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V. Environmental Law

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V. ENVIRONMENTAL LAW

*Requiring Past Disposers of Hazardous Wastes to Abate
Resultant Imminent Hazards Under Section 7003 of the
Resource Conservation and Recovery Act*

In recent years, the improper disposal of hazardous waste has emerged as perhaps the nation's most serious environmental problem.¹ The Resource Conservation and Recovery Act of 1976 (RCRA)² represents Congress' first direct attempt to address the problem of improper disposal of hazardous waste.³ The RCRA requires the Environmental Protection Agency (EPA) to

1. See *Hazardous Waste Disposal, Our Number One Environmental Problem: Hearings Before the Subcomm. on Transportation and Commerce of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 2d Sess. 1 (1980). No distinct concept of the magnitude of the hazardous waste problem exists. See Special Report to Congress, INJURIES AND DAMAGES FROM HAZARDOUS WASTE: ANALYSIS AND IMPROVEMENT OF LEGAL REMEDIES, IN COMPLIANCE WITH SECTION 301(e) OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE COMPENSATION AND LIABILITY ACT OF 1980 BY THE "SUPERFUND SECTION 301(e) STUDY GROUP" Vols. I & II, 1, reprinted as *Comm. Print for the Senate Comm. on Envtl. and Pub. Works*, serial No. 97-12, 97th Cong., 2d Sess. (1982). Limitations in scientific testing procedures, a lack of information about the chemical properties of combinations of hazardous substances and a lack of understanding of the effects of human exposure to hazardous wastes have created substantial scientific uncertainty about the magnitude of the hazardous waste problem. *Id.* at 8-9, 12-16. The absence of records concerning the substances disposed of and the location of disposal sites renders the evaluation of the hazardous waste problem even more difficult. *Id.* at 7, 10-11.

In 1979, manufacturers produced 173,500,000 tons of hazardous chemicals. S. REP. NO. 848, 96th Cong., 2d Sess. 3 (1980). At that time, production of hazardous chemicals was growing at a rate of 3.5% per year. *Id.* As of February, 1981, the EPA was discovering hazardous waste disposal sites at a rate of 400 per month. See *Using RCRA's Imminent Hazard Provision in Hazardous Waste Emergencies*, 9 *ECOL. L. Q.* 599, 600 n.3 (1981).

2. Pub. L. No. 96-482, 94 Stat. 2334 (codified as amended at 42 U.S.C. §§ 6901-6987 (1982)).

3. See Wolf, *Hazardous Waste Trials and Tribulations*, 13 *ENVTL. L.* 367, 368 (1983) (Resource Conservation and Recovery Act (RCRA) was Congress' first direct attempt to regulate hazardous waste). Prior to the enactment of the RCRA, the Solid Waste Disposal Act of 1965 and the Resource Recovery Act of 1970 addressed solid waste disposal in general, but did not specifically address hazardous waste disposal. See 42 U.S.C. § 3251(b)(2) (1970) (Solid Waste Disposal Act of 1965); 42 U.S.C. § 3251(b) (1982) (Resource Recovery Act of 1970); see also Kovacs and Klucsik, *The New Federal Role in Solid Waste Management: The Resource Conservation and Recovery Act of 1976*, 3 *COL. J. ENVTL. L.*, 205, 212-16 (1977) (discussion of history of federal solid waste legislation).

The Clean Air and Clean Water Acts, which made incineration and aquatic disposal more costly, provided a stimulus to increased land disposal of hazardous wastes. See Andersen, *The Resource Conservation and Recovery Act of 1976: Closing the Gap*, 1978 *Wis. L. REV.* 633, 635, 646; 33 U.S.C. § 1252 *et seq.* (1982) (Clean Water Act); 42 U.S.C. § 7401 *et seq.* (1982) (Clean Air Act). Congress enacted the RCRA to remedy the problem of unregulated land disposal of hazardous wastes and other substances which Congress perceived as the last remaining loophole in environmental law. See H.R. REP. NO. 1491, 94th Cong., 2d Sess. at 4-5, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 6238, 6241-42. Since the RCRA's passage

establish minimum safety standards for generation, storage, treatment, transportation and disposal of hazardous waste.⁴ Section 7003 of the RCRA is an imminent hazard provision which addresses the situation in which hazardous wastes present an impending risk to public health or the environment.⁵ Section 7003 permits the Administrator of the EPA to obtain an injunction to restrain persons from contributing to the handling, storage, treatment, transportation or disposal of wastes in ways which present an imminent

in 1976, however, the magnitude of the hazardous waste problem has revealed itself as far greater than Congress had anticipated. See H.R. REP. No. 1016, Part I, 96th Cong., 2d Sess. 2 (1980), reprinted in 1980 U.S. CODE CONG. & AD. NEWS 6119, 6120 [hereinafter cited as Superfund Report]. The discovery of the serious health problems of residents of Niagara Falls, New York as a result of the residents' exposure to hazardous wastes at the abandoned Love Canal disposal site provided Congress with the impetus first to amend the RCRA and eventually to enact the Superfund legislation. See *id.* at 6121 (Love Canal hazard as impetus to Superfund); SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, HAZARDOUS WASTE DISPOSAL REPORT, (H.R. Comm. Print No. IFC 31), 96th Cong., 1st Sess. 1, 32 (1979) [hereinafter cited as Eckhardt Report] (Love Canal hazard was impetus for RCRA amendments). The Superfund legislation created a fund financed by the federal government and those sections of industry whose wastes contribute significantly to the hazardous waste disposal problem. See 42 U.S.C. § 9631 (1982). The fund compensates federal and state governments for clean-up activities in cases in which the governments are unable to locate the responsible parties, or in which the parties do not have the resources to perform the clean-up. See *id.* § 9611(c)(2). Although Congress recognized that section 7003 of the RCRA applies to inactive dump sites, in enacting Superfund, Congress wanted to provide a means to remedy imminent hazards at disposal sites for which the EPA could locate no financially responsible owner. See Superfund Report, *supra* at 6125; *infra* notes 5-8 and accompanying text (discussion of section 7003 of RCRA).

