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United States v. Waste Industries: Federal Common Law and Imminent Hazards

I. Introduction

The Supreme Court in *Illinois v. City of Milwaukee (Milwaukee I)*¹ recognized a cause of action based on federal common law of nuisance² as an exception to the *Erie Railroad Co. v. Tompkins*³ doctrine that there is no federal general common law.⁴ In *City of Milwaukee v. Illinois (Milwaukee II)*⁵ the Court reevaluated its earlier decision and held that the 1972 Amendments to the Federal Water Pollution Control Act (FWPCA),⁶ which completely revised the Act soon after *Milwaukee I*, displaced the previously available federal common law action.⁷ The application of the preemption standard of *Milwaukee II*⁸ to other environmental statutes is not entirely

1. 406 U.S. 91, 107 (1972).

2. Federal common law of nuisance has its origin in the early twentieth century. See, e.g., *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907); *Missouri v. Illinois*, 200 U.S. 496 (1906). See also Bleiweiss, *Environmental Regulation and the Federal Common Law of Nuisance: A Proposed Standard of Preemption*, 7 Harv. Envtl. L. Rev. 41 (1983).

3. 304 U.S. 64 (1938). This landmark decision held that state and not federal law supplies the substantive standards in diversity actions in federal court. The Court stated: "Congress has no power to declare substantive rules of common law applicable in a State. . . . And no clause in the Constitution purports to confer such a power upon the federal courts." *Id.* at 78.

4. The Supreme Court has fashioned federal common law where there is "an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism. . . ." 406 U.S. at 103-07 & n.6.

5. 451 U.S. 304 (1981). See Note, *Milwaukee v. Illinois: An Interstate Water Pollution Dispute*, 1 Pace Envtl. L. Rev. 50 (1983).

6. Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1376 (1982)).

7. See *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 3, 22 (1981) (For the majority, Justice Powell wrote that the Court in *Milwaukee I* had held that "the federal common law of nuisance in the area of water pollution control is entirely pre-empted by the more comprehensive scope of the [FWPCA].").

8. "The question whether a previously available federal common-law action has been displaced by federal statutory law involves an assessment of the scope of the

straightforward.

One area of substantial uncertainty, solid and hazardous waste disposal, is governed by two federal statutes: the Resource Conservation and Recovery Act (RCRA)⁹ and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).¹⁰ RCRA authorizes the Environmental Protection Agency (EPA) to establish a "cradle-to-grave" regulatory scheme to control the generation,¹¹ transportation,¹² treatment, storage and disposal¹³ of solid and hazardous waste. CERCLA was enacted to address the problem of cleaning up inactive or abandoned¹⁴ solid and hazardous waste disposal sites.¹⁵ CERCLA authorizes EPA to undertake remedial action with respect to actual or threatened releases of hazardous substances into the environment which may present "an imminent and substantial danger to public health or wel-

legislation and whether the scheme established by Congress addresses the problem formerly governed by federal common law." 451 U.S. at 315 n.8.

9. Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified as amended at 42 U.S.C. §§ 6901-6987 (1982)) *amended by* The Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 1984 U.S. Code Cong. & Ad. News (98 Stat. 3221) 5576 (to be codified at 42 U.S.C. §§ 6901-6987). RCRA was designed to eliminate "the last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous wastes." H.R. Rep. No. 1491, 94th Cong., 2d Sess. 4, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6238, 6241. For a discussion of RCRA's legislative history, see Kovacs & Klucsik, *The New Federal Role in Solid Waste Management: The Resource Conservation and Recovery Act of 1976*, 3 Colum. J. Envtl. L. 205, 216-20 (1977).

10. Pub. L. No. 96-510, 94 Stat. 2767 (codified at 42 U.S.C. §§ 9601-9657 (1982)).

11. 42 U.S.C. § 6922.

12. *Id.* § 6923.

13. *Id.* §§ 6924, 6925.

14. "The distinction between abandoned and inactive waste disposal sites lies in the continuing ownership of the latter. A dump site has been abandoned when its owners and operators no longer maintain a relationship with it. . . . A site which the current owner controlled while it was used for waste disposal is an inactive site." *United States v. Waste Indus.*, 556 F. Supp. 1301, 1304 n.5 (E.D.N.C. 1982) (order granting motion to dismiss), *rev'd*, 734 F.2d 159 (4th Cir. 1984).

15. In the legislative history subsequent to the enactment of RCRA, Congress discussed the need for further legislation: "Since enactment of [RCRA], a major new source of environmental concern has surfaced: the tragic consequences of improperly [sic], negligently [sic], and recklessly [sic] hazardous waste disposal practices known as the 'inactive hazardous waste site problem.' . . . Existing law is clearly inadequate to deal with this massive problem." H.R. Rep. No. 1016, 96th Cong., 2d Sess. 17-18, *reprinted in* 1980 U.S. Code Cong. & Ad. News 6119, 6120.

fare."¹⁶ EPA is also authorized under CERCLA to sue designated classes of persons to reimburse the fund for costs incurred while performing these remedial operations.¹⁷ Finally, both RCRA and CERCLA contain imminent hazard provisions pursuant to which EPA may bring suit in federal district court for injunctive relief to abate an imminent and substantial endangerment to health or the environment.¹⁸

Before the Supreme Court decided *Milwaukee II*, two

16. 42 U.S.C. § 9604(a)(1). The functions vested in the President by section 106(a) are delegated to the Administrator of EPA. Exec. Order No. 12316, 46 Fed. Reg. 42,237, 42,238 (1981).

17. 42 U.S.C. § 9607(a)(4)(A). See *infra* note 99.

18. RCRA section 7003 states, in pertinent part:

[U]pon receipt of evidence that the handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the administrator may bring suit on behalf of the United States in the appropriate district court to immediately restrain any person contributing to such handling, storage, treatment, transportation or disposal to stop such handling, storage, treatment, transportation or disposal or to take such other action as may be necessary. . . .

