HOFSTRA UNIVERSITY
SCHOOL OF LAW

ENVIRONMENTAL LAW DIGEST

COMPILATION OF RECENT ENVIRONMENTAL CASES — PREPARED BY THE ENVIRONMENTAL LAW SOCIETY OF HOFSTRA UNIVERSITY SCHOOL OF LAW.

Hempstead, New York 11550

Volume 1, Spring 1984

ENERGY

Silkwood v. Kerr-McGee, 104 S. Ct. 615 (Jan. 11, 1984)

The estate of Karen Silkwood brought a diversity action in Federal District Court in Oklahoma to recover for contamination injuries sustained while Silkwood was a laboratory analyst at Kerr-McGee, a federally licensed manufacturer of plutonium fuel pins. In addition to awarding actual damages, the District Court awarded $10 million in punitive damages as authorized by Oklahoma tort law. 485 F. Supp. 566 (W.D. Okla. 1979). The award of punitive damages was based on the jury's finding that plutonium found in Silkwood's apartment was caused by Kerr-McGee's grossly negligent, reckless, and willful conduct in allowing it to escape from the plant. The parties stipulated that urine samples brought to the plant by Silkwood for analysis had been spiked with plutonium that is not naturally excreted; however, both parties were unsuccessful in their assertions that the other had intentionally contaminated the samples. There was no factual finding as to how Silkwood, her apartment, or her urine samples had been contaminated.

The United States Court of Appeals for the Tenth Circuit reversed as to the punitive damages award on the ground that such damages were preempted by federal law. 667 F.2d 908 (10th Cir. 1981). The plaintiff appealed to the United States Supreme Court and in a 5-4 decision written by Justice White the Court held that the federal preemption of state regulation of the safety aspects of nuclear energy does not extend to the state-authorized award of punitive damages for conduct related to radiation hazards.

Justice White noted that the issue before the Court was whether the state-authorized award of punitive damages is preempted either because it falls within that prohibited area of regulating nuclear safety risks or because it conflicts with the federal regulatory scheme.

The Court acknowledged that states are precluded from regulating the safety aspects of nuclear energy, *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 103 S. Ct. 1713 (1983); however, Justice White's opinion rejected Kerr-McGee's argument that the punitive damages award falls within the prohibited field merely because such damages may have the regulatory effect of punishing and deterring conduct related to radiation hazards. In determining exactly what is regulated by the federal scheme, the Court examined the legislative history of the 1954 Atomic Energy Act and its subsequent amendments. The Court concluded that Congress assumed that traditional tort remedies would be available absent express language to the contrary. The Court cited *IBEW v. Foust,* 442 U.S. 42, 53 (1979) as support for placing the burden upon Kerr-McGee to show that Congress intended to preclude an award of punitive damages. Justice Powell's dissent places the burden on Silkwood to show that punitive damages are allowed as an exception to the broad federal preemption of nuclear safety regulation that was expounded in *Pacific Gas & Electric.* Justice Blackmun's lengthier dissent criticized the Court's analysis for failing to distinguish between compensatory and punitive damages. Blackmun's dissent asserts that, in doing so, the Court addressed the wrong issue of whether a victim of radiation contamination may obtain *any* compensation under state law.

The Court reiterated that a state law conflicts with the federal regulatory scheme if it is impossible to comply with both the state and federal law, *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142-143 (1963) or where the state law frustrates the objectives of the federal law. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); [also citing *Pacific Gas & Electric*]. The Court had little difficulty finding that it is not impossible to pay both federal fines and state imposed punitive damages. Justice Blackmun's dissent points out that the $10 million punitive damages award was imposed by the jury even though a Nuclear Regulatory Commission investigation of the Silkwood contamination revealed no material violations of federal regulations that would justify a fine.

As was noted in Justice Blackmun's dissent, *Pacific Gas & Electric* made it clear that the purpose of a statute is critical in a preemption analysis. The Court conceded that the punitive damages award may have a regulatory effect, but observed that the primary objective of the 1954 Atomic Energy Act is to encourage the peaceful use of atomic energy. The Court went on to emphasize that the objective of promoting nuclear power is not to be accomplished at all costs. Specifically, the purpose of the federal scheme is to promote the development and use

of nuclear energy only to the extent that such promotion is consistent with the public welfare. The Court's decision makes it clear that the state-authorized award of punitive damages does not frustrate the purpose of the federal regulatory scheme because it is not in the interest of the public health and safety to preclude adequate remedies for grossly negligent, reckless, and willful conduct related to radiation hazards. Although there are federal remedies available, the Court found that there was not an irreconcilable conflict between the federal regulatory scheme and a state jury's award of punitive damages. Justice Powell's dissent characterized the award as unauthorized regulation and asserted that this area of the law is in disarray because operators of nuclear facilities cannot rely solely on compliance with Nuclear Regulatory Commission regulations.

