

# HOFSTRA

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### **BANKRUPTCY**

**United States v. Maryland Bank and Trust Co.**, 632 F. Supp. 573 (D. Md. Apr. 9, 1986).

The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. §§9601-9657 (1980), was enacted in response to the environmental and public health hazards posed by improper disposal of hazardous wastes. Unfortunately, Congressional drafting of this compromise legislation, with its recurrent lack of clarity and precision, has muddled the courts with prodigious litigation regarding its interpretation.

Under 42 U.S.C. §9607, four categories of persons are liable for expenses incurred by the Environmental Protection Agency (EPA) in cleaning up hazardous waste facilities in what are called response actions. In the present case, the District Court of had to interpret 42 U.S.C. §9607(a)(1) which holds liable "the current owners and operators of the hazardous substance facility" for costs incurred by EPA response actions. More specifically, the principle issue in this case is whether a bank, holding a secured interest in a parcel of land, which subsequently purchases such land at a foreclosure sale, can be defined as a current owner or operator of the hazardous substance facility so as to be liable for EPA cleanup costs.

The United States instituted this action to recover the expenses incurred by the EPA for the removal of hazardous wastes from a toxic dump site known as the California Maryland Drum Site (CMD). From 1944 to 1980, Herschel McLeod Sr. and Nellie McLeod owned the 117-acre farm known as CMD. During this period, Maryland Bank and Trust (MBT) advanced credit to the McLeods for business conducted on the property. Although the details of this financial arrangement were disputed by the parties, the bank was aware that the McLeods operated a trash and garbage business on the site. During 1972 or 1973, the McLeods permitted toxic waste to be dumped at the CMD site.

In 1980, Mark Wayne McLeod applied for and received a loan from MBT to purchase CMD from his parents. Shortly thereafter, Mark Wayne McLeod failed to make payments on the loan. MBT instituted a foreclosure action against CMD in 1981, purchased the property at the foreclosure sale, and took title to the property. From the date of purchase to the institution of this action, MBT had been the record owner of CMD. The EPA cleaned up CMD after informing MBT about the hazardous wastes and in response to MBT's inaction.

In order to establish liability under 42 U.S.C. §9607(1), the government must establish that: (1) the site is a facility; (2) a release or threatened release of any hazardous substance from the site has occurred; (3) the release or threatened release has caused the United States to incur response costs; and (4) the

defendant is one of the persons designated as a party liable for costs. 632 F. Supp. at 576. MBT did not dispute that the first three elements required to impose strict liability under the act had been met by the United States.

However, MBT did dispute that it fell within the category of persons designated as a party liable for costs. The question central to both MBT's and the United States' motions for summary judgment thus concerned the final element; specifically, whether MBT was an "owner and operator" of CMD within the meaning of 42 U.S.C. §9607(a)(1) as defined in 42 U.S.C. §9601(20)(A). MBT additionally raised in its answer an affirmative defense based upon 42 U.S.C. §9607(b)(3), called the "third party defense." The United States argued that MBT could not meet its burden of proof on the affirmative defense.

The District Court of Maryland, per Judge Northrop, granted the United States' motion for summary judgment with respect to the issue of MBT's liability as an "owner and operator" under 42 U.S.C. §9607(a)(1), but denied that part of the motion concerning the third party defense under U.S.C. §9607(b)(3). The court also denied MBT's motion for summary judgment. 632 F. Supp. at 582.

In reaching this conclusion, the court initially had to decide whether MBT fell within 42 U.S.C. §9607(a)(1). This section holds liable "*the owner and operator . . . of a facility . . .*" *Id.* (emphasis added). A strict interpretation of this language would result in the conclusion that in order to be a responsible party, one must be *both* an owner *and* operator. MBT would escape liability under a strict interpretation of 42 U.S.C. §9607(a)(1) because MBT clearly was not an operator of the facility.

However, the court refused to strictly construe the language. Instead, the court held that "[n]otwithstanding the language, '*the owner and operator*,' a party need not be both an owner and operator to incur liability under [42 U.S.C. §9607(a)(1)]." 632 F. Supp. at 577 (emphasis added).

The court found that the ambiguity in 42 U.S.C. §9607(a)(1) resulted from the placement of the definite article "the" before the term "owner" and its omission prior to the term "operator". However, after examining the legislative history of CERCLA, 42 U.S.C. §§9601-9657 (1980), the court decided that the omission of the word "the" before the term "operator" was insignificant. First, "[m]isuse of the definite article is hardly surprising in a hastily conceived compromise statute such as CERCLA . . .". 632 F. Supp. at 578. Second, an interpretation that required one to be both an owner and operator before liability would be imposed would frustrate the purposes of the act. CERCLA was designed to ensnare the largest possible class of responsible parties so that hazardous waste sites could be cleaned up expeditiously. Therefore, an interpretation of the statute which would limit members falling within a responsible class would circumvent the effectiveness of CERCLA. Third, the term "operator", as explained in 1980 U.S.

Code Cong. Ad. News 6119, 6182 (House report accompanying H.R. 85), means "a person who is carrying out operational functions for the owner of a facility . . .". *Id.* Thus, reasoned the court, a class defined as consisting of persons who are both owners and operators would contain no members since, by its definition, an operator cannot be the same person as an owner. 632 F. Supp. at 578.

Additionally, the court noted that a recent decision of the Court of Appeals for the Second Circuit held that a current owner of a facility was liable for response costs under 42 U.S.C. §9607(a)(1), even though the current owners had not owned the site at the time of the dumping, nor had they operated the facility. *State of New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985). The court agreed with the conclusions in *Shore Realty* that 42 U.S.C. §9607 imposes strict liability without regard to causation. Therefore, current ownership of a facility, by itself, is sufficient to bring a party within the ambit of CERCLA liability.

The court then addressed the issue of whether MBT was an "owner" within the definition contained in 42 U.S.C. §9601(20)(A). This section excludes from liability "a person who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the . . . facility." *Id.* MBT argued that it was entitled to this exclusion because it acquired ownership of CMD through foreclosure on its security interest in the property and purchase of the land at the foreclosure sale. Unconvinced by MBT's argument, the court held that MBT was not exempted from liability by the exculpatory clause of 42 U.S.C. §9601(20)(A). 632 F. Supp. at 579.

The court stated that the exemption under 42 U.S.C. §9601(20)(A) covers "only those persons who, at the time of the cleanup, hold indicia of ownership to protect a then-held security interest in the land." 632 F. Supp. at 579. MBT's security interest was converted into full title on the date of the foreclosure sale. Thus, only "during the life of the mortgage did [MBT] hold indicia of ownership primarily to protect its security interest in the land," such that MBT would be entitled to the exemption. *Id.* Here, since MBT took full title to the property on the date of the foreclosure sale, four years prior to the cleanup, MBT could not use the exemption.

In deciding that a former mortgagee, who subsequently purchases the mortgaged property in a foreclosure sale, is an owner under 42 U.S.C. §9607(a)(1), the court differed with the result reached in *United States v. Mirabile*, 15 Env'tl L. Rep. 20992 (E.D. Pa. Sept. 4, 1985). In *Mirabile*, the court held that a bank purchasing a parcel of land at foreclosure, in which they held a mortgage, was entitled to the exception in 42 U.S.C. §9601(20)(A). Seemingly contradictory, there were factual differences in this case that persuaded the court to disagree with the holding in *Mirabile*. Primarily, the time factors involved were different.

MBT held the property for over four years, while the bank in *Mirabile* quickly assigned its interest in the foreclosed property. Another consideration the court cited was legislative history and policies inherent in CERCLA that necessitated a narrow reading of this exclusion. Thus, the court held that MBT could be held as an owner of CMD for the purpose of 42 U.S.C. §9607(a)(1) liability. Finally, the court decided that there were factual questions unresolved regarding the third party defense posited by MBT.

Dennis Kelly '87

## BIOTECHNOLOGY

**Foundation on Economic Trends v. Thomas**, 637 F. Supp. 25 (D.D.C. March 6, 1986).

The issue presented in the plaintiffs' motion for preliminary injunction is whether the Environmental Protection Agency's (EPA) granting of an Experimental Use Permit (permit) to Advanced Genetic Sciences, Inc. (AGS) for a field test of bacteria strains altered by recombinant DNA technology was arbitrary, capricious and an abuse of agency discretion.

Plaintiffs are various individuals and non-profit environmental organizations. Defendants are the EPA and, as intervenor, the Industrial Biotechnical Association, a trade association of companies in the business of genetic engineering. AGS is a member of the Industrial Biotechnical Association.

The court finds that the EPA decision to grant the permit was not arbitrary, capricious or an abuse of discretion because AGS complied with the required procedure. Moreover, plaintiffs' claims are insufficient for the Court to sustain the motion for preliminary injunction.

AGS has developed genetically altered strains of *Pseudomonas Syringae* and *Pseudomonas Fluorescens* bacteria. The natural strains of these bacteria are involved in frost formation on plant surfaces which is known as ice nucleation. Both ice nucleating active (INA+) which encourages frost formation and non-ice nucleating active (INA-) bacteria which inhibits frost formation coexist in nature, INA+ being predominant. AGS has removed genetic material from INA+ bacteria to create INA- bacteria, a pesticide which would control frost damage on plants.

In 1984, AGS sought to field test their INA- pesticide in order to generate the data necessary for registration with the EPA required by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. §§136-136y (Supp. III 1985). FIFRA regulates the marketing and use of pesticides prohibiting the registration of those which "may cause unreasonable adverse effects on the environment." *Id.* at §136c(d). In order to test an unregistered pesticide, an application must be filed with the EPA for a permit which will determine the conditions for the proposed test. The permit is granted only if the EPA finds that the proposed experiment is needed to produce data necessary for registration and that no unreasonable adverse effect on the environment will result. 7 U.S.C. §136c (1982). In addition, agency policy requires that tests involving genetically engineered microbial pesticides be presented to the EPA for a determination of the need for a permit. See 49 Fed. Reg. 40095 (1984) (establishing this interim policy).

In August 1984, upon request of plaintiffs, the Hazard Evaluation Division (HED) of the EPA Office of Pesticide Programs, in accordance with the interim policy, reviewed several proposed experiments which had been recommended for approval by the Recombinant DNA Advisory Committee of the National Institutes of Health (NIH). 637 F. Supp. at 26. (Prior to the existence of the EPA's interim policy, recombinant DNA

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experiments were reviewed by NIH.) Data in conjunction with the INA- proposal was submitted to the EPA by AGS. Formal EPA review began on October 31, 1984. *Id.* Although HED determined that the proposed test was not likely to pose significant risks to humans or the environment, they requested AGS to provide additional information before testing under a permit would be allowed. *Id.* HED was specifically concerned with the possible environmental effects if the mutant bacteria spread beyond the test site, particularly its effects upon natural INA+ bacteria and precipitation patterns.

A subpanel of the FIFRA Scientific Advisory Panel (panel) reviewed HED's conclusions in January 1985, agreeing with HED's findings. Because HED determined that a permit was necessary for AGS' proposed field test, HED requested AGS to provide data on particular characteristics of the bacteria. In response to HED's request, AGS submitted a modified proposal in June, 1985. AGS also requested a waiver of some of EPA's additional standard data requirements as provided in 40 C.F.R. §158.45 (1985). EPA published notice of AGS' application in the Federal Register on August 21, 1985 and requested public comments. 637 F. Supp. at 27.

On August 27, 1985 HED issued its determination that AGS' proposed test posed no foreseeable risks. In response, plaintiff Foundation on Economic Trends (FOET) challenged HED's conclusions concerning the bacteria's novelty, competitiveness, pathogenicity, and atmospheric role and urged additional laboratory study of the bacteria's effects. *Id.* In response to plaintiffs' comments, HED contacted the scientists referenced in the FOET challenge as well as other scientists. The panel concluded the proposed experiment was unlikely to pose significant risks and recommended approval of AGS' application. On November 5, 1985 after review of all data, HED announced their final position that AGS' proposed experiment of the INA-bacteria posed no significant adverse environmental risk. *Id.*

Permits effective December 1, 1985 through November 30, 1986 were issued to AGS by the EPA on November 14, 1985. The permit allows for field testing of the INA- bacteria on a 0.2 acre site in Monterey County, California. AGS must give the EPA 15 days advance notice of testing. A Monterey County ordinance prohibiting release of genetically altered material before March 28, 1986 delayed the possibility of AGS' testing before that time.

Prompted by media reports that AGS may have conducted unauthorized open air tests of mutant bacteria, the EPA began an investigation of AGS' research facility. The parties stipulated in open Court that no tests under the permit would be conducted until the completion of the EPA investigation on March 24, 1986.

On November 14, 1985, plaintiffs filed suit alleging that issuance of the permit violated FIFRA, was arbitrary, capricious and an abuse of agency discretion. An amended preliminary injunction request was filed on January 26, 1986. Defendants moved for summary judgement on the propriety of EPA's issuance of the permits to AGS on February 12.

Preliminarily, District Judge Hogan found FIFRA §16(a), (7 U.S.C. §136n(a)), and section 702 of the Administrative Procedure Act (APA), (5 U.S.C. §702), granted the Court jurisdiction in the matter. To determine whether a preliminary injunction should be issued, the Court examined four factors:

- 1) *Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal?* . . .
  - 2) *Has petitioner shown that without such relief it will be irreparably injured?* . . .
  - 3) *Would the issuance of an . . . [injunction] . . . harm other parties interested in the proceedings?* . . .
  - 4) *Where lies the public interest?* . . .
- 637 F. Supp. at 27-8.

Plaintiffs' claim concerning the issuance of the permit was reviewed by the court in accordance with standards specified in FIFRA and the APA. An EPA decision is presumed valid and must be affirmed if a rational basis for the decision is shown. The court's review gave deference to the EPA decision because it concerned areas of newly developed scientific technology. *See Baltimore Gas & Electric Co. v. N.R.D.C.*, 103 S. Ct. 2246, 2256 (1983). To ensure that the EPA had considered the relevant factors, the Court reviewed the agency record.

There were two phases in review of the permit. Plaintiffs were required to show either a procedural defect or, based on the record, that the substantive decision to issue the permit was arbitrary, capricious or an abuse of agency discretion.

Plaintiffs argued that the waiver issued to AGS by the EPA was improper. The Code of Federal Regulations provides that waivers are to be issued on a case-by-case basis. 40 C.F.R. §158.45(a)(2) (1985). After review of the available information, the size and scope of the experiment and AGS' proposed safeguards, the EPA deemed the waivers appropriate and granted them following all the statutorily required procedure.

Plaintiffs challenged the substantive result of issuing the permit claiming the EPA failed to adequately consider the effects of release of the INA- bacteria and alternatives to the proposed test. The Court found that the EPA operated within a regulatory framework stressing the quality of the environment and a procedural framework which provided opportunity for consideration of the environmental issues and judicial review. This framework was functionally equivalent to the substantive and procedural requirements of the National Environmental Policy Act ("NEPA") and fulfilled the purpose and policies of the act. Thus the Court held in this case that formal compliance with NEPA was not required. 637 F. Supp. at 28-9.

