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NOTES AND COMMENTS

HAZARDOUS WASTE DISPOSAL: IS THERE STILL A ROLE FOR COMMON LAW?

I. INTRODUCTION

The magnitude of the hazardous waste¹ disposal problem in our country is almost incomprehensible. In 1978, there were approximately 30,000 hazardous waste disposal sites in the United States.² Roughly thirty-five million metric tons of hazardous waste were being generated annually, with only ten percent of that waste being disposed of in a manner considered environmentally safe.³ Assistant U.S. Attorney General for Land and Natural Resources, James Moorman, in testimony before the House Subcommittee on Oversight and Investigations, stated,

I believe that [hazardous waste disposal] is probably the first or second most serious environmental problem in the country. One of the difficulties is that we really do not know what the dimensions of the problem are. . . .

1. "Hazardous waste" has been defined in the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6987 (1976 & Supp. V 1981), as amended by Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, 94 Stat. 2334 [hereinafter cited as RCRA], as:

[A] solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—

(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

Id. § 6903(5).

The hazardous substance designation of "such elements, compounds, mixtures, solutions, and substances which, when released into the environment may present substantial danger to the public health or welfare or the environment," as found in § 9602(a) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601-9657 (Supp. V 1981) [hereinafter cited as CERCLA], has also been taken into account throughout this Comment whenever the term "hazardous waste" has been used.

2. 43 Fed. Reg. 58,946, 58,946 (1978). Figures were Environmental Protection Agency (EPA) estimates of storage and disposal sites requiring governmental involvement under proposed regulations to implement the hazardous waste disposal provisions of the RCRA.

3. *Id.* at 58,947.

We do not know where the millions of tons of stuff is going. . . .

The public is basically unprotected. There just are not any lawmen out there, State or Federal, policing this subject.⁴

Because the hazardous waste problem is often described in staggering statistical terms, it is very difficult to comprehend the immediate danger of the situation. Therefore, an example of a prevalent method of handling hazardous wastes, as well as the resultant environmental and legal problems, helps to bring the subject matter into perspective.

*United States v. Midwest Solvent Recovery, Inc.*⁵ is an excellent example of the problems that can be created by inadequate handling of hazardous waste. Midwest Solvent Recovery, a firm involved in storing and disposing hazardous wastes, stored thousands of fifty-five gallon drums filled with chemical waste on a dumpsite near a Gary, Indiana, residential area. In December 1976, a huge fire broke out at the dumpsite, generating toxic fumes and causing many of the drums to explode and rocket 250 feet into the air. The fire ravaged the site throughout the following week. Thereafter, the director of Midwest Solvent simply relocated his waste storage operation, leaving the previous site littered with burned out drums and chemical wastes. Less than one year later, a fire erupted at the new waste site, fueled for days by the chemicals in thousands of drums.⁶ By January 1980, when the Environmental Protection Agency (EPA) sought injunctive relief, there were roughly 14,000 damaged drums stacked or lying on the original site and thousands of fire-damaged drums on the second site. Poisonous chemical wastes had contaminated the topsoil at both sites and a drainage ditch at the second site leading into the nearby Grand Calumet River.⁷ The EPA's efforts to force a cleanup of the dumpsites were complicated by the fact that by the time of trial, the government still was unable to locate or serve process on four of the responsible parties.⁸)

Since there are innumerable comparable hazardous waste disposal

4. HOUSE SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 96TH CONG., 1ST SESS., HAZARDOUS WASTE DISPOSAL 1 (Comm. Print 1979) [hereinafter cited as HAZARDOUS WASTE DISPOSAL].

5. 484 F. Supp. 138 (N.D. Ind. 1980).

6. *Id.* at 140-41.

7. *Id.* at 141-42.

8. *Id.* at 139; cf. Note, *Inactive or Abandoned Hazardous Waste Disposal Sites: Coping With a Costly Past*, 53 S. CAL. L. REV. 1709, 1710-11 (1980) (discussing difficulty in locating appropriate defendants).

sites presently in existence,⁹ it is clear there is a need for developing methods to control the disposal of hazardous substances and to address the question of how those injured by improper disposal might be compensated. The federal government is attempting to solve these problems through legislation.¹⁰ State legislatures have also enacted waste disposal statutes.¹¹ The purpose of this Comment is to determine whether common law causes of action are tools that can adequately resolve technologically-induced environmental problems. The answer to this inquiry, as outlined in the following pages, is that the common law *alone* may indeed be inadequate to handle the nation's hazardous

9. For a discussion of a number of other hazardous waste disposal sites and the resulting problems, including an overview of the Love Canal catastrophe, see M. BROWN, *LAYING WASTE* (1979); Baurer, *Love Canal: Common Law Approaches to a Modern Tragedy*, 11 ENVTL. L. 133, 133-37 (1980).

10. Federal statutes relating to disposal of hazardous substances are discussed in notes 108-20 *infra* and accompanying text. For further discussion, see Dore, *The Standard of Civil Liability for Hazardous Waste Disposal Activity: Some Quirks of Superfund*, 57 NOTRE DAME LAW. 260 (1981); Mott, *Liability for Cleanup of Inactive Hazardous Waste Disposal Sites*, 14 NAT. RESOURCES LAW. 379 (1982); Comment, *The Emergency Powers in the Environmental Protection Statutes: A Suggestion for a Unified Emergency Provision*, 3 HARV. ENVTL. L. REV. 298 (1979); Note, *supra* note 8.

11. The relevant state statutes are as follows: ALA. CODE §§ 22-30-1 to -24 (Supp. 1982); ALASKA STAT. §§ 46.03.010 to .900 (1982); ARIZ. REV. STAT. ANN. §§ 36-2801 to -2806 (Supp. 1975-82); ARK. STAT. ANN. §§ 82-4201 to -4224 (Supp. 1981); CAL. HEALTH & SAFETY CODE §§ 25100-25240 (West Supp. 1982); COLO. REV. STAT. §§ 30-20-101 to -116 (1973 & Supp. 1982); CONN. GEN. STAT. ANN. §§ 22a-115 to -125 (West Supp. 1982); DEL. CODE ANN. tit. 7, §§ 6301-6317 (Supp. 1982); D.C. CODE ANN. §§ 6-701 to -712 (1981); FLA. STAT. ANN. §§ 403.701 to .73 (West Supp. 1982); GA. CODE ANN. §§ 43-2901 to -2921 (Supp. 1982); HAWAII REV. STAT. §§ 342-1 to -51 (Supp. 1981); IDAHO CODE §§ 31-4401 to -4411 (Supp. 1982); ILL. ANN. STAT. ch. 111½, §§ 1001-1051 (Smith-Hurd Supp. 1982-83); IND. CODE ANN. §§ 13-7-1-2 to -19-3 (Burns 1981 & Supp. 1982); IOWA CODE ANN. §§ 455B.130 to .141 (West Supp. 1982-83); KAN. STAT. ANN. §§ 65-3401 to -3450 (1980 & Supp. 1982); KY. REV. STAT. ANN. §§ 224.005 to .877 (Bobbs-Merrill 1982); LA. REV. STAT. ANN. §§ 30:1131 to :1149.1 (West Supp. 1983); ME. REV. STAT. ANN. tit. 38, §§ 1301 to 1319-K (Supp. 1982-83); MD. NAT. RES. CODE ANN. §§ 8.1413 to .1416 (Supp. 1982); MASS. GEN. LAWS ANN. ch. 21C, §§ 1-14, ch. 21D §§ 1-16 (West 1981 & Supp. 1982-83); MICH. COMP. LAWS ANN. §§ 299.501 to .551 (West Supp. 1982-83); MINN. STAT. ANN. § 115A.01 to .72 (West Supp. 1982); MISS. CODE ANN. §§ 17-17-1 to -135 (Supp. 1982); MO. ANN. STAT. §§ 260.350 to .430 (Vernon Supp. 1982); MONT. CODE ANN. §§ 75-10-101 to -223 (1979); NEB. REV. STAT. §§ 81-1521.01 to .07 (1981); NEV. REV. STAT. §§ 444.700 to .778 (1981); N.H. REV. STAT. ANN. §§ 147-A:1 to :20 (Supp. 1981); N.J. STAT. ANN. §§ 13:1E-1 to -116 (West Supp. 1982-83); N.M. STAT. ANN. §§ 74-4-1 to -12 (1979); N.Y. ENVTL. CONSERV. LAW §§ 27-0900 to -0923, 71-2701 to -2727 (McKinney Supp. 1982-83); N.C. GEN. STAT. §§ 130-166.16 to .21E (1981); N.D. CENT. CODE §§ 23-29-01 to -12 (1978 & Supp. 1981); OHIO REV. CODE ANN. §§ 3734.01 to .99 (Baldwin 1982); OKLA. STAT. ANN. tit. 63, §§ 1-2001 to -2021 (West Supp. 1982-83); OR. REV. STAT. §§ 459.410 to .690 (1979-80); PA. STAT. ANN. tit. 35, §§ 6018.101 to .1003 (Purdon Supp. 1982-83); R.I. GEN. LAWS §§ 23-19.1-1 to -23 (Supp. 1982); S.C. CODE ANN. §§ 44-56-10 to -200 (Law. Co-op. Supp. 1982); S.D. CODIFIED LAWS ANN. §§ 34A-6-1 to -50 (1977 & Supp. 1982); TENN. CODE ANN. §§ 53-6301 to -6317 (Supp. 1982); TEX. REV. CIV. STAT. ANN. art. 4477-7 (Vernon Supp. 1982-83); UTAH CODE ANN. §§ 26-14-1 to -18 (Supp. 1981); VT. STAT. ANN. tit. 10, §§ 6601-6613 (Supp. 1982); VA. CODE §§ 32.1-177 to -186 (Supp. 1982); WASH. REV. CODE ANN. §§ 70.105.010 to .140 (Supp. 1982); W. VA. CODE §§ 20-5E-1 to -23 (1981); WIS. STAT. ANN. §§ 144.60 to .74 (West Supp. 1982-83); WYO. STAT. §§ 35-11-501 to -503 (1977 & Supp. 1982).

waste problems; nevertheless, it remains necessary to provide legal recourse in those areas that statutory law does not satisfactorily address.

