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AIR

Council of Commuter Organizations v. Thomas,
799 F.2d 879 (2d Cir. August 28, 1986).

Although attaining cleaner air is the purpose of the Clean Air Act, 42 U.S.C. §§ 7401-7626 (1982 & Supp. II 1984), the language of the 1977 Moynihan-Holtzman Amendment (Amendment) to the Act, § 7410(c)(5), engendered expectations that requiring some states to meet air quality control standards also meant requiring them to make improvements in mass transit. Under the Amendment, states which had previously promised in State Implementation Plans (SIPs) to use bridge tolls to accomplish the automobile emissions reductions required by the Act, were permitted to remove those tolls if they "(i) establish, expand, or improve public transportation measures to meet basic transportation needs." 42 U.S.C. § 7410(c)(5)(B). To replace the tolls, states were also required to "(ii) implement transportation control measures necessary to attain and maintain national ambient air quality standards." *Id.*

The primary issue in the present case is whether a state, in fulfilling its obligation to make its air cleaner, can meet the "basic transportation needs" of its cities without adopting mass transit improvements.

This case is the second of two petitions for review brought by the Council of Commuter Organizations before the United States Court of Appeals for the Second Circuit seeking to overturn the United States Environmental Protection Agency's (EPA) approvals of SIPs submitted by New York State. The first such petition was brought by the Council in 1982. The second was brought in 1986 after EPA granted final approval to a 1982 SIP.

The 1982 petition for review challenged EPA's conditional approval of the SIP revision submitted by New York in 1979. *Council of Commuter Organizations v. Gorsuch,* 683 F.2d 648 (2d Cir. 1982) (CCO I). That revision relied mostly on transit fare stabilization to achieve emissions reductions equivalent to those expected from bridge tolls. It included forty mass transit improvement projects to satisfy what was then believed to be the Amendment's requirement of improving transit to meet basic transportation needs. *See* 42 U.S.C. § 7410(c)(5)(B)(i). EPA initially proposed to disapprove the transit improvement part of the SIP, citing insufficient schedules and details for progress measurement, but then conditionally approved the entire submission in the fall of 1981. *Council of Commuter Organizations v. Thomas,* 799 F.2d 879, 883 (2d Cir. 1986) (CCO II). To receive final approval, New York was required to submit more specific details of transit improvement measures, as well as reports on the impact of pending fare increases on air quality.

Petitioner, Council of Commuter Organizations, challenged EPA's conditional approval of New York's 1979 SIP by using essentially the same language EPA had used in its conditional approval. The Council charged that the 1979 SIP "contain[ed] insufficient implementing schedules and details." *CCO I,* 683 F.2d at 650. The court expressed its view on the issue of whether it was more appropriate for EPA to issue a conditional approval, as opposed to a conditional disapproval of the 1979 SIP, by saying it was "troubled" by the generous four year period that New York was given to submit a more detailed SIP revision, well after "the date . . . Congress specified the revision should be made." *CCO II,* 799 F.2d at 883. Yet the court held, among other things, that by permitting a state to supply details and schedules of improvements in two stages EPA was not unreasonable nor acting contrary to the purposes of the Clean Air Act. The court denied the petition, but premised its approval of EPA's conditional approval on EPA's adherence to judicially created requirements designed to assure adequate review of New York's forthcoming SIP revision for final approval. Not surprisingly, one such requirement was inspection of details and schedules to insure that they were "sufficiently specific to enable the monitoring of New York's progress toward meeting its basic transportation needs." *CCO I,* F.2d. at 663.

In a separate development in 1980, EPA and the United States Department of Transportation proposed a policy describing the "basic transportation needs" requirement of the Moynihan-Holtzman Amendment. The proposed policy presumably issued in response to New York's criticism that EPA failed to adequately define these needs. *CCO II,* 799 F.2d at 882. EPA defined "basic transportation needs" as the need to "maintain mobility where transportation control strategies are implemented." *Id.*

Apparently, none of the parties to the 1982 petition ever stopped to think of the impact this proposed policy might have on attaining improvements in mass transit in New York City. For its part, New York was quick to incorporate the proposed policy in its SIP submission for final approval. It simply abandoned all promised plans to improve mass transit. The State argued that since existing transit services in New York City were underloaded, it would be able to maintain the mobility of drivers diverted by transportation control strategies without having to resort to transit improvements. Its finding of underloaded services was based on its calculation that "subway ridership was down by 300,000 from 1979 levels." *CCO II,* 799 F.2d at 884.

The 1982 final SIP revision initially met with a proposed disapproval from EPA. The agency found failure to adequately reduce emissions, and additionally was not con-

vinced that the state had proposed "all reasonably available control measures to meet the national air quality standards . . ." *Id.* Significantly, the agency did not object to New York's method of fulfilling the "basic transportation needs" requirement of the Amendment. EPA eventually gave final approval to the 1982 SIP revision once it contained revisions addressed to the criticisms in its proposed disapproval.

In the instant case, the Council of Commuter Organizations challenged EPA's 1985 final approval of New York's SIP. Whereas the 1982 petition charged that New York's SIP lacked adequate details for implementing transit improvals, the 1986 petition charged that an outright exclusion of any commitment to improve transit contravened the Moynihan-Holtzman Amendment's requirement that public transportation be improved to meet "basic transportation needs." The court addressed the issue of whether EPA was entitled to rule, as it had in the 1980 policy statement, that a state could meet the "basic transportation needs" requirement of the Amendment by absorbing, into existing mass transit services, motorists diverted from city streets by transportation control measures. Although the court was "surprised to learn that EPA regards this as a sufficient test for meeting 'basic transportation needs,' " it ruled that EPA was within its authority to drop the transit improvement requirement. *CCO II,* 799 F.2d at 885-86.

The court agreed with the EPA contention that the meaning of "basic transportation needs" derives from the Amendment's requirement that a state "implement transportation measures necessary to attain and maintain national ambient air quality standards." 42 U.S.C. § 7410(c)(5)(i). Since the latter requirement deals with the basic purpose of the Clean Air Act, the court felt that it is not unwarranted to difine "basic transportation needs" as those needs created by transportation control measures alone. Where mass transit facilities are able to absorb motorists diverted by such measures, those needs are already met. Thus, the court found that no improvements to transit were necessary.

The court found nothing in the legislative history of the Amendment defining "basic transportation needs," and found references to improving mass transit inconclusive.

Since the court viewed the EPA's interpretation of the Amendment as being consistent with the Clean Air Act's goal of providing better air quality, the court reluctantly deferred to EPA's interpretation. The court reasoned that deference is "normally due an agency in interpreting ambiguities in a statute it administers," unless the interpretation is inconsistent with the basic goal of the statute. *CCO II,* 799 F.2d at 886 (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 844 (1984).

Returning to the facts of the case, the court had "little doubt New York's 1982 SIP revision is not deficient," given EPA's meaning of "basic transportation needs." *CCO II,* 799 F.2d at 886.

