

# HOFSTRA

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### HAZARDOUS WASTE

**Eagle-Picher Industries v. United States E.P.A.**, 759 F.2d 922 (D.C. Cir. April 16, 1985).

This case expands the scope of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §9601 (1982), in a challenge to the U.S. Environmental Protection Agency's (EPA) authority to place certain hazardous waste sites on the National Priorities List (NPL). The action was brought by several mining companies and an electric utility as petitions for review of an EPA order. The petitioners claim: (1) that their facilities, which produce mining waste and fly ash (a by-product of the combustion of coal and small amounts of coke), were improperly placed on the NPL; and (2) "that the EPA cannot lawfully place sites on the NPL that are currently regulated by their respective States pursuant to agreements with the Nuclear Regulatory Commission (NRC)." 799 F.2d at 926.

CERCLA was enacted to deal with the problems of inactive hazardous waste sites and authorized the EPA to respond by removal and/or remedial action. See 42 U.S.C. §9601(23) and (24). To limit response actions by the EPA to those sites most in need, CERCLA authorizes the creation of a National Priority List (NPL) of hazardous waste sites. Sites become eligible for the list:

- (a)(1) Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or
- (B) there is a release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare . . .

42 U.S.C. §9604(a)(1).

Petitioners' first claim involves a challenge of the EPA's decision to include mining waste and fly ash within the definition of "hazardous substances" under §9601(14). This inclusion would allow the EPA to place sites, owned by petitioners, on the NPL. In denying the petitions for review, the U.S. Court of Appeals for the District of Columbia Circuit rejected a plea to limit the scope of CERCLA, and instead, held that mining waste and fly ash fall within CERCLA's definition of hazardous substances.

The section of CERCLA which defines hazardous substances, §9601(14), is composed of six subparagraphs, lettered (A) through (F). However, embodied within subparagraph (C), is a parenthetical exception excluding mining waste and fly ash. This subparagraph provides that:

any hazardous waste having the characteristics identified under or listed pursuant to section §3001 of the Solid Waste Disposal Act [42 U.S.C. §6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C. §6901 *et. seq.*] has been suspended by Act of Congress).

42 U.S.C. §9601(14)(C).

Petitioners argued that the parenthetical exception to subparagraph (C) completely exempted mining waste and fly ash from the definition of hazardous substances. The court disagreed, reasoning that petitioner's argument does not comport with the

plain meaning of §9601(14) because the parenthetical exception applies only to subparagraph (C) and not to the other subparagraphs within that section. They recognized, however, that mining waste and fly ash could fall within the definition of hazardous substances, as long as they are subject to another subparagraph of §9601(14). Furthermore, the court noted that if Congress had intended to exclude mining waste and fly ash, they would have included these substances among the general exceptions found at the end of §9601(14), rather than hiding them in the middle of the statute.

Petitioners further argued that the parenthetical exception in §9601(14)(C) would be rendered meaningless by restricting its effect only to subparagraph (C). Their argument is founded on the assumption that virtually all mining waste and fly ash contain traces of cadmium, arsenic and selenium, all of which are clearly within the scope of hazardous substances under §9601(14). Thus, mining waste and fly ash would be within the definition of "hazardous substances" merely because one or more of their constituent elements fall within one or more of the subparagraphs of [§9601(14)]." 759 F.2d at 930, in spite of the exception in subparagraph (C). In rejecting this argument, the court stated that, "[p]etitioners have failed to cite any evidence in the legislative and administrative records that would allow us to conclude that virtually all mining wastes and fly ash would, under EPA's approach, fall within [§9601(14)], or that this result would violate Congress' intent." *Id.* at 930-931.

Another argument asserted by petitioners stems from a statement in CERCLA's legislative history, which allegedly shows Congress' intent to exempt mining waste and fly ash from the definition of hazardous substances under §9601(14)(C). The court resolved this conflict between the legislative history and §9601(14)(C) in favor of the plain meaning of the statute. The court reasoned that once a statute is passed by Congress, absent an irrational result, the plain meaning of the statute must take precedence over its legislative history.

The court admitted, however, that Congress' intent may have been unclear. In such a case the question becomes whether or not the EPA's interpretation is sufficiently reasonable. *Id.* at 930. The EPA interpreted the parenthetical exception as being limited to subparagraph (C). The court found that this interpretation was consistent with the plain meaning of the statute and, therefore, sufficiently reasonable. *Id.*

The court then turned its attention to the issue of whether sites owned by petitioners could be placed on the NPL by virtue of the inclusion of mining waste and fly ash within §9604(a). Again, the court gave an expansive reading to CERCLA by holding that mining waste and fly ash could be included as "pollutants or contaminants" which may present imminent and substantial danger as set forth in §9604(a).

Petitioners again unsuccessfully argued that inclusion of mining waste and fly ash within this section would render meaningless the parenthetical exception in §9601(14)(C). Judge

Starr rejected this argument noting that the consequences of defining a substance as a "pollutant or contaminant" are different from defining it as a "hazardous substance." Judge Starr found that, "[t]he owner of a facility may be liable for cleanup of a release of a 'hazardous substance,' but not for the cleanup of a release of a 'pollutant or contaminant.'" *Id.* at 932. The mere exemption of a substance from being defined as a hazardous substance would not necessarily negate that substance from being defined as a pollutant or contaminant. Under either standard the substance will be regulated.

Finally, petitioners urge that as a condition precedent to being subject to §9604(a), the pollutant or contaminant must, under reasonably foreseeable circumstances, present an imminent and substantial danger which is not present here. In response, the court stated that this standard went beyond the limited purpose of the NPL as a first step in identifying sites most in need of response actions. The proper standard necessary to justify inclusion of a site on the NPL is merely that of "[s]ome minimum degree of confidence that the site may someday be eligible for fund financed remedial action." *Id.* According to the court, this standard is more in line with the function of the NPL.

The second challenge to the above definition involved only the three petitioners who own uranium mill tailing facilities. They disputed the EPA's authority under CERCLA to list sites which are already regulated by their respective states pursuant to authority that has been delegated to those states (Agreement States) which have an agreement with the Nuclear Regulatory Commission (NRC). Petitioners contend that "[t]he EPA came forward with no rational explanation for its decision to exclude NRC-regulated facilities from the NPL, while at the same time including facilities regulated by Agreement States." *Id.* at 934. In spite of the NRC's plenary authority to require cleanup of inactive uranium mill sites, it must first withdraw at least some of its delegation of power to Agreement States before acting. *Id.* On the other hand, EPA is able to act immediately and need not wait for NRC action. In bypassing this requirement, the court recognized that it would be more prudent to allow the EPA to respond directly to sites regulated by Agreement States, rather than wait for NRC action.

Petitioners also argued that CERCLA was intended to regulate only high priority sites and not sites "adequately regulated by the NRC or Agreement States . . ." *Id.* Here again, the court broadly interpreted CERCLA, as giving the EPA authority to place uranium mill tailing sites on the NPL. The court reasoned that except for specific limitations, not applicable here, nothing in CERCLA limits the EPA's authority to regulate mill tailing facilities.

David M. Grey, '86

## INSURANCE

**Continental Insurance Co. v. Northeastern Pharmaceutical & Chemical Co.**, No. 84-5034-CV-S-4 (W.D. Mo. June 25, 1985).

The plaintiff, Continental Insurance Co., brought this action for declaratory judgment against the defendants, Northeastern Pharmaceutical & Chemical Co. (NEPACCO), Michaels (NEPACCO's founder and president), Lee (NEPACCO's vice-president), and Mills (NEPACCO's shift supervisor). The plaintiff was a liability insurer for the defendants pursuant to three consecutive Comprehensive General Liability (CGL) policies covering the period August 5, 1970, to November 17, 1973. Continental sought a declaration of its obligations to defend and indemnify the defendants in two lawsuits involving defendants'

production and disposal of hazardous wastes, *United States v. Northeastern Pharmaceutical & Chemical Co.*, 579 F.Supp. 823 (W.D. Mo. 1984) (hereinafter *EPA*) and *Capstick v. Independent Petrochemical Corp.*, No. 83-00453 (St. Louis City Cir. Ct. filed March 7, 1983) (hereinafter *Capstick*). The issue was whether the plaintiff owed the defendants a duty to defend and a duty to indemnify in these two lawsuits.

The State of Missouri intervened and counterclaimed for past and future cleanup costs against Continental due to the defendants' involvement in a third lawsuit, *Missouri v. Independent Petrochemical Corp.*, No. 83-2670-C-C (E.D. Mo. filed Nov. 23, 1983) (hereinafter *IPC*). Plaintiff then moved for summary judgment respecting its rights and obligations in all three lawsuits.

All three CGL policies obligated the plaintiff to defend and pay on behalf of the defendants any damages caused by an "occurrence" which the defendants became legally obligated to pay. The policies only applied to bodily injury and property damage occurring during the policy periods. The policies defined "occurrence" as "an accident, including continuous or repeated exposure to conditions, injury or property damage neither expected nor intended from the standpoint of the insured." *Continental Insurance*, at 6. The two policies effective from August 6, 1971, to November 17, 1973, also contained a pollution exclusion clause limiting coverage to "sudden and accidental" acts of pollution or contamination.

The plaintiff argued that the alleged damages were not caused by an "occurrence" and in the event that they were caused by an "occurrence," then the pollution exclusion clause applied. The plaintiff also argued that the alleged damages did not occur within the policy periods and any harm in the *EPA* suit did not involve bodily injury or property damage as set forth in the policies.

The court's analysis was separated into two parts. United States District Court Judge Russell G. Clark of the United States District Court for the Western District of Missouri discussed the *EPA* and *IPC* suits. In *EPA*, this court held that §§104, 106(a), and 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) of 1980, 42 U.S.C. §§9604, 9606(a), and 9607(a) (1982) apply retroactively, but only as far back as CERCLA's effective date of December 11, 1980. This court then found the *EPA* defendants liable for all cleanup costs after CERCLA's effective date. In *IPC*, which is pending, the State of Missouri's claim was made pursuant to only §107(a) of CERCLA and Missouri's common law of public nuisance for all past and future cleanup costs.

The court considered the *EPA* and *IPC* suits jointly because in both the plaintiffs were governmental entities whose actions sought recovery for cleanup and response costs. 42 U.S.C. §9607(a). Further, the court reasoned that the state of Missouri in the *IPC* suit could potentially recover only cleanup costs incurred after December 10, 1980, if the *EPA* decision is followed. (The court fails to discuss the State of Missouri's common law nuisance claim.) The court then applied the general rule that the time of "occurrence" within the meaning of an indemnity policy (the CGL policies in this action) is the time of actual loss or damage. The court then concluded that a governmental entity does not suffer a compensable loss until it actually incurs response costs. Applying this rationale to the conclusion that the defendants can only be held liable under CERCLA for costs incurred after its effective date, the court found that there could be no occurrence within the policy periods. Thus, Judge Clark granted partial summary judgment declaring that the plaintiff had no duty to defend or indemnify the defendants in the *EPA* and *IPC* suits.

The second part of this case involved the parties' respective rights and duties concerning the *Capstick* suit. In *Capstick*, the

plaintiffs sought: (1) compensation for present and future personal injury and property damage; (2) payment for cleanup costs; and (3) punitive damages. The *Capstick* plaintiffs made no claims pursuant to CERCLA.

In the pending *Capstick* suit, the court found that the law was undecided on how to define whether the insured, the defendants, incurred a loss caused by an occurrence within the policy periods. The defendants argued that liability should attach from the time of the negligent or wrongful act to the time of discovery of the damage. The plaintiffs responded that the time of occurrence and loss is determined when the damage is manifested or ascertainable.