Gary Jonesi, '85

Van Dissel v Jersey Central Power & Light Co., 104 S.Ct.989 (Jan. 23, 1984)

Plaintiffs were the owners of riparian property, near which the defendant public utility, Jersey Central Power & Light Co., built and operated a nuclear power plant. The waterways on whose banks the plaintiffs' property rested were deepened, straightened and widened by the defendant so as to use them as part of the nuclear generator's cooling system. Plaintiffs contended that the alterations to the waterways together with the subsequent operation of the plant and, in particular, its cooling system, were the cause of increased water flow, a rise in salinity levels and higher water temperatures in the rivers and creeks where their property was located. They further claimed that these changes in the marine environment resulted in the proliferation of shipworms which proceeded to destroy wooden docks, bulkheads, and accessories belonging to the plaintiffs.

In a class action, the property owners brought suit against Jersey Central in New Jersey Superior Court, seeking money damages and a restraint against further harmful operation of the plant. Issues arose at trial as to the proximate cause of the property damage and the plaintiffs' right to a jury trial with respect to their claim of inverse condemnation. However, the major issue, discussed herein, dealt with whether or not the New Jersey state court had the proper subject matter jurisdiction to hear the case.

Plaintiffs maintained that the cooling system in question was a cause of *thermal* pollution, therefore a non-radiological hazard and properly subject to state regulation. Defendants argued, however, that the cooling system had been approved and licensed by the Atomic Energy Commission (AEC), and contained as one of its integral components the plant's radioactive waste disposal system, which was subject to exclusive AEC regulation. Hence, defendants maintained that federal law preempted the field and that any state interference was impermissable. The trial judge agreed, relying in part on *State v. Jersey Central Power & Light Co.*, 69 N.J. 102, 351 A. 2d 337 (1976), and dismissed in part, holding that the state court was preempted and therefore lacked subject matter jurisdiction over all of plaintiffs' claims of tort liability. Plaintiffs appealed to the Superior Court of New Jersey, Appellate Division, where the trial opinion was affirmed for the same reasons. *Van Dissel v. Jersey Central Power & Light Co.*, 181 N.J. Super. A.D., 516, 438 A.2d 563. Plaintiffs' petition for writ of certiorari was granted by the U.S. Supreme Court and the Supreme Court vacated the judgment and remanded the case to the Superior Court of New Jersey, Appellate Division for further consideration in light of *Silkwood v. Kerr-McGee Corp.*, 104 S.Ct. 615 (Jan.11, 1984).

The issue in *Van Dissel* is whether state common law tort claims for thermal pollution damages brought by a riparian landowner against the owner and operator of a federally licensed nuclear power plant are preempted by the Atomic Energy Act.

In *Silkwood*, an analyst at a federally licensed nuclear plant suffered plutonium contamination and was later killed in an unrelated auto accident. The administrator of her estate brought a state tort law action against the owner of the plant for the plutonium contamination injuries to the analyst and her property. In a 5-4 decision, the U.S. Supreme Court held that an award of punitive damages was not preempted by federal law. The majority found that Congress had never considered precluding state remedies in actions against federally licensed nuclear plants when it enacted the Atomic Energy Act in 1954, and that, since no federal remedy was provided at that time, Congress had in fact assumed that state remedies would be available. The Court also concluded that paying both federal fines and state-imposed damages was neither physically impossible nor did it frustrate Congress' express desire to promote the safe development of atomic energy in the future.

The *Silkwood* decision makes it likely that the New Jersey Superior Court, Appellate Division, will reverse its earlier decision in *Van Dissel*, and allow the landowners to assert the tort claims based on their damages. As a result, the issues of proximate cause and the plaintiffs' right to a jury trial will have to be reexamined. The case is scheduled to be heard on remand on May 7, 1984.

Bill Condon, '85

CASE IN PROGRESS

Foundation on Economic Trends v. Heckler, No. 83-2714 (D.D.C. filed Sept. 14, 1983)

A group of plaintiffs, including the Foundation on Economic Trends, Environmental Action, Inc., and Environmental Task Force, are challenging the procedures for approving experiments involving the deliberate release of genetically altered bacteria into the environment. The plaintiffs are seeking an injunction to prohibit the deliberate release of certain bacteria from the laboratory. The experiment was proposed by Dr. Steven Lindow and colleagues at the University of California-Berkeley and is partially funded by Advanced Genetic Sciences Co. of Berkeley. It involves manipulating a bacteria's deoxyribonucleic acid (DNA) so as to inhibit the formation of frost on crops and is tentatively scheduled to take place this spring near Tule Lake, California.

