NOTES

Raytheon Constructors, Inc. v. ASARCO Inc.: The Tenth Circuit Finds a Successor in Interest Not Liable for the Cleanup Costs of a Mine Site Under CERCLA . . . But What About State Corporate Law?

I. INTRODUCTION

Raytheon Constructors, Inc. (Raytheon) sought a declaratory judgment under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) for the cleanup costs, attributable to its predecessor, Stearns-Roger, at the Rawley Mine site in Saguache County, Colorado.[1] In 1925, the Colorado Corporation, owner of the Rawley Mine site, encountered financial difficulties and defaulted on several debts, including debts owed to Stearns-Roger, ASARCO Corporation (ASARCO), and Metals Exploration Company.[2] To recover outstanding debts, Stearns-Roger, ASARCO, and Metals Exploration Company created Rawley Mine, Inc. (RMI) as part of a reorganization plan.[3] The three entities invested funds in RMI in the following proportions: ASARCO at forty percent, Metals Exploration at forty percent, and Stearns-Roger at twenty percent.[4] Each entity also received stock corresponding to the amount of its lien held against Colorado Corporation.[5] The president of Stearns-Roger, Thomas Stearns, was elected chairman and president of RMI at the initial board of directors

1. Raytheon Constructors, Inc. v. ASARCO Inc., 368 F.3d 1214, 1216 (10th Cir. 2003); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) § 107(a), 42 U.S.C. § 9607(a) (2000).
2. *Raytheon*, 368 F.3d at 1216.
3. *Id.*
4. *Id.*
5. *Id.*

meeting of RMI.[6] In 1929, after RMI had completely repaid Stearns-Roger's loan, ASARCO purchased all of Stearns-Roger's stock, which ended Stearns-Roger's association with RMI.[7] Because Stearns-Roger never owned more than twenty percent of RMI, it was characterized as a "minority shareholder," rather than a "parent company."[8]

In 1996, Raytheon sought a declaratory judgment that it was not liable to ASARCO for the cleanup costs at the Rawley Mine site as an "operator" or an "arranger" under CERCLA.[9] ASARCO counterclaimed that Raytheon was liable under CERCLA and under state common law as Stearns-Roger's successor in interest.[10] The district court held Raytheon liable under CERCLA as an operator and arranger.[11] Raytheon appealed and the United States Court of Appeals for the Tenth Circuit reversed.[12] The Tenth Circuit *held* that, as successor in interest to Stearns-Roger, Raytheon may not be held liable as an operator or as an arranger for the cleanup costs at the Rawley Mine site. *Raytheon Constructors, Inc. v. ASARCO Inc.*, 368 F.3d 1214, 1220 (10th Cir. 2003).

II. BACKGROUND

Congress enacted CERCLA in 1980 in response to serious environmental and health risks posed by industrial pollution in the 1970s.[13] Unlike other environmental statutes, the focus of CERCLA is remedial rather than regulatory because of the need to manage the cleanup costs of past environmental contamination.[14] Accordingly, the purpose of the Act is "to provide for liability, compensation, cleanup, and emergency response to hazardous substances released into the

6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. United States v. Bestfoods, 524 U.S. 51, 55 (1998) (citing Exxon Corp. v. Hunt, 475 U.S. 355, 358-59 (1986)); *see* Lucia Ann Silecchia, *Pinning the Blame and Piercing the Veil in the Mists of Metaphor: The Supreme Court's New Standards for the CERCLA Liability of Parent Companies and a Proposal for Legislative Reform*, 67 FORDHAM L. REV. 115, 116 n.6 (1998).
14. *See* Silecchia, *supra* note 13, at 116 n.6; *see also* Ronald H. Rosenberg, *The Ultimate Independence of the Federal Courts: Defying the Supreme Court in the Exercise of Federal Common Law Powers*, 36 CONN. L. REV. 425, 456 (2004) (explaining that Congress enacted CERCLA "in the wake of the Love Canal episode," and thus CERCLA "attempts to allocate the financial costs of cleanup and natural resource damage to those actors believed to be responsible for the past dumping").

