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ASBESTOS

In re Asbestos School Litigation, No. 83-0268 (E.D. Pa. Sept. 28, 1984).

In what is recognized as the first nationwide class action for property damages arising in a product liability context, the United States District Court for the Eastern District of Pennsylvania has conditionally certified a class action suit against virtually all of the major producers of school asbestos and their principal suppliers. The Johns-Manville Corporation is not a defendant in the suit because legal process is stayed while Manville's bankruptcy proceedings continue.

The suit arose as a result of action by the U. S. Environmental Protection Agency (EPA), Congress and the Department of Justice. After investigating the presence of asbestos in the nation's schools in 1980, the EPA promulgated regulations requiring every public and private school in the nation to test for potentially airborne asbestos. 40 C.F.R. §§763.100-.119 (1983). These regulations were promulgated pursuant to the Toxic Substances Control Act (TSCA), 15 U.S.C. §2605 (1982). At approximately the same time, Congress enacted the Asbestos School Hazard Detection and Control Act of 1980, 20 U.S.C. §§3601-3611 (1982), to provide interest-free loans for the testing and subsequent remedial action. Instead of appropriating money for remedial action, Congress directed the U.S. Attorney General to investigate and report to Congress the parties who should be legally and financially responsible for asbestos abatement remedial action in the schools. In August 1981, the Attorney General issued a report finding that the asbestos industry should be held responsible and that the schools could rely on existing state law to recover. Land and Natural Resources Div., U.S. Dept. of Justice, 97th Cong., 1st Sess., *The Attorney General's Asbestos Liability Report to Congress* (Comm. Print 1981). After the report was issued, complaints were filed by the school districts who have become representative plaintiffs in this class action lawsuit.

The representative plaintiffs are four public school districts: the Districts of Lancaster, Manheim Township, and Lampeter-Strasburg, all of which reside in the Eastern District of Pennsylvania; and the School District of Barnwell, South Carolina. In addition to punitive damages, they are seeking compensatory and equitable relief for the past and future costs of undertaking asbestos abatement remedial action (e.g. isolating and removing asbestos from schools).

On behalf of essentially all public school districts and private schools in the nation, the four school districts moved for class certification under Rule 23 of the Federal Rules of Civil Procedure. On September 28, 1984, Judge James McGirr Kelly granted the motion for mandatory class treatment only on the issue of punitive damages. This mandatory class was created to prevent individual punitive damage awards from adversely affecting the ability of future claimants to obtain such damages. School districts may, however, opt out of the class and seek compensatory damages in individual lawsuits, an option that Judge Kelly noted is in the interest of large school districts such as those in Los Angeles and Chicago.

In granting the representative plaintiffs' motion for class certification, the Court concluded in four-step fashion that the Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy of representation had been established.

Numerosity: The Court points to a September 1983 U.S. Department of Education report to Congress, which estimates that 14,000 schools may contain potentially airborne asbestos, as clearly satisfying the Rule 23(a)(1) requirement that the plaintiffs be "so numerous that joinder of all members is impracticable."

Commonality: The hazards of asbestos, the defendants' knowledge of the hazards, their failure to warn, and conspiracy in adhering to industry practices are cited as the common core of questions that make this lawsuit amenable to a class action under Rule 23(a)(2). Judge Kelly noted that common proof will establish these elements, thereby making out what the plaintiffs contend is a *prima facie* case under the alleged theories of negligence, strict liability, intentional tort, breach of warranty, concert of action, and common law conspiracy.

Typicality: The Court acknowledged that, although the plaintiffs may have suffered differing degrees of harm, the claims of the representative school district plaintiffs are typical of other members of the class and in satisfaction of Rule 23(a)(3) because they raise common issues with regard to the theories of liability alleged.

Adequacy of Representation: In a note to the opinion, Judge Kelly recognizes the "Olympian efforts contributed by counsel . . . diligence, thoroughness and scholarship." Note 9. Co-lead counsels Herbert Newburg, author of the multivolume treatise, *Newburg on Class Actions*, and Daniel Berger are recognized by the Court as very experienced and competent. The Court easily concluded that this expertise, combined with the absence of a showing that the plaintiffs' interests are antagonistic to those of the class, satisfies the adequacy of representation clause in Rule 23(a)(4).

Judge Kelly views the school asbestos litigation as "uniquely suitable" to class action treatment because of the great savings in litigation expenses and judicial resources. Small school districts are relieved of the burden of bringing these complex and costly lawsuits individually. While acknowledging that causation problems caution against certifying mass tort cases, Judge Kelly noted that the damages alleged are to property and not of a personal injury nature, thereby mitigating such concerns.

Gary Jones, '85

AIR

Chevron, U.S.A. v. Natural Resources Defense Council, ___ U.S. ___, 104 S.Ct. 2778 (June 25, 1984).

Prior to the U.S. Supreme Court's disposition of this case, the Natural Resources Defense Council, along with Citizens for a Better Environment, and the North Western Ohio Lung Association, filed a petition in the United States Court of Appeals for the District of Columbia Circuit to review U. S. Environmental Protection Agency (EPA) regulations, promulgated in 1981, concerning the EPA's definition of the term "stationary source" in the Clean Air Act Amendments of 1977.

The 1981 EPA regulations were issued to implement and enforce the Clean Air Act Amendments of 1977. These Amendments imposed various requirements on states that have not met the National Ambient Air Quality Standards (NAAQS), including the requirement that these "nonattainment" states establish a permit program regulating new or modified stationary sources of air pollution. The 1981 EPA regulations allow a state to adopt a plantwide definition of the term "stationary source" to implement the permit requirement.

The Clean Air Act, as amended in 1970, defines "stationary source" as "any building, structure, facility or installation which emits or may emit any air pollutant." Pub.L. No. 91-604, 84 Stat. 1683. This definition of "stationary source" allows an existing plant that contains several polluting devices to install or modify one piece

of equipment without meeting the permit conditions if the modification will not increase the total emissions from the plant. Such a procedure allows a state to treat all of the pollution-emitting devices as though they were encased in a single "bubble." (During the Carter Administration, the EPA decided against allowing the "bubble" policy in the geographical areas that did not meet the NAAQS.)

The Court of Appeals agreed with the challenge by the Natural Resources Defense Council and set aside the 1981 regulations incorporating the "bubble concept." The Court's reasoning was that the "bubble concept" did not achieve the purpose behind the Clean Air Act's nonattainment program, i.e. to improve the air quality in nonattainment areas enough to achieve expeditious compliance with the NAAQS. *Natural Resources Defense Council v. Gorsuch*, 222 U.S.App.D.C. 268, 685 F.2d 718 (1982). The intervenors in the Court of Appeals case, Chevron, U.S.A., the American Iron and Steel Institute, the American Petroleum Institute, the Chemical Manufacturers Association, General Motors Corp., and the Rubber Manufacturers Association, appealed to the U.S. Supreme Court and were granted leave to intervene and argue in support of the regulation along with the original defendant, the EPA Administrator.

In a 6-0 decision written by Justice Stevens, the Supreme Court held that the plantwide definition incorporated in the EPA's 1981 regulations is a permissible construction of the statutory term "stationary source", thus reversing the Court of Appeals decision. Justices Marshall, Rehnquist, and O'Connor did not participate in the Court's decision.

According to Justice Stevens, the issue before the Court was whether EPA's decision to allow states to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single bubble was based on a "reasonable construction" of the term "stationary source."

Although the Court's decision has had and will continue to have an impact on the environment and environmental policy, its rationale was not based primarily on environmental concerns. Rather, the Court based its decision on the power of an administrative agency to interpret congressional language when the Congress has not directly spoken to the precise question at issue. When the statute is silent or ambiguous on the specific issue, the question for the Court is "whether the agency's answer is based on a permissible construction of the statute." 104 S.Ct. at 2782. The Court held that since Congress did not specifically address the bubble concept, the EPA's definition of "stationary source" was a reasonable policy choice for the agency to make.

The Court, noting the interpretation of "stationary source" made during the Carter Administration and the different interpretation made during the Reagan Administration's Government-wide reexamination of regulatory burdens and complexities, concluded that an initial agency interpretation is not set in stone. Agencies "must consider varying interpretations and the wisdom of its policy on a continuing basis . . . particularly since Congress has never indicated any disapproval of a flexible reading of the statute." 104 S.Ct. at 2792.

Criticizing the Court of Appeals ruling, the Supreme Court also noted that specific policy battles of this sort are more properly addressed by legislators and administrators, not by judges. When a challenge to an agency's construction of a statutory provision is made and the legislative delegation to an agency is implicit rather than explicit, the challenge must fail. The Court will not substitute its own construction of a statutory provision when an agency has made a reasonable interpretation. The responsibility of assessing policy decisions such as this is not a judicial one.

Steven Sonkin, '86

WATER

National Association of Metal Finishers v. E.P.A., 719 F.2d 624 (3d Cir. Sept. 20, 1983), cert. granted, 104 S.Ct. 2167 (1984) (Nos. 83-1013, 83-1373).

This case involves a review of the Clean Water Act's (CWA) pretreatment regulations promulgated by the U.S. Environmental Protection Agency (EPA). Petitioners include various trade organizations, individual businesses, and the Natural Resources Defense Council (NRDC). The CWA, 33 U.S.C. §1251(a)(1) (1982),

embodies congressional intent to eliminate the discharge of pollutants into the nation's navigable waters. The EPA is responsible for setting rules regulating permissible levels of these discharges and enforcing these regulations through the requirement of National Pollutant Discharge Elimination System (NPDES) permits.