A complaint was filed on September 14, 1983 in U.S. District Court for the District of Columbia, No. 83-2714. Jeremy Rifkin, an outspoken critic of "genetic engineering" and president of the Foundation on Economic Trends, asserts in his complaint that the National Institutes of Health (NIH), an agency within the Department of Health and Human Services, has violated NEPA (National Environmental Policy Act), CEQ (Council on Environmental Quality), and APA (Administrative Procedure Act) regulations in approving what would be the first such environmental release. The plaintiffs further allege that the Lindow experiment has potentially harmful environmental consequences.

The plaintiffs have alleged that the NIH failed to perform an environmental assessment or prepare an environmental impact statement (EIS) as required by NEPA and CEQ regulations. An EIS was prepared in 1977 on the NIH Guidelines for Recombinant DNA Research Guidelines that were promulgated in 1976; however, Rifkin has asserted that a new EIS is required, arguing that the 1977 EIS does not address the issue of a deliberate release into the environment. In late March 1984, the NIH responded to a second set of interrogatories and denied that there was a failure to do a required environmental assessment or EIS. The response contends that environmental impact assessments published in the Federal Register in 1978 and 1979 covered deliberate releases that, upon approval of the Director of the NIH, were allowable at that time. An NIH attorney stated in April 1984 that the deliberate release provisions in the Guidelines published in 1982 and 1983 "simply reworded and clarified the procedures that existed in 1978."

Rifkin argues that, prior to 1982, the NIH Guidelines contained a general prohibition against the deliberate release of recombinant DNA molecules into the environment. The complaint urges that it is the 1982 and 1983 revisions of the Guidelines that removed this blanket prohibition and now allow for the deliberate release of recombinant DNA molecules. According to Rifkin, these revisions constitute major federal actions and under NEPA §4332 an EIS is required if such actions significantly affect the quality of the human environment.

According to Rifkin's complaint, the most qualified people to make an assessment of the effects of such actions include ecologists, botanists, population geneticists, and plant pathologists. On November 14, 1983, the NIH answered Rifkin's complaint and denied that expertise in these areas is essential to an adequate assessment. The Recombinant DNA Advisory Committee (RAC) approves experiments like these under the auspices of the NIH and has no members who are botanists or plant pathologists. Although an ecologist has recently been added to the RAC, most of the RAC members are experts in molecular biology or human health.

Other inadequacies are alleged concerning the RAC review procedure. Rifkin claims that the approval procedures are arbitrary and capricious in violation of the APA and has noted publicly that the nature and amount of information submitted by a researcher to the RAC is left to the researcher's discretion. Rifkin has also stated that, for the first time, the RAC has gone behind closed doors to consider granting approval for two more deliberate releases. The NIH contends that these sessions must be closed to protect corporate trade secrets and to encourage private industry to voluntarily comply with the Guidelines. Rifkin has formally opposed this practice and on February 6, 1984, the U.S. Court of Appeals for the District of Columbia Circuit enjoined the NIH, No. 84-5079, from considering the Lindow experiment, either in open or closed session, during the February 6th RAC meeting. In reversing the District Court's order denying injunctive relief, the D.C. Circuit cited the NIH's failure to fully and prospectively demonstrate the need for such a closed session as is required by *Common Cause v. Nuclear Regulatory Commission*, 674 F.2d 921, 928-929 (D.C. Cir. 1982).

Rifkin has also stated publicly that the presence of several industry members on the RAC raises a possible conflict of interest. He argues that it is in the mutual interests of such members to approve each other's experiments and has called for an investigation by the NIH. An NIH spokesman stated in January 1984 that an investigation was conducted and no evidence of a conflict of interest was found.

The states of New York and Maryland, and several cities have made the NIH Guidelines mandatory for private firms; however, there is currently no federal legislation specifically regulating recombinant DNA research within private industry. Due to fear of criticism, civil liability, and strict federal legislation that might otherwise result, private firms have generally adhered to the voluntary compliance provision in the NIH Guidelines. In addition to focusing attention on the adequacy of the NIH procedures, the Rifkin suit spotlights the concern over whether a deliberate release should be subject to voluntary compliance or whether some sort of specific federal legislation is necessary to protect the environment. The trial is expected to begin this spring before District Court Judge John J. Sirica.