42 U.S.C. § 6973(a).

In 1984 Congress amended section 7003 to specify that an action may be brought under the provision to remedy conditions resulting from past completed acts:

[U]pon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States in the appropriate district court against any person (including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage or disposal facility) who has contributed or who is contributing to such handling, storage, treatment, transportation or disposal to restrain such person from such handling, storage, treatment, transportation or disposal, to order such person to take such other action as may be necessary, or both. . . .

42 U.S.C. § 6973(a), as amended by Pub. L. No. 98-616, 98 Stat. 3221 (1984).

CERCLA section 106(a) states, in pertinent part:

[W]hen the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. . . .

42 U.S.C. § 9606(a).

federal district courts¹⁹ held that the imminent hazard provision in RCRA, section 7003, is solely jurisdictional and applied federal common law of nuisance substantive standards of liability.²⁰ Since *Milwaukee II*, however, the federal courts have been reluctant to apply federal common law principles in the area of solid and hazardous waste disposal. The district court opinion in *United States v. Waste Industries*²¹ typifies this reluctance. Holding that RCRA preempts federal common law of nuisance, the district court nonetheless explored the availability of federal common law of nuisance as a source of substantive law.²² The district court concluded that the preemption of federal common law in the area of solid and hazardous waste disposal is "complete and total" and that the federal courts must look to sources other than federal common law for section 7003 substantive standards of liability.²³

On appeal, the Fourth Circuit validated the district court's preemption analysis, but rejected its reasoning and reached a different result.²⁴ Relying on the legislative history of the 1980 Amendments to RCRA,²⁵ the circuit court found

19. *United States v. Midwest Solvent Recovery* (Midwest Solvent), 484 F. Supp. 138, 143-44 (N.D. Ind. 1980) (order granting motion for preliminary injunctive relief); *United States v. Solvents Recovery Serv. (Solvents Recovery)*, 496 F. Supp. 1127, 1133-34 (D. Conn. 1980) (order denying motions to dismiss).

20. *Solvents Recovery* concluded that the application of federal common law was justified by the "sufficiently strong federal interest in preventing and abating ground-water pollution caused by the disposal of hazardous wastes, and in having a uniform body of federal law governing controversies involving such pollution. . .," as evidenced by the legislative history and statutory provisions of RCRA. 496 F. Supp. at 1138. *But see infra* note 62. *Solvents Recovery* rejected the defendant's contention that a necessary condition of a federal common law of nuisance claim to abate pollution of any kind is an interstate effect, i.e., pollution having its origin in one state and its effect in another. 496 F. Supp. at 1134-39. *See Illinois v. Outboard Marine Corp.*, 619 F.2d 623, 623-24 (7th Cir. 1980). *Cf. United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1107-08 (D. Minn. 1982) (order denying motion to dismiss for lack of jurisdiction and for failure to state a claim, wherein the court refused to limit section 7003 to ground water pollution having interstate effects).

21. 556 F. Supp. 1301 (E.D.N.C. 1982).

22. *Id.* at 1316 n.29.

23. *Id.*

24. *United States v. Waste Indus.*, 734 F.2d 159 (4th Cir. 1984). *See infra* notes 71-78 and accompanying text.

25. The Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 1984 U.S. Code Cong. & Ad. News (98 Stat. 3221) 5576 (to be codified at 42 U.S.C. §§

that Congress incorporated and expanded upon federal common law principles of nuisance in section 7003 as part of the substantive standards of liability.²⁶ Holding that federal common law of nuisance standards apply to section 7003 except to the extent that section 7003 expands upon those standards, the circuit court concluded that *Milwaukee II* is not inconsistent with this result.²⁷

The decision in *Waste Industries* marks the first attempt by a circuit court to apply the holding of *Milwaukee II* to RCRA section 7003. This note discusses the preemption of federal common law by RCRA and CERCLA, and the application of federal common law principles to the imminent hazard provisions of those Acts. It concludes that the Fourth Circuit's holding that federal common law standards of liability apply to section 7003 is the better view, but that the circuit court's reasoning is flawed.

II. Background

There is a split among the federal courts on the question of whether RCRA section 7003 is merely a jurisdictional provision granting EPA the authority to bring suit or a substantive provision against activities that may present an imminent and substantial endangerment.²⁸ The distinction between a substantive and a jurisdictional statute is that a substantive statute is one that creates liability, and a jurisdictional statute is one that authorizes remedies or proceedings but does not create liabilities.²⁹ If section 7003 is solely jurisdictional, a source of substantive standards by which to apply that section must be found. Federal common law of nuisance is a possible source.³⁰ If section 7003 contains substantive standards of lia-

6901-6987). See *infra* note 36.

26. 734 F.2d at 167.

27. *Id.*

28. No court has held that the analogous imminent hazard provision in CERCLA, section 106(a), is solely jurisdictional. See *infra* note 97.

29. See *United States v. Outboard Marine Corp.*, 556 F. Supp. 54, 55 (N.D. Ill. 1982) (order denying motion to dismiss).

30. Those standards may also be found in other provisions of RCRA or in the regulations promulgated pursuant to the Act. See *Solvents Recovery*, 496 F. Supp.

bility, it would appear that the need for federal common law is displaced.³¹

Before the Supreme Court's decision in *Milwaukee II*, three courts held that section 7003 is merely a jurisdictional grant to EPA and does not confer substantive liability.³² One court applied section 7003 substantively without deciding the issue expressly,³³ and another held that section 7003 is both jurisdictional and substantive.³⁴

In *United States v. Midwest Solvent Recovery (Midwest Solvent)*³⁵ the District Court for the Northern District of Indiana considered whether section 7003 imposes substantive standards of liability. After reviewing both the "sketchy" legislative history³⁶ and the structure³⁷ of the Act, the district

1127, 1134 (D. Conn. 1980).

31. *But see Waste Industries*, 734 F.2d 159, 167 (4th Cir. 1984). *See infra* notes 71-78 and accompanying text.

32. *Midwest Solvent*, 484 F. Supp. 138, 143-44 (N.D. Ind. 1980); *Solvents Recovery*, 496 F. Supp. 1127, 1133-34 (D. Conn. 1980); *United States v. Ottati & Gross, Inc.*, No. 80-225-L (D.N.H. Oct. 20, 1980) (order denying motion to dismiss).