In addition to regulating wastes directly discharged into the nation's waters, the CWA regulates indirect dischargers whose wastes go through Publicly Owned Treatment Works (POTW) before they reach their ultimate destination. The indirect discharger's use of a treatment facility primarily designed to treat municipal sewage or industrial wastewater presented foreseeable problems which were addressed by the CWA. "Congress recognized that the pollutants which some indirect dischargers release into POTWs could interfere with the operation of the POTWs, or could pass through the POTWs without adequate treatment." 719 F.2d at 633. Congress, therefore, ordered the EPA to promulgate regulations addressing this problem. The general pretreatment regulations that resulted are the focus of this case review. The particular section of the pretreatment regulations applying to Fundamentally Different Factor (FDF) variance provisions is the subject of the appeal before the United States Supreme Court.

Under the CWA, the Administrator of the EPA was ordered to designate the categories of existing sources subject to pretreatment regulations, promulgate discharge standards by 1973, and revise standards as control technologies and industrial processes change. In 1977, the CWA was amended to permit a POTW to modify pretreatment standards applicable to an indirect discharger if that POTW "could successfully remove all or part of the toxic pollutants released by that discharger." 33 U.S.C. §1317(b)(1) (1982).

Pursuant to the 1977 Amendments, the EPA promulgated two types of pretreatment standards. The first standard designated twenty-one types of industrial sources whose discharged pollutants could interfere with or pass through a POTW. The second standard established a general ban on nondomestic discharges (regardless of their industrial source) which interfere with or pass through a POTW. In this case, the United States Court of Appeals for the Third Circuit invalidated and remanded the EPA's definition of "interference", "pass through" and "new source" as well as the Fundamentally Different Factor (FDF) provisions. The Court did, however, uphold the EPA's Removal Credits provision and the Combined Wastestream formula.

The definition of "interference" was remanded to the Agency because the Court found that the EPA's definition did not include a causation requirement as Congress had intended. The definition of "pass through" was held to be invalid because it was promulgated without notice and comment as required by the Administrative Procedure Act. The definition of "new source" was invalidated because it did not subject as many firms as possible to the EPA's "new source" regulations. See *Pennsylvania Department of Environmental Resources v. EPA*, 618 F.2d 991 (3d Cir. 1980).

The FDF Variance provision in the general pretreatment regulations allows the EPA to grant a variance from pretreatment standards for the wastes flowing from an indirect discharger if the EPA, in establishing the standard, considered factors fundamentally different from those relating to that particular source. The indirect discharger, POTW, or other interested party can request the variance, making standards stringent to greater and lesser degrees. The Court interpreted the Administrator's FDF Variance provision as applicable to both toxic and non-toxic pollutants and held that the provision was directly contrary to congressional intent evidenced in §301(l) of the CWA. That provision prohibits any modification of discharge standards for the discharge of toxic wastes. The Court noted that its interpretation of §301(l) conflicted with the Fourth Circuit's treatment of §301(l) in *Appalachian Power Co. v. Train*, 620 F.2d 1040 (1980). The Fourth Circuit found congressional intent to be less clear and deferred to the Administrator's interpretation of the section. Whether or not §301(l) allows variances for the discharge of toxic wastes is the issue on appeal to the Supreme Court.

The general pretreatment regulations also contain a Removal Credits provision. The provision allows a POTW to relax an indirect discharger's removal requirements and is applicable to toxic and non-toxic pollutants. The conditions established by the EPA as prerequisites to the Removal Credits provision were challenged as being unworkable, improperly promulgated, and in excess of the EPA's authority. Under the regulations, a POTW is required to have a pretreatment program approved by a responsible Approval

Authority, i.e. either a state water pollution control agency or the appropriate Regional Administrator of the EPA. Following approval of the pretreatment program, the POTW must obtain authorization to revise discharge limits for specific pollutants; however, further requirements designed to insure removal of the pollutants involved must be met.

The Court rejected the petitioners' claim that the EPA could not limit a POTW's dispensation of removal credits and held that the regulations were a proper assertion of the EPA's authority.

The Court also addressed the issue of combined wastestream formulas. These formulas regulate wastestreams that combine with each other prior to pretreatment. The Court approved the regulations which apply to categorical sources within each plant and did not adopt the approach that focuses on individual pollutants being treated as individual sources. The Court acknowledged that uncertainty would likely follow from the use of the EPA's formulas, complicating the building and planning of control technology. Although the Court noted that the EPA must consider the effluent reduction attainable by pretreatment of combined wastestreams and the costs of attaining that reduction, review was delayed pending future applications of the formula to specific factual conditions.

The Supreme Court heard oral arguments in the case on November 6, 1984. A decision is expected within the next few months.

Howard Lipper, '85

Safe Water Foundation v. City of Houston, 661 S.W.2d 190 (Tex. App. 1 Dist. 1983), *appeal dismissed*, 53 U.S.L.W. 3199 (Oct. 1, 1984).

The Safe Water Foundation (Foundation) filed suit in Texas District Court of Harris County, seeking an injunction to permanently enjoin the City of Houston (City) from injecting fluoride into the City's drinking water. The Foundation was granted a temporary restraining order until a hearing could be held. Thereafter, the parties agreed to combine the hearing with the trial on the merits. The District Court entered judgment against the Foundation on January 13, 1982 and the Foundation subsequently appealed to the Texas Court of Appeals. Among the seven points of error on appeal, the Foundation argued that the trial court erred in not holding that fluoridation of the City's water supply violated the police power of the City under the United States and Texas Constitutions. Although the City filed one cross point of error claiming the Foundation lacked standing to bring the suit, the Court of Appeals held that the Foundation was entitled to sue not only to protect their individual interests but those of the general public as well.

Ordinance No. 80-2530, which provides for the injection of fluoride into the City's water supply and which the Foundation challenged as invalid, was passed by the Houston City Council on July 8, 1980. The Council adopted the Ordinance upon recommendation of the Director of the Houston Health Department that fluoride (hydrofluosilic acid) in a concentration of one part per million (1 ppm) be added to the City's surface water supply.

Hydrofluosilic acid and sodium silicofluoride are generally regarded as the most widely used artificial fluorides in the fluoridation of drinking water. Both are by-products of the phosphate fertilizer industry. Unlike calcium (natural) fluoride, artificial fluorides have been used as effective roach and rat exterminators, and in high concentrations can prove fatal to humans upon ingestion. See McFadden, *\$750,000 Is Awarded In Death of a Child*, 3, *From Dose of Fluoride*, N.Y. Times, Jan. 20, 1979, at 23, col. 1.

The idea of adding fluoride to drinking water for the purpose of reducing tooth decay in children was first proposed by Dr. Gerald J. Cox. On September 30, 1939, Dr. Cox, then a research fellow at the Mellon Institute in Pittsburgh, Pennsylvania, proposed adding fluoride to the public drinking water of Johnstown, Pennsylvania. Since that time, approximately 100 epidemiological studies have been conducted which found a 50 to 70 percent reduction in tooth decay attributable to fluoride. *But cf. EPA Seeks to Link Excess Fluoride Levels with Adverse Mental Effects*, Inside E.P.A. Oct. 19, 1984, at 2 (citing a new University of Texas study which disputes the Surgeon General's (U.S. Department of Health and Human Services) longstanding position that excess fluoride does not cause adverse health effects). Claims have been made against fluoridation, on alleged medical grounds, that the 1 ppm recommended dosage can result in mottling of tooth enamel (i.e. fluorosis), and is cumulative

within the body, therefore posing a high risk to diabetics who drink more water, patients on dialysis systems, and people with allergies who have a low tolerance for drugs. Purported side effects include miscarriages, births of mongoloid children, liver and kidney damage, cancer, and heart disease. See F.B. Exner, M.D. and G.L. Waldbott, M.D., (New York: The Devin-Adair Co., 1957).

In the instant case, the Texas Court of Appeals found that the Houston City Council had both the authority and responsibility to determine as a matter of fact whether injecting fluoride into the City's water supply was an act in furtherance of the public's health, safety and welfare. The Court determined that there was no indication that the City had clearly abused its discretion and determined that the Foundation had failed to meet their burden of proving that the City, in the exercise of its police power, acted arbitrarily, unreasonably and capriciously in making the decision to fluoridate its water supply. The Foundation appealed to the U.S. Supreme Court but the Court dismissed the appeal on October 1, 1984.

To support its position, the Foundation had contended that the trial court erred in failing to hold that the fluoridation of the Houston water supply violated the United States and Texas Constitutions. The Texas Court of Appeals responded by citing four state court decisions which had previously upheld the constitutionality of fluoridation. *E.g., Paduano v. City of New York*, 45 Misc.2d 718, 257 N.Y.S.2d 531 (1965), *aff'd*, 24 App.Div.2d 437, (1965), *aff'd*, 17 N.Y.2d 875 (1966), *cert. denied*, 385 U.S. 1026 (1967). *But cf. McGurran v. City of Fargo*, 66 N.W.2d 207 (N.D. Sup. Ct. 1954); *Teeter v. Municipal City of LaPorte*, 236 Ind. 146, 139 N.E.2d 158 (1956), in which the courts voiced qualified objections to the constitutionality of fluoridation.

Since fluoridation allegedly benefits children only, an underlying issue in these cases is whether fluoridation has a discriminatory impact. In *Paduano*, the Court responded to this issue by stating that "in the usual course . . . fluoridation will, commencing with the date of its adoption, ultimately affect all." 257 N.Y.S.2d at 539.