Gary Jonesi, '85
Susan Arnold, '85

PESTICIDES

Ruckelshaus v. Monsanto Co., 104 S.Ct. 3 (July 27, 1983)

The Monsanto Company brought suit in the United States District Court for the Eastern District of Missouri challenging several sections of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) 7 U.S.C. §136 *et. seq.*, as permitting an unconstitutional taking of its property and requesting an injunction of the enforcement of those sections.

As amended in 1978, 92 Stat. 820, FIFRA requires pesticide manufacturers to register their products with the United States Environmental Protection Agency (EPA) prior to marketing them in the United States. The EPA's decision whether to allow registration is based on an evaluation of test data usually submitted by the manufacturer. Section 3(c)(1)(D) of FIFRA, 7

U.S.C. §136(a)(c)(1)(D) (1976 ed., Supp. V), provides, however, that test data submitted in connection with a particular pesticide may be used by other manufacturers seeking registration of similar pesticides. Additionally, Section 10(d), 7 U.S.C. §136 (1976 ed. Supp. V), provides that health and safety data submitted by the initial applicant may be disclosed to the public.

To obtain registration of pesticides, Monsanto submitted test data to the EPA. Under Missouri law these data were trade secrets and consequently Monsanto asserted the right to prevent its use and disclosure. The District Court held in favor of Monsanto and enjoined the enforcement of Section 3(c)(1)(D) as well as Section 10(d) and related sections of FIFRA. The Administrator of the EPA's request for a stay of the injunction pending appeal was denied by the District Court. The Administrator then applied to the United States Supreme Court for a stay pending appeal to the Supreme Court.

In his capacity as Circuit Justice for the Eighth Circuit, Justice Blackmun wrote an opinion denying the stay and holding that the EPA had failed to meet its burden of justifying a stay of the injunction pending appeal. Citing *Whalen v. Roe*, 423 U.S. 1313 (1975), the Court stated that to be entitled to a stay of an injunction pending appeal the applicant must overcome a heavy burden of showing not only that he will suffer irreparable injury from the denial of the stay, but also that the judgment of the lower court was erroneous on the merits. The court held that the EPA had not shown that it would suffer irreparable harm from the denial of the stay and, therefore, found it unnecessary to inquire into the EPA's likelihood of success on the merits.

In so holding, the Court stressed that while the injunction prevented the registration of new pesticides through the use of previously submitted test data and prevented public access to health and safety data, the EPA could still register new pesticides where the manufacturer submitted its own test data. The Court also noted that while the injunction would delay registration and disclosure pending appeal, delay alone was not sufficient to constitute irreparable harm.

In denying the stay, the Court considered that the stay would likely cause irreparable harm to Monsanto in that Monsanto's trade secrets would become public knowledge and could not become secret again if the District Court's judgment is affirmed. The Court also counseled against the grant of a stay because the Administrator's seven-week delay in requesting a stay indicated a lack of urgency. The merits of the case were argued before the Supreme Court on February 27, 1984 and a decision in the case is pending.

Paul Molano, '84

In the Matter of Ames v. Smoot, 98 A.D. 2d 216 (2d Dept., Dec. 27, 1983)

Local Law No. 1 of 1981, enacted in Laurel Hollow, N.Y., prohibited the aerial spraying of pesticides in that village. One year later, the Board of Trustees voted 4-3 to enact Local Law No. 1 of 1982, which immediately repealed the prior ban against aerial spraying in the village. Three homeowners brought suit to have the court declare that the repealing legislation was invalid in that it did not comply with the State Environmental Quality Review Act (SEQRA) because the Board failed to file an environmental impact statement (EIS) before enacting Local Law No. 1 of 1982. The Supreme Court at Special Term agreed with the petitioners and found Local Law No. 1 of 1982 invalid. Because the repealing ordinance represented a major change in policy, the court reasoned that SEQRA mandated filing an EIS. The Board of Trustees of Laurel Hollow appealed, contending that an EIS was unnecessary in that Local Law No. 1 of 1981 was invalid because the ordinance conflicted with article 33 of New York's Environmental Conservation Law (ECL art. 33), which preempted any local legislation in the pesticide area.

The issue before the Appellate Division was whether the State Legislature's enactment of ECL art. 33 effectively preempted the field of pesticide regulation, thus precluding any local legislation.

In a 3-2 decision, the Appellate Division broadly construed ECL art. 33 and reversed the Special Term judgment. The court held that because ECL art. 33 preempted any local legislation of pesticide use, Local Law No. 1 of 1981 was void, and consequently its repeal by Local Law No. 1 of 1982 did not require an EIS under SEQRA.