4. See 42 U.S.C. §§ 6923-6925 (1982) (statutes concerning generation, storage, treatment, transportation and disposal of hazardous wastes under RCRA).

5. 42 U.S.C. § 6973(a) (1982) [hereinafter referred to as § 7003 of RCRA]; see *Using RCRA's Imminent Hazard Provision in Hazardous Waste Emergencies*, 9 *Ecol. L. Q.* 599, 600 (1981) (§ 7003 of RCRA is imminent hazard provision). In addition to the RCRA, three other environmental statutes which include imminent hazard provisions are the Safe Drinking Water Act, the Clean Water Act and the Clean Air Act. See 42 U.S.C. § 300; (1982) (imminent hazard provision of Safe Drinking Water Act); 33 U.S.C. § 1364 (1982) (imminent hazard provision of Clean Water Act); 42 U.S.C. § 7603(a) (1982) (imminent hazard provision of Clean Air Act). The House Committee Report on the Safe Drinking Water Act details the meaning of the imminent hazard provision. See H.R. REP. No. 1185, 93rd Cong., 2d Sess. 35-36 (1974), reprinted in 1974 U.S. CODE CONG. & AD. NEWS 6454, 6487-88. The report states that the Environmental Protection Agency may bring suit to abate a danger to public water supplies when the risk of harm is imminent, without waiting until the harm itself is imminent. *Id.* at 6487-88. Because of the preventive nature of the imminent hazard provision, courts should give consideration to the time necessary for pursuing abatement of the danger through the judicial system when evaluating the imminence of the hazard. *Id.* at 6488. The term "substantial" in the phrase "imminent and substantial endangerment" refers to the size of the risk as well as the amount of harm. *Id.* at 6487. A substantial likelihood of harm to health is sufficient to permit an injunction under the Safe Drinking Water Act's imminent hazard provision. *Id.* at 6488.

In *Reserve Mining Co. v. EPA*, the Eighth Circuit interpreted the predecessor of the Clean Water Act's imminent hazard provision, which permitted the EPA to bring suit to obtain abatement of pollution originating in one state which was endangering public health or welfare in another state. See 514 F.2d 492, 528-29 (8th Cir. 1975) (en banc); 33 U.S.C. § 1160(g)(1)

hazard to health or the environment.⁶ In addition, section 7003 authorizes the Administrator to take other necessary action to protect public health and the environment.⁷ Under the authority of section 7003, the EPA has brought suits to require parties responsible for the creation of an imminent hazard to remedy the hazard.⁸ Frequently, however, the hazard is discovered after the voluntary disposal of wastes has ceased.⁹ In *United States v. Waste Industries*,¹⁰ the Fourth Circuit recently considered whether section 7003 authorizes courts to require persons who have ceased dumping activities before the hazard arises to remedy the resultant imminent hazard.¹¹

In *Waste Industries*, the defendant, Waste Industries, operated a sanitary landfill¹² at Flemington in New Hanover County, North Carolina from 1972 to 1979.¹³ Buried wastes at the landfill leached¹⁴ through the soil to the

(1970), amended by 42 U.S.C. § 7603(a) (1982). The Eighth Circuit held that the EPA need only prove a risk of harm and not actual harm to show endangerment. *Reserve Mining Co. v. EPA*, 514 F.2d 492, 529 (8th Cir. 1975) (en banc). The Eighth Circuit further found that scientists need not have completely established the relationship between the suspected harmful agent and the harm for the EPA to seek abatement of the endangerment. *Id.* The Eighth Circuit noted, however, that the term "imminent and substantial endangerment" in the later version of the Clean Water Act connoted a greater risk of harm than the earlier version's term "endangering." *Id.* at 528; compare 42 U.S.C. § 7603(a) (1982) (amended version of Clean Water Act's imminent hazard provision) with 33 U.S.C. § 1160(g)(1) (1970) (prior version of Clean Water Act's imminent hazard provision).

6. 42 U.S.C. § 6973(a) (1982). § 7003 of RCRA provides:

Notwithstanding any other provisions of this chapter, upon receipt of evidence that the handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States in the appropriate district court to immediately restrain any person contributing to such handling, storage, treatment, transportation or disposal, or to take such other action as may be necessary. The Administrator shall provide notice to the affected State of any such suit. The Administrator may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and the environment.

Id.

7. *Id.*

8. See *Using RCRA's Imminent Hazard Provision in Hazardous Waste Emergencies*, 9 *ECOL. L. Q.* 599, 601 n.9 (1981) (list of 56 suits EPA has filed under RCRA § 7003 as of 1981).

9. *Id.* at 603.

10. 734 F.2d 159 (4th Cir. 1984).

11. See *id.* at 165 (under § 7003, courts may require persons no longer actively disposing of hazardous wastes to alleviate imminent hazard which is result of such persons' past conduct). But see *United States v. Waste Industries*, 556 F. Supp. 1301, 1305-14 (E.D.N.C. 1982) (§ 7003 merely permits restraint of affirmative disposal conduct); see *infra* note 25 and accompanying text (discussing district court's reasoning on affirmative conduct issue).

12. A sanitary landfill is a dump site in which an earth moving machine compresses compacted wastes and covers the wastes with soil. See N. SAX, *INDUSTRIAL POLLUTION* 264 (1974).