II. THE COMMON LAW

Traditionally, the public has looked to the judiciary to settle disputes and redress injuries. With advances in technology enabling the production of countless varieties of chemicals,¹² a large portion of the responsibility for policing the disposal of chemicals and other hazardous wastes has fallen on government regulatory agencies, in particular the EPA. Nevertheless, the judiciary still plays a vital role in adjudicating administrative actions and in resolving complaints of private citizens or local groups. Traditionally, the law of torts has been the primary common law approach to environmental issues. It has become increasingly apparent, however, that the common law of torts is strapped by the demands of adapting to societal and environmental problems that may be beyond its ability to resolve.¹³

The cornerstone of common law tort actions is the concept of fault;¹⁴ remedies are not permissible unless a causal link can be established between the defendant's act and the plaintiff's injury.¹⁵ Given

12. In 1980, there were 43,000 chemical substances in commercial production in the U.S., with thousands of new ones being introduced every year. Growth of the chemical industry has continued to accelerate from year to year. The industry is economically booming, with worldwide chemical sales of the top fifty producers reaching approximately \$90 billion in 1979. Chemical spills harmful to the environment occur roughly 3,500 times annually. In 1979, over 2,000 dumpsites were targeted by the EPA as posing threats to public health. S. REP. NO. 848, 96th Cong., 2d Sess. 2 (1980). For an excellent overview of the problems New Jersey is facing from the expansion of the chemical industry, see Note, *An Analysis of Common Law and Statutory Remedies for Hazardous Waste Injuries*, 12 RUT. L.J. 117, 118-22 (1980).

13. Under the common law approach, the court must require plaintiff to show that defendant has not only been polluting, but that such activity has had a harmful effect upon plaintiff. See, e.g., *Illinois v. City of Milwaukee*, 8 ENVTL. L. REP. (ENVTL. L. INST.) 20,503, 20,505 (N.D. Ill. Mar. 6, 1978) (plaintiff's showing of substantial risk of infection from inadequately treated sewage discharges into water source held sufficient to warrant relief, *aff'd in part*, 599 F.2d 151 (7th Cir. 1979), *vacated*, 451 U.S. 304, *cert. denied*, 451 U.S. 982 (1980); *Reserve Mining Co. v. EPA*, 514 F.2d 492, 536-37 (8th Cir. 1975) (evidence insufficient to justify immediate closing of defendant's plant discharging taconite tailings into Lake Superior); *Reserve Mining Co. v. United States*, 498 F.2d 1073, 1083-84 (8th Cir. 1974) (plaintiffs failed to prove demonstrable public health hazard created by defendant's activities); *Miller v. National Cabinet Co.*, 8 N.Y.2d 277, 288, 168 N.E.2d 811, 817, 204 N.Y.S.2d 129, 137, *modified*, 8 N.Y.2d 1025, 170 N.E.2d 214, 204 N.Y.S.2d 129 (1960) (widow of cancer victim unable to prove occupational exposure to benzene was cause of death).

14. For a discussion of the role "fault" played in the development of the tort branch of common law, see G. WHITE, *TORT LAW IN AMERICA* 12-19 (1980).

15. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 41, at 236-39 (4th ed. 1971). For further discussion, see Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); Comment, *Environmental Carcinogenesis: Regulation on the Frontiers of Science*, 7 ENVTL. L. 83, 94-97 (1976).

this fundamental common law requirement, the difficulties of applying specific tort law causes of action in environmental pollution cases are apparent.

A. Common Law Nuisance

The most frequently used common law tort action in an environmental lawsuit is that of nuisance.¹⁶ Both "private" and "public" nuisance actions, discussed below, have been utilized to seek monetary damages for injuries already incurred and to seek injunctions to prevent continuation of the harmful activity or situation.

1. Private Nuisance Action

The private nuisance cause of action is tied directly to the use and enjoyment of land¹⁷ and is generally an action brought by an individual or group of private citizens.¹⁸ Since private nuisance is a non-trespassory invasion of an owner's use and enjoyment of his land,¹⁹

16. For a discussion of nuisance causes of action, see W. PROSSER, *supra* note 15, §§ 88-89, at 583-602.

17. The RESTATEMENT (SECOND) OF TORTS § 822 (1977) specifies that, One is subject to liability for a private nuisance if, but only if, his conduct is a *legal cause* of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either

(a) intentional or unreasonable, or

(b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

Id. (emphasis added).

18. "For a private nuisance there is liability only to those who have property rights and privileges in respect to the use and enjoyment of the land affected . . ." *Id.* § 821E. For examples of the application of the private nuisance action, see *Kentucky W. Va. Gas Co. v. Lafferty*, 174 F.2d 848, 854 (6th Cir. 1949) (nuisance found when power plant caused violent quaking of earth and shaking and trembling of plaintiffs' houses, resulting in diminution of value of use and enjoyment of residences); *Gesswin v. Beckwith*, 35 Conn. Supp. 89, 89, 397 A.2d 121, 121 (1978) (private nuisance includes all injuries to owner or occupier of property in enjoyment of that property, including fall from defectively constructed treehouse placed on property by landlord); *Mulcahey v. IT&T*, 31 Conn. Supp. 1, 2, 318 A.2d 804, 805 (1974) (customer in public parking garage does not have interest in land sufficient to sustain private nuisance claim); *Richmond Bros. v. Hagemann*, 359 Mass. 265, —, 268 N.E.2d 680, 682 (1971) (erecting structures on land adjacent to radio station transmitting towers did not constitute private nuisance since no actual emission from the structures invaded station's use and enjoyment of its land).

19. RESTATEMENT (SECOND) OF TORTS § 821D (1977); see, e.g., *Davoust v. Mitchell*, 146 Ind. App. 536, —, 257 N.E.2d 332, 336 (1970) ("Anything offensive to the senses so as to essentially interfere with the comfortable enjoyment of life or property is a nuisance," including a neighbor's odorous, unsightly, and noisy dogpen.); *Schmidt v. Paul*, 554 S.W.2d 496, 497 (Mo. Ct. App. 1977) (mud and debris that washed onto property from adjacent construction site which neighbor refused to remove constituted a nuisance); *Bowlin v. George*, 239 S.C. 429, —, 123 S.E.2d 528, 531 (1962) (residence owner allowed to maintain private nuisance action against adjacent auto junkyard where stagnant water collecting in wrecked autos created breeding place for mosquitoes).

many types of invasion could be actionable under this theory. For example, a private nuisance action appears readily applicable in situations involving seepage of chemicals into groundwater from nearby chemical dumps, toxic fumes escaping from leaking barrels on adjoining property, or pollutants discharged into the air by smokestacks of a nearby factory.

Despite the promise that the private nuisance cause of action appears to give a potential plaintiff, problems arise because nuisance liability requires proof of significant harm.²⁰ The proof of the connection between the resulting injuries and the defendant's previous acts often is very difficult to obtain. Many of the effects of hazardous waste disposal are not manifested for many years.²¹ Chemicals carelessly dumped that have seeped down through the soil and into the groundwater may take years to contaminate the drinking water or the soil of nearby property owners.²² Thus, it may not become obvious for a long period of time that ailments within a family could be the result of polluted drinking water from private wells on the property.²³ When such a possibility does occur to the family or is suggested by the treating physician, proof of the actual cause of the illness may be impossible or too costly to

20. See, e.g., *Stockdale v. Agrico Chem. Co.*, 340 F. Supp. 244, 262 (N.D. Iowa 1972) (farmer not entitled to recover damages under nuisance theory for livestock loss attributed to emissions from chemical plant because he failed to prove proximate cause or actionable damage); *Jones v. Adler*, 183 Ala. 435, —, 62 So. 777, 780 (1913) (to constitute nuisance, sewage purification plant must cause annoyance or discomfort of "such degree or extent as to materially interfere with the ordinary comfort of home existence"); *Jillson v. Barton*, 139 Ga. App. 767, —, 229 S.E.2d 476, 478 (1975) ("unsightliness of adjacent property alone . . . is not such inconvenience as to amount to a nuisance," nor is mere violation of an ordinance a private nuisance). "There is liability for a nuisance only to those to whom it causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose." RESTATEMENT (SECOND) OF TORTS § 821F (1977).

21. Toxic teratogenic, mutagenic, and carcinogenic agents can remain dormant in both body and environment for years. In the body, low levels can accumulate over long periods until the threshold level is reached and an injury occurs. In addition, the person exposed to the chemicals may not manifest any symptoms, but the toxics can be transferred to future generations as mutations and birth defects.