The deferential standard of review applied in this case resulted in a finding that plaintiffs did not make a strong showing that they would prevail on the merits of their claims. No evidence of irreparable injury had been shown by the plaintiffs. Because the test of the INA- bacteria could not have occurred before March 28, 1986, the motion for preliminary injunction was denied.

Decision on defendants' motion for summary judgement was withheld until completion of the EPA's investigation of AGS. At that time the EPA could revoke the permit or impose sanctions against AGS. Revocation of the permit would render moot any court decision on its propriety. If the permit is allowed, plaintiffs can seek review of that decision under the APA.

Plaintiffs moved for a continuance of the Court's decision on the summary judgement under Fed. R. Civ. P. 56(f) to enable them to conduct discovery of the media allegations against AGS. The motion was denied. The Court's opinion on the issue was that since discovery would not aid in plaintiffs' challenges of the agency record at the time of decision, discovery was not warranted.

Ross Herman '88

(Author's note: At the time of this writing, AGS has not field tested the INA-bacteria under the permit.)

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## HAZARDOUS WASTE

**Outboard Marine Corp. v. Thomas**, 773 F.2d 883 (7th Cir. Sept. 23, 1985), *reh'g denied*, Nov. 25, 1985, *cert. granted*, — U.S. —, (Oct. 6, 1986) (No. 85-1735).

This case arose out of a motion to quash an administrative warrant granting the United States Environmental Protection Agency (EPA) right of entry onto private property to facilitate cleanup operations at a hazardous waste site. The principal issue



presented in this case is whether section 104(a), (b), and (e) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. §9604(a),(b),(e), grant the EPA authority to enter private property to conduct the field investigations necessary for designing and constructing a waste storage facility at a contiguous hazardous waste site.

The EPA is faced with a dilemma when, in order to facilitate cleanup operations at a hazardous waste site, it must secure right of entry onto private property and such permission is refused. The Seventh Circuit Court of Appeals held that in a non-emergency situation, no authority presently exists granting the EPA right of entry to conduct preliminary field investigations for a future cleanup of hazardous waste.

Outboard Marine Corporation (OMC), a private corporation, owns an industrial complex on Waukegan Harbor, Lake Michigan. In 1976, the EPA charged that OMC was responsible for polychlorinated biphenyl (PCB) contamination of a portion of OMC property and the adjacent Slip No. 3 in Waukegan Harbor. This site is designated as the number one priority site in Illinois and ranks high on the National Priority List. In 1978, the EPA brought suit against OMC, but after seven years of discovery, the EPA voluntarily moved to dismiss. The motion was granted without prejudice. See *infra* *United States v. Outboard Marine Corp.*, 789 F.2d 497 (7th Cir. Apr. 22, 1986).

CERCLA provides that the EPA is permitted to conduct its own remedial action under section 104, 42 U.S.C. §9604, and recover costs under section 107, 42 U.S.C. §9607. The EPA sought to conduct a walk-through of the exterior portions of OMC's property, which involves surveying the property, placing survey monuments, locating utility lines, and taking weight-bearing subsurface tests of soil samples. Its activities would take place over a period of seventy days and would involve numerous persons, vehicles and heavy equipment. In addition, approximately 1,000 square feet of OMC's parking lot would be taken for the EPA's use. As noted by the court, "[t]he so-called 'walk through' is not a Sunday afternoon stroll." 773 F.2d at 885.

The EPA was unable to negotiate an agreement with OMC whereby OMC would voluntarily provide EPA access to the property. On February 13, 1985, the EPA obtained an *ex parte* administrative warrant to conduct the preliminary phase of the remedial response consisting of the above-described activities. OMC sought to enjoin application of the warrant claiming that it would suffer irreparable harm if EPA were allowed to enter pursuant to the warrant and take a sizeable tract of its property in contravention of the Fifth Amendment to the Constitution. The EPA maintained that the alleged irreparable harm would be no more than some temporary inconvenience which the EPA would attempt to minimize. Furthermore, the EPA argued, public interest would suffer if the warrant were not issued. OMC responded that CERCLA permits only remedial actions at facilities, 42 U.S.C. §9604(a), and that Congress did not intend to authorize construction of a large project on uncontaminated property which is in daily use by its owner.

Despite OMC's contentions, the United States District Court for the Northern District of Illinois refused to grant OMC a preliminary injunction to quash the administrative warrant holding that: (1) because OMC had Tucker Act remedy for compensation for any alleged taking resulting from EPA's activities, OMC was not entitled to a preliminary injunction quashing the administrative warrant under the Fifth Amendment taking clause; (2) the Fourth Amendment search and seizure provision would not be violated by the EPA's activities pursuant to the warrant; (3) OMC was unlikely to succeed on the merits of its Fifth Amendment due process claim, and therefore was not

entitled to an injunction on that ground. 610 F. Supp. 1234 (N.D. Ill. 1985).

OMC appealed to the United States Court of Appeals, Seventh Circuit, which construed section 104 of CERCLA less broadly than did the lower court and held that right of entry was statutorily lacking. 773 F.2d at 889. Furthermore, the court declined to find any implied authority under the statute. In its analysis of the statute, the court held that under section 104(e)(1) right of entry can be obtained only for inspection and gathering information and samples related to the hazardous substance itself. Judge Wood noted that the proposed activities were "too construction related to be considered authorized under the statute." 773 F.2d at 885. Under section 106, the EPA may enter where there is "imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility." 42 U.S.C. §9606. However, because no emergency exists, authority under section 106 is also absent.

Finally, the fact that the Tucker Act is available to compensate OMC for any taking was found immaterial by the court because the Tucker Act is applicable only to authorized governmental actions; EPA's proposed action exceeded the scope authorized by statute. 773 F.2d at 890.

The court, while recognizing the noble purpose of the EPA, held that it may not bestow greater powers than granted by Congress by rewriting the statute. Therefore, the decision of the lower court was reversed and remanded for the grant of preliminary injunction pending a hearing on the merits.

Millicent Vulcan, '87

**United States v. Outboard Marine Corp.**, 789 F.2d 497 (7th Cir. April 22, 1986), *petition for cert. filed*, 55 U.S.L.W. 3153 (U.S. Aug. 20, 1986) (86-280).

In this case, Outboard Marine Corp. (OMC) and the Monsanto Company (Monsanto) appealed a district court order which granted the United States' and State of Illinois' motion to dismiss their action "without prejudice to a future cost-recovery suit," 789 F.2d at 501, pursuant to Fed. R. Civ. P. 42(a)(2), on the condition that both governments execute a covenant not to sue OMC for injunctive relief. The issue on appeal is whether the court abused its discretion by dismissing the EPA's action for injunctive relief without prejudice.

In March 1978, the United States sought to compel OMC to remove an estimated 1.1 million pounds of polychlorinated biphenyls (PCB) which rested on the bed of Waukegan Harbor, Illinois, allegedly resulting from OMC's manufacturing process. In its complaint, the United States requested mandatory injunctive relief under the Refuse Act, 33 U.S.C. §407, the Clean Water Act, 33 U.S.C. §§1251-1376, and the federal common law tort of nuisance. The government twice amended its complaint; once to include Monsanto as a defendant and a second time in 1982 to claim relief under section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§9601-9657 (CERCLA). As a precondition to the section 106 CERCLA action, the EPA had to determine that an actual or threatened release from the facility posed an "imminent and substantial endangerment to the public health or welfare or the environment." 42 U.S.C. §9606.

In 1982, the district court granted OMC's and Monsanto's motion to dismiss the federal common law nuisance claims, granted Monsanto's motion to dismiss all other claims of the United States against Monsanto, but refused to dismiss the Refuse Act and the Clean Water Act claims against OMC. *United*



*States v. Outboard Marine Corp.*, 549 F. Supp. 1032, 1036 (N.D. Ill. 1982). The district court also refused to dismiss the section 106 CERCLA claim against OMC. *United States v. Outboard Marine Corp.*, 556 F. Supp. 54 (N.D. Ill. 1982). OMC then filed a motion requesting the district court to reconsider its order denying OMC's motion to dismiss the Refuse Act, the Clean Water Act and the section 106(a) CERCLA claims. In response, the district court expressed a sixty percent comfort in its prior ruling but set a hearing date on OMC's motion.

Waukegan Harbor's priority ranking as a hazardous waste site, OMC's having "fought the government every possible inch of the way," 789 F.2d at 504, for five years, and the anticipated further delay of three to four years prompted the United States in 1983 to seek to remove the PCB pursuant to section 104 of CERCLA, 42 U.S.C. §9604. The United States requested a stay of its action and after one year of conducting remedial investigation and feasibility studies (RI/FS) the EPA issued its Record of Decision (ROD). Approximately one week later the United States filed a motion pursuant to Fed. R. Civ. P. 41 (a)(2) to dismiss its complaint without prejudice because the ROD concluded that the appropriate remedy was for the EPA to remove the PCB sediments under section 104. The EPA chose this course of action knowing that OMC could still be held liable for the removal and cleanup costs in a subsequent section 107 action. 42 U.S.C. §9607.

The district court dismissed the government's claim for injunctive relief without prejudice and "to avoid any question of res judicata effect on the cost recovery claim, while still protecting defendants [OMC] from repetitive litigation," 789 F.2d at 502, the government stipulated to refrain from reinstating the injunctive relief claims. The district court refused to address the extent of harm inflicted from the PCB and the proposed removal because such action would create pre-removal judicial review not provided for in CERCLA sections 104 and 107. *See id.* at 506 ("judicial review is not available under CERCLA until the EPA files suit for reimbursement of its costs, as authorized by section 107, CERCLA, 42 U.S.C. §9607.") (quoting *Wheaton Industries v. United States EPA*, 781 F.2d 354, 356 (3d. Cir. 1986).

The Court of Appeals, Seventh circuit, affirmed the district court's decision. The court noted that abuse of discretion exists only where the defendant will suffer "plain legal prejudice" if plaintiff's action is dismissed. Factors which indicate legal prejudice include

the defendant's effort and expense of preparation for trial, excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action, insufficient explanation for the need to take a dismissal, and the fact that a motion for summary judgment has been filed by the defendant.

789 F.2d at 502 (quoting *Pace v. Southern Express Co.*, 409 F.2d 331 (7th Cir. 1969)).

The court rejected OMC's contention that the suit was dismissed because the government could not prevail. The court stated that "Congress has given the EPA the discretion to determine how best to economically and feasibly expend the government's limited resources in remedying the pollution problems . . . hazardous waste sites." 789 F.2d at 503. Judge Coffey, writing for a unanimous court, asserted that

[f]rom our review of the record we are convinced that balancing the delay pending the years of anticipated litigation over injunctive relief against the overwhelming interest of the government in protecting the environment from further irreparable damage to the water and marine life and in protecting citizens from the potential harmful effects of PCB . . . justifies the government's decision to proceed with the immediate removal of the PCB sediments and possibly sue at a later date for the removal costs.

*Id.*

The court discounted OMC's proposal that the government could have cleaned the harbor under the Clean Water Act by

observing that the PCB problem had not been remedied due to the continuous and protracted litigation in the case.

OMC's argument that it would have been able to obtain a ruling from the district court dismissing the injunctive relief claim for failure to state a claim was likewise dismissed. The court was not convinced that OMC would have obtained a favorable ruling based upon the district court's "sixty percent comfort" in its prior ruling. Moreover, because the government is prevented from pursuing injunctive relief, the claim has in effect been dismissed.

The court did not examine the alleged harm or future harm caused by the PCB in the harbor but noted that the government had already begun the cleanup process. Therefore, there no longer existed a valid reason for injunctive relief. Judge Coffey also held that OMC was not deprived of a cost-effectiveness defense and did not incur additional costs by preparing for the injunctive relief trial because the defense can be raised and the preparation work used during the probable cost recovery action.

Furthermore, the court deemed OMC's claim of unfavorable publicity a "red herring." 789 F.2d at 507. The court stated that OMC did not provide evidence demonstrating that it suffered unfavorable publicity and, even if it did, the district court had wide latitude in its determination.

Lastly, the court declared that the district court "obviously had no intention of preventing the government from later seeking recovery costs incurred in the removal of the PCB's from the Waukegan harbor; thus saving the taxpayers from being saddled with the interim cleanup expense." *Id.* at 508. Because the recovery action was not "in and of itself prejudicial to defendants," there was no abuse of discretion and, as a consequence, there was no need to reach the issue of whether the section 107 cost recovery action would be barred by res judicata. *Id.*

Mindy E. Hartstein, '87

**Wagner Seed Co. v. Daggert**, No. 86-6032 (2d Cir. Sept. 10, 1986) (slip opinion).

This action seeking a preliminary injunction was brought by plaintiff-appellant, Wagner Seed Company (Wagner), against defendant-appellee, Christopher J. Daggert, Regional Administrator of the U.S. Environmental Protection Agency (EPA). The United States District Court for the Eastern District denied Wagner's motion and Wagner appealed to the United States Court of Appeals for the Second Circuit. In a recent decision rendered by Judge Cardamone, the Court of Appeals affirmed the lower court's decision.

Wagner, a subsidiary of Wagner Brothers Feed Corporation, is a distributor of animal feed and agricultural chemicals. On June 1, 1985, Wagner's warehouse located in Farmingdale, New York was destroyed by a fire apparently caused by lightning. As a result of substantial amounts of water used during firefighting measures, highly toxic chemicals dissipated onto surrounding properties, including private homes. The EPA undertook a cleanup operation of the contaminated area expending several hundred thousand dollars under the supervision of the New York Department of Environmental Conservation (DEC). At the request of the DEC, the EPA assumed supervision of the cleanup in November, 1985. The EPA determined "that a potentially dangerous situation existed because properties located in populated areas were still polluted, the contamination sites were unprotected, and the onset of winter threatened to produce conditions that would exacerbate the damage. There was also a possibility that the contamination would leach into the area's groundwater." Slip Op. at 4.

The EPA issued an administrative order pursuant to section 106(a) of the Comprehensive Environmental Response

Compensation and Liability Act, 42 U.S.C. §§9601-9657 (1980) (CERCLA). This order required Wagner to continue remedial action and to work out a plan to complete the disposal of the remaining contaminated soil. Section 106(a) authorizes the EPA to take action where there "may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance . . .". 42 U.S.C. §9606(a). In addition, under section 106(b), the EPA could impose a fine of up to \$5000 per day for noncompliance with its orders and, under section 107(a)(3), seek damages in the event the government expends its own resources to clean up a contaminated site. 42 U.S.C. §§9606(b), 9607(a)(3).