By eliminating all promises to improve public transportation, New York was, however, circumventing compliance with judicial requirements established in *CCO I.* Judge Van Graafeiland, in his concurring opinion, put it succinctly: "[t]his court has had its prior opinion . . . virtually ignored." *CCO II,* 799 F.2d at 889. Focusing on what he believed to be the *"quid pro quo"* of being allowed, under the Amendment, to remove bridge tolls, Judge Van Graafeiland contended that New York had not reciprocated by improving public transportation. His statement that this exchange was "intended" by the Amendment points to a fundamentally different interpretation of the spirit, if not the letter of the law. *Id.* Yet, conceivably he would not have deferred to EPA's definition of "basic transportation needs," since the court was only willing to make this concession on the basis of its finding that the intent of the Clean Air Act was to improve air quality, not mass transit. While that may be true for the statute as a whole, Judge Van Graafeiland seems to have contended that the intent of the Amendment, to incorporate transit improvements into the bargain, is controlling when the court is determining a state's obligations under the Amendment. Thus, a different, and perhaps more common-sense meaning of "basic transportation needs" would have been supplied under Judge Van Graafeiland's interpretation of the Amendment's intent. If getting from one place to another in as commodious a fashion as possible is a transportation "need," then the obligation to "establish, expand or improve public transportation" is just that.

Clifford J. Petroske, '89

Thomas v. New York, 802 F.2d 1443 (D.C. Cir. 1986).

In September 1986, the Court of Appeals for the District of Columbia overturned a district court ruling that would have required the United States Environmental Protection Agency (EPA) to identify "acid rain"-producing states and to direct those states to abate their harmful emissions. *New York v. Thomas,* 613 F. Supp. 1472 (D.D.C. 1985) (*See* 3 Hofstra Envtl. L. Dig. 18 (Spring 1986) for a discussion of this case). The Court of Appeals' reversal was based on the lack of EPA notice and comment procedures employed in attempting to activate the transboundary air pollution section of the Clean Air Act (CAA). § 7415, 42 U.S.C. §§ 7401-7642 (1982).

Circuit Judge Scalia initially observed, "[t]his case involves an unusual statute executed in an unexpected manner. . . . Had the statute been executed as Congress probably anticipated, the present suit would not have arisen. 802 F.2d at 1446.

The court viewed the issue as whether former EPA Administrator Costle's private correspondence to Secretary of State Edmond Muskie had a legally binding effect on future EPA administrators. 802 F.2d at 1445. If the statement in the letter could be classified as a "finding" that acid-rain created by emmissions from the United States had produced harm in Canada, section 115(a) and (b) of the Clean Air Act would mandate the future action of identifying the polluting states and issuing SIP revision notices. 42 U.S.C. § 7415(a), (b). The statement being such as to constitute formal action would subject the process to the notice and comment requirements of a rule under the Administrative Procedure Act. 5 U.S.C. §§ 551-559 (1982) (APA).

The court reviewed the APA's section 551(4) definition of a rule, "an agency statement of . . . future effect designed to . . . implement law or policy." 802 F.2d at 1446. The court held that any agency statement, no matter how informally issued, that triggered the process of issuing "SIP

notices ultimately causing the termination or restriction of the operations of many utilities and manufacturers" in presently undesignated states was clearly a rule. 802 F.2d at 1447. Requiring the EPA Administrator to identify acid-rain producing states and to issue the SIP revision notices, the relief sought in plaintiffs' complaint, would be implementing the transboundary air pollution law and could only be done with proper notice and comment procedures mandated for a rule.

The court concluded the opinion by recognizing that based on Costle's letter EPA had discretion to proceed to identify the acid-rain producing states and notify those state's Governors, as long as the findings when promulgated were with the formal rule requirements. This would involve identifying the blame-worthy states *before* publishing notice of the endangerment to Canada as well as the reciprocal Canadian statute, and issuing SIP revision notices to the states. Then, comment would be taken on both, and both would be published in the Federal Register. As it was the "findings" were issued without identifying the polluting states. Therefore, the lower court's order to issue SIP revision notices was invalid as it directed the EPA to proceed with enforcement of a statute in a proceedurally defective way. Because the findings had the future force and effect of a rule, present EPA enforcement would only be mandatory if the past EPA Administrator had begun enforcement in a proceedurally correct manner.

Richard Horowitz '87
Jo-Ann Browne '87

BANKRUPTCY

Commonwealth Oil Refining Co. v. United States Environmental Protection Agency, 805 F.2d 1175 (5th Cir. Nov. 25, 1986), *petition for cert. filed,* 55 U.S.L.W. 3622 (U.S. Feb. 23, 1987)(No. 86-1400).

On November 25, 1986, the United States Court of Appeals for the Fifth Circuit affirmed an order from the district court upholding a bankruptcy court decision which found that the EPA's administrative enforcement action against the Commonwealth Oil Refining Company (CORCO) is exempt from the automatic stay provision of the Bankruptcy Code. 11 U.S.C. § 362(a)(1)(1978). The Fifth Circuit also found the bankruptcy court acted properly by not applying the discretionary stay available under section 105 of the Bankruptcy Code to the EPA action. 11 U.S.C. § 105(a).

The debtor, CORCO, owns and operated a petroleum refinery in Penuelas, Puerto Rico and as a result of those operations generated hazardous waste. Pursuant to the requirements of section 3005(e) and section 3010(a) of the Resource Conversation and Recovery Act (RCRA), §§ 6925(e), 6930(a), 42 U.S.C. §§ 6901-6987(1976), CORCO notified EPA that it was conducting activities at the facility involving "hazardous waste" as that term is defined in section 1004(5) of RCRA, 42 U.S.C. § 6903(5). On November 18, 1980, CORCO submitted the Part A of its RCRA application thus obtaining "interim status." "Interim status" is the legally permissible status to operate a facility. The facility is deemed permitted under section 3005(e)(1) of RCRA, 42 U.S.C. § 6925(e)(1), if it was in existence on November 19, 1980 and complied with the preliminary notification requirements of 42 U.S.C. § 6930(a), and filed the part A of its RCRA permit application, with a final disposition of the permit application, by EPA, postponed until a future date. Facilities having achieved interim status must comply with the interim status standards in the Code of Federal Regulations set forth at 40 C.F.R. Part 265 or with analogous provisions of an authorized state program.

The suit began when CORCO filed a motion for an order determining the applicability of the automatic stay provision in anticipation of an impending EPA enforcement action pursuant to section 3008(a) of RCRA, 42 U.S.C. § 6928(a). In the alternative, CORCO moved for an order requesting that the court stay the action pursuant to its discretionary power under 11 U.S.C. § 105(a). The motions were filed in the Bankruptcy Court of the Western District of Texas. The court determined that EPA's impending enforcement action was not subject to the automatic stay and that no discetionary stay should be issued under 11 U.S.C. § 105(a), because CORCO had failed to show a likelihood of success on the merits. *In re Commonwealth Oil Refining Co.,* 58 Bankr. 608 (Bankr. W.D. Tex. 1985). (For a discussion of this case *see* 2 Hofstra Environmental Law Digest 15 (Fall 1985)).

After the favorable bankruptcy court decision, EPA issued an administrative complaint under section 3008(a) of RCRA on July 1, 1985, alleging violations of both RCRA and the Puerto Rico Public Policy Environmental Act, P.R. Laws Ann., tit. 12, §§ 1121 *et seq.,* (Law No. 9 of June 18, 1970, as amended), and the regulations promulgated under both statutes. EPA alleged that CORCO failed to submit the Part B of its RCRA application, failed to install, operate and maintain a groundwater monitoring system, and failed to sample and analyze the groundwater.

The district court affirmed the bankruptcy court decision holding that the automatic stay provision did not preclude EPA's enforcement action and that CORCO failed to establish the prerequisites necessary to invoke the court's use of the section 105 discretionary stay. *Commonwealth Oil Refining Co. v. United States Environmental Protection Agency,* No. SA-85-CA-2044 (W.D. Tex. 1985) (slip op.). CORCO then appealed to the Court of Appeals for the Fifth Circuit.

