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HOFSTRA ENVIRONMENTAL LAW DIGEST

A Publication of the Environmental Law Society
Hofstra University School of Law

Vol. 2, No. 1 Spring 1985

HAZARDOUS WASTE

Pinole Point Properties, Inc. v. Bethlehem Steel Corp.,

596 F.Supp. 283 (N.D. Cal. October 22, 1984).

To date, there have been few decisions addressing the scope and interpreting the provisions of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §9601 (1982). In one of the earliest cases to do so, the United States District Court for the Northern District of California addressed the meaning of CERCLA upon a prior landowner's motion to dismiss the current landowner's claims arising under CERCLA and California state law.

The defendant, Bethlehem Steel Corporation, owned a piece of property in Contra Costa County, California until February 1979. In December 1979, the property was transferred to the plaintiff from its parent company, Pinole Point Steel Company, the original purchaser from Bethlehem Steel. The plaintiff, Pinole Point Properties ("Pinole Point"), alleged that the defendant released hazardous substances into a pond on the property from 1965 to 1975. Pinole Point filed suit seeking a declaratory judgment holding the defendant liable for the plaintiff's past, present and future cleanup costs at the site and Bethlehem Steel subsequently moved to dismiss the plaintiff's claims.

With respect to Pinole Point's federal claims under CERCLA, Bethlehem Steel argued that the complaint failed to state a cause of action upon which relief may be granted because: (1) CERCLA does not apply to sites the government has not acted upon or regulated; (2) CERCLA does not provide for private causes of action for damages to natural resources; (3) Pinole Point lacks standing to sue under CERCLA; and (4) Pinole Point's CERCLA claims are not ripe for adjudication.

United States District Court Judge Robert P. Aguilar rejected Bethlehem Steel's arguments with respect to the federal claims. The Court first noted that the principal issue before it was the interpretation of CERCLA as a whole and §107 of the Act (codified at 42 U.S.C. §9607) in particular. Section 107(a)(4), under which Pinole Point seeks recovery, provides that the present owner of a facility and the owner at the time of the hazardous waste release shall be liable for:

> (A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the [National Contingency Plan (NCP)]; (B) any other necessary costs of response incurred by any other person consistent with the [NCP]; and (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.

Bethlehem Steel urged the Court to interpret CERCLA narrowly and argued that action taken under CERCLA in response to the problem of hazardous waste sites ought to be governmental or government-triggered. The Court rejected Bethlehem Steel's analysis and cited two district court decisions, *United States v. Reilly Tar & Chemical,* 546 F.Supp. 1100 (D. Minn. 1982), and *United States v. Wade,* 577 F.Supp. 1326 (E.D. Pa. 1983), as precedent for adopting a broad view of CERCLA as a comprehensive response to the hazardous waste disposal problem.

Bethlehem Steel argued that §107 does not authorize a private cause of action, rather §107 merely establishes liability for purposes of §§111-112 which govern claims against the "Superfund." Because §112 requires that Superfund payments to private parties for necessary response costs be certified by a federal official, Bethlehem Steel contended that CERCLA envisions governmental action as a condition precedent to any and all private liability. Consistent with its broad interpretation of CERCLA, the Court refused to accept Bethlehem Steel's argument and found that §107 provides a cause of action distinct from that of §§111-112. The Court noted that the opening clause of §107 and the language of §107 itself is extremely broad and inclusive. Furthermore, relevant case law, e.g. *Reilly Tar & Chemical* and *United States v. Northeastern Pharmaceutical and Chemical Co.,* 579 F.Supp. 823 (W.D. Mo. 1984), are cited as supporting the finding that liability under §107 is independent of the liability created under §§111-112.

Bethlehem Steel also argued that the §107 language requiring recoverable costs to be "consistent with the National Contingency Plan" is exactly the same as the requirement in §111 that costs recoverable from the Superfund be incurred "as a result of carrying out the National Contingency Plan." Therefore, Bethlehem Steel contended, Pinole Point's costs cannot be "consistent" with the NCP because its costs were not incurred at the direction of the U.S. Environmental Protection Agency (EPA), the federal agency responsible for administering the Superfund law.

The Court acknowledged that there is a split of authority on this point, citing *Wickland Oil Terminals v. ASARCO, Inc.,* 590 F.Supp. 72 (N.D. Cal. 1984), and *Cadillac Fairview/California, Inc. v. Dow Chemical Co.,* CV-83-7996/CV-83-8034 [bench opinion at 21 ERC 1108] (C.D. Cal. March 5, 1984), both as support for Bethlehem Steel's argument. Without discussing the California courts' approach in either *Wickland Oil* or *Cadillac Fairview,* the Court looked at the preamble to the National Contingency Plan and the language of §§107, 111, and 112 and concluded that "[c]onsistency with the NCP and government pre-authorization are thus distinct requirements, only the first of which must be satisfied for recovery under section 107(a)(4)(B)." 596 F.Supp. at 290. In doing so, the Court relied on *City of Philadelphia v. Stepan Chemical Co.,* 544 F.Supp. 1135 (E.D. Pa. 1982). In *Stepan Chemical,* the Court refused to dismiss the plaintiff's §107 action, rejecting the defendant's argument that cleanups cannot be consistent with the NCP unless the federal government has taken some action with respect to the site. (In *Cadillac Fairview,* the Court ruled that a purchaser of land on which hazardous substances had been disposed cannot recover response costs under §107 absent some sort of prior governmental action, e.g. the EPA commencing a CERCLA action or placing the site on the National Priorities List.) In refusing to dismiss Pinole Point's claims, Judge Aguilar noted that whether the cleanup activities are consistent with the NCP is a question of fact that must await development of a factual record. Thus, the Court reserved its opinion on this issue pending a determination as to the efficacy and cost-effectiveness of the cleanup activities.

The Court then addressed Bethlehem Steel's claim that Pinole Point lacked standing to sue under §107. Bethlehem Steel argued that since Pinole Point was a potentially liable party under §§111-112 it might be placed in the absurd position of having to bring an action against itself. Having already determined that §107 provides for a cause of action independent of §§111-112, the Court rejected Bethlehem Steel's argument and cited *Stepan Chemical* to support its position. In *Stepan Chemical,* the Court concluded that the "any

other person" language of §107(a)(4)(B) "refers to persons other than the state and federal government rather than to persons other than those liable under the Act." 544 F.Supp. at 1142. Thus, the Court found that Pinole Point does have standing because it has incurred cleanup costs and because a different interpretation of the "any other person" language would prevent recovery by non-culpable parties who incur cleanup costs, a result that would be contrary to the legislative goal of enhancing prompt cleanups.

Bethlehem Steel's final argument against the CERCLA claims was that Pinole Point's action was not ripe for adjudication. Bethlehem Steel relied heavily on *D'Imperio v. United States,* 575 F.Supp. 248 (D. N.J. 1983), where a complaint seeking declaratory relief against the government was dismissed as premature because the administrative decision-making process at the EPA was only in the preliminary stage and thus was too hypothetical. The Court readily distinguished *D'Imperio* from the case at bar, noting that Pinole Point had already conducted considerable cleanup activities and finding that other courts have not hesitated to grant declaratory relief where a private party has expended cleanup costs. As support for its refusal to dismiss Pinole Point's claims, the Court cited, *inter alia, Jones v. Inmont,* 584 F.Supp. 1425, 1430 (S.D. Ohio 1984), which stated that "[t]o require either the government or a private party to complete cleanup prior to filing suit would defeat the dual purpose of CERCLA to promote rapid response to hazardous situations and to place the financial burden on the responsible parties."

The Court then turned its attention to Pinole Point's state claims of nuisance and ultrahazardous activity. The Court dismissed both claims as barred by the statute of limitations because, under California law, actions for injuries to real property must be brought within three years of the accrual of the cause of action. The cause of action accrues on the date the plaintiff knew or should have known that an injury occurred. Here, Pinole Point bought the land in 1979 and filed suit in 1983. Since the complaint did not allege that discovery of injury was delayed or that such a delay was justified, the claims were barred and thus dismissed.

Martin dePorres Cargas, '86

Aminoil, Inc. v. E.P.A., 599 F.Supp. 69 (C.D. Cal. Sept. 28, 1984).

This was an action brought by several oil companies, including Aminoil, Inc. and McAuley, Inc., to enjoin the U.S. Environmental Protection Agency (EPA) from issuing an administrative order pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA or "Superfund"). 42 U.S.C. §9601 (1982). The plaintiff companies claimed that the coercive effects of the Superfund sanctions deprived them of their due process rights by forcing them to forego their legal challenge to an EPA administrative order. The administrative order directed the plaintiffs to submit a response plan for cleaning the hazardous waste site in question and implementing the plan upon EPA approval. The United States District Court for the Central District of California agreed with the plaintiff oil companies and issued a preliminary injunction.