33. *United States v. Vertac Chem. Corp.*, 489 F. Supp. 870, 885 (E.D. Ark. 1980) (order granting motion for preliminary injunctive relief).

34. *United States v. Diamond Shamrock Corp.*, 17 Env't Rep. Cas. (BNA) 1329, 1332 (N.D. Ohio May 29, 1981) (order denying motion for summary judgment).

35. 484 F. Supp. 138 (N.D. Ind. 1980).

36. The only reference to section 7003 in the legislative history contemporaneous with its passage is found at H.R. Rep. No. 1491, 94th Cong., 2d Sess. 69, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6238, 6308, wherein it is merely reiterated that EPA "may bring suit in the United States District Court, for appropriate relief." Since all prior major environmental statutes have included emergency provisions similar to section 7003 - Safe Drinking Water Act, 42 U.S.C. § 300 (i)(a) (1982); Clean Water Act, 33 U.S.C. § 1364(a) (1982); Clean Air Act, 42 U.S.C. § 7603 (1982) - section 7003 was probably included in RCRA as a matter of course and without considerable thought. *Waste Industries*, 556 F. Supp. 1301, 1311 (E.D.N.C. 1982); *United States v. Northeastern Pharmaceutical & Chem. Co. (NEPACCO)*, 579 F. Supp. 823, 835 n.6 (W.D. Mo. 1984).

37. First, the court observed that section 7003 is placed among the "miscellaneous" provisions of RCRA and not in the subchapter that set forth duties under the Act. Second, the court noted that section 7003 is preceded by a "citizen suit" provision which confers standing upon any person, not including the United States, to sue to enforce the Act. The immediate proximity of those provisions is further evidence that section 7003 does not create tests of substantive liability. Third, the court noted that section 7003 is worded so broadly that it is unlikely that Congress intended section 7003 to serve as a liability creating provision. Finally, the court observed that other sections of RCRA establish standards of conduct for the disposal of hazardous waste. 484 F. Supp. at 143-44.

court held that section 7003 merely confers jurisdiction upon the federal district courts and standing upon EPA where the "evidentiary tests" of "an imminent and substantial endangerment to health or the environment" are satisfied.³⁸ The district court found that in determining whether preliminary injunctive relief should be granted the federal courts must apply both common law principles and the Federal Rules of Civil Procedure.³⁹

The District Court of Connecticut in *United States v. Solvents Recovery Services of New England (Solvents Recovery)*⁴⁰ also held that section 7003 is solely jurisdictional. The district court noted that although, in an appropriate case, standards of liability might be found in other provisions of RCRA or the regulations promulgated pursuant to the Act, federal common law of nuisance is the source of any substantive right which the United States may have in cases regarding groundwater pollution.⁴¹

A different view was implied in *United States v. Vertac Chemical Corp.*⁴² In *Vertac* the District Court for the Eastern District of Arkansas applied section 7003 substantively without expressly addressing the issue of whether section 7003 is solely jurisdictional or both jurisdictional and substantive. The district court held that the escape of dioxin from a waste site into nearby navigable waters constitutes an "imminent and substantial endangerment" within the meaning of section 7003,⁴³ and granted injunctive relief to alleviate the condition.

Finally, in *United States v. Diamond Shamrock Corp.*⁴⁴ the District Court for the Northern District of Ohio reviewed both *Midwest Solvent* and *Vertac* and concluded that section 7003 is both jurisdictional and substantive in nature.⁴⁵ The

38. *Id.* at 143-44.

39. *Id.* at 143.

40. 496 F. Supp. 1127 (D. Conn. 1980) (Note that the relief sought in *Midwest Solvent* was a preliminary injunction, and that the relief sought here was a permanent injunction).

41. *Id.* at 1134.

42. 489 F. Supp. 870 (E.D. Ark. 1980).

43. *Id.* at 884-86.

44. 17 Env't Rep. Cas. (BNA) 1329 (N.D. Ohio May 29, 1981).

45. *Id.* at 1332.

district court held that section 7003 provides jurisdiction to grant injunctive relief where a hazardous waste presents an "imminent and substantial endangerment to health or the environment" within the meaning of section 7003.⁴⁶

Since *Milwaukee II*, only one court has held that section 7003 is solely jurisdictional. That court is the District Court for the Eastern District of North Carolina in *Waste Industries*.⁴⁷ Three courts have applied section 7003 substantively without addressing the issue expressly,⁴⁸ and two courts, including the Fourth Circuit Court of Appeals in *Waste Industries*, have explicitly found that section 7003 contains both substantive and jurisdictional elements.⁴⁹

III. *United States v. Waste Industries*

A. *The Facts and The District Court's Decision*

Before 1968, New Hanover County, North Carolina did not have a solid waste disposal program or facility.⁵⁰ Waste was disposed of on private property. In 1968, the county contracted with the city of Wilmington to use its landfill site. That landfill, however, proved inadequate for the county's

46. *Id.*

47. 556 F. Supp. 1301 (E.D.N.C. 1982), *rev'd*, 734 F.2d 159 (4th Cir. 1984). See *infra* notes 50-70 and accompanying text.

48. *United States v. Price* (Price I), 523 F. Supp. 1055 (D.N.J. 1981) (order denying petition for preliminary injunctive relief and motion for summary judgment, except with respect to plaintiff's cause of action based on federal common law of nuisance which was dismissed with prejudice and holding that the defendant was "contributing to" the "disposal" of hazardous waste resulting in an endangerment within the meaning of section 7003), *aff'd*, 688 F.2d 204 (3d Cir. 1982); *NEPACCO*, 579 F. Supp. 823 (W.D. Mo. 1984) (order pursuant to a motion for declaratory judgment and holding that the defendant was not contributing to the "disposal" of hazardous waste resulting in an endangerment within the meaning of section 7003); *Reilly Tar*, 546 F. Supp. 1100 (D. Minn. 1982) (order denying motion to dismiss for lack of jurisdiction and for failure to state a claim and holding that the complaint was sufficient to establish an "imminent and substantial endangerment" within the meaning of section 7003).

