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Environmental Consultants Beware: The Eighth Circuit Has Unearthed CERCLA's Strict Liability Standard. K.C. 1986 Ltd. Partnership v. Reade Mfg.

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CASENOTE

ENVIRONMENTAL CONSULTANTS BEWARE: THE EIGHTH CIRCUIT HAS UNEARTHED CERCLA'S STRICT LIABILITY STANDARD

K.C. 1986 Ltd. Partnership v. Reade Mfg.[1]

I. INTRODUCTION

The hazardous waste that our society generates is an issue that Congress began attacking in the late 1970s, resulting in the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") of 1980.[2] With hazardous waste becoming increasingly problematic, one common course of action for potential purchasers is to hire environmental engineers to test the site for hazardous wastes. But when those environmental engineers shift pre-existing contaminants in the course of their testing, should they be held liable for clean-up costs? In the instant decision, the Eighth Circuit declined to follow the Fourth Circuit and held that environmental engineers are strictly liable for any contamination caused during preacquisition testing.

II. FACTS AND HOLDING

For more than 20 years, three chemical companies used a plot of land in North Kansas City, Missouri, to store and blend chemicals for herbicides.[3] In December, 1986, K.C. 1986 Limited Partnership ("K.C. 1986") purchased that site.[4] Two years later, Hardee's Food Systems ("Hardee's") began preparations to purchase the land for a restaurant,[5] and in June, 1989, Hardee's and K.C. 1986 entered into a ground lease for the site, subject to several conditions precedent.[6] Such conditions precedent included that tests reveal no findings of contamination and that the area be suitable for improvements for a restaurant.[7]

In accordance with the local practices of commercial purchasers and lessees at that time, Hardee's sought a preacquisition environmental investigation of the site and thereafter contracted with Terracon Environmental, Inc. ("Terracon").[8] Because a preliminary site inspection revealed "high evidence of contamination," Hardee's and Terracon considered several proposals as to the extent and cost of further investigation.[9] The final agreement included sampling for contamination "in an area where it may likely be present, based upon Terracon's knowledge of the site."[10]

Between October of 1988 and September of 1989, Terracon was on site during all or part of seven to ten days.[11] It installed five monitoring wells, which required boring several holes into the ground.[12] On September 5, 1989, Terracon issued a preliminary environmental assessment, in which it concluded that there were "elevated levels of several contaminants ... in the soil and groundwater samples."[13] Terracon believed that these test results required "further exploratory efforts and, most likely, remedial actions."[14] Hardee's then forwarded that report to K.C. 1986.

On September 22, 1989, Terracon issued its final assessment, and on that day Hardee's notified K.C. 1986 of its election to terminate the ground lease as a result of the contamination.[15] Terracon's final report recommended that "the

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[1] 33 F.Supp.2d 1143 (W.D. Mo. 1998).
[2] Pub. L. No. 96-510. 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601 *et seq.* (1994)).
[3] *KC.1986.* 33 F. Supp.2d at 1146. The three chemical companies were Reade Manufacturing, U.S. Borax and Habco, Inc. *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.* at 1147.
[12] *Id.* at 1147.
[13] *Id.* at 1146-47.
[14] *Id.*
[15] *Id.* at 1147.

five monitor wells be properly abandoned at the site, including removing the... casing and filling the boreholes with appropriate material."[16] Hardee's offered to cap or remove the monitoring wells, but K.C. 1986 never responded to the offer.[17] Further, K.C. 1986 was advised in its copy of the final report (and again about two months later in a separate letter), that as owner, it was required to notify the Missouri Department of Natural Resources of the contamination findings and that Terracon would report the findings if K.C. 1986 failed to do so.[18] Because K.C. 1986 did not report the findings of contamination, Terracon notified the Missouri Department of Natural Resources.[19] In 1993, the Missouri Department of Natural Resources and K.C. 1986 entered into a consent agreement.[20] This consent agreement required K.C. 1986 to take remedial action for the site.[21] K.C. 1986 removed the five monitoring wells two years later.[22]

In 1995, K.C. 1986 filed suit against Borax, Inc. ("Borax"), a former owner of the plot,[23] under the Resource Conservation and Recovery Act ("RCRA").[24] Later that year, Borax filed claims under RCRA and under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") against Terracon.[25] Borax claimed that the monitoring wells that Terracon installed contributed to the contamination of the regional alluvial aquifer.[26] Specifically, Borax asserts that "because Terracon screened monitoring wells 1, 2 and 5 through the near-surface groundwater zone, high concentrations of arsenic were released directly to the top of the regional aquifer, and the arsenic loading to the regional aquifer beneath the site increased by 17 percent."[27]

Terracon motioned the court for a summary judgment, claiming that as an environmental consultant it was not a covered person under CERCLA because it neither operated at the site nor disposed of any hazardous material at the site.[28] Further, Terracon claimed that it was exempt from CERCLA liability because it was an environmental consultant who merely conducted preacquisition testing.[29] On September 16, 1998 the United States District Court for the Western District of Missouri denied Terracon's motion for summary judgment as to the CERCLA and RCRA claims.[30] This Note primarily focuses on the court's holding that CERCLA's strict liability standard applies to the disposal of hazardous wastes during preacquisition environmental investigation.