As a result of the severe environmental and public health effects resulting from improper handling and disposal of hazardous wastes, Congress enacted CERCLA. CERCLA provides the EPA with three alternatives in responding to a hazardous waste situation: (1) EPA may clean up the site itself using Superfund money as provided for in §9631 and seek recovery from responsible parties under §9607 for the costs incurred; (2) EPA may seek injunctive relief under §9606(a); or (3) EPA may issue an administrative order under §9606(a) requiring the responsible parties to clean up the site where necessary to protect public health, welfare, and the environment. However, an owner or operator may refuse to comply with an administrative order. If a party so refuses, it may be fined, if the EPA acts to enforce the order, in an amount not to exceed $5000 for each day of its failure to clean the site or its refusal to obey the order. 42 U.S.C. §9606(b).

In finding that the Court had jurisdiction and that the controversy was ripe for review, the Court focused on the constitutionality of the statutory scheme. Although Congress did not intend to provide for preenforcement review of administrative orders prior to the commencement of either an enforcement action under §9606(b) or a recovery action under §9607(c)(3), the issues of the daily penalties and the treble damages provision do not pertain to the merits of the order, but raise a constitutional question regarding the protection of due process rights.

United States District Court Judge David V. Kenyon issued the preliminary injunction based on the possibility of irreparable injury and a finding of probable success on the merits of proving: (1) a violation of due process rights; and (2) that the balance of hardships tipped sharply in the plaintiffs' favor. Thus, the Court found that the public interest in preserving due process rights decidedly outweighed the government's interest in imposing coercive measures.

To determine whether the plaintiffs' due process challenge would likely succeed, the Court relied on the Supreme Court test delineated in *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976). *Mathews* provides that three distinct factors be considered: (1) the private interest at stake; (2) the risk of erroneous deprivation through the present procedures; and (3) the government and public interest at stake.

Private Interest: The private interest at stake is based on the requirement of an opportunity to be heard. Within the context of this case, the private interest is the due process infringement arising from the imposition of daily penalties and treble damages. The Court held that "[n]o opportunity is provided for a hearing involving the alleged responsible parties prior to the issuance of an administrative order." 599 F.Supp. at 75. Furthermore, CERCLA does not contain any procedures whereby an alleged responsible party can challenge the validity of an administrative order. The Court then concluded that "the private interest at stake here is the valued right to a fair hearing unencumbered by the chilling effect of excessive sanctions if one were to obtain such a hearing and lose on the merits." *Id.*

Risk of Erroneous Deprivation: If the plaintiffs yield to sanctions they would forego their right to challenge the order "with a defense that would have been successful." *Id.* Thus, acquiescence would appear to be an admission of liability. Therefore, the present procedure erroneously deprives plaintiffs of due process rights, not only by depriving them of the right to challenge the administrative order, but also in threatening them with the loss of their "property interest in the funds expended in complying with the order." *Id.*

Government and Public Interest: Although the government has a significant interest in managing hazardous waste problems efficiently, the Court was not convinced that this interest was not attainable by other means which would provide basic due process protection. In arriving at this conclusion, the Court suggested that the present procedural scheme in CERCLA does not protect an alleged responsibile party's due process rights in emergency situations. Thus, the Court found that the balance of hardships tipped in favor of the plaintiffs since the harm involved "significant threats to their due process rights," *id.* at 76, whereas the harm to the government was "minimal" since §9607 provides for reimbursement.

Steven Sonkin, '86

Ayers v. Township of Jackson, 189 N.J. Super.561, 461 A.2d 1984 (April 5, 1983), *appeal docketed,* No. A-2103-83 T3 (N.J. Super.Ct. App. Div. Sept. 19, 1984).

In this case, the plaintiffs are 325 residents of a section of Jackson Township in Ocean County, New Jersey, who allege that toxic wastes leached through a municipal landfill owned and operated by the defendant township, thereby contaminating the plaintiffs' well water.

In the Superior Court of New Jersey, Ocean County, the residents sought compensation for toxic waste contamination which allegedly caused them to suffer bodily injury, emotional distress, impairment of quality of life, and an increased risk of

cancer. The plaintiffs also claimed that the contamination resulted in property damage and a loss in property value to their homes. The residents further alleged that their ingestion of known carcinogens over a prolonged period of time entitles them to substantial future medical surveillance and that the contamination and subsequent ingestion of their well water violates their civil rights and constitutes a taking of property without due process or just compensation, thereby stating a claim under the Civil Rights Act, 42 U.S.C. §1983 (1982).

The Township moved for partial summary judgment dismissing the plaintiffs' claims for emotional distress, increased cancer risk, the costs of future medical surveillance, and civil rights violations. Writing for the Superior Court of New Jersey, Judge Havey granted the defendant's motion for summary judgment on the claims of enhanced risk and civil rights violations, but denied summary judgment on the claims of emotional distress and future medical surveillance costs.

The plaintiffs asserted that they suffered from a present condition of an increased risk of developing cancer or liver and kidney ailments. The plaintiffs' experts found the presence of numerous chemicals in the groundwater, including benzene, acetone, chloroform, and chlorobenzene. The Court noted that these substances are known carcinogens and can cause liver and kidney damage. Thus, the experts would testify that the individuals exposed to the contaminated well water have an increased risk of contracting these illnesses. The Court, however, excluded recovery of damages for the plaintiffs' enhanced risk of future illness because of inadequate proof of causation. Any other holding would force the trier of fact to speculate as to the possible consequences of ingesting the contaminants upon the future health of each plaintiff. The enhanced risk could not be quantified nor did the plaintiffs' experts advance an opinion that any of the plaintiffs have developed or will probably develop any of the illnesses. Additionally, the Court stated that permitting recovery for the possible risk of illness "raises the spectre of potential claims arising out of tortious conduct [to] boundless proportion." 461 A.2d at 187. The Court did recognize, however, that if in the future any plaintiff suffers from a physical condition which can be medically attributed to the ingestion of the contaminants, his cause of action will survive the New Jersey statute of limitations.

The plaintiffs also sought compensation for the emotional distress suffered as a result of exposure to carcinogens found in their water. Their argument was twofold: (1) emotional distress is compensable without a showing of physical injury; and (2) physical injury did occur, however slight, because the ingested carcinogens caused "sufficient clinical insult" to their bodies.

The Court rejected the argument that mental and emotional suffering is compensable as an injury by itself and maintained that recovery for emotional trauma requires proof of substantial bodily injury or sickness. After noting the unusual nature of the plaintiffs' second argument and the type of bodily injury complained of, the Court determined that a full record should be made before it decides if there was an impact sufficient to support a claim of emotional distress. Accordingly, the defendant's motion for summary judgment was denied because three questions had to be resolved: (1) whether the Township reasonably foresaw that their negligence in permitting contaminants to leach into the groundwater would cause the type of fear experienced; (2) what the nature of the impact to the plaintiffs' bodies was; and (3) whether the emotional injuries complained of by the plaintiffs are compensable under relevant case law.

In determining that medical surveillance is necessary, the Court recognized that whether there is a reasonable probability of plaintiffs developing cancer in the future is not controlling. The important issue is whether medical judgment necessitates that a plaintiff who has been exposed to known carcinogens should undergo annual medical testing to diagnose early warning signs of cancer. Judge Havey noted that public policy supports the conclusion that the tortfeasors should bear the costs of medical surveillance because plaintiffs may lack the financial resources to pay for diagnostic testing.

The Court rejected the plaintiffs' claim that they were deprived of due process because of an invasion of their bodies by the contaminants. Judge Havey cited several cases as support for concluding that recovery for bodily injury under 42 U.S.C. §1983 requires the invasion to be direct, active, and intentional on the part of the government or one acting under color of state law. The plaintiffs' injuries were found not to be caused by a direct intentional tort, but by the indirect process of contaminants slowly escaping from the landfill and ultimately being ingested by the plaintiffs.

The Court also rejected the plaintiffs' claim that the negligent contamination of their wells constitutes a taking actionable under §1983. To make out such a claim under §1983, the Court noted that the negligent taking or deprivation must be without due process. If a plaintiff can show that he has been deprived of his property because of the defendant's conduct, he has an adequate State remedy and, therefore, has not been deprived of his property without due process of law. Even though the New Jersey Tort Claims Act may preclude the plaintiffs from recovering punitive damages or seeking other remedies available under §1983, the State remedies are not viewed by Judge Havey as inadequate to satisfy the due process requirement.

Ayers v Township of Jackson is now on appeal to the Appellate Division of the Superior Court of New Jersey. The Township has appealed the plaintiffs' awards for impairment of quality of life, future medical expenses, and emotional distress. The plaintiffs have cross-appealed Judge Havey's dismissal of the claims alleging an enhanced risk of illness and deprivation of constitutional rights pursuant to §1983. Oral argument was held on April 2, 1985 and a decision is pending.

Randell Montellaro, '85

United States v. Johnson & Towers, Inc., 741 F.2d 662 (3d Cir. Aug. 15, 1984), *cert. denied sub nom.* **United States v. Angel**, 53 U.S.L.W. 3597 (Feb. 19, 1985).

A recent Third Circuit decision extended criminal liability under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §6901 (1982), from owners and operators to employees of facilities that treat, store, and dispose of hazardous waste.