49. *Jones v. Inmont Corp.*, 584 F. Supp. 1425, 1434-35 (S.D. Ohio 1984) (order denying motion to dismiss); *Waste Industries*, 734 F.2d 159, 167 (4th Cir. 1984). See *infra* notes 71-78 and accompanying text.

50. The discussion of the facts is based on the circuit court's summary of the district court's findings. *Waste Industries*, 734 F.2d 159, 161-63 (4th Cir. 1984).

needs. In an effort to alleviate its disposal problem, the county in 1972 granted Waste Industries an exclusive license to establish and operate landfills for the disposal of solid waste generated within the county.

Waste Industries acquired several landfill sites, including a seventy-acre site in Flemington. A lease from private owners granted Waste Industries sole use and control of the premises. Waste Industries situated the landfill in a hole created by the removal of sand. Solid and hazardous waste buried at the site began leaching through the permeable sandy soil into the groundwater aquifer below.

Flemington area residents first noticed in 1977 that their well water had become foul in color, taste and smell. Tests conducted by EPA confirmed groundwater contamination. Analysis revealed many toxic, organic, and inorganic chemicals, including known carcinogens, and established the improper disposal of waste at the Flemington landfill as a source of contamination. On June 30, 1979, Waste Industries' permit to use the landfill was withdrawn. Although Waste Industries has ceased operations at the landfill and the site has since remained inactive, the leaching and migration of contaminants will continue indefinitely unless remedial action is taken.

EPA brought suit under RCRA section 7003 to abate the leaching of hazardous chemicals from the Flemington landfill. In its initial complaint, EPA requested both preliminary and permanent injunctive relief. When federal, state, and local governments jointly funded a permanent safe water supply, EPA withdrew its request for preliminary relief. EPA continued, however, to demand a plan to prevent further contamination, to restore the groundwater, to monitor the site and to reimburse EPA for monies expended to clean up the site.

On motion to dismiss EPA's complaint for failure to state a cause of action, the District Court for the Eastern District of North Carolina held that section 7003 is solely jurisdictional.⁵¹

51. *Waste Industries*, 556 F. Supp. 1301, 1314 (E.D.N.C. 1982), *rev'd*, 734 F.2d 159 (4th Cir. 1984). *Accord Midwest Solvent*, 484 F. Supp. 138 (N.D. Ind. 1980) (pre-*Milwaukee II* decision holding section 7003 is solely jurisdictional). See *supra* notes 35-39 and accompanying text.

In search of a source of substantive standards by which to measure the conduct of the defendants under section 7003, the court looked to federal common law of nuisance.

Federal common law exists where "an overriding federal interest in the need for a uniform rule of decision" creates the need.⁵² The existence of federal common law, however, is specifically limited by "new federal laws and new federal regulations [which] may in time pre-empt the field of federal common law of nuisance."⁵³ Thus, in assessing the availability of federal common law of nuisance as a source of substantive standards of liability under section 7003, the district court addressed the threshold issue of whether RCRA preempts federal common law.⁵⁴

Whether RCRA preempts federal common law of nuisance in the area of hazardous waste disposal "involves an assessment of the scope of the legislation and whether . . . [it] addresses the problem formerly governed by federal common law."⁵⁵ The district court found that the legislative history of RCRA supports the notion that Congress intended "to enter [this] area which has traditionally been considered the sphere of local responsibility."⁵⁶ Secondly, the court observed that Congress believed that it was enacting a comprehensive regulatory program⁵⁷ that, in conjunction with previously enacted environmental legislation, formed a unified scheme for protecting the environment.⁵⁸ Finally, the court noted that Congress mandated that an expert agency oversee the administration of the program.⁵⁹ By analogy to *Milwaukee II*,⁶⁰ the court

52. *Milwaukee I*, 406 U.S. 91, 103-07 & n.6 (1972).

53. *Id.* at 107.

54. Note that on appeal the circuit court made the same determination without reaching the issue of whether federal common law is preempted. See *infra* notes 71-78 and accompanying text.

55. 556 F. Supp. at 1315 (quoting *Milwaukee II*, 451 U.S. 304, 315 n.8 (1981)).

56. *Id.* (quoting H.R. Rep. No. 1491, 94th Cong., 2d Sess. 3, reprinted in 1976 U.S. Code Cong. & Ad. News 6238, 6240).

57. *Id.* (citing *Milwaukee II*, 451 U.S. 304, 317 (1981)).

58. *Id.* (citing H.R. Rep. No. 1491 at 4, reprinted in 1976 U.S. Code Cong. & Ad. News at 6240).

59. *Id.* (citing *Milwaukee II*, 451 U.S. 304, 317 (1981)).

60. 451 U.S. 304 (1981).

found that just as a regulatory scheme appeared best suited to control water pollution,⁶¹ so too did a regulatory scheme appear best suited to control hazardous waste disposal.⁶² This application of the *Milwaukee II* standard of preemption led the district court to conclude that RCRA preempts federal common law of nuisance in the area of solid and hazardous waste disposal.⁶³

In a footnote, the district court explored whether federal common law of nuisance, though preempted, was nonetheless available to provide substantive content to section 7003. Concluding that it was not available, the district court held that the preemption of federal common law of nuisance is "complete and total."⁶⁴

The district court examined *United States v. Price* (*Price I*)⁶⁵ which applied section 7003 substantively despite finding that federal common law had been preempted.⁶⁶ The district court commented that "[a] serious anomaly results from that determination. In essence, the RCRA preempts the federal common law of nuisance as it relates to hazardous waste disposal. Nevertheless, section 7003, a provision within the

61. 556 F. Supp. at 1315 (citing 451 U.S. at 1325).

62. *Id.* But see Goldfarb, *The Hazards of Our Hazardous Waste Policy*, 19 Nat. Resources J. 249, 255-59 (1979) (criticizing RCRA's "cradle-to-grave" approach to hazardous waste disposal).