III. LEGAL BACKGROUND

CERCLA is often criticized as hastily and poorly written.[31] It was a congressional compromise of 1980, a last-minute product of an outgoing Democratic president and Congress, and a response to the Love Canal disaster.[32] Because

[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] There are 12 parties to this case; Borax is but one of many defendants as CERCLA cases are often multi-party lawsuits. In this case, the owner, K.C. 1986 initiated the suit. Other parties who were originally or who were added include companies who mixed chemicals on the site, previous owners, and Terracon. The full list is as follows: K.C. 1986, Borax, DEH Merrywood Company (the general partner of K.C. 1986), HABCO (a defunct Minnesota corporation), Habco International, Inc. (whose principal place of business is Kansas City, Missouri), Donald E. Horne (a limited partner of K.C. 1986 and the sole shareholder of DEH), Victor A. Horne, Nancy Reade Foster, British Aluminum Limited (which is affiliated with Reade Manufacturing Company), Magnesium Electron, Inc. (which is affiliated with Reade Manufacturing Company), and Burlington Northern Railroad Co.
[24] *K.C. 1986*, 33 F. Supp.2d at 1147.
[25] *Id.* at 1146-47. The court also disposed of three lesser claims: a nuisance claim and two indemnity claims, not addressed in the text of this Note. *See infra* note 100.
[26] *K.C. 1986*, 33 F. Supp.2d at 1147.
[27] *Id.*
[28] *Id.* at 1148.
[29] *Id.*
[30] *Id.* at 1157.
[31] *See infra* note 32 and accompanying text.
[32] For more on the history of CERCLA, see Martin A. McCrory, *The Equitable Solution to Superfund Liability: Creating a Viable Allocation Procedure for Businesses at Superfund Sites*, 23 VT. L. REV. 59, 60 (1998); Andrew R. Klein, *Hazardous Waste Cleanup and Intermediate Landowners: Reexamining the Liability-Based Approach*, 21 HARV. ENVTL. L. REV. 337, 340-42 (1997); Katherine X. Vasiliades, *Encouraging Industry in Order to Preserve Non-Commercial Property*, 9 VILL. ENVTL. L.J. 29, 30-40 (1998).

of its hasty inception, there is little congressional history; yet courts and scholars attribute two principal purposes to CERCLA: (1) to facilitate voluntary cleanup of potentially hazardous waste sites and (2) to impose the costs of cleanup on parties responsible for the contamination.[33]

Against that backdrop, courts have labored over countless CERCLA cases. Nonetheless, case law about whether environmental engineers conducting preacquisition testing can be liable under CERCLA is scant,[34] and Congress has not expressly addressed the matter. Key issues that can arise with respect to CERCLA liability for preacquisition testing include: the definition of "disposal," the definition of "operator" and whether the "innocent landowner defense" is applicable by analogy.[35] As the case law below demonstrates, environmental engineers easily fall under CERCLA's definitions for "disposal" and "operator," but whether the "innocent landowner defense" applies by analogy is less certain.

A. Defining "Disposal" Under CERCLA[36]

Determining liability rests in part on whether a "potentially responsible party" (PRP)[37] has met CERCLA's definition of "disposal." The plain language of CERCLA states that "disposal" means the:

> discharge, deposit, injection, dumping, spillage, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any water, including ground waters.[38]

Directly introducing hazardous waste into the environment is a clear example of disposal. However, more complicated situations frequently arise, such as when pre-existing hazardous waste festers or is disturbed by a party who was unaware of its presence. Whether these situations constitute "disposal" seems to be resolved on a case-by-case basis. Below is a synthesis of some of the leading cases on the issue of disposal.

The court in *Nurad, Inc. v. William E. Hooper & Sons, Inc.*[39] affirmed a summary judgment motion holding liable a previous owner, Hooper, who deposited hazardous substances in underground storage tanks. From some point before 1935 until 1962, Hooper used the tanks to store mineral spirits, which it used to coat fabrics in its textile finishing plant.[40] In 1962, Hooper ceased the textile treatment, but left the tanks underground.[41] The site changed hands several times before the commencement of the CERCLA lawsuit, which involved several defendants including former owners and former tenants.[42] The court noted that included in CERCLA's definition of "disposal" were verbs with passive and active components.[43] Specifically, the court noted that words like deposit, injection, dumping, and placement sound like active verbs but further noted that "hazardous waste may leak or spill without any active human participation."[44] In holding

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[33] Michael V. Hernandez, *Cost Recovery or Contribution?: Resolving the Controversy of CERCLA Claims Brought by Potentially Responsible Parties*. 21 HARV. ENVTL. L. REV. 83 (1997). *See also* Kaiser Aluminum v. Catellus, 976 F.2d 1338, 1340 (9th Cir. 1992), United States v. CDMG Realty Co., 96 F.3d 706. 717-18 (3d. Cir. 1996), Nurad, Inc. v. Hooper, 966 F.2d 837, 840 (4th Cir. 1992).

[34] Though environmental engineers are not expressly mentioned within the text of CERCLA, they are a "potentially responsible party" (PRP). There are four PRPs in CERCLA: "(1) owner or operator of a facility; (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed; (3) any person who by contract, agreement or otherwise arranged for disposal or treatment, or arranged with a transporter for transport or disposal or treatment at a facility owned by a third party; or (4) any person who accepts or accepted any hazardous substances for transport to a disposal or treatment facility selected by that person." 42 U.S.C. § 9607(a) (1994).