The federal government brought suit against Johnson & Towers Inc., a plant which repairs and overhauls large motor vehicles, and two plant employees, a foreman and the service manager of the trucking department. The complaint charged violations of RCRA's criminal provision, §6928(d), which refers to the knowing treatment, storage, and disposal of hazardous wastes without a permit. It was alleged that the defendant employees were liable under §6928(d) because they supervised the corporation's activities relating to the treatment, storage, and disposal of hazardous wastes.

The plant uses industrial chemicals, such as methylene chloride and trichlorethylene, both classified as pollutants under the Clean Water Act, 33 U.S.C. §1251 (1982), and as hazardous wastes under RCRA. During its cleaning operations, the plant drained chemical wastes into a holding tank which, once full, was emptied into a trench. The trench emptied into Parker's Creek, a tributary of the Delaware River. The U.S. Environmental Protection Agency (EPA) did not receive from or issue to Johnson & Towers an application for a permit, as is required under RCRA for generators of such wastes.

In the United States District Court for the District of New Jersey, Johnson & Towers pled guilty to the RCRA charges of unlawful disposal of hazardous wastes without a permit. The defendant employees pled not guilty and moved to dismiss the charges against them, claiming that the statute does not apply to company employees. The Court concluded that the RCRA criminal provision is solely applicable to owners and operators and granted the employees' motion to dismiss.

On appeal, Judge Sloviter of the United States Court of Appeals for the Third Circuit reversed the lower court's

decision which excluded employees from liability. However, the Court held that employees may only be subject to criminal prosecution if they knew or should have known that the requisite permit under §6925 had not been obtained.

At issue was the scope of the term "person" in §6928(d). In adopting a broad reading of the term based on statutory analysis, the Court considered three specific grounds for applying §6928(d) to the defendants. First, it looked to the general definition under §6903(15). The definition includes, *inter alia,* individuals, partnerships, corporations, trusts, associations, and government bodies. The Court concluded that Congress would have used more restrictive language if it had intended to narrow the scope of the provision. Second, adopting a plain meaning reading of the statute led the Court to conclude that the only ground for exculpation is based on the possession of the requisite permit. The Court found that there is no language within the statute to indicate that employees should be exempt from the statute. Third, the Court stated that criminal penalties in regulatory statutes are necessary to protect public health and, therefore, they should be construed to realize their regulatory purpose.

Upon finding that §6928(d) is applicable to the defendants, the Court decided that the case must be remanded. Before remanding, however, the Court was still left with the question as to what proof is necessary in order to hold the defendants liable. The Court concluded that the term "knowingly" applies to all of the elements of the offense as contained in §6928(d). Thus, the defendants must be shown to have known that Johnson & Towers was required to obtain a permit and that the defendants knew the wastes were hazardous and knowingly disposed of them. Although the jury is required to find that both of the defendants acted knowingly in each of these respects, the Court concluded that the jury may, depending on the evidence, be able to infer such knowledge, especially as to parties such as the defendants who hold responsible positions in the company.

The defendant Angel, who was the service manager, filed for *certiorari* on October 10, 1984. He was later joined in his action by the defendant Hopkins, who was the foreman. The Supreme Court denied *certiorari* on February 19, 1985.

The question which still remains to be answered after this decision is to what level the courts will extend employee liability under §6928(d).

Natalia Rusak, '86

United States v. AVX, Inc., No. 83-3882 (D. Mass. filed Dec. 9, 1983).

In a case now pending, the United States is seeking recovery under, *inter alia,* the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §9601 (1982). The six defendants named in the suit are AVX, Inc., Belleville Industries, Inc., Aerovox, Inc., RTE Corporation, Cornell-Dubilier Electronics Co., and the Federal Pacific Electric Company.

The complaint was filed on December 9, 1983 in the United States District Court for the District of Massachusetts. The thrust of the complaint is that the defendants are liable under CERCLA §§106 and 107. Under §107 of CERCLA, the owner or operator of a facility which releases hazardous wastes is responsible for the injury or destruction of natural resources and is liable for all costs of removal or remedial action incurred by the United States. Under §106 of CERCLA, the President may, upon determining that there may be an imminent and substantial endangerment to the public health, welfare, or environment, require the U.S. Attorney General to secure whatever relief is necessary to abate such a danger or threat.

The United States alleges that the defendants have seriously contaminated the New Bedford area, i.e. New Bedford Harbor, Buzzards Bay, and the Acushnet River. The United States contends that the releases may present an imminent and substantial endangerment to the environment, health, and public welfare of the community. This is a civil action in which the United States seeks recovery for both damages to natural resources and response costs incurred by the U.S. Environmental Protection Agency (EPA) in investigating and implementing cleanup procedures. Additionally, the United States is requesting an injunction to stop the defendants from discharging dangerous wastes into the Harbor area.

Investigations conducted by the plaintiff found highly dangerous levels of polychlorinated biphenyls (PCBs) in the Harbor waters. Tests found PCB concentrations in sediments as high as 190,000 parts per million (ppm) and in water as high as four parts per billion (ppb). Samples taken from fish living within the Harbor vicinity detected PCB concentrations which generally exceed the U.S. Food and Drug Administration's (FDA) established standard of 5 ppm. (Since this action was filed, the FDA tolerance levels for fish and shellfish have been reduced to 2 ppm. 21 C.F.R. §109.30(a)(7) (1984).) Some fish tested in the harbor waters have PCB concentrations as high as 730 ppm.

The Massachusetts Public Health Commissioner has acted on these findings by restricting fishing activities and advising pregnant women, breast-feeding mothers, and women contemplating having children not to eat bluefish caught in the Bay area.

Four of the six defendants brought counterclaims against the United States for contribution, indemnification, set-off, and recoupment. In the first counterclaim, the defendants allege that the United States is liable to them for negligence. They argue that, since the United States was obligated to enforce federal pollution statutes against the defendants and failed to do so prior to bringing this suit, the United States breached its duty and is therefore negligent.

The second counterclaim alleges that the United States is liable under CERCLA for the release of PCBs into the Bay because it is the owner of the Harbor "facility." Under this theory, the defendants argue that the United States is acting as a trustee by bringing this action. Since the United States has asserted trusteeship over the natural resources of the Harbor, the United States must be the owner of the resources and the Harbor. The defendants further classify the Harbor as a "facility", a term found in the liability provisions of CERCLA. Thus, the defendants allege that by permitting the disposal of PCBs into the Harbor, the United States was acting as the owner of a "facility" and, as such, is a responsible party under §107.

The third counterclaim alleges that the United States is liable under the Massachusetts Oil and Hazardous Material Release Prevention and Response Act. The Massachusetts statute is essentially identical to CERCLA. Thus, it follows that this counterclaim repeats the argument alleged in the second counterclaim, i.e. the United States is liable as the owner of the facility which released or arranged for the disposal of hazardous wastes.

The last counterclaim also alleges that the United States is liable under CERCLA. Specifically, the defendants allege that the U.S. Army Corps of Engineers undertook projects such as the dredging of ship channels and the construction of an earthen barrier across the harbor, both of which resulted in the "release" of hazardous

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ENVIRONMENTAL LAW DIGEST

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substances. These activities did not actually emit PCBs into the Harbor, but activated the PCBs that the defendants had discharged into the Harbor at an earlier time.

In summary, the United States has moved for partial dismissal or, in the alternative, for summary judgment of the first, second, and third counterclaims. With regard to the counterclaims seeking contribution, indemnification, set-off, and recoupment, the United States claims that the Court lacks subject matter jurisdiction because the counterclaims are barred by the doctrine of sovereign immunity. Additionally, according to the United States, the defendants have not stated a claim upon which relief can be granted because the negligence alleged is not actionable under the statutes relied on by the defendants. The United States moved to extend the time for answering the counterclaim regarding the civil projects undertaken by the U.S. Army Corps of Engineers.

On March 9, 1985, the Court heard oral argument on the parties' motions to dismiss. A decision is not expected for several months.

Theresa M. McSweeney, '86

PESTICIDES

Monsanto Co. v. Ruckelshaus, 753 F.2d 649 (8th Cir. January 24, 1985).

Last summer, the United States Supreme Court addressed the issue of whether a portion of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §136 (1982), provides for an unconstitutional taking of property. In *Ruckelshaus v. Monsanto,* 104 S.Ct. 2862 (1984), the Supreme Court concluded that the FIFRA provisions allowing applicants for pesticide registration to use previously submitted environmental safety data to support their own applications is not an unconstitutional taking because the statute is consistent with reasonable investment-backed expectations. This case arose out of that controversy.

During Monsanto's challenge to FIFRA, the United States District Court for the Eastern District of Missouri issued a pretrial order to prevent the U.S. Environmental Protection Agency (EPA) from disclosing information contained in Monsanto's registration application for the herbicide "Roundup." Subsequently, the EPA acted contrary to the District Court's order and violated the trade secret provision in §136 h(b) of FIFRA when it honored a Washington attorney's request, under the Freedom of Information Act, for confidential information regarding Monsanto's registration application.

