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# Owning Up: Determining the Proper Test for Ownership Liability Under CERCLA

James Morrow\*

## INTRODUCTION

In 1978, residents of Niagara Falls received an unwelcome surprise when they discovered hazardous chemical and industrial wastes oozing up from the ground into their homes.<sup>1</sup> Between 1942 and 1953, the Hooker Chemical and Plastics Company had buried approximately 21,800 tons of chemical waste in a sixteen-acre ditch at a site affectionately called the “Love Canal.”<sup>2</sup> After capping the Love Canal with clay, Hooker Chemical sold the land to the Niagara Falls Board of Education.<sup>3</sup> Homes and schools were constructed in the area, and a vibrant community was born. Only years later, when neighborhood residents began to develop a range of illnesses, did the extent of the chemical danger become clear.<sup>4</sup>

The Love Canal garnered national attention when, in 1978, the New York Commissioner of Health declared an emergency and ordered the area evacuated.<sup>5</sup> The United States Environmental Protection Agency (EPA) attempted to intervene, but found it lacked authority to remediate the site under existing statutes.<sup>6</sup> In reaction to

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1. JACKSON B. BATTLE & MAXINE I. LIPELES, HAZARDOUS WASTE 179–80 (2d ed. 1993).

2. *Id.*

3. *Id.* at 180. The site was sold for the nominal price of one dollar. *Id.*

4. Such illnesses included cancer, mental retardation, rashes, and migraine headaches. David R. Rich, *Personal Liability for Hazardous Waste Cleanup: An Examination of CERCLA Section 107*, 13 B.C. ENVTL. AFF. L. REV. 643, 650 n.60 (1986).

5. BATTLE & LIPELES, *supra* note 1, at 180. The New York Commissioner for Public Health declared a health emergency in 1978. *Id.* In 1979, the Commissioner ordered the evacuation of all families with pregnant women and children under two years of age. *Id.*

6. *Id.* Specifically, the EPA attempted to remediate pursuant to its authority under the Clean Water Act, 33 U.S.C. §§ 1251–1387 (1977), and the Resource Conservation and

the Love Canal emergency, Congress took measures to vest the EPA with the authority necessary to adequately respond to incidents of hazardous contamination and the release of pollutants that might harm public health.<sup>7</sup> In doing so, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)<sup>8</sup> was born, fundamentally altering the federal approach to environmental protection and enforcement.<sup>9</sup>

The most comprehensive environmental statute since the National Environmental Policy Act of 1969,<sup>10</sup> Congress enacted CERCLA to “provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites.”<sup>11</sup> The statute

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Recovery Act, 42 U.S.C. §§ 6901–7000 (1976). However, while the Clean Water Act authorized Coast Guard response to oil spills and hazardous pollution in navigable waters, it was inapplicable to inland soil and groundwater contamination. Moreover, the Resource Conservation and Recovery Act permitted EPA response only to present environmental emergencies, and its applicability to parties whose contribution to contamination occurred wholly in the past was uncertain. BATTLE & LIPELES, *supra* note 1, at 180.

7. Specifically, the EPA was authorized to take removal or remedial action:

Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare.

42 U.S.C. §§ 9604(a)(1)(A)-(B) (2012).

8. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767, 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601–9675 (2012)).

9. The Love Canal emergency ranks as one of the most highly publicized episodes of hazardous contamination in contemporary United States history. CAROLE STERN SWITZER & PETER L. GRAY, *CERCLA: COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION & LIABILITY ACT (SUPERFUND)* 3 (2d ed. 2002). Although Congress was already considering expanding the scope of federal environmental statutes, it is undeniable this incident was a driving force behind the legislative activity that eventually became CERCLA. A. Theodore Steegmann Jr., *History of Love Canal and SUNY at Buffalo’s Response: History, the University Role, and Health Research*, 8 BUFF. ENVTL. L.J. 173, 174–76 (2002). For additional information on the history of the Love Canal emergency, see Sheldon Hurwitz & Dan D. Kohane, *The Love Canal—Insurance Coverage for Environmental Accidents*, 50 INS. COUNS. J. 378, 380 (1983). On a more positive note, in March of 2004, the Love Canal was declared safe, and its name was removed from the National Priorities List of contaminated sites—over two decades after EPA remediation began. Linda Roeder, *EPA Final Rule Removes Love Canal Site From National List, Announces Area Cleanup*, 35 ENV’T REP. (BNA) NO. 190, at 2057 (Oct. 1, 2004).

10. 42 U.S.C. §§ 4321, 4331–4347 (2012).

11. 94 Stat. at 2767.

authorized the EPA to expend agency resources in the cleanup of contaminated sites, and vested the agency with the authority to compel those responsible for contaminations to take remedial action.<sup>12</sup> In either circumstance, the EPA could sue potentially responsible parties (PRPs) to recover the agency's financial expenditures.<sup>13</sup> The statute also created the Hazardous Substance Superfund as a repository for PRP contributions and for the monies expended in site remediation.<sup>14</sup>

Under CERCLA, a *prima facie* case for liability requires a moving party to demonstrate, *inter alia*, that the defendant falls within one of

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12. H.R. REP. NO. 96-1016, 33 (1980). When discussing the purposes of the then-pending bill H.R. 7020 (a precursor to CERCLA), the House Committee on Foreign and Interstate Commerce—upon recommending passage of the bill—noted that:

[The Act] would establish a federal cause of action for liability for the costs of emergency assistance, removal, and containment action . . . to provide a mechanism for prompt recovery of monies expended for the costs of such action from the Hazardous Waste Response Fund . . . from persons responsible therefor and to induce such potentially liable persons to pursue appropriate environmental response actions voluntarily.

*Id.*

13. 42 U.S.C. § 9607(a) (2012). Subsection (a)(4) provides in pertinent part that responsible persons shall be liable for—

- (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
- (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
- (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
- (D) the costs of any health assessment or health effects study carried out under [§ 9604(i)].