13. See 734 F.2d at 162.

14. Leaching involves the percolation of water soluble components downward through the soil and ultimately into ground water below the disposal site. See W. HONOUR, *HONOUR'S ENERGY & ENVIRONMENTAL HANDBOOK* 64 (1979).

ground-water aquifer¹⁵ below the site and infiltrated the Flemington water supply.¹⁶ A variety of contaminants in concentrations large enough to harm persons and the environment reached residential wells.¹⁷ Upon detecting the contamination, the EPA advised residents of the serious health risks and required the County to provide a water system.¹⁸

The EPA brought suit against Waste Industries, seeking restoration of the ground water to its original condition and reimbursement of the funds spent on the EPA's investigation of the Flemington landfill.¹⁹ The EPA asserted that section 7003 of the RCRA permits a suit to restrain the former operators of an inoperative dump site from allowing hazardous substances at that site to continue to pollute water supplies.²⁰ Waste Industries, however, contended that the EPA could use the statute only to restrain ongoing dumping activities.²¹ Waste Industries argued that section 7003 does not empower courts to require persons who have ceased affirmative disposal activities to eliminate current hazards resulting from past disposal.²² Waste Industries therefore argued that since the dump was no longer in operation, the complaint failed to state a claim upon which the court could grant relief.²³

The United States District Court for the Eastern District of North Carolina granted Waste Industries' motion to dismiss the complaint.²⁴ Following standard rules of statutory interpretation, the district court determined that the statute permits injunctions to restrain only active human conduct.²⁵

15. A groundwater aquifer is an underground repository consisting of earth, gravel or porous rock, which holds water. *See id.* at 10, 53.

16. *See* 734 F.2d at 162. At the time the contamination in *Waste Industries* occurred, the town of Flemington had no centralized water system. *Id.* at 162-63. Residents obtained water from individual wells. *Id.*

17. *Id.* at 162. In *Waste Industries* the contaminants found in residential wells included tetrachloroethylene, benzene, trichloroethylene, 1, 2-dichloroethane, vinyl chloride, methylene chloride, and lead. *Id.* The contaminants created a substantial risk of cancer and an unacceptably high risk of neurological damage to children. *Id.*

18. *Id.* at 162-63.

19. *Id.* at 163. In *Waste Industries*, in addition to seeking reimbursement and decontamination of the ground water underlying Flemington, the EPA sought a plan for preventing additional contamination of Flemington water supplies. *Id.* The EPA also requested that the court require Waste Industries to monitor the contaminated site. *Id.* The EPA abandoned its original request that the court require the defendants to provide a permanent source of safe water for Flemington residents when residents obtained a water system with federal, state, and local funds. *Id.*

20. *Id.* at 161.

21. *Id.* at 164.

22. *Id.*

23. *Id.* at 161. In *Waste Industries*, the defendants moved to have the court dismiss the EPA's claim under rule 12(b)(6) of the Federal Rules of Civil Procedure. *See* 556 F. Supp. at 1301; FED. R. CIV. P. 12(b)(6) (motion to dismiss complaint for failure to state claim upon which court can grant relief).

24. *See* 556 F. Supp. 1301, 1319 (E.D.N.C. 1982).

25. *See Id.* The district court in *Waste Industries* used the *ejusdem generis* and *noscitur a sociis* rules of statutory interpretation to interpret the term "disposal" within § 7003. *Id.* The rule of *ejusdem generis* interprets general words following specific words in a statute to include

The district court further discussed whether, assuming section 7003 applied to situations in which past conduct created a present danger, the statute provided any substantive standards for imposing liability.²⁶ The district court determined that section 7003 does not establish standards for the imposition of liability on persons responsible for creating an imminent hazard.²⁷ The court found that section 7003 simply gives federal courts jurisdiction over actions to enjoin persons from contributing to an imminent waste hazard.²⁸ Moreover, the district court stated that the federal common law of public nuisance²⁹ could not provide the necessary substantive standards of liability for an imminent hazard because the RCRA had preempted federal common law in the area of hazardous waste disposal.³⁰

Finally, the district court determined that the imposition of liability on persons who complied with the laws in effect at the time such persons deposited wastes would amount to a retroactive application of the RCRA.³¹ The court contrasted section 7003 with provisions of Superfund.³² The Superfund legislation, which Congress passed in 1980, explicitly imposes liability for dumping of hazardous wastes which occurred prior to the passage

only objects similar to those that the specific words include. *Id.* at 1305 n.7. The district court concluded that Congress intended the general term "disposal" to refer only to active human conduct, because "disposal" follows handling, storage, treatment and transportation in § 7003, and the latter four terms refer specifically to active human conduct. *Id.* at 1305. The rule of *noscitur a sociis* directs a court to interpret the meaning of an ambiguous term in accordance with other words in the same grouping. *Id.* Therefore, the district court in *Waste Industries* interpreted the ambiguous term "disposal" in light of the element of affirmative conduct common to handling, storage, treatment and transportation. *Id.* *But see* *United States v. Price*, 688 F.2d 204, 213-14 (3d Cir. 1982) (term "disposal" under RCRA is not ambiguous because term's definition within RCRA leaves no doubt concerning meaning of "disposal").

26. 556 F. Supp. at 1314-16.

27. *Id.*

28. *Id.*

29. *See* *Illinois v. City of Milwaukee*, 406 U.S. 91, 103-07 (1972) (courts may fashion federal common law pertaining to public nuisances to fill interstices in federal pollution laws where overriding federal interest exists in uniform rule of decision).

30. 556 F. Supp. at 1315-16. The *Waste Industries* district court found that the RCRA had preempted the common law of public nuisance based on the Supreme Court's holding in *City of Milwaukee v. Illinois* that the enactment of amendments to the Clean Water Act made the Act a comprehensive regulatory scheme and thus preempted the federal common law. *Id.*; *see* *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981); Federal Water Pollution Control (Clean Water) Act of 1972, Pub. L. No. 92-500, § 2, 86 Stat. 816 (1972) (amendments to Clean Water Act). According to the Supreme Court in *City of Milwaukee v. Illinois*, whether a federal statutory scheme has preempted federal common law depends on the comprehensiveness of the scheme and whether the scheme addresses the problem that the common law had previously controlled. 451 U.S. at 315 n.8.

31. *Id.* at 1317-18; *see infra* note 53 and accompanying text (EPA did not promulgate standards for disposal of hazardous wastes until after *Waste Industries'* landfill had ceased operations).