environment."[15] Section 107(a) of CERCLA imposes strict liability on four classes of parties for cleanup costs: (1) owners and operators of hazardous substance sites, (2) persons who owned or operated such sites at the time of disposal, (3) persons who have arranged for the disposal of hazardous substances, and (4) persons who have transported hazardous substances for disposal.[16] Determining liability within the meaning of these four categories, however, has "ignited thousands of lawsuits" attempting to impose liability on the responsible parties.[17] One issue in particular, that has sparked considerable conflict among the circuits is whether a successor in interest may be liable for the cost of cleanup.[18]

In the 1998 case *United States v. Bestfoods*, the United States Supreme Court defined the meaning of "operator" under section 107(a) in the context of a parent-subsidiary relationship.[19] The Court ruled that under CERCLA, a parent corporation could be liable derivatively and directly for the actions of its subsidiary.[20] Applying the fundamental principles of corporate derivative liability, the Court determined that a parent corporation may be liable for its subsidiary's ownership or operation of a polluting facility when the corporate veil may be pierced.[21] However, the Court quickly pointed out that under an equally important principle of corporate law, the parent corporation could not be liable simply because its subsidiary is subject to liability for owning or operating a polluting facility.[22] The Court thus distinguished between the level of the parent's activities in controlling the subsidiary as a whole,

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15. *See* United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1111 (D. Minn. 1982).

16. CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2) (2000); *see also* Fla. Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1317 (11th Cir. 1990).

17. Eric L. Yeo, Note, United States v. Bestfoods*: Narrowing Parent Corporation Liability Under CERCLA for the Twenty-First Century*, 51 ADMIN. L. REV. 1267, 1268 (1999).

18. *See* N. Shore Gas Co. v. Salomon Inc., 152 F.3d 642, 649 (7th Cir. 1998); Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 91 (3d Cir. 1988). CERCLA does not expressly address corporate successor liability. *See* CERCLA § 107(a), 42 U.S.C. § 9607(a).

19. 524 U.S. 51, 55 (1998); *see also* Joshua Safran Reed, *Reconciling Environmental Liability Standards After* Iverson *and* Bestfoods, 27 ECOLOGY L.Q. 673, 688 (2000) ("Prior to the decision in *Bestfoods*, federal courts had taken three different approaches to a parent corporation's liability as an 'operator' of a facility owned or operated by its subsidiary.").

20. *See Bestfoods*, 524 U.S. at 62.

21. *Id.* The Court explained that by enacting CERCLA, Congress did not intend to rewrite the common law doctrine of piercing the corporate veil. Accordingly, the Court found "that the corporate veil may be pierced and the shareholder held liable for the corporation's conduct when, *inter alia*, the corporate form would otherwise be misused to accomplish certain wrongful purposes." *Id.*

22. *Id.* (observing that "nothing in CERCLA purports to reject this bedrock principle, and against this venerable common-law backdrop, the congressional silence is audible").

and the level of control in the waste disposal activity at issue.[23] Under this framework, the Court concluded that the parent could be directly liable as an "operator" when the parent has managed, directed, or conducted "operations specifically related to pollution."[24]

In *Carter-Jones Lumber Co. v. Dixie Distributing Co.*, the United States Court of Appeals for the Sixth Circuit applied *Bestfoods* to decide whether a company and its sole shareholder could be liable as an arranger under CERCLA.[25] The court first explained that under section 107(a)(2), operator liability should logically apply to arranger liability.[26] The court then established that the application of state law was appropriate in resolving CERCLA liability issues concerning corporations and officers.[27] Thus, the court concluded that the defendant could be held jointly and severally liable for the cleanup costs when the corporate veil can be pierced under state law.[28]

In *North Shore Gas Co. v. Salomon Inc.*, the United States Court of Appeals for the Seventh Circuit addressed whether a successor corporation may be liable for the cost of cleanup under CERCLA.[29] The court explained that the issue of successor liability could not be resolved by the plain language of CERCLA, which imposes liability on "covered persons."[30] Adopting the rationale of other circuits, the court reasoned that "CERCLA defines 'person' as an 'individual, firm, corporation, association, partnership, consortium, joint venture, or commercial entity.'"[31] The court noted that Congress directed the judiciary to apply the following rule of construction to the United States Code: "[W]hen the word 'company' . . . is used 'in reference to a corporation, [it] shall be deemed to embrace the words 'successors and assigns of such

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23. *See id.* at 65 (noting that CERCLA's operator provision is concerned primarily with direct liability for one's own actions).