In an effort to prevent competitive harm to Monsanto resulting from the EPA's admittedly improper disclosure, the EPA and Monsanto entered into a consent decree establishing a Scientific Advisory Panel (SAP) designed to screen registration applications for herbicides containing ingredients identical or similar to Roundup. The purpose of the SAP was to determine whether the applicant's herbicide had been developed independently of the information disclosed by the EPA before the EPA "formally accepts" the application.

Pursuant to a provision in the consent decree authorizing Monsanto to "make presentations" concerning registration applications under SAP investigation, Monsanto requested the name of an undisclosed applicant and the active ingredient in its herbicide. The EPA denied Monsanto's request, asserting that anonymity was required by FIFRA and the consent decree. Monsanto successfully petitioned the District Court for a temporary restraining order (TRO) which prevented continuation of the screening process until a "more appropriate and complete submission" was provided to Monsanto. 753 F.2d at 652 (citing TRO, Slip op. at 3-4 (E.D. Mo. Oct. 14, 1983)). The EPA, however, did not interpret the TRO to necessitate immediate disclosure. Consequently, the District Court found that the EPA and the SAP had denied Monsanto due process and permanently enjoined the EPA and SAP from proceeding with the investigation until it disclosed the requested information to Monsanto.

On appeal, the United States Court of Appeals for the Eighth Circuit reversed the order, reasoning that the District Court had mistakenly treated the SAP review as an adversarial proceeding. Circuit Court Judge McMillian found that the consent decree entrusted the preliminary screening process to the independent investigatory capabilities of the SAP. Nothing in the consent decree indicated that the SAP was obligated to assist Monsanto in an independent investigation. Accordingly, in entering into the consent decree, the applicant and Monsanto were not adverse parties and thus the Court implied that Monsanto waived the due process rights guaranteed in an adversarial proceeding.

In addition, Judge McMillian found that the SAP protected rather than endangered Monsanto's property interest in the information on the Roundup application. If the SAP found that the active ingredient in another applicant's herbicide was not independently developed, the EPA would deny consideration of the registration application, thereby protecting Monsanto against any competitive harm.

Judge McMillian noted that Monsanto offered no evidence that the SAP's independent investigation might be inadequate to prevent competitors from benefiting from the disclosed information. Furthermore, once an unknown applicant passes the screening process, Monsanto is then capable of challenging the registration in an adversarial administrative proceeding. Thus, until the EPA has formally accepted a registration application, it is not obligated to disclose the identity of the applicant nor the active ingredient in the herbicide. A holding to the contrary would expose the registration applicant to an unnecessary risk of competitive harm.

Judge Gibson dissented on the ground that the majority misinterpreted the District Court's injunction. The majority focused on the process created by the consent decree and concluded that it was not adversarial in nature. Judge Gibson conceded that the process was not adversarial, but maintained that Monsanto was still entitled to due process. In accordance with the principles of contract law, the District Court was empowered to construe the language within the consent decree and any controversy which arose thereto. According to Judge Gibson, the focal point of this dispute is the language contained in the provision authorizing Monsanto to "make presentations" to the SAP. Thus, the due process right asserted by Monsanto was not for an adversarial proceeding, but rather for an effective presentation. By this interpretation the District Court properly enforced the consent decree, whereas the Eighth Circuit mistakenly interpreted the District Court's holding as modifying the consent decree. Therefore, Judge Gibson concluded, while Monsanto waived its right to sue for negligent disclosure, it retained its right to participate in a meaningful screening process.

The dissent suggests that Monsanto would have been in a more advantageous position had it never entered into the consent decree. Absent the screening process, the EPA, upon receipt of an application, would be obligated to publish, in the *Federal Register*, the identity of the applicant and the active ingredient contained in its herbicide. This result makes the consent decree an illusory remedy because it deprives Monsanto of information it would have had if no consent decree was ever entered into.

Judge Gibson found the EPA's arguments "disingenuous." Initially, the EPA argued that FIFRA publication requirements were not invoked because it had not "formally accepted" any application which had been screened by the SAP; subsequently, the EPA justified withholding information from Monsanto pursuant to the confidentiality provisions in FIFRA. Judge Gibson reasoned that the EPA should not be allowed such a "strained" reading of the decree.

While the dissent recognizes that the EPA is in a difficult position, it is more sympathetic to Monsanto since the EPA brought this predicament upon itself by disclosing confidential information. Thus, Judge Gibson felt that the EPA should bear the risk that applications reviewed by the SAP are inadequately protected from such disclosure. He notes that Monsanto's concern is further

legitimized by the fact that whatever company has obtained the disclosed information through misappropriation is likely to use similar tactics to survive the screening process. There is no guarantee, therefore, that the SAP will be able to effectively protect Monsanto's trade secrets. In sum, Judge Gibson concluded that greater deference should have been afforded to the District Court because it oversaw and approved the consent decree.

Michael Ambrosino, '85

Judicial & Regulatory Updates

BANKRUPTCY

Recently there have been a number of cases addressing the apparent conflict between state and local environmental laws and the federal Bankruptcy Code. While the Third Circuit has grappled with this issue, the U.S. Supreme Court has recently decided one case and granted *certiorari* in another.

In *Ohio v. Kovacs,* 105 S.Ct. 705 (1985), the Supreme Court considered whether an obligation to clean up a hazardous waste site is a "debt" or liability on a "claim" within the meaning of the Bankruptcy Code, 11 U.S.C. §101 (1982). Under the Code, a "debt" or "claim" can be discharged in a bankruptcy proceeding.

In July 1979, the State of Ohio obtained an injunction in state court ordering the Chem-Dyne Corporation along with other business entities with whom Chem-Dyne operated an industrial and hazardous waste disposal site, and William Lee Kovacs, one of the two principal officers of Chem-Dyne, to clean up the site in question. When the injunction was ignored, the state had a receiver appointed. The receiver was directed to seize the assets of both Kovacs and the corporate defendants and to implement the injunction by supervising the cleanup. Before the waste could be removed from the site, Kovacs filed a Chapter 11 petition, 11 U.S.C. §1101, which was subsequently converted to a liquidation proceeding under Chapter 7 of the Code, 11 U.S.C. §701. Thereafter, the State of Ohio filed a motion in state court to discover Kovacs' current income and assets. In response, Kovacs requested that the Bankruptcy Court stay the proceedings. The Bankruptcy Court concluded that an injunction requiring the expenditure of money was an action to enforce a money judgment and granted the stay, which was affirmed by both the United States District Court for the Southern District of Ohio and the United States Court of Appeals for the Sixth Circuit. *In re Kovacs,* 681 F.2d 454 (6th Cir. 1982). The Supreme Court granted *certiorari,* vacated the judgment of the Court of Appeals, and remanded to that court to consider whether the dispute over the stay was moot. *Ohio v. Kovacs,* 459 U.S. 1167 (1983). The Court of Appeals has taken no action on this issue.

In re Kovacs was followed by another decision in the same case. On October 20, 1980, the State of Ohio filed a complaint in Bankruptcy Court seeking a declaration that Kovacs' obligation was not dischargeable in bankruptcy because it was not a debt or claim within the meaning of the Code. In addition, the complaint sought an injunction against the bankruptcy trustee to restrain him from pursuing any action to recover assets of Kovacs that are in the hands of the receiver. The Bankruptcy Court denied the State's motion and found that Kovacs' obligations were dischargeable in bankruptcy. *In re Kovacs,* 29 Bankr. 816 (S.D. Ohio 1982). Both the District Court and the Court of Appeals affirmed. *In re Kovacs,* 717 F.2d 984 (6th Cir. 1983).

In an opinion written by Justice White, the Supreme Court unanimously affirmed the Sixth Circuit, finding that Kovacs' obligation under the injunction is a debt or claim subject to discharge in bankruptcy. The Court reasoned that Congress intended a broad definition of the term "claim." Justice White noted that the language in the statute did not indicate that a claim must arise from a contractual arrangement. The Court concluded that the District Court's orders to cease polluting, to clean up the site, and to pay a sum of money to the state, each constitute a claim for bankruptcy purposes. Support for this conclusion was found in a review of the legislative history of Section 101 of the Code. Thus, the Supreme Court found that the State's interest in cleaning the contaminated soil was not moot and the Court affirmed the rulings below as "wholly consistent with the statute and its legislative history, sparse as it is." 105 S.Ct. at 709.

The Court specifically limited its holding to discharges of money judgments, reasoning that the appointment of a receiver prior to bankruptcy stripped Kovacs of control over his assets which he otherwise would have used to clean up the site. After the filing of bankruptcy, therefore, the only performance that could have been sought from Kovacs was a claim for the payment of money. Such a claim was found to be dischargeable in bankruptcy.