63. 556 F. Supp. at 1315-16. *Accord Price I*, 523 F. Supp. 1055, 1069 (D.N.J. 1981) ("The comprehensive nature of the schemes established by the RCRA and the CERCLA require [this court] to conclude that, if federal common law ever governed this type of activity, it has since been preempted by those statutes."), *aff'd*, 688 F.2d 204 (3d Cir. 1982). See *infra* note 113. Granting defendants' summary judgment motions on the federal common law nuisance claims, the district court examined the threshold question of whether intrastate pollution is an appropriate area for the development of federal common law. The court held that intrastate pollution is not, since coping with it neither requires a uniform rule of decision nor implicates important concerns of federalism. 523 F. Supp. at 1069. But see *supra* note 20.

64. 556 F. Supp. at 1316 n.29. *Accord NEPACCO*, 579 F. Supp. 823, 837 n.13 (W.D. Mo. 1984) ("Federal common law governing hazardous waste disposal has been preempted by subsequent Congressional legislation, RCRA and CERCLA. The Court is therefore without recourse to federal common law in determining the defendants' liability under section 7003. . . .").

65. 523 F. Supp. 1055 (D.N.J. 1981), *aff'd*, 688 F.2d 204 (3d Cir. 1982).

66. *Price I* held that although dumping had ceased both the current and the former owners of the landfill were "contributing to" the "disposal" of hazardous wastes within the meaning of section 7003. 523 F. Supp. at 1070-74.

RCRA, clings to this common law for its substance.”⁶⁷ The district court noted that the “vague and imprecise” language in section 7003 and the absence of any standards of liability in section 7003 necessitated a search for substantive provisions.⁶⁸ The district court concluded, however, that Congress never intended for that search to begin,⁶⁹ and dismissed the complaint.⁷⁰

B. *The Circuit Court’s Decision*

Holding that section 7003 functions both as a jurisdictional basis and as a source of substantive liability,⁷¹ the Court of Appeals for the Fourth Circuit reversed the district court opinion. Rejecting the district court’s holding that federal common law had been entirely preempted, the Fourth Circuit found that Congress incorporated federal common law of nuisance in section 7003.⁷² The circuit court reasoned that section 7003 substantive standards of liability might be found in both section 7003 and federal common law of nuisance, and concluded that federal common law substantive liability standards apply to section 7003 except to the extent that section 7003 expands upon those standards.⁷³

In reaching its conclusion, the circuit court relied on the following passage from a report on hazardous waste disposal issued when the 1980 Amendments were being drafted:

[S]ection 7003 is essentially a codification of common law

67. 556 F. Supp. at 1316 n.29.

68. *Id.*

69. *Id.*

70. Although the district court opinion appears to leave section 7003 without any substantive standards, the Fourth Circuit interpreted the district court opinion to hold that section 7003 substantive standards may be found in the regulatory provisions of RCRA. *Waste Industries*, 734 F.2d 159, 167 (4th Cir. 1984).

71. *Id.* at 167. *Accord Diamond Shamrock*, 17 Env’t Rep. Cas. (BNA) 1329, 1332 (N.D. Ohio May 29, 1981); *Inmont*, 584 F. Supp. 1425, 1434-35 (S.D. Ohio 1984).

72. 734 F.2d at 167. *Accord United States v. Stringfellow*, 20 Env’t Rep. Cas. (BNA) 1905, 1911-12 (C.D. Cal. Apr. 5, 1984) (order denying motion to dismiss, and denying in part and granting in part motion to strike). See *infra* notes 104-05 and accompanying text. See also *Inmont*, 584 F. Supp. at 1434-35.

73. 734 F.2d at 167.

public nuisance. . . . However, section 7003 should not be construed solely with respect to the common law. Some terms and concepts, such as persons "contributing to" disposal resulting in a substantial endangerment, are meant to be more liberal than their common law counterparts.⁷⁴

The circuit court found that this passage evidenced Congress' intent to establish substantive standards of liability by incorporating and expanding upon the common law.⁷⁵

By analogy to the Supreme Court's opinion in *Milwaukee II*,⁷⁶ some courts have found that the regulatory provisions of RCRA and CERCLA are the sole source of substantive standards in the area of solid and hazardous waste disposal; that RCRA and CERCLA entirely preempt federal common law in this area, leaving no room for the application of common law principles.⁷⁷ The Fourth Circuit opined that this analysis misinterprets the holding of *Milwaukee II*. The circuit court found that *Milwaukee II* "disapproved only of the courts' use of federal common law as a source for setting regulatory stan-

74. S. Rep. No. 172, 96th Cong., 1st Sess. 5, reprinted in 1980 U.S. Code Cong. & Ad. News 5019, 5023. See also Subcomm. on Oversight and Investigations of the Comm. on Interstate and Foreign Commerce, Report on Hazardous Waste Disposal, H.R. Doc. No. 31, 96th Cong., 1st Sess. 31 (1979) (Eckhardt Report). Subsequent legislative history concerning previously enacted statutes merit considerable weight in determining legislative intent. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81 (1969); *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 329-30 (1942). See also *NEPACCO*, 579 F. Supp. 823, 835 n.8 (W.D. Mo. 1984); *Solvents Recovery*, 496 F. Supp. 1127, 1140 n.18 (D.Conn. 1980); *Waste Industries*, 556 F. Supp. 1301, 1311 n.21, 1312 (E.D.N.C. 1982) (acknowledged weight to be given subsequent legislative history, but added that it should not be read blindly without regard for the context in which it was made or the legislation which resulted from the pronouncements). See *supra* note 36.

75. The Fourth Circuit explained:

Section 7003 is a congressional mandate that the former common law of nuisance, as applied to situations in which a risk of harm from solid or hazardous waste exists, shall include new terms and concepts which shall be developed in a liberal, not a restrictive, manner. This ensures that problems that congress could not have anticipated when passing the Act will be dealt with in a way minimizing the risk of harm to the environment and the public.

734 F.2d at 167.

76. 451 U.S. 304 (1981).