Comment, *Compensating Hazardous Waste Victims: RCRA Insurance Regulations and a Not So "Super" fund Act*, 11 ENVTL. L. 689, 713 n.130 (1981) (citing Comment, *A Proposal for the Administrative Compensation of Victims of Toxic Substance Pollution: A Model Act*, 14 HARV. J. ON LEGIS. 683, 686 (1977)).

22. It may take as many as 10 to 20 years for contaminants to reach a wellfield only 3,400 feet away, depending upon the gradient, the subsurface formation, and the amount of pumping from wells in the area. *United States v. Price*, 523 F. Supp. 1055, 1063-65 (D.N.J. 1981), *aff'd*, 688 F.2d 204 (3d Cir. 1982). For a list of studies regarding the movement of contaminants through soil and within the aquifer, see D. TODD & D. McNULTY, *POLLUTED GROUNDWATER 100-04* (1976); Note, *supra* note 12, at 139-41.

23. See, e.g., HAZARDOUS WASTE DISPOSAL, *supra* note 4, at 17; M. BROWN, *supra* note 9, at 186-88.

pursue.²⁴ In order to obtain proof of causation, the plaintiff often must rely on the aid of governmental agencies which, typically, are overburdened with requests for help and sometimes unsympathetic to the individual's problem.²⁵ Even when soil and water tests indicate that dangerous levels of toxics are present, the problem of proof remains. The plaintiff still must demonstrate that those toxics are the actual cause of the injury. The problem of proof is further compounded when the injury could have resulted from one of several causes. Moreover, the plaintiff's burden of proof is exacerbated by the paucity of scientific knowledge of the effects caused by many modern chemicals and chemical byproducts.²⁶ Clearly, in matters involving the boundaries of scientific knowledge, any common law cause of action presents serious problems of proof for the plaintiff.)

(An additional obstruction in private nuisance actions is the "balancing" which the court may apply in arriving at a decision.²⁷ Even if the plaintiff is able to prove the defendant's activities have caused his injuries, he may find the court unwilling to grant a remedy because the economic harm that the defendant, and perhaps the community, would suffer from an enforced cessation of the activities would be too great to justify the abatement of the private harm. In such a case, the court may either refuse the plaintiff the remedy he seeks or simply award him monetary damages in lieu of protection from future nuisance.) The *Boomer v. Atlantic Cement Co.*²⁸ decision provides an excellent example of the New York Court of Appeals' application of this economic/social balancing approach. The court determined that the gravity of the harm suffered by private landowners from the dirt, smoke, and vibration caused by defendant's cement plant did not justify the severe economic consequences that a permanent closing of the plant would inflict upon the company *and* the community. As an alternative to injunction, the court awarded the plaintiffs permanent monetary damages and allowed the defendant to continue its operations

24. Note, *supra* note 12, at 139-43.

25. See, e.g., HAZARDOUS WASTE DISPOSAL, *supra* note 4, at 20-22; M. BROWN, *supra* note 9, at 121-31.

26. See *Miller v. National Cabinet Co.*, 8 N.Y.2d 277, 284, 168 N.E.2d 811, 814-15, 204 N.Y.S.2d 129, 134, *modified*, 8 N.Y.2d 1025, 170 N.E.2d 214, 204 N.Y.S.2d 129 (1960) ("[T]here must be some evidence of a basis for the opinion, and the acceptance in one case of the 'possible' as meaning reasonable medical certainty does not justify treating every 'possibility' as though it were enough to establish the facts sought to be proved.").

27. See, e.g., *Reserve Mining Co. v. EPA*, 514 F.2d 492, 537 (8th Cir. 1975); RESTATEMENT (SECOND) OF TORTS §§ 827-831 (1977).

28. 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970).

unchanged.²⁹ To a plaintiff seeking relief from a noxious interference with the use and enjoyment of his land, such a holding could be considered less than a victory.

2. Public Nuisance Action

[In contrast with the private nuisance action, a public nuisance cause of action is not dependent upon ownership of property. Instead, it involves an unreasonable interference with a right "common to the general public."³⁰ If an individual can show that he has suffered physical injury or pecuniary loss due to a nuisance created by the defendant, he then has a valid claim for damages.³¹

This tort action would be useful in a situation in which a particular area of a city was suffering noxious fumes from a waste disposal site used by a private organization.) For example, in *McCastle v. Rollins Environmental Services*,³² the plaintiffs brought an action in state court on behalf of themselves and 4,000 other residents of an area located adjacent to a privately-owned hazardous waste disposal facility which contained incinerators, ponds, and dumping pits. The plaintiffs alleged

29. *Id.* at 228, 257 N.E.2d at 875, 309 N.Y.S.2d at 319. When an action constitutes a permanent nuisance, complainants may be awarded all damages already sustained, or those which may thereafter be sustained, in one action. "Where the cause of the injury is in its nature permanent, and a recovery for such injury would confer a license on the defendants to continue the cause, the entire damage may be recovered in a single action . . ." *Severt v. Beckley Coals, Inc.*, 153 W. Va. 600, —, 170 S.E.2d 577, 582-83 (1969).

30. RESTATEMENT (SECOND) OF TORTS § 821B (1977); *see, e.g.*, *Fort Smith v. Western Hide & Fur Co.*, 153 Ark. 99, —, 239 S.W. 724, 726 (1922) (business of buying and selling hides held public nuisance because odors and flies adversely affected health and comfort of others in vicinity); *Liber v. Flor*, 160 Colo. 7, —, 415 P.2d 332, 338 (1966) (storage of boxes of dynamite only 50-70 feet from paved highway endangered public's right to safety and constituted public nuisance); *State v. Excelsior Powder Mfg. Co.*, 259 Mo. 254, —, 169 S.W. 267, 273 (1914) (maintenance of powder factory and storage facility near public roads and schoolhouse affected the rights of citizens to safety and constituted a public nuisance).

If the goal of the suit is to enjoin the nuisance, under the Restatement approach the individual must prove he has a right to recover damages under § 821C(1) or prove he has the authority to bring a suit on behalf of the public, or prove standing to sue in a citizen's action or class action. RESTATEMENT (SECOND) OF TORTS § 821C(2) (1977); *see, e.g.*, *Venuto v. Owens-Corning Fiberglass Corp.*, 22 Cal. App. 3d 116, 131, 99 Cal. Rptr. 350, 360 (1971). Although the individual plaintiffs' pleaded facts were sufficient to support a public nuisance action in regard to plant emissions, plaintiffs did not have standing to sue. The action was held to be properly left to an appointed representative of the community. *Id.* at 123, 99 Cal. Rptr. at 355.

31. RESTATEMENT (SECOND) OF TORTS § 821C comments d & h (1977). "[I]t is uniformly held that a private individual has no action for the invasion of the purely public right, unless his damage is in some way to be distinguished from that sustained by other members of the general public." W. PROSSER, *supra* note 15, § 88, at 586. "Where the plaintiff suffers personal injury, or harm to his health, . . . there is no difficulty in finding a different kind of damage." *Id.* at 588. "Pecuniary loss to the plaintiff has been regarded as different in kind . . ." *Id.* at 590.

32. 514 F. Supp. 936 (M.D. La. 1981).

that the fumes from the defendant's plant caused them to suffer physical ailments such as upset stomachs, sore throats, and burning eyes.³³ Defendant removed the suit to federal court, which extended the state court's temporary restraining order on further disposal activities. The federal court then granted plaintiffs' motion to remand the action to the state court on the basis that federal law was not applicable and Congress did not intend to supersede state law in actions between private parties.³⁴ The Louisiana Court of Appeal³⁵ affirmed the injunction on further disposal and amended it to enjoin further emission of odors and fumes that cause "serious or material discomfort to persons of ordinary sensibilities in a normal state of health."³⁶

In another use of the public nuisance cause of action, the City of Philadelphia sued Stepan Chemical Co.³⁷ to recover cleanup costs and consequential damages resulting from the illegal dumping of industrial waste on city property. In addition to stating a common law cause of action, the city also predicated the suit upon several federal and state environmental statutes.³⁸ The court dismissed five of the claims but permitted the city to pursue its claim for response costs under the aegis of common law theories.³⁹ The significance of the court's recognition that a valid cause of action existed under common law cannot be overstated, for the issue which this case represents, the recovery of costs of cleaning up dumpsites and decontaminating polluted water sources,⁴⁰ may prove to be of vital importance to many communities in the decades to come. If the high costs involved in such cleanups cannot be recovered from the parties causing the damage through an appropriate

33. *Id.* at 938.

34. *Id.* at 941.

35. 415 So. 2d 515 (La. Ct. App. 1982).

36. *Id.* at 519.

37. *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135 (E.D. Pa. 1982).

38. *Id.* at 1139-40.

39. The claims for relief that were dismissed by the court included: The citizen suit provision of the Clean Water Act, 33 U.S.C. § 1365(a) (1976); the federal common law of nuisance; the Pennsylvania Solid Waste Management Act, PA. STAT. ANN. tit. 35, § 6018.101 (Purdon Supp. 1982-83); the Pennsylvania Clean Streams Law, PA. STAT. ANN. tit. 35, § 691.1 (Purdon Supp. 1982-83); various provisions of the Philadelphia Code. The court allowed the city to pursue its claims under the common law theories of nuisance, trespass, strict liability, and negligence. A claim under CERCLA was also permitted. 544 F. Supp. at 1154.