In finding for the EPA, the court of appeals held that the EPA enforcement action against CORCO does not come within the ambit of section 362(a)(1) of the bankruptcy code because it is an action to enforce EPA's police power, thus falling squarely within the section 362(b)(4) exception to the automatic stay. "The filing of a petition . . . does not operate as a stay . . . of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." 11 U.S.C. § 362(b)(4). The court stated further that the EPA action is not an attempt to enforce a money judgment proscribed explicitly by section 362(b)(5), notwithstanding the practical effect of forcing CORCO to expend funds in order to comply. "The filing of a petition . . . does not operate as a stay . . . of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." 11 U.S.C. § 362(b)(5).

First, the court disposed of a procedural question. The

issue was whether this case was moot as a result of the statutorily mandated termination of CORCO's interim status as of November 8, 1985. 42 U.S.C. § 6925(e)(2). Loss of interim status was triggered by the statute because CORCO neither filed the Part B of its RCRA permit application, nor certified that its facility was in compliance with applicable groundwater monitoring and financial responsibility requirements. The court declined to adopt the district court's conclusion that CORCO is a land disposal facility and, thus, had lost interim status. Without resolving the issue and at the same time deferring to the attendant administrative proceeding, the court found that there were viable claims even if CORCO's status was terminated.

In its discussion of the substantive question, the court dispensed with CORCO's argument that the exception to the automatic stay is limited to situations where there is "imminent and identifiable harm." Plain reading of the statute and analysis of the legislative history does not allow for any such proviso to the automatic stay. The words of the exception are unambiguous and contemplate no such limitation. The court supported its position with caselaw, stating that "neither *Penn Terra [Penn Terra Ltd. v. Department of Environmental Resources,* 733 F.2d 267 (3d Cir. 1984)] nor other cases in which a regulatory or policy action was found to be exempt from the automatic stay depended on a determination that there was imminent danger to the public." 805 F.2d at 1185.

The court rejected CORCO's argument that EPA's administrative enforcement action is an action to enforce a money judgment and is therefore barred by section 362(b)(5) of the bankruptcy code. Section 362(b)(5) carves out an exception to the exception to the automatic stay provision by barring the enforcement of a money judgment obtained in an action by a governmental unit to enforce the government's regulatory or police power. CORCO's argument is based on the premise that the development of the Part B of its RCRA permit application or the filing of a closure plan will cause CORCO to expend funds.

The court relied heavily on the reasoning used by the Court of Appeals for the Third Circuit in *Penn Terra,* 733 F.2d 267. The Third Circuit pointed out that since Congress did not define the term "money judgment" in the Bankruptcy Code, the court must seek the meaning of the term in its traditional usage. Historically, one of the elements of "money judgment" is a definite and certain designation of the amount which the plaintiff is owed by the defendant. Using this approach, the Court of Appeals for the Third Circuit proposed a method to determine whether an injunction is, in essence, an attempt to enforce a money judgment. The court focused "on the nature of the injuries which the challenged remedy is intended to redress - including whether plaintiff seeks compensation for past damages or prevention of future harm." 733 F.2d at 278. The present court readily adopted this test and concluded that EPA's administrative action is not a money judgment proscribed by section 362(b)(5). 805 F.2d at 1187. The court held simply that the action does not seek the entry of a money judgment or the ajudication of liability for a certain sum and that the mere payment of money would not satisfy EPA's requests. *Id.* at 1187-88. EPA's requests would only be satisfied by compliance with federal and applicable state environmental laws.

The court dispensed with CORCO's reliance on the *Kovacs* holding [*Ohio v. Kovacs,* 469 U.S. 274 (1985)], that an obligation to clean up a hazardous waste site under an injunction is a claim subject to discharge in bankruptcy by stating that *"Kovacs* can be properly read as an acceptance of *Penn Terra's* money judgment analysis, and, at the very least, should be seen as casting no doubt on *Penn Terra."* 805 F.2d at 1187 n.14. The dispossession of Kovacs' assets and the appointment of a receiver turned the injuction in that case into a dischargeable monetary obligation. *Id.*

As to the section 105 stay, the court found that the bankruptcy court did not abuse its discretion in refusing to issue such a stay. 805 F.2d. at 1189. The bankruptcy court stated that section 105 makes clear that stays under that section are granted only under the usual rules for issuance of injunction. The first of these rules is a substantial likelihood of success on the merits. The bankruptcy court decided that CORCO conceded this first requirement by admitting it did not have a RCRA Part B or a groundwater monitoring system. The Court of Appeals agreed with the bankruptcy court and the district court that they had correctly identified the "merits" and that the finding that CORCO was not likely to succeed on the merits was not erroneous. *Id.* at 1189-90.

Carol Casazza, '84

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This case review was written by the author in her private capacity. No endorsement of its contents by the USEPA is intended, nor should it be inferred.

HAZARDOUS WASTE

United States v. Hayes International Corp., 786 F.2d 1499 (11th Cir. April 21, 1986).

Recently, the United States Court of Appeals for the Eleventh Circuit found Hayes International Corporation (Hayes) guilty under section 6928(d)(1) of the Resource Conservation and Recovery Act for unlawful transportation of hazardous waste. 42 U.S.C. §§ 6901-6987 (1984). The question presented in this case was whether Hayes had the degree of knowledge necessary to be convicted under the statute.

The appellee, an airplane refurbishing plant operator, generated waste products as a result of the ordinary nature of its business. Early in 1981, appellee's employee, L.H. Beasley, contracted with Performance Advantage Inc. (Performance) to dispose of certain wastes, namely, jet fuel and a mixture of paint and solvents. The contract provided that Performance, a recycler, buy the jet fuel for twenty cents per gallon and remove other wastes at no charge. Performance transported waste from appellee on numerous occasions between January 1981 and March 1982. Soon after this, government officials found that the transported waste was being illegally disposed of by Performance.

The government attempted to prosecute Hayes under section 6928(d)(1) of the statute which provides criminal sanctions for "[a]ny person who (1) knowingly transports any hazardous waste identified or listed under this subchapter to a facility which does not have a permit under section 6925 of this title." 42 U.S.C. § 6928(d)(1). The key to finding a violation of the statute may depend on how the court defines knowledge in a particular case. The district court acquitted Hayes notwithstanding the jury verdict of guilty. The court ruling was on the basis that the government had not shown that defendants had the knowledge necessary for a conviction under the statute. In this appeal, the United States Court of Appeals vacated the decision below and remanded the case to the district court to enter judgments of guilty.

This court found section 6928(d)(1) of the Act to be ambiguous. Neither the legislative history nor the statute itself provided a precise meaning of the word "knowing" within the statute. Congress left the definition to the court.

The courts must decide whether someone has to "know" that the regulation existed in order to have violated it or whether someone can be guilty without knowing that such illegality existed. The issue is whether a mistake of law is a valid defense. Second, the courts must establish what "knowing" modifies in the sentence. For example, in order to violate section 6928(d)(1) must one know the material is being transported, know the material is hazardous waste, and/or know that the facility to which it is transported is required to have a permit?