There were two options open to Wagner after the EPA issued its administrative order. First, Wagner could have refused to comply with the order. Non-compliance would be premised on the belief that Wagner had a meritorious defense to liability since the fire that precipitated the spill was caused by an "act of God." 42 U.S.C. §§ 9601(1), 9607(b)(1). If Wagner had chosen this course, the EPA could have either expended its own funds to effectuate the cleanup and then sought restitution from Wagner, or the EPA could have sought judicial enforcement of their order. If the EPA exercised its right to judicial relief Wagner would have the opportunity to raise its defense on the merits. Second, Wagner could have chosen to expend the funds necessary to clean up the site and later sought reimbursement from its property insurance carriers.

In response to the EPA's administrative order, Wagner, choosing neither option, instead brought suit in the District Court for the Eastern District of New York seeking declaratory and injunctive relief against the imposition of fines and penalties and a stay against the order. First, Wagner contended that the district court had proper subject matter jurisdiction to review the order issued by the EPA. The district court stated that even if subject matter jurisdiction existed, Wagner would still have to meet requisite judicial standards to obtain injunctive relief. 16 ELR 20367 (E.D.N.Y. Jan. 27, 1986). On appeal, the court of appeals supported this finding stating that to receive a preliminary injunction Wagner must demonstrate "that it will suffer irreparable harm if the injunction is not granted." Slip Op. at 6. In addition, Wagner must demonstrate a good chance of success on the merits of its case or at the very least "sufficiently serious questions going to the merits . . .". *Id.*

With regard to its capacity to hear Wagner's case on the merits, the lower court determined that it lacked subject matter jurisdiction of a CERCLA order prior to a court action seeking enforcement by the EPA. 16 ELR at 20367. In re-examining subject matter jurisdiction, the court of appeals noted that "a presumption exists in favor of jurisdiction by federal courts over the actions of federal administrative agencies. [However, a review of the legislative intent and policies underlying CERCLA reveals that t]his presumption . . . can be overcome by specific language or . . . legislative history that is a reliable indicator of congressional intent." Slip Op. at 7. Numerous cases have concluded that Congress did not intend there to be pre-enforcement judicial review under CERCLA and therefore subject matter jurisdiction does not exist in such cases in federal district court. These decisions reason that CERCLA allows the EPA to avoid the delays of litigation and "to move expeditiously in the face of a potential environmental disaster." Slip Op. at 8. The court of appeals agreed "unequivocally that pre-enforcement review of EPA's remedial actions . . . [is] contrary to the policies underlying CERCLA." *Id.* (quoting *Wheaton Industries v. EPA*, 782 F.2d 354 (3d Cir. 1986)). The district court also denied Wagner's claim for relief on the constitutional issues holding that there was no showing of irreparable harm if relief was not granted.

Wagner requested the court of appeals to consider the record *de novo* and to review the "act of God" defense on the premise that the district court did, in fact, have subject matter jurisdiction. The court found that although this defense might be credible, "it [was] plainly inappropriate here where no basis exists for exercising jurisdiction." Slip Op. at 9.

Wagner next raised two constitutional claims. Wagner alleged that the section 106(a) administrative order was a deprivation of property without due process and that the penalties and fines under sections 106(b) and 107(c)(3), by chilling its right to judicial review, were a violation of procedural due process.

The court dealt first with Wagner's claim that the possible imposition of fines effectively dissuaded Wagner from seeking judicial review. Wagner relied on *Ex Parte Young*, where it was established that when fines were so burdensome as to dissuade a party from seeking judicial review, the penalties must be declared unconstitutional. *Ex Parte Young*, 209 U.S. 123 (1908). Critical to the determination of a constitutional violation in CERCLA is the permissive language in both sections of the statute. Section 106(b) states that fines *may* be levied. The court observed that as long as the fines are discretionary and cannot be imposed until after judicial review, they cannot effectively intimidate a plaintiff from seeking judicial review. The court also cited the relevant language in section 107(c)(3) which states that a "person may be liable to the United States for punitive damages . . .". 42 U.S.C. §9607(c)(3).

The court further believed that another way to guarantee that unconstitutional penalties would not be assessed was "to require that no penalty be imposed where a challenge was brought in good faith." Slip Op. at 11 (citing *Oklahoma Operating Company v. Love*, 252 U.S. 331, 338 (1920)).

Conceding that it is an open question whether a good faith defense exists to section 106(b), the court analogized to other decisions where "willfully" has been equated with bad faith. Reasoning that the term "willfully", which appears in section 106, has in other statutes been equated with bad faith, and that good faith is the opposite of bad faith, the court decided that a person who had a good faith defense would not be subject to fines for willful violation of a statute. The court relied on *Reisman v. Caplin*, 375 U.S. 440 (1964), where the Supreme Court declined to impose fines under a tax statute because the individual had a defense as the basis for non-compliance, and therefore there was no willful violation.

Since "willfully" appears in section 106(b) and legislative history encourages a presumption of a good faith defense for section 107(c)(3), the court could see no logic in exempting a party from damages under one section of the statute and not another when the party believed himself not liable.

The court read into section 106(b) a good faith defense. The combination of judicial discretion in the application of fines and damages and a good faith defense to each provision allowed the court to hold that Wagner's claim that the statute is a violation of procedural due process was without merit.

When the court addressed Wagner's second claim requiring it to spend additional funds to clean up the site prior to a hearing on the merits of its "act of God" defense, the court returned to its previous analysis. The court here held that no due process rights had been violated because Wagner did not have to comply with the EPA order. If Wagner chose not to comply, Wagner could contest the validity of the order if and when the EPA brought an enforcement action. By pointing to the discretionary provisions in the statute and by reading the good faith defense into the imposition of fines, the court showed that Wagner had protection against those fines when the case was heard on the merits.

In summary, the court of appeals found that Wagner had no right to injunctive relief prior to initiation by the EPA of a court action to enforce their administrative order. It is only then that the court may decide the case on the merits and Wagner can defend its position of noncompliance. The court of appeals, supporting the strong policy behind CERCLA to allow the EPA to act quickly to remedy hazardous environmental conditions for the public safety, had no difficulty in upholding the district court's final judgment.

Vinca Liane Jarrett, '88 and Monica Papola, '88

(Editor's Note: As of the date of publication, Wagner has proceeded with cleanup of the site.)

## PRE-EMPTION

**Exxon Corp. v. Hunt**, 106 S. Ct. 1103 (March 10, 1986).

Plaintiff, Exxon Corp., originated this action in New Jersey Tax Court against defendants, State of New Jersey and certain of its officials. Plaintiff sought a declaratory judgment and a tax refund in connection with a special excise tax imposed on the plaintiff under the New Jersey Spill Compensation and Control Act, N.J. Stat. Ann. §§58:10-23.11 to 58:10-23.11z (West 1982 and Supp. 1985) (Spill Act).

After defendants prevailed on their summary judgment motion, the decision was affirmed by the Appellate Division, 190 N.J. Super. 131, 462 A.2d 193 (1983), and then by the state's supreme court, 97 N.J. 526, 481 A.2d 271 (1984). The present case results from the plaintiff's appeal to the United States Supreme Court.

Plaintiff's action was premised on an alleged federal pre-emption of the Spill Act by the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§9601-9657 (1980) (CERCLA). The Spill Act authorized an excise tax upon major petroleum and chemical facilities in New Jersey. The fund, created by the tax, could be used to clean up hazardous substance releases, to compensate third parties for certain economic losses, and for administrative and research costs. CERCLA also provided for the creation of a fund (Superfund) to clean up hazardous substances through a special excise tax on petroleum and certain chemicals. Plaintiff's pre-emption claim, based on the Supremacy clause, concerns the construction of CERCLA, specifically section 114(c), which states:

Except as provided in this Act, no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this subchapter. Nothing in this section shall preclude any State from using general revenues for such a fund, or from imposing a tax or fee upon any person or upon any substance in order to finance the purchase or prepositioning of hazardous substance response equipment or other preparations for the response to a release or hazardous substances which affects such state.

42 U.S.C. §9614(c).

The Supreme Court began by stating that the language of section 114(c) was clearly meant to forbid the states from taxing to finance certain types of funds. After a painstaking analysis the Court held that the Spill Act was partially pre-empted by section 114(c). The 7-1 decision was written by Justice Marshall. (Justice Powell took no part).

CERCLA was passed by a lame duck Congress in the eleventh-hour and the meaning of many sections was not made clear by Congress. Also contributing to the difficulty in interpreting CERCLA is the fact that it represents a compromise bill created from parts of prior, competing bills. In order to

determine the pre-emptive scope of CERCLA the Court first scrutinized the following part of section 114(c): "to pay compensation for *claims* for any costs of response or damages or *claims* which may be compensated under this subchapter." 42 U.S.C. §9614(c) (emphasis added). The Court had to decide what was meant by "which may be compensated" and whether this meaning modified "claims for any costs or response or damages or claims" or only the last word "claims."

The Court resolved the latter issue so that "claims for any costs of response or damages or claims" was read as one clause. Both parties agreed with this interpretation and it was only put in issue by the Solicitor General's *amicus curiae* brief. The significance of the Solicitor General's position is that section 114(c) would have required pre-emption of all state legislation that provided for "claims for any costs of response or damages", regardless of whether these expenses are of the type "which may be compensated" by Superfund.

In rejecting the Solicitor General's position the Court also rejected his construction of the word "claims" which was the foundation of his position. The Solicitor General felt that "claims" should be construed to have a consistent meaning within the section. Claims, the Solicitor General argued, are a private party's demand upon a state fund or upon Superfund for cleanup cost reimbursement. This implies that section 114(c) does not pre-empt use of state funds for a state government's own cleanup costs.

The Court found several problems with this position. First, the legislative history of CERCLA indicates that government cleanup costs are included in "claims." Second, the Court compared CERCLA sections 111(a), 114(c), and 114(b). Section 114(b) precludes any person who is compensated for "removal costs or damages or claims" by CERCLA from recovering under any other state or federal law. Because of this similarity to section 114(c)'s "costs or response or damages or claims," the Court found this suggested that the three terms of section 114(c) should be read as one clause since the three terms in section 114(b) are read as one clause. 106 S.Ct. at 1113. Additionally, section 111(a) provides that the Superfund may be used for governmental *response costs*, *natural resource damages*, and *third party cleanup claims*. This indicates that section 114(b)'s "removal costs or damages or claims" is meant as a shorthand for the section 111(a) authorized uses. The Court found in this a suggestion that Congress believed double recovery out of a state fund was possible for all of the authorized uses of the Superfund and that "claims" under section 114(b) includes state cleanup costs in addition to private party cleanup costs.

Third, the Court found that if "claims" does not cover governmental expenditures then the second sentence of section 114(c), which provides that nothing within the section shall prevent a state from using a special tax to prepare for a response to hazardous substance releases, is redundant. *Id.* In light of these problems, the parties' position on the meaning of claims was adopted and the rejected alternatives were attributed to inartful drafting.

The Court then defined the clause "which may be compensated" in section 114(c). The New Jersey Supreme Court held this clause to include only expenses which are actually paid by Superfund. The plaintiff argued that it pre-empted any fund that pays for those expenses which may be paid by Superfund. The Court agreed with the plaintiff because: (1) there is no need for a provision whose sole function is to prohibit double compensation as a state is unlikely to ever pay it; (2) section 114(b) would be redundant because it would not be possible to recover under a state law as



no valid state law could exist for an expense actually paid for by Superfund; (3) the literal meaning of "may" would be violated by reading it to mean "is actually compensated"; and (4) the second sentence of section 114(c) would be rendered meaningless as there would be no need to tell the states that they may spend money in preparation for responses. 106 S. Ct. at 1113-14.

Defendants argued that even conceding that "may" does not mean money actually disbursed, it includes only expenses where Superfund paid or would have paid a claim if it had not been paid by a state fund. Defendants argued that CERCLA's structure and legislative history supported their view. Structurally, CERCLA does not pertain to large areas, such as oil spills and private property damages, and the size of the Superfund, when created, was known to be inadequate for all but a few hazardous waste sites. Thus, defendants contended that Congress could not have intended to prevent state cleanup efforts at those very sites that they wanted to clean up but knew Superfund would never reach. Although such Congressional purpose was consistent with defendants' position, the Court looked to another policy and held that Congress, in enacting section 114(c), was clearly concerned "about the potentially adverse effects of overtaxation on the competitiveness of the American petrochemical industry." 106 S. Ct. at 1114. This policy consideration prevented the Court from concluding that Congress wanted state cleanup attempts to proceed unhindered. After finding defendants' structural argument lacking, the Court also found the legislative history insufficient to support defendants' interpretation of "may."

Although the Court had made the decision that the phrase "which may be compensated" applies to "claims for any costs of response or damages or claims" and includes expenses, which as a practical matter may never be paid by Superfund, the Court still had to define what expenses, (i.e., "costs of response or damages or claims"), were compensable under CERCLA so as to determine the actual pre-emptive scope of section 114(c). The Court sought guidance from the National Contingency Plan (NCP), 42 U.S.C. §9605(8)(b). NCP provides for a National Priorities List, and also sets the criteria that determines what expenses, at which sites, may be paid for by Superfund. The Court held the NCP to be the appropriate measure of expenses under section 114(c).

Applying this holding to the Spill Fund, the Court had to decide whether the purpose of the Spill Fund was to pay expenses covered by section 114(c). The Spill Fund was available for six purposes:

- (1) to finance governmental cleanup of hazardous waste sites; (2) to reimburse third parties for cleanup costs; (3) to compensate third parties for damage resulting from hazardous substance discharges; (4) to pay personnel and equipment costs; (5) to administer the fund itself; and (6) to conduct research.

106 S.Ct. at 1116. The Court held that the last four were clearly not pre-empted, and that the first two were in part pre-empted by section 114(c), but only to the extent they permitted expenditures authorized by the NCP. Additionally, the court noted that clearly the statutory requirement of a 10% state contribution to an EPA response effort was not pre-empted. 106 S.Ct. at 1116.

The defendants' argument that all Spill Fund expenditures to date were for non-Superfund sites, as defined by the NCP, was inapposite. The Court held the test of the Spill Act's validity was whether it permitted taxation for pre-empted expenditures and not how the Spill Fund is actually spent. The Court remanded the case to the New Jersey Supreme Court to determine if, or to what extent, the pre-empted parts of the Spill Act are severable.

The lone dissenter, Justice Stevens, would have affirmed even though he agreed with the majority's decision that the Spill Act authorizes taxation and a Spill Fund for expenses that are of the same type included under section 114(c). Despite this identity of expenses, Justice Stevens would not find any pre-emption unless the sole purpose of the Spill Act was within "the purpose" of CERCLA section 114(c). Justice Stevens focused on section 114(c)'s clause "no person may be required to contribute to any fund, the purpose of which is to pay compensation for [expenses] which may be compensated," by Superfund. 42 U.S.C. §9614(c) (emphasis added). Thus he made a literal reading of "the purpose" to mean the one and only purpose and would pre-empt only legislation creating a state fund whose sole purpose was to pay claims covered by the NCP. Justice Stevens would have held that the New Jersey Spill Act is not pre-empted because all parties agreed that the Spill Act has multiple purposes and that at least some of these purposes are not within section 114(c)'s term "the purpose." (The majority's reply was that to hold the entire Spill Act valid because many of its purposes are permissible would allow States to flout federal law by including invalid provisions with valid provisions in statutes. Justice Stevens' response was that the majority was concerned with a question not yet properly before the Court.)