14. 42 U.S.C. § 9611(a) (2012). CERCLA authorized apportionment of funds from the Hazardous Substance Superfund of no more than \$8.5 billion for five years from October 17, 1986, and no more than \$5.1 billion between October 1, 1991, and September 30, 1994. *Id.* In addition to reimbursement from responsible parties, the Superfund is replenished by appropriations from the federal government's general fund, and recently received a special infusion of approximately \$600 million as part of the American Reinvestment and Recovery Act of 2009 (Stimulus Bill), Pub. L. No. 111-5, 123 Stat. 15 (2009) (codified as amended in scattered sections of 6 U.S.C., 19 U.S.C., 26 U.S.C., 42 U.S.C., and 47 U.S.C.). U.S. ENVTL. PROT. AGENCY, OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, OSWER DIRECTIVE NO. 9360.0-46, INITIAL GUIDANCE FOR IMPLEMENTING THE SUPERFUND REMEDIAL PROGRAM PROVISIONS OF THE AM. REINVESTMENT & RECOVERY ACT OF 2009 (2009).

four classes of PRPs listed in § 107(a) of the statute.<sup>15</sup> These PRPs broadly include: (1) the owners and operators of a vessel or facility; (2) the previous owners or operators of a facility at the time of contamination; (3) persons who arranged for the disposal or transport of a hazardous substance; and (4) those who transported a hazardous substance.<sup>16</sup> Defendants who fall into any of these categories are subject to strict liability<sup>17</sup> and will be held jointly and severally liable for the costs of cleanup.<sup>18</sup> While a defendant might escape liability in limited circumstances,<sup>19</sup> courts generally construe the

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15. 42 U.S.C. § 9607(a) (2012). There are four elements to a prima facie showing of CERCLA liability. *Freeman v. Glaxo Wellcome, Inc.*, 189 F.3d 160, 163 (2d Cir. 1999). In addition to demonstrating the defendant is a PRP, the moving party must show that “(1) the site is a ‘facility’ as defined in CERCLA, (2) a release or threatened release of a hazardous substance has occurred, [and] (3) the release or threatened release has caused the plaintiff to incur response costs that were necessary and consistent with the National Contingency Plan set up by CERCLA.” *Id.* (citing *3550 Stevens Creek Assocs. v. Barclays Bank*, 915 F.2d 1355, 1358 (9th Cir. 1990), *cert. denied*, 500 U.S. 917, 111 S. Ct. 2014, 114 L. Ed. 2d 101 (1991)). These other three elements are expansively defined and deserving of their own scholarly work, however this Note focuses solely on the determination of ownership liability under CERCLA § 107(a).

16. 42 U.S.C. §§ 9607(a)(1)-(4) (2012).

17. *See United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 184 (2d Cir. 2003) (noting that “CERCLA § 9607 is a strict liability statute”). Imposing strict liability comports with Congressional intent; in its commentary on S. 1480, a precursor to CERCLA, the Committee on the Environment and Public Works indicated its desire to apply strict liability to environmental harms when it stated:

Strict liability, the foundation of S. 1480, assures that those who benefit financially from a commercial activity internalize the health and environmental costs of that activity into the costs of doing business. Strict liability is an important instrument in allocating the risks imposed upon society by the manufacture, transport, use, and disposal of inherently hazardous substances . . . . To establish provisions of liability any less than strict, joint, and several liability would be to condone a system in which innocent victims bear the actual burden of releases, while those who conduct commerce in hazardous substances which cause such damage benefit with relative impunity.

S. REP. NO. 96-848, at 13 (1980).

18. Liable parties will be held jointly and severally liable unless a defendant can demonstrate that (1) the harm is capable of reasonable apportionment, and (2) that the defendant should be liable for only a defined portion of the harm. *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 559, 614 (2009). The burden of proving apportionment rests at all times on the defendant. *Id.* (citing *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 810 (S.D. Ohio 1983)).

19. Liability will not attach if the release or threat of release of a hazardous substance was caused solely by:

terms of CERCLA liberally, so as to accomplish the statute's goal of effective environmental protection.<sup>20</sup>

Federal courts have struggled to apply a consistent test to determine if a PRP is an "owner" under CERCLA, particularly when a PRP possesses an interest in the contaminated property that is less than full title.<sup>21</sup> The definition of an owner given by the statute is a tautology: "[t]he term 'owner or operator' means . . . any person owning or operating such facility."<sup>22</sup> The unaccommodating nature of this definition has led courts to adopt a variety of tests to resolve the term's uncertain legal meaning.<sup>23</sup>

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(1) an act of God; (2) an act of war; (3) an act or omission of a third party other than an employee or agent of the defendant, or [one in a contractual relationship with the defendant] . . . if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance . . . and (b) he took precautions against such foreseeable acts or omissions of any such third party.

42 U.S.C. §§ 9607(b)(1)-(3) (2012).

20. See *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1198 (2d Cir. 1992) (noting "[b]ecause it is a remedial statute, CERCLA must be construed liberally to effectuate its two primary goals: (1) enabling the EPA to respond efficiently and expeditiously to toxic spills, and (2) holding those parties responsible for the releases liable for the costs of the cleanup"). See also *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 881 (9th Cir. 2001); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 21 (1989) (holding "[t]he remedy that Congress felt it needed in CERCLA is sweeping: *everyone* who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup") (emphasis in original), *overruled on other grounds by* *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 45 (1996).

21. No cases directly on point have risen to the Supreme Court. Relevant but not essential to this Note's analysis is the decision in *United States v. Bestfoods*, which addressed operator liability under CERCLA § 107. After ruling the "uselessness of CERCLA's definition of a facility's 'operator' . . ." the Court applied the "ordinary or natural" meaning of the word, concluding that "under CERCLA, an operator is simply someone who . . . must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." 524 U.S. 51, 66-67 (1998). Court decisions on ownership liability often hinge on whether the term owner has a plain meaning. See *infra* note 59.

22. 42 U.S.C. § 9601(20)(A) (2012). As the Ninth Circuit put it, "[CERCLA] defines 'owner or operator' as 'any person owning or operating' a toxic waste facility, which is a bit like defining 'green' as 'green.'" *Long Beach Unified Sch. Dist. v. Dorothy B. Godwin California Living Trust*, 32 F.3d 1364, 1368 (9th Cir. 1994).

23. See *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984 (D.S.C. 1986), *aff'd in part, vacated in part sub nom. United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988) (utilizing the site control test); *Commander Oil v. Barlo Equip. Corp.*, 215 F.3d 321 (2d Cir. 2000) (looking for sufficient indicia of ownership to hold the party liable as a de facto owner); *City of Los Angeles v. San Pedro Boat Works*, 635 F.3d 440 (9th Cir. 2011) (looking to the property rules of state common law for guidance); *infra* Part II.