The Appellate Division began its analysis by determining the extent of a municipality's authority. Relying on the State Constitution and various enabling statutes, the court found that municipalities have the power to adopt local laws relating to: (1) their property, affairs, or government, provided that such legislation is not in conflict with the Constitution or any general law; and (2) the health, safety, and welfare of residents, so long as no conflict exists with state legislation or the Constitution. *See*, N.Y. Constitution Art. IX,§2, N.Y. Municipal Home Rule Law.

Because pesticide use involves health, safety, and welfare, the court had to determine whether Local Law No. 1 of 1981 was inconsistent with ECL art. 33. The Appellate Division defined "inconsistency" as either situations where express conflicts exist between local and state law or where the state law evidences an intent to preempt local regulation, whether such regulations actually conflict or not. The court next deduced the Legislature's intent to preempt local regulation of pesticide use, primarily through a broad reading of ECL art. 33. The court found this intent in the language of ECL 33-0303 subd. 1, which states that "jurisdiction in all matters relating to the distribution, sale, use and transportation of pesticides is vested exclusively in the Commissioner (of Environmental Conservation)." The court found further evidence of this intent to preempt in the legislation's declaration of uniformity in the area of pesticide regulation. Moreover, the court found persuasive the fact that the state scheme was both detailed and comprehensive.

The Appellate Division then relied on the precedent set in *Long Island Pest Control Assn. v. Town of Huntington*, 72 Misc 2d. 1031, *affd* 43 A.D. 2d 1020. The trial court struck down Huntington's effort to assert local control over pesticide use, holding that the purpose of ECL art. 33 was to occupy the entire field of pesticide regulation. The Appellate Division in the instant case did not find the *Huntington* case distinguishable. In finding the state's intent to preempt local pesticide regulation, the court declared Local Law No. 1 of 1981 null and void. That being so, filing an EIS was not necessary prior to enacting Local Law No. 1 of 1982 because the 1982 ordinance only repealed an invalid law. The dissent took a narrow view of ECL art. 33 and would hold that since Local Law No. 1 of 1981 was valid, an EIS was required prior to its repeal.

John Mongeluzzi, '85

COASTAL ZONE

Secretary of the Interior v. California, 104 S.Ct. 656 (Jan. 11, 1984)

In 1977, the Secretary of the Interior (Interior) announced approval of a five year plan to lease tracts of the outer continental shelf seabed for oil and gas exploration and development. Among the proposed lease sales was Lease Sale No. 53, which consisted of one hundred and fifteen (115) separate

tracts located off the California coast near Santa Barbara. The State of California, having determined that Lease Sale No. 53 was an activity "directly affecting" its coastal zone within the meaning of Section 307(c)(1) of the Coastal Zone Management Act (CZMA), 16 U.S.C.§456(c)(1), demanded that Interior produce a "consistency determination" — a showing that the lease sale would be "consistent" to the" maximum extent practicable" with the state coastal zone management plan. Interior rejected California's demands and the state filed suit in federal district court seeking declaratory and injunctive relief. The District Court entered a summary judgment for California. *State of California v. Watt*, 520 F.Supp. 1359 (C.D. Cal. 1981. The Court of Appeals for the Ninth Circuit affirmed, 683 F.2d 1253 (9th Cir. 1982), and the Interior, together with the Western Oil & Gas Association, appealed to the U.S. Supreme Court.

The primary issue facing the Supreme Court was whether Interior's Lease Sale No. 53 was an activity "directly affecting" California's coastal zone.

Section 307(c)(1) of the CZMA provides, in part, that each federal agency conducting or supporting activities directly affecting the coastal zone must, wherever practicable, act consistently with the state management plan for the area affected. Further, the agency must submit a consistency review to the governor of the affected state. Such reviews shall include a detailed description of the planned activity, an analysis of the projected effects on the coastal zone, and data to support a finding that the activity is consistent with the state's management plan to the maximum extent possible.

Interior based its rejection to submit a consistency determination on the theory that the lease sale stage of the overall plan does not engage §307(c)(1). Since passage of the 1978 Amendments to the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C.§1340, offshore oil development has been divided into four separate categories: (1) preparation of a five year leasing plan; (2) lease sales; (3) exploration; and (4) development and production. According to the Court, only the latter two stages required a federal agency to submit a consistency determination. The Court stated that under the amended OCSLA, the lease sale stage entitles the lessee only to priority over other parties submitting bids. By purchasing the lease, the lessee acquires no right to explore, develop or produce, and, therefore, a consistency determination is unnecessary at that stage of the plan. The Court added that since consistency determinations are required at the latter two stages, conformity with the state's management plan would be assured.