Justice Stevens forcibly argued that his interpretation of section 114(c) was consistent with the legislative history. While agreeing with the majority that the legislative history is sparse, he found that at the time of CERCLA's enactment Representative Florio, who introduced the legislation in the House, and Senator Bradley, both of New Jersey, had expressed their concerns in floor debates of section 114(c)'s possible effect on the already existing New Jersey Spill Act. The reply in both the House and the Senate was that section 114(c) was only meant to be a prohibition against double taxation. Though this reply is not conclusive as to legislative purpose, it certainly seems to have allayed the concerns of Senator Bradley and Representative Florio. Justice Stevens argued that:

if Congress had intended to forbid any further contributions to the New Jersey Spill Fund—the existence of which it was made acutely aware—it surely could have expressed that intent in less ambiguous language . . . we should not presume pre-emption unless Congress clearly identifies its intent to curtail the lawmaking power of a sovereign State, either by careful draftsmanship . . . or by necessary implication.

106 S.Ct. at 1119.

Thus, in the absence of clear Congressional intent and because at least some of the Spill Act's purposes are valid, Justice Stevens would have affirmed.

Justice Stevens went on to criticize the majority for resolving issues not yet before the Court. The plaintiff had challenged the whole tax as pre-empted and never made any claim for a partial refund or challenged any particular expenditure. The majority remanded to the New Jersey Supreme Court for possible partial relief, but this would have been proper only if a particular expenditure had been challenged. Justice Stevens also criticized the majority on the grounds that even if partial relief was a controversy before the Court, as the majority believed, they failed to provide any guidelines on remand as to what the proper tax rate should have been. 106 S.Ct. at 1120. Thus, the issue is whether the defendants should be required to refund that share of the tax proportionate to the Spill Fund share that is pre-empted, or whether New Jersey should show that it would have taxed the plaintiff at the same exact rate in order to build a reserve in the Spill Fund, or whether the New Jersey Supreme Court can adopt whatever solution it desires out of a multitude of conceivable possibilities.

Thomas G. Sheehan, '87

## RESTRICTIVE ZONING

**MacDonald, Sommer & Frates v. Yolo County**, 106 S. Ct. 2561 (June 25, 1986).

The Supreme Court of the United States granted certiorari to decide whether the Constitution requires a monetary remedy when a property owner has proven a regulatory taking of his property. However, the Supreme Court was unable to decide this issue because there were insufficient factual allegations to determine the preliminary matter of whether there had been a taking. The Supreme Court affirmed the California State Court judgment sustaining a demurrer to the complaint. The complaint was defective because the factual allegations that the zoning deprived the land owner of the entire economic use of his property and that "any application for a zoning change . . . would be futile" were conclusory. 106 S.Ct. 2564.

In 1975, appellant, MacDonald, Sommer & Frates, a developer, submitted a proposal to the Yolo County Planning Commission ("Commission") to subdivide a piece of agricultural property into 159 single and multi-family residential lots. The Commission rejected the tentative proposal. The Yolo County Board of Supervisors ("Board") affirmed this decision. 106 S.Ct. at 2563. The Board based its decision on the grounds that the proposal failed to adequately provide street access, sewer service, police and fire protection, and water service. These services, which could have reasonably been provided by the local government, were refused to the developer.

In response to this rejection, the developer filed both an action in inverse condemnation and an action in mandamus with the California Superior Court. At the present time, the mandamus action is still pending. 106 S.Ct. at 2563.

There are two remedies in land use restriction cases and the states are split on which remedy will apply. One remedy is a declaratory judgment which is available when the court finds that the regulation or action restricting the landowner's use of his property is either unconstitutional on its face or unconstitutional as applied to the particular landowner. If the law or restriction is found to be unconstitutional on its face, the legislature may amend the law, and in the interim, the landowner will be free from restriction. If the law or restriction is found to be unconstitutional as applied to the landowner, the restriction will not be applied against the landowner and the landowner will thus be free from regulation. The other remedy is if the court finds that the regulation amounts to a "taking", then "just compensation" or monetary damages are available to the landowner. In effect, "just compensation" is when the government pays the landowner for his property and then the government becomes the owner of the property outright.

In the California Superior Court, the developer argued that the Commission and the Board rejected the developer's proposal because they wanted a "public, open-space buffer." 106 S.Ct. at 2564. The developer further alleged that they restricted the property to only agricultural use because they would deny all permits and requests for any other use of the property. In essence, the developer claimed that any future applications for development would be futile because the reasons the Commission and Board used to base its decisions on were so restrictive. Because the developer was denied all reasonable use of his property, their action amounted to a "taking" of the developer's property. The Commission and the Board demurred to these charges.

The California Superior Court held that no taking occurred because the property was not restricted to agricultural use and that the property had obvious other uses. The Court further

found that even if there was a taking, monetary damages for inverse condemnation are foreclosed based upon the rule of law established in *Agins v. City of Tiburon*, 24 Cal. 3d 266, 598 P.2d 25 (1979), *aff'd*, 447 U.S. 255 (1980). The developer would not be entitled to "just compensation", only a declaration that the regulation or restriction was unconstitutional.

The California Court of Appeals affirmed the lower court's decision by upholding *Agins*. It held that instead of monetary damages, the proper remedy for the developer is to have the regulation set aside as unconstitutional. In addition, the Court held that even if California law allowed for monetary damages, the developer did not allege sufficient facts to establish a taking of private property. In other words, rejection of a particular and intensive development of the land by the Commission did not constitute a refusal to permit *any* development. The Commission may have accepted a different, less intensive proposal.

The California Supreme Court denied the developer's petition and the United States Supreme Court granted an appeal.

The issue before the United States Supreme Court, as framed by the developer, was whether the rejection of the developer's proposal by the Commission and the Board constituted a taking of property without just compensation contrary to the 5th and 14th Amendments of the U.S. Constitution.

In a 5-4 decision, Justice Stevens delivered the majority opinion in which Brennan, Marshall, Blackmun and O'Connor joined. The Supreme Court held that it could not determine if the regulation was so restrictive that it constituted a taking because a final determination, as to the developer's proposal, had not been made by the Commission. The Supreme Court followed its rule that until a landowner "receives the Board's final, definitive position regarding how it will apply the regulations at issue to the particular land in question", it cannot decide the taking issue. 106 S.Ct. at 2568 (citing *Williamson Planning Commission v. Hamilton Bank*, 473 U.S. at \_\_\_, 105 S.Ct. at 3119 (1985)).

The Court stated that the regulatory taking claim, advanced by the developer, has two components. First, the developer must establish that the regulation "goes too far" in that the developer is deprived of all reasonable use of his property, thus amounting to a taking. Second, the developer must demonstrate that any "proffered compensation is not just". 106 S.Ct. at 2566.

However, in this case, the Court never engaged in the two-prong analysis to determine whether a "taking" had occurred, nor did the Court address the issue of the applicable remedy if a "taking" had occurred. The reason the Court never addressed the merits of this case was because the developer only submitted *one* proposal to the Commission and did not submit any alternative proposals which may have been more acceptable to the Commission. Therefore, the Commission's denial of the developer's proposal was not a final decision subject to review because the developer was free to submit other, different proposals which may be accepted. In sum, the developer had not exhausted his administrative remedies and thus the "taking" claim was not ripe for adjudication by the Court.

This application of the final decision rule by the Court has left several issues unresolved. The first issue left unanswered is *who* has the burden to show when there has been a final decision. If the landowner has the burden, he must continue to submit proposals until the Commission accepts one or until no alternative proposals exist. This is a substantial burden to place on the landowner because while he is continuously submitting

proposals, the land remains unusable and undeveloped. On the other hand, if the Commission (government) has the burden, the Commission would have the duty to inform the landowner what it considers an acceptable proposal.

A second, and related issue concerns the number of proposals a landowner must submit, if the landowner has the burden, before a court will step in and say a final decision has been made and that any further applications would be futile. Conceivably, an applicant could submit thousands of proposals, only to be rejected because of a minor problem. At some point a court must step in and stop the cycle. However, the Supreme Court of the United States in the present case never delineates how many alternatives must be proposed before it will be considered a "final decision" subject to judicial review.

But, if a court does step in to halt an otherwise endless cycle of proposals and subsequent denials, a third issue necessarily arises. There is a tension between needing court intervention and allowing a local government to run their local affairs unhindered by judicial interference. A court may not know what is best for a locality, whereas a local government would have greater expertise in dealing with such matters.

These issues were left unanswered by the Court's decision in the present case, and may prove to be a source of future litigation.

In a strong minority dissent, Justices White, Burger, Powell and Rehnquist disagreed with the majority's inability to address the merits of the case. The minority agreed that "[w]hether a regulatory taking has occurred is an inquiry that can not be completed until a *final decision* has been made as to how the allegedly confiscatory regulations apply to the pertinent property." 106 S.Ct. at 2571 (emphasis added). However, the minority did not feel it was necessary to have repeated applications and denials before a final decision was reached. Thus, the minority assumed that the developer had alleged a final decision because its proposal was denied.

Because the final decision rule had been satisfied, the minority was able to reach the merits of the case. The minority thus addressed the issue of whether the developer had alleged a takings cause of action in the complaint. After looking at the developer's factual allegations, the minority found that the developer had adequately alleged a taking.

Once the minority decided that a takings claim had been alleged, the only remaining issue was the applicable remedy for the taking. More specifically, the final issue addressed by the minority was whether a state, under *Agins, supra*, "can limit to declaratory and injunctive relief the remedies available to a person whose property has been taken by regulation, or whether the state must pay compensation. . .". 106 S.Ct. at 2573. Justices White and Burger held that just "compensation must be available for the period of time between the time of the final decision taking the property and the time that that decision is rescinded." *Id.* In reaching this conclusion, Justices White and Burger reasoned that even when the government decides to rescind the taking by amending the regulation, it does not reverse the fact that the property owner has been deprived of its property in the interim. Thus, "it is only fair that the public bear the cost of benefits received during the interim period between the application of regulation and the government's rescission of it." *Id.* Justices White and Burger recognized that what constitutes "just compensation" is a difficult problem since it is hard to value. However, they felt that such unsettled questions should not deter them from acting to protect constitutional requirements.

In a separate dissent, Rehnquist and Powell reserved opinion on the applicable remedy for "interim" takings.

Theresa Frey, '88; Rosemary Olsen, '88; Shelly Sheetz, '88

## SEARCH AND SEIZURE

**Dow Chemical Co. v. United States**, 106 S. Ct. 1819 (May 19, 1986).

The Environmental Protection Agency (EPA) took precision aerial photographs with a standard aerial mapping camera of Dow Chemical Co.'s (Dow) industrial complex. The issues that arose from that action were whether the taking of aerial photographs without a warrant constituted a search prohibited by the Fourth Amendment and whether EPA acted within its statutory authority to use aerial photography for site inspection under §114(a) of the Clean Air Act. 42 U.S.C. §7414(a)(1982).

Petitioner Dow operates a chemical manufacturing facility consisting of numerous covered buildings, with piping conduits interspersed between them, and manufacturing equipment visible from the air. Although Dow has maintained elaborate security around the perimeter of the 2,000 acre complex to prevent ground level public view, no effort had been made to conceal manufacturing equipment from aerial view.

In 1978, Dow consented to an EPA on-site inspection of the complex for possible Clean Air Act violations. However, EPA's request for a second on-site inspection was denied. Instead of seeking an administrative search warrant, EPA employed a commercial aerial photographer to photograph the facility from different altitudes. The airplane always remained within lawfully navigable airspace. Dow was not notified of this aerial photography, but when Dow learned of it, Dow brought suit against EPA in the United States District Court for the Eastern District of Michigan.

Dow alleged that the aerial photographs constituted a search in violation of the Fourth Amendment and further that EPA's action was beyond its statutory investigative authority. Dow's motion for summary judgment was granted by the District Court on the ground that the taking of aerial photographs was a search violating the Fourth Amendment and that EPA had no statutory investigative authority for such action. 536 F. Supp. 1355 (E.D. Mich. 1982). Proceeding on the assumption that a search for Fourth Amendment purposes had been conducted, the court found that Dow, by its endeavor to shield the exposed manufacturing areas from ground level public view, manifested an expectation of also being free from aerial surveillance. Turning to the *Katz v. United States*, 389 U.S. 347 (1967), two-prong test, the court held that this expectation of privacy was reasonable. In reaching this conclusion, the court stressed that human vision was too greatly enhanced by the use of the precision aerial mapping camera, allowing much more detailed observation than the human eye could perceive unaided. 536 F. Supp. at 1367.

The United States Court of Appeals for the Sixth Circuit, also adhering to the *Katz* two-prong test, agreed that Dow had a subjective expectation of privacy from *ground level* intrusions, but did not agree with the District Court's finding that Dow had a subjective expectation of being free from *aerial* observation. 749 F.2d 307 (6th Cir. 1984). This finding was based on the fact that Dow had taken no precautions against aerial observation, which the court felt Dow could have taken, in comparison to its elaborate ground level precautions. Therefore, the Court of Appeals reversed the District Court and held that Dow's privacy expectation of being free from aerial surveillance was not



reasonable because Dow's facility contained many buildings and the "area observed [was] outside of these buildings and the spaces in between the buildings." *Id.* at 313.

The Court of Appeals also held that the common law curtilage doctrine did not apply to Dow's facility. 749 F.2d at 313-14. Instead, the court determined that Dow's large industrial complex was more analogous to an open field than to curtilage surrounding a home. Therefore, Dow had a lesser expectation of privacy in its industrial facility than an individual would have in his home. Because the court determined that the open field doctrine applied, EPA's use of precision photography equipment was not controlling because in an open field vision may legally be enhanced.

The Court of Appeals finally held that EPA acted within its statutory authority even though it lacked express authorization for aerial observation. The assignment of general investigative authority to EPA was adequate to support the use of aerial photography as an investigative technique. 749 F.2d at 315.

Chief Justice Burger delivered the 5-4 opinion of the United States Supreme Court which affirmed the Court of Appeals decision. 106 S.Ct. 1819 (1986). Justice Burger began his analysis by summarily rejecting Dow's claim that aerial photography might be barred by State law relating to unfair competition. The Court found the claim irrelevant since no one, least of all the government, was using the aerial photography to compete with Dow. *Id.* at 1823.