This Note argues that a uniform approach is needed, and that a test that looks for discrete factors demonstrating sufficient indicia of ownership, giving rise to de facto ownership, is an appropriate method for determining an entity's liability as an owner. Part I of this Note discusses the legislative history of CERCLA. Part II presents the varying methods of analysis used by circuit courts to define a standard for CERCLA ownership, including (1) the site control analysis, (2) the de facto ownership test, and (3) deference to state common law. Part III then compares and evaluates the different court decisions that address CERCLA ownership standards, and posits that a test for de facto ownership is the proper metric for determining ownership liability. Finally, this Note concludes by arguing that a test for sufficient indicia of ownership is appropriate for assessing CERCLA liability because it affords a more consistent application of the statute across federal jurisdictions.

#### I. LEGISLATIVE HISTORY OF CERCLA

CERCLA's fragmentary history provides little illumination into the meaning of "owner."<sup>24</sup> However, CERCLA was preceded by four fully developed bills,<sup>25</sup> and legislative discussions addressing the purpose of CERCLA's predecessor acts reveal Congress' intent to define an owner as one who need only possess sufficient indicia of ownership. The Comprehensive Oil Pollution Liability and Compensation Act<sup>26</sup> defined an owner as "any person holding title to, or in the absence of title, *any indicia of ownership* of a vessel or

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24. Many courts have lamented the haste with which Congress passed the statute. *See, e.g., United States v. Price*, 577 F. Supp. 1103, 1109 (D.N.J. 1983) (noting that "[CERCLA] was hastily, and therefore, inadequately drafted . . . Congress was not able to provide a clarifying committee report, thereby making it extremely difficult to pinpoint the intended scope of the legislation."); *United States v. Ne. Pharm. & Chem. Co., Inc.*, 579 F. Supp. 823, 838 n.15 (W.D. Mo. 1984), *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986) (describing CERCLA as a "hastily drawn piece of compromise legislation, marred by vague terminology and deleted provisions").

25. Commentators have noted that "[m]any provisions of CERCLA were drawn from four previously considered bills, three of which (H.R. 85, S. 1480, and H.R. 7020) were fully developed by Congress through committee consideration, floor debate, and amendments. A fourth bill, the Administration Bill, S. 1311, was discussed in Senate hearings but never made it out of committee." SWITZER, *supra* note 9, at 5.

26. H.R. 85, 96th Cong. (2d Sess. 1980).

facility . . . .”<sup>27</sup> Similarly, the Offshore Oil Pollution Compensation Fund, considered concurrently with the Comprehensive Oil Pollution Liability and Compensation Act, defined an owner as “any person holding . . . *any indicia of ownership* . . . whether by lease, permit, contract, license, or other form of agreement . . . .”<sup>28</sup> Notably, these bills contained liability exceptions that depended on the sufficiency of each party’s indicia of ownership, and explicitly excluded those parties who held sufficient indicia of ownership from liability when such was held only to “protect their security interest in the vessel or facility . . . .”<sup>29</sup> This language was kept in the final CERCLA statute.<sup>30</sup>

## II. DIVERGING TESTS AMONG THE CIRCUITS

### A. Site Control

In *United States v. South Carolina Recycling and Disposal, Inc.*,<sup>31</sup> the Columbia Organic Chemical Company (COCC) entered into a verbal lease agreement with property title owners to store raw materials and chemicals on a small, four-acre plot in South Carolina.<sup>32</sup> COCC operated the site under lease from 1974 to 1976, when it sublet the property to South Carolina Recycling and Disposal

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27. H.R. 85, 96th Cong. § 101(x) (2d Sess. 1980) (emphasis added).

28. H.R. REP. NO. 96-172, pt. 2, at 45 (1980) (emphasis added). Although the particular phrasings of these definitions were not retained in the enacted bill, at a minimum, they demonstrate that Congress intended ownership liability to attach even to those with less than full title.

29. H.R. 85 § 101(x); Bill Summary Status (S. 1480), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d096:SN01480:@@L&summ2=m&> (demonstrating that at the time S. 1480 was indefinitely postponed in favor of H.R. 7020, it excluded those “who, without participating in the management of a vessel or facility, [held] indicia of ownership primarily to protect their security interests in the vessel or facility . . . .”); Bill Summary Status (H.R. 7020), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d096:HR07020:@@L&summ2=m&>. This bill was later passed as Public Law 96-510 and codified as CERCLA, and, at the time of this summary, contained language also excluding a person “who without participating in the management of a vessel or facility, holds indicia of ownership [sic] primarily to protect their security interests in the vessel or facility . . . .”

30. 42 U.S.C. § 9601(20)(A) (2012) (stating the term owner “does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility”).

31. 653 F. Supp. 984 (D.S.C. 1986).

32. *Id.* at 990.

Inc. (SCRDI).<sup>33</sup> SCRDI took over management of the site until 1978 and assumed the verbal lease from the title owners that same year.<sup>34</sup>

During the course of storage operations, some 7,200 fifty-five-gallon drums filled with various forms of hazardous material were “randomly and haphazardly stacked upon one another without regard to their source or the compatibility of the substances within.”<sup>35</sup> The improperly stored drums eventually deteriorated and began “leaking and oozing” their contents onto the ground.<sup>36</sup>

The EPA intervened and, after determining improper waste storage had released hazardous substances into the environment, took action to remediate the site.<sup>37</sup> The EPA reached an agreement with COCC, SCRDI, and other PRPs under which the PRPs were to perform 75 percent of the cleanup, while money from the Superfund financed the remaining 25 percent.<sup>38</sup> The EPA then brought civil actions against COCC and other PRPs for reimbursement of the Superfund costs.<sup>39</sup>

To determine whether COCC was an owner under CERCLA and therefore liable, the district court looked to the extent of control and responsibility COCC maintained over the affected property during its leasehold.<sup>40</sup> In a very brief explanation, the court found “site control [was] an important consideration in determining who qualifie[d] as an ‘owner’ under [CERCLA] Section 107(a).”<sup>41</sup> Because COCC maintained control over and responsibility for the property as a lessee, the court determined that COCC essentially “stood in the

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33. *Id.* COCC’s decision to store waste on site was made by three individuals: James McClure, Max Gergl, and Henry Tischler. *Id.* These individuals later incorporated SCRDI and continued hazardous waste storage under the new corporation. *Id.*

34. *Id.* Between 1976 and 1978, SCRDI operated the land on a month-to-month sublease from COCC. *Id.* at 1000.

35. *Id.* at 990.

36. *Id.* Exposure of substances contained in the drums to the outside environment resulted in “a number of fires and explosions and generated noxious and toxic fumes.” *Id.*

37. *Id.* at 990–91.