In dictum, the court discussed alternate theories and expressed its preference for one. The court made an analogy to asbestos litigation and rejected the defendants' "exposure" theory which fixed the occurrence at the time of exposure. The court also rejected the plaintiffs' "manifestation" theory, which fixed the occurrence at the time injuries become apparent. The court preferred the "injury in fact" theory as it fixes the time of occurrence when it actually happens, regardless of when the injury manifests itself.

The court held that a declaratory judgment was premature concerning the rights and obligations of the parties in the *Capstick* suit. In addition to the unresolved law on time of occurrence, the court found that the law was unsettled as to the interpretation of pollution exclusion clauses and even if it were settled, whether the events in *Capstick* were "sudden and accidental," "will inevitably depend upon findings of fact after a trial on the merits." *Continental Insurance*, at 15. The court also held that additional findings would be necessary as to: (1) medical evidence on the progression and nature of any diseases related to hazardous wastes; (2) more specific determinations of bodily injury and property damage; and (3) "whether the polluting acts were intended or unintended and whether the pollution results were intended or unintended." *Id.*

Thomas G. Sheehan, '87

## BANKRUPTCY

**In Re Commonwealth Oil Refining Co., Inc.**, 23 E.R.C. 1069 (Bankr. W.D. Tex. May 16, 1985).

On May 16, 1985, Bankruptcy Judge Joseph C. Elliott, writing for the U.S. Bankruptcy Court for the Western District of Texas, San Antonio Division held:

1. That the automatic stay provision of the Bankruptcy Code is inapplicable to EPA's enforcement action;
2. That the Supreme Court's decision in *Ohio v. Kovacs* supports the government's attempt to bring CORCO (the debtor) into compliance with the state environmental laws; and
3. That CORCO is not entitled to a stay under 11 U.S.C. §105.

The debtor, Commonwealth Oil Refining Company (CORCO), owns and operates a hazardous waste facility in Penuelas, Puerto Rico. Pursuant to §3005 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §6925 (1982), CORCO informed the U.S. Environmental Protection Agency (EPA) on August 13, 1980, that it handles hazardous waste as defined in section 1004(5) of RCRA, 42 U.S.C. §6903(5) and in 40 C.F.R. §261.3 (1984). Pursuant to §§3004 and 3005 of RCRA, and the standards promulgated by EPA in 40 C.F.R. §§264 and 270, CORCO completed Part A of its permit application on November 18, 1980, thereby obtaining interim status as a hazardous waste facility. This allowed CORCO to operate without a RCRA permit until EPA reviewed CORCO's

Part B of the permit application, due October 12, 1984. After obtaining interim status, a hazardous waste management facility must still comply with federal and state requirements. On July 11, 1984, CORCO filed for bankruptcy, and on December 13, 1984, CORCO, as debtor-in-possession, moved for an automatic stay, or, in the alternative, a section 105(a) stay of any RCRA enforcement action.

In holding that the section 362(a) stay provision of the bankruptcy code is inapplicable to EPA's enforcement action, Judge Elliott found that such action by the EPA "falls squarely within the exception to the automatic stay codified at 11 U.S.C. §362(b)(4) (1985)." 23 E.R.C., at 1072. That section exempts "[t]he commencement or continuation of an action or proceeding by a governmental unit" and permits the "governmental unit to enforce [its] police or regulatory power . . . ." §362(a)(5). In support of this reading, Judge Elliott reviewed the legislative history of the Bankruptcy Reform Act of 1978. The Judge cited to both the Senate and House reports which provide that "where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection . . . or similar police or regulatory laws, . . . the action or proceeding is not stayed under the automatic stay." *Id.* at 1072, citing S. Rep. No. 989, 95th Cong., 2d Sess. 52, reprinted in 1978 U.S. Code Cong. & Ad. News 5787, 5838; H.R. Rep. No. 595, 95th Cong., 2d Sess. 343, reprinted in 1978 U.S. Code Cong. & Ad. News 5963, 6299.

With regard to the exercise of EPA's police power, the court cited an unpublished opinion by U.S. District Judge Dickinson R. Debevoise in the District of New Jersey. Judge Debevoise found "that EPA's issuance of administrative orders or initiation of other action pursuant to section 7003 [of RCRA] . . . to protect public health and welfare and the environment also constitutes a valid exercise of the police power of the U.S." *CORCO*, at 1072, citing *In re Bayonne Barrel & Drum Co., Inc.*, No. 82-0474, slip op. at 1 (D.N.J. July 17, 1984). Judge Elliott referred to strong language from the U.S. District Court for Puerto Rico, which stated that "Congress has recently recognized in an express fashion its intention that public interest regulations are to outweigh that of the Bankruptcy Act and Rules in case of conflict." 23 E.R.C., at 1072, citing *Matter of Canarico Quarries, Inc.*, 466 F.Supp. 1333, 1339 (D.P.R. 1979).

In addition, Judge Elliott cited *Penn Terra Ltd. v. Department of Environmental Resources*, 733 F.2d 267, 274 (3d Cir. 1984), in which the automatic stay provision was found to be inapplicable where it would have interfered with a state's ability "to rectify harmful environmental hazards." The Third Circuit found that "[n]o more obvious exercise of the state's power to protect the health, safety, and welfare of the public can be imagined." 23 E.R.C., at 1073, citing *Penn Terra*, at 274.

Judge Elliott found that *Ohio v. Kovacs*, —U.S.—, 105 S. Ct. 705 (1985), supported EPA's attempt to bring CORCO into compliance with federal environmental laws and the hazardous waste regulations of the Commonwealth of Puerto Rico. In *Kovacs*, the U.S. Supreme Court stated that the automatic stay provision was inapplicable to suits to enforce the regulatory statutes of a state and that the possessor of the property of a bankrupt estate must comply with the state's environmental laws. 23 E.R.C., at 1073, citing *Kovacs*, at 711-12.

The crucial factor in determining the applicability of the automatic stay provision involves the question of whether or not the state is concerned with seeking a money payment from the bankrupt party. Judge Elliott found that "[t]he Supreme Court had made it unequivocally clear that it was the dispossession of Kovacs' assets and the appointment of a receiver that turned the injunction into a dischargeable money obligation." 23 E.R.C., at 1073-74, citing *Kovacs*, at 710-11, n.11. (See Vol. 2, No. 1 *Hofstra*



*Environmental Law Digest* (Spring 1985) for a discussion of Kovacs.)

The Supreme Court found support for this position in the Third Circuit's decision in *Penn Terra*. In that case, there was neither the appointment of a receiver, nor was there an attempt made by the state to obtain money from the bankrupt. Although imposition of injunctive relief will likely require the expenditure of money, the Third Circuit reasoned that this did not constitute a "money judgment." That court opined, "[a]n injunction which does not compel some expenditure or loss of monies may often be an effective nullity." 23 *E.R.C.*, at 1074, citing *Penn Terra*, at 277-78.

Because EPA did not intend to dispossess CORCO of its assets or to seek a money judgment, and because CORCO had neither submitted its Part B application (thereby failing to comply with interim status requirements), nor submitted a closure plan, the Bankruptcy Court found CORCO to be in violation of both the RCRA regulations and Puerto Rico's environmental statutes. In addition, the court noted that, based on *Kovacs*, "[t]he automatic stay provision does not apply to suits to enforce a state's regulatory statutes." 23 *E.R.C.*, at 1075, citing *Kovacs*, at 711 n.11.

The Bankruptcy Court easily disposed of CORCO's motion for a stay of proceedings pursuant to 11 U.S.C. §105. That section provides that "the Bankruptcy Court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." This broad language is greatly circumscribed by the legislative history cited by Judge Elliott, which explains that §105(a) stays are granted "under the usual rules for the issuance of injunction . . ." 23 *E.R.C.*, at 1075, citing S. Rep. No. 989, 95th Cong. 2d Sess. 51, reprinted in 1978 U.S. Code Cong. & Ad. News 5837, H.R. Rep. 595, 95th Cong., 2d Sess. 342, reprinted in 1978 U.S. Code Cong. & Ad. News 6298. Based on case law within the Fifth Circuit, one of the four prerequisites for the issuance of an injunction is "a substantial likelihood that the movant will prevail on the merits." 23 *E.R.C.*, at 1075, citing *Southern Monorail Co. v. Robbins & Myers*, 666 F.2d 185, 186 (5th Cir. 1977). Since CORCO had "conceded this element," Judge Elliott determined that the court need not address the remaining three elements for a preliminary injunction.

Finally, Judge Elliott noted "that Congress has expressly directed in 28 U.S.C. §959(b) that a debtor-in-possession 'shall manage and operate the property in his possession . . . according to the requirements of the valid laws of the state in which the property is situated . . .'" This provision requires CORCO to comply with federal law." 23 *E.R.C.*, at 1075, citing *Haberern v. Lehigh & N.E. Ry. Co.*, 554 F.2d 581 (3d Cir. 1977); *Carpenters Local Union No. 2746 v. Turney Woods Products, Inc.*, 289 F.Supp. 143 (W.D. Ark. 1968).

In another case involving, *inter alia*, applicability of the automatic stay provision, the U.S. District Court for the Northern District of Alabama concluded "that the complaint filed by the U.S., which seeks a court order compelling [defendant ILCO] . . . to remedy environmental hazards, constitutes an equitable action to prevent future harm, rather than an action to enforce a money judgment." *United States v. Interstate Lead Co., Inc.*, CV85-H-823-S, at 16, (N.D. Ala. May 10, 1985) (hereinafter cited as *ILCO*). In reaching this conclusion, the Alabama District Court quoted the same paragraphs from the legislative history that were cited in *CORCO*. Judge Hancock reasoned that, based on this legislative history, "[t]he enforcement of an injunction ordering compliance with environmental laws is more important than the debtor's right to have a breathing spell from its creditors or than the creditors' rights to an orderly administration of the estate." *Id.* at 15.

The Alabama District Court agreed with the Third Circuit's

approach in *Penn Terra* which suggested that a court ought to determine whether an injunction is an equitable remedy or a money judgment by focusing on the "nature of the injuries which the challenged remedy is intended to redress — including whether plaintiff seeks compensation for past damages or prevention of future harm . . ." *ILCO*, at 15-16, citing *Penn Terra*, at 278; see also, *In re Laurinburg Oil Co., Inc.*, No. B-84-00011 (Bankr. M.D.N.C. Sept. 14, 1984); *Matter of Williston Oil Corp.*, No. 83-04116 (D.N.J. Sept. 26, 1984).

Carl Howard, '86

## PUBLIC LANDS

**Natural Resources Defense Council, Inc., v. Hodel**, No. 84-616, slip op. (E.D. Ca. Sept. 3, 1985).

The plaintiffs, the Natural Resources Defense Council, Inc., (NRDC), the Sierra Club, the Wilderness Society, the Defenders of Wildlife, the Animal Defense Council and an individual, Curt Spalding, filed a complaint with the U.S. District Court for the Eastern District of California, challenging the final rules and agency actions of the Director of the Bureau of Land Management (BLM) and the Secretary of the Department of the Interior (DOI) (hereinafter defendants). The relief sought was an injunction to prohibit the defendants from implementing any Cooperative Management Agreements (CMAs), diluting Allotment Management Plans (AMPs), deleting the Supplement Feeding Amendment and amending the Land Use Planning and Operator Penalty Statutes.

This case is one of first impression, where it is charged that the defendants, who were delegated the authority by Congress to manage more than 170 million acres of public rangelands, impermissibly re-delegated their authority by amending existing DOI regulations and by creating CMAs. Specifically, plaintiffs alleged, and the court found, that the CMAs granted the defendants the ability to allow ranchers to graze their livestock on public lands "in the manner that these ranchers deem appropriate." Slip op. at 3-4. These rights were found to conflict with the Taylor Grazing Act (TGA) of 1934, the Federal Land Policy and Management Act (FLPMA), the Public Rangeland Improvement Act (PRIA) and the National Environmental Policy Act (NEPA).