24. *Id.* at 66-67. The Court concluded that given the "plain language" of CERCLA "any person who operates a polluting facility is directly liable for the costs of cleaning up the pollution." *Id.* at 65. Therefore under section 107(a) the "operator" could be "the facility's owner, the owner's parent corporation or business partner, or even a saboteur who sneaks into the facility at night to discharge its poisons out of malice." *Id.*

25. 166 F.3d 840, 846 (6th Cir. 1999).

26. *Id.* (citing CERCLA § 107(a), 42 U.S.C. § 9607(a) (2000)).

27. *Id.* at 847 (citing *Bestfoods* for the principle that state law may be applied to pierce the corporate veil in CERCLA cases).

28. *Id.*

29. 152 F.3d 642, 648 (7th Cir. 1998).

30. *Id.* at 649 (citing CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1), which states that "[a]ny person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title").

31. *Id.* (citing Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1247 (6th Cir. 1991); United States v. Mexico Feed & Seed Co., 980 F.2d 470, 486 (8th Cir. 1992)).

company.'"[32] Moreover, citing *United States v. Mexico Feed & Seed Co.*, the court emphasized that successor liability is such a "well-established" corporate doctrine that the Eighth Circuit "suggested that Congress would have to explicitly *exclude* successor corporations if it intended to place them beyond CERCLA's reach."[33] The court further stated that such a statutory construction is consistent with the purpose of CERCLA because Congress enacted it as a response to environmental hazards, and to allocate the cost to the parties who created or maintained the hazard.[34] Moreover, the court explained that imposing liability on the successor corporation is not necessarily inequitable because the successor and its shareholders are likely to have "derived some benefit from the predecessor's use of the pollutant and the savings that resulted from the hazardous disposal methods."[35] The Seventh Circuit also acknowledged that there were differing opinions among the other circuits on whether state law or "federal common law" should be applied in determining successor liability.[36] Nonetheless, the court decided to apply federal common law because neither party briefed the conflict of law issue, and "both seemingly assume[d] that federal common law applies."[37] Therefore, the court applied the "mere continuation" rule, which holds that "an asset purchaser . . . does not acquire the liabilities of the seller. . . . [except when] . . . (1) the purchaser expressly or impliedly agrees to assume the liabilities; (2) the transaction is a de facto merger or consolidation; (3) the purchaser is a 'mere continuation' of the seller; or (4) the transaction is an effort to fraudulently escape liability."[38]

The United States Court of Appeals for the First Circuit also addressed successor liability in *United States v. Davis*.[39] In its analysis, the court considered three tests used by the other circuits.[40] The court first explained that some circuits had applied the "mere continuation test" to impose successor liability.[41] Next, the court noted that a few of the circuits have adopted the federal substantial continuation test, which requires that courts consider the following eight factors: "(1) retention of

32. *Id.* (citing 1 U.S.C. § 5 (2000)).
33. *Id.* (citing *Mexico Feed & Seed*, 980 F.2d at 486).
34. *Id.*
35. *Id.* at 650.
36. *Id.*
37. *Id.* at 650-51.
38. *Id.*
39. 261 F.3d 1, 52 (1st Cir. 2001).
40. *Id.* at 53.
41. *Id.* (observing that "the 'mere continuation' test is an exception to the common law rule that the buyer of a corporation's assets (as opposed to its stock) does not incur liability for the divesting corporation's debts").