[35] Further, indemnity and the factual question of whether a consultant followed the standards of the National Contingency Plan ("NCP"), which is included in CERCLA, are other issues that naturally arise. *See infra* note 112 and accompanying text for the text of the NCP.

[36] CERCLA adopted the definition of disposal from the Resource Conservation and Recovery Act ("RCRA") 42 U.S.C. § 6903(3) (1994), incorporated into CERCLA at 42 U.S.C. § 9601(29) (1994).

[37] *See supra* footnote 34 and accompanying text.

[38] 42 U.S.C. § 9601(29) (1994). CERCLA includes the definition of disposal of the Solid Waste Disposal Act at 42 U.S.C. § 6903(3) (1994).

[39] 966 F.2d 837 (4th Cir. 1992).

[40] *Id.* at 840-41.

[41] *Id.*

[42] *Id.* (*See infra* notes 63-88 and accompanying text on operator liability.)

[43] *Id.* at 845.

[44] *Id.*

Hooper and other interim owners liable, the *Nurad* court concluded that to require active participation would mean allowing an owner to "avoid liability simply by standing idle while an environmental hazard festers in his property."[45]

Similarly, in *CPC Int'l v. Aerojet-General Corp.*,[46] the defendant lost in a CERCLA case with the argument that it was not subject to liability because migrating, contaminated groundwater does not constitute disposal. In *Aerojet*, the purchaser bought a plot of land that had been contaminated by a bankrupt chemical plant, whose actions "caused the spread of hazardous substances further below the surface and beyond the site."[47] Pursuant to the purchase, Aerojet signed a consent order with the state's department of natural resources acknowledging the extensive environmental problems with the understanding that the agency would clean up the contaminants.[48] Even though the agency failed to clean up the waste, the court held the purchaser liable for contamination, concluding that the "unchecked spread of contaminated groundwater, which was identified in the stipulation and consent order as a problem existing at the site, qualifies as a disposal."[49]

The court in *Kaiser v. Catellus*[50] reversed a lower court's dismissal and held that an excavator can be liable for disposal of contaminated soil.[51] In *Kaiser*, the owner hired a contractor to excavate and grade the site of a housing development, but in the process of doing so, the contractor spread some of the contaminated soil over the other parts of the property.[52] The soil contained hazardous chemicals, including paint thinner, lead, asbestos and petroleum hydrocarbons.[53] The court concluded that because of the overall remedial purpose of CERCLA, a more limited interpretation of "disposal" would "subvert Congress' goal that parties who are responsible for contaminating property be held accountable for cleaning it up."[54]

Also relevant is *United States v. CDMG Realty*.[55] In this case, the site, which was once part of a landfill, was under investigation in the mid-1970s by the Environmental Protection Agency and the New Jersey Department of Environmental Protection and Energy.[56] Before acquiring the site in 1981, the purchaser contracted with an engineering company to conduct soil testing.[57] The engineering company bored nine holes into the ground through various waste materials and groundwater; several of the boreholes "caved" during the testing.[58]

Though no other disposal occurred during the purchaser's ownership,[59] the *CDMG* court decided two disposal issues. First, unlike the *Nurad* and *Aerojet* courts, the *CDMG* court concluded under the doctrine of *noscitur a sociis* that passive migration[60] is not disposal under CERCLA: "Finding it unnecessary to reach the question whether the movement of contaminants unaided by human conduct can ever constitute 'disposal,' we conclude that the language of CERCLA's

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[45] Nurad, Inc. v. William E. Hooper & Sons, Inc, 966 F.2d 837, 845 (4th Cir. 1992).

[46] 759 F. Supp. 1269 (W.D. Mich. 1991).

[47] *Id.* at 1273.

[48] *Id.*

[49] *Id.* at 1278. This case demonstrates an increasingly common cause of action. The circuits are split as to whether "passive migration" constitutes disposal. *See, for example*, Craig May, *Taking Action: Rejecting the Passive Disposal Theory of Prior Owner Liability under CERCLA*, 17 VA. ENVTL. L.J. 385 (1998); Carol E. Dinkins *et al*, *Overview: Recent Trends and Developments in Environmental and Toxic Tort Litigation* SC64 ALI-ABA 221, 234-237 (1998); Sam Kalen, *Passive Migration: A Limit to Liability*, 14 NO. 4 ENVTL. COMPLIANCE & LITIG. STRATEGY 4 (1998); Joseph Lipinski, *Last Owner Liability for Passive Migration under CERCLA*, 7 DICK. J. ENVTL. L. & POL'Y 97 (1998); Robert L. Bronston, *The Case against Intermediate Owner Liability under CERCLA for Passive Migration of Hazardous Waste*, 93 MICH. L. REV. 609 (1994); Michael S. Caplan, *Escaping CERCLA Liability: The Interim Owner Passive Migration Defense Gains Circuit Recognition*, 28 ENVTL. L. REP. 10121 (1998). For a review of cases on passive migration, *see* Stanley Works v. Snydergeneral Corp., 781 F. Supp 659 (E.D. Calif. 1990).

[50] 976 F.2d 1338 (9th Cir. 1992). *See also* Brian I. Sopinski, *Kaiser Aluminum and Chemical Corp. v. Catellus Development Corp.: Broad Remedial Powers of CERCLA Take No Prisoners*, 6 VILL. ENVTL. L.J. 181 (1995).