Although the U.S. Department of Health and Human Services has as their objective the further proliferation of community fluoridation programs between now and 1990, *Public Health Reports*, Supp. Sept.-Oct. 1983, at 94, a severe shortage of fluoride additives might curtail this proliferation. N.Y. Times, Aug. 12, 1982, at A15, col. 1. At least twelve cities in the west and midwest have been forced to halt their fluoridation programs as a result of shortages. *Id.* The shortage is due to declining production in the phosphate mining and processing industry, where fluoride is produced as a by-product in the manufacture of chemical fertilizer. According to the American Dental Association, if this shortage continues it could cause a "temporary setback in the battle against tooth decay." *Id.*

Pamela Hirschhorn, '86

BANKRUPTCY

City of New York and State of New York v. Quanta Resources Corp., 739 F.2d 912 (3rd Cir. July 20, 1984), *reh'g denied*, Aug. 16, 1984.

Recently, many federal, state, and local laws have been enacted to regulate the disposal of hazardous waste. A serious problem arises when a company, which has hazardous waste on its property, goes into bankruptcy. Under 11 U.S.C. §554 (1982) of the Bankruptcy Reform Act of 1978, a court appointed trustee, after notice and a hearing, can abandon any property that places a burden on the estate or is of inconsequential value to the estate.

The principal issue in the present case is whether 11 U.S.C. §554 permits the abandonment of property, in contravention of state and local environmental protection laws, by the trustee of a bankrupt estate.

This case arose when the trustee for Quanta Resources Corp. (Quanta), a bankrupt company in liquidation proceedings under Chapter 7, filed a notice of intention to abandon a waste oil and processing facility in Long Island City, New York. At the time of filing the notice of intention to abandon, Quanta had more than 500,000 gallons of waste oil in fuel storage tanks on the site, including a minimum of 70,000 gallons that were contaminated with highly toxic polychlorinated biphenyls (PCBs). The trustee alleged that the cost of removing these hazardous wastes so as to comply with the en-

environmental laws of New York State and New York City (New York) would render the property worthless because it would deplete the equity remaining in the property (which was already subject to two mortgage liens). The United States Bankruptcy Court for the District of New Jersey held for the trustee and permitted abandonment.

New York, the appellants herein, brought the action in the Bankruptcy Court to prevent Quanta from abandoning the facility and to grant New York first lien (priority) on the property for any money New York spent to bring the site in compliance with the environmental laws. New York's primary objection to the abandonment of the facility was that it constituted, in effect, the disposal of hazardous waste in contravention of New York Environmental Conservation Law §71-2702 (McKinney Supp. 1982). New York alleged that such a violation would pose a great risk to the health and safety of the public. The Bankruptcy Court rejected New York's contentions, allowed the abandonment, and denied New York the right of first lien on the property. New York proceeded to clean and remove the hazardous wastes from the facility at a cost of approximately \$2.5 million, and appealed to the United States District Court for the Northern District of New Jersey on the issue of abandonment. The District Court affirmed the decision of the Bankruptcy Court.

Appealing to the United States Court of Appeals for the Third Circuit, New York raised the questions of the propriety of the abandonment and New York's right to reimbursement for its clean up costs as an administrative expense under 11 U.S.C. §§503(b), 507(a)(1982). Both the State of New Jersey and the Commonwealth of Pennsylvania submitted *amicus curiae* briefs on behalf of New York. The Third Circuit reversed on the abandonment question and remanded on the issue of priority. A rehearing and rehearing en banc was denied on August 16, 1984.

Writing the opinion for the 2-1 majority, Circuit Judge Garth looked to the supremacy clause, U.S. Const. Art. VI, cl. 2, to determine whether state and city environmental laws frustrated the full effectuation of the federal bankruptcy laws. Generally, state laws are only preempted to the extent that they are in actual conflict with federal law. To determine whether such a conflict existed, the Court applied the two stage test enunciated in *Perez v. Campbell*, 402 U.S. 637, 652 (1971). The first stage requires an examination of the primary purpose of the laws at issue and the second stage questions whether the state laws are an obstacle to the objectives of the federal law. Noting that the purpose of the New York environmental laws appeared to be irreconcilable with the federal bankruptcy law, the Court raised the question of whether Congress intended the trustee's abandonment power to be unrestricted by public health regulations. The Court examined the bankruptcy laws and those authorities (including case law) interpreting them and found no such congressional intent. Starting with the basic assumption that Congress did not intend to displace state law, the Court relied on *Penn Terra Ltd. v. Department of Environmental Resources*, 733 F.2d 267, at 272-73 (3d Cir. 1984), in which the Third Circuit stated that: "[w]here it is argued that Congress intended to withdraw police power from a state, that intention must be unmistakable." 739 F.2d at 916. Thus, the *Quanta* Court held that the state's police power to regulate highly toxic chemicals to protect the public's interest was paramount and could not be overridden by the federal bankruptcy law. Therefore, the abandonment under 11 U.S.C. §554 in contravention of state and local environmental laws was not allowed, and the decision of the lower courts on the order of abandonment was reversed. In addition, the Court allowed New York to recoup clean-up costs as an administrative expense under 11 U.S.C. §503(b)(1)(A), but remanded the issue of priority to the Bankruptcy Court.

The dissenting opinion by Judge Gibbons stated that the majority holding was contrary to *United States v. Security Industrial Bank* 459 U.S. 70 (1982). *Security Industrial Bank* requires that if a plain meaning reading of a statute in the Bankruptcy Act is ascertainable, its plain meaning construction must be applied in order to avoid the possible Fifth Amendment violation of taking property from the creditors without just compensation. The majority opinion, however, found *Security Industrial Bank* inapplicable to the present case by characterizing the New York statutes as "regulation" and not a "taking" of property under the Fifth Amendment. The dissent also noted that, on remand, the majority had given the Bankruptcy Court no guidance to determine how, consistent with the taking clause, the clean-up costs should be apportioned among the creditors.

Dino Noto, '86

State of Ohio v. Kovacs, No. 83-1020 (U.S. Sup. Ct. cert. granted Mar. 6, 1984).

Oral arguments in *Ohio v. Kovacs* were heard by the Supreme Court of the United States on October 10, 1984. The primary issue is whether the federal Bankruptcy Code can be used by industrial defendants to avoid liability for hazardous waste clean-ups. The defendant, William Lee Kovacs, filed for bankruptcy after Ohio had obtained an injunction requiring him to clean up pesticides and industrial wastes caused by his Chem-Dyne site in Hamilton, Ohio. The United States Court of Appeals for the Sixth Circuit held that Kovacs' clean-up obligation is a debt and is dischargeable in bankruptcy. 717 F.2d 984 (6th Cir. 1983). (See Vol. 1, No. 1 *Hofstra Environmental Law Digest* (Spring 1984) for a review of the Sixth Circuit decision.)

The defendant's arguments are that the clean-up obligation is a money judgment dischargeable under Section 727(b) of the Bankruptcy Code and that Kovacs' obligation to remove the toxic waste from the Chem-Dyne site has been satisfied, therefore rendering this lawsuit moot. Kovacs bases the latter argument on the fact that he fulfilled all the clean-up obligations to which he and the State of Ohio had formally stipulated prior to his filing for bankruptcy. The Supreme Court is expected to decide this matter within the next several months.

Michael A. Biggiani, '85

NATIONAL SECURITY

Wisconsin v. Weinberger, 736 F.2d 438 (7th Cir. June 13, 1984), (slip opinion Aug. 20, 1984, available Oct. 23, 1984 on LEXIS, Genfed library, cases file).

The State of Wisconsin and the County of Marquette, Michigan, an intervening plaintiff, sought a preliminary and permanent injunction against the continuation of Project ELF (Extremely Low Frequency). The plaintiffs sued Casper Weinberger, individually and as Secretary of Defense, the United States Department of Defense, John F. Lehman Jr., individually and as Secretary of the Department of the Navy, and the United States Department of the Navy. Project ELF is a submarine communication system that uses extremely low frequency electromagnetic radiation to make submarines less vulnerable to detection by increasing the depth at which a submarine may operate while receiving or sending messages. The plaintiffs sought to enjoin the project until a Supplemental Environmental Impact Statement (SEIS) was prepared in accordance with the National Environmental Policy Act (NEPA), 42 U.S.C. §4321 (1982).

The United States Court of Appeals for the Seventh Circuit noted that an Environmental Impact Statement (EIS) is meant to: (1) insure the adequate consideration of environmental consequences during the agency's decision-making process; (2) fully inform the public; (3) increase public input into environmental decision-making; and (4) serve as a record for substantive review of challenges to compliance with NEPA (citing *Andrus v. Sierra Club*, 442 U.S. 347, 350 (1979)). *Weinberger v. Catholic Action of Hawaii/Peace Education Project*.

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454 U.S. 139, 143 (1981), and *Appalachian Power Co. v. EPA*, 477 F.2d 495, 507 (4th Cir. 1973)).

NEPA is essentially a procedural act in that it does not dictate the answer to any questions, but leaves the weighing of substantive goals to the agencies involved in the decision-making process. Thus, the decision to file an initial EIS, as well as the decision to file a supplemental EIS, is left to agency discretion. However, as in the present case, these decisions are subject to judicial review using the arbitrary, capricious, and abuse of discretion standard.

The plaintiffs claimed that since the original EIS was filed in 1977 significant information regarding electromagnetic radiation had been discovered. This new information allegedly presented a seriously different environmental picture. Thus, the plaintiffs claimed that the reactivation of Project ELF in 1981 required the filing of an SEIS.