The United States Court of Appeals found that appellee's mistake of law defense was not valid; defendants could be found guilty without knowing that such a regulation existed. The court reasoned that the decision was based on the dangerous nature of the conduct being prohibited and the public interest involved. The court noted several Supreme Court cases where the Court held that a violation of a statute required "no mental element, simply requisite actions." 786 F.2d at 1501 (citing *United States v. Freed,* 401 U.S. 601 (1971); *United States v. International Minerals & Chemical Corp.,* 402 U.S. 558 (1971); *Boyce Motor Lines v. United States,* 342 U.S. 337 (1952)). The court also looked at contrasting cases where knowing of the regulation was a prerequisite to the finding of a violation. 786 F.2d at 1504 (citing *Liparota v. United States,* 105 S. Ct. 2084 (1985)).

In *United States v. Freed,* the Court found the defendant guilty of violating a statute making it unlawful "to receive or possess a firearm which is not registered to him." 401 U.S. at 607 (1971). In *Freed,* the statute was a regulatory measure in the interest of public safety and required no mental element.

Similarly, in *United States v. International Minerals & Chemical Corp.,* the Court held the defendant guilty where he did not "know" of the existence of the regulation even though the statute set forth a mental element of "knowingly violating a regulation." The prohibition concerned shipping hazardous materials. The Court reasoned that it was common knowledge that dangerous materials were likely to be regulated and therefore if one knew he was in possession of dangerous materials he should also know about the regulation.

However, in a contrasting case, the Supreme Court found a defendant not guilty absent knowledge of the regulation. *Liparota v. United States,* 105 S. Ct. 2084 (1985). In *Liparota,* the statute provided criminal sanctions for anyone who "knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by [the statute] or the regulation." *Id.* at____. Mere knowledge of using or transferring food stamps without knowledge that it was illegal to do so, was not enough for a violation of the statute. The reasonable person may not imagine that this conduct is regulated or that it would endanger public safety.

In the present case, the court found the violation of U.S.C. § 6928(d)(1) to be more analogous to *Freed* and *International Minerals* because it was "undeniably a public welfare statute involving a heavily regulated area with great ramifications for public health . . . ." 786 F.2d at 1503. Therefore, defendants were charged with knowledge of the regulations.

In answer to appellee's second defense, the United States Court of Appeals indicated that section 6928(d)(1) mandated knowledge of the permit status of a facility. Congress intended to prevent transportation of hazardous waste to an unlicensed facility and if knowledge were not required, innocent acts would be criminalized. Appellee argued that section 6928(d)(1) required knowledge of all the elements of the offense and defended that they did not "know" that Performance did not have a permit. The government, on the other hand, argued that knowledge of the permit status of a facility is not required by the statute.

The United States Court of Appeals noted that if Congress had not required knowledge of permit status they would have dropped the word from the statute. This begs the question however, because the problem is determining which word knowledge modifies and not whether knowledge is required at all. The court found that to act knowingly means "that that result is practically certain to follow from [ones] conduct, whatever [ones] desire may be as to that result." 786 F.2d at 1503 (citation omitted). The court required knowledge of Performance's permit status. However, the government would have a relatively easy time of showing it in this case. This is because Performance was carrying away certain waste at no cost. Since it is common knowledge that disposing of waste is an expensive task, the jury could have inferred that because of these unusual circumstances, appellee did not believe that Performance had a permit.

Finally, appellee argued that they believed that Performance was recycling the waste and thus, they alleged a theory of mistake of fact. The United States Court of Appeals noted that if the appellee had a good faith belief that the waste was being recycled, and if it were in fact recycled, there would be no crime. However, given the facts in this case, the jury could have easily rejected the defense of mistake of fact. First, appellee knew that Performance had tested the waste in its recycling system and afterwards did not want the paint even "for free." There is an obvious inference that Performance was unable to recycle the waste. Also, there was documentary evidence from inside Hayes that stated that hazardous waste with no resale value must be disposed of. Since Performance did not want the waste, even at no charge, appellee knew that it had no resale value and therefore that it should be sent to EPA approved sites.

Finally, a conversation between both companies revealed that appellee knew the waste was being buried somewhere.

The Eleventh Circuit Court addressed a problem within the Resource Conservation and Recovery Act created by its ambiguous language. There is room for conflicting interpretations of the criminal liability provisions. Transporters of hazardous waste who attempt to get around the regulations are hard to stop if a strict interpretation is not enforced. In this case, the United States Court of Appeals for the Eleventh Circuit refuted appellee's defenses and interpreted 42 U.S.C. §§ 6901-6987 to their own satisfaction. However, no real uniformity has been achieved.

Shelly Sheetz '88

INSURANCE

Waste Management of Carolinas, Inc. v. Peerless Insurance Company, 315 N.C. 688, 340 S.E.2d 374 (1986).

This case is concerned with the meaning placed upon the words "occurrence" and "sudden" as used in insurance policies. The North Carolina Supreme Court decided that "sudden" should have its plain meaning. As a consequence of the court's ruling, the insurers did not have a duty to defend. In reaching its conclusion, the court acknowledged that other courts have interpreted "occurrence" and "sudden" in numerous ways. The diverse interpretations of these words have resulted in courts, with basically the same facts and the same policy provisions before them, reaching a range of different results. At stake in these suits are millions of dollars of liability insurance and defense costs. The significance of these different interpretations cannot be ignored.

The seeds for this suit were sown when the United States sued the owners and operators of a landfill for monetary and injunctive relief under section 6973 of the Resource Conservation Recovery Act, 42 U.S.C. §§ 6901-6987. The landfill owners and operators then sought indemnification from Waste Management of Carolinas, Inc., d/b/a Trash Removal Service Inc. (TRS). The owners and operators, in their third-party complaint, alleged that TRS had carelessly and negligently hauled solid and hazardous waste to the landfill between 1973-1979. This complaint prompted TRS to request defense of the suit from its insurers of that period, Pennsylvania National Mutual Causalty Insurance Company (Penn) and Peerless Insurance Company (Peerless). The insurers denied there was a duty to defend. Their denial was based on their interpretation of the allegations contained withing the pleadings of the underlying action. The insurers' refusal to defend led TRS to file an action for a declaratory judgment seeking a determination of the parties' rights and obligations under the policies. Cross-motions for summary judgment were entered by the parties, which eventually led to this decision.

The trial court granted the summary judgment motions of Penn and Peerless and denied the same to TRS, 315 N.C. at ____, 340 S.E.2d at 377. However, the court of appeals found that the facts alleged had not foreclosed the possibility that the policies may cover the events alleged in the complaint. 71 N.C.App.80, 323 S.E.2d 726 (1984). The supreme court reversed and held that Penn and Peerless had no duty to defend TRS in the federal court action.

The North Carolina Supreme Court acknowledged that the duty to defend is ordinarily broader than the duty to indemnify. The duty to defend, stated the court, is to be determined by the facts as alleged in the pleadings. This is the so-called "comparison test" which requires the pleadings to be read side by side with the policies and any doubt resulting would be resolved in favor of the insured. A summary judgment motion favorable to the insurers is not a final determination. It is only a determination that a present obligation to defend does not exist. If the insurers do not defend, it is at their own peril. If the subsequent trial results in the finding of facts proving a duty to defend exists, the insurer could then be required to reimburse the insured for costs incurred for the defense of the suit.

The court then examined the complaint, which alleged intentional disposal of solid wastes by TRS for a six-year period and also alleged that this disposal contributed to the contamination of the aquifer beneath the landfill. The complaint did not allege the dumping or the contamination to be either "sudden" or "accidental" but rather the facts had suggested a gradual seepage into the groundwaters.