the same employees; (2) retention of the same supervisory personnel; (3) retention of the same production facilities; (4) production of the same product; (5) retention of the same name; (6) continuity of assets; (7) continuity of general business operations; and (8) whether the buyer holds itself out as continuation of the divesting corporation."[42] Finally, the court observed that other circuits have declined to apply a federal test in determining successor liability.[43] The court explained:

> [T]hese cases heed the Supreme Court's warnings that courts should presume the matters left unaddressed are subject to state law when a "comprehensive and detailed" federal statutory regime is at issue, and that cases in which the creation of a "special federal rule would be justified" generally are "few and restricted."[44]

The First Circuit adopted the last approach in its analysis.[45] In doing so, the court stated that *Bestfoods* "left little room for the creation of a federal rule of liability under [CERCLA]."[46] Accordingly, the court applied state law to determine successor liability.[47] However, the court pointed out that state law should only be applied "so long as it is not hostile to the federal interests animating CERCLA."[48]

III. THE COURT'S DECISION

In the noted case, the Tenth Circuit concluded that Raytheon, as a successor in interest to Stearns-Roger, may not be held liable either as an operator or an arranger for clean up costs at the Rawley Mine site.[49] The central issue on appeal was whether Raytheon may be held liable for the actions of RMI under section 107(a) of CERCLA.[50] In its analysis, the court noted that section 107(a) provides four classes of liable parties: (1) owners and operators of hazardous substance sites, (2) persons who owned or operated such sites at the time of disposal, (3) persons who have arranged for the disposal of hazardous substances, and (4) persons

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42. *Id.* (citing B.F. Goodrich v. Betkoski, 99 F.3d 505, 519 (2d Cir. 1996); United States v. Carolina Transformer Co., 978 F.2d 832, 837 (4th Cir. 1992)).

43. *Id.* (citing Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1501-02 (11th Cir. 1996); City Mgmt. Corp. v. United States Chem. Co., 43 F.3d 244, 253 n.12 (6th Cir. 1994)).

44. *Id.* (quoting O'Melveny & Myers v. Fed. Deposit Ins. Corp., 512 U.S. 79, 85-87 (1994)).

45. *Id.* at 54.

46. *Id.*; *see also O'Melveny & Myers*, 512 U.S. at 85.

47. *Davis*, 261 F.3d at 54.

48. *Id.*

49. Raytheon Constructors, Inc. v. ASARCO Inc., 368 F.3d 1214, 1216 (10th Cir. 2003).

50. *Id.* at 1217.

who have transported hazardous substances for disposal.[51] Applying section 107(a), the court determined RMI was liable as an owner, an operator, and arranger.[52] However, the court noted that Raytheon may only be liable as successor in interest to Stearns-Roger, "if it can be determined that the operation and arrangement functions of RMI may be directly attributed to Stearns-Roger as a stockholder."[53] To make this determination, the court looked to the Supreme Court's analysis in *Bestfoods*.[54] In *Bestfoods*, the Supreme Court observed that "an operator must manage, direct, or conduct operations specifically related to pollution, that is operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations."[55] Furthermore, the court pointed out that *Bestfoods* emphasized the necessary relationship between the potential operator and the polluting facility itself.[56] Thus, the court acknowledged the question in *Bestfoods* was "not whether the parent operates the subsidiary, but rather whether it operates the facility, and that the operation is evidenced by participation in the activities of the facility."[57]

Citing the Supreme Court's discussion of *Bestfoods*, the court stated that it is appropriate that directors and officers hold positions in both the parent and the subsidiary and that such "dual officers can and do 'change hats' to represent the two corporations separately."[58] Further, the court observed that in *Bestfoods*, the Supreme Court determined that liability could not be established where "dual officers and directors made policy decisions and supervised activities at the facility."[59] Instead, to impose liability in that case "the Government would have to show that . . . the officers and directors were acting in their capacities as [parent] officers and directors, and not as [subsidiary] officers and directors when they committed those acts."[60] Under this rationale, the court determined that the district court had misinterpreted *Bestfoods*.[61]