Although Judge Crabb of the United States District Court for the Western District of Wisconsin denied the preliminary injunction on the grounds that continued work did not constitute irreparable harm, she granted the permanent injunction, holding that a significant amount of new scientific information had been generated and that the defendants had violated NEPA by failing to undertake a thorough and comprehensive review of that information. 578 F.Supp. 1327 (1984). In addition, because the defendants' actions were arbitrary, capricious, and an abuse of discretion, the Court ordered that an SEIS be filed and an injunction imposed.

In response to the defendants' motion for reconsideration and the plaintiffs' motion for clarification, Judge Crabb held that the Court could not balance NEPA and national security concerns before issuing an injunction since there is no national security exemption to NEPA. 582 F. Supp. 1489 (1984). The defendants then appealed the decision to the United States Court of Appeals for the Seventh Circuit and, in a unanimous ruling on June 13, 1984, the Court reversed the lower court's decision and lifted the injunction.

In the slip opinion of August 20, 1984, Judge Wood noted that the issues before the Court were whether the Navy acted in an arbitrary or capricious manner or abused its discretion in its review of the new information. Judge Wood agreed with the District Court that an SEIS must be filed when new information presents a picture of likely environmental consequences not envisioned by the original EIS. The Court, however, rejected the District Court's reasoning that information that is significant enough to require careful review is also significant enough to require that an SEIS be filed.

The Court examined the post-1977 scientific information and experimentation on extremely low frequency radiation and concluded that the new information, coupled with the Navy's continued research and review, fell short of the threshold of "significance" at which the duty to prepare an SEIS is triggered. Thus, the Court found a lack of significant new concerns sufficient to justify classifying the Navy's conduct as arbitrary, capricious, or an abuse of discretion. Judicial review of Naval activity was therefore not warranted, an SEIS was not called for, and an injunction was said to be incorrectly applied.

In his dissent, Judge Cudahy disagreed with the Court's finding of insignificance regarding both the new information and the thoroughness of the Navy's review. He agreed with Judge Crabb that the Navy abused its discretion and violated NEPA by failing to evaluate the new information. He also found that the majority overstepped the bounds of appellate review in its virtually de novo treatment of the evidence and concluded that Judge Crabb was justified in ordering the Navy to file an SEIS.

Both the majority and the dissent, however, agreed that Judge Crabb was incorrect in issuing an injunction. Judge Crabb held that an injunction was proper if an agency commits itself to a policy, namely the reactivation of Project ELF, without complying with the mandated procedures (i.e. conducting an SEIS). Judge Wood held that, although no national defense exception exists in NEPA, the well-being of national security must be determined before an injunction is issued.

Judge Cudahy reasoned that where there is new information relevant to an ongoing project, enjoining its continuation would only undermine NEPA. For example, an agency would be tempted to "soft pedal relevant information" and thereby appear to be in compliance with NEPA, whereas the truth would be that such compliance would be merely on paper. Slip op. at 35.

Richard Friedman, '86

LANDFILLS

City of Oak Creek v. Milwaukee Metropolitan Sewerage District, 576 F.Supp. 482 (E.D. Wisc. Dec. 14, 1983).

The City of Oak Creek, seven individual owners of land proposed to be condemned, and a church owning property near the land brought suit to enjoin the Milwaukee Metropolitan Sewerage District, the Milwaukee Metropolitan Sewerage Commission and the eleven Commissioners from condemning certain property in the City to use as a landfill site for solid wastes. The plaintiffs alleged a threatened violation of both their constitutional rights under 42 U.S.C. §1983 (1982) and of the National Environmental Policy Act (NEPA), 42 U.S.C. §4321 (1982). They sought, *inter alia*, preliminary injunctive relief to restrain the defendants from acquiring the proposed landfill site and from having the site approved for landfill construction. The decision follows the defendants' motion to dismiss the plaintiffs' §1983 claim for lack of subject matter jurisdiction and the plaintiffs' NEPA cause of action for failure to state a claim.

The Sewerage District, empowered to plan, construct and operate a sewer system designed for disposing of solid waste generated at two Lake Michigan wastewater treatment plants, began comprehensive planning for solid waste management in 1977, resulting in the Solids Management Facility Plan (SMFP) of June 1980. The SMFP recommended that solid waste from one location be landfilled (approx. 250 dry tons/day) and that solid waste from the second location be used for agricultural applications. A Site Specific Analysis (SSA) identified a 288 acre tract in the City of Oak Creek as the preferred site for a sludge landfill.

During the SSA study period, but following the selection of the site, the District staff recommended an amendment to the SMFP that reduced proposed fill material to only 127 dry tons/day for four months per year and changed the source location. Due to the changes, the plaintiffs requested that the District review selection of the Oak Creek site. This request was denied by the District.

The SMFP was the subject of an environmental impact statement (EIS) by the Wisconsin Department of Natural Resources (DNR) and the U.S. Environmental Protection Agency (EPA). The DNR conditionally approved the SMFP, as well as the concept of landfilling solid wastes, in June 1981. In December 1982, the Sewerage Commission authorized commencement of condemnation procedures under state law. At that time, the plaintiffs had not filed state action to contest the condemnation proceedings.

In support of their §1983 claim, the plaintiffs asserted that, in light of the substantial factual changes in the proposed amendments to the SMFP, the Sewerage Commission's decision to acquire the Oak Creek site without conducting further site selection analysis is arbitrary, capricious, and made in bad faith, all in violation of the plaintiffs' equal protection and Fourteenth Amendment substantive due process rights.

Chief Judge Reynolds held the federal district court to be without jurisdiction to enjoin condemnation under §1983. Rather than basing the decision on the insufficiency of the complaint, the Court primarily justified denying jurisdiction by relying on the proposition that state courts are a better forum for resolving local land use disputes. The Court acknowledged that, although "federal courts have a special role to play in the civil rights area, [the fact] that land use cases are sometimes civil rights cases . . . does not compel the conclusion that any land use controversy that can be cast in civil rights terms is entitled to vindication in a federal forum." 576 F.Supp. at 487 (quoting from Ryckman, *Land Use Litigation, Federal Jurisdiction, and the Abstention Doctrines*, 69 Calif.L.Rev.377 (1981)).

Observing that this was a case of first impression, the Court noted an increase, since 1960, of federal suits to resolve land use disputes. In language subsequently cited (in denying jurisdiction) in *Corder v. Sherwood*, 579 F. Supp. 1042, 1044 (E.D. Ark. 1984), the Court stated that:

Section 1983 was never intended as a vehicle for federal supervision of land use policy Quite the contrary, federal courts have no business meddling in state condemnation proceedings under Section 1983 in the absence of some compelling evidence of a genuine civil rights violation. Any procedural or substantive "process" that the plaintiffs may be "due" in this case is amply afforded by the statutory condemnation procedure found in state law. Thus, this Court resists the plaintiffs' effort to make a federal case out of what, in truth, is a local land use concern.

576 F.Supp. at 487.

The plaintiffs sought to enjoin further condemnation proceedings pending completion of both the EIS on the SSA and the supplementary EIS, arguing that to permit condemnation prior to completion of the EIS would frustrate the intent of NEPA and violate its procedural safeguards which require consideration of environmental effects before a project is commenced. In finding this claim without merit, the Court emphasized (1) that NEPA's requirements are strictly procedural, creating no substantive rights, and (2) that the role of the federal courts is to ensure that the agency has considered the environmental consequences in a "fully informed" and "well-considered" decision.

In short, the Court held that NEPA imposes no requirement that the Sewerage District refrain from committing resources toward the acquisition of a proposed landfill site until the environmental consequences of placing a landfill facility there are presented and considered in a statutory EIS. In so holding, the Court found that, while federal courts have the power to enjoin non-federal actors pending the observance of NEPA's procedural duty to prepare an EIS if a partnership with the federal government can be shown (and despite the fact that the defendants admit that federal grant funds have been received for the purposes of site planning), the plaintiffs' claim requires the Court to interject itself impermissibly into an area of administrative discretion. Having been admonished by the Supreme Court in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), not to introduce additional procedural or substantive standards of review into the provisions of NEPA, the Court held that a federal court's only role is to ensure that the environmental consequences are considered before a landfill is constructed on a proposed site; not to pass upon the merits of the ultimate decision. Therefore, so long as the NEPA-required impact statements were prepared, the federal court could not interject its own substantive standards.

In addressing the plaintiffs' claims that an EIS must be completed before a proposed federal action is "commenced" and that condemnation must not be permitted until an EIS is prepared on the proposed amendment to the SMFP, the Court held that NEPA does not require preparation of an EIS on the District's SSA before specific site acquisition activities are undertaken. The Court noted that "[i]t is the landfill itself, not the land acquisition, that causes the major environmental impact", stressing that "when a proposed action is rejected, expenditures on land are not wasted in the sense that construction expenses are wasted" and that "[t]o require an environmental assessment at an earlier point . . . would amount to undue judicial involvement and would require the preparation of unnecessary impact statements." 576 F.Supp. at 490.

The plaintiffs subsequently appealed the NEPA determination, but withdrew the appeal in a letter to the Circuit Court dated February 28, 1984.

Gregory D. Shanklin, '85

ENERGY

Van Dissel v. Jersey Central Power & Light Co., 476 A.2d 310 (N.J. Super. A.D. May 30, 1984).

