").


196. See 42 U.S.C.A. § 9627. The amendments indicate that a determination of liability under section 9607(a)(3) for any material that is not recyclable material shall be made without regard to subsections (b)–(e) of the amendments. Id. § 9627(a)(2).

of a set of rules to a specific class of materials, that is, traditionally recycled materials, excludes all other materials from that particular rule.\textsuperscript{198}

Because the amendments explicitly apply to certain recyclable materials, this may only mean that transactions with these materials will benefit from a certain presumption of non-liability. Consequently, while transactions with other materials may be subject to the same ultimate standards, they would not have the same presumption of non-liability.\textsuperscript{199} If the recycling amendments were enacted as a clarification of the original CERCLA provisions, and not a change in the law,\textsuperscript{200} they should have been written more broadly to address the recycling and useful product issues relating to all products.\textsuperscript{201}

Moreover, despite the assertions of 106th Congress,\textsuperscript{202} the 96th Congress that enacted CERCLA did not manifestly intend to isolate

\textsuperscript{198} Christensen, 529 U.S. at 582–83.

\textsuperscript{199} Despite, or perhaps because of, the reasonable possibility of such a difference in presumptions, the amendments go out of their way to state that differences in presumptions should not result from the amendments. See § 9627(l)(2). Whether Congress likes it or not, it has created a presumption when it states in strong terms that certain transactions absolutely will not be considered arrangements to dispose. See § 9627(a)(1). Courts might not adhere to previous doctrine because they might reason that Congress left some materials off the exempted list because it intended they normally should not be recycled at all.

\textsuperscript{200} See § 9627(a) (titling the section “Liability clarification”); Interstate Non-Ferrous, 99 F. Supp. 2d at 1151 (“The statute is rationally designed to achieve clarification and consistency in addressing recycler liability under CERCLA to serve the ultimate purpose of protecting the recycling industry and encouraging recycling.”). The debate over whether the new amendments are really a change in the law or rather only a clarification in the law has several consequences. The first consequence, of greater relevance to this Comment, is that Congress may be changing CERCLA to fit a new legal environment without outwardly admitting it has done so. The second consequence relates to the retroactivity of the new amendments. This has been the source of most of the litigation on the amendments since they were enacted and has led to very detailed opinions on the law of amendment retroactivity. See, e.g., Interstate Non-Ferrous Corp., 99 F. Supp. 2d at 1127–54 (analyzing the change and clarification issues relating to the recycling amendments).

\textsuperscript{201} As the previously discussed case law shows, the dividing line between a recyclable, reusable, and useful product is not an easy one to draw. See supra notes 29–31 and accompanying text. Some materials, for instance, may be “useful products” because they are “recyclable products” or vice versa. Addressing one class of materials without recognizing the underlying principles that apply to all classes is patently unhelpful.

\textsuperscript{202} For instance, Senator Lott asserted that “when Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), members of both bodies did not want, and did not suggest, that traditional recyclable materials should be any more subject to Superfund liability than a competitive product made of virgin material.” 145 CONG. REC. S10431 (1999).
transferors of recycled materials from CERCLA arranger liability. If anything, the 96th Congress' choice to incorporate the RCRA definitions of "disposal" and "treatment," into CERCLA with their corollary definition of "solid waste," reveals Congress's initial desire to treat recycling transactions similar to other materials. The line between "traditionally recyclable materials" and all other disposed materials is not as bright as the more recent Congress suggests.

The bright-line categories of the new amendments run counter to the more flexible approach of case law relating to the recycling and reuse of materials. Regardless of whether the courts explicitly

203. Legislative history, however, never revealed what Congress intended for recycled materials or other re-useable products under CERCLA section 9607(a)(3) in 1980. Interstate Non-Ferrous Corp., 99 F. Supp. 2d at 1145 ("CERCLA, as originally enacted, does not per se address recycling, recycled materials, or recycler liability. It provides no express exemption for recycling or recyclers."). Nor did Congress specifically debate the issue of excluding recyclers from liability or including recyclers as liable parties. Id. ("[T]he legislative history of CERCLA 'sheds little light on the intended meaning' of section 9607(a)(3)'s provision of liability for persons who ... 'otherwise arranged for' the disposal of hazardous substances.") (quoting United States v. Aceto Agric. Chem. Corp., 872 F.2d 1373, 1380 (8th Cir. 1989)).