Before applying the comparison test, the court defined two dispositive terms in the coverage language of the policies: "occurrence" and "discharge that is sudden and accidental." The court discovered that both policies, which are standard policies, defined "occurrence" as "an accident, . . . which resulted in bodily injury or property damage neither expected or intended from the standpoint of the insured." 315 N.C. at____, 340 S.E.2d at 379. The court defined "accident" as "an unforeseen event, occurring without the will or design of the person whose mere act causes it. . . ." *Tayloe v. Indemnity Co.,* 257 N.C. 626, 627, 127 S.E.2d 238, 239-40 (1962). Therefore, an occcurrence is defined in terms of an accident that results from TRS's intentional conduct, i.e., placing the waste in the landfill.

In the first stage of analysis, the court decided an "occurrence" had happened, as defined in the policies, warranting a duty to defend. The court rejected Penn and Peerless' argument that the routine conduct or intentional dumping of waste materials, as alleged, was not an "occurrence" as defined in the policies. The court pointed out the error in the insurers' misguided approach, saying "whether events are 'accidental' and constitute and 'occurrence' depends upon whether they were expected or intended from the point of view of the insured. . . . [I]t was not the routine dumping but the arguably unintended, unexpected leaching of contaminants into the groundwater that constituted the 'occurrence' for the purpose of TRS's insurance coverage." 315 N.C. at____, 340 S.E.2d at 380. In the court's view there were two events; the placing of the waste at the site and the seepage of the contaminants into the aquifer. The court construed the "occurrence" to be the seepage which from the standpoint of the insured was neither "intended" or "expected."

Although the court found that an occurrence had occurred, the insurers would be relieved from the duty to defend if the damage was to the environment because the policies

contained pollution-exclusion clauses which stated: "This insurance does not apply:. . .(f) to property damage arising out of the discharge, dispersal, release or escape of smoke,. . ., or other contaminants or pollutants into or upon the land,. . ., or any water course or body of water. . . ." *Id.* at____, 340 S.E.2d at 379. However if the discharge, et cetera, was sudden and accidental the pollution exclusion would not apply and the duty to defend would be reinstated. The policies provided "this exclusion does not apply if such discharge, dispersal,. . . is sudden or accidental." *Id.* Therefore, the court had to next decide if the occurrence was sudden and accidental.

In addition to looking at the exact language of the policies, the court explained the policy considerations that justified the inclusion of the pollution-exclusion clauses in insurance policies. If the insured knew that all kinds of negligent or careless spills would be covered the insured would lack incentive to behave prudently with respect to the potentially hazardous material. Also, the exclusion still provides for coverage of events that are beyond control and cannot be prevented or contained. In sum, the court concluded that the exclusion clause was an attempt to place the responsibility to guard against such occurrences upon the party who has the most control over the situation.

The court held that the word "sudden" as used in "this exclusion does not apply if such discharge. . . . is sudden and accidental," was to be given it's common-sense meaning, i.e., an interpretation synonymous with "instantaneous." To construe the word any differently, the court stated, would be to strain logic. Therefore, no ambiguity existed with regard to the language in the contract. However, the court did cite *Lansco, Inc. v. Environmental Protection Dep't.,* 138 N.J. Super. 275, 350 A.2d 520 (CH. Div. 1975), *aff'd,* 145 N.J. Super. 433, 368 A.2d 363 (App. Div. 1976), *cert. denied,* 73 N.J. 57, 372 A.2d 322 (1977) and *Allstate Ins. Co. v. Klock Oil Co.,* 426 N.Y.S.2d 603, 73 A.2d 486 (1980), where "sudden" was not limited to an "instantaneous" happening. It also cited *Jackson Twp., Etc. v. Hartford Acc. & Indem.,* 186 N.J. Super. 156, 164, 451 A.2d 990, 994 (1982). In that case, the court equated "sudden" with "unexpected," focussing on the expectation element rather than on the temporal. Therefore, it appears in North Carolina that no ambiguity may exist in interpreting "sudden" in an insurance policy, but with so many other courts construing the word differently than "instantaneous" it could be said that some ambiguity generally does exist.

In summary, the North Carolina Supreme Court found that an "occurrence" relates to the anticipation of an event, whether or not intended or expected. The exclusion, it found, relates to the fact that the releases resulted in some polluting or contamination damage. Finally, the exception is to be determined not by whether it was unexpected, but whether the event occurred instantaneously or percipitantly.

In the last analysis, because a "sudden" release of contaminants was not expressly nor impliedly alleged in the pleadings, and because "sudden" is to be interpreted with relation to its temporal significance, the court found the duty to defend did not exist for the insurers.

Susan Dorgan, '88.

NUCLEAR WASTE

Tennessee v. Herrington, 806 F.2d 642 (6th Cir. Nov. 25, 1986).

The Nuclear Waste Policy Act of 1983 (NWPA), provides for the construction of permanent repositories for high level radioactive waste and spent nuclear fuel. 42 U.S.C. §§ 10101 - 10226 (1983). The NWPA also authorizes the Secretary of Energy (Secretary) to study and recommend to Congress sites suitable for Monitored Retrievable Storage (MRS) facilities which would be an alternative system for the long term disposal of nuclear waste. Placing spent nuclear fuel in MRS sites would permit constant monitoring and management of spent nuclear fuel and would provide for the ready retrieval of such fuel for future processing or disposal. Although the construction of permanent sites is automatically authorized under the NWPA, construction of MRS facilities requires explicit authorization by Congress.

The Department of Energy (DOE) conducted a study of potential MRS sites using a set of guidelines that took into account sufficient acreage (at least 1100 acres), and proximity to already existing utilities, in order to achieve safety and reduce cost by minimizing total transportation miles. The DOE studied the possibility of environmental disturbances as well as any socioeconomic disruption within a community as a result of MRS development. The DOE determined that three Tennessee sites would be suitable for MRS facilities and prepared to submit its findings to Congress on February 10, 1986. While the study was being conducted the state of Tennessee (State) brought an action against the Secretary in the United States District Court for the Middle District of Tennessee. *Tennessee v. Herrington,* 622 F. Supp. 923 (M.D. Tenn. 1986). The State alleged that the DOE failed to consult and cooperate with it before submitting the MRS proposal to Congress as required under section 10137 of NWPA, 42 U.S.C. § 10137. Conversely, the DOE argued that cooperation with the State was not required until after MRS authorization by Congress and more importantly, all matters concerning NWPA have original jurisdiction in the federal appellate courts under section 10139, 42 U.S.C. § 10139. The district court denied the DOE's motion to dismiss the action due to lack of jurisdiction and ruled that cooperation and consultation was required *before* submitting the proposal to Congress. The district court granted a permanent injunction prohibiting the DOE from submitting any MRS proposals to Congress concerning the State.

The DOE brought an appeal to the United States Court of Appeals for the Sixth Circuit. The court of appeals granted a motion by the DOE to consolidate and expedite. This case represents a consolidation of three cases brought by the parties: an interlocutory appeal pursuant to 28 U.S.C. § 1292 on the jurisdictional ruling of the district court; the DOE's appeal of the injunction; and a declaratory judgment suit filed earlier with the court of appeals by the State as a precautionary matter "[t]o prevent the [180 day] statute of limitation period from running while the jurisdictional dispute was being resolved." 806 F.2d at 646.

The court of appeals in this proceeding reversed the district court on the issue of jurisdiction. The court of appeals noted that the NWPA's jurisdictional requirements are ambiguous. While section 10139(a) of NWPA provides that federal courts of appeals have original jurisdiction over certain actions arising under the Act, the grant of jurisdiction is not determinative because section 10139(a) is found in Subchapter I, Part A of the NWPA which only governs permanent repositories for spent nuclear fuel and radioactive waste. However, the MRS provisions are located in Subchapter I, Part C. Since there was no express jurisdictional requirement for MRS proposals in the NWPA, the court of appeals looked to the intent of Congress in drafting the Act to understand and determine whether the provisions of Part A apply to Part C also.