[51] *Kaiser*, 976 F.2d at 1342-43.

[52] *Id.* at 1339.

[53] *Id.* at 1339-40.

[54] *Id.* at 1342-43. The court relied heavily on Tanglewood East Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568 (5th Cir. 1988) for this reasoning. See also State of New York v. Almy Brothers, Inc. 866 F.Supp 668, 674-676, (1994) and Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489 (11th Cir. 1996) for similar facts and reasoning.

[55] 96 F.3d 706 (3d Cir. 1996). *See also* Monica Shah Desai, *Disposing of United States v. CDMG Realty Co.: The Case Against the Application of CERCLA Liability for De Minimis Disturbances of Pre-Existing Contamination*, 6 N.Y.U. ENVTL. L. J. 200 (1997).

[56] *CDMG*, 96 F.3d at 711.

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *See supra* note 49 and accompanying text.

'disposal' definition cannot encompass the spreading of waste here.'[61] Second, and most relevant to the facts of the *K.C. 1986* case, however, the court found that drilling could cause disposal by upsetting already present contaminants, stating that "the fact that a defendant's dispersal of contaminants is trivial may provide a ground to allocate less liability to that defendant, but it is not a defense to liability.'[62]

B. Defining "Operator" Under CERCLA

In addition to CERCLA's definition of "disposal," understanding its definition of "operator" is equally important in assessing CERCLA liability. Again, consideration of CERCLA's plain language and interpretative case law is illuminative.

The plain language of CERCLA states that any "owner or operator of a vessel or facility" is liable for clean-up costs.[63] This definition is largely unhelpful because CERCLA defines an owner or operator as "any person owning or operating such a facility."[64] As such, courts have struggled to interpret "operator,"[65] thus providing little guidance for contracting environmental engineers. There appear to be two schools of thought on how to interpret "operator," both of which relate to degree of control. The majority's approach is to interpret the term "operator" as someone who has actual control over the facility. The minority approach is to find liability from less than actual control.[66] Courts within the Eighth Circuit have interpreted the word differently, but recent case law[67] suggests it has adopted principally the majority approach.

A leading example of the application of the majority view is *Redwing Carriers v. Saraland Apartments*.[68] For eleven years, Redwing operated a trucking business in southern Alabama, which hauled materials such as asphalt, tail oil, and molten sulfur.[69] When Redwing's trucks were cleaned out, the wastewater runoff and excess asphalt flowed directly into pits dug into the ground.[70] The property changed hands twice before a partnership called Saraland Apartments sought the land to develop apartments.[71] During construction of the apartments, a contractor graded, excavated and filled the ground on the property, uncovering contaminated soil.[72] Under those facts, the court applied the majority's rationale on operator liability and declined to find the partnership liable because even though the partners had the authority under an agreement to control important decisions, they neither participated in the activities resulting in disposal nor exercised control over the operations of the partnership.[73]

Directly in contrast with the majority view, the Fourth Circuit's leading case, *Nurad, Inc. v. Hooper*,[74] demonstrates the minority approach, which imposes operator liability on parties who have the authority to control disposal, regardless of whether they actually exercise that control. Unlike in *Nurad*, the *Redwing* court found the previous owners liable even though they did not exercise actual control because the "authority to control the facility was present."[75] Moreover, the court wrote that even though the previous owners "never actively participated in the disposal of hazardous

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[61] *CDMG*, 96 F.3d at 711.

[62] *Id.* at 719.

[63] 42 U.S.C. § 9607(a)(1) (1994).

[64] *Id. at* § 9601(20)(A).

[65] One court wrote that the circular definition of "operator" "is a bit like defining 'green' as 'green.'" Long Beach Unified Sch. Dist. v. Dorothy B. Godwin Calif. Living Trust, 32 F.3d 1364, 1368 (9th Cir. 1994).

[66] Carol E. Dinkins and Arthur E. Murphy concluded that the circuits are split into three categories with respect to operator liability: the "authority to control" standard, found in *Nurad* (*see supra* notes 39-45 and *see infra* notes 74-76 and accompanying text), the "actual control" standard, found in *Gurley* (*see infra* notes 78-88 and accompanying text), and the "piercing the corporate veil" standard (not addressed herein). 6 BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS, § 80.3(3) (1998).

[67] *See, e.g.*, East Bay Municipal Utility Dist. v. United States Dept. of Commerce, 142 F.3d 479, 485 (D.C. Cir. 1998).

[68] 94 F.3d 1489 (11th Cir. 1996).

[69] *Id.* at 1494.

[70] *Id.*

[71] *Id.* at 1494-95.

[72] *Id.* at 1494.

[73] *Id.* at 1505, *citing* Jacksonville Elec. Auth. v. Bernuth Corp., 996 F.2d 1107 (11th Cir. 1993). In this case, the Eleventh Circuit expressly rejected the Fourth Circuit's interpretation. *See supra* notes 39-45 and accompanying text, and *see infra* notes 74-76 and accompanying text for the Fourth Circuit's interpretation.

[74] 966 F.2d 837 (4th Cir. 1992). *See supra* notes 39-45 and accompanying text.

[75] *Id.* at 842.

substances," they had the authority to control, and hence were encompassed within the definition of "operator."[76] The *Nurad* decision is often quoted, but its reasoning is often rejected.