32. *See* 42 U.S.C. §§ 9601-9657 (1982). "Superfund" refers to the Comprehensive Environmental Response, Compensation and Liability Act of 1980. *See* Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COL. J. ENVTL. L., 1, 1 n.1 (1982); *supra*, note 3 (discussing history of

of Superfund.³³ The court viewed the expressly retroactive provisions of Superfund as proof that Congress was capable of spelling out its intent that a statute have retroactive effect.³⁴ According to the district court, the absence of such unequivocal retroactive language in section 7003 of the RCRA indicated that Congress did not intend section 7003 to impose liability for dumping activities which occurred prior to the enactment of the RCRA.³⁵ The district court therefore refused to apply section 7003 to require the defendants to take action to abate the hazard.³⁶

On appeal, the Fourth Circuit reversed the district court's decision and remanded the case.³⁷ The Fourth Circuit found that the district court had interpreted section 7003 too narrowly.³⁸ The Fourth Circuit explained that the inclusion of the term "leaking" in the Act's definition of "disposal" indicated that Congress did not intend to require active human conduct as a prerequisite to suit under section 7003.³⁹ Consequently, persons who deposited wastes prior to the effective date of the RCRA can be liable if that past conduct is responsible for an imminent hazard caused by post-RCRA leakage of those wastes.⁴⁰

In response to the defendants' contention that section 7003 permits an

federal regulation of hazardous waste).

33. 42 U.S.C. § 9607(a) (1982).

34. 556 F. Supp. at 1318. In addition to finding that the lack of explicit language regarding retroactivity in § 7003 implies that Congress did not intend § 7003 to be retroactive, the *Waste Industries* district court discussed the implications of the enactment of Superfund for § 7003. *Id.* at 1316-17. Since Superfund authorizes the cleanup of abandoned hazardous waste disposal sites, the district court concluded that Congress enacted Superfund because § 7003 of the RCRA does not apply to inactive sites. *See id.* But see Superfund Report, *supra* note 3, at 6125 (House report on Superfund recognizes that § 7003 of RCRA applies to sites where past dumping has resulted in imminent hazard).

35. 556 F. Supp. at 1318.

36. *Id.*

37. *See* 734 F.2d at 168.

38. *Id.* at 163.

39. 734 F.2d at 164. *See* 42 U.S.C. § 6903(3) (1982). The RCRA defines "disposal" as "the discharge, leaking or placing of any solid waste or hazardous wastes into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters." *Id.* The legislative history of § 7003 is sparse. *See* United States v. Midwest Solvent Recovery, Inc., 484 F. Supp. 138, 143 (N.D. Ind. 1980). The sole contemporaneous congressional report on the RCRA does not explain the imminent hazard provision. *See* H.R. REP. NO. 1491, 94th Cong. 2d Sess. 69, reprinted in 1976 U.S. CODE CONG. & AD. NEWS, 6238, 6309; *see also* Kovacs and Klucsik, *The New Federal Role in Solid Waste Management: The Resource Conservation and Recovery Act of 1976*, 3 COL. J. ENVTL. L., 205, 216-20 (1977) (chronicling development and passage of RCRA in final days of 1976 congressional session); *Using RCRA's Imminent Hazard Provision in Hazardous Waste Emergencies*, 9 ECOL. L. Q. 599, 604 n.21 (1981) (discussing likely reasons for Congress' lack of explanation of § 7003 when RCRA's development was in progress). Subsequent congressional interpretations of § 7003 exist, however, and such interpretations are an appropriate source of information concerning the meaning of the statute. *See infra* notes 45 & 75 (courts appropriately defer to subsequent congressional interpretation of statutes).

40. 734 F.2d at 165.

injunction only under emergency conditions, the Fourth Circuit stated that the language of the section permits an action against the operator of a dump when the disposal creates a substantial imminent hazard.⁴¹ The court noted that the Third Circuit in *United States v. Price*⁴² similarly had held that a risk of harm was sufficient to permit the EPA to bring suit under section 7003.⁴³ The Fourth Circuit also addressed the defendants' claim that section 7003 was solely jurisdictional and provided no substantive basis for the imposition of liability upon persons responsible for creating an imminent hazard.⁴⁴ Based on a House subcommittee report issued pursuant to Congress' consideration of amendments to the RCRA (the "Eckhardt Report"), the Fourth Circuit found that section 7003 imposes substantive liability upon persons who create an imminent hazard and additionally gives courts jurisdiction over actions brought to abate impending danger from hazardous waste disposal.⁴⁵ The Eckhardt Report states that section 7003 essentially codified the common law of public nuisance by incorporating common-law theories assigning liability for the creation of a public nuisance.⁴⁶ Since section 7003 incorporates common-law theories, the Fourth Circuit reasoned

41. See *id.*; 42 U.S.C. § 6973(a) (1982).

42. 688 F.2d 204, 207 (3d Cir. 1982). In *Price*, the EPA sought from the defendants a study of the danger to Atlantic City's wells and an alternative source of water for residents whose wells were contaminated by the leakage of hazardous waste from a landfill in Pleasantville, New Jersey. *Id.* at 207-09. The defendants in *Price* had ceased dumping chemical wastes at the site in 1972, prior to the enactment of the RCRA. *Id.* at 208. Although the Third Circuit affirmed the district court's denial of preliminary injunctive relief, the Third Circuit disapproved the lower court's restrictive interpretation of § 7003. See *id.* at 211; 523 F. Supp. 1055, 1067-68 (D.N.J. 1981). The *Price* court discussed § 7003 in response to the district court's conclusion that federal courts could not grant relief by decreeing that a defendant in a suit under § 7003 pay funds to abate an imminent hazard. See 688 F.2d at 211-14; 523 F. Supp. at 1068. The Third Circuit found that pursuant to § 7003, courts may order persons who ceased dumping prior to the enactment of the RCRA to clean up hazardous waste disposal sites which present an imminent danger. 688 F.2d at 214. The Third Circuit affirmed the lower court's denial of such a remedy in this case, however, because the Third Circuit found no abuse of discretion by the district court. *Id.* at 211. The Third Circuit noted that the government had joined as defendants in the action only a few of the persons responsible for the creation of the hazard. *Id.* Based on the unfairness of requiring those few to expend the large sums necessary to abate the hazard, and the danger to the public if the defendants proved financially unable to bear the burden, the Third Circuit agreed with the district court that the EPA's cleanup and subsequent reimbursement provided a better solution in this case. *Id.*

43. See 734 F.2d at 165; 688 F.2d at 211 (§ 7003 and similar provision of the Safe Drinking Water Act authorize injunctive relief where only risk of harm is present); *supra* note 5 (discussing imminent hazard provisions in environmental statutes).