Justice Burger then addressed the issue of whether EPA acted within its statutory authority. Congress has given EPA certain investigatory and enforcement authority, without exactly stating how such authority is to be carried out in all circumstances in monitoring situations that pertain to clean air and water standards. Pursuant to §114(a)(2) of the Clean Air Act, the EPA has a "right of entry to, upon, or through any premises" once credentials have been presented. 42 U.S.C. §7414(a)(2)(A). Dow claimed that aerial observation was not authorized under this limited grant of authority. However, the court held that §114(a) of the Clean Air Act expanded EPA's authority and allowed EPA to use techniques of observation that are common to the public. Moreover, the Court found "[r]egulatory or enforcement authority generally carries with it all the modes of inquiry and investigation traditionally employed or useful to execute the authority granted." 106 S.Ct. at 1824. Therefore, the use of aerial observation and photography is permitted, and is within the EPA's statutory authority. *Id.*

Justice Burger then turned to the issue of whether the taking of aerial photographs without a warrant constituted a search prohibited by the Fourth Amendment. The Court's primary inquiry was into the distinction between the curtilage doctrine and the open field doctrine. It is well established that the curtilage area immediately surrounding a private home is a protected area where individuals have the same expectations of privacy as that associated with the intimacy of a home. In contrast, society does not recognize a reasonable expectation of privacy for open fields. Therefore, privacy can be demanded for activities in the area immediately surrounding the home, but not in open fields.

Dow analogized its exposed manufacturing facility to the curtilage surrounding a home and tried to claim it had a subjective expectation of privacy in that area. This claim was based on Dow's effort to prevent visual observation of its complex from ground level. However, the Court determined that Dow's facility did not fall exactly within the reach of either doctrine even though "an industrial or commercial facility [does enjoy] certain protections under the Fourth Amendment." 106 S.Ct. at 1825 (relying on *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978)). The

Court then went on to reason that because the open areas of Dow's facility spread over 2,000 acres and were exposed from the air, they were not entitled to the same constitutional protections as the interior of the covered buildings. Thus, the Court held that this type of industrial facility was more analogous to an open field, for purposes of aerial surveillance, because a corporation has a lesser expectation of privacy in exposed areas than an individual. 106 S.Ct. at 1827.

The Court further noted that the use of standard photography equipment did not present constitutional problems. "The mere fact that human vision is enhanced somewhat, *at least to the degree here*, does not give rise to constitutional problems." *Id.* (emphasis added). The Supreme Court explicitly did not decide the issue of whether super-enhanced photography would be constitutional. In sum, observation of an exposed industrial complex from public airspace using a standard precision mapping camera is constitutional.

Justice Powell, joined by Justices Brennan, Marshall and Blackmun, did concur with the holding of the Court that using aerial observation and photography is within EPA's statutory authority. But in dissent, the Justices disagreed with the holding that warrantless photography was not a Fourth Amendment search. The conclusion was based on the finding that a "private commercial enclave [is] an area in which society has recognized that privacy interests legitimately may be claimed." 106 S.Ct. at 1834. Justice Powell felt that under the majority's holding, privacy would be decided by the type of surveillance used. This holding would permit the decay of Fourth Amendment rights as this type of surveillance technology improves.

Don Mitchell, '88

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## TAX

**True v. United States**, 603 F. Supp. 1370 (D. Wyo. March 20, 1985).

As the result of a controversial decision by the Wyoming District Court, a question has arisen about the deductibility of penalties and fines from federal income tax levied for violations of environmental laws.

The principle issue in this case is whether civil penalties imposed under the Federal Water Pollution Control Act, 33 U.S.C. §1321(b)(6)(1982) (Clean Water Act), are deductible from a corporation's income tax. A secondary issue concerns surface damage payments, and whether they are a cost of constructing an oil pipeline and thereby eligible for an investment tax credit.

The case was brought to court after the Commissioner of the Internal Revenue Service (IRS) disallowed the deduction of penalties assessed against the Belle Fourche Pipeline Company (Belle Fourche) under section 1321(b)(6) of the Clean Water Act. Plaintiffs, who are shareholders of the Subchapter S Corporation, sought a refund of the civil penalties imposed for three consecutive years, for oil leaks from Belle Fourche's pipelines. The company, which transports crude oil by pipeline, paid the fines to the United States Coast Guard for a violation of paragraph (3) of section 1321(b) which states that "the discharge of oil or hazardous substances . . . is prohibited." 33 U.S.C. §1321(b)(3).

Plaintiffs also requested a determination on whether they could receive the benefits of the investment tax credit for payments made to landowners for the destruction of their land caused by the presence of Belle Fourche's pipelines. The case is a consolidation of the several suits brought by the individual stockholders, and as there were no contested facts, the issues were decided as a matter of law.

The ruling by the IRS to disallow the penalties was made on the basis of section 162(f) of the Internal Revenue Code. 26 U.S.C. §162(f)(1982). This section provides that "[n]o deduction shall be allowed under Subsection (a) for any fine or similar penalty paid to a government for the violation of any law." *Id.* Subsection (a) allows for the deduction of "ordinary and necessary" business expenses. *Id.* at §162(a).

The plaintiffs brought suit against defendant, the United States, alleging that section 162(f) rendered penalties nondeductible only in situations where a penalty is criminal in nature and its purpose is to punish. The court agreed, interpreting section 162(f) to mean that a penalty is not criminal in nature and is deductible if it serves the purpose of encouraging compliance with the law or if it is remedial or compensatory in nature. 603 F. Supp. at 1373. The District Court, accepting plaintiffs' argument, reversed the judgment of the Internal Revenue Service.

In deciding whether the fine assessed under Section 1321, (designated a civil penalty in *United States v. Ward*, 448 U.S. 242 (1980) ), serves the purpose of a criminal penalty, the court followed two separate, and often conflicting, theories on the deductibility of fines. The District Court, per Judge Kerr, first explored the historical under pinnings of section 162(f). At common law, fines were not deductible because the deduction of fines frustrated public policy which intended to punish taxpayers for even non-willful violations of state penal laws. Section 162(f), a codification of this strong public policy, originally promulgated in the Tax Reform Act of 1969, was put into proper perspective by a Senate Finance Committee Report which responded to proposed IRS regulations making all fines non-deductible. The report made clear that "deductions [would not] be denied in the case of sanctions imposed to encourage prompt compliance with requirements of the law." 603 F. Supp. at 1373. Only those civil fines similar to punishment under criminal statutes were non-deductible. The key point in determining the deductibility of a civil penalty, then, is whether the penalty serves a purpose similar to a criminal fine or penalty.

In a different vein, the court explored recent case law to find criteria on which to base a decision about the legislature's purpose behind a penalty. Specifically, the court sought to clarify the purpose of fines imposed under the Clean Water Act. The court relied on *Southern Pacific Transportation Co. v. Commissioner*, 75 T.C. 497 (1980) and *Middle Atlantic Distributors v. Commissioner*, 72 T.C. 1136 (1979), where the distinction between different types of civil penalties was expressed by the tax court. The standard enunciated in these decisions is that a penalty has no criminal punishment aspect when its purpose is remedial or compensatory. If the fine is to punish a violation of the law, or is intended to deter a violation of the law, it has a purpose similar to a fine imposed under criminal statute.

The court focused on the fact that the Clean Water Act is a strict liability statute. Penalties are imposed under it irregardless of fault, and are contributed to a revolving fund used to pay for clean-up operations. The Congressional purpose behind the penalty provision of the Act was to impose the burden of paying clean-up costs on parties most able to bear it. The court cited several cases for the proposition that as a matter of policy, those parties who cause the environmental harm should assume the cost of their activities. "[I]t has been held, [the court noted], that the [Clean Water Act] is a means of transferring the risk from the public to the operator of the facility causing a harmful discharge." 603 F. Supp. at 1374 (citing *United States v. Ward*, 448 U.S. 242 (1980) ).

The conclusion to this analysis was that, on the balance, the scale tipped in favor of a remedial, compensatory purpose to the

section 1321(b)(6) fines. The court could see in the fines no purpose to punish polluters for their action or to deter them from future violations. In spite of a citation to a Seventh Circuit decision that the fines were imposed because "Congress ha[d] made a legislative determination that polluters rather than the public should bear the costs of water pollution . . .", *United States v. Marathon Pipeline Co.*, 589 F.2d 1305, 1309(7th Cir. 1978), Judge Kerr was not dissuaded. The court held that the fines were imposed to encourage compliance with, and to compensate other parties for, violations of the Clean Water Act and public policy did not militate against allowing Belle Fourche to deduct them as an ordinary and necessary business expense.

As to the second issue of surface damage payments, the District Court again held in favor of plaintiffs. When originally filing tax returns, Belle Fourche did not claim that these damage payments were eligible for investment tax credit. This credit is only allowed for construction costs for tangible property. 26 U.S.C. §§38, 46-48. Thus, the court had to decide whether the damage payments were actually part of the acquisition costs of easements, or a part of the cost of constructing the pipeline.

The problem arose in this case because Belle Fourche prepaid the damage payments to the landowners on whose land Belle Fourche had easements. The defendant argued that the company should not get the advantages of the investment tax credit because the damage payments were not refundable to Belle Fourche if pipelines were not constructed. The damages would become an acquisition cost and were unrelated to construction.

The plaintiff contended, and the court agreed, relying on the United States Court of Claims decision in *Mapco Inc. v. United States*, 556 F.2d 1107 (1977), that "[d]amage payments are an integral part of the cost of constructing a pipeline, rather than part of the cost involved in acquiring right of way easements for the pipeline." 603 F.Supp. at 1375-76. The time of damage payment to landowners was irrelevant to the court. Belle Fourche conserved its resources by negotiating the acquisition of easements and damage payments together, and thus the court concluded that it would not punish the plaintiffs for a shrewd business deal.

Werner Lehfellner, '88

(Editor's Note: The new federal tax reform does not affect section 162(a)(f) of the Internal Revenue Code. 26 U.S.C. §162(a)(f). )

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## WATER

**Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield Ltd.**, 791 F.2d 304 (4th Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3239 (U.S. Sept. 23, 1986) (86-473).

As the number of non-profit corporations, or citizens groups dedicated to the protection of natural resources has grown, industrial corporations and these citizens groups have been locked in a continuing battle over the meaning of our nation's environmental laws. Under section 505 of the Clean Water Act, 33 U.S.C. §1365, any citizen may bring an action against any other citizen or corporation who is in violation of its discharge limits for various pollutants. Under the National Pollutant Discharge Elimination System (NPDES), the Environmental Protection Agency (EPA) sets limits on waste water discharged into rivers and other waterways by industrial corporations. There is an extensive monitoring component of the system. Companies are required to file discharge monitoring reports (DMR) with the EPA. The reports are public information and are often the source of the citizens' suits under section 505 of the Clean Water Act. *Id.*

The primary issue in the present case is whether section 505(a), 33 U.S.C. 1365(a), allows citizens to seek civil penalties against companies for past violations of NPDES permits in the absence of an ongoing and continuous violation.

The case arose when Gwaltney, a processor and packager of pork products at a plant on the Pagan River in Smithfield, Va., discharged more pollutants than allowed under its NPDES permit. The violations occurred from October, 1982, through May, 1984. On the basis of the excessive pollutant discharges, revealed in Gwaltney's DMRs, Chesapeake Bay Foundation (CBF), a regional environmental group in the Chesapeake Bay area, filed a lawsuit in June, 1984, in the United States District Court for the Eastern District of Virginia. 611 F.Supp. 1542. Under section 505(a) of the Clean Water Act, CBF sought civil penalties totaling \$10,000 per day of violation plus attorneys' fees.

It was undisputed that Gwaltney had ceased violating its NPDES permit prior to June, 1984. For this reason, Gwaltney maintained that the district court lacked subject matter jurisdiction; when the complaint was filed, Gwaltney was no longer in violation of its permit. The citizen suit provision of the Clean Water Act, argued Gwaltney, only confers jurisdiction when the polluter is engaged in an ongoing violation. The violation must continue when an aggrieved party files suit. The district court rejected Gwaltney's argument that where a statute's language is clear, courts must interpret the statute narrowly.

Section 505(a) provides in part that "any citizen may commence a civil action . . . against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation . . ." 33 U.S.C. §1365 (emphasis added). The district court, however, perceived that the words "in violation", standing alone, were ambiguous in the sense that they were susceptible to various interpretations. Based on the legislative history of the Act, and the fact that the disclosure requirements of NPDES and the DMRs are not available to the public for at least a month after a discharge occurs, the district court concluded that section 1365 confers jurisdiction for past violations. The court then awarded a civil penalty totaling \$1,285,322. 611 F.Supp. 1542.

Gwaltney appealed to the United States Court of Appeals for the Fourth Circuit on the issue of subject matter jurisdiction, the method of determining per month violations and the actual amount of the penalty under 33 U.S.C. §1365. 791 F.2d 304. The Fourth Circuit affirmed the district court's decision on all issues including the district court's holding that the absence of an ongoing violation does not preclude federal subject matter jurisdiction over a citizen suit brought under section 505(a) of the Clean Water Act.

Writing the opinion for the unanimous court, Circuit Judge Winter examined the language and structure of section 505(a) to determine whether the statute requires that a defendant be engaged in a violation at the time a complaint against the offending company is filed in order for a federal court to assert jurisdiction. The court noted that Gwaltney's interpretation of section 505(a) was not without authority. See *Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392, 395 (5th Cir. 1985). The court in the present case not only distinguished *Hamker* on the facts, but also took a more enlightened approach to interpreting the statute in light of legislative intent. Unlike the instant case, the facts in *Hamker* did not involve a permit violation, but rather a single long-past non-recurring discharge. Even if the cases were not distinguishable on the facts, the court in the present case stated they would still not have followed *Hamker*. See 791 F.2d at 312.

The court initially examined the language in all the enforcement provisions of the Act and noted that these provisions, for citizen and government enforcement, use similar present tense phrasing. But, "[i]t can hardly be questioned that the EPA has authority to bring suit for civil penalties for purely past violations." *Id.* at 309. The court refused to read the enforcement provisions of the Act in any manner that would severely undercut this mechanism as a significant deterrent to violations, especially in light of the Act's expressed purpose "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. §1251(1).

Recognizing that the scope of citizen enforcement powers were not identical to the enforcement powers of the EPA, the court noted that the express limitations on citizen powers, namely certain notice and waiting periods before a citizen action can be filed, should not be construed as limitation on a whole class of actions, specifically suits for past violations. The statute requires "only those limits on citizen suit jurisdiction that the Congress expressly provided; we see no reason to impose by implication limits which Congress could have, but did not create." 791 F.2d at 310.