The Eighth Circuit's approach is neither as broad as the Fourth Circuit's *Nurad* decision nor as strict as the rulings of the majority of the other circuits. Courts[77] generally cite *United States v. Gurley*[78] as representative of the Eighth Circuit's approach.[79] In *Gurley*, a company leased a site located within the 100-year flood plain of a tributary to the St. Francis River in Arkansas to refine used motor oil.[80] The Gurley Refining Company deposited acidic sludge, which contained hazardous materials such as barium, lead, zinc, PCBs, and sulfuric acid into a pit.[81] Ultimately, the pit flooded, releasing 450,000 to 500,000 gallons of sludge into surrounding farmlands and into the tributary of the river.[82]

Larry Gurley argued he was not an operator under CERCLA because he was merely an employee of the Gurley Refining Company.[83] The *Gurley* court held that an

> individual may not be held liable as an operator... unless he or she (1) had authority to determine whether hazardous wastes would be disposed of and to determine the method of disposal and (2) actually exercised that authority, either by personally performing the tasks necessary to dispose of the hazardous wastes or by directing others to perform those tasks.[84]

The *Gurley* court used this standard to conclude that the defendant was an operator because he had the authority to implement policies and practices of a corporate entity, *i.e.*, that he had "substantial responsibilities" for waste disposal.[85]

The *Redwing* court included a footnote about *Gurley*, illustrative of the differences between the Eighth Circuit and the majority approach.[86] Specifically, the *Redwing* court wrote that "under *Gurley*, an officer or shareholder of a corporation can only be found liable as an operator when they [sic] actually controlled the disposal of hazardous substances at a facility;"[87] whereas, under the *Redwing* standard, "an individual need not have actually controlled the specific decision to dispose of hazardous substances [to be found liable]."[88] Thus, one interpretation is that the Eighth Circuit neither follows the Fourth Circuit's broad interpretation, nor the majority's strict interpretation of "operator."

In short, then, courts have interpreted the word "operator" differently. Hence, for environmental engineers, a great deal could hinge on the circuit in which they operate. A circuit may choose to apply a standard of control, of authority to control, or a hybrid, as the Eighth Circuit appears to do in *Gurley*.

C. Using the "Innocent Landowner Defense" to Apply a Negligence Standard of Care

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[76] *Id.*

[77] *See, e.g.*, East Bay Municipal Utility Dist. v. United States Dept. of Commerce, 142 F.3d 479, 485 (D.C. Cir. 1998).

[78] 43 F.3d 1188 (8th Cir. 1994).

[79] United States v. Northeastern Pharmaceutical & Chemical Co. ("NEPACCO") preceded and influenced Eighth Circuit's interpretation of "operator" in *Gurley*. 810 F.2d 726 (8th Cir. 1986). In *NEPACCO*, the appellants, who manufactured disinfectants, leased a site to dispose of their hazardous waste, but in addition, the company made an agreement with a nearby farmer to dispose of approximately 85 55-gallon drums of waste on his land by way of a trench. *Id.* Acting on an anonymous tip, the EPA investigated the farmer's site, and found that the site had an "alarmingly" high amount of contamination and that the drums had deteriorated. *Id.*

NEPACCO is similar to *Gurley* in that both companies disposed of waste onto another's property: NEPACCO did so through a private agreement with a farmer, and Gurley Refining Co. did so through a lease. In finding operator liability in *NEPACCO*, it may appear at first glance that the court followed more closely the Fourth Circuit's minority position, holding that a defendant was individually liable because he had the authority to control the hazardous substances involved, though he never actually possessed the substances. The *NEPACCO* court concluded: "It is the authority to control the handling and disposal of hazardous substances that is critical under the statutory scheme." *Id.* at 743.

But when the *Gurley* court clarified the Eighth Circuit's opinion, it observed that the actual control doctrine encompasses the authority to control. 43 F.3d at 1193.

[80] *Gurley*, 788 F.Supp. at 1476.

[81] *Gurley*, 43 F.3d at 1191

[82] *Gurley*, 788 F.Supp. at 1477

[83] *Gurley*, 43 F.3d at 1192. Because he leased the land, only the question of whether Gurley was an operator, not whether he had an ownership interest under CERCLA, was at issue. *Id.*

[84] *Gurley*, 43 F.3d at 1193.

[85] *Id.* at 1194.

[86] *Redwing*, 94 F.3d at 1505.

[87] *Id.*

[88] *Id.*

The third issue that aids in understanding when environmental engineers may be liable under CERCLA is the "innocent landowner defense." CERCLA allows an exemption to liability for those who have acquired contaminated property without knowledge of the contamination. In 1986, Congress amended CERCLA to include such exemption. The exemption is part of the Superfund Amendments and Reauthorization Act of 1986 ("SARA") amendments. In relevant portion, the SARA amendments read:

> To establish that the defendant had no reason to know... the defendant must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability.... The court shall take into account any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection.[89]

Though the "innocent landowner defense" is not directly applicable to contractors (because they are not the landowners), one court applied the purpose behind other CERCLA defenses to find a lower standard of liability. In *United States v. CDMG Realty,*[90] the court held that a contracting environmental engineer should be subject to a negligence standard of care, instead of the traditional strict liability standard of care, inferring that such was the purpose behind the "innocent landowner defense."