44. 734 F.2d at 167; see *infra* notes 76-82 and accompanying text (discussing substantive or jurisdictional nature of § 7003).

45. See 734 F.2d at 167; Eckhardt Report, *supra* note 3, at 31; Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572, 596 (1980) (reports of subsequent congressional interpretation of statute provide authority for statutory interpretation in absence of pertinent legislative history).

46. See Eckhardt Report, *supra* note 3, at 31; *supra* notes 29 & 30 (federal common law of public nuisance fills interstices of federal environmental statutes).

that section 7003 contains common-law standards of liability for the creation of imminent hazards.⁴⁷

As a consequence of the finding that section 7003 incorporates the common law of public nuisance, the Fourth Circuit criticized the trial court's holding that the RCRA preempted the federal common law of nuisance.⁴⁸ Although the Fourth Circuit recognized that the Supreme Court in *City of Milwaukee v. Illinois*⁴⁹ had cautioned against courts' use of common-law principles to decide cases in areas that Congress had preempted through the enactment of comprehensive statutory schemes, the Fourth Circuit emphasized that nothing prohibited Congress from incorporating the common law into such a statutory framework.⁵⁰ Since the Eckhardt Report indicates that section 7003 embodies the common law of public nuisance, the Fourth Circuit reasoned that proper application of the statute requires courts to enjoin parties responsible for the creation of a common-law public nuisance, when that nuisance constitutes an imminent hazard.⁵¹

Finally, the Fourth Circuit addressed the defendants' contention that the suit was an impermissible retroactive application of the RCRA since the EPA had not adopted regulations controlling the disposal of hazardous and solid wastes until after the Flemington landfill had ceased operation.⁵² The Fourth Circuit stated that the applicability of section 7003 did not depend on the adoption of regulations since the statute provided a remedy not for improper disposal procedures, but rather for results of disposal presenting substantial risks of harm.⁵³ The Fourth Circuit, therefore, concluded that section 7003 became operative as soon as Congress enacted the statute.⁵⁴

The predominant disagreement between the Fourth Circuit and the district court concerned whether courts may apply section 7003 in the absence of ongoing affirmative disposal of hazardous wastes.⁵⁵ Several other courts

47. See 734 F.2d at 167.

48. See *id.*; *supra* note 30 (discussing preemption of federal common law of public nuisance by environmental legislation).

49. 451 U.S. 304 (1981).

50. 734 F.2d at 167; see *City of Milwaukee v. Illinois*, 451 U.S. 304, 320 (1981) (federal courts lack authority to impose restrictions beyond those which Congress has enacted in comprehensive regulatory scheme).

51. See 734 F.2d at 167-68; Eckhardt Report, *supra* note 3, at 31 (§ 7003 embodies common law of public nuisance).

52. See 734 F.2d at 167-68. The landfill in *Waste Industries* ceased operations in 1979. See *Waste Industries*, 556 F. Supp. at 1303. Although Congress enacted the RCRA in 1976, the EPA did not promulgate the standards that the RCRA called for until 1980. See 734 F.2d at 167-68.

53. 734 F.2d at 164, 168. In *Waste Industries*, the Fourth Circuit contrasted the RCRA's Subtitle C which applies to persons handling hazardous wastes with § 7003, which is within a separate subtitle of the RCRA concerning environmental endangerment. *Id.* The Fourth Circuit viewed § 7003's placement within the RCRA as evidence that § 7003 deals with the effect of disposal practices, not the way in which persons dispose of wastes. *Id.* The cessation of active disposal prior to the EPA's promulgation of disposal regulations, therefore, is immaterial to liability under § 7003. *Id.*

54. *Id.*

55. Compare 734 F.2d at 164-67 (courts may apply § 7003 to require defendants no longer

have addressed this question.⁵⁶ For example, in *United States v. Solvents Recovery Service of New England*,⁵⁷ the United States District Court for the District of Connecticut held that the EPA need not allege continuing affirmative disposal to state a claim under section 7003 upon which the court could grant relief.⁵⁸ The defendants in *Solvents Recovery Service* had ceased any affirmative acts of disposal prior to the time EPA sought an injunction.⁵⁹ The *Solvents Recovery Service* court stated that section 7003 does not differentiate between present hazards due to continuing acts and hazards due to acts which have ceased.⁶⁰ Therefore, the district court held that the EPA's failure to allege ongoing voluntary acts of disposal did not render the complaint invalid.⁶¹

The Third Circuit United States Court of Appeals also addressed the question of whether ongoing dumping is a prerequisite for obtaining abatement of an imminent hazard under section 7003 in *United States v. Price*.⁶² Although the Third Circuit's interpretation of section 7003 in *Price* was dictum, the Third Circuit's discussion of the issue is helpful in interpreting the statute.⁶³ Like the Fourth Circuit in *Waste Industries*, the Third Circuit

actively disposing of waste to abate imminent hazard resulting from past disposal) with 556 F. Supp. at 1305-14 (ongoing affirmative disposal of hazardous wastes is prerequisite to application of § 7003).