The Court observed in a footnote, note 12, that if the property were worth less than the cost of the cleanup, the trustee would likely abandon the property; but, the Court declined to address the legal issues that would have been raised had Kovacs filed for bankruptcy before a receiver had been appointed or before a trustee was designated to liquidate the estate. Moreover, in another footnote the Court approved the holding in *Penn Terra Ltd. v. Department of Environmental Resources, Commonwealth of Pennsylvania,* 733 F. 2d 267 (3rd Cir. 1984). Justice White observed that in *Penn Terra* Circuit Judge Garth held that the automatic stay provision of 11 U.S.C. §362 did not apply where a state sought an injunction against a bankrupt party to compel compliance with the state's environmental laws. Judge Garth found this to be enforcement of the police powers of the state and not a suit to enforce a money judgment. However, Justice White distinguished *Penn Terra* from *Kovacs,* noting that in *Penn Terra* there had been no appointment of a receiver with a duty to comply with the state environmental laws and to collect money from the bankrupt party. Thus, Justice White concluded that "[t]he automatic stay provision does not apply to suits to enforce the regulatory statutes of the State. . . ." 105 S.Ct. at 711, note 11.

Finally, the Court noted that Kovacs' discharge of his debts and/or claims will not shield him from prosecution for violation of state environmental laws, and that had a fine been imposed before filing the bankruptcy petition, the fine would not be dischargeable.

Justice O'Connor's concurrence addressed the State's concern that the Court's action will impede the enforcement of state environmental laws. Justice O'Connor stated that "[b]ecause Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law," [citing *Butner v. United States,* 440 U.S. 48, 54 (1979)] ". . . a State may protect its interest in the enforcement of its environmental laws by giving cleanup judgments the status of statutory liens or secured claims." 105 S.Ct. at 712.

On February 19, 1985, the U.S. Supreme Court granted *certiorari* in the *Quanta Resources* case (formerly cited as *City of New York and State of New York v. Quanta Resources Corp.,* 739 F. 2d 912 (3d Cir. 1984), *reh'g denied,* Aug. 16, 1984). Similar to *Kovacs,* the case involves a conflict between federal and state laws. In that case (now cited as *O'Neill v. City of New York,* No. 84-805), the trustee of a waste-oil processing facility attempted to abandon properties which had been found to contain polychlorinated biphenyls (PCBs) and other hazardous materials. The United States Court of Appeals for the Third Circuit held that the trustee may not abandon the property. (See Vol. 1, No. 2 *Hofstra Environmental Law Digest* (Fall 1984) for a review of the Third Circuit decision.) The constitutional issues which may be addressed by the Supreme Court are whether, through the enforcement of state and local environmental laws, denying the trustee in bankruptcy the right to abandon worthless property violates either the "taking clause" or

the "supremacy clause" of the U.S. Constitution.

In re Thomas Solvent Co., 44 Bankr. 83 (W.D. Mich. 1984) is yet another case involving an apparent conflict between federal bankruptcy laws and state environmental laws. In that case, the Court held that a debtor-in-possession may enjoin the state from taking any action against the debtor where a state court order requires the debtor to expend assets of the estate to clean up toxic chemicals causing groundwater pollution.

In January 1984, the State of Michigan obtained an injunction ordering the Thomas Solvent Company ("Thomas"), which operated a wholesale chemical and solvent storage and distribution business, to purify and protect the groundwater beneath their premises. The State alleged that improper storage of toxic chemicals was causing groundwater pollution and threatening drinking water supplies. On April 6, 1984 Thomas filed a Chapter 11 petition and on August 21, 1984 the company filed a proposed plan of reorganization. Thereafter, the State claimed that Thomas must use its assets to purify the groundwater. The estimated cost of the cleanup would be $2 - 2.5 million. In response, Thomas requested that the Bankruptcy Court stay the proceedings because the State was attempting to enforce a money judgment.

After discussing the holdings in *Kovacs, Penn Terra,* and *Quanta Resources,* the Court examined the intent of Congress in enacting the Bankruptcy Code. The Court concluded that Congress did not intend to stay suits brought to enforce the police power of states. Bankruptcy Judge David E. Nims, Jr. added, however, that such exceptions to the stay do not extend to permit enforcement of money judgments. The Court's reasoning was similar to that of Justice White's in *Kovacs* because the debtor's assets were viewed to be in the possession and control of the Bankruptcy Court. Since these assets constitute a fund to be divided among the various creditors, governmental units may not be given preference to the detriment of these creditors. Judge Nims expressed his concern over the orderly distribution of the assets of the bankrupt estate, noting that "[i]f a governmental unit can completely deplete all of the funds in an estate, or if a trustee cannot abandon an asset for the benefit of the creditors, how can a court find a trustee willing to serve . . . [and how] can we have an orderly closing of a bankruptcy case?" 44 Bankr. at 88.

The Court then distinguished the instant Chapter 11 proceeding involving a debtor engaged in an on-going business from a liquidation proceeding as set forth above. Under 28 U.S.C. §959(b), an on-going business must be operated in accordance with local law. "A debtor in possession may not preserve its viability as a business entity, yet avoid its responsibility to society, simply by filing a Chapter 11 petition." *Id.*

Although the Court enjoined the defendants from taking action against Thomas, the Court ruled that a liquidation plan must be confirmed within 90 days or the case will not be converted to a Chapter 7 proceeding, the preliminary injunction will be void, and an order may then be entered granting relief from the automatic stay.

Kenneth Lewis, '86

WATER

In a sharply divided opinion, a 5-4 majority of the United States Supreme Court reversed the Third Circuit's decision in *Chemical Manufacturer's Assn. v. Natural Resources Defense Council,* 719 F.2d 624 (3d Cir. 1984), and held that fundamentally different factor (FDF) variances are permissible as applied to toxic wastewater pollutants. 53 U.S.L.W. 4193 (Feb. 27, 1985). (See Vol. 1, No. 2 *Hofstra Environmental Law Digest* (Fall 1984) for a review of the Third Circuit decision, known as *National Association of Metal Finishers v. E.P.A..*)

At the core of the Supreme Court's decision was a finding that the relevant sections of the Clean Water Act (CWA), 33 U.S.C. §1251 (1982), were unclear and "very complex." Relying on its earlier decisions in *Train v. Natural Resources Defense Council,* 421 U.S. 60 (1975), and *Chevron U.S.A. Inc. v. Natural Resources Defense Council,* 104 S.Ct. 2778 (1984), the Court cited its policy of deference to the construction of complex statutes made by administative agencies charged with their enforcement. Upon a finding of complexity and no clear congressional purpose, the *Train* test was satisfied as the Court found the U.S. Environmental Protection Agencie's (EPA) interpretation of the law to be "sufficiently rational" and not clearly against congressional intent.

The Court was divided on the issue of whether or not the intent of Congress was clearly expressed in §301(*l*) of the CWA. Section 301(*l*) states that "[t]he administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list under 1317(a)(l) of this title." The majority noted that a variance "represents an acknowledgement that not all relevant factors were taken sufficiently into account in framing that requirement originally." 53 U.S.L.W. at 4197. Thus the Court rejected an absolute ban on variances of toxic discharges as inconsistent with the EPA's obligation to promulgate regulations consistent with diverse industry conditions and economies. Variances are necessary, the Court found, because regulations may have been devised when certain information was either unavailable or not considered by the EPA Administrator.

The dissent by Justice Marshall reaffirmed the Supreme Court's support of judicial deference in cases where administrative agencies have construed unclear legislation, but found *Chevron* dissimilar to the case at bar. In addition, Justice Marshall observed that Congress "realized that such regulations [301(*l*)] would cost industry 'millions of dollars and result only in a little more clean-up of our waters.' " 53 U.S.L.W. at 4200 (citing the Legislative History of the Clean Water Act of 1977, at 305 (Rep. Roberts) (1978)). Finally, the dissent found a clear congressional intent to prohibit fundamentally different factor variances (FDF) for the discharge of toxic pollutants.

The practical impact of the Court's decision is unclear. Only four FDF variances have been issued between 1972 and 1984 from a total of over 4,000 applications.

Howard Lipper, '85

RADIONUCLIDES

In compliance with a court order, the U.S. Environmental Protection Agency (EPA) has promulgated final rules, effective February 6, 1985, setting standards for emissions of radionuclides to air. Radionuclides are radioactive particles emitted in varying degrees from many sources. EPA initially identified nine source categories of radionuclides with potential emission levels warranting regulatory attention. The February 6th final rules are promulgated pursuant to Section 112 of the Clean Air Act, 42 U.S.C. §7401 (1982), and will only apply to the following source categories: (1) U.S. Department of Energy (DOE) facilities; (2) Nuclear Regulatory Commission (NRC)-licensed facilities and non-DOE Federal facilities; and (3) elemental phosphorus plants. The court order also requires EPA to issue final standards, by April 10, 1985, for a fourth source category — underground uranium mines. 50 Fed. Reg. 5190 (1985).

In a *Federal Register* notice dated April 6, 1983, the EPA determined that it is unnecessary to regulate the following five

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source categories: (1) coal-fired boilers; (2) the phosphate industry; (3) other extraction industries; (4) uranium fuel cycle facilities, uranium mill tailings, and management of high-level radioactive waste; and (5) low energy accelerators. 48 Fed. Reg. 15076.