Plaintiffs, riparian landowners, brought an action in the Superior Court of New Jersey to recover for damage to their property allegedly caused by thermal pollution arising from the building and operation of the defendant's nuclear power plant cooling system. (See Vol. 1, No. 1, *Hofstra Environmental Law Digest* (Spring 1984) for a review of the *Van Dissel* case prior to this May 30, 1984 decision.)

The major issue at trial and on appeal was whether state common law tort claims for thermal pollution damages, made against the owner and operator of a federally licensed nuclear power plant, are preempted by the Atomic Energy Act of 1954 or the Price-Anderson Act of 1957. The Appellate Division of the Superior Court of New Jersey held, on remand from the United States Supreme Court, that such state-authorized compensatory damage claims are not preempted by the federal atomic energy laws.

In reaching its conclusion, the New Jersey Superior Court relied heavily on the U.S. Supreme Court's opinion in *Silkwood v. Kerr-McGee*, 464 U.S. ___, 104 S.Ct. 615, (1984). In *Silkwood*, the Court concluded that, in passing and amending the Price-Anderson Act, Congress had assumed that state law remedies would be available to those injured by nuclear incidents. Although this policy creates tension when considered with the U.S. Nuclear Regulatory Commission's exclusive right to regulate safety matters with respect to nuclear energy, the *Silkwood* Court stated that this was a tension Congress was willing to tolerate.

The defendant, Jersey Central Power & Light Co., attempted to distinguish *Silkwood* from the case at hand by arguing that the *Silkwood* holding was limited to radiation related damages only. Presiding Judge Bischoff of the Appellate Division, however, refused to view the *Silkwood* holding that narrowly, citing Justice Blackmun's dissent which states that "Congress intended to rely solely on federal expertise in setting safety standards, and to rely on States and juries to remedy whatever injury takes place under the exclusive federal regulatory scheme. Compensatory damages therefore complement the federal regulatory standards, and are an implicit part of the federal regulatory scheme." 476 A.2d at 316 (citing *Silkwood*, at 629).

Bill Condon, '85

Judicial, Legislative and Regulatory Updates

BIOTECHNOLOGY

On May 16, 1984, Judge John Sirica issued a preliminary injunction against the University of California and the National Institutes of Health (NIH), an agency within the U.S. Department of Health and Human Services that funds biological research. *Foundation on Economic Trends v. Heckler*, 587 F.Supp. 753 (1984). Under the Order, the University is enjoined from conducting an experiment involving the deliberate release of genetically altered bacteria into the environment. The experiment was proposed by the University's Dr. Steven Lindow and would have consisted of spraying the bacteria on crops to increase their resistance to frost. (See Vol.1, No. 1, *Hofstra Environmental Law Digest* (Spring 1984) for a review of the lawsuit prior to the May 16th Order).

In granting the preliminary injunction, the Court concluded that the plaintiffs, led by genetic engineering critic Jeremy Rifkin and his Foundation on Economic Trends (Foundation), would probably succeed in showing that the NIH had violated the National Environmental Policy Act (NEPA), 42 U.S.C. §4332 (1982) by not taking the required "hard look" at the environmental consequences of deliberate

release experiments. As a result, the Court not only enjoined the Lindow experiment, but also prohibited the NIH from approving any deliberate release experiments pursuant to the NIH's Guidelines for Recombinant DNA Research (Guidelines) until a final judgment on the merits of the case is reached.

On June 1st, two weeks after the preliminary injunction was issued, the NIH's Recombinant DNA Advisory Committee (RAC) approved an experiment "voluntarily submitted" by Advanced Genetic Sciences, Inc. (AGS). The Foundation alleges that the AGS experiment is "similar in substance and purpose" to the Lindow experiment and, therefore, enjoined by the May 16th Order. Motion for Summary Enforcement of the Order of the Court of Appeals or, in the Alternative, For Preliminary Injunction, *Foundation on Economic Trends v. Heckler*, No. 83-2714 (D.D.C. motion filed June 11, 1984), at 3. The May 16th decision had adopted the contention of the NIH that RAC approval of privately sponsored deliberate release experiments is not subject to the requirements of NEPA and therefore not enjoined by its Order. The Court noted that NEPA requires federal agencies to consider the potential environmental consequences of major actions prior to their approval; but, because the

AGS experiment does not involve NIH or NIH-affiliated funding, the submission and approval of the experiment were viewed by Judge Sirica to be completely voluntary and therefore not bound by the Court's NEPA injunction.

Having lost the attempt to enjoin private firms under the May 16th Order, the Foundation's motion of June 11, 1984 requests that the Court reconsider the issue. In the motion, it is argued that AGS and other private firms are bound by the preliminary injunction because they are required to comply with the NIH Guidelines under a Stanford University patent-license agreement (Agreement) and an NIH Directive published in the *Federal Register*. The Foundation points to Patent 4,237,224, issued in 1980 to university scientists Stanley Cohen and Herbert Boyer, as a comprehensive patent covering the basic recombinant DNA technique used by AGS and at least 67 other biotechnology firms. The Foundation alleges that the broad scope of the patent makes AGS and the other private firms licensees under the patent. As licensees, they must comply with the NIH Guidelines or be in violation of the Agreement. In support of this argument, the Foundation relies on an NIH Directive which states that "the licensee provides assurance of compliance with the . . . guidelines [so that] the requirements set for NIH grantees and contractors will thus be honored by licensees as well." 43 Fed. Reg. 33098 (1978). As of early November 1984, the District Court had not ruled on the motion for reconsideration.

Also presently before the District Court is a motion in which the Foundation seeks to preliminarily enjoin or vacate the June 1st approval of the AGS experiment. The motion alleges that significant elements of the AGS experiment were considered by the NIH in a closed session on June 1st, thereby violating a February 6, 1984 Order of the U.S. Court of Appeals for the District of Columbia Circuit. The February 6th Order enjoined the NIH from considering the AGS experiment behind closed doors because of their failure to fully and prospectively demonstrate the need for such a session. (Unpublished opinion, Docket No. 84-5079.). In addition, the Foundation asserts that the *Federal Register* notice announcing the June 1st meeting, 49 Fed. Reg. 17672 (1984), violated the Federal Advisory Committee Act, 5 U.S.C. App. I (1982), because it was inadequate and misleading.

In a reply brief filed in October 1984, the NIH appealed the District Court's preliminary injunction only on the issue of the NIH's future approval of deliberate release experiments. *Foundation on Economic Trends v. Heckler*, Nos. 84-5314, 84-5419 (D.C. Cir. filed Oct. 10, 1984). The NIH contends, *inter alia*, that the Foundation did not meet the standard for a preliminary injunction because they failed to show that they would suffer irreparable harm if the NIH continued to approve deliberate releases during a trial on the merits.

Whether or not the Foundation prevails in its attempts to bind private industry to the NIH Guidelines, the federal government is moving towards a more comprehensive approach to regulating new biotechnologies. Although there is presently no federal legislation that specifically addresses recombinant DNA and related techniques, several federal agencies are adapting existing health and environmental statutes to cover these new technologies. For example, on October 17, 1984 the U.S. Environmental Protection Agency (EPA) announced an interim policy requiring notification of all small scale field tests of certain microbial pesticides. 49 Fed. Reg. 40659 (1984). Upon notification, the EPA will determine on a case-by-case basis whether "experimental use permits", required under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. §136 (1982) are required in these situations. According to EPA Biotechnology Project Director Ann Hollander, the EPA will publish a *Federal Register* notice in the near future that will lay out EPA's plans for regulating biotechnology under FIFRA and the gap-filling Toxic Substances Control Act (TSCA), 15 U.S.C. §2601 (1982). Other agencies (e.g. the Food and Drug Administration and the Department of Agriculture) are also claiming authority to regulate new biotechnologies and some may be challenged in court or by the Reagan Administration. See Kriz, *Growing Biotechnology Industry Sparks Governmental Turf Battle Over Federal Regulation of Potential Health and Environmental Risks*, 8 Chem. Reg. Rep. (BNA) 393 (July 6, 1984).

In a separate lawsuit, the Foundation has sued the U.S. Department of Agriculture (USDA) to enjoin USDA-sanctioned experiments involving the exchange of genetic material between humans and animals. *Foundation on Economic Trends v. Block*, No. 84-3045 (D.D.C. filed Oct. 1, 1984). The complaint asserts that

the USDA's overemphasis on research aimed at producing faster growing and larger animals is detrimental in environmental, social, and economic terms. The Foundation argues, *inter alia*, that transplanting the human growth hormone gene into animals such as pigs and sheep violates the species' biological integrity and constitutes a new form of cruelty to animals. The complaint states that increased disease susceptibility may result due to the emphasis on large size and rapid growth. Metabolic diseases, joint misalignment, and skeletal deformation are among the ailments cited by the Foundation as likely to arise. According to the Foundation, a trial date has been tentatively scheduled for February 28, 1985.

Gary Jones, '85

COASTAL ZONE

In *Secretary of the Interior v. California*, 104 S. Ct. 656 (1984), the United States Supreme Court faced the issue of whether the Department of Interior's proposed sale of Outer Continental Shelf (OCS) oil and gas leases was an activity "directly affecting" the California coastal zone management plan within the meaning of the Coastal Zone Management Act (CZMA), 16 U.S.C. §456(c)(1)(1982). That section of the CZMA provides, in part, that an agency's proposal which directly affects the coastal zone of an area must be consistent with approved state management programs "to the maximum extent practicable." The agency must submit a "consistency review" to the governor of the affected area showing that the lease sale would be consistent with the state coastal zone management plan.