The court held that the CMAs: were not congressionally authorized; represented a permanent system potentially covering millions of acres of public land; unlawfully abdicated the Secretary's statutory duty to regulate the use of private land; failed to retain necessary governmental authority to enforce overgrazing prohibitions by cancelling, suspending, or modifying permits; violative of the spirit and letter of federal law intended to preserve public lands via intensive management and ongoing governmental rights of re-entry.

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Before the court addressed the facts of the case, it focused on two issues: whether the plaintiffs had standing to sue, and what is the proper standard of review for the court. Judge Raul Ramirez found valid standing since plaintiffs satisfied a four pronged test: (1) an actual or threatened injury would result from the illegal conduct of the defendant; (2) a causal connection existed between the injury and the challenged action and that the injury was likely to be redressed by a favorable decision; (3) plaintiffs alleged particularized legal rights as opposed to generalized grievances; and (4) the interest of the plaintiffs arguably fell within the zone of interests to be protected by the statute.

Regarding the scope of review, a court will generally defer "to the agency charged with the administration of the laws and sustain its interpretation of a complex statute even if it is not the only permissible construction." *Id.*, at 8, citing *Chemical Mfrs. Ass'n v. NRDC*, —U.S.—, 105 S.Ct. 1102, 1108 (1985). However, in the present case the court found it necessary to overrule the agency's actions as contrary to existing law. The court noted that "administrative constructions reached by rulemaking must be set aside if they are 'inconsistent with the statutory mandate [or] frustrate the policy that Congress sought to implement.'" Slip op. at 8-9, quoting *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 24, 32 (1981).

The court then reviewed the legislative and historical background of federal grazing policy. Directing its attention to the principal dispute in the lawsuit, the court began its analysis by comparing the new CMA to the old AMP under the FLPMA to see if in fact the new program superseded the existing act. Under the CMA, 43 C.F.R. §4120.1 (1984), the BLM was authorized to enter into special permit agreements with selected ranchers who demonstrated "exemplary rangeland management practices," Slip op., at 29, citing 43 C.F.R. §4120.1(a) (per the discretion of BLM officials) for a period of ten years without prescribing to the ranchers numerous conditions concerning the proper use of the allotment. The BLM further issued a BLM Manual, which included new standards for ranchers to follow under the CMA. The handbook instructed the defendants to evaluate the permittees after five years. The unique feature in this directive was that if the permittee did not comply, "nevertheless [he was] entitled to an additional five years within which to comply." Slip op., at 34. Thus, for ten years the BLM forfeited its power to revoke or cancel the permit if the rancher failed to meet any conditions.

After finding that defendants' notice of proposed rulemaking, with respect to the CMA program, was adequate, *id.* at 39, and that defendants had "considered the significant issues relevant to promulgation of the CMA rule," *id.* at 42, the court addressed plaintiffs' substantive statutory arguments.

Under FLPMA, all permits have to conform to one of two plans. The first involved the use of AMPs, which prescribed specific guidelines for grazing practices. If the Secretary chose to incorporate an AMP into a permit, the AMP must be tailored to fit the range conditions in question and the Secretary must periodically review each AMP. Slip op., at 24-25. However, the Secretary can only revise or terminate AMPs following consultation and coordination with the parties involved. *See*, 43 U.S.C. §1757(d).

If the Secretary chooses the second alternative, permits without AMPs, the Secretary may proceed without consulting the parties in interest. This alternative mandates that the Secretary "shall specify" conditions governing the use of public lands for livestock grazing.

The defendants argued that even if their proposed CMAs conflicted with prior law, they were valid as a new regulatory form contained in PRIA in that the CMA was based on language found in a federally created program known as the Experimental Steward Program (ESP) 43 U.S.C. §1908. The ESP allows the Secretary to select areas of rangelands and concentrate on those areas to explore innovative grazing management procedures. This program would give the defendants the right to supersede existing authority.

After extensive review, the court found that the CMA was not a congressionally authorized program. Thus the CMA regulations that were implemented violated defendants' duties under the Taylor Act, FLPMA and PRIA. In its analysis the court found that the defendants' reliance on ESP was unfounded. The court explained that ordinarily it would defer to the Secretary's judgment on matters such as the applicability of a particular program; however, it was "blatantly obvious from the record that the Secretary did not in fact rely upon ESP when he promulgated the regulation authorizing the CMA program." Slip op., at 44. The court noted that "it is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself," and not on the basis of "counsel's *post hoc* rationalizations." *Id.*, at 45 n.35, citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 50 (1983). Moreover, even if the court could find that the CMA did fall under the guise of ESP, it would still be improper because "any experimentation with new permit issuance procedures is bounded by existing law, . . . and the ESP does not create an exception to the FLPMA permit requirements." Slip op., at 48-49. Thus the CMA did not meet the description of projects that ESP was intended to encourage.

In considering plaintiffs' principal contention under the federal grazing statutes, the court agreed "that the CMA regulation, as finally promulgated and implemented by the Secretary and the BLM, is a naked violation of defendants' affirmative duties under the Taylor Grazing Act, FLPMA, and PRIA." Slip op., at 49. The court reasoned that the CMA was an unlawful method of permit issuance because it did not meet the recognized requirement of review to revise or cancel livestock grazing permits when necessary. Rather, the CMA was a permanent license to new permittees (in direct opposition to the AMP). Thus, even if the CMA was a species of AMP, the defendants would nevertheless have been required to specifically limit the extent to which livestock grazing could be conducted on each allotment. The court suggested that the CMA regulation fell short of the standard set by Congress in FLPMA, in that it abdicated "the Secretary's statutory duty to prescribe for ranchers the appropriate number of livestock which may be grazed . . ." *id.* at 4, and that the CMA contained only "vague references to the BLM's authority to periodically evaluate the range." *Id.* at 55. Hence, the court found that the BLM violated congressional intent in that "Congress had ordered the Secretary to continue managing the lands in accordance with both the Taylor Act and FLPMA when it enacted PRIA in 1978." *Id.* at 46. Furthermore, the court stressed that under any program "[p]ermittees must be kept under a sufficiently real threat of cancellation or . . . other forms of mismanagement . . . [I]t is for Congress and not the defendants to amend the grazing statutes." *Id.* at 56-57.

The court further found that the defendants violated the National Environmental Policy Act (NEPA), 42 U.S.C. §4332 (1982), by failing to prepare an Environmental Impact Statement (EIS) prior to implementing the CMA. The court relied upon *Foundation for North American Wild Sheep v. United States Dept. of Agriculture*, 681 F.2d 1172, 1177 n.24 (9th Cir. 1982) (hereinafter *Foundation*), finding that "[a]n EIS must be prepared for actions that may significantly affect the quality of the human environment." Slip op., at 60. The defendants claimed that their decision to forego

preparation of an EIS was reasonable since they had concluded that the new program would not "significantly [affect] the quality of the human environment." *Id.* at 57, citing 42 U.S.C. §4332(2)(c). However, the court found that defendants' Environmental Assessment "was essentially a policy justification" and did not support defendants' finding that an EIS was not required. Slip op., at 58. The court conceded that defendants had failed to "take a hard look at the potential degrading environmental impacts which they concluded might result from program abuse." *Id.* at 60. This "failure to address 'crucial factors' . . . renders [defendants'] determination of no significant impact plainly unreasonable." *Id.* at 62, citing *Foundation*, at 1178.

The defendants' duty under the Administrative Procedure Act, 5 U.S.C. §553 (1982), is to allow interested persons to participate in rulemaking. The court found that no notice was given to these concerned citizens except for a very technical report of the proposal published in the Federal Register. 48 Fed. Reg. 21821 (May 13, 1983). Defendants contended that their modification of the AMP was intended only to clarify and "eliminate redundancy." Slip op., at 64. The court found defendants' claim to be misleading and "a mischaracterization," *id.*, of what was in fact a basic policy readjustment. As a result, the court granted plaintiffs' motion for summary judgment on this issue.

The court also granted plaintiffs' motion for summary judgment concerning defendants' regulatory dilution of the rule of land use plans in grazing administration. The court found that the defendants' modification of the AMP was contrary to legislative purpose in that it was a radical departure from existing grazing statutes. The language found in the existing statute "required BLM officers to modify, suspend, or cancel all permits which were inconsistent with governing land use plans. These sections were deleted in 1984." *Id.* at 67. The proposed amendments merely provide that "the authorized officer *may* modify . . . if monitoring data show that [objectives are not being met]." *Id.* at 68. Thus, the court characterized this action as "a 180-degree turn [with] 360 degrees of circular reasoning and no degree of explanation or justification." *Id.* at 70.

Plaintiffs were granted summary judgment on two more issues: the deletion of operator penalties, and the defendants' revision of the supplemental feeding amendment. In the deletion of operator penalties, provisions which penalize livestock operators who violated federal or state environmental laws, the court found that the defendants failed to respond to comments or to explain the basis and purposes of this policy reversal. The court could "imagine no legal argument" in support of defendants' position on this issue and granted plaintiffs' motion. *Id.* at 73.

Regarding the supplemental feeding amendment, the court found that the Secretary's final rulemaking enabled the ranchers, for the first time, to use supplemental feeding techniques without prior BLM authorization. Such authorization was invalid since defendants failed to prepare an EIS.

Finally, the court withheld a decision on defendants' new definition of "affected interests." See, e.g. 43 C.F.R. §§4110.3-3, 4120.2(a), 4160.1-1, 4160.2 and 4160.3(B) (1984). The court reasoned that a ruling would not be ripe "[u]nless and until defendants impermissibly prevent public participation in livestock management decisionmaking . . ." Slip op., at 82.

Steve Wasserman, '86

## AIR

**State of New York v. Thomas**, 613 F.Supp. 1472 (D.D.C. July 26, 1985).

Several northeastern states, concerned environmental groups, and four individuals were granted summary judgment in the first

action invoking §115 of the Clean Air Act. 42 U.S.C. §7401 (1982). The court ordered the Administrator of the Environmental Protection Agency (EPA) to take specific actions to abate acid depositions that endanger the health and welfare of Canadians.

Plaintiffs' objective in bringing this suit was to force the present EPA Administrator to take the action necessitated by former Administrator Douglas Costle's findings under §115. Section 115 requires the acid-producing states to revise their State Implementation Plans (SIPs) to prevent the flow of acid rain over the United States border into a foreign nation. The evidentiary basis of the suit consisted of letters to government officials and a press release in which Costle expressed his conclusion that the United States and Canadian sources of acid rain were "endangering [the] public welfare in the U.S. and Canada and that the U.S. and Canadian sources contribute to the problem not only in the country where they are located but also in the neighboring country." Appendix A (letter to Secretary of State Muskie from Costle) 613 F.Supp. at 1486. Costle's correspondence was prompted by his reading of the Seventh Annual Report on Great Lakes Water Quality (1980) of the International Joint Commission (IJC), which concluded that acid rain was harming both United States and Canadian citizens.

The issue in the case was whether Costle's actions were sufficient to invoke §115 and if so, whether the present Administrator and the polluting states would be ordered to comply with the section.