40. In *Stepan*, defendant generators of industrial byproduct wastes had contracted with private haulers to dispose of the waste. The haulers bribed two city employees to allow dumping at a city landfill. This illegal dumping resulted in soil contamination as well as contamination of underlying groundwater and the adjacent Delaware River. The City was forced to undertake a cleanup program estimated to cost \$10 million and to suffer a \$20 million delay in construction of a sewage sludge recycling center on the site. 544 F. Supp. at 1139.

judicial proceeding or financed by a governmental fund established for such a purpose,⁴¹ then many cities may find themselves facing the unpleasant alternative of either polluted natural resources or financial ruin.

Often there are circumstances that lend themselves to liability suits under both private and public nuisance actions. *Chappell v. SCA Services*⁴² presents a fact situation in which this combination of nuisance actions is appropriate. In *Chappell*, representatives of residents of the Village of Wilsonville and adjoining landowners brought a class action against the operator of a hazardous chemical waste landfill containing polychlorinated biphenyls (PCBs) and other toxic waste substances.⁴³ In a previous trial,⁴⁴ the defendant was enjoined from further operations at the landfill and ordered to clean up the site.⁴⁵ The second suit sought damages for "actual interference with the enjoyment of [plaintiffs'] real property, including past and future damages to their crops, residences and underground water supplies, and for the substantial diminution in property value."⁴⁶ In addition, the plaintiffs claimed personal injuries including "burning eyes, running noses, headaches, nausea and exposure to carcinogenic elements."⁴⁷ The federal district court granted plaintiffs' motion to remand the case to the county circuit court, concluding that the federal court had neither diversity nor federal question jurisdiction and that "it would appear that a state common law nuisance action may be the only way plaintiffs can recover for any damages which have accrued to them."⁴⁸ Thus, when the plaintiff can prove special damages and causation, the public nuisance action,

41. CERCLA § 107, 42 U.S.C. § 9607 (Supp. V 1981). Congress passed CERCLA in 1980, 42 U.S.C. §§ 9601-9657 (Supp. V 1981), to complement existing environmental pollution statutes through cleanup compensation. *Superfund at Square One: Promising Statutory Framework Requires Forceful EPA Implementation*, 11 ENVTL. L. REP. (ENVTL. L. INST.) 10,101, 10,102 (May 1981). The Act established a \$1.6 billion fund to reimburse costs of cleanup, removal, and resource restoration where hazardous waste polluters are unknown or are unable or unwilling to be financially responsible. *Id.* Generally, expenditures for each individual response action are limited to \$1 million. *Id.* at 10,103.

42. 540 F. Supp. 1087 (C.D. Ill. 1982).

43. *Id.* at 1089.

44. *Village of Wilsonville v. SCA Servs.*, 77 Ill. App. 3d 618, 396 N.E.2d 552 (1979), *aff'd*, 86 Ill. 2d 1, 426 N.E.2d 824 (1981). For a discussion of the background of this case, see J. BELFIGLIO, T. LIPPE & S. FRANKLIN, HAZARDOUS WASTE DISPOSAL SITES 125-36 (1981) [hereinafter cited as J. BELFIGLIO].

45. *Wilsonville*, 77 Ill. App. 3d at —, 396 N.E.2d at 566.

46. *Chappell*, 540 F. Supp. at 1089.

47. *Id.*

48. *Id.* at 1100.

often coupled with a private nuisance claim, may present the plaintiff with the only viable means of recovering damages.

B. *Trespass*

The tort of trespass involves an intentional physical invasion of property.⁴⁹ If a plaintiff can establish that his present possessory interest in his land has been invaded, resulting in damage to himself, his family, or his property, he can hold the defendant liable for that damage.⁵⁰

(There are obvious limitations in the use of common law trespass when applied in the environmental hazardous waste suit. One such limitation occurs since the action cannot be brought unless a physical invasion of plaintiff's property has caused damage, yet proof of a physical invasion can pose a serious obstacle to recovery when the activity that results in harm occurs off plaintiff's property.⁵¹ For example, improper dumping of chemical wastes may not physically invade plaintiff's property, but may cause contaminated groundwater⁵² or toxic fumes which can substantially affect plaintiff's property.) These types of injuries are more readily proved in common law nuisance actions.⁵³

One circumstance in which common law trespass could be an important tool of the hazardous waste litigant is exemplified in *City of Philadelphia v. Stepan Chemical Co.*⁵⁴ In that case, private waste haulers obtained entrance to city property illegally in order to dispose of hazardous chemicals. Accordingly, the court found that the plaintiffs

49. *Borland v. Sanders Lead Co.*, 369 So. 2d 523, 530 (Ala. 1979) ("[I]f, as a result of the defendant's [lead smelting] operation, the polluting substance is deposited upon the plaintiff's property, thus interfering with his exclusive possessory interest by causing substantial damage to the *res*, then the plaintiff may seek his remedy in trespass . . ."); see RESTATEMENT (SECOND) OF TORTS § 158 & comment i (1964); *cf.* *Born v. Exxon Corp.*, 388 So. 2d 933, 934 (Ala. 1980) (light and odor emanating from oil treating facility did not constitute trespass since no particulate matter was deposited on plaintiff's property).

50. W. PROSSER, *supra* note 15, § 13, at 63-67.

51. *But cf.* *Renken v. Harvey Aluminum, Inc.*, 226 F. Supp. 169, 173 (D. Or. 1963) (emissions of flourine and flourides from aluminum plant which settled on plaintiff's land, damaging peach and apricot tree, constituted a continuing trespass).

52. HAZARDOUS WASTE DISPOSAL, *supra* note 4, at 13 ("The most pervasive damage done to the environment at these sites has been the contamination of groundwater.")

53. For example, although the court in *Renken* held that a trespass had occurred, it indicated in the opinion that such a continuing trespass could be viewed as a nuisance and that indeed a continuing trespass could well be a nuisance. 226 F. Supp. at 175-76; see also *Hakkila v. Old Colony Broken Stone & Concrete Co.*, 264 Mass. 447, —, 162 N.E. 895, 896 (1928). Blasting operations caused throwing of stones upon plaintiffs' property. "The throwing of stones upon lands of others . . . is a direct trespass, and when in the nature of a continued wrong is a private nuisance." *Id.*

54. 544 F. Supp. 1135 (E.D. Pa. 1982).

had stated a valid trespass claim.⁵⁵

Unfortunately, the costs of effective toxic waste disposal are high⁵⁶ and the industrial manufacturer concerned with profit margin may ask few questions regarding the ultimate destination of the wastes hauled off by an independent contractor.⁵⁷ Alternatively, the generator of the waste may simply discard his wastes improperly on his own property.⁵⁸ In either situation, a litigant cannot effectively recover under a trespass action, for in the first instance he often cannot identify the source of the contaminants he finds on his property, and in the second instance, no actual invasion of his property has occurred.

C. Negligence

The elements of a negligence cause of action specifically enumerate the obstacles to be overcome in effectively litigating a hazardous waste lawsuit. The plaintiff must prove that: (1) a legally recognized duty required the defendant to conform his conduct to a certain standard of care; (2) defendant breached that duty; (3) the conduct that constituted the breach of duty was the proximate cause of (4) actual

55. See *supra* note 39 and accompanying text.

56. "With the cost of using adequate treatment methods estimated at as much as ten to forty times that of environmentally offensive alternatives, continuous pressure is necessary to deter operators from realizing the substantial economic benefits of improper disposal." Note, *supra* note 12, at 130 (footnotes omitted). "The scarcity of [safe disposal] sites is posing a major immediate problem in many States. . . . Besides the fact that the number of State sites is clearly inadequate to handle the hazardous waste now being generated, the transportation costs to these few sites are often prohibitive." HAZARDOUS WASTE DISPOSAL, *supra* note 4, at 27.

Compliance with environmental statutes will noticeably affect the profit margin of the chemical industry. "[T]he cost to industry to comply with the proposed regulations under the . . . RCRA (enacted in 1976 to provide adequate regulation of solid and hazardous wastes) will be in the neighborhood of \$750 to \$900 million per year." SENATE SUBCOMM. ON OVERSIGHT OF GOVERNMENT MANAGEMENT OF THE COMM. ON GOVERNMENTAL AFFAIRS, 96TH CONG., 2D SESS., REPORT ON HAZARDOUS WASTE MANAGEMENT AND THE IMPLEMENTATION OF THE RESOURCE CONSERVATION AND RECOVERY ACT 2 (Comm. Print 1980). Thus, only if the chemical industry can be forced to bear a substantial share of the \$26.2 to \$44.1 billion cost of cleaning up current hazardous disposal sites, *id.* at 1, will statutory compliance become economically attractive.

57. In 1978, the House Subcommittee on Oversight and Investigation of the Interstate and Foreign Commerce Committee began an extensive investigation into hazardous waste disposal. Findings showed that of 1,605 chemical plants providing information, 78% used company haulers or outside contractors to remove process wastes from facility property, and 37% of these companies indicated they were unaware of the disposal site locations of the waste hauled from their plants since 1950. HOUSE SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 96TH CONG., 1ST SESS., WASTE DISPOSAL SITE SURVEY 24-25 (Comm. Print 1979) [hereinafter cited as WASTE DISPOSAL SITE SURVEY]. "[W]aste has been illegally dumped in open fields, swamps, and vacant lots. It also has been spread on roads as a dangerous ingredient of road oil. In sum . . . proper disposal of hazardous materials is the exception, rather than the rule." HAZARDOUS WASTE DISPOSAL, *supra* note 4, at 2.