In a 5-4 decision, the Supreme Court held that CZMA §307(c)(1) was not triggered by the Department of Interior's decision not to present a consistency review because the selling of the oil leases did not "directly affect" the California coastal zone. The majority further held that only the subsequent exploration, development and production of tracts already sold directly affected the coastal zones and that only these phases of the Interior Department's plan required that a consistency determination be done.

The majority's reasoning in adopting the narrower definition of "directly affects" is based on the legislative history of the CZMA. The Court found that the Senate's definition of coastal zone excluded federal lands from falling within the scope of consistency requirements while the House of Representatives voted to include federal lands. Since the conference committee adopted the Senate definition of coastal zone, the Court concluded that Congress intended a limited application of §307(c)(1) and thus found that the federally-owned OCS lease did not fall within the scope of §307(c)(1). (See Vol. 1, No. 1. *Hofstra Environmental Law Digest* (Spring 1984) for a more complete review of the Supreme Court's decision.)

The present unpopularity of the ruling in *Interior v. California* is demonstrated by congressional action designed to erase the effects of the decision. Less than two weeks after the Supreme Court ruled, H.R. 4589 was introduced in the House of Representatives. This bill proposed an expansion to the CZMA phrase "directly affects." The Court in *Interior v. California* had accepted the Department of Interior's limiting definition of "having a direct identifiable impact on the coastal zone" and rejected the State of California's definition of an "activity initiating a series of coastal management consequences." H.R. 4589 would broaden the meaning by combining both parties' definitions into one in which an activity that "directly affects the coastal zone" under §307(1)(B) is one that "(i) produces identifiable physical, biological, social or economic consequences in

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the coastal zone; or (ii) that initiates a chain of events likely to result in any of such consequences." The bill was approved with amendments on April 3, 1984 but it has not passed the House of Representatives.

The Senate proposed S.2324 to amend the CZMA definition of "to the maximum extent practicable" and require consistency reports in all cases that do not meet three exceptions. A federal activity would only be excluded from the consistency review requirement under CZMA§307(c)(1) if:

- (i) undertaken to counter the immediate effects of a declared national emergency;
- (ii) necessary for reasons of national security; or
- (iii) required by any provisions of a Federal law which prevents consistency with any provision of an approved State coastal zone management program.

S. 2324 98th Cong. 2d Sess. (1984).

If these amendments are passed, it would appear that the Court in *Interior v. California* may have misinterpreted congressional intent regarding definitions encompassed in CZMA.

The U.S. Department of Commerce's National Oceanic and Atmospheric Administration (NOAA), the agency responsible for administering the CZMA, has also proposed many revisions in the current CZMA definitions in light of the *Interior v. California* decision. For example, in an Advance Notice of Proposed Rulemaking (ANPR), 49 Fed.Reg. 22825 (1984), NOAA requested views from the public and interested parties on the meaning of "directly affecting." The ANPR further announced NOAA's intent to remove those references in NOAA regulations which identify gas lease sales as activities covered by §307(c)(2).

On September 10, 1984, NOAA formally announced that they were conducting a comprehensive review of the federal consistency process established by §307. 49 Fed.Reg. 35541. The study will document state and agency accounts of successful implementation of CZMA as well as any unresolved conflicts. NOAA anticipates that results from the study will be useful to Congress when it considers whether to reauthorize the CZMA in 1985.

David Rabbino, '85

ENDANGERED SPECIES

The Endangered Species Act Amendments of 1982 became law on October 13, 1982, thus modifying the Endangered Species Act of 1973. In order to comply with the changes effected by the 1982 Amendments, the U.S. Department of Interior's Fish and Wildlife Service and the Commerce Department's National Marine Fisheries Service (Services) amended 50 C.F.R. Part 424 on October 1, 1984. 49 Fed.Reg. 38900. Part 424 governs the listing, delisting and reclassifying of species as endangered or threatened as well as the designation or revising of critical habitat. A species is "endangered" when there is a danger of its extinction throughout all or a significant part of its range. 50 C.F.R. §424.02(e). A "threatened" species is a species which is likely, within the foreseeable future, to become endangered throughout all or a significant part of its range. 50 C.F.R. §424.02(m). A species' "critical habitat" is the specific geographical areas which the species occupies, at the time it is listed as endangered or threatened, where physical or biological features essential to the conservation of the species are found. These features may require special management considerations or protection. Critical habitat also includes specific areas, outside the geographic area, which are occupied by a species at the time it is listed as long as the Secretary of the Department of the Interior or the Department of Commerce determines that such areas are essential to the conservation of the species. 50 C.F.R. §424.02(d).

The changes in the listing procedures were devised to ensure that only biological factors are considered in the determination of the endangered or threatened status of a species. Economic and non-biological factors are prohibited from entering the listing process. Economic considerations, however, continue to be considered relevant for purposes of designating critical habitat and therefore remain part of the decisionmaking process.

Significant changes have also been made to "streamline" the listing procedure. Time periods within which rules must be adopted have been reduced and public meeting and hearing requirements have been consolidated. Although the Amendments restate the requirement of concurrent listing and critical habitat designation, listings may now be finalized without waiting for the designation of the critical habitat where the relevant data demonstrate that a prompt listing is vital to the conservation of a species. This final rule took effect on October 31, 1984.

The comments provided by interested parties during this rulemaking procedure indicated that the consideration of only biological factors in the listing process was the subject of some controversy. Particularly, Conoco Inc., North American Production (CNAP) did not agree that Congress had intended that "every scarce creature or plant should be protected at all costs!" 49 Fed.Reg. at 38903. However, the Colorado River Water Conservation District (CRWCD) expressed their concern that, in the past, too little emphasis may have been afforded to the quality and validity of the biological information used in the listing process. CRWCD suggested that the Services develop listings based on biological data found using the best available scientific and commercial information and not on "shaky scientific foundations or biased analyses." *Id.* The Services agreed with the recommendation of CRWCD and, in response to the concern of CNAP, emphasized that Congress had clearly indicated that any costs of eventual protection were not to be considered as part of the identification or listing process for endangered or threatened species.

The Fish and Wildlife Service also amended Part 17, Title 50 of the *Code of Federal Regulations* to comply with the 1982 Amendments. 49 Fed.Reg. 33885 (1984). This final rule became effective on September 26, 1984. The Amendments set forth procedures to establish and/or designate certain populations of species otherwise listed as endangered or threatened as "experimental populations." An experimental population is a designated population of endangered or threatened species that has been or will be released into a suitable natural habitat outside the species' current natural range. Under the new rules, such experimental populations are to be entirely geographically separate from the nonexperimental populations of the same species. 50 C.F.R. §17.80(a). Before any endangered or threatened experimental population may be released, the Secretary must find, using the best scientific and commercial data available, that such a release will further the conservation of the species. These populations are designated as either "essential" or "nonessential." If the loss of an experimental population is likely to significantly reduce the probability of the survival of the species in the wild, it is considered to be an "essential experimental population"; otherwise, the experimental population is "nonessential." 50 C.F.R. §1780(b). A nonessential experimental population will not be protected under Section 7(a)(2) of the Act. This section prohibits federal agencies from authorizing, funding or carrying out any activity which is likely to either jeopardize the continued existence of endangered or threatened species or adversely affect their critical habitat. Essential experimental populations remain protected by all provisions of Section 7.

Procedures have also been established for the promulgation of appropriate protective regulatory measures for these experimental populations. Special rules will be developed on a case-by-case basis to identify the geographic location of, and management procedures for, the experimental populations. Regulations for experimental population designation will be issued in compliance with the informal rulemaking provisions of the Administrative Procedure Act (APA), providing for public notice and comment.

Colorado, Utah, and the Forest Service of the U.S. Department of Agriculture suggest that the designation and listing process is overly complex and cumbersome. 49 Fed.Reg. at 33887. The Colorado River Water Conservation District expressed its desire for an environmental impact statement (EIS) to provide a more comprehensive analysis of these regulations. The Forest Service, however, believes that an environmental assessment is adequate and an EIS is not required for such rule making because this regulation is considered "generic" and "procedural" in nature and that no significant impact on the quality of the human environment is anticipated.

Ellen Drucker, '85

CERCLA

The 98th Congress failed to reauthorize the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund), 42 U.S.C. §9601 (1982), prior to adjournment in October. Senator Robert Stafford (R-Vt.) attempted to attach S. 2892, a reauthorization bill, to H.J. Res. 648, but the Senate voted on October 2, 1984 to resist such an effort.

S. 2892 proposes *inter alia*: (1) establishing a \$150 million demonstration program in five states to provide a source of funds for assisting hazardous waste victims in these states; (2) forcing states to bear responsibility for siting hazardous waste facilities by making the availability of CERCLA money contingent upon a state demonstrating its ability to properly dispose of waste generated within its borders for the next 20 years; (3) providing up to \$250 million over five years to fund research on the health effects of chemicals found at the sites considered by the U.S. Environmental Protection Agency (EPA) to merit National Priority List (NPL) status; (4) requiring the EPA to consider factors such as money available in the "Superfund" and risks to public health and the environment when deciding upon remedial action for hazardous waste sites; (5) extending the post-closure maintenance period for Superfund sites from one year to five years, while splitting the costs between the EPA, who would pay 90 percent, and the state, who would pay 10 percent; (6) extending the statute of limitations for recovery of natural resource damages from three years after discovery to three years after the U.S. Department of Interior issues regulations defining such damages; (7) enabling states to levy Superfund-type taxes to pay for both state funded clean-ups and the state's share in federally funded cleanups; and (8) requiring federal agencies to "concur" with EPA concerning hazardous waste cleanups on federal land.