Before considering the merits of the claim, the court determined that the plaintiffs had presented a justiciable controversy. First, regarding standing, the court found that all plaintiffs had "statutorily cognizable claims," *Id.* at 1477, under §304 of the Clean Air Act. 42 U.S.C. §7604 (1982). The standing of the environmental groups proved to be particularly significant because they "alleged not only that emissions from polluting states have adversely affected eastern Canada, but also . . . that its members live, work, vacation or own property in eastern Canada." *Id.* at 1479. Under the present statutory scheme the court suggested that United States citizens' property interests in a foreign nation, namely Canada, is the most effective means by which to meet the standing requirements of §115. Although some Canadian citizens may have been represented by the environmental groups, there were no Canadian citizens directly represented.

The court determined that this was an appropriate "case and controversy" under Article III of the U.S. Constitution, as interpreted by *Hall v. Beals*, 396 U.S. 45 (1969). In *Hall*, the court determined that a plaintiff must allege a threatened or a direct injury, and that the injury must be fairly traced to the challenged action which could be legally redressed. In the present case, Judge Norma Holloway Johnson explained that constitutional "traceability and redressability" requirements were necessarily met because Congress felt that acid rain was an abatable problem, as shown by their adoption of §115. Operation of §115 would compel the Administrator to "end the very inaction which is the cause of plaintiffs' injuries." *Id.* at 1481, citing Plaintiffs' Memoranda of Points of Authorities.

Judge Johnson then addressed the merits of the case and examined the three requirements of §115. The first requirement is the receipt of a report from a recognized international agency. 42 U.S.C. §7415. In October 1980, the IJC released its report on which Costle later relied. The IJC is a seventy-five year old treaty organization established by the United States and Canada; the court did not question the legitimacy of the Commission or its report. The report confirmed that acid rain was harmful to the health and welfare of both United States and Canadian citizens.

This information prompted Costle to write to Secretary of State Muskie and Senator Mitchell, in early 1981, to inform them of the report's contents and of the EPA's planned action.

The second requirement of §115 is that the Administrator must have reason to believe that pollutants emitted by the United States are harmful to the health and welfare of a foreign nation. The court concluded that the content of the report was a sufficient basis for Costle to conclude that the Canadians were being harmed.

The final requirement of §115 is statutory reciprocity. Canada must have a statute which affords the United States the reciprocal rights to those which Canada gains under §115. Costle found that §21.1 of the Canadian Clean Air Act granted such reciprocal rights. Judge Johnson noted that "Costle qualifies this conclusion by characterizing the reciprocity as a fluid and dynamic situation that is subject to change." *Id.* at 1483. The Canadian legislation,

although written to grant reciprocal rights with regard to transboundary air pollution, has not yet been tested. The reciprocity requirement could prove to be the most troublesome of any future tests of §115.

In opposition to plaintiffs' motion for summary judgment, defendant argued that plaintiffs failed to prove causation between EPA inaction and the injury alleged in Canada. The court rejected defendant's argument and granted plaintiffs' motion. The court concluded that "it is now incumbent upon the current EPA Administrator to 'give formal notification' to the governors of the states in which harmful emissions originate and to set in motion the necessary processes to require a plan revision so as to prevent or eliminate the endangerment encompassed by the Costle determinations." *Id.* at 1486. The Administrator must now instruct his staff to determine which states are original emission sources of acid rain.

Richard Horowitz, '87

## Judicial Updates

### RADIOACTIVE WASTE

**Brown v. Kerr-McGee Chemical Corp.**, 767 F.2d 1234 (7th Cir. July 18, 1985).

Plaintiffs, property owners living adjacent to the Kerr-McGee West Chicago Rare Earths Facility, (the site), sought an injunction under state tort law theories to compel Kerr-McGee to remove certain hazardous, nonradioactive wastes from the industrial site. The plaintiffs also sought compensatory and punitive damages because liquid wastes, deposited in ponds at the disposal site by Kerr-McGee and its predecessors, had leached into the soil polluting the water table. The issue on appeal was whether the federal Atomic Energy Act (AEA), 42 U.S.C. §2011 (1982), which governs radioactive waste removal and disposal, preempts the use of an injunction based on state law to remove nonradioactive wastes when such wastes are inseparable from radioactive wastes. (See Vol. 2, No. 1 *Hofstra Environmental Law Digest* (Spring 1985) for a discussion of "mixed wastes.") The Seventh Circuit, in a 2-1 decision, concluded that federal law preempts the plaintiffs' request that defendant Kerr-McGee move the mixed wastes.

The Kerr-McGee site at issue includes approximately forty-three acres of land: an eight acre factory site, a twenty-seven acre storage and disposal site, and an eight acre intermediate site which connects the factory, storage, and disposal sites. From the mid 1930's until 1973, the factory area was used by Kerr-McGee and its predecessor companies to process monazite ores. Monazite ores contain thorium, a natural radioactive element. The solid and liquid wastes resulting from the processing were disposed of in the storage area. Although Kerr-McGee stopped processing monazite ores in 1973, it continues, under license from the Nuclear Regulatory Commission (NRC), to possess and store thorium ores at the West Chicago site. 767 F.2d at 1247. In July 1977, the NRC ordered the decommissioning of the inactive site and also ordered disposal of the contaminated materials. However, not until May 27, 1983, did the NRC issue its Final Environmental Statement, which recommended that the buildings on the site be razed and the wastes encapsulated and stored on the site for an undefined time period. *Id.*

The plaintiffs alleged that the buildings on the site constitute a public and private nuisance under Illinois tort law because they were in a state of disrepair. *Id.* Specifically, plaintiffs claimed that open pits were filled with refuse and chemicals; that hazardous

chemicals were dumped in the storage area; that liquid wastes were deposited in ponds on the site, contaminating the water table; and that the level of contamination in underground waters near the site exceeded the standards set by the Illinois Pollution Control Board.

Count I of plaintiffs' complaint sought an injunction ordering the defendants to destroy or to repair the buildings on the site and to remove all hazardous wastes. Defendant Kerr-McGee moved for dismissal of that part of count I requesting that the wastes be removed on the ground that federal law preempted an injunction based on state law. The United States District Court for the Northern District of Illinois granted partial summary judgment for Kerr-McGee. Plaintiffs appealed the summary judgment order to the Seventh Circuit.

The Circuit Court posed the threshold question of jurisdiction as whether the district court order granting partial summary judgment was appealable. The court accepted plaintiffs' contentions that jurisdiction was granted under 28 U.S.C. §1292(a)(1) because summary judgment "had the practical effect of denying plaintiffs' request for permanent injunctive relief." 767 F.2d at 1237. That section grants jurisdiction in appellate courts over interlocutory district court orders "granting, continuing, modifying, refusing or dissolving injunctions." 28 U.S.C. §1292(a)(1) (1982). When the district court granted partial summary judgment for defendants, thereby denying plaintiffs' request that the wastes be removed, "the court denied plaintiff's part of the injunctive relief sought; thus the court's order constitutes denial of an injunction for purposes of 1292(a)(1)." 767 F.2d at 1237.

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Regarding the preemption issue, the plaintiffs argued that federal law preempts state regulation of radiation hazards but not state regulation of nonradiation hazards. They also argued that since Illinois tort law allows a court to order exhumation of hazardous wastes, "the district court can find that the nonradiation hazards of the Kerr-McGee wastes justify the removal of the wastes to another site." *Id.* at 1240. Writing for the majority, Judge Harlington Wood, Jr. rejected plaintiffs' basic argument and held that "when the radiation and nonradiation hazards are inseparable, federal law preempts a state-law injunction ordering removal of the wastes." *Id.*

The court cited two tests to determine when federal law preempts state law. The first test is whether there is congressional intent or a pervasive federal scheme to occupy a given field. *Silkwood v. Kerr-McGee Chemical Corp.*, 464 U.S. 238, 248 (1984). The second test is whether there is an "actual conflict" between the state and federal law. *Id.* at 1240.

In this case, the first test was not met as the court did not find explicit congressional intent or a pervasive federal scheme that preempts the state public and private nuisance laws relied on by plaintiffs. The AEA preempts any state regulation of radioactive wastes because it provides a pervasive scheme for regulating such substances. 767 F.2d at 1241. The Illinois laws relied on by plaintiffs only concern pollution standards, building codes and public nuisances; they do not regulate radioactive wastes. Therefore, the plaintiffs "can bring an action based on these [Illinois] laws against Kerr-McGee as long as the remedy involves no radioactive materials." *Id.* at 1241, citing *Illinois v. Kerr-McGee Chemical Corp.*, 677 F.2d 571, 582 (1982).

Regarding the second test, whether an actual conflict exists between state and federal law, the courts must look to the facts of the case to make such a determination. *Id.* at 1241-42, citing *Illinois v. Kerr-McGee*, at 581. The wastes at the Kerr-McGee site were found to constitute "byproduct material", 767 F.2d at 1242, under the AEA, as amended by the Uranium Mill Tailings Radiation Control Act. 42 U.S.C. §2014(e)(2) (1985). Because Illinois did not enter into an agreement with the NRC to regulate radioactive byproduct material under §2021(b), the NRC has exclusive authority to regulate the radioactive wastes of the byproduct material. Furthermore, Kerr-McGee must obtain a license from the NRC for decommissioning the site and disposing of the wastes. 42 U.S.C. §§2113-14. Therefore, the court found that the state law remedies sought by the plaintiffs interfere with the NRC's authority to regulate radioactive wastes, and specifically with the NRC's function of choosing "the method of disposal that, in light of radiation, nonradiation, and economic considerations is the most appropriate." 767 F.2d at 1242. Even though the radioactive and nonradioactive wastes are intermixed, the court held that the plaintiffs' request for an injunction that the wastes be moved elsewhere is preempted because the injunction "would stand 'as an obstacle to the accomplishment of the full purpose and objectives' of federal regulation of radiation hazards." *Id.* citing *Silkwood*, 464 U.S. at 248. Thus an actual conflict was found, thereby preempting state law.

In his dissent, Judge Richard Cudahy disagreed with the majority's conclusion that a direct conflict exists between state and federal law. According to Judge, "[a]ll Kerr-McGee need do in order to preclude any conflict is to request NRC permission for a disposal alternative which satisfies state law." 767 F.2d at 1246.

Steven Sonkin, '86

## HAZARDOUS WASTE

**Ayers v. Township of Jackson**, \_\_ N.J. Super. \_\_, 493 A.2d 1314 (N.J. Super. App. Div. June 4, 1985).

A recent decision by the Superior Court of New Jersey, Appellate Division, severely curtails the possible recovery of damages by plaintiffs from a municipality under the New Jersey Tort Claims Act, N.J.S.A. §59:1-1 (1972). In modifying the decision of the Superior Court, Law Division, the court asserted the need for ensuring sovereign immunity from tort liability as its justification for the decision. (See Vol. 2, No. 1 *Hofstra Environmental Law Digest*, (Spring 1985) for a review of the lower court's decision. 189 N.J. Super. 561, 461 A.2d 1984 (1983).)

The Township of Jackson, appellant herein, was held liable for creating a nuisance affecting 339 residents of the Legler area of Jackson Township. The residents had endured twenty months without well water because contaminants had leached into the Cohansey aquifer over a six year period from the municipality's landfill. Plaintiffs were awarded a judgment of almost 16 million dollars as compensation for emotional distress, infringement upon their quality of life and the cost of medical surveillance to guard against plaintiffs' increased risk of cancer and disease.

Judge Antell affirmed the quality of life judgment but overturned the judgments for emotional distress and medical surveillance, thus reducing the judgment amount by more than 10 million dollars. 493 A.2d at 1326. The classification of the injuries as tort was critical to the court's determination. The court equated emotional distress with pain and suffering because the residents' emotional distress was entirely subjective. The court relied upon the fact that there were never any objective manifestations of injury. "[A]lthough damages for these intangible harms might be recovered from a non-governmental entity," *Id.* at 1319, the court concluded that since N.J.S.A. §59:9-2(d) bars the award of damages from a public entity for pain and suffering, the residents' claim against the municipality for emotional distress is likewise non-compensable.