The court of appeals interpreted the structure of the NWPA and the relevant legislative history as expressing concern with rapid implementation of MRS facilities. The court found, "Congress clearly intended that the development of the MRS proposal proceed in as timely a fashion as the development of the permanent repositories." 806 F.2d at 649. Congress desired to streamline the MRS system as an insurance against possible delay and failure in establishing permanent sites as well as potential problems that may arise as nuclear facilities "begin being decommissioned." *Id.* Because Congress intended a timely development of MRS proposals, review by both the federal district court and court of appeals would be unnecessarily repetitive. The court could find no reason for treating jurisdiction of MRS proposals differently from permanent repositories and held that jurisdiction should, therefore, reside in the federal court of appeals for both kinds of nuclear waste repositories.

The court of appeals then considered when the consultation and cooperation requirements in section 10137 should take effect in the MRS siting process. The problem arises over the term "authorizes." Section 10161(h) states "[a]ny facility *authorized* pursuant to this section shall be subject to the provisions of section 10135, 10136(a), 10136(b), 10136(d), 10137 and 10138 of this title." 42 U.S.C. § 10161(h)(emphasis added). The DOE argued that the meaning of authorization is not the study and mere proposal of an MRS siting, but rather the express Congressional authorization required for MRS siting. The consultation and cooperation requirement of section 10137 would not apply until after Congress has authorized the MRS proposal. The State argued that authorization comes about at the time of the DOE investigation and before Congressional approval.

The court of appeals began its analysis by examining the statute for congressional intent. As the language of statute was not unambiguous, recourse was had "to the legislative history and overall structure of the Act." 806 F.2d at 652. The court found that Congress seemed to have two conflicting goals in its MRS siting process. Congress wanted to give the states an active role in the development of an MRS proposal while also wishing to implement the siting process in as timely a manner as possible. Because the court was unable to find guidance for a clear determination for either the state or DOE, the court turned to the DOE's interpretation of the statute. The court stated "[i]n such an instance, we must adopt the DOE's position." 806 F.2d at 652 (relying on *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). The court noted that it has long been recognized that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . . ." 806 F.2d at 653 (citing *Chevron,* 467 U.S. at 837). Thus, the court deferred to the DOE as an executive department and gave weight to its administrative interpretation of the statute DOE was trying to implement.

The court of appeals disagreed with the district court's decision in favor of Tennessee and held for the DOE. The court of appeals stated that "[t]he DOE's interpretation of 'authorized' in section 10161(h) is a rational one. It does not totally deprive the State of its role in the MRS siting process, since the provisions set forth in section 10161(h) will apply when and if Congress approves the MRS proposal and authorizes construction of an MRS facility." 806 F.2d at 763.

Joan Gallo, '88

REGULATORY UPDATE
Small Quantity Generators of Hazardous Waste

I INTRODUCTION

If those who generate between 100 to 1,000 kilograms of hazardous waste per calendar month (kg/mo) still think that they are exempt from the EPA's stringent regulation of large generators because they consider themselves a "small quantity generator" under 40 C.F.R. § 261.5 (1986), look again. Recently, the EPA, pursuant to the statutory mandate of section 3001(d) of the Resource Conservation and Recovery Act, § 6921(d), 42 U.S.C. §§ 6901-6987 (1984) (RCRA), proposed and enacted regulations which will apply to small quantity generators who generate between 100 to 1,000 kg/mo of hazardous waste. 51 Fed. Reg. 10146 (March 24, 1986) (effective Sept. 22, 1986). In essence, the new regulations remove this class of small generators from the less stringent standards of 40 C.F.R. § 261.5 and places them under the more burdensome regulations applied to large generators of hazardous waste.

Prior to the new regulations, those who generated between 100-1,000 kg/mo were exempt from heavier regulation because their smaller size apparently meant that these generators were less of a threat to human health and the environment. In addition, their size made them less capable of complying with the burdensome administrative and technical regulations placed on large generators. However, the attitude toward small generators changed and in 1984 RCRA was amended by the Hazardous and Solid Waste Amendments (HSWA). Added to section 3001 of RCRA was subsection (d), which directed the EPA to develop standards to apply to those who generate 100-1,000 kg/mo. 42 U.S.C. § 6921(d). These amendments reflected a policy to formulate standards sufficient to protect human health and the environment. However, HSWA recognized that small generators may have difficuilties in

meeting the increased burdens of regulation. Therefore, HSWA directed that when the EPA drafted the new regulations they had discretion to "vary from the standards applicable to hazardous waste generated by larger quantity generators." RCRA § 3001(d)(2), 42 U.S.C. § 6921(d)(2).

II APPLICATION OF THE REGULATIONS

A. Generators Regulated

Generators of the 100-1,000 kg/mo class are now subject to regulation because they no longer qualify for exemption under 40 C.F.R. § 261.5(a). Section 261.5(a) now defines a "small quantity generator" as a generator who generates no more than 100 kilograms of hazardous waste in a month. Therefore, because 100-1,000 kg/mo generators are no longer classified as "conditionally exempt small quantity generators," they are subject to full regulation as if they were large quantity generators, under 40 C.F.R. Parts 262-266, 270, 142 and section 3010 of RCRA, 42 U.S.C. § 6930 (notification requirements).

B. Quantity Determination

A problem engendered by the new regulations is *what* waste should be counted in order to determine if a generator of hazardous waste produces 100-1,000 kg/mo thus falling within the ambit of the new regulations. The EPA recognized the problem of waste quantity determination and, with limited success, attempted to solve it by amending 40 C.F.R. § 261.5(c) and (d) to explicitly specify which waste are counted in quantity determination. Under section 261.5(c), a hazardous waste is not included in quantity determinations if it is not subject to regulation, or is only subject to regulation under 40 C.F.R. § 262.11, .12, .40(c), .41. Hazardous waste is included in quantity determinations if it is subject to the requirements of 40 C.F.R. § 261.6(b) and (c) and Subparts (C),(D), and (F) of Part 266.

An effect of the regulations is that generators may be subject to different regulations at different times, depending on the amount of waste generated in a month. For example, a generator who produces less than 100 kg of hazardous waste in one month and is exempt under section 261.5(a) may be subject to full regulation in another month if he exceeds the 100 kg level. Despite some opposition, the EPA has always taken the position, and still does, that a generator may be subject to different standards at different times.

III REGULATION REQUIREMENTS

A. Identification Number

Under the new regulations, 100-1,000 kg/mo generators must now comply in substantial part with 40 C.F.R. § 262, unless such generator is considered an infrequent generator. Section 262.12 requires that generators in the 100-1,000 kg/mo class obtain an EPA identification number and only give their hazardous waste to transporters and facilities with EPA numbers. The I.D. numbers were found necessary to monitor compliance through using a central data base and to provide information for Congress and resource projections. The only change made by the EPA in applying section 262.12 is that all applicants must now indicate if they generate more or less than 1,000 kg per month.