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51. *Id.* (citing CERCLA § 107(a), 42 U.S.C. § 9607(a) (2000)).
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.* (citing United States v. Bestfoods, 524 U.S. 51, 66 (1998)).
56. *Id.*
57. *Id.* The court pointed out that *Bestfoods* addressed a situation involving a parent and subsidiary. The court thus noted that although it must modify its inquiry as appropriate to suit the situation of a minority shareholder, the "focus on the facility remains the crucial consideration." *Id.*
58. *Id.*
59. *Id.* at 1218 (citing *Bestfoods*, 524 U.S. at 69-70).
60. *Id.*
61. *Id.* at 1219.

The court explained that in the present case, no evidence existed to rebut the presumption that Mr. Stearns' involvement in RMI was undertaken in any capacity other than as president of RMI and a member of its board.[62] As a result, Mr. Stearns' involvement in RMI could not serve as the basis for operator or arranger liability of Stearns-Roger.[63] The court also explained that the "critical point" was that Mr. Stearns took actions concerning RMI while wearing his "RMI president hat," and therefore the "crucial consideration" was "not what Mr. Stearns did, but what Stearns-Roger did."[64] The court concluded that because Mr. Stearns acted as executive and board member of RMI, under *Bestfoods*, Mr. Stearns' actions could not be attributed to Stearns-Roger.[65] For this reason, the court found that while "the district court believed that Mr. Stearns himself was an operator of RMI's facilities, that does not suffice to make Stearns-Roger, as a minority shareholder, an operator."[66]

Similarly, the Tenth Circuit determined that Raytheon may not be held liable under CERCLA as an arranger. To be liable as an arranger under CERCLA, the court found that a party must satisfy three requirements: (1) the party must be a "person" as defined in CERCLA; (2) the party must "own or possess" the hazardous substance at issue; and (3) the party must by contract, agreement or otherwise, arrange for the transport or disposal of such hazardous substances.[67] The court explained that the analysis in *Bestfoods* regarding operator liability also logically applies to arranger liability.[68] Under this rationale, the Tenth Circuit found that the district court also erred when it automatically attributed Mr. Stearns' actions to his role at Stearns-Roger, and not to his role at RMI.[69] Therefore, under the principals set forth in *Bestfoods*, the court concluded that "Raytheon, as successor in interest to Stearns-Roger, may not be held liable either as an operator or as an arranger in connection with the environmental cleanup at issue."[70] Accordingly, the Tenth Circuit reversed the decision of the district court.[71]

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62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3) (2000)).
68. *Raytheon*, 368 F.3d at 1220 (citing Carter-Jones Lumber Co. v. Dixie Distrib. Co., 166 F.3d 840, 846 (6th Cir. 1999)).
69. *Id.*
70. *Id.*
71. *Id.*

IV. ANALYSIS

The Supreme Court established that to find direct liability for the parent's operation of a facility, the parent must "operate" the activities of the facility, rather than merely control the activities of the subsidiary.[72] The Tenth Circuit applied this analysis in finding that Raytheon was not liable as a successor in interest at the Rawley Mine site.[73] However, the Supreme Court also established a standard for derivative liability, which the Tenth Circuit did not apply.

Currently, the standard for successor liability under CERCLA is not entirely clear.[74] In fact, one of the first questions that a court should ask when determining successor liability under CERCLA is whether to apply state or federal law.[75] This question is "truly confusing" because "[n]ot only has each state developed its own common law rules concerning successor liability, but so have the federal courts."[76] While *Bestfoods* did not expressly resolve whether state law or federal law should govern CERCLA liability, the Court maintained that it did not seek to rewrite the "fundamental principles of corporate law."[77] This indicates that "bedrock state corporate law concepts would not be easily cast aside solely because the issue arose in federal CERCLA litigation."[78] As a result, to be consistent with *Bestfoods*, courts should apply state law principles governing successor liability in addition to the CERCLA analysis. Accordingly, courts should assess not only whether a successor is deemed to be an "operator" or an "arranger" under CERCLA, but also whether the laws of the state necessitate liability for the predecessor's actions.