Note that S. 2892 does not include a mandatory schedule for cleaning up NPL sites. There is no citizens suit provision, nor are punitive damages proposed for generators who do not join cleanup agreements. All of these provisions were included in H.R. 5640, a CERCLA reauthorization bill passed by the House of Representatives on August 10, 1984.

Carl Howard, '86

RCRA

Technological progress has brought to society not only an enhanced standard of living but also serious financial, managerial and technical problems in the disposal of solid and hazardous wastes. The hazardous waste dilemma eventually became a national problem and required action beyond the state or regional level. Federal financial, technical and regulatory assistance was a necessary addition to state and regional efforts. In response to this need, the Resource Conservation and Recovery Act (RCRA) was enacted in 1976, 42 U.S.C. §6901 (1982), thus amending the Solid Waste Disposal Act of 1970, 42 U.S.C. §3251 (1970 ed. and Supp. V).

RCRA was enacted to promote environmentally safe solid waste collection, disposal and recycling in order to protect health and the environment and conserve material and energy resources. In May 1980, the U.S. Environmental Protection Agency (EPA) promulgated Hazardous Waste Regulations as required by RCRA. 45 Fed. Reg. 33066 (1980). RCRA and the implementing regulations established a cradle-to-grave system of regulating hazardous waste with which generators, transporters, and owners and operators of storage and disposal facilities must comply. Generators must comply with a manifest system and pretransport, recordkeeping, and reporting requirements. Transporters are prohibited from accepting any hazardous waste for shipment which is not accompanied by a manifest form supplied by the generator. Treatment, storage, and disposal facilities must obtain permits in order to operate.

In October 1984, the House-Senate Conference Committee on RCRA passed compromise bill H.R. 2867 to reauthorize and amend RCRA. On November 9, 1984, President Reagan signed the bill into law. Pub. L. No. 98-616.

The law extends RCRA through fiscal year 1988 at an average funding level of \$247 million per year. Grants are authorized to allow the states to conduct their hazardous waste programs. In addition, appropriations to EPA and the states are provided for the regulation of underground storage tanks, to assist small quantity generators in complying with the regulations, and to conduct criminal investigations of RCRA violations.

Small Quantity Generators

This law, for the first time, requires that EPA issue standards by March 31, 1986 for the handling of hazardous wastes produced in quantities ranging from 100 to 1,000 kilograms per month. Although these standards are less stringent than those applicable to the larger generators, the small quantity generators must nonetheless meet the law's threshold requirement of protecting human health and the environment. These small generators are also required to supply a uniform manifest form with their hazardous waste shipment. In addition, hazardous waste onsite storage is only allowed for a period of 180 days without a permit.

Land Disposal

In order to qualify for a land disposal permit, Pub. L. No. 98-616 requires that any new or expanded facility have at least two liners, leachate collection systems between the two liners (to also function as a leak detection system), and a groundwater monitoring system. All new or expanded landfill and surface impoundments will be affected by these permit requirements. Over a period of four years, most surface impoundments that are not meeting minimum technological requirements are prohibited from accepting, storing, or treating any hazardous waste listed under RCRA. Pub. L. No. 98-616 also prohibits the disposal of noncontainerized liquid hazardous waste into landfills *notwithstanding* the addition of absorbent material. The law mandates that the EPA promulgate regulations to minimize the disposal of containerized liquid in landfills and a timetable is set forth within which the land disposal of certain liquid waste is entirely banned unless EPA determines that such disposal would not pose a threat to human health and the environment. Solvents and dioxin-contaminated wastes are among the substances designated for regulation under this timetable.

Other Requirements

Under the law, EPA is required to establish rules pertaining to acid wastes, liquids containing polychlorinated biphenyls or other halogenated organic chemicals, and liquids containing metals such as arsenic, chromium, lead and mercury. In addition, permit requirements are to be promulgated by EPA before liquid hazardous wastes can be disposed of in salt dome formations, salt bed formations, or underground caves. EPA is also required to assess all wastes considered hazardous under RCRA, other than those specified in Pub. L. No. 98-616, to determine whether the disposal of these liquid wastes would pose a threat to human health or the environment.

Facilities operating under interim status RCRA permits are required to apply for final permits within one year after the law was passed. These facilities must also certify that they are meeting full groundwater monitoring and financial responsibility requirements under RCRA. The bill sets up a timetable within which EPA would be required to issue final permits for all land disposal facilities, incinerators, and all other hazardous waste facilities. A research permit may be issued to a facility that requests the testing of a new treatment technique even absent formally issued standards for the use of that technique.

As reauthorized and amended, RCRA also requires all hazardous waste generators who apply for permits for the operation of on-site storage or disposal facilities to certify both that they have implemented a program to reduce the amount and toxicity of generated waste and that the proposed treatment, storage, or disposal method would minimize threats to human health. The generators must indicate on their manifest form that they have in fact instituted a waste reduction program.

Pub. L. No. 98-616 provides notification requirements for owners of underground storage tanks which contain petroleum or hazardous substances regulated under the 1980 Comprehensive Environmental Response, Compensation and Liability Act. 42 U.S.C. §9601 (1982). The underground tank provisions require, *inter alia*, the promulgation of regulations concerning leak detection systems, recordkeeping, financial responsibility, and tank closure. (See related article in this issue.) Requirements concerning notification, recordkeeping, technical standards, and warning labels apply to producers, burners, distributors and marketers of fuels produced by hazardous wastes.

Other provisions of Pub. L. No. 98-616 include the establishment of a nineteen-member National Groundwater Commission that will evaluate groundwater quality and report their findings to Congress. The law also expands the citizen suit provision of RCRA and provides for an ombudsman's office within EPA that will address complaints and information requests from the public.

Ellen Drucker, '85

Leaking Underground Storage Tanks: Buried But Not Forgotten

Scope of the Problem

In May of 1983, residents of a small community in North Babylon, New York detected strong gasoline odors in their homes. Upon investigation, New York State officials learned that approximately 100,000 gallons of petroleum had leaked from an underground storage tank located at a nearby service station, and that the leak had contaminated the drinking water and air of the neighboring community.¹ One year later, the local health department issued an order² directing the owner of the gas station to relocate those families who were exposed to dangerously high levels of the toxic petroleum by-products benzene, toluene and xylene (BTX).³ The health department's order was prompted by evidence that a number of residents exposed to the leak were suffering from a variety of ailments, including nausea, headaches, dizziness, drowsiness and liver contamination. Private physicians treating families from the affected area reported the presence of benzene in the urine of children and benzene phenols or "rings" on the livers of several residents.⁴

The incident reported above is not unique. All across the nation underground storage tanks are leaking, releasing their toxic contents into the air and water of unsuspecting communities. This article discusses the problems presented by leaking underground storage tanks and the legislative and regulatory mechanisms that address this issue.

The United States Environmental Protection Agency (EPA) recently stated that "leaking storage tanks may be causing the most serious risks to human health and the environment."⁵ These leaks pose a severe threat to the nation's groundwater. In the United States, one half of the population relies on groundwater for its potable water supply.⁶ Unfortunately, groundwater supplies are easily contaminated. In a recent EPA study of the nation's 48,000 public drinking water systems, the agency detected manmade chemicals in about one third of these systems.⁷ One EPA official was quoted as saying that "one gallon per day of gasoline . . . can contaminate the water supply of a 50,000 person community . . ."⁸ The problem is further exacerbated by our inability to restore groundwater to its natural state once polluted. In the case of petroleum leaks, attempts to decontaminate are typically only 40-60 percent effective.⁹ Thus, the sensitive nature of groundwater coupled with our dependence on it for our drinking water necessitates the creation of a sound policy aimed at addressing sources of contamination.

Several factors, however, make the development of such a policy for underground storage tanks difficult. One of the major problems is that we have no exact data as to how many tanks are out there and, more importantly, how many are leaking. The EPA estimates that, of the 2.5 million tanks used to store petroleum, up to 25 percent are leaking.¹⁰ These figures, however, refer only to tanks which contain petroleum products; therefore, the scope of the threat is dangerously underestimated. While it is true that approximately 40 percent of the underground storage tanks are owned by major oil companies, the remaining 60 percent are owned and operated by a variety of industries who store a diverse mix of volatile substances.¹¹ These substances include heavy metals, acids, flammables and synthetic organics.

An unfortunate example of the problem posed by leaks of non-petroleum products is the present situation in the "Silicon Valley" region of northern California. In the past three years, the home of the nation's high tech industry has experienced more than 120 underground leaks.¹² The majority of these leaks came from tanks owned by the semiconductor industry which uses toxic solvents to clean computer chips. So far, leaks from these tanks have contaminated private drinking water wells in several communities.¹³ An important step towards creating a strong regulatory policy, therefore, is the attainment of more realistic estimates as to the number of tanks that pose a threat to groundwater.

Another key step towards a sound policy is the development of a better understanding of the probability and causes of leaks. Generally, there are three causes of leaks from underground storage tanks: (1) corrosion; (2) poor installation; and (3) poor operating or management practices.¹⁴

Corrosion is, perhaps, the worst of the three causes in that it has the highest probability. The great majority of storage tanks now in

the ground are made of bare carbon steel; a substance which is extremely susceptible to corrosion.¹⁵ Corrosion is, however, primarily an electrical process which can be enhanced by a number of external and internal factors. The single most influential factor is the soil in which the tank is located. Soil characteristics such as acidity, temperature, moisture, bacterial content and resistivity (the degree to which soil can resist the flow of electrical current) can all affect the rate of corrosion.¹⁶ Other factors affecting the corrosivity of underground tanks are adjacent metal structures, stray electrical currents and the age of the tank itself.¹⁷ This last factor is of particular concern because, based on the EPA's (conservative) estimates, at least one million of the steel tanks now in the ground are more than sixteen years old.¹⁸

The second principal cause of leaks is poor installation.¹⁹ Improper handling and installation of the tanks and pipe connectors can result in structural damage to the surfaces of the storage system and thereby increase the probability of leakage and corrosion. Installing tanks on poor backfill or bedding or without proper anchors in areas which experience fluctuations in water table levels will also increase the chance of leakage.