The court further stated that whereas pain and suffering is wholly subjective, the discomfort and inconvenience experienced by the plaintiffs are tangible injuries which can be understood by people of ordinary experience and thus can be objectively ascertained. Therefore, damages for negative impact upon quality of life were held to be recoverable under §59:9 2(d). *Id.* at 1321.

The court also overturned the plaintiffs' award for costs of future medical surveillance since none of the residents had manifested any illness causally related to their use of contaminated water. Despite testimony concerning the birth of crippled livestock and death and disease among plaintiffs' families, "nothing was offered to show that these were in any way related to the consumption of contaminated water." *Id.* at 1322. Moreover, although a toxicologist testified that "there is an increased level of risk of cancer in the future deriving from the fact that there is exposure to carcinogens," *id.*, he could not quantify the risk because interactions among the numerous chemicals involved rendered assessment impossible. In the absence of an accurate prediction as to the amount by which the risk of cancer increased, the court maintained that the defendant should not bear the burden of lifetime medical surveillance.

The court rejected plaintiffs' argument that the injuries are sub-clinical, i.e., present, but not yet manifested. The court required an objective measurement of illness in furtherance of the policy to compensate victims who have suffered. Judge Antell stated that no proof was offered that actual illness would result from sub-clinical damage and thus denied damages for the cost of future medical surveillance. According to the court, such a holding follows the spirit of §59:2-1 which is intended to discourage "novel causes of action against public entities." *Id.* at 1323, citing *comment*, N.J.S.A. 59:2-1.

The court also rejected the residents' cross-appeal which asserted that their judgment should not have been reduced by the

settlement amount reached with a co-defendant to the action. The court agreed with the residents' contention that §59:9-3(b) does not apply because the statute only provides for a reduction of a judgment by the amount paid in settlement with a joint tortfeasor. In this case, the co-defendant was not found to be a joint tortfeasor. The court, however, noted that §59:9-2(e) provides that benefits received from "any source other than a joint tortfeasor . . ." must be deducted from any judgment awarded. 493 A.2d at 1325. Judge Antell reasoned that the purpose of the statute was to deny the possible payment of duplicate benefits and affirmed the reduction.

Lastly, the court dismissed plaintiffs' claim under the Civil Rights Act, 42 U.S.C. §1983 (1982), for unconstitutional taking of property without due process, finding that the New Jersey Tort Claims Act provides adequate remedy for tortious deprivation of property by a public entity.

Marliese Flis, '87

## WORKPLACE HAZARDS

**United Steelworkers of America v. Auchter**, 763 F.2d 728 (3rd Cir. May 24, 1985).

In a case before the Third Circuit, unionized steelworkers and several states joined in the first consolidated petition for judicial review of the Hazard Communication standard, 29 C.F.R. §1910.1200 (1984), which was promulgated last year by the Occupational Safety and Health Administration (OSHA). The standard requires employers who are chemical manufacturers, importers or distributors to evaluate chemicals produced in their workplaces or imported by them to determine if they are hazardous, and prepare and distribute to employees a material safety data sheet (MSDS) which contains information necessary for the safe use of the product.

The threshold question presented by the petitioners is whether the Hazard Communication standard is accurately termed a standard or whether it is a regulation. The question creates a jurisdictional issue. The Occupational Safety and Health Act (OSH Act), 29 U.S.C. §§665, 657 (1982), granted the federal courts of appeal jurisdiction over challenges to Section 6 standards, whereas jurisdiction to review Section 8 regulations is vested in district courts pursuant to the Administrative Procedure Act (APA). 5 U.S.C. §703 (1982).

The standard or regulation status of the rule also affects its preemptive value on state law. The petitioners argue that the difference between a standard and a regulation is determined by examining the purpose of the provision. They claim that a standard is intended "1) to improve safety in the workplace by removing specific and already identifiable hazards; and 2) to provide objective criteria capable of immediate application," 763 F.2d at 735, whereas a regulation is intended to aid investigation and enforcement. The court adopted this distinction and found the Hazard Communication rule to be a standard which is "aimed at eliminating the specific hazard that employees handling hazardous substances will be more likely to suffer impairment to their health if they are ignorant of the contents of those substances." *Id.* Furthermore, in arriving at the conclusion that the provision constitutes a standard, Judge Gibbons noted that courts should "[afford] some degree of deference" to the agency in charge of interpreting provisions of the OSH Act. *Id.*

Petitioners next claimed that the limited application of the Hazard Communication standard solely to the manufacturing sector is not consistent with the OSH Act's goal to "assure so far as possible every working man and woman in the nation safe and healthful working conditions." 29 U.S.C. §651(b) (1982). The

court noted that although 50% of illness due to chemical exposure occurs in the manufacturing sector, the manufacturing sector comprises only 32% of the total work force and this does not demonstrate an exclusive need to protect only those who have manufacturing-related jobs. 763 F.2d at 736. Evidence shows that other employees experience high level exposure to similar, or greater, hazards as workers in the manufacturing sector. Although the Secretary of Labor is allowed to prioritize when establishing standards, he may not leave a group of employees to depend on a "trickle down" form of protection. *Id.* at 738.

The Secretary did not explain why coverage of non-manufacturing employees would jeopardize enforcement of the standard in the prioritized manufacturing sector. The court was not persuaded that the Secretary "set the standard which most adequately assures . . . that no employee will suffer material impairment of health . . . if the employee has regular exposure to the hazard dealt with by such standard." *Id.* at 738, quoting 29 U.S.C. §655(b)(5). The court ordered that the standard may continue to operate but that the Secretary must consider extending coverage to non-manufacturing employees or explain why such action would not be feasible. 763 F.2d at 739.

OSHA promulgated the Hazard Communication standard in response to mounting concern for employee safety in chemically related occupations. The Secretary properly followed the statutory provisions for the development of a standard by asking the OSHA advisory body, the National Institute of Occupational Safety and Health (NIOSH), to compile a list of hazardous substances. Ultimately the Secretary rejected NIOSH's list, known as the Registry of Toxic Effects of Chemical Substances (RTECS). Petitioners maintain that the rejection of the RTECS impermissibly narrows the list. The court concluded that the Secretary's reason for rejecting the list "is supported by substantial evidence and is consistent with the OSH Act's statutory purposes." 763 F.2d at 739. The Secretary's rationale was that the list was overinclusive since it encompassed potential as well as identifiable hazards and underinclusive since no one list can remain suitably up to date.

Petitioners also challenged the inclusion in the Hazard Communication standard of a "trade secret" exception. *Id.* citing 29 C.F.R. §1910.1200(i) (1984). They argued that the agency has defined 'trade secret' too broadly and that the conditions under which workers may obtain information claimed to be a trade secret are unduly burdensome." 763 F.2d at 739. The Secretary defined a trade secret as

[A]ny confidential formula, pattern, process, devise, information or compilation of information (including chemical name or other unique chemical identifier) that is used in an employer's business, and that gives the employer an opportunity to obtain an advantage over competitors who do not know or use it.

*Id.* at 740, citing 29 C.F.R. §1910.1200(c) (1984).

While the Secretary claimed that this definition is found in §757 of the Restatement (Second) of Torts, the court noted that the parenthetical "(including chemical name or other unique chemical identifier)" is not included in that definition. 763 F.2d at 740. Thus the court found that the Secretary's definition was too broad, and contained the type of information not traditionally afforded trade secret protection under state law. *Id.* The court remanded to the "Secretary for reconsideration of the definition of trade secret which definition shall not include chemical identity information that is readily discoverable through reverse engineering." *Id.*

In addition, the standard's restriction that allows trade secret access only to health care professionals in a medical emergency situation was struck. The court concluded that such a restriction "is not supported by substantial evidence in the record, and is inconsistent with the [standard's goal of] adequately assur[ing]

that no employee will suffer material impairment of health . . ." *Id.* at 743, citing 29 U.S.C. §655(b)(5) (1982).

Finally, petitioners challenged the requirement that those who seek information regarding trade secrets must sign a confidentiality agreement with a liquidated damages clause except in a medical emergency. The court rejected petitioners arguments because "confidentiality agreements are a well-accepted traditional means of allowing access to trade secret information while effectively protecting the owners of that information from irreparable harm." 763 F.2d at 743.

District Judge Kelly dissented from the portion of the court's opinion striking the restriction in the standard allowing trade secret access exclusively to medical personnel in an emergency. Judge Kelly stated that not all persons in the workplace should be able to obtain trade secrets merely by signing a confidentiality statement. Judge Kelly noted that the Secretary, acting as "a quasi-fiduciary for owners of trade secrets," must be cognizant of their interests. *Id.* at 744.

Jo-Ann Browne, '87  
Steven Sonkin, '86  
Fran Cohen, '86

## Challenges to Presidential "Supervision" of Environmental Rulemaking

Richard L. Gross\*

Since 1981, the Reagan administration has achieved a modicum of success in its goal of redirecting the federal health and environment regulatory agenda through the use of an executive order that allows the President, acting through the Office of Management and Budget (OMB), a unit of the White House Executive Office, to review and comment on proposed and existing agency regulations. That executive order, E.O. 12291,<sup>1</sup> is being challenged both in the courts and in Congress. At issue is the authority of the President, as chief of the Executive Branch, to impose his policy preferences in executive agency rulemaking versus the independence of federal executive officers to exercise the discretion delegated to them by Congress. This article notes some recent developments that directly affect regulatory programs of the U.S. Environmental Protection Agency (EPA), the Occupational Safety and Health Administration (OSHA), and other health and environmental agencies.

### The Executive Order

E.O. 12291 was issued by President Reagan shortly after taking office in 1981 "in order to reduce the burdens of existing and future regulations, increase agency accountability for regulatory actions, provide for presidential oversight of the regulatory process, minimize duplication and conflict of regulations, and ensure well-reasoned regulations."<sup>2</sup>

The order directs executive branch agencies<sup>3</sup> to base regulatory decisionmaking on cost-benefit analyses and to take action only where the benefits to society outweigh the costs to society.<sup>4</sup> Prior to issuing regulations, agency heads are directed to submit proposed and final versions, accompanied by a "regulatory impact analysis," to OMB for review.<sup>5</sup> OMB can extend the time allocated for review (10 to 60 days depending on the rule) in order to resolve issues related to the order, and the agency may not issue the proposed or final rule until it responds to OMB's comments.<sup>6</sup>

### The Problem

The executive order purports to be a non-binding, procedural directive that does not involve OMB in substantive decision-making. It specifically requires agencies to comply only "to the extent permitted by law"<sup>7</sup> and provides that the order is not to be "construed as displacing the agencies' responsibilities delegated by law."<sup>8</sup> Indeed, the Justice Department has alleged in recent court papers that OMB cannot require an agency to conform to its views and that federal agency heads are not bound to comply with it.<sup>9</sup>

If this is the case, what is the basis of the challenge to the executive order? The allegations are many, and they involve not so much the legality of the executive order itself, but the manner in which OMB has exercised its authority under the order. OMB has been accused of delaying agency actions, causing agencies to miss statutory or court-imposed deadlines, forcing revision of substantive agency decisions, and quashing proposed actions outright. It has also been accused of operating behind closed doors, off the record, and therefore beyond the reach of public, judicial, and congressional accountability. These activities have been described as violating the constitutional separation of powers, the Administrative Procedure Act (APA), various enabling statutes, and basic principles of prudent and responsible public administration.<sup>10</sup>