204. See § 9601(29).

205. Congress manifestly wished to focus on "traditionally recyclable materials" to solve an isolated problem with standard-fare recycling companies: "While the bill proposes to amend Superfund, ... it is really a recycling bill. Recycling is not disposal." 145 CONG. REC. S13086 (statement of Sen. Lott, Oct. 25, 1999) ("[The bill] was negotiated in 1993 between representatives of the industry that recycles traditional materials—paper, glass, plastic, metals, textiles, and rubber—and representatives of the Environmental Protection Agency, Department of Justice and the national environmental community."). Under RCRA, recycling may very well constitute disposal if it is done incorrectly. See 40 C.F.R. § 261.2(a)–(e).

206. If factors relating to the type of arrangement were met, any product could be recycled or reused, and not just those from a limited pre-established list of materials. In United States v. Cello-Foil Products, Inc., 100 F.3d 1227, 1233–34 n.6 (6th Cir. 1996), the court anticipated the amendments' factors for deciphering whether the defendant took reasonable care to recycle by asking whether the defendant chose a facility that would treat its products without simultaneously causing a release of those products into the environment. In that case, however, the material transferred, used hazardous waste drums, would not have qualified under the current amendments. Id.; see also Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R., 142 F.3d 769, 772 (4th Cir. 1998) (applying case law regarding transactions that do not fall under the recycling amendments to a case involving transactions that may fall under the recycling amendments); Id. at 775 (holding that the transferor of a factory with working machines containing hazardous substances was not liable when chemicals leaked out of the machines at the transferee's site, given that the chemicals were "contained" when sold); Cadillac Fairview/Cal., Inc. v. United States, 41 F.3d 562, 565 (9th Cir. 1994) (per curiam) (holding that a fact finder can find a seller liable for arranging to dispose of a hazardous substance when the buyer purchased used styrene and removed hazardous materials from the styrene and processed it further for reuse).
followed RCRA regulations on recycled materials, they would carry out a multi-factor analysis to determine whether an arrangement to recycle or reuse a product should be characterized as an arrangement to dispose.

This is because RCRA treats recycled materials in a continuum within its overall analysis of solid waste. There is no basis in CERCLA's language for singling out "traditionally recycled materials" transactions from other recycling or reuse transactions. Another consequence of limiting the amendments to only certain recycling transactions is that the due care inquiry might no longer remain uniform in all CERCLA cases.

If an inquiry into due care will ultimately differentiate an arrangement to dispose from an arrangement to recycle, one might question why recyclers of certain traditionally recyclable materials should be subject to a special rule, while parties interested in recycling other materials should not be subject to that rule. The recycling amendments apply to only certain types of materials, yet they also go into great depth about the proper processes required for these materials. This raises the question of whether, if the same processes are applied to other non-enumerated materials, those other...
materials can also be exempted. If the amendments cover all possible processes that might point to a disposal, there is no reason why the amendments could not apply to all materials. 213

The recycling amendments confirm that CERCLA acts both as a broad remedial and liability statute and a preventive and regulatory statute. 214 As such, their effect is to draw CERCLA even closer to RCRA in the types of activities it governs. 215 The legislative record indicates that the 106th Congress thought that the due care standard in the recycling amendments would be easy to meet. Furthermore, the amendments arguably would have the affect of extinguishing all claims against generators who send hazardous wastes to a recycling facility. 216 This is an admirable goal, but one might question whether the recycling amendments would not have been better off as part of a larger overhaul of the whole statute which would incorporate overlapping concepts in RCRA and CERCLA. 217

From a policy standpoint, one could argue that CERCLA provides no basis for broadly exempting recycled material transactions from liability. 218

213. One reason might be that recyclers of traditional materials were able to come together in a coalition to petition for this exclusion from Congress.