The *CDMG* court reached its conclusion by way of a three-part process. First, it considered CERCLA's requirements that a prospective purchaser "undertak[e] ... all appropriate inquiry" into previous ownership and uses of the property and engage in "appropriate inspection."[91] Second, it reasoned that the innocent landowner defense would not be effective without "appropriate" soil investigation.[92] For this analysis, the court wrote that "prospective purchasers who by diligently inspecting for contamination cause the dispersal of any contaminants will find themselves liable for causing a "disposal."[93] To illustrate its point, the court noted that to conclude otherwise would mean that prospective purchasers would be liable with or without buying the property.[94] If they buy the property after discovering the contamination, they will be ineligible for the defense because they will no longer be "innocent"; if they do not buy the property, they will be ineligible for the defense because they will not be "owners."[95] "In order to give the defense effect, then, an 'appropriate' soil investigation cannot constitute disposal."[96]

Third, the court drew from other CERCLA provisions to demonstrate that two other defenses are available only if the defendant's actions were not negligent. Specifically, the court considered the third-party defense, which requires "due care," and the defense of compliance with the National Contingency Plan,[97] which is only available absent negligence.[98]

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[89] 42 U.S.C. § 9601(35)(B) (1994). Before the "innocent landowner defense" was enacted, CERCLA only provided three defenses for potentially responsible parties (which remain feasible defenses in addition to the innocent landowner defense). Parties could avoid liability only where the release was caused by an act of God, war, or third parties. 42 U.S.C. § 9607(b) (1994). The third-party defense was the most commonly invoked defense, but it is limited. It excludes (1) employees or agents of the defendant, and (2) those whose acts or omissions occurred in connection with a contractual relationship with the defendant, and it requires the defendant to establish by a preponderance of the evidence that he exercised due care and took precautions against foreseeable acts or omissions of any such third party. *Id.* Further, as a result of the provision excluding contractual relationships, a landowner could not take advantage of the defense when contamination existed upon property acquired pursuant to a land contract, deed or transfer instrument. *See* 42 U.S.C. 9601(35)(A) (1994) (defining contractual relationship). The purpose of the innocent landowner defense is to allow innocent purchasers relief from liability, and the amendment provided that land contracts would not be considered contractual relationships. *See* Debra L. Baker and Theodore G. Baroody, *What Price Innocence? A Realistic View of the Innocent Landowner Defense under CERCLA*, 22 ST. MARY'S L.J. 115, 119-120 (1990).

[90] 96 F.3d 706 (3d Cir. 1996). *See supra* notes 55-62 and accompanying text.

[91] *Id.* at 721.

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] United States v. CDMG Realty Co., 96 F.3d 706, 721 (3d Cir. 1996).

[97] *See infra* note 112 and accompanying text.

[98] *See infra* note 112 and accompanying text.

In short, when the *CDMG* court addressed this issue of whether the "innocent landowner defense" can be used to divine intent for a lesser standard of negligence in lieu of strict liability, it held that "only 'appropriate' soil investigations--*i.e.*, those that do not negligently spread contamination--fall outside the definition of 'disposal.' Such a rule best harmonizes CERCLA's clear intention to allow soil investigations and its goal of remedying hazardous waste sites."[99]

D. Summary

Three principal issues aid in understanding why environmental engineers may be liable under CERCLA: the definitions of "disposal" and "operator" and knowledge of when the "innocent landowner defense" applies. While the definition of "operator," and to an even greater extent, the definition of "disposal" are almost uniformly interpreted broadly by the circuits, there is a significant split in the interpretation the "innocent landowner defense."

IV. INSTANT DECISION

In response to Terracon's summary judgment motion, the court disposed of two issues arising from the CERCLA claim.[100] The two main issues included 1) whether an exemption to CERCLA exists for preacquisition soil and ground water investigation, and 2) two subissues relating to the interpretation of "disposal" and to the standard of liability applicable under CERCLA.

Under the first issue arising from the CERCLA claim, the court found that no explicit exemption exists for environmental engineers conducting preacquisition inquiries.[101] The court noted that Terracon was unable to cite a case that found an exemption and that Terracon was unable to point to any specific language in CERCLA that afforded such an exemption.[102]

The court next disposed of Terracon's argument that the innocent landowner status (exempted under CERCLA) should apply to Terracon.[103] Because it was not a landowner, Terracon did not argue that it was entitled *per se* to the innocent landowner defense. Rather, it argued that this defense demonstrated Congress' desire to encourage prospective real estate purchasers to conduct preacquisition environmental testing.[104] The court disposed of Terracon's reasoning by concluding that "in light of CERCLA's language, its purpose and the judicial precedent interpreting it, the court finds no basis for implying an absolute exemption from CERCLA liability for environmental engineers who conduct preacquisition environmental inquiries."[105]

The second issue arising under CERCLA concerned whether Terracon had disposed of any waste, and if so, whether strict liability or negligence should apply.[106] Terracon argued that CERCLA's strict liability standard did not apply because no hazardous waste was disposed during Terracon's soil testing.[107] In determining this issue, the court first considered the plain language of CERCLA. Under the plain language rule, "disposal" means the "discharge, deposit, injection, dumping, spillage, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that