The court also examined the legislative history and gave an expansive reading to section 505(a) to permit suits for violations occurring solely in the past. Congress explicitly recognized the importance of citizen suits as an enforcement tool in its discussion of government enforcement provisions. See S. Rep. No. 414, 92nd Cong., 1st Sess. 79 (1971), reprinted in 1 *Legislative History of the Water Pollution Control Act Amendments of 1971*, at 1497. The court viewed citizens' suits as a proven enforcement tool, describing the role of the citizen suit in the nature of "private attorneys general" enforcing the act. 791 F.2d at 311. The deference paid to maintaining the broad scope of citizen suits for past violations reinforced the expressed desire of Congress to create enforcement provisions where "the threat of sanction[s] must be real and enforcement provisions must be swift and direct." *Id.*

This is the first Court of Appeals case that disagreed with the decision of the Fifth Circuit in *Hamker*. The present court's holding that section 505(a), 33 U.S.C. §1365(a), permits citizen suits seeking civil penalties for permit violations committed solely in the past is a significant departure from the *Hamker* case which limited citizen suits to continuing violations. In refusing to limit citizen suits solely for continuing permit violations, the court recognized the policy objectives of the Clean Water Act, namely to encourage public participation in the enforcement of any regulation or effluent standard. There is a fear that allowing citizen suits will flood state courts with damage claims. The court recognized this possibility but discounted it. Because pendant jurisdiction is at the discretion of the judiciary, a court does not have to hear a state damages claim brought with a citizen suit under the Clean Water Act.

The court then addressed the issue of the assessment of fines. The difficulty in assessing the proper fine was in working out a way to reconcile the section 1319(d) fines, which are to be assessed "per day of such violation," with Gwaltney's NPDES permit which limited Gwaltney to a monthly average effluent discharge. A NPDES permit actually has two parts. There is a daily maximum discharge limit, and a monthly average discharge. The daily discharge is monitored daily but the monthly average is based on a selection sample. The daily limit is designed to prevent toxic shocks to the environment while the monthly average is to prevent cumulative effects.

The result of having these two limits is that a pollutor could seriously violate the daily limit on one day but barely exceed the monthly limit. A pollutor could also discharge heavily every day



but never exceed the maximum for a single day and arrive at the same low monthly average violation. Depending on the disparity between the monthly average limitation and the daily maximum limit, a polluter could have no violations in one class and still violate the other.

In arriving at a formulation, the court rejected Gwaltney's assertions that the monthly average violation should be treated as one day of violation. The decision was to treat each violation of the monthly average limitation as though there had been a violation every day of the month. 791 F.2d at 313. The court admittedly had very little to go on in making this decision. The ultimate formulation had a sound basis in public policy. The primary concern was to retain flexibility in assessing fines. *Id.* at 314. The court spoke of three determinate factors: the economic advantage to a polluter for non-compliance, the length of time taken to come into compliance, and the particular gravity of an individual discharge violation. *Id.* at 308.

The court relied on *United States v. Amoco Oil Co.*, 580 F.Supp. 1042 (W.D.Mo. 1984), which computed fines under the Clean Water Act for the violation of a NPDES permit with quite different terms than Gwaltney's. The court adopted the *Amoco* approach simply because it made sense to reduce each violation to a *per diem* calculation and then assess the fines within a flexible framework. A violation of a monthly average, then, is defined in terms of the number of days in that time period. 791 F.2d at 314. Gwaltney had a grand total of 666 days of violation. *Id.* at 307. In the district court, however, "the parties agreed that in assessing penalties the court would use EPA's Civil Penalty Policy, 41 Env't Rep. (BNA) 2991 (Feb. 16, 1984), as a guideline. 791 F.2d at 316. The court of appeals affirmed the district court's penalty of \$1,285,322 because that court had applied the guidelines in a thoughtful and rational manner. *Id.*

Lawrence Frankel, '87

## ***International Whale Conservation: Moby Dick's Last Hurrah***

### **Introduction**

Have you gazed out on the ocean, seen the breaching of a whale?<sup>1</sup> Conservationists had hoped that the International Whaling Commission's (IWC) five year moratorium on commercial whaling would enable you to do so. However, the Supreme Court's recent decision in *Japan Whaling Association v. American Cetacean Society*<sup>2</sup> reduces the likelihood of live whale sightings. Because the IWC is powerless to enforce its regulations, nations which file a timely objection may disregard limitations set by the IWC for whale harvesting without being sanctioned,<sup>3</sup> but domestic sanctions may be imposed to secure compliance with IWC provisions.

Therefore, when Japan objected to the moratorium and violated the IWC's zero quota, conservationists<sup>4</sup> sought a writ of mandamus compelling the Secretary of Commerce to certify Japan as a violator of an international fishery conservation program,<sup>5</sup> thereby subjecting Japan to domestic economic sanctions. In reversing the district court and court of appeals, the Supreme Court held that the Secretary of Commerce does not have a mandatory obligation to act upon every quota violation. Absolved from sanctions, Japan is now free to continue whaling until 1988.

This article will address whaling and its environmental impact, creation of the IWC, implementation of IWC regulations and the merits of the *American Cetacean Society* litigation.

### **Whales and Whaling**

Subsistence whaling by native populations for meat and clothing was practiced as early as 1500 B.C.,<sup>6</sup> whereas commercial whaling only began in the eleventh and twelfth centuries.<sup>7</sup> For a time, commercial whaling remained localized, but the industry expanded as stocks, which are reproductively independent, genetically distinct populations of the same species which arise from geographic or behavioral isolation,<sup>8</sup> were depleted close to home. By the fifteenth century, whaling had spread afar and continued at such a pace that by the eighteenth century stock depletion threatened to collapse the industry.<sup>9</sup>

Instead of remedying the problem, technology exacerbated stock depletions. Development of steam-powered boats and the invention

of harpoon guns, exploding harpoons and compressed air pumps, which kept the carcasses from sinking, ushered in the modern era of whaling.<sup>10</sup>

The effects on the whale population today are critical. The total whale population existing in the ocean is estimated at approximately two million out of an estimated pre-exploitation population of approximately four million,<sup>11</sup> but this figure is deceptive for two reasons. First, because stocks are genetically distinct populations, "once a given stock is extinct, biogeographical barriers may prevent migration into the region from other stocks of the same species."<sup>12</sup> For example, although gray whale stocks barely survive in the Pacific,<sup>13</sup> even if their ranks were healthy, they would not replace the gray whale stocks which have been extinguished in the Atlantic. Second, larger whales have suffered disproportionately from whaling, thereby reducing the total weight of all whales by eighty-five per cent.<sup>14</sup>

Of initial population sizes only about twenty per cent of fin whales, seven per cent of humpback whales, thirty-eight per cent of sei whales, and, as of the late 1970's, only about four-tenths of one per cent of blue whales survive.<sup>15</sup> Moreover, as larger species have become scarce, smaller species, such as the minke whale, have been exploited, with the result that both individual stocks and complete species suffer possible extinction. Concern among environmentalists is genuine because they recognize the necessity of preserving endangered species. "To cause the extinction of a species, whether by commission or omission, is unqualifiedly evil. The prevention of this extinction, thus, must be a tenet among man's moral responsibilities."<sup>16</sup>

### **The International Whaling Commission**

Concern over the effects of excessive whaling prompted the League of Nations in 1927 to propose the development of an international conference on whale conservation,<sup>17</sup> but the league's proposal was opposed by several nations, including Japan.<sup>18</sup> In 1931, the international body once again addressed the whaling crisis through the Convention for the Regulation of Whaling.<sup>19</sup> Unfortunately, the convention was largely ineffective because it did not prescribe quotas for whale species and some major whaling countries did not participate.<sup>20</sup>

During World War II, whale stocks had an opportunity to recover, yet they did not. In response, fifteen major whaling nations formed the International Convention for the Regulation of Whaling (ICRW)<sup>21</sup> on November 20, 1946. The ICRW established the International Whaling Commission (IWC) which is composed of one representative from each member nation.<sup>22</sup> The IWC was not created solely to conserve whale stocks; rather, its initial purpose was to preserve the whaling industry. Over the years, however, the IWC has shifted its objectives from predominantly commercial to increasingly conservationist.<sup>23</sup>

Since whales are not defined in the Convention, large and small cetaceans are regulated.<sup>24</sup> Despite the fact that the IWC has the authority to protect species, designate whaling seasons, set size and age limits and set quotas,<sup>25</sup> which quotas are binding on IWC members if accepted by a three-fourths' majority vote,<sup>26</sup> the IWC can neither enforce its own quotas nor impose sanctions for quota violations.<sup>27</sup> Moreover, if any member country objects to an amendment of the schedule and the setting of new harvest quotas, it may file a timely objection<sup>28</sup> and thereby exempt itself from any obligation to comply with the limit unless and until the objection is withdrawn.<sup>29</sup>

The inability to enforce its own provisions, coupled with political and economic pressures has reduced the IWC's effectiveness. For instance, during its first 25 years the IWC almost always set quotas on exploited stocks too high.<sup>30</sup> In addition, the IWC often bowed to the pressures of members for short term economic gains rather than conservation.<sup>31</sup> As a result, private pressure and domestic sanctions have become the means by which IWC provisions are effectuated.

#### Implementing IWC Quotas

Private acts, by organizations or individuals, and domestic laws are the major methods of securing compliance with IWC regulations.<sup>32</sup> Private acts can take many forms, from direct confrontation and demonstrations to letter writing. For example, starting in 1975, Greenpeace, an environmental organization formed in 1969 to oppose a United States plan to explode an atom bomb in the Aleutians, took on the whaling industry by racing inflatable rafts between harpoon guns and their targets.<sup>33</sup> Although such actions are psychologically powerful, legislative lobbying can be equally effective.<sup>34</sup>

Conservationists have made some inroads in obtaining Congressional support for conserving wildlife. Sanctions may be obtained against domestic violators of regulations through the Endangered Species Act of 1973<sup>35</sup> or the Marine Mammal Protection Act of 1972.<sup>36</sup> Congress has also reacted against violators of international fishery conservation programs<sup>37</sup> through various amendments. In 1971, Congress enacted the Pelly Amendment which mandates that the Secretary of Commerce certify a nation to the President when the Secretary determines that "nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program."<sup>38</sup> The President may then direct the Secretary of the Treasury "to prohibit the bringing or the importation into the United States of fish products . . . from the offending country for such duration as the President determines appropriate."<sup>39</sup>

Congress subsequently enacted the Packwood Amendment to the Magnuson Fishery Conservation and Management Act<sup>40</sup> in an attempt to remedy the President's past failure to sanction different nations whose operations diminished the effectiveness of IWC quotas.<sup>41</sup> Unlike the Pelly Amendment, the Packwood-Magnuson Amendment automatically triggers a minimum fifty

per cent reduction in the fishing allocation of the offending nation within the United States' 200 mile fishing zone.<sup>42</sup> In contrast to the Pelly Amendment, the Secretary of State has no discretion concerning the imposition of sanctions once certification has occurred.<sup>43</sup>

However, the legislation did not put the "real economic teeth into whale conservation efforts"<sup>44</sup> that Congress had envisioned, as evidenced by the Supreme Court's decision in *Japan Whaling Association v. American Cetacean Society*.<sup>45</sup>

#### The American Cetacean Society Litigation

Despite having filed timely objections to the IWC's 1981 adoption of a zero quota for North Pacific sperm whales<sup>46</sup> and 1982 imposition of a five year moratorium on all commercial whaling,<sup>47</sup> Japan was still vulnerable to domestic sanctions if certified under the Packwood-Magnuson Amendment. Although Japan's whaling industry is valued at only \$50 million per year, if sanctions were imposed Japan would lose about \$250 million worth of fish products annually.<sup>48</sup>

To avoid such sanctions, Japan's Charge d'Affaires *ad interim*, Yasushi Murazami, negotiated with Secretary of Commerce Malcolm Baldrige via an exchange of letters, which resulted in a final agreement on November 13, 1984. The agreement provided that the Secretary would refrain from certifying Japan in accordance with the Packwood-Magnuson Amendment and the Pelly Amendment in exchange for certain concessions from Japan. Japan agreed to withdraw its objection to the IWC's zero quota for sperm whales by December 13, 1984, in exchange for permission to harvest up to 400 sperm whales during the 1984 and 1985 coastal seasons. Japan also agreed to withdraw its objection to the IWC's commercial whaling moratorium by April 1, 1985. Under the agreement, Japan would cease whaling by April 1, 1988, if the United States would permit Japan to harvest whales through that date under limits acceptable to the United States. Japan further agreed to cease all whaling by the end of the 1987 whaling season if Japan's continued whaling would not be viewed as diminishing the effectiveness of the IWC.<sup>49</sup>

Pursuant to the agreement, the Secretary of Commerce did not certify Japan for violating IWC regulations. On November 8, 1984, conservationists filed suit in district court against Secretary of Commerce Malcolm Baldrige and Secretary of State George Schultz. Plaintiffs argued that any action taken by the United States which would injure the IWC's conservation efforts would ultimately weaken the effectiveness of the IWC. Plaintiffs contended that the United States had long been a forerunner in conservation efforts. Plaintiffs also argued since certification under the Pelly Amendment operates as certification under the Packwood-Magnuson Amendment,<sup>50</sup> and the legislative history of the Pelly Amendment intended that the Secretary of Commerce certify any nation regardless of its objections, the Secretary of Commerce was obligated to sanction any quota violation which diminished the effectiveness of the IWC.<sup>51</sup>

The defendants<sup>52</sup> responded that Congress granted the Secretary of Commerce the same discretion to determine diminished effectiveness under the Packwood-Magnuson Amendment as under the Pelly Amendment.<sup>53</sup> Defendants also argued that the agreement between the United States and Japan did not diminish the effectiveness of the IWC, but regardless of the result, the court should defer to executive actions and decisions on foreign policy matters.<sup>54</sup>

On March 5, 1985, Judge Charles R. Richey of the District Court for the District of Columbia held that "[t]he legislative history and consistent agency interpretation shows that any

nation which exceeds the IWC quotas will be viewed as acting to diminish the effectiveness of the IWC and will be certified, regardless of the nation's own view of the propriety of the quotas themselves."<sup>55</sup> Judge Richey also stated that "[t]he legislative history [of the Packwood-Magnuson Amendment] shows no evidence that Congress intended to alter the meaning [of diminished effectiveness as used in the Pelly Amendment] . . ."<sup>56</sup>

The Court of Appeals for the District of Columbia Circuit affirmed the district court's findings on August 5, 1985, in an opinion written by Judge J. Skelly Wright.<sup>57</sup> He further noted that the Packwood-Magnuson Amendment was enacted to provide new sanctions, not to change the certification process.