77. See *supra* note 63 and accompanying text.

dards independent of those established by a comprehensive statutory scheme. [*Milwaukee II*] did not assail Congress' prerogative to empower the courts to apply common-law principles as part of an ongoing regulatory scheme."⁷⁸

IV. Analysis

Citing *Midwest Solvent*,⁷⁹ the district court in *Waste Industries* held that section 7003 is solely jurisdictional. Close examination reveals that this pre-*Milwaukee II* decision, though stating that section 7003 is solely jurisdictional, in fact found substantive requirements in section 7003.

In *Midwest Solvent* the district court concluded that section 7003 merely confers jurisdiction upon the federal district courts and standing upon EPA where the evidentiary tests of an imminent and substantial endangerment to health or the environment are satisfied.⁸⁰ What this district court characterized as an evidentiary test other federal courts have characterized as a substantive standard. This distinction is one only of terms and not of substance. Whether the imminent and substantial endangerment language in section 7003 is deemed evidentiary or substantive, it must be interpreted and given effect. Thus, the circuit court's conclusion in *Waste Industries* that section 7003 functions both as a jurisdictional basis and as a source of substantive liability is supported not only by those decisions which expressly hold that section 7003 is both jurisdictional and substantive, but also by the leading decision which, at first glance, appears to hold that section 7003 is solely jurisdictional.

The Fourth Circuit Court of Appeals in *Waste Industries* concluded that federal common law standards of liability apply to section 7003 except to the extent that section 7003 expands upon those standards.⁸¹ Reasoning that Congress man-

78. 734 F.2d at 167 (emphasis in original).

79. 484 F. Supp. 138 (N.D. Ind. 1980). See *supra* notes 35-39 and accompanying text.

80. 484 F. Supp. at 143-44.

81. *Waste Industries*, 734 F.2d 159, 167 (4th Cir. 1984). See *supra* notes 71-78 and accompanying text.

dated this result, the circuit court appears to take the position that Congress empowered the courts to apply federal common law principles to RCRA by codifying federal common law in section 7003.

It is suggested that the circuit court reached the correct result but that the court's analysis is inconsistent with established legal principles. Whether the federal courts may apply federal common law to section 7003 depends not upon whether Congress mandated this result by codifying federal common law in section 7003, but whether that section speaks directly to issues which previously were governed by federal common law.⁸²

Federal common law exists and is resorted to as a necessary expedient whenever a court is compelled to answer federal questions which cannot be answered from federal statutes alone.⁸³ When Congress speaks directly to a question previously governed by a decision based upon federal common law, the need for such an unusual exercise of judicial legislation by the federal courts disappears.⁸⁴ This principle is exemplified in *Mobil Oil Corp. v. Higginbotham*.⁸⁵ In an action to recover for wrongful death on the high seas, respondents sought to recover damage for their loss to society under general maritime law, in addition to damages for pecuniary loss authorized by federal statute. The Supreme Court held that the only damages respondents could recover were those authorized by statute: "The [Death on the High Seas] Act does not address every issue of wrongful death law, . . . but when it does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless."⁸⁶

82. Congress "empowers" the courts to apply federal common law - not by codifying federal common law but by not speaking directly to a question. See *Erie*, 304 U.S. 64, 78 (1938); see also *Milwaukee II*, 451 U.S. 304, 312 (1981) ("Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decisions.").

83. *Milwaukee II*, 451 U.S. at 314.

84. *Id.*

85. 436 U.S. 618 (1978).

86. 436 U.S. at 625.

Summarizing its decision in *Mobil Oil*, the Supreme Court in *Milwaukee II*⁸⁷ noted that "the question was whether the legislative scheme 'spoke directly to a question' - in that case the question of damages - not whether Congress had affirmatively proscribed the use of federal common law."⁸⁸

Similarly, the threshold question in the instant case is not whether Congress has mandated the use of federal common law, but whether RCRA "spoke directly to a question." It is apparent that Congress addressed the issue of who may be liable for suit under RCRA section 7003.⁸⁹ Neither RCRA section 7003 nor any other provision of RCRA, however, addresses the issues of standard of liability and scope of liability.⁹⁰ Since these issues "cannot be answered from federal statutes alone,"⁹¹ the federal courts may resort to federal common law to fill the "interstitial gaps."⁹²

The Fourth Circuit's conclusion that *Milwaukee II* does not absolutely preclude the application of nuisance principles in the area of hazardous waste disposal aptly recognizes that legislation does not exist in a vacuum. The circuit court inter-

87. 451 U.S. 304 (1981).

88. 451 U.S. at 315.

89. RCRA section 7003 authorizes suit against "any person contributing to [the] handling, storage, treatment, transportation or disposal [of any solid waste or hazardous waste presenting an imminent and substantial endangerment to health or the environment]." 42 U.S.C. § 6973(a).

90. Whether a party is strictly liable for his actions or is liable only for his negligent conduct is the issue of standard of liability. Whether parties are jointly and severally liable for their actions, and whether EPA must prove causation to recover under RCRA, is the issue of scope of liability. For lack of a better word or phrase, this note uses the phrase "standards of liability" to refer collectively to the issues identified here.

91. *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 469 (1942) (Jackson, J., concurring), quoted in *Milwaukee II*, 451 U.S. at 314.

92. See *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 593 (1973) ("[T]he inevitable incompleteness presented by all legislation means that interstitial federal law making is a basic responsibility of the federal courts."), cited in *Milwaukee II*, 451 U.S. at 314. See also 451 U.S. at 323 ("[T]here is no 'interstice' here to be filled by federal common law. . . ."). In CERCLA section 107 Congress addressed the issue of standard of liability. (It did not in that section address the issue of scope of liability.) It may be, therefore, that the CERCLA section 107 standard of liability should be applied to RCRA section 7003, and that the federal courts should resort to federal common law to fill only the scope of liability gap in RCRA section 7003. See *infra* notes 96-119 and accompanying text.

preted *Milwaukee II* to preclude the judiciary from applying federal common law principles as a source for setting standards independent of those established by statute, but not the power of the judiciary to apply common law principles to a statutory scheme.⁹³ Thus, without reaching the issue of whether RCRA preempts actions brought pursuant to federal common law of nuisance, the Fourth Circuit held that federal common law standards of liability apply to section 7003 to the extent that section 7003 does not expand upon those standards.