58. HAZARDOUS WASTE DISPOSAL, *supra* note 4, at 3-4, 25-26; WASTE DISPOSAL SITE SURVEY, *supra* note 57, at 24.

harm resulting to plaintiff.⁵⁹

The most difficult problems of proof in a negligence claim are the determination of the standard of care owed by the generator/disposer of hazardous wastes and the "foreseeability of the harm" component of proximate cause.⁶⁰ The industry standard regarding disposal of hazardous wastes is nebulous at best.⁶¹ Too little has been and is known about the effects of chemical wastes being discarded throughout the nation,⁶² and there are doubts that a truly safe means of disposal is even possible for some of the byproducts being generated today.⁶³ Thus, the courts face the unpleasant task of determining the adherence to a standard of care in the hazardous waste lawsuit that may well be beyond the court's expertise, and indeed even the industry's knowledge, to de-

59. W. PROSSER, *supra* note 15, § 30, at 143-44.

60. *Powder Horn Nursery v. Soil & Plant Lab.*, 119 Ariz. 78, 579 P.2d 582 (Ariz. Ct. App. 1978), illustrates the difficulty of establishing the standard of care against which a defendant's actions will be measured in determining negligence. In *Powder Horn*, a commercial plant nursery brought a negligence action against a soil and plant laboratory for failing to inform the nursery of proper methods of combating iron toxicity. Plaintiff alleged that such failure resulted in plant loss. The court noted that the plaintiff nursery had a burden to establish both the standard of care required of the defendant and the defendant's departure from that standard. *Id.* at —, 579 P.2d at 586. Plaintiff's failure to meet its burden of proof resulted in summary judgment for defendant. *Id.* at —, 579 P.2d at 587.

61. [W]aste disposal practices vary considerably among participating companies depending upon size, types of waste generated, geographic location of facilities, and corporate policy. Just as no one chemical plant exactly represents the waste handling practices of its parent company, so no one corporation represents the chemical industry as a whole. . . .

And second, just as waste disposal practices vary by company, they vary also by region of the country and by state. Climate, density of population, and state environmental and land use laws are significant factors influencing waste handling practices across the country.

WASTE DISPOSAL SITE SURVEY, *supra* note 57, at 14.

62. *See, e.g., United States v. Price*, 523 F. Supp. 1055, 1062-63 (D.N.J. 1981), *aff'd*, 688 F.2d 204 (3d Cir. 1982) (court listed several chemical compounds "suspected" of being carcinogenic or teratogenic); Comment, *supra* note 15, at 94-95. For a discussion of characteristics used by the EPA to identify a hazardous waste, see COUNCIL ON ENVIRONMENTAL QUALITY, 12TH ANNUAL REPORT 95 (1981) [hereinafter cited as ENVIRONMENTAL QUALITY].

63. Many hazardous wastes placed in land disposal facilities will not degrade to a point where they are no longer hazardous, or will do so only very slowly. Toxic heavy metals, for example, will not degrade. . . . Moreover, current scientific knowledge about the degradation of hazardous wastes placed in land disposal facilities is imperfect. . . .

There is good theoretical and empirical evidence that the hazardous constituents which are placed in land disposal facilities very likely will migrate from the facility into the broader environment. . . . [E]ven with the application of best available land disposal technology, it will occur eventually.

. . . .
Although it is technically possible to design and construct a land disposal containment system . . . to interrupt this process; EPA seriously questioned whether such systems can be maintained and made to operate effectively and efficiently for long periods of time, or perpetually where this is required.

46 Fed. Reg. 11,125, 11,128 (1981). *But see* ENVIRONMENTAL QUALITY, *supra* note 62, at 101-09 (summary of effective alternatives in handling of hazardous wastes).

termine.⁶⁴ Moreover, since many of the acts causing harmful results today occurred years ago,⁶⁵ the courts may have to consider whether a contemporary standard of care is even relevant in assessing any negligence involved in previous methods of waste handling and disposal.⁶⁶

In light of the fact that past standards of care may have been less stringent, and given that competent knowledge of long-range chemical effects on people and the environment may have been unavailable, the foreseeability of harm necessary to prove the proximate cause element of negligence is problematical. Negligence "necessarily involves a foreseeable risk, a threatened danger of injury, and conduct unreasonable in proportion to the danger."⁶⁷ Methods of disposal of hazardous chemicals which would be blatantly negligent today might not lead to liability if the harm which resulted was not foreseeable *at the time* of the act. In addition, to prove causation of harm from chemical pollutants, a plaintiff must isolate the responsible chemical, trace the pathway from the site where the chemical entered the environment to where it came into contact with the plaintiff, and then prove medically that the chemical caused his injury—a task of frequently insurmountable proportions.⁶⁸ Finally, the practice of contracting out the actual disposal⁶⁹ may give many generators of hazardous wastes the legal "out" of disclaiming liability for, or even knowledge of, negligent practices.⁷⁰

64. For a discussion of the determination of a standard of care in the hazardous waste field, see Comment, *The Environmental Lawsuit: Traditional Doctrines and Evolving Theories to Control Pollution*, 16 WAYNE L. REV. 1085, 1121-23 (1970), which indicates that formulating an industry standard involves technological, political, and philosophical considerations.

65. "Problems from dumping which probably took place over 50 years ago are now becoming evident in the City of Denver, Colorado. Radioactive waste products from old radium industry mining and milling operations have been discovered in buildings, under buildings, in abandoned lots and under streets throughout the Denver area." HAZARDOUS WASTE DISPOSAL, *supra* note 4, at 12. "In Minnesota, 11 cases of arsenic poisoning, which developed as a result of drinking contaminated well water, were traced to the burial of grasshopper bait approximately 35 years previously." Note, *supra* note 12, at 124 n.46 (citing U.S. ENVIRONMENTAL PROTECTION AGENCY, HAZARDOUS WASTE DISPOSAL DAMAGE REPORTS No. 1, at 1 (1975)).

66. The defendant can argue that when the wastes were disposed of, perhaps thirty years prior to litigation, the risks were unknown and the disposal practices used were the industry's standard. . . . The fact that it became known later that the disposal technique could result in harm is immaterial. The defendant is liable only if he continues disposal after the time the risk of harm should have been recognized.

Comment, *Compensating Hazardous Waste Victims: RCRA Insurance Regulations and a Not So "Super" fund Act*, 11 ENVTL. L. 689, 713-14 (1981).

67. W. PROSSER, *supra* note 15, § 43, at 250.

68. See Comment, *A Proposal for the Administrative Compensation of Victims of Toxic Substance Pollution: A Model Act*, 14 HARV. J. ON LEGIS. 683, 706 (1977).

69. See *supra* notes 40 & 57.

70. See, e.g., *Merten v. Pedersen*, 199 Neb. 34, —, 255 N.W.2d 869, 871 (1977) ("[O]ne who causes work to be done is not liable for injuries that result . . . from carelessness in the performance of the work by the employees of an independent contractor to whom he has left the work

While the negligence cause of action does not appear exceptionally promising as a method of compensating victims of hazardous chemicals, there are some cases in which negligence theories have proved successful. In *Reynolds Metals Co. v. Yurbide*,⁷¹ plaintiffs brought a negligence suit to recover for poisoning caused by flourides emanating from defendant's aluminum reduction plant. The court held that there was proof of the poisoning, that flourides emanating from the plant were shown to have caused the poisoning, that flourides emitted in sufficient quantity to cause poisoning would be an excessive emission, and that such excess was circumstantial evidence of negligence.⁷² *Hagy v. Allied Chemical & Dye Corp.*⁷³ is another case where a negligence cause of action was successful. In *Hagy*, a jury found that a woman's dormant cancer was aggravated by driving through sulphuric acid smog emitted by a manufacturer during a cold air inversion.⁷⁴ The manufacturer was held negligent for not stopping operations sooner, as a reasonably prudent operator would during an inversion.⁷⁵ Finally, in a promising Louisiana decision, *Ewell v. Petro Processors of Louisiana, Inc.*,⁷⁶ landowners of a tract adjacent to land on which a corporation was conducting industrial waste disposal operations were successful in proving the corporation's negligence in allowing the toxic wastes to leak onto their property.⁷⁷ In light of the fact that such actions have proved successful, the common law negligence action cannot be totally discounted as a viable tool in the hazardous waste lawsuit.

D. Federal Common Law of Nuisance

When the Supreme Court first applied the federal common law of nuisance to abate pollution in *Illinois v. Milwaukee (Milwaukee I)*,⁷⁸ it

without reserving to himself any control over the execution of it."); *Ventoza v. Anderson*, 14 Wash. App. 882, —, 545 P.2d 1219, 1228-29 (1976) (jury was properly instructed that one who engages an independent contractor is not liable for the trespass of that contractor unless the trespass occurred with the direction or knowledge of the principal). *But see* *Boroughs v. Joiner*, 337 So. 2d 340, 343 (Ala. 1976) (landowner could not escape liability for damages caused by aerial application of insecticides by independent contractor since such activity falls into the "inherently dangerous" category); *Bousquet v. Commonwealth*, 374 Mass. 824, —, 372 N.E.2d 257, 258 (1978) (defendant held responsible for damages from oil seepage despite its claim that seepage was result of negligence of independent contractor).