56. See *United States v. Solvents Recovery Service of New England*, 496 F. Supp. 1127, 1139-41 (D. Conn. 1980) (§ 7003 does not require ongoing conduct); *infra* notes 58-61 and accompanying text (discussion of *Solvents Recovery Service*); *United States v. Price*, 688 F.2d 204, 213-14 (3d Cir. 1982) (§ 7003 can apply to dormant site), *affirming* *United States v. Price*, 523 F. Supp. 1055, 1071 (D.N.J. 1981) (§ 7003 permits courts to require defendants to take steps to stop leaking that results from passive inaction); *infra* notes 62-65 (discussion of *Price*); *Jones v. Inmont Corp.*, 584 F. Supp. 1425, 1435-37 (S. D. Ohio 1984) (§ 7003 applies to present leaking resulting from past, pre-RCRA actions); *United States v. Reilly Tar and Chemical Corp.*, 546 F. Supp. 1100, 1108-09 (D. Minn. 1982) (refusing to hold that § 7003 cannot apply to persons whose connection with the dump ceased prior to the enactment of RCRA when such persons sold site); *United States v. Wade*, 546 F. Supp. 785, 789-91 (E.D. Pa. 1982) § 7003 does not apply to nonnegligent persons who formerly generated hazardous waste and contracted for waste's disposal at site other than where generation occurred); *United States v. Midwest Solvent Recovery, Inc.*, 484 F. Supp. 138, 144-45 (N.D. Ind. 1980) (court did not discuss ongoing conduct issue but granted injunction to force cleanup of site no longer in operation).

57. 496 F. Supp. 1127 (D. Conn. 1980).

58. *Id.* at 1139-41.

59. *Id.* at 1130, 1141. In *Solvents Recovery Service*, both defendants apparently continued to dispose of wastes after the enactment of the RCRA by dumping the wastes into unlined lagoons, or by placing leaky drums of hazardous waste at the disposal site. *Id.* However, both defendants had ceased the dumping before the EPA filed the complaint. *Id.* at 1141.

60. *Id.* at 1140. See *supra* note 6 (quoting § 7003). The *Solvents Recovery Service* court noted that § 7003 on its face requires only that the disposal present an imminent hazard and does not require that the disposal be continuing. 496 F. Supp. at 1140.

61. *Id.* at 1141. The defendants in *Solvents Recovery Service* had moved to dismiss the EPA's claim for failure to state a claim upon which the court could grant relief. *Id.* at 1129; see FED. R. CIV. P. 12(b)(6) (motion to dismiss claim for failure to state claim upon which court can grant relief).

62. See 688 F.2d 204, 214 (3d Cir. 1982); *supra* notes 42-43 and accompanying text (discussion of *Price*).

63. See *supra* note 42 (Third Circuit in *Price* discussed meaning of § 7003 in dictum).

relied on the Eckhardt Report's conclusion that section 7003 may be used in cases where past events have created a present hazard.⁶⁴ The Third Circuit in *Price*, found that the statutory language of section 7003, together with the Eckhardt Report, unequivocally authorized cleanup of a dormant site to eliminate an imminent hazard.⁶⁵

The definition of "disposal" within the RCRA provides another basis for courts' decisions that the application of section 7003 is not limited to the restraint of ongoing voluntary disposal.⁶⁶ The definition of disposal under the RCRA includes "leaking."⁶⁷ Since leaking refers to the escape of a substance without affirmative human conduct, the RCRA authorizes the EPA to obtain an injunction against persons whose affirmative conduct has ceased.⁶⁸ Instead of looking directly to the unambiguous statutory definition of disposal, the district court took a circuitous route, using rules of statutory construction to interpret the term "disposal."⁶⁹ In doing so, the *Waste Industries* district court arrived at an interpretation of disposal that excludes waste disposal due to leaking from the purview of section 7003.⁷⁰

In addition to contradicting the statutory definition of disposal, the district court's interpretation of section 7003, which requires ongoing dumping, contradicts statements in the Eckhardt Report.⁷¹ The House Committee on Interstate and Foreign Commerce, which prepared the 1976 report published in lieu of a conference report as the official legislative history of the RCRA,⁷² was also responsible for the issuance of the Eckhardt Report

64. See 688 F.2d at 213-14; *supra* note 46 and accompanying text (Eckhardt Report indicates that § 7003 adopted common law of public nuisance).

65. See 688 F.2d at 213-14.

66. See *United States v. Price*, 523 F. Supp. 1055, 1071 (D.N.J. 1981) (plain wording of § 7003 permits restraint of "further disposal, *i.e.* leaking" (emphasis in original)); see also *Jones v. Inmont Corp.*, 584 F. Supp. 1425, 1436 (S.D. Ohio 1984) (finding *Wade* and *Waste Industries* district court decisions unpersuasive because "leaking" is part of statutory definition of disposal); *supra* note 39 (definition of "disposal" under RCRA).

67. See *supra* note 39 (definition of "disposal" under RCRA).

68. See *United States v. Price*, 523 F. Supp. 1055, 1071 (D.N.J. 1981) (affirmative conduct is not necessary to sustain action under § 7003 since statutory definition of disposal includes leaking of wastes); *accord*, *Jones v. Inmont Corp.*, 584 F. Supp. 1425, 1436 (S.D. Ohio 1984) (leaking need not proceed from affirmative conduct). *But see* *United States v. Waste Industries*, 556 F. Supp. 1301, 1307 n.10 (E.D.N.C. 1982) (citing *United States v. Wade*, 546 F. Supp. 785, 790 (E.D. Pa. 1982)) (term "leaking" in definition of "disposal" refers to structure that permits waste to leak into dump and does not refer to leakage of wastes into environment).

69. See *supra* note 25 (discussing *Waste Industries* district court's use of rules of statutory construction to interpret meaning of "disposal" in RCRA).

70. See *supra* note 39 (definition of "disposal" in RCRA and courts' interpretations of definition).

71. See *infra* note 74 and accompanying text (Eckhardt Report indicates that courts may require persons no longer actively disposing of hazardous waste to eliminate resultant imminent hazard under § 7003).