The February 6th final rules are the culmination of five years of debate and litigation. EPA initially listed radionuclides as a hazardous air pollutant on December 27, 1979 after concluding that exposure to radionuclides increases the risk of cancer and genetic damage. Under §7412(b)(1)(B) of the Clean Air Act, once a substance is listed EPA is required to promulgate proposed emissions regulations for that substance within 180 days. Then, within the next 180 days EPA is required to either issue final rules governing emissions of the listed pollutant or make a determination that the pollutant is not hazardous.

EPA took no further action on radionuclide regulation until 1982 when the Sierra Club filed suit in the United States District Court for the Northern District of California alleging that the EPA had failed to perform its duty under the Clean Air Act by not establishing national emission standards for radionuclides. EPA argued that is was unable to comply with the statute on the grounds that it needed more time to study radionuclides. EPA added that it might need until as late as 1989 to promulgate proposed regulations.

On September 30, 1982 the Court held that EPA had not met the judicially developed "heavy burden" of proof, which requires EPA to demonstrate that it would be infeasible or impossible to issue the proposed regulations within the 180 day schedule proposed by the plaintiffs. *Sierra Club v. Gorsuch,* 551 F.Supp. 785 (N.D. Cal. 1982). Thus, the Court granted the Sierra Club's motion for an order requiring compliance within 180 days.

On Apirl 6, 1983, EPA complied with the court order by issuing proposed standards for radionuclide emissions in the following source categories: (1) DOE facilities; (2) NRC-licensed facilities and non-DOE Federal facilities; (3) elemental phosphorus plants; and (4) underground uranium mines.

After EPA failed to promulgate final rules for radionuclide emissions, the Sierra Club filed suit to compel final action. *Sierra Club v. Ruckelshaus,* No. 84-0656 (N.D. Cal. filed Feb. 17, 1984). The Court granted the Sierra Club's summary judgment motion on July 25, 1984, giving EPA 90 days to either promulgate final regulations or make a finding that radionuclides are not a hazardous air pollutant. On October 23, 1984, EPA withdrew its proposed regulations for the first three source categories after determining that the current industry practice already provided the public with an ample margin of safety. Proposed regulations governing emissions from underground uranium mines were also withdrawn after EPA concluded that the proposed regulations did not meet the legal requirements of §112 of the Clean Air Act. Additionally, EPA affirmed its April 6, 1983 decision not to regulate radionuclide emissions from the five latter source categories on the belief that current emissions levels satisfied the Clean Air Act. 49 Fed. Reg. 43906 (1984).

Subsequently, the Sierra Club made a motion to find EPA in contempt of the Court's July 25th order. On December 11, 1984, the Court found EPA in contempt and ordered it to either conclude that radionuclides are not a hazardous air pollutant or issue, within 30 days, final radionuclide emission standards for DOE facilities, NRC-licensed and non-DOE Federal facilities and elemental phosphorus plants. The Court also ordered the EPA to issue final emission standards for underground uranium mines within 120 days. Unable to find radionuclides non-hazardous, EPA complied with the court order by issuing final rules for the first three source categories. On February 21, 1985, the EPA proposed a "work practice" standard for emissions from underground uranium mines, 50 Fed. Reg. 7280, and reiterated its intent to issue final rules for this source category by the April 10, 1985 deadline.

Operators of facilities affected by the February 6th rules have objected vigorously to the stringency of the standards and three environmental groups are already challenging the rules as not providing an ample margin of safety. *Natural Resources Defense Council v. Thomas,* No. 85-1123 (D.C. Cir. filed Feb. 26, 1985). If upheld, however, the final rules may not have a significant impact on current levels of radionuclide emissions because regulations promulgated for each source category tend to reflect existing industry emission levels. Prior to these final rules, industry had been following a self-policing policy of maintaining radionuclide emission levels "as low as reasonably achievable" (ALARA). 50 Fed. Reg. at 5192. EPA alleges that the ALARA practice provides the public with an ample margin of safety from the hazards associated with exposure to airborne radionuclides. *Id.* at 5190. Thus, despite promulgation of the final rules, EPA still maintains that regulatory action is unnecessary and expects to litigate for the withdrawal of the February 6th standards. *Id.*

Howard Poliner, '85

As EPA and DOE Debate, Radioactive "Mixed Waste" Goes Unregulated

During the past year the U.S. Environmental Protection Agency (EPA) and the U.S. Department of Energy (DOE) have been involved in an ongoing administrative struggle over the authority to regulate the handling and disposal of mixtures of hazardous and radioactive waste. As a result, potentially dangerous "mixed wastes" produced by government and commercial facilities have gone largely unregulated.

The current controversy over mixed waste regulation arose in the aftermath of a suit brought in the United States District Court for the Eastern District of Tennessee against the DOE by the Legal Environmental Action Fund (LEAF), the Natural Resources Defense Council (NRDC), and the State of Tennessee.[1] The suit concerned the disposal of large amounts of hazardous wastes, including mercury, polychlorinated biphenyls (PCBs), and chromium, which had leaked into the groundwater and tributaries of the Clinch River in Tennessee from the Y-12 plant at Oak Ridge, a DOE facility that manufactures and assembles nuclear weapons components. The plaintiffs claimed that DOE was in violation of the sections of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §6901 (1982), that govern the disposal of hazardous wastes and the permit provisions of the Clean Water Act, 33 U.S.C. §1251 (1982). A territorial battle of statutes ensued, with the plaintiffs asserting that hazardous waste disposal at the Y-12 plant should be regulated under RCRA and the defendants countering that, because Y-12 was involved in the manufacturing of nuclear weapons, its activities were subject to the guidelines of the Atomic Energy Act (AEA) of 1954, 42 U.S.C. §2011 (1982). The significant difference between the two statutes is that RCRA gives control over the Y-12 disposal system to the EPA while the AEA would place that authority exclusively with the DOE.

In support of the plaintiffs' position, the Court noted, was the underlying purpose of RCRA: to protect public health and the environment by regulating the treatment, storage, transportation, and disposal of potentially dangerous hazardous wastes. The DOE's defense relied on another section of RCRA, however, which specifically excludes from RCRA authority "any activity or substance which is subject to the . . . Atomic Energy Act of 1954 except to the extent that such application (or regulation) is not inconsistent with the requirements of [the AEA]."[2] The DOE argued that application of RCRA to the Y-12 plant would be inconsistent with provisions of the AEA because: (1) the AEA precludes state regulation of the plant while RCRA would have permitted it; and (2) RCRA allows the EPA and local authorities to regulate waste disposal at the Y-12 site while the AEA gives such

authority exclusively to the DOE. Also, for national security reasons, the AEA keeps information concerning nuclear weapons and materials restricted while RCRA would make such sensitive information available to the public.

With respect to this RCRA-AEA conflict, the Court ultimately held that DOE facilities are subject to RCRA except as to nuclear and radioactive wastes, which are expressly regulated by the AEA. Furthermore, the Court concluded that DOE had the burden of proving that application of RCRA at the Y-12 site would result in a breach of national security. If such a breach were proven, the Court suggested, DOE could then apply for a Presidential exemption from RCRA as provided in 42 U.S.C. §6961. DOE was unable to meet its burden in this instance.

Despite the Court's finding that hazardous waste disposal at the Y-12 plant was in violation of RCRA, no injunctions or civil penalties were imposed against the defendants, partially because DOE agreed to take steps that would reduce environmental harm caused by its RCRA violations.[3] To that end, DOE and EPA (which together had drafted a memorandum of understanding concerning hazardous waste disposal one month before the *LEAF* court mandated DOE compliance with RCRA[4]) began informal negotiations to determine the safest, most efficient and practical methods for the disposal of hazardous waste at DOE facilities.[5]

While it is now clear that DOE guidelines apply to nuclear waste and RCRA standards govern hazardous waste disposal, the two agencies have yet to reach a tenable agreement as to who should have authority over the disposal of "mixed wastes," which are composed of hazardous waste compounds *and* low-level radioactive materials. As a result, disposal of these harmful substances has gone largely unregulated.[6] Without any guidelines, generators and operators of hazardous waste disposal facilities, including medical research facilities and animal testing laboratories that produce mixed wastes, have been left to their own resolve in disposing of the dangerous matter.[7] This has created problems for industry and the environment. It has been reported that at least one facility has been mixing its wastes with fuel oil and burning them on site.[8] Even the more conscientious facilities are having trouble getting rid of their "scintillation cocktail fluids" (as some of these mixed wastes are referred to) in a safe manner because most hazardous waste treatment and disposal facilities with RCRA permits have refused to accept chemically hazardous substances that are mixed with radioactive materials.[9]

Last August, EPA and DOE agreed that DOE nuclear facilities should follow RCRA regulatory requirements for disposing of mixed wastes, as closely as possible, until final rules can be drafted.[10] The major roadblocks preventing any conclusive rulemaking have involved disagreements over technical definitions, national security considerations, and potential liability. In an attempt to overcome these problems, EPA and DOE officials have proposed revisions of applicable RCRA regulations so that the dangers of radiological contamination inherent in the handling of mixed wastes will be taken into account.[11] For example, current RCRA disposal procedures require workers to handle hazardous wastes in disposing of them.[12] If these rules were to apply to mixed wastes, workers would face a serious risk of exposure to radiation.