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[99] *CDMG*, 96 F.3d at 722

[100] K.C. 1986 Ltd. Partnership v. Reade Mfg., 33 F.Supp.2d 1143 (W.D. Mo. 1998). The court also disposed of an RCRA claim, which it decided on procedural grounds, and three lesser issues: a nuisance claim and two indemnity claims. As to the nuisance claim, the court found in favor of Terracon. The action against Terracon was for a public nuisance, and the court required the plaintiff to demonstrate that Terracon (1) "unreasonably interfered" (2) with "common community rights," and (3) suffered a "special injury that differs in kind, not just in degree, from the rest of the community." *Id.* at 1156. The court decided that K.C. 1986 did not establish that Terracon interfered with common community rights and that K.C. 1986 did not suffer a special injury simply by having to pay cleanup costs. *Id.* Terracon also sought summary judgment as to K.C. 1986's and Borax's indemnification claims. *Id.* The court denied summary judgment on both claims because there existed a genuine issue of material fact as to whether K.C. 1986 and Borax were joint tortfeasors. *Id.* at 1157.

[101] *Id.* at 1149.

[102] *Id.* at 1148.

[103] *Id.* The court cited the CERCLA's definition of innocent owner, stating: "the defendant must have acquired the contaminated real property 'after the disposal or placement of the hazardous substance on, in or at the facility' and 'at the time the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, or at the facility'" 42 U.S.C. § 9601(35)(A) (1994). *See supra* notes 89-99 and accompanying text.

[104] *K.C. 1986*, 33 F.Supp.2d at 1148.

[105] *Id.*

[106] *Id.* at 1149.

[107] *Id.*

such solid waste or hazardous waste or any constituent thereof may enter the environment or be... discharged into any water, including ground waters."[108] Then, the court considered the allegations against Terracon, including whether it caused existing contaminants to spread by boring holes into the aquifer, and concluded that a general issue of material fact existed as to whether its actions constituted disposal, thereby precluding summary judgment.[109]

After it found that CERCLA applies, the court noted that the general rule in CERCLA cases is that owners and operators are strictly liable for contamination.[110] Terracon argued it should be subjected to the lesser standard of negligence because the innocent landowner defense is applicable by analogy[111] and because its investigation was conducted in accordance with the National Contingency Plan ("NCP").[112] The court denied Terracon's argument based on the NCP because a material issue of fact existed as to whether Terracon's investigation was rendered in accordance with the NCP.[113]

Also, the court declined to adopt Terracon's argument that the innocent landowner defense justifies a negligence standard of care. In doing so, the court rejected the reasoning of the Third Circuit Court of Appeals in *CDMG*, which used the innocent landowner defense to apply a negligence standard of care to a soil investigation, concluding that the Third Circuit's reasoning[114] was contrary to the express language of CERCLA.[115] Also, in its discussion of the innocent landowner defense, the court noted that the defense was available only for those who had no notice of possible contamination.[116]

With respect to the negligence standard, the court also declined to adopt Terracon's argument that it was not an operator under CERCLA. Specifically, the court rejected Terracon's argument that it was not an operator because its involvement at the site was limited in nature.[117] The court concluded that "the proper inquiry is not the extent of the involvement with a hazardous waste site, but whether disposal occurred during its involvement at the site."[118] Because Terracon is an environmental consultant trained in detecting hazardous substances and because it prepared the plan to investigate the site, the court found insufficient evidence that any other person was involved in the process and declined to issue a summary judgment declaring that Terracon was not an operator.[119]

In summary, the court found 1) that there is no exemption for environmental engineers under CERCLA, 2) that it could not issue a summary judgment as to whether Terracon caused disposal of hazardous substances, 3) that a fact issue precluded summary judgment as to whether Terracon followed the NCP, 4) that Terracon met CERCLA's definition of operator, and (5) that CERCLA's strict liability standard applies to preacquisition environmental testing.

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[108] *Id., citing* 42 U.S.C. § 6903(3) (1994). *See supra* notes 36-62 and accompanying text.

[109] *Id.* at 1149-50.

[110] *K.C. 1986*, 33 F.Supp.2d at 1150.

[111] *Id.*

[112] *Id.* The text of the NCP reads as follows: "No person shall be liable under this subchapter for costs or damages as a result of actions taken or omitted in the course of rendering care, assistance, or advice in accordance with the National Contingency Plan ... or at the direction of an on scene coordinator appointed under such plan, with respect to an incidence creating a danger to public health or welfare or the environment as a result of any releases of a hazardous substance or the threat thereof. This paragraph shall not preclude liability for costs of damages as the result of negligence on the part of such persons" 42 U.S.C. § 9607(d)(1) (1994).

[113] *K.C. 1986*, 33 F.Supp.2d at 1150.

[114] *K.C. 1986*, 33 F.Supp.2d at 1151. The case the court considered was United States v. CDMG Realty Co., 96 F.3d 706 (3rd Cir. 1996). *See supra* notes 47-50 and accompanying text and notes 84-92 and accompanying text.

[115] *Id.* The CERCLA language that the court considered contrary to *CDMG* read as follows: "Notwithstanding any other provision or rules of law and subject only to the defenses set forth in the statute" those who dispose of hazardous waste shall be strictly liable for the cleanup. 42 U.S.C. § 9607(a) (1994).

[116] *K.C. 1986*, 33 F.Supp.2d at 1152. "If the history reveals no owner or uses to which the land was put that would alert a reasonable person in the prospective purchaser's position of the possibility of hazardous waste contamination, an appropriate inquiry has been made, and the purchaser likely will be deemed an innocent owner" [sic].