38. *Id.* at 991.

39. *Id.* at 989–91. In total, thirteen entities identified as PRPs agreed to perform 75 percent of the removal work at the site. *Id.* Of those, four waste generators (AquAir Corporation, Allied Corporation, Monsanto Company, and EM Industries, Inc.), the property owners (Harvey Hutchinson and Oscar Seidenberg), the current operator (SCRDI), and COCC were collectively sued for reimbursement. *Id.* at 999.

40. *Id.* at 1003.

41. *Id.*

shoes of the property owners” and should be held liable as an owner.<sup>42</sup> The court reasoned that assigning ownership liability against parties who controlled the site would achieve Congress’ goal of holding those responsible for hazardous conditions liable for costs of remediation.<sup>43</sup> The court also remarked that such a decision comported with common principles of landlord-tenant law.<sup>44</sup> Moreover, the court found it persuasive that COCC’s sublease agreement with SCRDI imbued COCC with additional responsibilities to monitor the operations of its sublessor, therefore indicating an additional level of control.<sup>45</sup>

### *B. De Facto Ownership*

In *Commander Oil Corp. v. Barlo Equip. Corp.*,<sup>46</sup> the Second Circuit adopted a different test. In 1963, Commander Oil Corp. acquired two lots of land around Nassau County, New York.<sup>47</sup> At the time of the purchase, Lot 7A included office and warehouse space, while Lot 7B contained above-ground storage tanks that Commander Oil used as a fuel depot.<sup>48</sup> In 1964, Commander Oil leased Lot 7A to Barlo Equipment Corp., and in 1969, leased Lot 7B to Pasley Solvents & Chemicals, Inc.<sup>49</sup> In 1972, Commander Oil consolidated the lots into a single lease to Barlo, which in turn sublet Lot 7B to Pasley.<sup>50</sup> Nine years later, the Nassau County Department of Health discovered contamination on lot 7B, leading to EPA intervention and a suit against Commander Oil and other defendants for response costs

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42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* The court made a point that “a lessor or sublessor who allows property under his control to be used by another in a manner which endangers third parties or which creates a nuisance, is, along with the lessee or sublessee, liable for the harm.” *Id.* (emphasis added) (citing *California ex rel. Brown v. Watt*, 520 F. Supp. 1359 (C.D. Cal. 1981), *aff’d in part, vacated in part, rev’d in part* 683 F.2d 1253 (9th Cir. 1982), *rev’d sub nom. Sec’y of the Interior v. California*, 464 U.S. 312 (1984) (recognizing that the lessor may be liable for activities carried on by the lessee), and *Daigle v. Cont’l Oil Co.*, 277 F. Supp. 875 (W.D. La. 1967) (holding oil company landowner and carbon company lessee liable *in solidio*)).

46. 215 F.3d 321 (2d Cir. 2000).

47. *Id.* at 324.

48. *Id.*

49. *Id.*

50. *Id.*

incurred by the EPA in remediating the site.<sup>51</sup> In a consent agreement between Commander Oil and the EPA, Commander Oil agreed to reimburse “past and future response costs incurred in connection with the [s]ite,” while maintaining the right to sue other PRPs for contribution.<sup>52</sup>

In 1990, Commander Oil brought an action against Barlo and Pasley in federal district court, seeking contribution for costs.<sup>53</sup> The district court rejected Barlo’s argument that an “owner under CERCLA § 107(a) meant a ‘record owner,’” and instead held that “a lessee who has control over and responsibility for the use of the property is the owner of the property for CERCLA purposes.”<sup>54</sup> Thus, Barlo was liable as an owner by virtue of its “authority and control” over lot 7B.<sup>55</sup> Barlo appealed the decision to the Second Circuit, which disagreed with the district court and reversed.<sup>56</sup>

The Second Circuit adopted a liberal interpretation of CERCLA, broadly construing the statute’s terms to “hold[] those parties responsible for the releases liable for the costs of the cleanup.”<sup>57</sup> However, wary of overextending the statute’s strict liability to unfairly reach non-responsible parties, the circuit court refused to “automatically assign liability to every party with any connection to a contaminated facility.”<sup>58</sup>

Like the court in *South Carolina Recycling*, the Second Circuit struggled to tease-out a tenable definition of an “owner” under the statute.<sup>59</sup> In its arguments, Barlo advocated that CERCLA liability be

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51. *Id.* at 325.

52. *Id.* (internal citation omitted).

53. *Id.*

54. *Id.* (internal quotations omitted).

55. *Id.* (internal quotations omitted).

56. *Id.* at 324.

57. The circuit court’s liberal interpretation of the statute was taken to effectuate Congress’ goals of “(1) enabling the EPA to respond efficiently and expeditiously to toxic spills, and (2) holding those parties responsible for the releases liable for the costs of the cleanup.” *Id.* at 327 (quoting *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1198 (2d Cir. 1992)). The term “release” is broadly construed, and generally means “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment . . . .” 42 U.S.C. § 9601(22) (2012).

58. *Commander Oil*, 215 F.3d at 327.

59. *Id.* The Second Circuit looked to the Supreme Court’s analysis in *United States v. Bestfoods*, 524 U.S. 51 (1998), for guidance. The *Bestfoods* Court managed to resolve the ambiguity of defining the term “operator” by looking to its “ordinary or natural meaning.” The

read narrowly to encompass only those with fee title, while Commander Oil pressed for a more expansive interpretation that rested primarily on the right to control the property.<sup>60</sup> The circuit court was conflicted, finding both interpretations plausible facial constructions of the term, and that no dictionary could provide a satisfactory plain meaning.<sup>61</sup>

Having failed to uncover the ordinary meaning of a CERCLA owner, the Second Circuit turned to other jurisdictions for assistance. The court found this exercise equally unhelpful, noting that “courts and commentators have supplied no consistent guidance as to which rights in the proverbial property bundle define ownership,” and those that had attempted to define owner “held that site control is a sufficient indicator of ownership to impose liability on lessees or sublessors.”<sup>62</sup> The court disagreed with this reasoning and rejected the site control test, observing that *owner liability* and *operator liability* denote two separate concepts; holding an owner liable because she exercised control over a facility would subsume operator liability into ownership liability.<sup>63</sup> To avoid redundancy in statutory interpretation<sup>64</sup> by intermingling ownership and operator liability, the

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Second Circuit in *Commander Oil* followed the same analysis, but was ultimately unable to find a natural meaning for the term “owner” that would resolve the issue of Barlo’s ownership status. *Commander Oil*, 215 F.3d at 327.