The DOE/EPA inter-agency group is also redrafting RCRA rules to enable DOE facilities to submit RCRA permit applications and allow inspections of records by state agencies and EPA officials without the risk of exposing confidential information deemed vital to national security.[13] Under the proposed rules, RCRA permit writers and inspectors would have to obtain national security clearance before working at DOE sites.[14]

Negotiations have also been hampered by disagreement within the EPA over a DOE-proposed interpretation of the term "byproduct material" as it exists in the Atomic Energy Act.[15] The current statutory definition of "byproduct material" is:

> (1) any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material, and (2) the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content.[16]

The Atomic Energy Act already gives the DOE sole jurisdiction over source and special nuclear material, i.e. material comprised of uranium, thorium or plutonium, any ores containing these elements in concentrations regulated by the Nuclear Regulatory Commission (NRC), and any material artificially enriched by any one of the three.[17] The DOE interpretation of "byproduct material" is controversial because it would give the DOE total control over weapons stream processes used at their nuclear weapons manufacturing sites that discharge high and low-level mixed wastes.[18] The EPA would thus govern all hazardous and mixed wastes discharged from all other processes, the total of which constitutes about 80% of DOE's waste.[19]

While the EPA's Office of Solid Waste supports the proposed interpretation, its Office of Radiation Programs and some environmentalists are opposed to it on grounds that it will restrict EPA's efforts to regulate radiation from the DOE's high-level waste disposal sites.[20] They are also concerned that DOE's new definition of nuclear "byproduct material" is too subjective and thus too easy a target for abuse.[21]

Several state groups have also opposed the draft RCRA regulations because they fear that the regulations will limit their authority over DOE facility operations.[22] The new rules would require states with RCRA programs to provide variances to DOE plants similar to those set out by the EPA in its proposed regulations,[23] an apparent infringement on state autonomy. Also, the DOE itself would have the authority to overturn state decisions denying such variances when compliance with such decisions would, in DOE's opinion, disclose restricted information vital to national security.[24] These state groups are worried that DOE will take advantage of the rules and interpret the terms "restricted" and "national security" as broadly as necessary in order to avoid state regulation.[25]

To date, no final agreement has been reached between the EPA and DOE concerning the disposal of mixed wastes. Tony Baney of EPA's Implementation and Compliance Branch in the Office of Waste Programs Enforcement noted in late February that, as a result of administrative changes at EPA and DOE, little recent progress has been made in the negotiations. He stated that both agencies are facing pressure to resolve the issue from Congress, the General Accounting Office, state agencies, and environmental groups; however, key differences still remain as to technical definitions and security considerations. Baney also said that, because some states have agreements with the NRC involving nuclear waste disposal while others are under RCRA programs, coming to a uniform set of terms has been that much harder.[26]

Recently, the NRDC and the State of Ohio have filed an intent to sue the DOE over the failure of two Ohio DOE facilities (at Miamisburg and Fernald) to comply with RCRA treatment, storage, and disposal requirements for both hazardous and mixed wastes.[27] Because much of the waste at these facilities is mixed with radioactive materials, the Court will have to decide how these substances should be handled and disposed of. Hopefully, that decision will set a precedent by outlining effective ways for regulating mixed hazardous and nuclear wastes in the future.

Bill Condon, '85

FOOTNOTES

1. *Legal Environmental Action Fund v. Hodel*, 586 F.Supp. 1163 (E.D. Tenn. 1984).
2. *Id.* at 1166.
3. National Association of Attorneys General, *Hazardous Waste: Application of RCRA to Nuclear Facilities*, Environmental Protection Report, April 1984, at 4.
4. *Waste Agreement Announced by EPA and DOE*, 1984 Pollution Cont. Guide (CCH) Newsletter, at 116 (March 5, 1984).
5. *Draft RCRA Regs Require 'National Security' Exemption for DOE Facilities*, Inside E.P.A. Weekly Report (Inside Washington Publ.), Jan. 25, 1985, at 1, 11.
6. *Regulatory Status of Mixed Wastes Generally Unclear, But One Class of Waste is Unregulated, Federal Officials Say*, 15 Env't Rep. (BNA), at 452-54 (July 20, 1984).
7. *Id.*
8. *Id.*
9. *Id.*
10. *Energy Department, EPA Reach Agreement on RCRA Application to DOE Mixed Wastes*, 15 Env't Rep. (BNA), at 566-67 (Aug. 10, 1984).

11. *See id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *EPA Takes Issue With DOE Atomic Energy Act Interpretation,* Inside E.P.A. Weekly Report (Inside Washington Publ.), Jan. 25, 1985, at 12.
16. 42 U.S.C. §2014(e) (1982).
17. 42 U.S.C. §§2014(z), 2014(aa) (1982).
18. *EPA RCRA, Radiation Staff at Odds Over Energy Stance on Mixed Wastes,* Inside E.P.A. Weekly Report (Inside Washington Publ.), Nov. 23, 1984, at 9.
19. *Id.*
20. *Id.*
21. *See id.*
22. Inside E.P.A. Weekly Report, *supra* note 15.
23. *Id.*
24. *Id.*
25. *Id.*
26. Telephone interview with Tony Baney (Feb. 26, 1985).
27. Telephone inteview with Barbara Finnamore, Natural Resources Defense Council (April 2, 1985).

Workplace Hazards: Do We Have a Right to Know?

The Federal Standard

Almost two years ago, in response to concern for employee safety in chemically-related occupations, the federal Occupational Safety and Health Administration (OSHA) promulgated a final "Hazard Communication" standard.[1] The standard, which will become effective on November 25, 1985, strives to ensure that employees receive adequate information concerning the name and effects of the substances to which they are exposed in the workplace. The goal is to educate those who are potentially exposed to hazardous substances, thereby reducing the incidence of injury and illness. The federal standard was enacted to satisfy the need for a uniform national policy, thus easing the burden on interstate commerce created by the states' differing requirements for the use and labeling of hazardous materials.

Chemical manufacturers and importers must assess the hazards of the chemicals they produce or import and devise a program to communicate information about those hazards to downstream manufacturers and purchasers who are themselves employers. Basic requirements of the program include: (1) the labeling of containers leaving the workplace as well as in-plant containers; (2) the completion of Material Safety Data Sheets (MSDSs) which will specify the physical and chemical characteristics of substances; (3) access to written records; and (4) specific training in handling toxic substances.[2]

OSHA's standard represents a comprehensive proposal, but its application is limited to the manufacturing sector.[3] Although other industries were recognized as hazardous, OSHA exercised its discretionary powers in deciding to initially regulate the manufacturing industry.[4] OSHA is given such discretion under the Occupational Safety and Health Act, which states that "[i]n determining the priority for establishing standards under this section, the Secretary [of Labor] shall give due regard to the urgency of the need for mandatory safety and health standards for particular industries, trades, crafts, occupations, businesses, workplaces or work environments."[5] OSHA based its decision on a study by the Bureau of Labor Statistics entitled "Occupational Injuries and Illnesses in the United States by Industry", which showed that the manufacturing industry has the highest incidence of chemical source illness among all of the industries under OSHA's authority.[6]

The New Jersey Law

Many states and municipalities have already enacted "Right-to-Know" legislation containing provisions similar to the federal Hazard Communication standard.[7] The State of New Jersey has a particularly stringent "Right-to-Know" law which became effective in August 1984.[8] It requires the New Jersey Department of Environmental Protection (DEP) to develop an environmental hazardous substance list and a survey that would help employers disclose information regarding hazardous substances at their facilities. The New Jersey Department of Health (DOH) is required to: (1) develop a workplace hazardous substance list; (2) develop a "special health hazardous substance" list of extremely hazardous substances; (3) design a workplace survey to help employers report hazardous substances; and (4) develop a hazardous substance fact sheet for each hazardous substance on the workplace hazardous substance list.[9]

An important difference between the federal standard and the New Jersey legislation is that the New Jersey law is not limited to the manufacturing sector, as is the federal standard. The New Jersey law applies to all employers and industries statewide.

Another difference concerns their trade secret provisions. The federal standard provides for protection against disclosure of chemical names and components when an employer claims and proves that such information constitutes a trade secret.[10] This exemption applies, at the federal level, even to such extraordinarily hazardous compounds as the 835 that are found on the New Jersey DOH's special substance list. Although some trade secret protection is provided under the New Jersey law, disclosure is required for every substance on this special list.