B. Manifest Requirement

Generators of the 100-1,000 kg/mo class are now fully regulated by the manifest requirements of 40 C.F.R. § 262 Sub Part B and must complete multiple copy manifest forms (262.22), retain a copy (262.23(a)(3)), and give the transporter multiple copies (262.23(b)). Although the EPA had initially proposed rules without these requirements, the final rule included them based on the EPA's conclusion that a multiple copy system requirement would add little or no burden and was necessary to give all parties proper incentive to comply with RCRA. Unscrupulous transporters could simply dump waste illegally if they did not have to give the generator any record of a facility accepting the waste. In addition, it was thought that most generators would use a multiple copy manifest so that they would get back a copy signed by the receiving facility. By doing this, the generator would demonstrate his compliance with state and federal laws and help avoid primary liability under CERCLA or RCRA. Substantively on the manifest itself, generators of the 100-1,000 kg/mo class must (1) certify that they have a program to reduce the quantity and toxicity of their wastes to a economically practicable amount as determined by the generator, and (2) certify that their current management method is the most practicable one available to minimize present and future threats to human health and the environment. RCRA § 3002(b), 42 U.S.C. § 6922(b).

In addition to making a manifest, generators of the 100-1,000 kg/mo class must now keep a copy of the manifest for three years from the date of shipment unless it is replaced with a signed copy from a designated facility. In the case of a large quantity generator, if he does not receive back a signed copy of the manifest within 45 days or is unable to locate the shipment, section 262.42 requires the generator to file an exception report with the EPA. However, 100-1,000 kg/mo generators are exempt from filing an exception report. The EPA felt that the burden on small generators, often small businesses, was potentially too onerous because they would have to develop tracking and follow up systems eventhough the need for reporting was seldom necessary. However, the EPA cautions that 100-1,000 kg/mo generators are still potentially liable if a shipment is lost. Finally, generators of the 100-1,000 kg/mo class are exempt from the section 262.41 biennial report regulations which require large generators to file a report of waste generated for the previous year and of efforts taken to minimize waste. Those 100-1,000 kg/mo generators who exceed the 1,000 kg/mo limit in certain months would only have to file a biennial report concerning those months.

A 100-1,000 kg/mo generator may avoid the manifest requirements of 40 C.F.R. Part 262 altogether if he makes certain types of reclamation shipments which are part of a recycling activity. This exception was meant to encourage recycling by reducing the burden of the manifest system. In order to be exempt from the manifest requirements of section 262 Sub Part B the generator must enter a written contract with a recycling facility to collect specific waste and to deliver back the regenerated "wastes" at specific intervals, both parties must keep a copy for at least three years following the expiration of the contract, the reclaimer/recycler must own and operate the vehicles used to pick up the waste and deliver it back after recycling, and a document with the name, address, EPA identification number of the generator, the quantity of waste in the ship-

ment, all Department of Transportation (DOT) shipping information, and the date must accompany all waste shipments from the generator and be kept by the reclaimer for at least three years after the date of shipment.

C. On Site Accumulation of Waste Requirements

Under the new regulatory scheme, generators of the 100-1,000 kg/mo class who accumulate waste on site are regulated. However, because of the concern over unduly burdening small businessess and the specific mandate of section 3001(d) of RCRA, 42 U.S.C. § 6921(d), the section governing generators who accumulate hazardous waste on site has been modified with respect to 100-1,000 kg/mo generators. 40 C.F.R. § 262.34. Section 262.34(d) allows these generators up to 180 days to accumulate hazardous waste on site without a permit or obtaining interim status, provided that the quantity of waste accumulated on site never exceeds 6000 kg. In addition, if a 100-1,000 kg/mo generator must ship his waste to a facility over 200 miles away, he may store the waste up to 270 days without obtaining a permit or interim status as long as he does not exceed the 6000 kg limit for that period. Finally, because of possible emergency situations, the EPA amended 40 C.F.R. § 262.34(f) to permit the EPA Regional Administrator to allow a 100-1,000 kg/mo generator to accumulate his waste an additional thirty days where the Regional Administrator determines that the time extension is warranted by "unforeseen, temporary and uncontrollable circumstances."

Generators of the 100-1,000 kg/mo class who store waste on site must also follow regulations for contingency plans, emergency procedures and personnel training. Rather than impose the more burdensome regulations applied to large generators, the EPA amended section 262.34(d), (e), and (f) to specify regulations for 100-1,000 kg/mo generators. Generally, the regulations require that each facility has at least one person available at all times who could be contacted and who knows what steps to take in an emergency.

D. Transportation of Waste

Transportation of hazardous waste by 100-1,000 kg/mo generators will now also be regulated. Except for some minor amendments, they must follow the same standards applied to large generators regarding the manifest system, record keeping and actions in response to spills or discharges contained in 40 C.F.R. Part 263. Furthermore, they must also follow the regulations set down by the Department of Transportation under the Hazardous Materials Transportation Act (HMTA), incorporated in 40 C.F.R. Part 262, Sub Part C, with regard to marking, packaging, and placarding waste. Because section 3001(d)(7) of RCRA, 42 U.S.C. § 6930, mandates that "nothing in this subsection shall be construed to impair the validity of regulations pursuant to [HMTA]," the EPA did not make any substantive changes to the DOT requirements or to 40 C.F.R. Part 263. The EPA also drafted a provision to impose certain record keeping requirements on transporters who are also reclaimers and who accept unmanifested hazardous waste from generators utilizing the section 262.20(e) exemption for waste reclaimed under contractual agreements. 40 C.F.R. 263.20(h). Finally, a generator may transport hazardous waste himself so long as he obtains a U.S. EPA Identification Number and complies with Part 263 plus the DOT regulations.

Ronald Maggiore, '87; Thomas Sheehan, '87

Food Irradiation Update

Two significant events occurred in 1986 concerning the use of irradiation on food. (For a general discussion of food irradiation, *see* 3 Hofstra Envtl. L. Dig. 11 (Spring 1986)).

On January 15, 1986 the Food and Drug Administration (FDA) issued a final rule authorizing low dose gamma radiation of fresh pork carcasses and cuts to control *Trichinella Spiralis,* a parasite that causes trichinosis. *See* Fed. Reg. 1769-70 (Jan. 15, 1986); 9 CFR § 318 (1986); 21 CFR § 179.26(b)(1986). The final rule amended prior FDA regulations to permit the use of gamma radiation sources with a minimum absorbed dose of 30 kilorads to a maximum absorbed dose not to exceed 100 kilorads for treatment of fresh pork.

On April 19, 1986, the FDA issued a final rule authorizing the irradiation of fresh fruits and vegetables at dosage limits not to exceed 100 kilorad. 21 CFR § 179.26(b)(1986). In addition, the finale rule increased the allowable dosage limit for microbiological disinfestation of herbs, spices, teas and vegetable seasonings to 3 megarad. *Id.* The final rule also included the requirement that irradiated food must be labeled. The rule requires that wholesale invoices or bills of lading bear either the statement "Treated with radiation, do not irradiate again," or the statement "Treated by irradiation, do not irradiate again," when irradiated food is shipped to a food manufacturer or processor for further processing, labeling or packing. 21 CFR § 179.26(c)(3)(1986). Retail packages of food which has been irradiated must bear an irradiated food logo along with either the statement "Treated with radiation," or the statement "Treated by irradiation." 21 CFR § 179.26(c)(1)(1986). The logo must be placed prominently and conspicuously in conjunction with the required statement. *Id.* For irradiated food not in package form, such as fresh fruits and vegetables, the required logo and phrase must be displayed to the purchaser with either the labeling of the bulk container in plain view or a counter sign or card bearing the information that the product has been treated with irradiation. 21 CFR § 179.26(c)(2)(1986). As an alternative, food not in package form may be individually labeled. *Id.*

There are two significant limitations on these new labeling requirements. The new labeling requirements only apply to a food which has been irradiated, *not* to a food which merely contains an irradiated ingredient. 21 CFR § 179.26(c)(2)(1986). In addition, the wording requirements pertaining to the label and labeling of retail packages of food (21 CFR § 179.26(C)(1), (2])) will expire on April 18, 1988, unless extended by the FDA. 21 CFR § 179.26(c)(4)(1986).