Eric D. Olson's comprehensive review of the subject, which centers on how OMB has conducted its review of EPA rules under the executive order, documents these allegations.<sup>11</sup> Olson concludes that OMB review under E.O. 12291 has failed to achieve the two main goals of what an executive oversight process should be: "to increase the accountability to the public of a sometimes unresponsive bureaucracy and to ensure better, more impartial reasoning in rulemaking."<sup>12</sup> He observes that, on the contrary, OMB's "institutional anti-regulatory bias, lack of staff and expertise, broad array of ancillary powers, and propensity for secrecy"<sup>13</sup> have undermined those objectives by making agency actions vulnerable to legal challenge and causing agencies to lose credibility with the public and the Congress. To remedy the situation, he calls for action by Congress and the courts.<sup>14</sup>

### Congressional Response

The Congress has been concerned for a number of years about the issue of executive oversight of agency rulemaking, holding hearings and introducing bills supporting both sides of the issue, but no legislation has been enacted. The most active body has been the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce. This subcommittee has held numerous hearings on the subject, including a hearing on the role of OMB under E.O. 12291 just four months after the Executive Order was signed.<sup>15</sup>

The most recent expression of congressional concern is an investigation, initiated by this subcommittee on February 25, 1985, of EPA's failure to propose two regulations that had been sent to OMB for review under the executive order.<sup>16</sup> The regulations would have phased out asbestos-containing products from the marketplace over a ten-year period on the grounds that asbestos is a well-documented carcinogen and that substitute materials could be safely used with only a small increase in cost to

\* Chief, Existing Chemical Control Branch, U.S. Environmental Protection Agency. J.D. Hofstra University School of Law, 1975. All views expressed in this article are solely the author's and should not be attributed to EPA or any other EPA employee. In the preparation of this article, the author was not advantaged by any special knowledge or information not available to outside researchers. All information used or referenced in this article is available on the public record.



the public. Prior to the intended public issuance of these rules in July and October 1984, respectively, they were sent to OMB for review under E.O. 12291. EPA had spent five years developing these proposals, but rather than issuing the proposed rules, EPA in February 1985 announced that it had reversed its earlier decision and decided instead to refer the problem to OSHA and the Consumer Product Safety Commission (CPSC). The reasons offered by EPA were that the primary risks addressed by the regulations were in the occupational environment and in consumer products and that a recent legal interpretation by EPA's General Counsel of section 9(a) of the Toxic Substances Control Act (TSCA) mandated such a referral.<sup>17</sup>

Within two weeks, the agency's motivation for this decision had been questioned by the employee union at EPA. The union took the extraordinary step of sending an "open letter" to the recently appointed EPA Administrator, Lee Thomas, expressing disappointment that "EPA resistance to intrusions of the Office of Management and Budget (OMB) into the open, public notice-and-comment rulemaking process has apparently been ineffective."<sup>18</sup> The union characterized the agency's action on asbestos as "a working conditions issue," claiming that its members' work was a "joke" if "all future decisions on risk control are to be made by OMB in private consultations with special interests who are not identified on the public record . . ."<sup>19</sup>

Motivated by the coincidence between OMB's review under E.O. 12291 and the agency's policy reversal, the subcommittee questioned the validity of EPA's new-found "restrictive reading of TSCA" that purportedly mandated the referral decision. In a letter to Lee Thomas initiating the investigation, Chairman Dingell expressed the view that such a policy would "irreparably undermine EPA's ability to regulate chemicals which present an unreasonable risk to health or the environment."<sup>20</sup> Within two weeks, EPA suspended its action in order to reevaluate its decision and "formally address a series of legal questions" regarding TSCA section 9 referrals.<sup>21</sup>

The subcommittee's investigation focused on OMB's role in EPA's decision to withhold the rules. Several representatives from EPA were called to testify, large numbers of internal EPA and OMB documents were submitted to the subcommittee and, from this, the nature of OMB's influence became apparent. The subcommittee concluded that "OMB directed EPA to refer the regulation of major asbestos risks to OSHA and CPSC, causing the Agency to reverse previous legal and policy determinations"<sup>22</sup> and that the EPA "capitulated to pressure from OMB leading to the arbitrary abandonment of a fully considered regulatory strategy to protect the public against asbestos risks."<sup>23</sup> It called the OMB's actions "an unlawful abuse of power" and part of a "pervasive and persistent pattern of intrusion and interference into agency rulemaking that has shifted the focus of discretionary decisionmaking from the agencies designated by Congress to OMB . . ."<sup>24</sup>

Two months after the hearing, EPA Administrator Lee Thomas informally announced that the agency had reversed its decision to refer the rules to OSHA and CPSC.<sup>25</sup> However, to date, despite a subcommittee recommendation to immediately publish the proposed rules,<sup>26</sup> the rules have not been published and the effect of the subcommittee's actions on the eventual outcome is uncertain.

### Judicial Actions

Two pending actions in federal court challenge the executive order's authority to oversee agency rulemaking. In *Public Citizen Health Research Group v. Rowland*,<sup>27</sup> OMB is alleged to have used its E.O. 12291 review authority to overturn a decision by the Secretary of Labor with respect to the issuance of a standard for

the chemical, ethylene oxide, under the Occupational Safety and Health Act.<sup>28</sup> The standard was issued without a provision for a short-term exposure limit, and the petitioner alleges that a short-term exposure limit was approved by the Secretary of Labor, but was overturned at the eleventh hour by OMB acting under its E.O. 12291 review authority.

The petitioners have not challenged the executive order directly; rather, the question is whether the agency acted in accordance with its own statute in acquiescing to OMB's views. The court reviewing the decision is being asked to find that the Occupational Safety and Health Act delegates standard-setting authority to the Secretary of Labor and that he "either ceded his decision-making responsibility to OMB, or he had his authority taken away from him."<sup>29</sup> In either case, the petitioners contend, the Secretary "impermissibly abdicated his decisional responsibility under the Act."<sup>30</sup>

The government responded with a defense of E.O. 12291, claiming that it is a legitimate exercise of the President's constitutional obligation in Article II, §3, to "take care that the laws be faithfully executed," which "authorizes the President to 'supervise and guide' his subordinates in 'their construction of the statutes under which they act . . .'" *Myers v. United States*, 272 U.S. 52, 135 (1926).<sup>31</sup> The government also claims that the executive order is implicitly authorized by the Occupational Safety and Health Act because rulemaking authority is delegated to the Secretary of Labor, who, as a member of the President's cabinet, is removable at the President's will and that the removal power is intended "[t]o insure the President's control and supervision over the Executive Branch," citing *Sierra Club v. Costle*, 657 F.2d 298, 405 (D.C.Cir. 1981).<sup>32</sup> Finally, the government argues that the record supports no inference of the Secretary of Labor abdicating his responsibility; on the contrary, the record supports the conclusions that the Secretary made a final decision on the short-term exposure limit only after considering OMB's comments, that the decision was supported by substantial evidence in the record, and that OMB comments were not determinative since OMB comments on other issues were not followed in the final rule.<sup>33</sup>

The petitioner's arguments are supported in a brief *amicus curiae* filed by Representative John Dingell and four other members of the House.<sup>34</sup> *Amici* stress that Congress intended to delegate its legislative authority to the Secretary of Labor (and not to the President) to issue standards under the Occupational Safety and Health Act, and they urge the court to conclude that OMB unlawfully interfered with this authority when conducting its E.O. 12291 review. They allege that "OMB's improper expansion of its authority violates the basic allocation of power under the Constitution, thereby transgressing the separation of powers."<sup>35</sup> They urge the court to reach the constitutional issue "in order to deter OMB from its present, unchecked course of arrogating rulemaking power delegated by Congress to other agencies."<sup>36</sup>

The decision in this case is not likely to address the constitutional issue. As the petitioners acknowledge,<sup>37</sup> the court has other adequate grounds to overturn the Secretary's decision: (1) there is not substantial evidence in the record to support the absence of a short-term exposure limit; (2) the absence of a short-term exposure limit in this case is not consistent with the policy directives of the Act; (3) consideration of OMB's views in off-the-record consultations is a violation of the due process requirements in the Occupational Safety and Health Act; and (4) the last-minute decision to eliminate the short-term exposure limit, to the extent it was based on OMB's view that a short-term exposure limit was not justified on cost-benefit grounds, impermissibly considers a factor prohibited by the Act under a Supreme Court decision in 1981.<sup>38</sup> A ruling is expected later this year.

In the second action, *Environmental Defense Fund v.*

Thomas,<sup>39</sup> the Environmental Defense Fund (EDF) sued the EPA and OMB for EPA's failure to meet statutory deadlines and issue regulations pertaining to permits for underground storage tanks for hazardous waste. Under the Resource Conservation and Recovery Act (RCRA) the regulations were required to be issued before March 1, 1985.<sup>40</sup> EPA submitted proposed rules to OMB for review under E.O. 12291, but encountered OMB objections and had not issued the proposed regulations when EDF filed suit in May 1985.

EDF requests a declaration that EPA's failure to issue the regulations constituted a violation of a mandatory duty under RCRA and a violation of the Administrative Procedure Act for administrative action unreasonably delayed. EDF seeks an order requiring EPA to issue the proposed and final regulations and prohibiting EPA from submitting the rules to OMB if this review would prevent the agency from meeting its deadline. Alleging that section 8(a)(2) of the executive order<sup>41</sup> clearly exempted these rules from OMB review and "clearance," EDF has claimed that OMB illegally impeded EPA from carrying out its mandatory duty and has requested the court to order OMB not to review these regulations in the future if review would impede EPA's ability to meet its deadlines.

EPA then proposed to issue the revised rules by June 30, 1986, and sought summary judgment solely on the legal issue of whether its proposed date is reasonable. Such a judgment would appear to preclude fact-finding on the issue of OMB involvement. In the EPA's motion for summary judgment, the Justice Department, as counsel for EPA and OMB, claims that the issue of OMB review need not be reached to dispose of the case and that to grant the relief requested by the plaintiff is beyond the court's jurisdiction. It alleges that the executive order is a non-binding, internal policy tool that imposes no legal restrictions on the agencies and creates no causes of action for outside parties.<sup>42</sup> Further, it claims that any attempts to preclude communications between OMB and EPA raise "the gravest separation of powers concerns."<sup>43</sup>

The court's ruling on the defendant's motion for summary judgment should determine whether the OMB issue will be litigated.

### Conclusion

The consensus of the reviewers on the subject is that some balance needs to be restored between legitimate presidential oversight of Executive Branch activities and independent exercise of legislative authority by executive agencies. At this time, it appears that the President has the balance skewed in his favor.<sup>44</sup>

A moderate solution has been proposed by Olson. He recommends a limited regulatory review process, to be conducted only when permitted by statute and then only by an entity other than OMB. The process should be conducted, according to Olson, on the public record, in accordance with the policies underlying the Administrative Procedure Act, should not impose considerations not permitted by statute (for example, cost-benefit analysis under the Occupational Safety and Health Act), and should not substitute the reviewing entity's policy views for those of the agency.<sup>45</sup>

In its recent report on EPA's asbestos regulations, the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce has two relevant legislative solutions: prohibit review by OMB, or any other party, of an agency's regulations unless authorized by statute, and require all written and oral communications between OMB and the agencies regarding regulatory matters to be on the public record.<sup>46</sup> However, Congress does not appear ready to address the issue in a comprehensive way; in the 97th and 98th Congress, it rejected all legislative proposals that would impose some form of executive

regulatory review.<sup>47</sup> The Subcommittee's latest recommendation, to the extent it would suppress off-the-record policy discussions among high level Executive Branch officials, could also suffer the same separation of powers problem it attributes to OMB's activities under the executive order.<sup>48</sup> Unless the President or OMB further extend their influence beyond some yet to be drawn constitutionally permissible line (perhaps by removing executive officers for not conforming to White House directives on specific regulations or perhaps by unduly influencing agencies' regulatory agendas through the recently issued Executive Order 12498<sup>49</sup>), aggressive congressional oversight activities, such as the House's asbestos investigation, may be the only means of imposing some degree of restraint on the President.