[117] *Id.* at 1153.

[118] *Id., citing* United States v. Gurley, 43 F.3d 1188 at 1193 and *CDMG*, 96 F.3d at 709.

[119] *K.C. 1986*, 33 F.Supp.2d at 1153-54.

V. COMMENT

The *K.C. 1986* court's decisions to deny summary judgment in favor of Terracon on the issues of "disposal" and "operator" liability are based on well-founded precedent. Courts have consistently construed both terms broadly per Congress's express purpose,[120] so the *K.C. 1986* court's decisions on these issues were predictable. However, its decision to decline to apply by analogy the negligence requirement on the part of contracting environmental engineers in preacquisition testing is a bit more surprising.

On the issue of "disposal" the Eighth Circuit's interpretation was in line with other courts' interpretations, and the court was therefore correct in denying a summary judgment in favor of Terracon.[121] The *K.C. 1986* court could cite other courts that were faced with tough "disposal" interpretations, including that there be no requirement of active participation and that soil excavation and grading, which entails spreading already existing contamination, can trigger CERCLA liability.[122] Finally and most relevant to the instant decision, the Eighth Circuit had precedent to find that drilling could cause disposal by upsetting already present contamination.[123]

Similarly, the *K.C. 1986* court's interpretation of "operator" liability is in line with the Eighth Circuit's precedent. Specifically, the court sought guidance from *Gurley* and reasonably required that an operator have authority to make decisions about hazardous waste disposal and actually exercise that authority.[124] The court correctly noted that Terracon had experience with hazardous waste and that the level of involvement (only parts of 7 to 10 days) was irrelevant per precedent. Given the Eighth Circuit's precedent, and given Terracon's experience, the *K.C. 1986* court's decision on this point was also clearly correct.

In rejecting the *CDGM*[125] court's precedent with respect to allowing a negligence standard for liability, the Eighth Circuit stood strictly by the plain language of the statute, where it could have continued a trend of requiring negligence for liability in certain circumstances. As such, whether the court's decision on this point is the best policy is debatable.

There are strong policy reasons to support either the *CDGM* or the *K.C. 1986* decision. The Eighth Circuit's reasoning encourages safe testing, with an eye towards preventing the disturbance and spread of contamination. Further, the Eighth Circuit's reasoning is also consistent with CERCLA's purpose of punishing those who contribute to contamination, regardless of the extent of contribution. However, those engineers in the *CDGM* jurisdiction may exercise free and unfettered, and thus more extensive, investigations prior to purchase. Presumably such preacquisition investigations would lead to earlier discovery of contamination and therefore an easier assignment of liability.

Conversely, under the reasoning of the Eighth Circuit, engineers might be less willing to conduct investigations, particularly in those cases where they know the site is likely to be contaminated, *i.e.*, and those cases that are most in need of environmental investigation. Even if environmental engineers competently conduct testing, the result of their findings of contamination may ultimately mean that they automatically be named a party in the lawsuit because of the strict liability standard. The parties involved in the litigation, particularly those who are presumably primarily responsible for the contamination, have every incentive to pass along liability, even if they are shedding only a small percentage of that liability. Further, the parties can easily do so due to CERCLA's broad purpose and history of enormous multi-party litigation.

The *K.C. 1986* decision also demonstrates that environmental engineers cannot likely win on summary judgment because there is an issue of material fact, *i.e.*, whether and to what extent their actions contributed to the contamination. Because they can easily be named in a suit, and because they cannot win on a summary judgment motion, litigating the matter will be costly, and thus preacquisition testing will become more expensive. As a result, increased costs of preacquisition testing may mean that those areas which are likely contaminated will not be tested. Further, many areas could be ripe for development with simple or no remedial action but remain undeveloped.

The result of the Eighth Circuit's decision is logically based on the plain language of CERCLA, but perhaps it is time for that plain language to be amended to include a negligence standard of liability for those who conduct

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[120] *See supra* note 33 and accompanying text.
[121] *See supra* notes 36-62 and accompanying text.
[122] *See supra* notes 50-54 and accompanying text.
[123] *See supra* notes 55-62 and accompanying text.
[124] *See supra* notes 55-62 and 90-99 and accompanying text.
[125] *See supra* notes 89-99 and accompanying text.

preacquisition testing. To allow the strict liability standard to remain may result in reducing the incentive for potential purchasers to pay for thorough testing and for environmental engineers to conduct thorough testing. Congress has allowed the negligence requirement for a finding of liability where public policy dictates it is best, *e.g.*, in the innocent landowner defense.[126] Placing a negligence requirement on preacquisition testing is likewise a better policy rationale in that it ultimately leads to placing the liability on those persons who by their actions most deserve to pay the cleanup costs, rather than on those who exercise due care in determining whether there will be any cleanup costs.

VI. CONCLUSION

In summary, because preacquisition testing in large part determines whether CERCLA liability is present, it is best to afford those investigators the standard of negligence rather than strict liability. To do otherwise may ultimately mean that economic development will be hindered because salvageable property will sit vacant. The plain language of CERCLA as it stands encourages courts to use the strict liability standard instead of applying the innocent landowner defense by analogy. Therefore, Congress should remedy this by once again amending its hastily enacted statute to allow for ascertainable and comprehensive investigations.

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[126] *See supra* notes 83-92 and accompanying text.