72. See H.R. REP. NO. 1491, 94th Cong., 2d Sess. (1976), reprinted in U.S. CODE CONG. & AD. NEWS 6238 (legislative history of RCRA of 1976). No conference committee report exists, since congress passed the RCRA without sending the bill to a House-Senate conference committee. See Kovacs & Klucsik, *The New Federal Rule in Solid Waste Management: The Resource Conservation and Recovery Act of 1976*, 3 COL. J. ENVTL. L., 205, 216-20 (1977).

pursuant to Congress' consideration of the 1980 amendments to the RCRA.⁷³ The Eckhardt Report refers to the RCRA's imminent hazard provision as the only tool that the RCRA provides for dealing with past improper disposal.⁷⁴ The Fourth Circuit correctly observed that when the intent of the enacting Congress is unclear, a court should give deference to a report such as the Eckhardt Report which expresses the views of a succeeding Congress.⁷⁵

The second major difference between the trial and appeals courts' opinions in *Waste Industries* concerns the substantive or jurisdictional nature of section 7003.⁷⁶ Aside from section 7003, none of the standards in the RCRA apply to the situation in which past activities eventually result in an imminent hazard.⁷⁷ Congress presumably contemplated some source of substantive standards of liability which courts could apply to determine whether to permit such restraint because section 7003 authorizes the EPA to seek restraint of persons contributing to the imminent hazard.⁷⁸ The substantive standards for section 7003 must exist either within the section itself or within the common law of nuisance because the substantive standards are not found elsewhere in the RCRA.⁷⁹ The statement in the Eckhardt Report that section 7003 incorporates the common law of public nuisance indicates that the Fourth Circuit in *Waste Industries* correctly held that section 7003 contains

The House report which serves as the official legislative history provides no interpretation of § 7003. See *Using RCRA's Imminent Hazard Provision in Hazardous Waste Emergencies*, 9 ECOL. L. Q. 599, 603, 604 (1981) [hereinafter cited as *RCRA's Imminent Hazard Provision*]. No other contemporaneous report on the RCRA exists. See *id.*

73. See Eckhardt Report, *supra* note 3, at 1.

74. See *id.* at 31. The Eckhardt Report states that Congress intended § 7003 not only to incorporate the common law of nuisance but also to broaden some of the common-law theories of liability for the creation of a nuisance. *Id.* As an example, the report explains that when someone other than the generator of hazardous waste has disposed of the waste improperly and the disposal results in an imminent hazard, the EPA can obtain an order under § 7003 to require the generator of the waste to abate the hazard. *Id.* The district court in *Waste Industries* correctly noted that the thrust of the example in the Eckhardt Report is that § 7003 imposes liability on persons who did not dispose of waste themselves. 556 F. Supp. 1301, 1308 (E.D.N.C. 1982). The example of generator liability nonetheless refers to § 7003 as imposing liability for past dumping. Eckhardt Report, *supra* note 3, at 31.

75. 734 F.2d at 166, citing *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980); see *supra* note 72 (discussion of RCRA's atypical legislative history).

76. Compare 734 F.2d at 167 (§ 7003 requires courts to expand upon common-law standards of liability for creation of nuisance) with 556 F. Supp. at 1314-16 (RCRA's preemption of common law of nuisance and solely jurisdictional nature of § 7003 result in absence of substantive standards for imposition of liability under § 7003).

77. See Preamble, 45 Fed. Reg. 33, 158 (1980). The House Committee on Interstate and Foreign Commerce criticized the EPA for failing to use § 7003 to attack the problem of inactive waste disposal sites. See H.R. REP. NO. 191, 96th Cong., 1st Sess. 5 (1979). Since the Committee participated in the formulation of RCRA, courts should give deference to the Committee's view. See *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 329-30 (1942) (interpretation of legislation within five years by committee which promulgated legislation was practically conclusive in determination of legislation's meaning).

78. Cf. *Jones v. Inmont Corp.*, 584 F. Supp. 1425, 1434 (S.D. Ohio 1984) (noting dilemma concerning function of § 7003 if no standards of liability exist in either common law or § 7003).

79. *Id.* The *Jones* court criticized the *Waste Industries* district court for failing to explain the function of § 7003 if no source of substantive standards of liability exists. *Id.*

substantive standards of liability.⁸⁰ Conversely, the district court's holding that section 7003 was solely jurisdictional and that the common law of nuisance was no longer available as a source of substantive standards because of preemption by the RCRA contradicts both the Eckhardt Report and case law from other federal courts.⁸¹

The retroactivity of section 7003 is the third major area of disagreement between the district and appellate courts.⁸² The district court held that the use of section 7003 to require persons who have ceased dumping to eliminate the resultant imminent hazard would be an impermissible retroactive application of the RCRA.⁸³ The Fourth Circuit, however, held that no retroactivity was involved because the defendants had continued dumping after the enactment of the RCRA.⁸⁴ The *Waste Industries* district court's failure to discuss the defendants' continued operation of the Flemington landfill after the enactment of the RCRA and the court's failure to state that the EPA did not promulgate regulations under the RCRA until after the defendants closed the landfill, renders the court's retroactivity rationale unclear.⁸⁵ The

80. See Eckhardt Report, *supra* note 3, at 31.

81. See 556 F. Supp. at 1315-16; *supra* note 30 (discussing preemption of federal common law of nuisance by federal environmental legislation); *supra* note 46 and accompanying text (Eckhardt Report states that § 7003 embodies common law of nuisance); *United States v. Diamond Shamrock Corp.*, No. C80-1857, slip op. (N. D. Ohio May 29, 1981) reprinted in 17 ENV'T. REP. CASES 1329, 1332 (1981) (§ 7003 does not simply grant jurisdiction over actions to enjoin persons from contributing to imminent waste hazard but also provides substantive law for imposition of liability upon such persons); *accord Jones v. Inmont Corp.*, 584 F. Supp. 1425, 1435 (S.D. Ohio 1984) (§ 7003 is both substantive and jurisdictional). *But see United States v. Solvents Recovery Service*, 496 F. Supp. 1127, 1133-34 (D. Conn. 1980) (§ 7003 is solely jurisdictional but substantive standards derive from common law); *United States v. Midwest Solvent Recovery*, 484 F. Supp. 138, 144 (N.D. Ind. 1980) (§ 7003 would extend liability far beyond common-law nuisance liability if broad wording of § 7003 were substantive, therefore § 7003 is solely jurisdictional and substantive standards derive from common law).