In consolidated cases, Japan Whaling Association, together with Japan Fisheries Association, and Malcolm Baldrige appealed to the Supreme Court on writs of certiorari.<sup>58</sup> The Court addressed the question of whether, under the Pelly and Packwood-Magnuson Amendments, the Secretary of Commerce is required to certify that Japan's whaling practices diminish the effectiveness of the International Convention for the Regulation of Whaling because that country's annual harvest exceeds quotas established under the Convention. In a 5-4 decision, rendered on June 30, 1986, the Court held that the Secretary is not required to certify each and every departure from the IWC's whaling Schedules.<sup>59</sup>

Japan Whaling Association's contention that the action was unsuitable for judicial review under the political question doctrine was immediately rejected. The association argued that a federal court lacks judicial power where there is a danger of "embarrassment from multifarious pronouncements by various departments on one question"<sup>60</sup> and therefore, the Court lacked judicial power to command the Secretary of Commerce, an executive branch official, to dishonor and repudiate an international agreement.<sup>61</sup>

The Court responded that it is "error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."<sup>62</sup> Justice White, joined by Justices Powell, O'Connor, Stevens and then Chief Justice Burger, noted that *Baker v. Carr* held that the courts have the authority to construe treaties and executive agreements. Furthermore, inasmuch as the issue presented a simple matter of statutory interpretation, i.e., the nature and scope of the Secretary's duty under the Pelly and Packwood-Magnuson Amendments, and one of the judiciary's roles is to interpret statutes, the action presented a justiciable controversy, regardless of the decision's "significant political overtones."<sup>63</sup>

The Court then addressed the merits of the case. The Court began by noting that under the Packwood-Magnuson Amendment, "certification is neither permitted nor required, until the Secretary makes a determination that nationals of a foreign country 'are conducting fishing operations or engaging in trade or taking which diminishes the effectiveness' of the ICRW."<sup>64</sup> Because the statute does not define the words "diminish the effectiveness of" or state that certification be made whenever a country violates IWC Schedules, the Court granted the Secretary latitude in making the certification decision.

Examining the plain language of the statutes, Justice White noted that the statutes might reasonably be construed to require certification, but might also be construed to allow withholding of certification. Because the statutes do not speak directly to the precise issue in question, the practice "is to defer to the executive department's construction of a statutory scheme it is entrusted to administer, unless the legislative history of the enactment shows with sufficient clarity that the agency construction is contrary to the will of Congress."<sup>65</sup>

The Court relied upon the Committee Reports, Senate Hearings

and House Reports in determining the legislative intent behind the Pelly Amendment. First, the majority held that "[t]he Committee Reports . . . do not support the view that the Secretary must certify every nation that exceeds every international conservation quota."<sup>66</sup> They rejected the Court of Appeals' reliance upon a statement in S. Rep. No. 92-582 which stated that the Amendment's purpose to prohibit the importation of fishery products from nations that do not conduct their fishing operations in accordance with international conservation programs would be accomplished by providing that whenever the Secretary of Commerce determines that a country's nationals are fishing in such a manner, he *must* certify such fact to the President.<sup>67</sup> The Supreme Court believes that the words impose only a duty to make an informed judgment.

Second, the Court derived support from congressional testimony for its conclusion that Congress had no intention to require the Secretary to certify every departure from the limits set by an international conservation program. Justice White noted that Representative Pelly testified that the sanctions were to be applied "in the case of flagrant violation of any international fishery conservation program to which the United States has committed itself."<sup>68</sup> According to the majority, the issue of what constitutes flagrancy denotes discretion on the part of the Secretary.

The majority further derived support for its position from the House Reports on the 1978 amendment to the Pelly Amendment which was designed to enforce the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).<sup>69</sup> In the House Report, the Merchant Marine and Fisheries Committee addressed the "diminish the effectiveness" standard by stating:

The nature of any trade or taking which qualifies as diminishing the effectiveness of any international program for endangered or threatened species will depend on the circumstances of each case. In general, however, the trade or taking must be serious enough to warrant the finding that the effectiveness of the international program in question has been diminished. An isolated, individual violation of a convention provision will not ordinarily warrant certification under this section.<sup>70</sup>

Therefore, the Court concluded that the Secretary is to exercise judgment in determining whether a fishing operation diminishes the effectiveness of the IWC.

Similarly, the Court found that the legislative history of the Packwood-Magnuson Amendment "did not negate the Secretary's view that he is not required to certify every failure to abide by IWC's whaling limits."<sup>71</sup> While the Packwood-Magnuson Amendment was designed to remove executive discretion in imposing sanctions, Congress retained the identical standard of the Pelly Amendment. In a footnote, the Court contended that the defeat of Senator Packwood's proposed amendment to the Packwood-Magnuson Amendment in 1984, which would have mandated certification whenever a nation violates an IWC quota, indicates lack of congressional intent.<sup>72</sup>

The majority concluded that "the Secretary's construction of the statutes neither contradicted the language of either Amendment, nor frustrated congressional intent"<sup>73</sup> and the Secretary of Commerce furthered Congress' goal of protecting whales by negotiating an end to all Japanese commercial whaling activities and the withdrawal of Japan's objection to the IWC zero sperm whale quota, in exchange for a transition period of limited whaling.

In a strongly worded dissent, Justice Marshall decried the fact that before the Packwood-Magnuson Amendment was enacted, i.e., between 1971 and 1978, the Secretary certified every violation



of the whaling quotas set by the IWC as diminishing the effectiveness of the conservation program. However, once the Packwood-Magnuson Amendment removed the discretionary feature of sanctions for violations, the Secretary then for the first time declined to certify a case of intentional whaling in excess of established quotas.

Justice Marshall, joined by Justices Brennan, Blackmun and Rehnquist, approached the issue from a different perspective than the majority, thereby attacking the majority's position. He focused on the fact that "even the Secretary himself has not taken the position that Japan's past conduct is not the type of activity that diminishes the effectiveness of the whale conservation program, requiring his certification under the Pelly Amendment."<sup>74</sup> The dissent relied upon a letter from Secretary Baldrige to Senator Packwood on July 24, 1984, in which the Secretary stated:

You noted in your letter the widespread view that any continued commercial whaling after the International Whaling Commission (IWC) moratorium decision takes effect would be subject to certification. I agree, since *any* such whaling attributable to the policies of a foreign government would clearly diminish the effectiveness of the IWC.<sup>75</sup> (emphasis added)

By his letter, the Secretary has acknowledged that the intentional taking of a large number of sperm whales diminishes the effectiveness of the IWC quota since the IWC determined that only a zero quota will protect the species.

Having established that the effectiveness of the IWC program has been diminished, the dissent contended that the Secretary violated Congress' intent by securing future adherence to the IWC ban rather than punishing past violations. The dissent stated that "[t]he Secretary's manipulation of the certification process to affect punishment is thus an attempt to evade the statutory sanctions rather than a genuine judgment that the effectiveness of the quota has not been diminished."<sup>76</sup>

Moreover, the Packwood-Magnuson Amendment was enacted to prevent the President from withholding sanctions upon the promise of future compliance. However, instead of immediate compliance, the Secretary settled for continued violations until 1988, in direct contravention of the legislative purpose behind the Packwood-Magnuson Amendment. The dissent objected to the Secretary substituting his judgment for Congress', in excess of his authority.

The dissent also countered the majority's assertion that nothing in the legislative history of either amendment requires the Secretary to certify every departure from the IWC's scheduled limits on whaling. Justice Marshall set forth two examples. In the first, Representative McCloskey and Richard A. Frank, Administrator of the National Oceanic and Atmospheric Administration, discussed the meaning of the Pelly Amendment. Mr. McCloskey stated in part "I do not see where you have any discretion to politely say to the Japanese you are violating our rules, but we will withhold certifying if you will change . . . [T]he certification is a mandatory act under the law. It is not a discretionary act."<sup>77</sup> Mr. Frank responded, "That is correct."<sup>78</sup>

The second example was a dialogue between Mr. Frank and Representative Breaux at the Hearings on Whaling Policy and International Whaling Commission Oversight before the Subcommittee on Fisheries and Wildlife Conservation and the Environment of the House Committee on Merchant Marine and Fisheries. Mr. Breaux stated in part, "[W]hat we are talking about under the Pelly amendment is . . . if a country is violating the terms of an international treaty, the Secretary of Commerce has to certify that he is doing that, and that is not a discretionary thing."<sup>79</sup> Mr. Frank responded, "That is correct."<sup>80</sup>

The dissent states that this legislative history demonstrates that Congress believed that, under the Pelly Amendment, when a nation clearly violated IWC quotas, the only discretion afforded the executive branch was the choice of sanction, which discretion was removed by the Packwood-Magnuson Amendment.<sup>81</sup> The dissent discounts the majority's proposition that "it would have been a simple matter to say that the Secretary must certify deliberate taking of whales in excess of IWC limits"<sup>82</sup> by once again noting that past Secretaries of Commerce consistently equated quota violations as diminishing the effectiveness of a conservation program so there was no need to amend the statute.

Lastly, the dissent rejects the majority's reliance upon the Merchant Marine and Fisheries Committee's statement that "[a]n isolated, individual violation of a convention provision will not ordinarily warrant certification under [the Pelly Amendment]."<sup>83</sup> The dissent maintains that Japan's actions are not de minimis, but rather flagrant, consistent and substantial.<sup>84</sup>

### Conclusion

While application of the Pelly Amendment or Packwood-Magnuson Amendment to Japan would have economic repercussions<sup>85</sup> and create possible international fall-out,<sup>86</sup> congressional intent should not have been ignored. The defeat of Senator Packwood's "mandatory certification" amendment in 1984 is not dispositive of congressional intent because the amendment was proposed six years after the enactment of the Packwood-Magnuson Amendment. Because the dissent raises substantial evidence that Congress intended the Secretary to certify violators of international programs, the Court should not have deferred to the executive department's statutory construction.

Although arguments from a purely legal level can be put forth on both sides of this issue, as the majority opinion and dissent illustrate, one cannot argue that the Supreme Court's decision will not affect our environment. Japan continues today to whale. Even if Japan ceases whaling on April 1, 1988, the moratorium will only be in effect for two years. Although the commission is required to undertake a comprehensive assessment of the effects of the moratorium by 1990, and to consider modification of the zero quota and the establishment of other catch limits,<sup>87</sup> the United States agreement with Japan will no longer be applicable. It is highly doubtful that shale stocks will replenish themselves in two years. Are we, through what amounts to technicalities, extinguishing yet another part of our environment?<sup>88</sup> Or, to apply Justice Marshall's statement in another context, are we as a nation responding properly to the question long pondered: "[W]hether Leviathan can long endure so wide a chase, and remorseless a havoc; whether he must not at last be exterminated from the waters, and the last whale, like the last man, smoke his last pipe, and then himself evaporate in the final puff."<sup>89</sup>

Marliese Flis, '87

### Postscript

As the IWC's 39th annual meeting unfolded in Malmo, Sweden some interesting developments occurred. On June 9, 1986, the first day of the meeting, the Secretary of Commerce, Malcolm Baldrige, certified Norway under the Pelly Amendment to the Fishermen's Protective Act of 1967.<sup>90</sup> The Secretary based his decision on the fact that "the IWC zero quota for two stocks of minke whales in the North Atlantic has been exceeded as a result of the harvest by Norway and in the absence of any remedial or mitigation actions, such activity has diminished the effectiveness of the IWC conservation program."<sup>91</sup> Because Norway last year exported more than \$143 million of fish to the United States, an

embargo by the President of any or all fish products from Norway would be very costly.<sup>92</sup>

Under the 1946 Whaling Convention, the Scientific Committee is to meet prior to each meeting of the entire commission to formulate the advice and recommendations it will make to the Technical Committee.<sup>93</sup> Article V of the Convention, in addressing Schedule amendments which may be made, including seasons, size limits and catch limits, also states in part that "[t]hese amendments of the schedule shall be based on scientific findings."<sup>94</sup> Article VIII provides that the "[c]ontracting Governments will take all practicable measures to obtain such data" and transmit it to the IWC.<sup>95</sup> Despite these provisions, Norway sent its whaling fleet to the North Atlantic two weeks prior to the IWC meeting. In doing so it disregarded the 1985 IWC vote, which granted complete protection to the Northeast Atlantic stock of minke whales, and the findings of its own scientific committee.<sup>96</sup> The whalers did not even await the IWC Scientific Committee's findings<sup>97</sup> and blatantly ignored a plea from fifteen prominent members of the European Parliament "[i]n the name of solidarity in humankind's fight to save these greatest mammals of the earth for the future, and the implications this struggle has for the environment in general . . . to stop commercial whaling immediately."<sup>98</sup>

Pursuant to an announcement by Norway that commercial Norwegian whaling would be gradually reduced and halted after the 1987 catch-season pending the outcome of the comprehensive stock assessment that the IWC is to conclude by 1990,<sup>99</sup> President Reagan refused to impose sanctions upon Norway. In his decision of August 4, 1986, President Reagan stated that Norway's promise indicates that the government "contemplates compliance."<sup>100</sup>

Article VIII of the Convention is now being employed to circumvent the whaling moratorium. Article VIII provides that "[n]otwithstanding anything contained in this Convention, any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take, and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit . . ."<sup>101</sup> Although proposed scientific permits must be submitted to the Scientific Committee for review,<sup>102</sup> countries such as Iceland and South Korea are successfully sidestepping the IWC.<sup>103</sup> On the second day of the IWC meeting, the United States responded by submitting a resolution banning all trade in the products of scientific hunts, but when the whaling nations objected the IWC watered down the resolution by merely requiring that whale meat from the hunts be consumed "primarily" in the country of origin.<sup>104</sup>

Despite its agreement with the United States to cease all whaling by 1988, Japan has also latched onto a loophole for exempting itself from the moratorium. Japan has proposed that its fleets be given a "coastal subsistence whaling" classification.<sup>105</sup> Japan contends that many people from the mainland town of Ayukawa and several villages on the northern island of Hokkaido have an economic, cultural and nutritional need to continue whaling.<sup>106</sup> Japan's claim is questionable in view of past data indicating that the country's economic and nutritional dependence on whaling is minimal.<sup>107</sup> The Working Group, comprised of New Zealand, Australia, Antigua, Netherlands and the United States requested more information from Japan about the technical and cultural aspects of its proposal.<sup>108</sup> Although no decision was issued this year, next year Japan may succeed in avoiding its agreement with the United States under the guise of aboriginal whaling. Sadly, Justice Marshall's concerns about the fate of Leviathan may prove prescient.