71. 258 F.2d 321 (9th Cir.), *cert. denied*, 358 U.S. 840 (1958).

72. *Id.* at 330.

73. 122 Cal. App. 2d 361, 265 P.2d 86 (1953).

74. *Id.* at —, 265 P.2d at 91.

75. *Id.* at —, 265 P.2d at 88.

76. 364 So. 2d 604 (La. Ct. App. 1978), *cert. denied*, 366 So. 2d 575-76 (La. 1979).

77. *Id.* at 606.

78. 406 U.S. 91 (1972) [hereinafter cited as *Milwaukee I*].

appeared that a new weapon against hazardous waste generators had been added to a plaintiff's arsenal. Quoting *Texas v. Pankey*⁷⁹ that "the ecological rights of a State . . . should . . . be held to be a matter having basis and standard in federal common law,"⁸⁰ the Court concluded that although new federal laws could be written that would preempt the federal common law of nuisance, "until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution."⁸¹ At the time the Supreme Court heard the case in 1972, there was no comprehensive statutory method regulating pollution of interstate waters.⁸²

As a result of the Court's *Milwaukee I* decision, many cases were filed in federal courts on federal common law nuisance grounds.⁸³ Results, however, were often inconsistent, depending upon the circuit in which the case originated or the types of remedies sought.⁸⁴ In *Reserve Mining Co. v. EPA*,⁸⁵ the Eighth Circuit rejected the federal common law of nuisance as a basis for relief and stated that "federal nuisance law contemplates, at a minimum, interstate pollution of air or water."⁸⁶ The court followed this theory in *Township of Long Beach v. City of New York*⁸⁷ when it allowed federal common law nuisance claims even though the plaintiff was a township, rather than a state, because the dumping of garbage and sludge into the Hudson River created a dispute of interstate nature.⁸⁸

In *Parsell v. Shell Oil Co.*,⁸⁹ the Connecticut District Court held that a showing of interstate effects was necessary to sustain a claim under the federal common law of nuisance. Furthermore, the court in-

79. 441 F.2d 236, 240 (10th Cir. 1971).

80. 406 U.S. at 99-100.

81. *Id.* at 107.

82. For a discussion of the *Milwaukee I* decision and the status of environmental protection statutes in 1972, see Fort, *The Necessary Demise of Federal Common Law Nuisance*, 12 Loy. U. CHI. L.J. 131, 132-36, 144 (1981).

83. *Id.* at 140-44; Mott, *supra* note 10, at 398-401; Note, *Federal Common Law and Water Pollution: Statutory Preemption or Preservation*, 49 FORDHAM L. REV. 500, 501-02 nn.8-9 (1981).

84. See Fort, *supra* note 82, at 140-42. The Seventh Circuit expanded the scope of authority under federal nuisance law to equate with that of the commerce power exercised by Congress and thus allowed federal nuisance suits for purely intrastate waters. *Id.* at 141. The First, Fourth, and Eighth Circuits required interstate effects to be shown before allowing federal common law nuisance claims, while the Second Circuit has issued summary affirmances on both sides of the extra-territorial issue. *Id.* at 142. Finally, the Third Circuit applied federal common law in intrastate waters apparently because of a need for a uniform rule of decision. *Id.* at 143.

85. 514 F.2d 492 (8th Cir. 1975).

86. *Id.* at 520.

87. 445 F. Supp. 1203, 1214 (D.N.J. 1978).

88. *Id.*

89. 421 F. Supp. 1275 (D. Conn. 1976).

licated that *Milwaukee I* was distinguishable because the plaintiff there was a governmental entity⁹⁰ and the claim was for equitable relief, not for damages as in *Parsell*.⁹¹ Just four years later, however, the Connecticut court expanded its interpretation of the scope of federal common law nuisance to allow an actionable claim without a showing of interstate effects.⁹² Following the Seventh Circuit's lead, the court abandoned its prior interstate requirement.⁹³ The holding even went so far as to state that the imminent hazard provision of the Resource Conservation and Recovery Act (RCRA)⁹⁴ was to be governed by the federal common law of nuisance, and that a federal nuisance action was not "impermissibly retroactive" in application to acts preceding the enactment of the RCRA.⁹⁵

The promising possibilities for applying federal common law to the problems of hazardous waste disposal were severely limited, if not completely eliminated, by the Supreme Court in the second *Milwaukee* case (*Milwaukee II*)⁹⁶. Between the 1972 *Milwaukee I* decision and 1981, when *Milwaukee II* was decided, Congress enacted the Federal Water Pollution Control Act Amendments of 1972.⁹⁷ In deciding whether Illinois could maintain a federal common law nuisance action against the City of Milwaukee and its Sewage Commission for polluting Lake Michigan with inadequately treated sewage, the Court repeated the rationale it used in *Milwaukee I*.

It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging crea-

90. Indicating that the federal nuisance cause of action had been extended by several courts to governmental entities other than the states, the court refused to extend the right of action to a private plaintiff in the absence of interstate impact. *Id.* at 1281.

91. Citing *Byram River v. Village of Port Chester*, 394 F. Supp. 618, 624 (S.D.N.Y. 1975), as support, the court limited any right of action that private parties might have under *Milwaukee I* to injunctive relief. The awarding of damages would contribute to the "resolution of intricate and highly important questions of the appropriate water quality standards . . . only in the most *ad hoc* way." 421 F. Supp. at 1281-82 (emphasis in original).

92. *United States v. Solvents Recovery Serv.*, 496 F. Supp. 1127, 1139 (D. Conn. 1980).

93. The court quoted *Illinois v. Outboard Marine Corp.*, 619 F.2d 623, 630 (7th Cir. 1980).

[T]here is an overriding federal interest in preserving, free of pollution, our interstate and navigable waters. *When a pollution controversy arises, it is immaterial whether there is a showing of extraterritorial pollution effects.* The issue is whether the dispute is a matter of federal concern. When it is, as in this case, federal courts should be accessible.

496 F. Supp. at 1135 (emphasis in original).

94. 42 U.S.C. § 6973 (Supp. V 1981).

95. 496 F. Supp. at 1129.

96. *Milwaukee v. Illinois*, 451 U.S. 304 (1981) [hereinafter cited as *Milwaukee II*].

97. 33 U.S.C. §§ 1251-1376 (1976 & Supp. V 1981).

tion of a public nuisance by water pollution.⁹⁸

After reviewing the scope of the amendments, the Court stated that "[t]he establishment of such a self-consciously comprehensive program by Congress, which certainly did not exist when *Illinois v. Milwaukee* was decided, strongly suggests that there is no room for courts to attempt to improve on that program with federal common law."⁹⁹ Accordingly, the Court disallowed any federal common law remedy.

The ramifications of *Milwaukee II* quickly prevented plaintiffs in federal courts from bringing environmental lawsuits under federal common law. The previously receptive Seventh Circuit¹⁰⁰ partially reversed its holding in *Illinois v. Outboard Marine Corp.*¹⁰¹ and denied Illinois any federal common law remedy for pollution of Lake Michigan by the defendant manufacturer on the basis of *Milwaukee II*.¹⁰² The New Jersey District Court ruled in *United States v. Kin-Buc, Inc.*¹⁰³ that the Clean Air Act¹⁰⁴ preempted the federal common law of nuisance in cases of air pollution emanating from a hazardous waste disposal site. After applying the *Milwaukee II* approach of determining whether the scope of the legislative scheme addressed the problem formerly governed by federal common law, the court concluded that the Clean Air Act occupied the field.¹⁰⁵

Other claims based on pollution activities and federal common law nuisance have received similar treatment by the federal courts.¹⁰⁶ Thus, the trend in federal court appears to strongly favor the preemption of federal common law nuisance—even when the federal statute held to preempt common law does not address the particular fact situa-

98. 451 U.S. at 310 (quoting *Milwaukee I*, 406 U.S. at 107).

99. *Id.* at 319.

100. *See supra* note 84.

101. 619 F.2d 623, 623-24 (7th Cir. 1980) (holding that a state has a federal common law cause of action in nuisance against an instate pollution source).

102. *Illinois v. Outboard Marine Corp.*, 680 F.2d 473, 481 (7th Cir. 1982). On remand the court reversed that portion of its prior holding allowing a federal common law cause of action.

103. 532 F. Supp. 699 (D.N.J. 1982).

104. 42 U.S.C. § 7601 (Supp. V 1981).

105. 532 F. Supp. at 702.