60. *Commander Oil*, 215 F.3d at 327.

61. *Id.* The court looked to *Webster’s Dictionary*, which defined an owner as “one that has the legal or rightful title whether the possessor or not.” *Id.* (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1612 (1981)). This definition supported Commander Oil’s expansive interpretation. The court also cited to *Black’s Law Dictionary*, which defined an owner as “[o]ne who has the right to possess, use, and convey something,” or “[o]ne who has the primary or residual title to property.” *Id.* (alteration in original) (quoting BLACK’S LAW DICTIONARY 1130 (7th ed. 1999)). This interpretation supported Barlo’s argument that an owner must have fee title. Ultimately, the Second Circuit concluded that “unlike ‘operator,’ the term ‘owner’ has no natural meaning that could resolve the dispute.” *Id.*

62. *Id.* at 328 (citing *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 1003 (D.S.C. 1986)).

63. *Id.* (citing *Bestfoods*, 524 U.S. at 64 (finding “[i]f the act rested liability entirely on ownership of a polluting facility, this opinion might end here; but CERCLA liability may turn on operation as well as ownership . . .”)); *Schiavone v. Pearce*, 79 F.3d 248, 254 (2d Cir. 1996) (observing that “owner liability and operator liability denote two separate concepts, [and] courts stress the disjunctive character of CERCLA liability”) (internal quotation marks omitted).

64. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (noting the “cardinal principle of statutory construction” that “a statute ought . . . to be so construed that, if it can be prevented,

Second Circuit concluded that “site control alone is an improper basis for the imposition of owner liability.”<sup>65</sup>

Instead, the Second Circuit produced a five-factor, non-exclusive test for ownership when the possessor lacks full title.<sup>66</sup> Although the court was reluctant to impose “new and unexpected liability” upon leaseholders,<sup>67</sup> the Second Circuit held that a non-fee simple lessee could be liable under the ownership provision of CERCLA when that lessee possessed sufficient “indicia of ownership” to be a de facto owner.<sup>68</sup> The court then articulated five non-exclusive factors denoting ownership, including:

- (1) whether the lease is for an extensive term and admits of no rights in the owner/lessor to determine how the property is used;
- (2) whether the lease cannot be terminated by the owner before it expires by its terms;
- (3) whether the lessee has the right to sublet all or some of the property without notifying the owner;
- (4) whether the lessee is responsible for payment of all taxes, assessments, insurance, and operation and maintenance costs; and
- (5) whether the lessee is responsible for making all structural and other repairs.<sup>69</sup>

The factors selected by the court reinforced the idea that the determinative element was the right of the lessee to manipulate the general privileges of property ownership, and not the extent to which the lessee might control operations on the site.<sup>70</sup>

Although the Second Circuit acknowledged that lessees *might* be liable as owners under CERCLA, it declined to extend such liability

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no clause, sentence, or word shall be superfluous, void, or insignificant” (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

65. *Commander Oil*, 215 F.3d at 329.

66. *Id.* at 330–31.

67. *Id.* at 330. The court believed it would be unfair to impose the potentially ruinous costs of CERCLA’s strict, joint, and several liability on an entity that was unaware it had an obligation to check for and contain environmental contamination on the leased property. *Id.* (recognizing that lessees are only concerned with environmental hazards to the extent that “the property is adequate for the tenant’s purposes and that there are no on-site environmental conditions or features which would impair the tenant’s ability to operate”).

68. *Id.*

69. *Id.* at 330–31.

70. *Id.* at 331.

to Barlo.<sup>71</sup> Despite Barlo's existing obligations to the property, the company lacked sufficient attributes of ownership over lot 7B to be a de facto owner.<sup>72</sup> The Second Circuit found it persuasive that Barlo's use of the leased property was limited to Lot A and not Lot B, that Barlo needed Commander Oil's permission before subletting or altering the property (which alterations would become Commander Oil's property anyway), that Barlo was required to keep the property clean to Commander Oil's satisfaction, and that Barlo was prohibited from taking any action that would "in any way increase the rate of fire insurance on the property."<sup>73</sup> The court also found it relevant that the lease between Barlo and Commander Oil was short,<sup>74</sup> and that Commander Oil retained many of the rights and obligations of ownership over the property.<sup>75</sup>

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71. *Id.* at 330–32.

72. The Second Circuit found Barlo's obligation to secure insurance for the lot, its liability to Commander Oil for all assessments on the property and increases in taxes, and its assumed responsibility for all nonstructural repairs to be indicative of ownership; but ultimately held that even with these attributes, "Barlo lacked most of the bundle of rights that comes with ownership of property," and should not therefore be liable as an owner. *Id.* at 332.

73. *Id.* at 330–31 (internal quotations omitted). Specifically, Barlo was

(1) limited to using lot 7A, and only "for that business presently conducted by tenant on a portion of the same premises leased hereunder"; (2) required to obtain written consent from Commander Oil before making "any additions, alterations or improvements" on the land, which alterations would become Commander Oil's property in any event; (3) required to obtain written approval from Commander Oil to sublet the property, and prohibited from subletting to any entity that had "any connection with the fuel, fuel oil or oil business"; (4) required to obtain written permission from Commander Oil to display any "sign, advertisement, notice or other lettering" on the building; (5) required to keep the property "clean and in order to the satisfaction of" Commander Oil, and responsible for any damage Barlo itself caused to the premises or to the "systems or equipment or any installation therein"; and (6) prohibited from doing anything that would "in any way increase the rate of fire insurance" on the property, and from bringing or keeping upon the premises "any inflammable, combustible or explosive fluid, chemical or substance."

*Id.*

74. *Id.* at 330 (noting that Barlo's short-term, five-year lease was less indicative of de facto ownership than a longer, ninety-nine-year lease).

75. Within the provisions of the lease, Commander Oil;

(1) reserved for its own use a right to enter the lot for various purposes; (2) reserved for its own use three oil storage tanks on lot 7B; (3) reserved an "option" to use, on written notice to Barlo, "certain office space" within lot 7A; (4) reserved the right to maintain "its aerial or a comparable aerial" on the roof of the building; and (6) [sic] assumed responsibility to make structural repairs.