The conclusion that RCRA does not preclude the application of federal common law standards of liability to section 7003 finds support in *Milwaukee II*. Although the Supreme Court's opinion is couched in language which refers to federal common law standards established independently of a statutory scheme,⁹⁴ the Court's holding that federal common law had been displaced may be limited to actions based on federal common law. Indeed, in the opening paragraph of the opinion the Court stated: "We granted certiorari to consider the effect of [The Federal Water Pollution Control Act Amendments of 1972] on the previously recognized *cause of action*."⁹⁵

V. CERCLA Section 106(a)

Like its RCRA counterpart, CERCLA's imminent hazard provision, section 106(a),⁹⁶ has been applied by some federal courts with reference to the standards of federal common law of nuisance, and by others without any reference to federal common law. Section 106(a) does not indicate who may be sued or enjoined. Nor does section 106(a) specify what acts would subject one to suit under that section. Thus, although section 106(a) contains some substantive requirements,⁹⁷ the

93. 734 F.2d at 167. See *supra* notes 71-78 and accompanying text.

94. 451 U.S. at 317 ("[I]t is for Congress, not federal courts, to articulate the appropriate *standards* to be applied as a matter of federal law." (emphasis supplied)).

95. 451 U.S. at 307-08 (emphasis supplied).

96. 42 U.S.C. § 9606(a) (1982). See *supra* note 18.

97. Section 106(a) contains the substantive requirement of an "imminent and substantial endangerment." See *United States v. Reilly Tar & Chem. Corp.*, 546 F.

federal courts have found it necessary to refer to other sources of substantive law when applying that section. Two decisions hold that federal common law of nuisance principles apply to section 106(a),⁹⁸ and four hold that CERCLA section 107⁹⁹ liability standards apply to section 106(a).¹⁰⁰

In *United States v. Reilly Tar & Chemical Corp.*,¹⁰¹ the District Court of Minnesota found that the language in section 106(a) authorizing the federal district courts to grant such relief as "the equities of the case may require" suggested

Supp. 1100, 1114 (D. Minn. 1982) (order denying motion to dismiss for lack of jurisdiction and for failure to state a claim); *United States v. Outboard Marine Corp. (OMC)*, 556 F. Supp. 54, 57 (N.D. Ill. 1982) (order denying motion to dismiss); *United States v. Price (Price III)*, 577 F. Supp. 1103, 1112-13 (D.N.J. 1983) (order denying motion for summary judgment).

98. *Reilly Tar*, 546 F. Supp. 1100 (D. Minn. 1982); *United States v. Stringfellow*, 20 Env't Rep. Cas. (BNA) 1905 (C.D. Cal. Apr. 5, 1984).

99. CERCLA section 107, which has no counterpart in RCRA states, in pertinent part:

(a) [S]ubject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel. . . or a facility,

(2) any person who. . . owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who. . . arranged for disposal or treatment, or. . . transport for disposal or treatment, of hazardous substances. . . and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities. . . from which there is a release, or a threatened release. . . of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred. . . ;

(B) any other necessary costs of response incurred. . . ; and

(C) damages for injury to. . . natural resources. . . . (b) There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and damages resulting therefrom were caused solely by—

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party. . . if the defendant establishes by a preponderance of the evidence that (a) he exercised due care. . . and (b) he took precautions against foreseeable acts or omissions of any such third party. . . .

42 U.S.C. § 9607.

100. *OMC*, 556 F. Supp. 54 (N.D. Ill. 1982); *Price III*, 577 F. Supp. 1103 (D.N.J. 1983); *United States v. Conservation Chem. Co. (Conservation Chemical)*, 20 Env't Rep. Cas. (BNA) 1427 (W.D. Mo. Feb. 3, 1984); *United States v. A & F Materials Co.*, 578 F. Supp. 1249 (S.D. Ill. 1984).

101. 546 F. Supp. 1100 (D. Minn. 1982).

that equitable principles of federal common law of nuisance may apply to determine an appropriate remedy.¹⁰² This analysis was extended by the District Court for the Central District of California in *United States v. Stringfellow*.¹⁰³ The *Stringfellow* court also found that the language in section 106(a) conferring jurisdiction upon the district courts evidenced Congress' intent that the federal courts' equitable powers be used, including the power to remedy nuisances.¹⁰⁴ The district court went on to hold, however, that the scope of liability under section 106(a) should also be determined with reference to its power under that section to grant an equitable remedy.¹⁰⁵

The first court to apply section 106(a) with reference to section 107 was the District Court for the Northern District of Illinois in *United States v. Outboard Marine Corp. (OMC)*.¹⁰⁶ The district court acknowledged that Congress might well have intended that section 106(a) be applied with reference to the standards of federal common law. In light of the "broad pronouncements" of *Milwaukee II*¹⁰⁷ in favor of preemption, however, the district court was reluctant to rely upon federal common law to interpret section 106(a).¹⁰⁸ The district court stated that "Congress included this imminent hazard authority in its CERCLA design, and it should be given effect. . . . Whatever the source of the substantive law to be applied in a 106(a) action, it is most probable that those who would be liable under Section 107 were intended to be liable in an action under 106(a) for injunctive relief."¹⁰⁹

102. *Id.* at 1113 n.3.

103. 20 Env't Rep. Cas. (BNA) 1905, 1910 (C.D. Cal. Apr. 5, 1984) (There is no role under section 106(a) for "joint and several liability to abate").

104. *Id.* Note that the district court applied the same reasoning to RCRA section 7003. *Id.* at 1911-12.

105. Even if traditional equitable principles of federal common law nuisance are appropriate in determining a remedy under section 106(a), it does not necessarily follow that they are appropriate in determining the standard or scope of liability under that section. Indeed, if Congress intended only that the traditional equitable remedies against nuisances are available under section 106(a), the substantive standards of liability of federal common law nuisance may not apply under that section.

106. 556 F. Supp. 54 (N.D. Ill. 1982).

107. 451 U.S. 304 (1981).

108. 556 F. Supp. at 56.

109. *Id.* at 57.