106. *E.g.*, *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 22 (1980) (federal common law of nuisance in area of water pollution entirely preempted by the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1976 & Supp. V 1981), and the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. §§ 1401-1444 (1976 & Supp. V 1981)); *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1148 (E.D. Pa. 1982) (federal nuisance cause of action for recovering cleanup costs resulting from illegal waste dumping preempted by RCRA and CERCLA); *United States v. Price*, 523 F. Supp. 1055, 1069 (D.N.J. 1981), *aff'd*, 688 F.2d 204 (3d Cir. 1982) (federal common law nuisance claims to remedy hazards of chemical dumping at private landfills preempted by CERCLA and RCRA).

tion or provide an appropriate remedy.¹⁰⁷ Given this background, it is useful to survey recent federal decisions to determine whether the need for federal common law in the hazardous waste setting is actually preempted.¹⁰⁸

In *United States v. Wade*,¹⁰⁹ a civil action was brought by the government under section 7003 of the RCRA and section 106 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) to impose liability upon six chemical companies for costs incurred in the cleanup of their disposal sites. The court concluded that past off-site generators were not proper defendants under the provisions cited by the government and dismissed the complaint.¹¹⁰ The court noted that while section 106 of CERCLA could not be used to impose cleanup liability on past waste generators, section 107 of the Act clearly included such generators among those who could be sued for reimbursement of cleanup costs expended initially by the government.¹¹¹ Speculating on the reason that section 107 was not utilized as a basis for the government's suit, the court stated:

107. "Although a federal court may disagree with the regulatory approach taken by the agency with responsibility . . . under the Act, such disagreement alone is no basis for the creation of federal common law." *Milwaukee II*, 451 U.S. at 323. "The question is whether the field has been occupied, not whether it has been occupied in a particular manner." *Id.* at 324.

108. In a lecture before the New York City Bar Association in January 1964, Judge Friendly spoke of the function of federal common law.

The clarion yet careful pronouncement of *Erie*, "There is no federal general common law," [quoting *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938)] opened the way to what . . . we may call specialized federal common law. . . .

So . . . the Supreme Court, in the years since *Erie*, has been forging a new centripetal tool incalculably useful to our federal system. It has employed a variety of techniques—spontaneous generation . . . , implication of a private federal cause of action from a statute providing other sanctions, construing a jurisdictional grant as a command to fashion federal law, and the normal judicial filling of statutory interstices.

H. FRIENDLY, *In Praise of Erie—and of the New Federal Common Law*, in BENCHMARKS 155, 178, 194-95 (1967) (emphasis added). The Supreme Court has spoken of the interstitial function of federal common law in *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 469 (1942) (Jackson, J., concurring).

The federal courts have no *general* common law But this is not to say that whenever we have occasion to decide a federal question which cannot be answered from federal statutes alone we may not resort to all of the source materials of the common law, or that when we have fashioned an answer it does not become a part of the federal non-statutory or common law.

Id. Under this approach, federal common law, as a needed tool for filling the gaps often found in federal statutes, would be preempted by federal statutes in the area of hazardous wastes only if the statutes provided a completely effective means of compensation to *all* for hazardous waste injuries. "Were we bereft of the common law, our federal system would be impotent. This follows from the recognized futility of attempting all-complete statutory codes . . ." *Id.* at 470.

109. 546 F. Supp. 785 (E.D. Pa. 1982).

110. *Id.* at 794.

111. *Id.* at 793.

The government does not . . . straightforwardly state the reason it has chosen to proceed via section 106 of CERCLA. A reason may be that the Superfund, as enacted, is inadequate to address the enormous public health problem posed in our country by abandoned or inactive hazardous waste sites. When describing the scope of the problem before the Joint Committee which considered CERCLA, EPA Assistant Administrator Thomas C. Jorling stated that approximately [one to two thousand] of the 30-50,000 waste disposal sites in the U.S. pose potential threats to public health or the local environment. He estimated that 26-44 billion dollars would be needed to clean up these potentially dangerous sites. . . . As enacted, the Superfund was a compromise bill, closer to the House version (\$1.6 billion) and clearly inadequate to remedy the problem as the EPA testimony described it.¹¹²

In light of the funding limitations imposed upon the CERCLA legislation, it appears that even though Congress has "occupied the field" of hazardous waste cleanup with this Act, there are still generators of waste that may not be held liable for the costs of remedying their past disposal practices since sufficient funds have not been allotted by the Act to enable the government to initially finance the cleanup.¹¹³ According to the *Wade* court, these same generators would also escape liability under section 7003 of the RCRA. "[S]ection 7003 may not, in any case, be used to confer liability on non-negligent past off-site generators of hazardous waste. . . . [T]here is nothing in the statutory language or the legislative history that would authorize such a considerable extension of liability."¹¹⁴

In contrast with the *Wade* court, a Minnesota decision refused to dismiss a suit against a past offender who spilled, leaked, and discharged chemical wastes directly into the ground at a disposal site.¹¹⁵ The United States sued Reilly Tar under section 7003 of RCRA¹¹⁶ and

112. *Id.* at 793-94 n.22 (citations omitted).

113. For a discussion of the history of CERCLA and the funding compromises involved in its enactment, see Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1 (1982).

114. *Wade*, 546 F. Supp. at 790. *But cf. Price*, 523 F. Supp. at 1073 (section 7003 imposed liability on a negligent former owner of a waste site since he had contributed to current seepage into groundwater).

115. *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1105 (D. Minn. 1982). Reilly Tar operated a plant refining coal tar and treating wood products from 1917 to 1972, generating chemical wastes that were treated, stored, and disposed of at the Reilly Tar site. The chemicals that were discharged into the soil then migrated into the groundwater, part of the system of aquifers supplying water to the Minneapolis-St. Paul area. *Id.*

116. 42 U.S.C. § 6973 (1976 & Supp. V 1981).

sections 106 and 107 of CERCLA.¹¹⁷ In refusing to dismiss the complaints, the court stated that section 7003 and section 106, the imminent hazards provisions of the two acts, were applicable in hazardous waste suits despite the absence of interstate pollution.¹¹⁸ The court further found that the defendant's prior sale of the property did not relieve it of accountability under the statute,¹¹⁹ and that the situation at the waste site met the "imminent and substantial endangerment" requirements of the provisions.¹²⁰ The court held that the United States could also base a claim for recovery of response costs on section 107 of CERCLA because,

Under section 107(f) Reilly Tar may escape liability for natural resource damages only where both the damages and the release occurred *wholly* before December 11, 1980. . . . Section 107(f) precludes liability under section 107(a)(4)(C) only where (1) all releases ended before December 11, 1980, and (2) no damages were suffered on or after December 11, 1980, as a result of the release.¹²¹

Given such statements, the conclusion that a federal common law of nuisance no longer presents a viable option to the environmental litigant seems inescapable at the present time.¹²² Since the decision in *Milwaukee II*, federal courts have consistently dismissed pollution claims based on federal common law.¹²³ Apparently the courts believe that the federal statutes regulating hazardous waste disposal remedies have preempted all other potential methods of enforcement. If those environmental statutes continue to be interpreted broadly, then there likely will be little need for the federal courts to again recognize the

117. 42 U.S.C. §§ 9606-9607 (Supp. V 1981).

118. *Reilly Tar*, 546 F. Supp. at 1113.

119. *Id.*

120. *Id.* at 1114. "[W]hile the risk of harm must be 'imminent' . . . the harm itself need not be." *Id.* at 1109-10. "Substantial" endangerment includes:

(1) a substantial likelihood that contaminants capable of causing adverse health effects will be ingested by consumers if preventive action is not taken; (2) a substantial statistical probability that disease will result from the presence of contaminants in drinking water; or (3) the threat of substantial or serious harm (such as exposure to carcinogenic agents or other hazardous contaminants).

Id. at 1110 (citing H.R. REP. NO. 1185, 93d Cong., 2d Sess. 35-36, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 6454, 6488).

121. 546 F. Supp. at 1120 (emphasis in original; citation omitted). December 11, 1980, was the date Congress officially enacted CERCLA, see 42 U.S.C. § 9601 (Supp. V 1981).

122. However, all the cases cited were suits brought by governmental entities, as was *Milwaukee II*. In the absence of statutes that provide a private cause of action, the question of whether federal common law may still govern in actions brought by private individuals to abate or compensate for interstate pollution remains unanswered.

123. See *supra* notes 99-105 and accompanying text.

federal common law nuisance action as a viable method of alleviating pollution caused by solid and hazardous wastes.

III. THE FUTURE ROLE FOR COMMON LAW

Assuming that federal common law nuisance is preempted by statutory enactments and recognizing that all the tort causes of action have problems of adaptability in the environmental setting, the question then becomes: What role, if any, can common law play in protecting people and natural resources against hazardous waste pollution? The answer appears to encompass three important aspects of the environmental lawsuit: the state or local action, the personal injury lawsuit, and the application of a strict liability standard to handlers of hazardous wastes.

A. *State and Local Actions*

One primary application of common law is in state, local, or private actions against polluters. *Chappell*,¹²⁴ *Stepan*,¹²⁵ and *Rollins*¹²⁶ represent cases where a court based its decision on a common law tort theory. Moreover, recent cases support the proposition that the common law may provide a viable cause of action for those claims falling outside the federal statutory scheme.

In *Scott v. City of Hammond*,¹²⁷ private individuals and the State of Illinois brought suit in federal court against the City of Hammond, Indiana, and its sanitary district alleging that untreated and inadequately treated sewage polluted Chicago beaches.¹²⁸ The court found that federal jurisdiction was based on diversity, not on a federal question,¹²⁹ that Illinois' choice of law rules applied,¹³⁰ and that plaintiffs were entitled to seek relief under state law claims,¹³¹ including common

124. 540 F. Supp. 1087; *see supra* notes 42-48 and accompanying text.

125. 544 F. Supp. 1135; *see supra* notes 37-40 and accompanying text.

126. 514 F. Supp. 936; *see supra* notes 32-36 and accompanying text.

127. 519 F. Supp. 292 (N.D. Ill. 1981).

128. *Id.* at 293.