214. CERCLA is more regulatory in character in the recycling context, when it seems to guide or encourage future behavior rather than just correct past behavior. See CHURCH & NAKAMURA, supra note 121, at 4-5, 19 (noting the traditional views of CERCLA as non-regulatory and RCRA as regulatory given its “forward looking approach”).

215. While CERCLA is generally considered a “remedial,” past-looking statute, commentators have noted that the CERCLA liability scheme can also have the effect of altering future acts of polluters, thereby acting as a regulatory scheme. See S. REP. No. 96-848, at 14 n.5 (1980); LLOYD S. DIXON, FIXING SUPERFUND 3 (1994).

216. See 99 F. Supp. 2d at 1136 (quoting 145 CONG. REC. S13086 (Oct. 25, 1999) (statement of Sen. Lott) (“We had one and only one purpose in introducing the Superfund Recycling Equity Act—to remove from the liability loop those who collect and ship recyclables to a third party site.”)); 145 CONG. REC. S15028 (1999) (statement of Sen. Lincoln) (“[W]e have written this legislation in such a fashion that virtually all lawsuits that deal with recycling transactions of paper, glass, plastic, metals, textiles and rubber are extinguished by this legislation.”).

217. Current transfers of hazardous wastes for recycling and reuse would be better addressed through administrative regulation than by costly litigation and judicial oversight. If standards can be laid out clearly and specifically for all recycling in the same way that the amendments laid out standards for some recycling, litigation costs associated with this area of law would be reduced because parties would take small measures early to avoid massive contaminations. CERCLA litigation could be reserved for parsing out the costs of those egregious disposals intended by the 1980 legislation. See supra note 4 (listing types of widespread contamination that CERCLA was designed to address).

218. The CERCLA liability provisions, without the recycling exception read into them, may appear harsh or unfair, but it would return to a standard under which those who contribute in any way to hazardous waste contamination must pay for its cleanup, rather than an entirely innocent public. See Nagle, supra note 124, at 1496-97.
materials may pose safety concerns that recycling of other materials might not.\textsuperscript{219} Treating hazardous wastes as just any other type of waste poses greater risks that CERCLA never intended to magnify.\textsuperscript{220} Although a largely regulatory scheme set out by the recycling amendments will make recyclers more careful in their recycling, this begs the question why all generators of hazardous substances could not be encouraged to be more cautious.

\textbf{CONCLUSION}

Regardless of whether the SREA is a change or clarification, it must be accepted as a new component of the CERCLA liability scheme. It does not, at least on its face, purport to alter the statutory structure of CERCLA. As such, it can be read, along with RCRA, the RCRA regulations, and the various judicially created factors, as one of several pieces to the CERCLA liability puzzle. With all the pieces now presented, several overarching principles emerge. First, although CERCLA addresses hazardous substances and not wastes, liability analysis often turns on the physical nature of the material containing the substances and the processes applied to the substances to make them useful. This analysis has more to do with RCRA and its conception of waste and recycling than CERCLA, which does not even go so far as to define, independently, "disposal" or "solid waste." A second principle is that courts should generally seek to address as many components of the law (statutory and common law) in any given case, as the goals of RCRA and CERCLA may need to be weighed in coming to a lasting equitable decision. While RCRA and the SREA openly encourage recycling, CERCLA is less open to giving leeway to any party who contributes to a hazardous waste facility. A final principle is that CERCLA still has problems. Courts and legislators will continue to struggle with the contours of liability under CERCLA, and the SREA will not be a solution to every recycling and useful products case.

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\textsuperscript{219} See Babich, \textit{supra} note 208, at 10140 (critiquing an identical bill to the one that became the new recycling amendments one year later). Babich reiterates that recyclable materials that become hazardous during use differ from most raw materials given the risks they present and therefore, they should be treated differently. \textit{Id.}

\textsuperscript{220} See \textit{id.}