The Court further held that §307(c)(1) of the CZMA does not apply to federal activities occurring seaward of the coastal zone. Focusing on the CZMA definition of the coastal zone as "that area extending three (3) geographical miles seaward from the coastline of the state in question," the Court concluded that submerged lands existing beyond that point are within the outer continental shelf and, therefore, within the territorial jurisdiction of the federal government. The Court added that since all of Interior lease sales consisted of tracts located seaward of the coastal zone, Interior's rejections of California's demand for a consistency determination was justified.

The dissent to the 5-4 decision sharply criticized the majority for misconstruing both the CZMA and OCSLA. The dissent argued that the legislative history substantiates that activities existing in the outer continental shelf, which pose an environmental threat to the coastal zone, are within the purview of the CZMA, and, therefore, must conform to the state's coastal zone management plan wherever practicable. The dissent further asserted that by allowing the lease stage to go forward, unchecked by a consistency determination, it will be more difficult to employ the consistency determination at one of the later stages and reject the lessee's future plans to explore, develop and produce.

Barry S. Cohen, '85

WATER

Power Authority of the State of New York v. Williams, 60 N.Y. 2d 315 (Nov. 29, 1983)

Through a variety of legislative acts over the last ten to fifteen years, the federal government has attempted to clean up pollutants and greatly restrict future effluent discharges into our nation's waterways. These acts provide a variety of direct methods to curb pollution levels, and the interplay within the legislative scheme provides for numerous indirect checks against future effluent discharges by any polluting entity. The most notable Acts currently in effect are the Federal Water Pollution Control Act (FWPCA), 33 U.S.C.§1251, and the Federal Clean Water Act (FCWA), 33 U.S.C.§1341. These acts provide strict guidelines for permissible discharge levels and heavy fines for violations. More importantly, they allow for a unified attack against pollution by keeping virtually all administrative power within the federal government, giving little jurisdiction to state environmental commissions.

The sole issue in this case is the extent to which state agencies actually have jurisdiction over water pollution regulation.

This case arises out of the Power Authority of the State of New York's (PASNY) decision to build a pumped storage power facility in the Catskill Mountains. In order to build such a facility, PASNY had to file for a license with the Federal Energy Regulatory Commission (FERC) pursuant to the Federal Power Act, 16 U.S.C.§§791a-828c. The issuance of a license is prohibited for any facility where such a license would result in a discharge into the navigable waters, in this case the Esopus Creek, *unless* the State of New York issued a certificate that the facility would comply with the water quality standards adopted by the State in compliance with FWPCA §303. PASNY, therefore, also applied to the State Department of Environmental Conservation (DEC) for what is known as a section 401 certification. (§401 is the section of the FCWA requiring such certification).

After extensive FERC hearings and hearings before the DEC, PASNY's 401 certification was denied on the ground that it had failed to show that relevant water quality standards would be met. The decision involved no balancing of any extrinsic factors, such as the State's Energy Law Policy, and was based solely on noncompliance with water quality standards. This decision was then appealed and transferred to the Appellate Division, Third Department, which voided the Commissioner's determination and remanded back to the DEC for reconsideration of other balancing factors. Interestingly, the Court took cognizance of the Commissioner's limited jurisdiction regarding review for a§ 401 certification, but rejected that position in reliance on a provision in the New York State Energy law that requires all state agencies to conduct their af-

fairs "so as to conform to the state energy policy expressed in this chapter." (Energy Law, §3-1-3). The Court of Appeals reversed the order of the Third Department, holding that the Commissioner may not base his decision to issue a §401 certification on a balancing of need for the project against adverse environmental impact.

This issue of state jurisdiction over water regulation was raised in the case of *Matter of de Rham v. Diamond*, 32 NY2d 34 (1973). With the identical question at issue, the Court of Appeals in ***de Rham*** held that the Commissioner could only look at whether or not a proposed project would violate applicable water quality standards when making a determination on a section 401 certification. As Chief Judge Fuld stated:

> Section 21 (subd. b) of the FWPCA relinquishes only one element of the otherwise exclusive jurisdiction granted the Power Commission by the Federal Power Act. It authorizes States to determine and certify only the narrow question whether there is 'reasonable assurance' that the construction and operation of a proposed project will not violate applicable water quality standards of the State. That is all that Section 21 (subd. b) did, and all that it was designed to do.

32 NY2d at 44-45. What was true then is no less true today, ten years later. To uphold the Appellate Division decision would in essence permit state interests to override Federal interests and allow for an intrusion by the States into what was clearly intended to be exclusive federal jurisdiction.