In addition to corrosion and poor installation, poor operating practices such as overfilling or puncturing the tank wall with measurement sticks during inventory can and does result in leaks.²⁰ Leaks from poor operating practices are also attributed to inaccurate liquid level readings.

Technological Solutions

Fortunately, as our understanding of the causes of leaks expands, so has the technology of leak prevention and detection. Sophisticated leak detection technology has enabled tank owners to take corrective action before the leak can cause harm. Some of the systems detect leaks through the employment of thermal, electrical and vapor sensors.²¹ Other detection systems rely on tank tightness testing and strict monitoring and inventory schedules.²²

Leak prevention technology has been particularly useful in providing methods for slowing and, in some cases, halting the corrosion process. One such method is cathodic protection. Cathodically-protected underground storage systems use either a sacrificial anode or a direct current from an external source to reverse the electrochemical action of corrosion.²³ Another prevention method, which can be used in conjunction with cathodic protection, consists of applying coatings and linings such as rubber, epoxies and silicones to the walls of the pipes and tanks.²⁴

The use of non-metallic materials such as fiberglass-reinforced plastics (FRPs) can, when handled properly, essentially eliminate the problem of corrosion.²⁵ FRPs, however, are not the answer to the problem of leaking underground storage tanks because the resins and plastics used to manufacture these materials make them unsuitable for the storage of certain hazardous and nonhazardous substances.²⁶

Two other forms of leak prevention include secondary containment devices and overfill protection systems. Protection by secondary containment involves the establishment of a membrane outside the tank to contain leaks coming from the tank itself. Typical forms of secondary containment are double-walled tanks, synthetic liners, concrete vaults and natural barriers such as clay.²⁷ Overfill protection systems range from simple gauges which indicate the level of fluid already in the tank to complicated automatic shutoff valves.

While these technologies afford us some hope, "there's no such thing as a free lunch." The cost of retrofitting underground storage systems with the types of technology described above is high. Perhaps the only way to justify such expenditures is to weigh these costs against the costs incurred by leaks. To begin with, leaks are simply not good business. Valuable products are lost and public relations suffer. More importantly, the number of cases in which companies are being forced to compensate victims of underground leaks is on the rise and the potential liability is staggering.

In one recent case, Chevron USA, Inc. paid in excess of \$10 million to settle claims arising from a single underground tank leak.²⁸ In another case, Mobil, Exxon and the State of Rhode Island signed a consent decree in which each agreed to pay one third of \$1.1 million to replace a drinking water supply that was contaminated by

simultaneous leaks from two gas stations.²⁹ Residents of the affected area have also filed a \$110 million lawsuit seeking compensation for lost property value and pain and suffering. In the "Silicon Valley" situation mentioned above, it is reported that some two dozen firms have already spent close to \$70 million in prevention and cleanup costs.³⁰

Regulation

As the foregoing discussion suggests, the nation's ominous predicament with leaking underground storage tanks requires stringent regulation in order to safeguard public health and the environment. Approximately twenty seven states³¹ and sixty five local municipalities³² have already enacted some form of legislation aimed at leak detection and prevention. The regulations, for the most part, focus on eleven categories of protection: permits, equipment specifications, installation, secondary containment, replacement, inventory control, tightness testing, monitoring, storage system closure, recordkeeping and penalties. These regulations vary widely depending on the area's own underground storage tank problem and the hydrological sensitivity of the region.

Florida, for instance, imposes extremely stringent equipment specifications because it is a sole source aquifer region.³³ Under its law, all new tanks installed in the state must be made of cathodically-protected steel, FRP, double-walled steel or plastic, or an otherwise approved design.³⁴ Another example of stringent regulation is the permit requirements found in the State of Kansas. These regulations call for an exhaustive list of information including construction plans, material specifications, soil analysis and local water table readings.³⁵ A different twist to the traditional permit requirements is seen in Santa Clara County, California, which demands earthquake fault information.³⁶ The State of Maryland imposes some of the most aggressive inventory control requirements including the daily measurement of liquid levels in all tanks.³⁷

Probably the most costly and, therefore, controversial category of leak prevention is that of replacement. Here again, Florida is one of the most progressive states. Under its replacement section³⁸, all existing tanks must be retrofitted to meet compliance requirements by a certain date or they will be removed at the expense of the owner. Even more stringent replacement requirements are found in the New York counties of Nassau and Suffolk.^{39, 40} Those counties require replacement, at the expense of the owner, of all tanks constructed of a corrosive material and above a certain capacity. Under these ordinances, tanks are phased out on the basis of seniority, e.g. tanks twenty years or older must be removed within five years; tanks five to twenty years old, within ten years, etc..

While some view the enactment of local and state regulations as the most effective way to address the problem of leaking underground storage tanks, others insist that federal involvement is essential to adequate protection. This latter view was recently expressed in two federal initiatives. The first was the release of the EPA's National Ground-Water Protection Strategy. Under this strategy, the EPA identifies underground storage tanks as one of the three main causes of groundwater contamination and targets them for future action. The second was the reauthorization of the Resource Conservation and Recovery Act (RCRA).⁴¹ The new law, which the President signed on November 9, 1984, requires the EPA to develop a comprehensive program for regulating tanks by 1987. The program will focus on leak detection, recordkeeping, replacement and performance standards.

Among the more important provisions of the law is the "Bare Steel Tank Prohibition" which prohibits the installation of any new tank made of bare steel unless it is buried in soil that meets high resistivity standards. The prohibition is an interim standard to be used until the EPA promulgates its final regulations. Other key pro-

visions of the law require owners of tanks to notify state agencies of new installations and to provide proof of financial viability.

Although federal regulation under RCRA does appear to be a step in the right direction, a strong argument can be made that it does not go far enough. One of the most obvious drawbacks is that it fails to regulate all underground tanks that may endanger human health and the environment. Only tanks of 1,100 gallons or more are regulated under RCRA. Furthermore, tanks which store substances for personal use, such as home heating oil and gasoline, and which are installed on private premises, are exempted from these regulations. It would seem logical that a true effort to protect our groundwater would include these types of underground storage systems. RCRA also fails to establish a system for compensating victims injured by leaks from underground storage tanks. Such a fund could be established by a combination of chemical excise fees, registration fees and penalties.

In conclusion, it must be recognized that present attempts to address the issue of leaking underground storage tanks are inadequate. We can only assure adequate protection of the nation's health and natural resources through the development of a comprehensive and costly regulatory scheme.

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FOOTNOTES

1. Newsday, Oct. 6, 1984, at 3.
2. Order, *In the Matter of the Complaint Against Sun Oil Refining and Marketing Co.*, (May 29, 1984).
3. Benzene has been designated a "known human carcinogen." Toluene and xylene are toxins which primarily affect the central nervous system. See Memorandum of Law, at 3-4, submitted by the New York State Dept. of Environmental Conservation, *Sun Refining and Marketing Co., v. Suffolk County Dept. of Health Services*, Index No. 84-10946.
4. *Id.* at 4-5.
5. EPA Ground-Water Protection Strategy (1984), at 15 [hereinafter cited as *EPA Strategy*].
6. *Id.* at 11.
7. *Id.* at 17.
8. Bergeson, *Pollution Engineering*, April 1984, at 71.
9. *EPA Strategy*, at 11.
10. N.Y. Times, Aug. 31, 1984 at A1, col. 1.
11. *EPA Strategy*, at 15.
12. N.Y. Times, Aug. 19, 1984, at 54.
13. *Id.* at 3.
14. P. Woods & D. Webster, *Underground Storage Tanks: Problems, Technology and Trends* (1984), at 1 [hereinafter cited as *Woods & Webster*].
15. *Id.* at 2.
16. *Id.* at 3.
17. *Id.*
18. *EPA Strategy*, at 15.
19. *Woods & Webster*, at 2.
20. *Id.* at 2.
21. *Id.* at 6.
22. *Id.*
23. *Id.* at 3.
24. *Id.*
25. *Id.* at 4.
26. *Id.*
27. *Id.* at 8.
28. Warren Rogers Associates, *Tank Integrity Program* (1984), at i.
29. Memorandum and Order, *In re Mobil Oil Corp.*, RCRA Docket No. 83-1028 (Feb. 21, 1984).
30. Wall St. Journal, Aug. 29, 1984, at 25.
31. See Fred C. Hart Associates, *Review of Underground Storage Regulations* (1984) [hereinafter cited as *Hart Study*].
32. *Woods & Webster*, at 10.
33. Sole source aquifer refers to an aquifer which constitutes a region's only supply of drinking water. See Safe Drinking Water Act, 42 U.S.C. §300 (h-3)(a)(1) (1982).
34. *Hart Study*, at 14.
35. *Id.* at 11.
36. *Id.* at 12.
37. *Id.* at 18.
38. *Id.* at 17.
39. *Id.* at 65.
40. *Id.* at 67.
41. Pub. L. No. 98-616

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