129. *Id.* at 297. Explaining its rationale, the court said:

[T]he issue of regulating and preventing water pollution does not present the same type of unresolvable conflict of state interests that the apportionment of boundaries and water rights does. . . . In the water pollution control field . . . the issue is not dividing the pie but determining which standards will regulate discharges and provide remedies for injuries. . . . [W]here one or the other set of rules must be recognized as controlling, . . . the benefits of stronger controls would redound to all states involved.

Id.

130. *Id.* at 298.

131. *Id.* at 297.

law. Addressing the question of statutory preemption of common law, the court said,

There can be no doubt that the [Federal Water Pollution Control Act] does not preempt states from enforcing stricter controls than the Federal government on in-state polluters. . . . Additionally, there is nothing in the Act nor its legislative history that indicates a different result should be reached when considering an out-of-state polluter.¹³²

The court thus dismissed the federal common law counts and permitted the causes of action based upon state common and statutory law of nuisance, state common law of trespass, and state statutory environmental law.¹³³

*Wood v. Picillo*¹³⁴ is a state decision of great significance in the hazardous waste area. In *Wood*, the Rhode Island Supreme Court affirmed the trial court's judgment that the defendants had created both a public and private nuisance by maintaining a hazardous waste dump on their farm property.¹³⁵ Describing the situation at the dumpsite, the court indicated the seriousness of the offense.

The dump site proper might best be described in the succinct expression of the trial justice as "a chemical nightmare." . . . A viscous layer of pungent, varicolored liquid covered the trench bottom to a depth of six inches at its shallowest point. . . . An official from the state fire marshal's office . . . testified that . . . he observed a truck marked "Combustible" offloading barrels of chemical wastes. The truck operator knocked the barrels off the truck's tailgate directly onto the earth below, and chemicals poured freely from the damaged barrels into the trench.¹³⁶

The trial judge found that the chemicals presented a current danger to public health and safety which would worsen without immediate remedial action.¹³⁷ He therefore permanently enjoined the disposal operations and authorized plaintiffs to clean up the property at the defendants' expense.¹³⁸ This type of forceful action, grounded in the common law, is essential in confronting the current waste problem.

Thus, it may be concluded that state common law theories still

132. *Id.* at 298.

133. *Id.* at 293, 298.

134. 443 A.2d 1244 (R.I. 1982).

135. *Id.* at 1245.

136. *Id.* at 1246.

137. *Id.* at 1247.

138. *Id.*

have a vital role to play in cleaning up hazardous sites and enjoining hazardous dumping practices and hazardous chemical emissions from plants. As long as the claim is not based on a federal question or federal statute, the courts have not held that common law claims are preempted.

B. *Personal Injury Actions*

One very important area in which common law may be the only tool currently available is that of compensation to private individuals for personal injury.¹³⁹ When Congress began consideration of a superfund to compensate victims of hazardous waste, the proposed legislation included provisions for compensation for personal injury; however, CERCLA, the compromise bill of 1980, eliminated any liability for personal injury or private property loss.¹⁴⁰ In commenting on this deletion, Senator Mitchell told the Senate that,

Under this bill, if a toxic waste discharge injures both a tree and a person, the tree's owner, if it is a government, can promptly recover from the fund for the cost of repairing the damage, but the person cannot. In effect, at least as to the superfund, it's all right to kill people, but not trees.¹⁴¹

The federal interest in controlling pollution of natural resources does not encompass a federal interest in a private damage action. Therefore, such actions should properly remain within the province of the state and the common law.¹⁴²

C. *Establishment of a Strict Liability Industry Standard*

The common law imposes a strict liability standard upon conduct in certain situations:

- (1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.

139. [B]y restricting the primary coverage of [CERCLA] to governmental cleanup, resource restoration, and pollution response costs, Congress has indicated its reluctance to modify legal principles traditionally relegated to state control. Thus, private citizens injured by toxic substances generally must continue to litigate such claims in state court according to the common law and other legal rules applied in that particular jurisdiction.

Superfund at Square One, *supra* note 41, at 10,106 (footnote omitted).

140. Grad, *supra* note 113, at 19; Comment, *supra* note 66, at 701.

141. 126 CONG. REC. S14,973 (daily ed. Nov. 24, 1980) (statement of Sen. Mitchell).

142. See generally Note, *supra* note 83, at 519-24 (damage actions do not stop pollution, which is the federal legislative goal, so such actions are best left to state courts).

(2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.¹⁴³

In explaining the applicability of a strict liability standard, Prosser¹⁴⁴ indicated that strict liability attaches to,

conduct which has so much social utility that it will not be treated as tortious or blameworthy in itself, and the defendant will not be prohibited from carrying it on, but not so much that he will be allowed to carry it on without liability for actual resulting damage, at the expense of his neighbors.¹⁴⁵

It is apparent that the transporting and disposing of toxic wastes is necessary. Yet there can be little doubt that the handling of toxic wastes meets almost all recognized criteria for considering the activity abnormally dangerous.¹⁴⁶ Therefore, courts must consider, and indeed already are, applying common law strict liability to the hazardous waste industry.¹⁴⁷

The Superior Court of New Jersey, in *City of Bridgeton v. B.P. Oil, Inc.*,¹⁴⁸ held that the possessor of a hazardous pollutant who stores it on his property is strictly liable for damages if it spreads or "escapes" onto surrounding property.¹⁴⁹ In a recent Fifth Circuit decision, *Ashland Oil, Inc. v. Miller Oil Purchasing Co.*,¹⁵⁰ the court cited with approval section 520 of the Restatement (Second) of Torts¹⁵¹ in holding that a chemical waste company was strictly liable for damages resulting

143. RESTATEMENT (SECOND) OF TORTS § 519 (1976).

144. Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399 (1942).

145. *Id.* at 404 (footnote omitted).

146. In determining whether an activity is abnormally dangerous, the following factors are to be considered:

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care;
- (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on; and
- (f) extent to which its value to the community is outweighed by its dangerous attributes.

RESTATEMENT (SECOND) OF TORTS § 520 (1976).

147. For a discussion of the applicability of the strict liability cause of action, see Note, *Strict Liability for Generators, Transporters, and Disposers of Hazardous Wastes*, 64 MINN. L. REV. 949 (1980); Note, *The Development of a Strict Liability Cause of Action for Personal Injuries Resulting from Hazardous Waste*, 16 NEW ENG. L. REV. 543 (1981).

148. 146 N.J. Super. 169, 369 A.2d 49 (1976).

149. *Id.* at —, 369 A.2d at 54. "The policy of the law in this State and of society in general makes this a case of strict liability rather than of negligence." *Id.*

150. 678 F.2d 1293 (5th Cir. 1982).

151. *Id.* at 1307-08.

from the intentional injection of hazardous chemical waste products into a crude oil pipeline.¹⁵² "Applying the factors articulated . . . in § 520 of the Restatement, Second, to the conduct of [defendants], the Court is constrained to hold that the disposal of the [hazardous chemical byproducts] by these defendants was an abnormally dangerous and ultrahazardous activity."¹⁵³

The application of strict liability standards to the hazardous waste industry clearly presents another important role for the common law. Although this approach would be applicable only to those openly involved in the industry,¹⁵⁴ it nevertheless would be a very effective tool for judicial enforcement of responsible industry standards.

IV. CONCLUSION

The day may come when the field of hazardous waste disposal regulation will be entirely and effectively consumed by statutory law. Both the federal government and the states appear to be moving generally in that direction. Because of the complexity of the issues and the technology involved with chemical wastes, it is likely that the federal government will be the only governmental entity with the resources necessary to truly implement effective regulatory programs. Nonetheless, even for the federal government, a genuinely effective comprehensive program may be many years away. In the meantime, the need for common law actions remains.

Regulatory agencies are sometimes thought to represent primarily the interests of those they were created to regulate.¹⁵⁵ Thus, the public's faith in their effectiveness can falter. Generally, agencies lack sufficient staffing and funding to handle all the problems currently arising from hazardous waste mismanagement. Moreover, state environmen-

152. *Id.* at 1308. The court further found the company liable under an intentional tort theory, even though plaintiff omitted that cause of action from its theory of the case. *Id.* at 1309.

153. *Id.* at 1308.

154. Only those storage or disposal activities ostensibly operating under appropriate governmental guidelines would be considered the type of activities with social utility to which strict liability would apply. "If the utility of the activity does not justify the risk it creates, it may be negligence merely to carry it on, and the rule stated in this Section is not then necessary to subject the defendant to liability for harm resulting from it." RESTATEMENT (SECOND) OF TORTS § 520 comment b (1976). Covert disposal operations, therefore, would more appropriately be punishable under other tort actions, criminal codes, or state waste disposal statutes.

155. "The tendency of administrative agencies to become the captives of those they ostensibly regulate has long been noticed and has had a deleterious effect on the legitimacy of the administrative process by calling into question its independence and integrity." J. FREEDMAN, CRISIS AND LEGITIMACY 35 (1978). "[L]ong-term dealing with the problems of an industry inevitably leads to a greater sympathy and understanding for the industry's attitudes . . ." *Id.* at 58.

tal statutory schemes are still in the formative stages and remain inadequate to handle the problems. The private citizen, therefore, is left without recourse for his injuries unless he has access to the courts under common law theories. Clearly, then, until federal and state regulatory agencies can govern the hazardous waste field under statutory schemes that are sufficiently broad in scope and sufficiently funded to be effective, the need for the common law cause of action will endure.

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