One court which has not ruled explicitly on the issue of the substantive or jurisdictional nature of § 7003 has granted an injunction under the section. See *United States v. Vertac Chemical Corp.*, 489 F. Supp. 870 (E.D. Ark. 1980). Other courts have indicated that such relief would be available in an appropriate case. See *United States v. Price*, 688 F.2d 204, 214-15 (3d Cir. 1982) (grant of injunction to require past disposers to clean up dormant disposal site was within power of district court); *United States v. Reilly Tar and Chemical Corp.*, 546 F. Supp. 1100, 1110 (D. Minn. 1982) (refusing to dismiss § 7003 complaint) The holdings in *Price* and *Reilly Tar* imply that the courts found some source of substantive standards of liability, either within § 7003 or from the federal common law of public nuisance. See *Price*, 688 F.2d at 214-15; *Reilly Tar*, 546 F. Supp. at 1110.

82. See *supra* notes 31-36 (discussion of *Waste Industries* district court's analysis of § 7003 regarding retroactive application of statute); 734 F.2d at 167-68 (*Waste Industries* case presents no retroactivity problem because defendants continued affirmative disposal after enactment of RCRA).

83. 556 F. Supp. at 1317.

84. 734 F.2d at 167-68.

85. See 556 F. Supp. at 1317-18. The district court's retroactivity argument in *Waste Industries* appears to be simply a restatement of the court's conclusion that ongoing acts of disposal are a prerequisite to actions under § 7003. See *id.* (district court's retroactivity discussion); *id.* at 1312 (district court's discussion of ongoing dumping as prerequisite to action under § 7003). The district court's statement that the cleanup that the EPA sought would

district court may have considered that section 7003 was not effective prior to the EPA's promulgation of regulations under the RCRA.⁸⁶ The Fourth Circuit's position is that section 7003 did not require regulations to render the section effective because the applicable standards of liability already existed within the common law.⁸⁷ Section 7003 therefore became effective as soon as Congress enacted the RCRA.⁸⁸ Since the defendants in *Waste Industries* engaged in affirmative disposal after the enactment of the RCRA, the case presented no retroactivity problem.⁸⁹

The Fourth Circuit's decision in *Waste Industries* is well-reasoned on the issues of the applicability of section 7003 to past dumping and the source of substantive standards of liability for the creation of an imminent waste hazard. The decision also is in accord with case law from other jurisdictions and would appear to follow the few existing indications of legislative intent regarding section 7003.⁹¹ The holding of the Fourth Circuit in *Waste Indus-*

impose liability retroactively for actions which complied with laws in effect at the time of the dumping demonstrates a focus on the defendant's conduct which is inconsistent with nuisance law. 556 F. Supp. at 1317; see W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 87 (4th ed. 1971). The focus in nuisance law is on the result of the defendant's conduct, not the conduct itself. Prosser, *supra* at § 87; see *United States v. Solvents Recovery Service*, 496 F. Supp. 1127, 1140 (D. Conn. 1980) (section 7003 addresses existence rather than cause of imminent hazard).

86. Compare 556 F. Supp. at 1317-18 (*Waste Industries* district court referred to imposition of liability through EPA regulations as a retroactive application of the RCRA) with 734 F.2d at 167-68 (Fourth Circuit explained that EPA promulgated RCRA regulations after *Waste Industries* dump had ceased operating). See *supra* note 52 (landfill in *Waste Industries* closed after enactment of RCRA, but prior to EPA's promulgation of regulations under RCRA).

87. See 734 F.2d at 167-68.

88. *Id.*

89. *Id.* at 168. Like the defendants in *Waste Industries*, one defendant in *United States v. Solvents Recovery Service* had ceased dumping after the enactment of the RCRA, but prior to the EPA's promulgation of regulations under the RCRA. See *United States v. Solvents Recovery Service of New England*, 496 F. Supp. 1127, 1130 (D. Conn. 1980). The *Solvents Recovery Service* court refused to dismiss the EPA's claim under § 7003. *Id.* at 1144. Similarly, in *United States v. Reilly Tar & Chemical Corp.*, despite the defendant's cessation of dumping prior to the enactment of the RCRA, the court denied the defendant's motion to dismiss the EPA's claim for abatement of the imminent hazard under § 7003. See *United States v. Reilly Tar & Chemical Corp.*, 546 F.Supp. 1100, 1105 (D. Minn. 1982).

90. See *Jones v. Inmont Corp.*, 584 F. Supp. 1425, 1434-36 (S.D. Ohio 1984). The United States District Court for the Southern District of Ohio decided *Jones* two weeks prior to the Fourth Circuit's decision in *Waste Industries*, following very similar reasoning. See *id.* 734 F.2d at 159, 164-67. Like the Fourth Circuit, the *Jones* court interpreted the Eckhardt Report's statement that § 7003 incorporates common-law theories of liability to mean that § 7003 contains substantive standards of liability. Compare 584 F. Supp. at 1434 with 734 F.2d at 167 (substantive standards of § 7003 derive from common law but are incorporated within § 7003). The *Jones* court also independently arrived at the same conclusion as the Fourth Circuit regarding the applicability of § 7003 to past dumping. Compare 584 F. Supp. at 1435-36 (based on definition of "disposal" within RCRA and recognition by subsequent Congress that § 7003 applies to dormant disposal sites, *Jones* court concluded that ongoing affirmative disposal was not prerequisite to suit under § 7003) with 734 F.2d at 164-66 (definition of "disposal" and subsequent Congressional interpretation show that § 7003 applies to dormant sites).

91. See *supra* notes 56, 68, 71-74 & 82 and accompanying text (both case law and indications of legislative intent support Fourth Circuit's analysis of § 7003 in *Waste Industries*).