The Tenth Circuit determined that Raytheon was not liable for the cleanup costs as an operator or arranger because its predecessor, Stearns-Roger, was acting on behalf of RMI and not Stearns-Roger. However, in its analysis the court never addressed whether Raytheon was liable derivatively under state laws concerning successor liability. Although the decision relied heavily on the analysis in *Bestfoods*, the court did not take into account the underlying argument in *Bestfoods* which is that the

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72. *See* United States v. Bestfoods, 524 U.S. 51, 68 (1997).

73. *See Raytheon*, 368 F.3d at 1217.

74. Michael T. Kafka, *Corporate Successor Liability in Minnesota and Other Jurisdictions: A Legal Landscape Where Even Purchasers of Assets Should Tread with Caution*, 26 HAMLINE L. REV. 1, 20 (2002).

75. *Id.*

76. *Id.* at 21. *But see* Rosenberg, *supra* note 14, at 462 (explaining that "[s]tate law on successor liability has established patterns that are surprisingly consistent from state to state").

77. Rosenberg, *supra* note 14, at 455.

78. *Id.*

principles of state corporate law should not be displaced. Furthermore, the court cited *Carter-Jones Lumber Co.* as support for the contention that the *Bestfoods* analysis applies to an arranger under CERCLA. However, the court overlooked the fact that *Carter-Jones Lumber Co.* applied state corporate law principles to determine liability under CERCLA.[79] If the court's decision had included a determination of Raytheon's liability under state law successor principles, the analysis would arguably be more complete, and in effect more consistent with *Bestfoods*.

Nonetheless, courts imposing successor liability under federal common law have maintained that their approach achieves "greater national uniformity and avoid[s] the danger of state laws that supposedly unduly limit the liability of successor corporations."[80] Although CERCLA does not directly speak to the issue of successor liability, its legislative history indicates that Congress enacted the statute to achieve the "fundamental remedial goal of making polluters and their successors pay for cleaning up hazardous substances."[81] Using this rationale, some courts have adopted more expansive federal common law standards to make successor corporations liable under CERCLA when state laws have limited successor liability.[82] In this respect, the First Circuit in *United States v. Davis* has adopted a more comprehensive approach to successor liability than the Tenth Circuit. By applying state corporate law, the First Circuit is consistent with the principles set forth in *Bestfoods*. At the same time, however, the First Circuit has limited the application of state law "so long as it is not hostile to the federal interests animating CERCLA."[83] Accordingly, the First Circuit's analysis of successor liability promotes the purpose of CERCLA, while also keeping to the standard set forth in *Bestfoods*.

V. CONCLUSION

Because the Tenth Circuit only analyzes Raytheon's liability as either an operator or arranger, the ruling in *Raytheon* reflects a narrow interpretation of CERCLA and a rigid understanding of *Bestfoods*. The

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79. Carter-Jones Lumber Co. v. Dixie Distrib. Co. 166 F.3d 840, 847 (6th Cir. 1999) (observing that "[a]pplication of Ohio law is appropriate in resolving liability issues relating to corporations and officers, as explained by the Supreme Court when it applied the state law for piercing the corporate veil in CERCLA cases," such as *Bestfoods*).

80. Bradford C. Mank, *Should State Corporate Law Define Successor Liability?: The Demise of CERCLA's Federal Common Law*, 68 U. CIN. L. REV. 1157, 1158 (2000).

81. *Id.* at 1157.

82. *Id.*

83. United States v. Davis, 261 F.3d 1, 54 (1st Cir. 2001).

decision does not fully apply the established doctrine of corporate law espoused in *Bestfoods*; nor does it seek to allocate cleanup costs of the Rawley Mine site. Therefore, in the spirit of CERCLA and *Bestfoods*, the court should adopt a more balanced approach which will maintain the principles of corporate law, while also achieving the remedial goal of hazardous waste cleanup.

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