*C. Looking to State Common Law*

In the recent case *City of Los Angeles v. San Pedro Boat Works*,<sup>76</sup> the Ninth Circuit premised its assessment of CERCLA ownership liability on analogous determinations of ownership liability in the California common law. In 1965, the City of Los Angeles issued a revocable permit (“Revocable Permit 936”) to the Los Angeles Harbor Marine Corporation to operate a boatworks facility at Berth 44 “for the repair, maintenance, and rebuilding of ships and boats” in the Port of Los Angeles.<sup>77</sup> Four years later, Pacific American purchased all assets of the Los Angeles Harbor Marine Corporation in Berth 44—including Revocable Permit 936—and immediately transferred all assets *except* the permit to its newly formed and wholly owned subsidiary, the San Pedro Boat Works (“San Pedro”).<sup>78</sup> Pacific American “rid itself of its last direct connection with Berth 44” in 1970, when it exchanged Revocable Permit 936 for Revocable Permit 1076, which it then assigned to San Pedro some ten months later.<sup>79</sup> Aside from possessing the boatworks operating permit for ten months, at no time did Pacific American own any of the assets at the boatworks; at all relevant times, San Pedro was the sole owner and operator of the facility.<sup>80</sup> In 1993, BCI Coca-Cola Bottling Company of Los Angeles (“BCI”) purchased Pacific American and assumed all of its liabilities.<sup>81</sup>

Two years after BCI’s acquisition, the City of Los Angeles assessed the soil and water around Berth 44 for contamination.<sup>82</sup> The City found a variety of toxic and hazardous contaminants and, by 2003, had begun cleanup activities.<sup>83</sup> The City sued San Pedro,

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*Id.* at 331.

76. 635 F.3d 440 (9th Cir. 2011).

77. *Id.* at 444. The City issued the permit through its Board of Harbor Commissioners, which was responsible for “issuing franchises, permits, and leases for use of the land at the Los Angeles Harbor [including the Port of Los Angeles].” *Id.*

78. *Id.*

79. *Id.* at 445. The Ninth Circuit’s opinion does not mention any change in conditions between Permit 936 and Permit 1076, and the court’s analysis does not seem to be affected by the exchange.

80. *Id.* at 444–45.

81. *Id.* at 445.

82. *Id.*

83. *Id.* Some contaminants identified by the City included: “volatile organic compounds,

Pacific American, and BCI for cleanup costs in federal court, arguing Pacific American—and consequently BCI—was liable as an owner because Pacific American held a revocable permit to operate the boatworks at Berth 44 for ten months between 1969 and 1970.<sup>84</sup> The district court was not persuaded, finding the Revocable Permits “insufficient to establish owner liability of Pacific American, and thus of BCI Coca-Cola as successor-in-interest, under CERCLA.”<sup>85</sup>

The Ninth Circuit affirmed the district court, relying on its prior decision in *Long Beach Unified Sch. Dist. v. Godwin Liv. Trust*.<sup>86</sup> In *Long Beach*, the circuit court held the tautological nature of CERCLA’s definitions “provide[d] a clue to the legislature’s purpose . . . [and] strongly implie[d] that the statutory terms ha[d] their ordinary meanings rather than unusual or technical meanings.”<sup>87</sup> Unlike in *Commander Oil*—where the Second Circuit failed to divine such “plain meaning”<sup>88</sup>—the Ninth Circuit in *City of Los Angeles* found the ordinary meaning of a CERCLA owner “incorporate[d] the common law definition of [the term].”<sup>89</sup> The reasoning in *Long Beach*—which led to the application of “common law analogies” to CERCLA’s statutory terms—turned in part on amendments to H.R. 7020, one of CERCLA’s precursors, which allowed a court to refuse to apportion damages in circumstances where the prevailing state common law prohibited such apportionment.<sup>90</sup>

Without much discussion, the court in *City of Los Angeles* rejected the tests for ownership liability from *South Carolina Recycling and*

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petroleum hydrocarbons, polychlorinated biphenyls, polycyclic aromatic hydrocarbons, copper, lead, mercury, and chromium.” *Id.*

84. *Id.* at 445–46.

85. *Id.*

86. 32 F.3d 1364 (9th Cir. 1994).

87. *Id.* at 1368 (quoting *Edward Hines Lumber v. Vulcan Materials Co.*, 861 F.2d 155, 156 (7th Cir. 1988)) (internal quotations omitted).

88. *See supra* note 61.

89. *Long Beach*, 32 F.3d at 1368 (citing *Edward Hines Lumber*, 861 F.2d at 157).

90. The court in *Long Beach* relied heavily on the reasoning from *Edward Hines Lumber*, which in turn cited to the district court decision in *Colorado v. ASARCO, Inc.*, 608 F. Supp. 1484 (D. Colo. 1985), for the proposition that since an operator was undefined in the federal statute, a court should “turn to common law analogies, as the sponsors of the legislation anticipated.” *Edward Hines Lumber*, 861 F.2d at 157 (citing *ASARCO*, 608 F. Supp at 1488–89 (quoting 126 Cong. Rec. 26, 785 (1980))).

*Commander Oil*.<sup>91</sup> Specifically, the Ninth Circuit criticized the site control analysis and five-factor test for de facto ownership as being “nebulous and flexible analytic framework[s]” that “d[id] not clearly call out what an investor in land can expect and which factors [were] themselves susceptible to endless manipulation in litigation.”<sup>92</sup> Instead, the court relied on *Long Beach* to hold that the California common law definition of an owner did not extend to the holder of a revocable permit for restricted uses of real property.<sup>93</sup>

Under this interpretation, Pacific American could not be liable as an owner under CERCLA. The California common law recognized that the holder of a revocable permit retained an interest in land “comparable to the interest of a licensee or easement holder.”<sup>94</sup> California courts had consistently distinguished between these less than full title interests and ownership.<sup>95</sup> While this distinction was usually observed in real property tax disputes against leaseholders,<sup>96</sup> the Ninth Circuit found it applicable in *City of Los Angeles*, noting “[a] leasehold is not an *ownership* interest, unlike the possession of land in fee simple.”<sup>97</sup> Since a lease “usually confers greater property interests than does a revocable permit,” Pacific American’s ten-month interest in the boatworks was not sufficient to impose liability for costs of environmental cleanup.<sup>98</sup>

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91. *City of Los Angeles*, 635 F.3d 440, 449 (9th Cir. 2011).

92. *Id.*

93. *Id.*

94. *Id.*

95. Such interests in land were merely “an interest in real property which exist[ed] as a result of possession, exclusive use, or a right to possession or exclusive use of land *unaccompanied by the ownership of a fee simple or life estate in the property*, which ownership interest is retained by the fee title owner of the property . . . and may exist as the result of a grant, among others, of a leasehold estate, a profit a prendre, or any other legal or equitable interest *of less than freehold.*” *Id.* at 449–50 (emphasis in original) (quoting *Bd. of Supervisors v. Archer*, 96 Cal. Rptr. 379, 386 (1971)).