The limited state jurisdiction with regard to a section 401 certification must be maintained if a comprehensive and unified effort is to be continued towards cleaning and keeping clean our nation's waterways. State interests come into play in the classification of a waterway, so it is not to be thought that they are of no importance. Once federal approval of that classification is made, however, it is left to the federal government to be the enforcement agent. It is in this manner that the interests of the entire nation in having pollution-free waterways may be uniformly and effectively sought.

David Rabbino, '85

United States v. M/V Big Sam, 693 F.2d 451 (5th Cir., Dec. 13, 1982)

The discharge of oil into our nation's navigable waterways resulting from accidents involving huge oil tankers has been an issue of great concern for some years. While the environmental damage such spills may cause is at times catastrophic, the costs of cleaning up these spills is many times not brought to light. These costs can reach enormous amounts. Of prime importance is the question of who should pay for such a clean-up – the government or the discharger. It is to this latter issue that this case focuses.

At issue in this case is the proper statutory interpretation of subsections (g) and (h) of section 311 of the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §1321 (g), (h). These subsections set forth the guidelines for liability when an oil spill occurs. Another subsection of this Act, (f), is also pertinent to any issue involving clean-up cost liability. Subsection (f) provides that a discharger of oil is subject to liability up to a limited amount specified in the statute. Such liability will be imposed without fault unless the discharger can prove he was not at fault — i.e. that the discharge was the result of an act of God, an act of war, or the act of a third party. Subsection (g) also provides for strict liability to be imposed (but this subsection applies solely to third parties whose negligence causes another to discharge oil) subject to similar exceptions as contained in subsection (f). Subsection (h) alters the liability limitation with regard to third parties. It puts forth that the Act shall not affect any rights the United States may have against any third party whose acts may have helped cause an oil discharge. In essence, a third party may be open to unlimited liability for his negligence.

In this case, the defendant vessel, a tugboat called "Big Sam," was negligently piloted when it collided with an oil tanker, causing 280,000 gallons of oil to be discharged from the latter vessel into the Mississippi River. The Big Sam's negligence was the sole cause of the collision. The Big Sam's charterer and its owners contended that their liability for the clean-up was limited due to the provisions of subsection (g). They claimed therefore that their liability was limited to only $15,000. The clean-up cost was over $300,000. A panel court of the Fifth Circuit disagreed and held the Big Sam liable to the United States Government for the entire cost of the clean-up under ordinary maritime tort principles due to the unambiguous provisions of subsection (h).

The main claim on Big Sam's appeal is that the panel misinterpreted subsections (g) and (h) and that the panel's decision was inconsistent with prior interpretations of subsection (f). The defendant based its claim on a prior Fifth Circuit decision, *United States v. Dixie Carriers, Inc.* 627 F.2d 736 (5th Cir. 1980). This case held that subsection (f) supplants any other remedies the Government has against a discharger alone. The Government was therefore barred from asserting any ordinary maritime claims against a discharger and was bound to seek recovery for any clean-up costs within the bounds of subsection (f). The Fifth Circuit refused to adopt the defendant's position in the present case and held that no inconsistency exists because subsections (f) and (g) apply to different parties, dischargers and third parties respectively, and that the additional provisions of subsection (h) apply only to third parties and not to dischargers. Therefore, the statute does not supplant the Government's maritime tort rights against a third party.

The dissent in this case notes that the Court's holding is contrary to the Congressional intent behind the statute. They see the decision as producing an anomalous result: "limited liability if one negligently dumps his own oil; unlimited liability if one negligently causes another to dump his."

This possible inconsistency in result was not overlooked by the majority. The majority felt it was up to Congress, not the courts, to correct any inconsistency. Courts in the United States must interpret statutes, not re-write them, especially when the language in the statute is unambiguous, as subsection (h) appears to be. The Court emphasized that any deficiencies that may exist as a result of application of the statute are for the legislators to work out, not the court.

David Rabbino, '85

BANKRUPTCY

State of Ohio v. Kovacs, 717 F.2d 984 (6th Cir., Sept. 22, 1983).

Kovacs, the defendant, operated an industrial and hazardous waste disposal facility in Hamilton, Ohio. In 1976, proceedings were instituted by Ohio's Environmental Protection Agency and Department of Natural Resources (hereinafter referred to as Ohio) against Kovacs, individually and as an officer of Chem-Dyne Corporation, Spray-Dyne Corporation and Iron Tree, Inc. In the Court of Common Pleas of Ohio, Kovacs and Chem-Dyne were charged with polluting the waters of the State with pesticides and industrial wastes. Kovacs signed a Stipulation and Judgment Entry enjoining him from causing any further pollution and required the removal of all industrial wastes from the premises.