The District Court of New Jersey in *United States v. Price (Price III)*¹¹⁰ found that *Reilly Tar* was inconsistent with *Milwaukee II*, and concurred with the result reached in *OMC*. Holding that the standards of liability set forth in section 107 apply under section 106(a), the district court listed several additional reasons for applying those standards. The district court opined that the section 107 "Liability" heading denotes Congress' intent that this section define liability for the entire Act.¹¹¹ Since section 107 does not contain any qualifying language and section 106(a) does not "discuss any independent standards of liability with respect to those parties coming within its coverage," the district court concluded section 106(a) is dependent upon the substantive liability provisions in section 107.¹¹²

OMC and *Price III* appear to find that the preemption standard of *Milwaukee II* mandates the conclusion that RCRA and CERCLA entirely preempt federal common law of nuisance.¹¹³ *Waste Industries*,¹¹⁴ holding that *Milwaukee II* does not preclude the application of federal common law principles to a statutory scheme, would appear to remove the barrier that both *OMC* and *Price III* saw in *Milwaukee II* to applying section 106(a) with reference to federal common law. Section 107 substantive standards, however, may preclude the application of federal common law principles to section 106(a). Still, federal common law of nuisance would apply to

110. 577 F. Supp. 1103 (D.N.J. 1983).

111. *Id.* at 113.

112. *Id. Accord Conservation Chemical*, 20 Env't. Rep. Cas. at 1430; A & F, 578 F. Supp. at 1257.

113. In CERCLA Congress expressed its intent concerning federal common law in the Act's savings clause. In the FWPCA, a similar provision provides that "nothing in this section shall restrict any right. . . under any statute or common law. . . ." § 505(e), 33 U.S.C. § 1365(e) (1982) (emphasis supplied). In *Milwaukee II*, the Court interpreted that section to mean that nothing in that section, rather than the entire Act, should be read to preclude other remedies. 304 U.S. at 328-29. Thus, consistent with section 505(e), the Court found that the entire Act preempted federal common law. In CERCLA's savings clause, however, Congress broadened the language to provide that nothing in the entire Act preempts state or federal laws. 42 U.S.C. § 9652(d) (1982) (emphasis supplied). Thus, it may be argued that Congress did not preempt actions based on federal common law nuisance by enacting CERCLA.

114. 734 F.2d 159 (4th Cir. 1984).

section 106(a) to the extent that section 107 leaves "interstitial gaps."¹¹⁵

This appears to be the view of the District Court for the Southern District of Illinois. In *United States v. A & F Materials Co.*¹¹⁶ the district court noted that there were compelling reasons for the development of a uniform federal common law in the area of hazardous waste disposal.¹¹⁷ Accordingly, the district court determined that CERCLA imposes joint and several liability.¹¹⁸ Nevertheless, the district court found that section 106(a) is dependent upon the liability provisions of section 107.¹¹⁹

VI. Conclusion

The vague and broadly worded imminent hazard provisions of RCRA and CERCLA have presented difficult questions of statutory construction for the federal courts. In *United States v. Waste Industries* the Court of Appeals for the Fourth Circuit held that federal common law standards of liability apply to the imminent hazard provision in RCRA,

115. See *supra* note 92.

116. 578 F. Supp. 1249 (S.D. Ill. 1984).

117. First, CERCLA and RCRA taken together represent a substantial special federal interest in the abatement of toxic waste hazards. . . . Second, CERCLA is a liability creating statute which relies on the federal courts for implementation. The development of federal common law is appropriate to fill in the gaps of a federal statute. . . . Third, a uniform rule of law will prevent excessive dumping in states with more lenient laws. Finally, the federal government has an interest in preserving the integrity of the Superfund and there is "no good reason why the United States' right to reimbursement should be subjected to the needless uncertainty and subsequent delay occasioned by diversified local disposition when this matter is appropriate for uniform national treatment."

A & F, 578 F. Supp. at 1255.

118. *Id.* at 1252-57. See also, e.g., *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 809 (S.D. Ohio 1983); *NEPACCO*, 579 F. Supp. 823, 844-45 (W.D. Mo. 1984) (Although both decisions hold that CERCLA section 107 imposes joint and several liability where the injury is indivisible, *Chem-Dyne* concluded that the question calls for a uniform federal rule while *NEPACCO* found that it is not clear from congressional statements whether federal or state common law should govern.); see also Comment, *Joint and Several Liability for Hazardous Waste Releases Under Superfund*, 68 Va. L. Rev. 1157 (1982).

119. *A & F*, 578 F. Supp. at 1257.

section 7003, except to the extent that section 7003 expands upon those standards. The circuit court reasoned that Congress empowered the federal courts to apply nuisance principles by codifying federal common law in section 7003. It is suggested that the application of federal common law to section 7003 depends not upon the incorporation of federal common law principles in section 7003 but on whether Congress spoke directly to issues in section 7003 which formerly were governed by federal common law of nuisance. Although the issue of party liability is addressed in section 7003, neither in section 7003 nor in any other provision of RCRA has Congress spoken directly to the issues of standard of liability and scope of liability. Since these issues cannot be answered from RCRA alone, the federal courts may resort to federal common law to fill those interstitial gaps. It is concluded that federal common law principles also apply to the imminent hazard provision in CERCLA, section 106(a), to the extent that it leaves interstitial gaps that are not filled by the other provisions of CERCLA.

In *City of Milwaukee v. Illinois* the Supreme Court held that federal common law of nuisance had been displaced in the area of water pollution control by the 1972 Amendments to the Federal Water Pollution Control Act. Federal courts, bound by the doctrine of stare decisis, have been compelled to interpret that decision and to apply its holding to RCRA and CERCLA. Some federal courts, holding that RCRA and CERCLA entirely preempt federal common law of nuisance in the area of solid and hazardous waste disposal, have been reluctant to apply federal common law principles to the imminent hazard provisions of those Acts. The Fourth Circuit opinion in *Waste Industries* is the first published decision to reconcile *Milwaukee II* with the application of federal common law nuisance principles to RCRA section 7003. The Fourth Circuit held that *Milwaukee II* does not preclude the application of federal common law to a statutory scheme.

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