Federal court action can address individual cases of alleged abuse, with the courts having to decide where the balance should be struck. It appears reasonable to expect that federal courts will require Executive Branch officers to exercise congressional delegations of authority in the manner required by the enabling law and other relevant statutes, such as the Administrative Procedure Act. It also appears reasonable to expect that federal courts will not allow rulemaking to be "supervised" by the President, through an executive order or any other means, when that supervision results in usurpation of administrative discretion or interference with mandatory duties. On the other hand, it also seems likely that the courts will not interfere with the presidential function of providing general policy guidance to the Executive Branch and will not rule directly on the validity of E.O. 12291. In most cases, overreaching by the President can be corrected by the courts by overturning improper decisions and ordering agency heads to comply with their delegated responsibilities.

### FOOTNOTES

1. Exec. Order 12291, 3 C.F.R. 127 (1982).
2. *Id.* Preamble.
3. The order does not apply to independent agencies, for example, the Consumer Product Safety Commission. *Id.* §1(d).
4. *Id.* §2(b).
5. *Id.* §3(c).
6. *Id.* §3(f)(1),(2).
7. *Id.* §2.
8. *Id.* §3(f)(3).
9. Defendants' Reply to Plaintiffs' Opposition to Defendants' Motion for Summary Judgment at 9, *Environmental Defense Fund v. Thomas*, No. 85-1747 (D.D.C. filed July 29, 1985).
10. See generally: Olson, Eric D., *The Quiet Shift of Power: Office of Management and Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12291*, 4 U.Va.J.Nat.Res.L. 1 (1984) and articles reviewed therein.
11. *Id.*
12. *Id.* at 80.
13. *Id.* at 5.
14. *Id.*
15. Role of OMB in Regulation, 1981: Hearing before the Subcomm. on Oversight and Investigations of the Comm. on Energy and Commerce, U.S. House of Representatives, 97th Cong., 1st Sess., June 18, 1981 (Comm. Print 97-70). The subcommittee was created in 1957 in part to explore a related issue: the attempts of the then-current administration "to influence and to dictate the policies of independent agencies created by Congress and ... to subvert the independence of those independent agencies." *Id.* at 2. Its current chairman, John Dingell (R-Mich.), has been a major force in defeating regulatory reform legislation that would have codified much of what is in E.O. 12291 and previous executive orders.
16. EPA's Asbestos Regulations, 1985: Hearing before the Subcomm. on Oversight and Investigations of the Comm. on Energy and Commerce, U.S. House of Representatives, 99th Cong., 1st Sess., April 16, 1985 (Comm. Print 99-2).
17. *Id.* at 209.
18. Letter from National Federation of Federal Employees to EPA Administrator Lee Thomas (February 14, 1985) at 1.
19. *Id.* at 2.
20. House Hearing, *supra* note 16 at 223.
21. *Id.* at 229.
22. Report on a Case Study on OMB Interference in Agency Rulemaking by the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, U.S. House of Representatives, 99th Cong., 1st Sess., October 1985 (Committee Print 99-V) at 6.
23. *Id.* at 8.
24. *Id.* at 7.
25. Darst, Guy, Associated Press, June 24, 1985.
26. House Report, *supra* note 22 at 8.
27. Nos. 84-1252, 84-1392, 85-1014 (D.C.Cir. filed March 4, 1985).
28. *Id.* Brief for Petitioners. The standard was issued under the Occupational Safety and Health Act, 29 U.S.C. §651 *et seq.* (1982), which provides that rulemaking authority is delegated to the Secretary of Labor, 29 U.S.C. §655(b).
29. *Id.* at 51.
30. *Id.*

31. Brief for the Secretary of Labor at 13, *Public Citizen Health Research Group v. Rowland*, *supra* note 27.
32. *Id.*
33. *Id.* at 14.
34. Brief for *Amici Curiae*, *Public Citizen Health Research Group v. Rowland*, *supra* note 27.
35. *Id.* at 3.
36. *Id.*
37. *Id.* at 52, n. 13.
38. *American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490 (1981).
39. *Environmental Defense Fund v. Thomas*, *supra* note 9.
40. 42 U.S.C. §6924(w) (1984).
41. E.O. 12291, §8(a)(2), exempts agencies from the review process when "consideration . . . under terms of this Order would conflict with deadlines imposed by statute or judicial order." The applicability of this section of the executive order arose in a recent case where EPA had failed to meet statutory deadlines for issuing regulations under the Clean Air Act, *Natural Resources Defense Council v. Ruckelshaus*, No. 84-758 (D.D.C. Sept. 14, 1984), 14 ELR 20817. In imposing deadlines for promulgating the rules, the court ruled that OMB review was not only unnecessary, but "in contravention to applicable law." 14 ELR at 20819.

42. Defendants' Motion for Summary Judgment and Reply Brief to Plaintiff's Opposition, *Environmental Defense Fund v. Thomas*, *supra* note 9. Defendants contend that the language of section 9 of E.O. 12291 and decisions on previous, similar executive orders support this assertion. Reply Brief at 11-12.
43. *Id.* Reply Brief at 10-11.
44. Olson, *supra* note 10.
45. Olson, *supra* note 10, at 2.
46. House Report, *supra* note 22 at 11.
47. See e.g., H.R. 746, the Regulatory Procedure Act of 1982, 98th Cong. 1st Sess.
48. See *supra* note 43 and accompanying text.
49. Exec. Order No. 12498 12498 (Jan. 4, 1985). This executive order establishes a regulatory planning process which allows the President, acting through OMB, to review pre-rulemaking plans of executive agencies for conformity with the administration's policies. This procedure gives OMB early veto power over potential rules it deems inconsistent with administration policy, allowing the administration to avoid the public scrutiny that notice and comment rulemaking provides.

## *The Role of Public Nuisance Law After Shore Realty*

Martin dePorres Cargas, '86\*

In a recent decision, *State of New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. April 4, 1985), the United States Court of Appeals for the Second Circuit addressed several novel issues pertaining to the scope and interpretation of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA).<sup>1</sup> Of particular importance is the interplay between CERCLA and New York public nuisance law which is the first example of its kind in the nation.

The site is a 3.2 acre parcel which juts into Hempstead Harbor at Glenwood Landing in Nassau County, New York. From 1940 to 1977 the site was developed as an oil and gasoline storage terminal by Phillips Petroleum Company. Since 1977, the property was used as a hazardous waste facility by several corporations. Defendant, Shore Realty Corporation (Shore), purchased the site in 1983 from two individuals leasing the property to a corporation using it as a hazardous waste facility until evicted by Shore in January, 1984.

The site had been the subject of a 1981 state committee report which concluded that it was among "the most flagrant illegal toxic waste operations" and demonstrated that the state was aware of "the deteriorated and illegal operation."<sup>2</sup>

In 1983, Shore entered into a contract for the purchase of the Glenwood site for \$435,000. Shore had been incorporated by its principal, Donald LeoGrande, solely for the purchase and development of the property. Shore retained an environmental consultant to investigate the condition of the site. Their report indicated that the tanks and pipes had received little maintenance and showed signs of deterioration, that spills had occurred in the past, and that hazardous substances were still leaking into groundwater and into the waters of the harbor adjacent to the bulkhead. No threat to drinking water was found since the groundwater flow was toward the harbor. The consultants estimated that cleanup would cost between \$650,000 and over one million dollars. Shore entered into discussions with the New York State Department of Environmental Conservation (DEC) and unsuccessfully sought a waiver of liability from them. Notwithstanding the situation, Shore took title on October 13, 1983, and promptly initiated proceedings to evict the occupants. Shore's assumption was that those who had disposed of their wastes at the site would remove them, and that Shore would then clean up the site and develop it for residential or for commercial use.

On the eve of the eviction by the Nassau County Sheriff, the site occupants filed a chapter 11 petition in bankruptcy court.<sup>3</sup> When Shore moved to vacate the automatic stay of eviction, the state intervened in the proceeding and opposed the motion. The motion was granted, however, and the eviction was completed on January 5, 1985. In the two and one-half month period between acquiring title and possession, many thousands of gallons of additional waste were added to the tanks, and additional drums of chemicals were brought to the site by the now illegal occupants. At the time Shore obtained possession, approximately 700,000 gallons of waste were stored in the tanks, and over 400 drums of hazardous materials were stored in the two warehouses.<sup>4</sup> The drums were in poor condition and some were leaking. During the following months, Shore repaired a steel fence to secure the perimeter of the site, hired a twenty-four hour on-site guard service, placed collection booms in the harbor outside the Glenwood Bulkhead, repaired the fire extinguishing system, and installed a pump to recover seepage from the earlier spills. Pursuant to a stipulation and order entered on June 15, 1984, Shore began removal of the drums and sealed pipes and valves.<sup>5</sup>

On February 29, 1984, the State of New York brought an action against Shore and Donald LeoGrande to clean up the site.<sup>6</sup> The suit was brought in the U.S. District Court, Eastern District of New York, under CERCLA, for an injunction and damages. In addition, the complaint contained state law nuisance claims. In March, 1984, the defendants moved to dismiss the complaint for failure to join necessary parties (the generators and transporters of the waste and the operators of the site). This was denied on June 9, 1984, and the defendants then filed their answer. On July 6, 1984, they also began an action as third-party plaintiffs against 94 firms and individuals who had generated, transported and stored the hazardous wastes on the Glenwood site. Also in July, the state filed a motion for summary judgment. This was argued on October 15, 1984, and partial summary judgment was granted by Judge Henry Bramwell.<sup>7</sup>

The District Court found that Shore was liable under CERCLA, that LeoGrande was personally liable, that there had been releases, that there was a present serious threat of release, and that the nuisance claims were valid. The court issued a permanent injunction, apparently relying on CERCLA, ordering the defendants to remove the wastes stored on the site, and holding them liable for the state's response costs. The court also found that the defendants were liable under a nuisance theory. In November 1984, the defendants filed a motion for partial summary judgment against the third-party defendants, seeking

\* I wish to thank Professor William Ginsberg of Hofstra University School of Law for some of the written material on which this article is based.  
Professor Ginsberg was Appellate Counsel for the firm of Reisman, Peirez & Reisman, attorneys for Shore Realty Corporation.



similar relief to that which had been granted against them. They also appealed to the Second Circuit Court of Appeals. The appeal was argued on December 5, 1984, and the lower court's decision (as revised and clarified) was affirmed on April 4, 1985.

The Second Circuit began its opinion by analyzing the history of CERCLA. It noted that the passage of CERCLA was the product of an eleventh hour compromise by the Senate, and therefore committee reports concerning the compromise were unavailable. However, after studying the available CERCLA legislative history, the court concluded that CERCLA is not a regulatory standard-setting statute such as the Clean Air Act, rather it is a measure designed to clean up hazardous waste sites with identified polluters liable for the cleanup costs. The court further concluded that cleanup under CERCLA was not solely in the hands of the Federal government. States could also sue responsible parties for remedial and removal costs, according to §9607(a)(4)(A), if such efforts were not inconsistent with the National Contingency Plan (NCP). Furthermore, the court, citing *City of Philadelphia v. Stepan Chemical Co.*, 544 F.Supp. 1135, 1142-43 (E.D. Pa. 1982), concluded that a private person may recover necessary response costs when acting consistently with the requirements of the NCP. Finally, the court noted that Congress intended CERCLA to be a strict liability statute despite the fact that an explicit provision for strict liability was not included in the compromise legislation. In examining the Legislative History of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (Superfund),<sup>8</sup> the court found that the sponsors of the compromise expressly stated that §9607 provided for strict liability except for the specific defenses listed in that section.