96. *Id.* at 450 n.7.

97. *Id.* at 450 (quoting *Auerbach v. Assessment Appeals Bd. No. 1 for County of Los Angeles*, 39 Cal. 4th 153 (2006)). The California Court’s decision in *Auerbach* was based, in part, on the recognition that the communal vernacular distinguished between “owners” and “leaseholders.” As the *Auerbach* court stated, “[i]t is for that reason that common parlance refers to the ‘owner’ of a freehold estate, encumbered or unencumbered, but to the ‘holder’ of a lease; [the reason being] the freeholder is seised of land, whereas the leaseholder is not.” *Auerbach*, 39 Cal. 4th at 163 (quoting *Pacific Southwest Realty Co. v. County of Los Angeles*, 1 Cal. 4th 155, 163 (1991)).

98. *City of Los Angeles*, 635 F.3d at 450. Similarly, since Pacific American was not liable

The Ninth Circuit reasoned that such a holding was consistent with Congress' intent for the statute. Because Congress failed to specify whether a “‘de facto owner,’ or ‘possessor,’ or ‘person with some incidents or attributes of ownership,’” was subject to owner liability—as it had in other legislation<sup>99</sup>—the Ninth Circuit read the unmodified use of owner to imply an “absolute owner.”<sup>100</sup> According to the court, this reading would still accomplish CERCLA's objective to hold responsible parties liable for environmental contamination, since Ninth Circuit precedent already recognized an expansive reading of ‘operator’ liability.<sup>101</sup> Thus, a more restrictive interpretation of CERCLA ownership liability would still ensure that liability attached to “passive fee title owner[s] of real property [as well as] the active (or negligent) operator of the facility who ha[d] only a possessory interest in the owner's real property.”<sup>102</sup> Therefore, a broad reading of the statutory term was unnecessary, because those responsible parties with less than full title would likely be liable as operators.

The Ninth Circuit was careful, however, not to overextend its reasoning and exempt *all* interests less than full title from CERCLA owner liability. Rather, the circuit court suggested, without deciding, that Congress intended to limit owners to those “possessing all the proverbial ‘sticks in the bundle of rights,’ including fee title to the real property.”<sup>103</sup> Thus, the court tenuously managed to distinguish its decision from the holding in *Commander Oil*, maintaining that

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as an owner of the boatworks, BCI, as successor-in-interest, was also absolved from liability. *Id.* at 452.

99. The Ninth Circuit pointed to 26 U.S.C. § 2042(2), which stated that “a life insurance policy can be included in the decedent's gross estate for estate tax purposes as if owned by the decedent, if the decedent possessed ‘incidents of ownership’ in the insurance policy.” *Id.* at 451.

100. *Id.* at 450 (citing *Dirs. of Fallbrook Irr. Dist. v. Abila*, 106 Cal. 355, 362 (1895)). The Ninth Circuit expressed the opinion that if Congress had intended to impose strict liability on holders of mere possessory interests in real property, it would have spoken clearly on the issue, rather than framing the statute in an ambiguous manner. *Id.*

101. *See id.* at 451 n.9 (recognizing that “[u]nder *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338 (9th Cir. 1992), CERCLA operator liability has been expansively interpreted by this court to extend to any party with the authority to control the cause of the contamination at the time the hazardous substances were released into the environment”) (internal quotations omitted).

102. *Id.* at 444.

103. *Id.* at 452 n.10.

“Pacific American’s revocable permits vested fewer rights in the real property than did the lease in *Commander Oil*,” and thus its result was “not at odds with that of the Second Circuit.”<sup>104</sup>

### III. ANALYSIS AND PROPOSAL

Of the various tests used to assess CERCLA ownership liability when a PRP has less than full title, the Second Circuit’s de facto ownership test is the most appropriate because it is the most effective at promoting Congress’ goal for the statute.

#### *A. Site Control is an Inappropriate Test For CERCLA Ownership Liability*

The site control test is an inappropriate measure of ownership liability because the liability it assigns is overbroad. Possessing control over a facility is more indicative of CERCLA operator status than owner status.<sup>105</sup> Courts have distinguished these two subsets of liability,<sup>106</sup> and a test that recombines them will introduce redundancy into the federal statute, will run contrary to judicial prudence, and will frustrate efficient future execution of the law. Other jurisdictions have recognized the problems associated with this approach and have

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104. *Id.* The factors the Ninth Circuit found persuasive were: the fact that Pacific American’s revocable permit could be terminated by the City at any time, that Pacific American could not convey the permit to another entity without the City’s permission, that Pacific American could not change the boatworks to a different commercial operation without the City’s permission, and that Pacific American could not hold up the land and structures at Berth 44 as security for a loan. *Id.* Cf. *supra* notes 69–75 and accompanying text (describing the limits of Barlo’s authority under its lease with Commander Oil).

105. The Supreme Court, in *United States v. Bestfoods*, defined an operator under CERCLA as one who “must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.” 524 U.S. 51, 66–67 (1998). See also *supra* note 21. Under the site control test used by the district court in *United States v. South Carolina Recycling & Disposal, Inc.*, an owner “maintained control over and responsibility for the use of the property . . . .” 653 F. Supp. 984, 1003 (D.S.C. 1986). As the Second Circuit in *Commander Oil* noted, “[e]ven a cursory examination of the basis for operator liability reveals that it would be almost entirely subsumed by owner liability that relied on site control analysis.” *Commander Oil*, 215 F.3d at 328.