Because Kovacs was behind schedule with the clean-up obligation Ohio made a motion in an Ohio State Court demanding that the court appoint a receiver with the power to receive and collect any money which was owing defendant business entities or defendant Kovacs. The Court granted the motion.

In 1980, Kovacs filed for personal bankruptcy. The Bankruptcy Court held that Ohio is enjoined from making any attempts to levy on Kovacs' post bankruptcy petition earnings and that Kovacs' debts were discharged. The court characterized Kovacs' obligation to clean up as a debt. Therefore, the obligation to clean up the hazardous waste was discharged under 11 U.S.C. §727(b).

At issue before the court of appeals was the statutory interpretation of 11 U.S.C. §101 which defines a "claim" or a "debt." Ohio argued that Kovacs' obligation was neither a claim nor a debt based on the legislative history of 11 U.S.C. §101 and is nondischargeable. The lower court had held that the fallacy in Ohio's argument was that it never claimed that Kovacs' obligation was exempted from dischargeability under 11 U.S.C. §523.

The Court of Appeals held that Kovacs' obligation was a debt and dischargeable where the State seeking to enforce the judgment essentially sought to obtain payment of money by use of the receivership. The court also pointed out that Ohio failed to make an argument that Kovacs' obligation was exempted from dischargeability under any of the provisions of 11 U.S.C. §523. The case has been appealed to the United States Supreme Court, No. 83-1020, and certiorari was granted on March 6, 1984.

Michael Biggiani, '85

ATTORNEY'S FEES

Ruckleshaus v. Sierra Club, 103 S.Ct. 3274 (July 1, 1983)

The Environmental Defense Fund (EDF) and the Sierra Club filed a petition for review in the United States Court of Appeals for the District of Columbia in response to the Environmental Protection Agency's (EPA) promulgation of regulations, pursuant to the Clean Air Act (CAA), limiting the emission of sulphur dioxide. The EDF argued that the standards were tainted because of the EPA's ex parte contracts with private industry, while the Sierra Club contended that the EPA lacked the authority to issue such regulations under the CAA. The Court of Appeals rejected both claims. *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Dir. 1981).

Despite failure, both groups filed a request for attorney's fees incurred, relying on §307(f) of the Clean Air Act, 42 U.S.C. 7607 (f), which allows payments of attorney's fees in certain proceedings "whenever [the court] determines that such an award is appropriate." The parties argued that despite complete failure on the merits, it was "appropriate" for them to receive fees because they contributed to the goals of the implementation of the Clean Air Act. The Court of Appeals found this argument persuasive, thereafter awarding fees to both groups. *Sierra Club v. Gorsuch*, 672 F.2d 33 (D.C. Cir. 1982); 684 F.2d 972 (D.C. Cir. 1982). On appeal by the EPA, the Supreme Court granted certiorari.

The issue in this case is whether or not it is "appropriate," within the meaning of §307 (f) of the Clean Air Act, to award attorney's fees to a party that has achieved no success on the merits of its claim.

In a 5-4 decision, the Supreme Court held that such a situation was not "appropriate" within the meaning of §307(f), thereby reversing the D.C. Court of Appeals.

The Supreme Court began its analysis with the so-called "American" rule which states that the *prevailing* party is ordinarily not entitled to attorney's fees from the *loser*. The Court found that any statutory departure from this rule required that the claimant seeking fees must have prevailed, or at least, partially prevailed. That aside, the Court found that the consistent rule is that complete failure on the merits will not, in the interests of fairness, justify shifting attorney's fees. The Court held that requiring a completely successful defendant to pay the unsuccessful plaintiff's legal fees would be a radical departure from long-standing authority.

The Court rejected the claimants' arguments that the legislative history of §307(f) indicated that an award to them was "appropriate." It found that although §307(f) expanded the class of claimants who could recover, it did so only to the extent that "partially-prevailing" parties can now recover fees. The Court held that in no way did the legislative history indicate that the government or any defendant should pay attorney's fees to plaintiffs who wrongly accused them of violating the Clean Air Act. Regarding the government, the Court found this particularly persuasive because, if the government were to pay, it would be a waiver of its immunity from paying attorney's fees.

The dissent, on the other hand, giving a plain meaning reading to §307(f), would award fees to a non-prevailing party under certain circumstances where that party had furthered the goals of the Act or settled critical legal points. The dissenters found such a situation here.

John Mongeluzzi, '85

This is the first issue of the Hofstra Environmental Law Digest. The Digest will be published biannually with the next issue to be printed in Fall 1984. Anyone interested in receiving future copies of this publication please call the Environmental Law Society at (516) 560-5007. All comments welcome.

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