The federal standard does, however, provide for disclosure in cases of medical emergencies. After a determination is made that a medical emergency exists and that the identification of the substance is necessary for treatment, the identity must be disclosed to medical professionals. By providing for disclosure to medical professionals only, the federal standard leaves a wide gap for those who have a demonstrated need to know but cannot show the existence of a medical emergency. This category includes employees trying to obtain such information, as well as union officials investigating claims of unsafe conditions in the workplace. More detailed procedures are required in non-emergency situations.[11]

Both the federal and New Jersey standards contain a twofold purpose, i.e. the assessment of hazards and the disclosure of such hazards to potentially affected employees and other individuals. Regarding disclosure, the New Jersey law goes farther than the federal standard because employers must provide information about both the Right-to-Know Act itself and the hazardous substances in general. Employers must also provide a plan for notifying emergency response authorities. Concerning the assessment of hazards, the federal standard gives employers themselves the opportunity to devise their own programs of safety, whereas the New Jersey law requires the DOH to develop a workplace hazardous substance list based on OSHA lists as well as other substances that the DOH determines to be a threat to safety. Similarly, New Jersey places responsibility for development of the MSDS on the state, whereas the federal standard leaves the duty to the employer. The state law also requires employers to make versions of the MSDSs available in Spanish to Hispanic employees.

Challenging the New Jersey Law

Many states, including New Jersey, object to the OSHA standard.[12] While not objecting to a national uniform policy, they urge a broader application of the standard extending beyond the manufacturing sector and a restriction of the trade secret exemption. In a recent case decided on January 3, 1985,[13] the New Jersey State Chamber of Commerce and several intervening chemical companies brought suit in the United States District Court for the District of New Jersey against the DEP, the Commissioner of Health, the Acting Commissioner of Labor and the State of New Jersey, claiming that the New Jersey Worker and Community Right-to-Know Act is unconstitutional. Two fragrance manufacturing associations, along with thirteen related

corporations, brought a similar suit against the same defendants. Twenty-nine unions and several environmental groups intervened in the fragrance manufacturer's action and the two actions were consolidated into *New Jersey State Chamber of Commerce v. Hughey*. The plaintiffs argued that the OSHA Hazard Communication standard preempts the New Jersey Right-to-Know law and that the law's provision regarding trade secrets amounts to a taking without just compensation. The plaintiffs and defendants both moved for summary judgment on these issues and the plaintiffs moved for a preliminary injunction against enforcement of the New Jersey statute.

Preemption

The plaintiffs asserted that the federal standard supercedes the New Jersey law because the state law covers the same area as the federally promulgated OSHA standard. The defendants argued that the New Jersey law is not preempted because the federal standard regulates chemicals only in the workplace, while the New Jersey law applies to the general public as well as the workplace. They contended that the law's purpose was thus to go beyond the manufacturing sector and regulate safety across-the-board.

United States District Court Judge Dickinson R. Debevoise noted that a state law is not exempt from federal preemption just because the law's purpose extends beyond the scope of the federal standard. Relying on *Perez v. Campbell*,[14] the Court rejected the theory that a state law could frustrate the operation of a federal law as long as the state legislature, in passing its law, had some purpose in mind other than one of frustration. *Perez* stated that such a policy would allow the state to nullify unwanted federal legislation by "simply publishing a legislative committee report articulating some state interest or policy other than frustration of the federal objective—that would be tangentially furthered by the proposed state law."[15]

In fact, the Court conceded that the New Jersey law may even further the objectives of the federal Occupational Safety and Health Act (the Act) and thus be permitted; however, the Secretary of Labor must make that determination. Since New Jersey has not sought such approval by the Secretary, as required by §18(b) of the Act, the Court concluded that the law is preempted.

Finding that the state law provisions deal with the same area as the federal standard, Judge Debevoise held that the New Jersey law is preempted insofar as it applies to the manufacturing sector. The defendants argued that the preemption doctrine does not extend to both the workplace and non-workplace provisions of the New Jersey law, but the Court noted that "[t]he workplace and non-workplace regulatory schemes are inextricably intertwined"[16] and held that both the workplace and non-workplace provisions of the New Jersey Act are preempted as they relate to the manufacturing sector.

The defendants also argued that the federal standard does not preempt state law because the federal standard is not effective until November 1985. The Court rejected this argument and held that a standard becomes effective for preemption purposes when it is promulgated, which in this case was November 1983.

Trade Secrets

The plaintiffs alleged that mandatory disclosure of substances on New Jersey's special health hazardous substance list is an unconstitutional taking, but the Court did not address this issue with regard to the manufacturing sector because the law was held to be preempted in that area. With regard to the non-manufacturing categories, the Court looked to the recent United States Supreme Court decision in *Ruckelshaus v. Monsanto*.[17] The Court in *Monsanto* determined that trade secret disclosures could constitute an unlawful taking depending on three factors: (1) the character of the government's action; (2) the economic impact of the action; or (3) interference with reasonable investment-backed expectations. Of these three factors, the third was found to be dispositive. A reasonable expectation of non-disclosure creates property rights which are actionable.

In *Hughey*, the defendants claimed that under New Jersey law trade secrets do not constitute property rights because when the New Jersey legislature required disclosure of certain chemicals they in effect redefined "property rights" so as to not include trade secrets. Judge Debevoise rejected this argument, finding that trade secrets are property rights; but, he concluded that disclosure of such trade secrets does not amount to a taking. Adopting the three-pronged test outlined in *Monsanto*, the Court reasoned that the manufacturer has no "reasonable investment-backed expectation" of non-disclosure since there was no pre-existing legislation protecting trade secrets. As long as manufacturers are "aware of the conditions under which the data are submitted and as long as the conditions are rationally related to a legitimate government interest, a submission under the Right-to-Know Act does not constitute a taking."[18] Emphasizing that the New Jersey law addresses an area of "great public concern," the Court held that the mandated disclosure of trade secrets in the non-manufacturing sector is not a taking. "The state has simply adopted a statute and regulations in economic and social areas in which it unquestionably has the power to act. As part of the regular scheme disclosure is required which may result in a loss of trade secrets."[19]

Limiting the Right to Know

Regarding the manufacturing area, Judge Debevoise granted the plaintiffs' motion for summary judgment on the preemption issue. He permanently enjoined the defendants from enforcing the New Jersey law in the manufacturing sector until New Jersey submits and receives approval, from the Secretary of Labor, of the law's plan for developing and enforcing the federal standards. In the non-manufacturing sector, Judge Debevoise granted the defendants' request for summary judgment on the issues of preemption and trade secrets.

Hughey represents a limited holding of preemption because Judge Debevoise found preemption only in the manufacturing sector addressed by the federal standard. Since no standard is in effect in non-manufacturing areas, state regulation may continue. But states with strict hazard communication laws must revise their statutes so as not to include the manufacturing sector or else such laws will be preempted by the federal standard.

The validity of the federal standard, however, is currently being challenged in the Third Circuit.[20] In *United Steelworkers of America v. Auchter*, the plaintiffs are joined by Public Citizen, Inc. and many states as intervening plaintiffs, in challenging the federal Hazard Communication standard. The plaintiffs claim that OSHA's decision to exclude non-manufacturing industries and include only employers who fall within certain industrial classifications is arbitrary and capricious. Oral argument was heard on March 18, 1985 and a decision is expected within the next several months.

Fran Cohen, '86

FOOTNOTES

1. 48 Fed. Reg. 53280 (1983). OSHA originally published an Advance Notice of Proposed Rulemaking for labeling chemicals on January 28, 1977 and a Notice of Proposed Rulemaking (NPRM) on January 16, 1981. On February 12, 1981, three weeks after President Reagan took office, OSHA withdrew the NPRM "for further consideration of regulatory alternatives." *Id.* A new NPRM was published on March 19, 1982 and the final standard was promulgated on November 25, 1983.
2. 29 C.F.R. §1910.1200 (1984).
3. 48 Fed. Reg. 53280, 53284-86 (1983).
4. *Id.*
5. 29 U.S.C. §655 (1982).
6. 48 Fed. Reg. at 53284-86. The agriculture industry was also recognized as hazardous, but the U.S. Environmental Protection Agency (EPA) has authority to regulate many of the dangers under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §136 (1982).
7. *See generally* O'Reilly, *Right to Know: Cincinnati's More Righteous, Less Knowing Experiment*, 52 Cin.L.Rev. 337 (1983) (citing numerous state and local Right to Know laws).
8. New Jersey Worker and Community Right to Know Act, N.J.S.A. 34:5A-1 (1983).
9. N.J.S.A. 34:5A-5.
10. 29 C.F.R. 1910.1200(i)(1) (1984).
11. 29 C.F.R. 1910.1200(i)(3) (1984).
12. See *United Steelworkers of America v. Auchter*, No. 83-3554 (3d Cir. filed Nov. 22, 1984), where several states are currently challenging the OSHA standard.
13. *New Jersey State Chamber of Commerce v. Hughey*, 600 F.Supp. 606 (D.N.J. Jan. 3, 1985).
14. 402 U.S. 637 (1971).
15. *Id.* at 651-52.
16. *Hughey*, *supra* note 13, at 40.
17. 467 U.S. —, 104 S.Ct. 2862 (1984).
18. *Hughey*, *supra* note 13, at 54.
19. *Id.* at 53.
20. *United Steelworkers of America v. Auchter*, *supra* note 12.

HOFSTRA ENVIRONMENTAL LAW DIGEST

Vol. 2, No. 1
Spring 1985

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