106. *Supra* note 63 and accompanying text.

soundly rejected a determination of ownership premised upon site control.<sup>107</sup>

*B. Looking to Analogous State Common Law is Inappropriate For Finding CERCLA Ownership Liability*

Using concepts of ownership derived from state common law is unsuitable as a standard for CERCLA liability. Such an approach will create inconsistent determinations of liability as a result of the inherent peculiarities unique to each state's common law. Environmental contamination and the remediation and removal of hazardous wastes are inter-state issues with inter-state implications, and it is therefore necessary that liability under CERCLA be assessed uniformly, no matter the jurisdiction.<sup>108</sup> Relying on state common law standards of ownership will obstruct efforts to hold responsible parties accountable, because such parties can evade liability by taking advantage of discrepancies in state common law and seeking safe havens in state jurisdictions with more favorable standards of ownership.<sup>109</sup> Consequently, the purposes of CERCLA can be better achieved through a uniform national response, rather than differentiated local treatment.<sup>110</sup> Thus, the Ninth Circuit's reliance on the California tax code to guide its implementation of a federal environmental statute was inappropriate.<sup>111</sup>

CERCLA is a statute subject to uniquely federal interests that compel national uniformity. The monies expended from the Superfund are replenished not only from contributions of responsible parties but from the national treasury, as well, through federal

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107. See *Commander Oil*, 215 F.3d at 329; *San Pedro Boat Works*, 635 F.3d at 449. See also *Bestfoods*, 524 U.S. at 67–68 (rejecting the “actual control” test).

108. *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 808 (S.D. Ohio 1983). Often hazardous sites will be comprised of waste produced by companies in several states within one regional area. The pollution produced can affect groundwater, surface water, and air, and can as a result raise concerns about health and safety across state lines. *Id.*

109. See *id.* at 809 (stating “[a] liability standard which varies in the different forum states would undermine the policies of [CERCLA] by encouraging illegal dumping in states with lax liability laws”).

110. *Id.*

111. See *City of Los Angeles*, 634 F.3d at 450 n.7 (citing CAL. REV. & TAX CODE § 107(a) (West 2011)).

taxation and federal appropriations.<sup>112</sup> Thus, the degree to which the federal government can secure the financial future of the Hazardous Substance Superfund created by CERCLA to finance remediation efforts “is directly related to the scope of liability under CERCLA, and is in no way dependent upon the laws of any state.”<sup>113</sup>

Moreover, according to the United States Supreme Court, when the EPA authorizes disbursement from the Superfund, the federal government is exercising a constitutionally granted authority.<sup>114</sup> The Court made clear that “[w]hen the United States derives its authority for reimbursement from a specific Act of Congress passed in the exercise of a constitutional function or power, its rights should also derive from *federal* common law.”<sup>115</sup> The ability to create and enforce federal specialized common law is permitted when “necessary to protect uniquely federal interests,”<sup>116</sup> and in this context the interests to be protected are uniquely federal. Forcing PRP reimbursement of remediation costs into the constraints of state-defined ownership standards could severely limit the amount of recovery provided, draining the Superfund, and ultimately restricting the EPA’s ability to respond to existing contaminated sites or address future episodes of contamination and hazardous releases.

Central to the development of CERCLA was the understanding that Congress’ goals for the statute could not be achieved through action exclusively at the state level.<sup>117</sup> A uniform federal response was needed.<sup>118</sup> Such uniform programs require uniform rules of

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112. *Supra* note 14.

113. *Chem-Dyne*, 572 F. Supp. at 808.

114. *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943) (holding that “[w]hen the United States disburses its funds or pays its debts, it is exercising a constitutional function or power . . . . The authority to issue the check had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws of . . . any other state.”).

115. *Chem-Dyne*, 572 F. Supp. at 809.

116. *Id.* (quoting *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 415 U.S. 630, 640 (1981)).

117. *Id.* at 808. *See also id.* at 809.

118. For example, the House Committee on Interstate and Foreign Commerce acutely observed that:

Existing state tort laws present a convoluted maze of requirements under which a victim is confronted with a complex of often unreasonable requirements with regard to theories of causation, limited resources, statutes of limitations and other roadblocks

decision, and the national interest in consistent application of CERCLA ownership standards favors a test that avoids reliance on state common law.<sup>119</sup>

*C. The De Facto Test is the Most Appropriate Test for CERCLA Ownership Liability*

The Second Circuit's test in *Commander Oil* is the most appropriate methodology for approaching ownership liability under CERCLA because it provides a framework for uniform application of the statute's liability standard. When a clear determination of ownership is absent—such as when a PRP holds less than full title—use of a predetermined set of criteria to evaluate a PRP's indicia of ownership can best resolve uncertainties as to ownership status, particularly should a suit arise involving cross-jurisdictional contamination.

Such a test is also supported by CERCLA's legislative history. As all three of the statute's predecessor bills wound their convoluted way through Congress, they each utilized "indicia of ownership" as a determinative element in assessing ownership liability.<sup>120</sup> Importantly, in the final statute, Congress purposefully excluded lenders from liability as owners, so long as such lenders assumed attributes of ownership solely as a security interest.<sup>121</sup> That Congress felt the need to exempt these lenders supports the conclusion that Congress intended CERCLA liability to attach upon a finding of sufficient indicia of ownership, and did not intend for courts to find

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that make it extremely difficult for a victim to be compensated for damages. A clear, uniform federal law defining a victim's cause of action in these areas is sorely needed .

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H.R. REP. NO. 96-1016, 63-64 (1980).

119. As the Court in *United States v. Kimbell Foods, Inc.* stated, "federal programs that 'by their nature are and must be uniform in character throughout the Nation' necessitate formulation of controlling federal rules . . . . Conversely, when there is little need for a nationally uniform body of law, state law may be incorporated as the federal rule of decision." 440 U.S. 715, 728 (1979).

120. See *supra* notes 26-29 and accompanying text.

121. See 42 U.S.C. § 9601(20)(E) (2012) (explicitly including lenders in the exception to ownership for those who only have indicia of ownership as a security interest).

liability based on the particulars of state common law or upon a PRP's active role in site management.<sup>122</sup>

#### CONCLUSION

Utilizing a discrete, factor-based test to evaluate indicia of ownership is the appropriate method for assessing ownership liability under CERCLA. Using the extent of site control as a basis for ownership liability is inappropriate because it subsumes CERCLA's related but distinct 'operator' liability. Similarly, relying on state common law standards for ownership is improper because CERCLA is a federal statute with national implications that should be applied uniformly. Following state common law will frustrate CERCLA's purpose by allowing otherwise responsible PRPs to escape liability under more favorable state standards of ownership, thwarting the EPA's attempts to recover the costs of remediation from the responsible owner. Instead, implementing a factor-based test, like that utilized by the Second Circuit in *Commander Oil*, is the best judicial approach. Such a test is a logical extension of the existing statutory framework: it acknowledges Congress' intent to use indicia of ownership as a measurement of liability, and it allows the EPA and the federal courts to assess PRP ownership liability under the federal statute in a consistent and uniform manner across jurisdictions at the national level.

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122. The Second Circuit's decision is consistent with this analysis. See *Commander Oil*, 215 F.3d at 329.