## FOOTNOTES

1. J. Denver, *I Want to Live*, Cherry Lane Music Publishing Co., Inc. ASCAP, RCA Records, 1977.
2. 106 S.Ct. 2860 (June 30, 1986).
3. International Convention for the Regulation of Whaling, Dec. 2, 1946, art. V, 62 Stat. 1716, 1718-19, T.I.A.S. No. 1849 (entered into force Nov. 10, 1948) [hereinafter cited as ICRW].
4. The original plaintiffs to the action are: American Cetacean Society, Animal Protection Institute of America, Animal Welfare Institute, Center for Environmental Education, The Fund for Animals, Greenpeace U.S.A., The Humane Society of the United States, International Fund for Animal Welfare, The Whale Center, Connecticut Cetacean Society, Defenders of Wildlife, Friends of the Earth and Thomas Garrett, former United States Representative to the IWC. 106 S.Ct. at 2865 n.2.
5. "International fishery conservation program" means "any ban, restriction, regulation, or other measure in effect pursuant to a multilateral agreement which is in force with respect to the United States, the purpose of which is to conserve or protect the living resources of the sea." 22 U.S.C. §1978(h)(3) (1982).
6. Smith, *The International Whaling Commission: An Analysis of the Past and Reflections on the Future*, 16 Nat. Resources Law. 543, 544 (1984) [hereinafter cited as Smith]. Native populations which claim an economic, cultural and social need for whaling are nonetheless subject to quotas. Note, *International Whaling Commission Regulations and the Alaskan Eskimo*, 19 Nat. Resources J. 943, 946-47 (1979). In 1982, the IWC attempted to create a uniform scheme for the regulation of "aboriginal whaling" by setting up a standing subcommittee on aboriginal subsistence needs. Kindt & Wintheiser, *The Conservation and Protection of Marine Mammals*, 7 U. Hawaii L. Rev. 301, 337 (1985) [hereinafter cited as Kindt & Wintheiser].
7. Smith, *supra* note 6, at 544.
8. Kindt & Wintheiser, *supra* note 6, at 321.
9. Levin, *Toward Effective Cetacean Protection*, 12 Nat. Resources Law. 549, 558 (1979) [hereinafter cited as Levin]. See also Kindt & Wintheiser, *supra* note 6, at 322.
10. Levin, *supra* note 9, at 559-60.
11. Kindt & Wintheiser, *supra* note 6, at 323.
12. *Id.* at 321.
13. *Id.* at 325.
14. *Id.* at 323.
15. *Id.* at 323-25.
16. 116 Cong. Rec. 17,198 (1970) (statement of Sen. Cranston). Sen. Cranston quoted Dr. Albert Schweitzer:

At the same time the man who has become a thinking being feels a compulsion to give to every will-to-live the same reverence for life that he gives to his own. He experiences that other life in his own. He accepts as being good; to preserve life, to promote life, to raise to its highest value life which is capable of development; and as being evil: to destroy life, to injure life, to repress life which is capable of development. This is the absolute, fundamental principle of the moral, and it is a necessity of thought.

The great fault of all ethics hitherto has been that they believed themselves to have to deal only with the relations of man to man. In reality, however, the question is what is his attitude to the world and all life that comes within his reach. A man is ethical only when life, as such is sacred to him, that of plants and animals as that of his fellowman, and when he develops himself helpfully to all life that is in need of help . . .

- Id.*
17. Smith, *supra* note 6, at 545.
18. Japan believed that whale conservation should be handled through bilateral or multilateral agreements rather than under the auspices of an international conference. Levin, *supra* note 9, at 559. However, the League concluded that "if hunting becomes unproductive, it will stop by itself, long before whales are exterminated." Christol, Schmidhauser & Totton, *The Law and the Whale: Current Developments in the International Whaling Controversy*, 8 Case W. Res. J. Int'l L. 149, 150 (1976).
19. Sept. 24, 1931, 49 Stat. 3079, T.S. No. 880, 155 L.N.T.S. 349 (entered into force Jan. 16, 1935).
20. Kindt & Wintheiser, *supra* note 6, at 328.
21. Dec. 2, 1946, 62 Stat. 1716, T.I.A.S. No. 1849, 161 U.N.T.S. 72 (entered into force Nov. 10, 1948). The President of the United States ratified the ICRW on July 18, 1947 and the Whaling Convention Act of 1949, 16 U.S.C. §916 (1976 & Supp. V 1981), made the International Convention effective for the United States.
22. ICRW, art. III, 62 Stat. 1717-18. The IWC is currently comprised of forty members. Note, *The U.S.-Japanese Whaling Accord: A Result of the Discretionary Loophole in the Packwood-Magnuson Amendment*, 19 Geo. Wash. J. Int'l L. & Econ. 577, 582 (1985) [hereinafter cited as *Whaling Accord*].
23. See ICRW, art. V which provides that the IWC regulations have the dual function of conservation and optimum utilization of whales. See also *Whaling Accord*, *supra* note 22, at 581 n.25 ("[a]lthough their objectives often conflict, countries supporting the whaling industry, as well as those supporting conservationist goals, share a common interest - the continued existence of the whale").
24. Birnie, *The International Organization of Whales*, 13 Den. J. Int'l L. & Pol'y 309, 320 (1984) [hereinafter cited as Birnie].
25. ICRW, art. V, 62 Stat. 1718-19. See also art. IV which requires the Commission to:
  - (a) encourage, recommend, or if necessary, organize studies and investigations relating to whales and whaling;
  - (b) collect and analyze statistical information concerning the current condition and trend of the whale stocks and the effects of whaling activities thereon;
  - (c) study, appraise, and disseminate information concerning methods of maintaining and increasing the populations of whale stocks.
- Id.*
26. ICRW, art. IX, 62 Stat. 1720.
27. ICRW, art. V, 62 Stat. 1718-19.
28. *Id.* The objection must be filed within ninety days of the adoption of a regulation.
29. *Id.* For example, in 1981, the IWC voted to prohibit the use of the nonexplosive harpoon, which does not immediately kill the whales but does less damage to the meat. Iceland, Norway and Japan objected to the rule and thereby are exempt from humaneness. Kindt & Wintheiser, *supra* note 6, at 332.
30. Birnie, *supra* note 24, at 321. Whale stocks declined also because the IWC used the blue whale unit (b.w.u.) system of setting kill quotas. The oil content of one blue whale was the measuring unit, yet whalers did not distribute the kill among the species. Instead, they caught the larger species of whales which became depleted more rapidly than smaller species. Kindt & Wintheiser, *supra* note 6, at 329-30.
31. *Id.* at 331.
32. Smith, *supra* note 6, at 563.

33. Jones, *Warriors Who Will Not Stay Down*, Sports Illustrated, Sept. 2, 1985, at 29. See, e.g., *Hairy Adventure*, Time, Aug. 1, 1983, at 17 (six Greenpeace members arrested after going ashore in Siberia to hand out leaflets to workers at a whale processing plant); *Greenpeace Ship Towed to Port for Hampering Icelandic Whaling*, N.Y. Times, Aug. 20, 1979, at A13, col. 1 (Greenpeace ship captain arrested for interfering with a whaler); *Whale Quotas Set at London Talks*, N.Y. Times, July 1, 1978, at 5, col. 1 (two dozen protesters pour fake blood on the Japanese delegation at the IWC's meeting in London to protest Japan's whaling industry).
- David McTaggart, Greenpeace's leader, set forth one of the organization's tactics. He said: When we tried to get the support of certain countries on the International Whaling Commission, we retrieved from our computers the public statements that officials had made about whaling. If one of them had forgotten his election promises, we would organize demonstrations in the streets of his constituency while the commission was meeting, and newspapers in his country would publish photographs of the demonstration."
- The Greenpeace Saga*, World Press Review, Dec. 1985, at 55.
34. Smith, *supra* note 6, at 563-65.
35. 16 U.S.C. §§1531-43 (1982). Humpback, blue, gray, sei, right, finback, bowhead and sperm whales were placed on the Endangered Species List on June 2, 1970. 50 C.F.R. §17.11 (1985).
36. 16 U.S.C. §§1361-62, 1371-84, 1401-07 (1982). The MMPA prohibits any person subject to the jurisdiction of the United States to take any marine mammal on the high seas. *Id.* §1372.
37. See *supra* note 5 and accompanying text.
38. 22 U.S.C. §1978(a)(1) (1982).
39. *Id.* §1978(a)(4). Within sixty days following certification by the Secretary of Commerce, the President shall notify the Congress of any action taken and if the importation of all fish products is not forbidden, the President must inform Congress of the reasons therefor. *Id.* §1978(b).
40. 16 U.S.C. §§1801-81 (1982 ed. and Supp II).
41. 106 S.Ct. at 2864. The President had previously refused sanctions five times. *Id.*
42. 16 U.S.C. §1821(e)(2)(B) (1982).
43. *Id.*
44. 125 Cong. Rec. 21,742 (1979) (statement of Sen. Packwood).
45. 106 S.Ct. 2860 (1986).
46. *Am. Cetacean Soc'y v. Baldrige*, 768 F.2d 426, 431 (D.C. Cir. 1985).
47. *Id.*
48. *Friends of the Earth*, The Mother Earth News, Nov./Dec. 1985, at 114. Japan catches at least \$500 million worth of fish in the United States annually. *Id.*
49. Leich, *Contemporary Practice of the United States Relating to International Law*, 79 Am. J. Int'l L. 431, 436-37 (1985) (arranged from Dig. U.S. Prac. Int'l L., Ch. 11, §1).
50. 16 U.S.C. §1821(e)(2)(A)(i) (1982).
51. See generally *Whaling Accord*, *supra* note 22, at 589-94.
52. The Japan Whaling Association and Japan Fishing Association were permitted to intervene. 106 S.Ct. 2865 n.3.
53. *Whaling Accord*, *supra* note 22, at 595.
54. *Id.* at 598.
55. *Am. Cetacean Soc'y v. Baldrige*, 604 F.Supp. 1398, 1408-09 (D.D.C. 1985).
56. *Id.* at 406.
57. *Am. Cetacean Soc'y v. Baldrige*, 768 F.2d 426 (D.C. Cir. 1985).
58. 106 S.Ct. 787 (1986).
59. 106 S.Ct. at 2867.
60. *Id.* at 2865 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1969)).
61. *Id.*
62. *Id.* at 2866 (quoting *Baker* at 211).
63. *Id.*
64. 106 S.Ct. at 2867.
65. *Id.* at 2868 (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) and *United States v. Riverside Bayview Homes, Inc.*, 106 S.Ct. 455, 461 (1985)).
66. 106 S.Ct. at 2868.
67. *Id.* n.5.
68. *Id.* at 2869 n.6.
69. March 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249. CITES was implemented in the United States by the Endangered Species Act of 1973, 16 U.S.C. §§1531-43.
70. 106 S.Ct. at 2869-70 (quoting H.R. Rep. No. 95-1029, p. 15 (1978); U.S. Code Cong. & Ad. News 1978, p. 1779).
71. *Id.* at 2870-71.
72. *Id.* at 2871 n.9.
73. *Id.* at 2871.
74. *Id.* at 2873.
75. *Id.* at 2873-74.
76. *Id.* at 2874. It is interesting to note that Arnold Burns, representing the Reagan administration, claimed that the legislative and executive branches have traditionally cooperated on whaling issues, to which Justice Byron White responded, "You wouldn't know that from the brief Congress filed." *Whales Wait for Supreme Court Judgement*, Greenpeace Examiner, June 1986, p. 28.
77. 106 S.Ct. at 2875 (quoting Hearings on Whaling Policy and International Whaling Commission Oversight before the Subcommittee on Fisheries and Wildlife Conservation and the Environment of the House Committee on Merchant Marine and Fisheries, 96th Cong., 1st Sess., 301, 322-23 (1979)).
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. See 106 S.Ct. at 2867.
83. See *supra* note 70.
84. 106 S.Ct. at 2876.
85. For example, Japan could incur sanctions amounting to approximately \$230 million per year and the United States might suffer if Japan were to retaliate by applying economic pressure against the United States. Japan could revoke its salmon treaties with the United States which could have a \$100 million impact on United States trade. *Whaling Accord*, *supra* note 22, at 585-86.
86. Application of the Pelly and Packwood-Magnuson Amendments to Japan would open the door to future U.S. action against other whaling nations. *Id.*
87. IWC Res. 38/28 (June 1986).
88. The environment is not just one more factor to be considered along with dozens of others in making social and economic decisions. The environment is not a crisis or a problem at all. Rather it is the context in which all crises and problems have been analyzed and judged. William V. Shannon, quoted in M'Gonigle, *The "Economizing" of the Ecology: Why Big, Rare Whales Still Die*, 9 Ecology L.Q. 119, 231 (1980) [hereinafter cited as M'Gonigle].
89. 106 S.Ct. at 2876 (quoting H. Melville, *Moby Dick* 436 (Signet ed. 1961)).
90. Letter from Malcolm Baldrige to the President (June 9, 1986).
91. *Id.* The United States has been negotiating with Norway since 1982 to secure compliance with the zero quota. *Baldrige Takes Action Against Norwegian Whaling*, United States Dep't of Commerce News, June 9, 1986.
92. *Id.*
93. M'Gonigle, *supra* note 88, at 134. The Scientific Committee recently met in Bournemouth, England. *Eco*, June 10, 1986, at 3.
94. ICRW, art. V, 62 Stat. 1717-18.
95. ICRW, art. VIII, 62 Stat. 1719-20.
96. *Whaling at the Crossroads*, Greenpeace Examiner, Oct./Dec. 1986, p. 17 [hereinafter cited as *Whaling at the Crossroads*]. Greenpeace attends IWC meetings as a non-government organization (NGO). While NGOs are not permitted to vote, they are active in applying political pressure at the IWC. See generally M'Gonigle, *supra* note 88, at 192-202.
97. The decision to protect the Northeast Atlantic stock of minke whales is "fully justified" because "too few whales were seen to give reliable estimates of stock size." *Comments on Some of the Work of the Scientific Committee*, Briefing for IWC Commissioners, June 9, 1986 [hereinafter cited as Briefing for IWC Commissioners].
98. *Whaling at the Crossroads*, *supra* note 96, at 17.
99. Official Translation of Norwegian Announcement, Foreign Ministry, July 3, 1986. The opportunity to conduct the comprehensive assessment is being dissipated by the continuing need to carry out stock assessments on stocks which are still exploited. Briefing for IWC Commissioners.
100. *Whaling at the Crossroads*, *supra* note 96, at 18. The President has now refused sanctions six times. See *supra* note 41.
101. ICRW, art. VIII, 62 Stat. 1719-20.
102. IWC Res. 38/28 (June 1986) (Resolution on Special Permits for Scientific Research). The Contracting Governments and the Scientific Committee are to take into account whether:
  - (1) the objectives of the research are not practically and scientifically feasible through non-lethal research techniques;
  - (2) the proposed research is intended, and structured accordingly to contribute information essential for rational management of the stock;
  - (3) the number, age and sex of whales to be taken are necessary to complete the research and will facilitate the conduct of the comprehensive assessment;
  - (4) whales will be killed in a manner consistent with the provisions of Section III of the Schedule, due regard being had to whether there are compelling scientific reasons to the contrary.
- Id.*
103. *Whaling at the Crossroads*, *supra* note 96, at 18-19. The whaling nations are trying to justify their scientific whaling on the basis that the information will aid in the comprehensive assessment. *Eco*, June 10, 1986, at 2.
104. *Whaling at the Crossroads*, *supra* note 96, at 18. See also IWC Res. 38/28 (June 1986).
105. *Eco*, June 12, 1986, at 1-2.
106. *Id.*
107. M'Gonigle, *supra* note 88, at 184-85. The industry employs less than 1,000 people, is scarcely profitable and provides products for which there is a demand but not a necessity. Japan exports more protein than it consumes in whale meat. *Id.* n.301. Japanese data indicates that meat from small minke only contributes between 2.6 to 3.8% of annual protein intake. *Eco*, June 12, 1986, at 2.
108. *Id.*

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