The court began its discussion of the case by holding that the district court properly awarded the state reimbursement for response costs under §9607(a)(4)(A). The court found that Shore was an "owner" of the site and as such falls under §9607(a). Shore argued that it was not bound by §9607(a) since it neither owned the site at the time of disposal nor caused the release of hazardous waste at the facility. Shore further maintained that §9607(a)(1) could not apply to Shore since the word "owned" in §9607(a)(2) would be unnecessary because an owner "at the time of disposal" would be necessarily included in §9607(a)(1). Shore further argued that both sections require a showing of causation.

The court rejected Shore's claims of ambiguity in §9607 as "illusory." The court held that it was clear that §9607(a)(1) applied to current owners and operators and that §9607(a)(2) applied to past owners and operators. However, §9607(a)(2) was found to apply only to prior owners and operators who owned or operated the facility at the time of disposal and thus was more limited than §9607(a)(1).

The court also rejected Shore's causation argument. It first noted that a causation requirement would make superfluous the affirmative defenses provided in §9607(b) and the court refused to construe the statute so as to make some of its provisions surplusage. Furthermore, the court noted that accepting Shore's argument with regard to causation would create a large loophole in CERCLA's coverage; namely, hazardous waste sites could be sold to new owners who could avoid liability under CERCLA by purchasing the site after chemical dumping had ceased.

The court found more substance to Shore's argument that since the Shore Road site is not on the NPL, the state's action could not be consistent with the NCP and thus Shore could not be found liable under §9607(a). Nevertheless, the court held that inclusion on the NPL was not a requirement for the state to recover its response costs. The state, relying on two district court decisions, *U.S. v. Northeastern Pharmaceutical & Chemical Co.*, (herein-

after NEPACCO), 579 F.Supp. 823, 850-851 (W.D. Mo. 1984); and *U.S. v. Wade*, 577 F.Supp. 1326, 1334-36 (E.D. Pa. 1983), argued that CERCLA authorized a bifurcated approach to the problem of hazardous waste cleanup by distinguishing between the scope of liability under §9607 and §9611 which governs the expenditure of Superfund monies. In *NEPACCO* and *Wade*, it was held that Superfund monies can be spent only on sites included on the NPL but that this limitation does not apply to §9607. Although the court failed to accept the state's argument it also rejected Shore's position. Instead, the court found that the NPL requirement was a limitation on remedial or long term actions as opposed to removal or short term actions. As support for its finding, the court held that, as a matter of statutory construction, the NPL criteria and listing imposes a general requirement for action consistent with the NCP. Furthermore, the court found support in the legislative history of CERCLA for the proposition that the NPL was a limitation on remedial or long term actions only.

The court then disagreed with Shore's argument that the state could not recover its response costs because the state had failed to comply with the NCP by not obtaining authorization from the Environmental Protection Agency (EPA). The court viewed Shore's argument as saying that the EPA had ruled that the state cannot act on its own and seek reimbursement under CERCLA. The court disagreed, finding that Congress intended states to clean up sites using their own resources and subsequently recover those costs from the responsible parties under §9607(a)(4)(A). The court ruled that §9607(a)(4)(A)'s requirement of consistency with the NCP meant that states cannot recover costs inconsistent with the response methods outlined in the NCP. Citing the text of the NCP, the court found that the NCP's requirements are applicable in joint federal-state cleanup and inapplicable where a state is acting on its own.

The court then dealt with Shore's claim that it had an affirmative defense based on an act or omission of a third party. The court rejected Shore's argument finding that the prior owners could not be such "third parties." The court found that the acts or omissions referred to in the statute must occur during the ownership or operation by the defendant and any acts or omissions by any prior owners would have occurred prior to Shore's ownership and operation of the site. Furthermore, Shore could not rely on an affirmative defense with respect to the tenants' conduct before Shore evicted them because Shore was aware of their activities and failed to take any precautions against foreseeable acts or omissions.

Although the court found Shore liable for the state's response costs under CERCLA, the court refused to grant the state injunctive relief under CERCLA. The state, conceding that §9607 does not explicitly provide for injunctive relief, urged the court to interpret §9607 broadly, reasoning that to do so otherwise would drastically misrepresent congressional intent to clean up hazardous sites. In rejecting the state's argument, the court analyzed CERCLA's statutory scheme. The court reasoned that implying authority for injunctive relief under §9607 would make the express injunctive authority granted in §9607 surplusage. The court then noted that Congress specifically declined to provide states with a right to injunctive relief. An earlier Senate version expressly gave both EPA and the states the right to seek injunctive relief yet the final Act limited that power to the EPA alone in §9606(a).

The court also addressed the issue of LeoGrande's personal liability and noted that the definition of an "owner and operator" (as found in §9601(20)(A)) contains an exception which implies that an owner stockholder who manages the corporation is liable

under CERCLA as an "owner or operator." This exception was found to apply to LeoGrande and thus he was held liable as an operator under CERCLA.

The court specifically declined to pierce the corporate veil in order to hold LeoGrande personally liable since New York courts are reluctant to disregard the corporate form. However, since LeoGrande was a corporate officer who controlled corporate conduct and was an active individual participant in that conduct, he is liable for the torts of the corporation under New York law.

Before the court discussed the issue of LeoGrande's personal liability it turned its attention to the state's claim that Shore was liable under New York's common law of public nuisance. As a preliminary matter, the court found that the District Court's reliance on New York public nuisance law was not an improper exercise of pendent jurisdiction since the public nuisance claim for abatement and the CERCLA claims clearly "derive from a common nucleus of operative fact."<sup>9</sup>

The court found that Shore, as a landowner, was subject to liability for maintaining a public nuisance and issued an injunction ordering Shore to clean up the site. In New York, the release or threatened release of hazardous waste into the environment unreasonably infringes upon a public right and thus is a public nuisance as a matter of law. *State v. Schenectady Chemicals, Inc.*, 117 Misc.2d 960, 459 N.Y.S.2d 971 (Sup. Ct. 1983), modified 103 A.D.2d 33, 37, 479 N.Y.S.2d 1010, 1013 (1984) (seepage of hazardous waste products into surrounding air, surface and groundwater); *State v. Monarch Chemicals, Inc.*, 90 A.D.2d 907, 456 N.Y.S. 2d 867, 868-869 (1982) (chemical contamination of soil and groundwater). The Second Circuit found that storage tanks were leaking and corroding and that the groundwater had been contaminated.<sup>10</sup> Shore was therefore maintaining a public nuisance. Moreover, the court noted that Shore learned of the nuisance when it purchased the site and had had a reasonable opportunity to abate it.

The court next found that Shore was liable for maintenance of a public nuisance regardless of negligence or fault. As the state pointed out in its reply brief, quoting *Schenectady Chemicals*, 177 Misc.2d at 970, 459 N.Y.S. 2d at 979,<sup>11</sup> in a public nuisance case "fault is not an issue, the inquiry being limited to whether the condition created, not the conduct creating it, is causing damage to the public." The court agreed with the state's argument and cited the Restatement (Second) of Torts §839, comment d (1979) as further authority:

[L]iability [of a possessor of land] is not based upon responsibility for the creation of the harmful condition, but upon the fact that he has exclusive control over the land and the things done upon it and should have the responsibility of taking reasonable measures to remedy conditions on it that are a source of harm to others. Thus a vendee . . . of land upon which a harmful physical condition exists may be liable under the rule here stated for failing to abate it after he takes possession, even though it was created by his vendor, lessor or other person and even though he had no part in its creation.

The court finally noted that Shore could be found to be maintaining a public nuisance under the theory of nuisance *per se* (continuous violations of New York Environmental Conservation Law §§27-0913(1), 27-0914(1) and 27-0914(c))<sup>12</sup> or on the theory of abnormally dangerous activity. (For an example of what constitutes an abnormally dangerous activity in New York see *Schenectady Chemicals*, 103 A.D.2d at 37, 479 N.Y.S.2d at 1013; see also *Doundoulakis v. Town of Hempstead*, 42 N.Y.2d 440, 448, 368 N.E.2d 24, 27; 398 N.Y.S.2d 401,404 (1977)).

The Second Circuit's denial of injunctive relief under CERCLA and granting of such relief under the common law of public nuisance raises important issues for states that are suing or plan to sue hazardous waste site owners under CERCLA. At first glance,

a state's ability to obtain injunctive relief under public nuisance law appears to be a powerful new tool in state efforts to clean up hazardous waste sites. Under §9607 of CERCLA, a state can recover monies expended for response costs in connection with its cleanup of a hazardous waste site. Injunctive relief under CERCLA is available only to the federal government under §9606. However, a state may be able to obtain an injunction from a federal court pursuant to state nuisance law which will accomplish the goal of cleanup without the expenditure of additional public funds, by including a pendent state nuisance claim in its CERCLA complaint.

The *Shore* case demonstrates the advantage to a state of obtaining injunctive relief under state common law. The State of New York spent several thousand dollars in initial response costs which it was able to recover under §9607 of CERCLA. The state did not have to spend in excess of one million dollars to fully clean up the site, and then seek reimbursement under CERCLA. Instead, it was able to obtain an injunction ordering Shore Realty to clean up the site.

The *Shore* decision also highlights the weaknesses of injunctive relief based on common law public nuisance. Under §9606 of CERCLA the Federal government can bring an action for injunctive relief against "generators," "transporters," and "operators," the parties responsible for creating the hazardous situation. However, under common law public nuisance, the state is only able to bring an action against the current site owner. The current site owner may not be the party responsible for the creation of the hazardous situation or may be judgment-proof. In *Shore*, the defendants were not responsible for the placement and storage of chemical wastes on the property nor did they have the money required to obey the court's injunction to clean up the site. The generators of the waste and previous owners of the site were left untouched by the decision. As a result, the parties responsible for the creation of the problem have not been held liable and the site at Glenwood landing has yet to be cleaned up.

Notwithstanding the flaws in the remedy, the ability of states to obtain injunctive relief under state common law may soon become more crucial to state efforts to clean up hazardous waste sites. In granting *certiari* in *Exxon Corp. v. Hunt*, 481 A.2d 271, (N.J. Sept. 19, 1984), *cert granted*, No. 84-978, 53 U.S.L.W. 3881 (June 17, 1985), the Supreme Court of the United States has decided to rule on whether state superfund laws are preempted by CERCLA. If the court holds that state superfund laws are preempted by the federal statute, the option of state superfund financed cleanup of hazardous waste sites will be lost. In the absence of state funds for this purpose, an injunction ordering an owner to clean up under a public nuisance theory will become an essential remedial tool notwithstanding its inequities or limitations.

## FOOTNOTES

1. 42 U.S.C. §§9601-9657 (1982).
2. References are to the record on appeal as cited in the briefs of the parties except for those facts used in the second circuit decision, in which case references are to the decision.
3. Bankruptcy Court, Eastern District of New York (Judge Parente).
4. Record at 130.
5. Record at 52-53.
6. Record at 10.
7. Record at 1028.
8. See H.R. 7020, 96th Cong., 2d Sess. (1980). See also 126 Cong. Rec. 26, 757-99 (1980) (debate & passage of H.R. 7020).
9. *Shore*, 759 F.2d at 1049.
10. *Id.* at 1038.
11. Plaintiffs brief at 21.
12. N.Y. Envtl. Conserv. Law §1-0101 et seq. (Consol. 1984).

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