Cynthia Hall, '87

(Author's Note: In September 1986, the first irradiated fruits were sold to U.S. consumers in North Miami Beach, Florida. They were irradiated mangoes from Puerto Rico).

SARA, L.U.S.T., AND OTHER RARELY MENTIONED MATTERS: WILL REAL ESTATE TRANSACTIONS EVER BE THE SAME?

Those of you who represent buyers, sellers, lessors, lessees or lenders in real estate transactions and think that the only counsel you need give your clients concerning environmental matters is that they consider a donation to the Sierra Club, think again. CERCLA,[1] SARA,[2] and LUST[3] are a few of the federal laws and programs that can impose potentially catastrophic liability upon a client if not carefully considered during contract negotiations. Each concerns hazardous wastes or substances, and the obligation to restore the environment upon their release.

CERCLA,[4] enacted in 1980, was an "attempt to create a coherent response to the dual problem of emergency response to releases of toxic chemicals into the environment, and short-and long-term response to the presence of toxic wastes in existing dumpsites, many of which had been abandoned by [parties who could not] be held legally or financially responsible for cleanup."[5] Current owners and operators of facilities, as well as all persons who owned or operated the facility in the past at any time when hazardous substances were disposed of, are among those classes of persons liable for response costs and damages to natural resources arising out of a release or threatened release of hazardous substances at the facility.[6] Responsible parties are strictly liable under CERCLA,[7] and courts have further concluded that liability should be joint and several unless the harm "is divisible and there is a reasonable basis for apportionment of damages."[8] In addition, CERCLA may be applied retroactively to hold liable those responsible for disposal of hazardous substances prior to the effective date of the Act.[9]

Traditional concepts of limited liability associated with corporate ownership will not necessarily protect an owner or operator who finds himself defending against a CERCLA action. Where a corporate officer has taken an active hand in the operation of the facility, the officer may be held personally liable for remediation of harm arising from the release of hazardous substances as an operator of the facility without piercing the corporate veil.[10]

Lenders too must be concerned with liability under CERCLA. In *United States v. Maryland Bank and Trust Company,*[11] the court held that a lender which had foreclosed its mortgage lien and had taken title to the property was the current owner and was therefore liable for the expense of cleaning up the site. The expected cost of the cleanup was several hundred thousand dollars greater than the value of the property. CERCLA section 101(20)(A)[12] provides that "owner and operator" does not include a person who, without participating in the management of a facility, holds indicia of ownership primarily to protect his security interest. However, since the lender may not be able to exercise its right to foreclose its mortgage lien without being exposed to substantial cleanup responsibilities this provides little comfort.

SARA[13] offers limited relief. SARA permits an innocent owner defense to be raised by any defendant in a CERCLA action if the hazardous substances were already present on or at the facility and at the time of acquiring the property the defendant was unaware that any hazardous substance was on the property.[14] In order to establish this defense, the defendant "must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. . . . [T]he court shall take into account any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection."[15] It is possible that courts will find that buyers of commercial property will not have met their burden when raising the innocent purchaser defense if an environmental risk assessment, conducted by a qualified engineering firm prior to closing on the property, would have disclosed the problem but was not conducted. Moreover, since a lender is likely to have acquired at least some knowledge of the nature of the business seeking a loan prior to the loan's approval, absent a clean engineering report, lenders too will find it difficult to convince courts that at the time of foreclosure on a mortgage lien they had no reason to know of the presence of the hazardous substances.

Even if the innocent owner defense can be established, it will be lost if the owner, upon discovery of the hazardous substance previously disposed of, fails to exercise due care with respect to the hazardous substances concerned or failed to take precautions against forseeable result from such acts or omissions.[16] As a practical matter, courts are likely to find the owner liable under CERCLA section 107(a)[17] whenever the situation appears to have gotten worse after the transfer of title.[18] In addition, if an innocent owner learns of the release or threatened release of hazardous substances on his property, and fails to disclose the problem to a subsequent purchaser, he will be barred from raising the innocent owner defense in a CERCLA action that arises after his transfer of title, and he will be strictly liable under CERCLA.[19]

1984 amendments to the Resource Conservation and Recovery Act[20] added a requirement that the EPA promulgate regulations governing underground tanks used to store regulated substances.[21] A tank is covered if it is used to store an accumulation of regulated substances, and if its volume, including the volume of underground pipes connected to the tank, is ten percent or more below ground. Owners of regulated tanks will have to install leak detection systems, and take corrective action in the event of a leak.[22] Thus, buyers should know whether there are underground tanks on the property they seek to purchase, the condition of those tanks, and the purpose for which they were previously used prior to going to contract, or, at the very least, prior to closing.

Frederick Eisenbud,* '75

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FOOTNOTES

1. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601- 9657 (also called the Superfund).
2. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (Oct. 17, 1986) (amending and extending CERCLA).
3. Mercifully refusing to go along with those who would refer to the regulations for underground storage tanks as RUST ("regulated underground storage tanks"), the EPA has retained the acronym LUST ("leaking underground storage tanks"). *See* Mugden & Adler, *The 1984 RCRA Amendments: Congress as a Regulatory Agency*, 10 Colum. J. Envtl. L. 215, 243 N. 85 (1985). Such tanks are regulated under 42 U.S.C. § 6991-6991i.
4. *See* note 1 *supra.*
5. City of New York v. Exxon Corp., 633 F. Supp. 609, 613 (S.D.N.Y. 1986).
6. CERCLA § 107(a)(1)-(4), 42 U.S.C. § 9607(a)(1)-(4).
7. *See, e.g.*, New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985).
8. United States v. Chem-Dyne Corp., 572 F. Supp. 802, 811 (S.D. Ohio 1983). *See also* United States v. Miami Drum Services Inc., 25 Envtl. Rep. Cas. (BNA) 1469, 1474 (S.D. Fla. 1986) and cases cited therein.
9. United States v. Miami Services, Inc., 25 Envtl. Rep. Cas. (BNA) 1469, 1476-78 (S.D. Fla. 1986).
10. *See* New York v. Shore Realty Corp. 759 F.2d 1032, 1052 (2d Cir. 1985). *See also* United States v. Mirabile, 23 Envtl. Rep. Cas. (BNA) 1510 (E.D. Pa. 1985) and cases cited therein.
11. 632 F. Supp. 573 (D. Md. 1986).
12. 42 U.S.C. § 9601(20)(A).
13. *See* note 2 *supra.*
14. SARA § 101(f), new CERCLA § 101(35)(A)(i), 42 U.S.C. § 9601(35)(A)(i).
15. SARA § 101(f), new CERCLA § 101(35)(B), 42 U.S.C. § 9601(35)(B).
16. CERCLA § 107(b)(3)(a) and (b), 42 U.S.C. § 9607(b)(3)(a) and (b).
17. 42 U.S.C. § 9607(a).
18. *See, e.g.*, New York v. Shore Realty Corp., 759 F.2d 1032, 1048-49 (2d Cir. 1985).
19. SARA § 101(f), new CERCLA § 101(35)(C), 42 U.S.C. § 9601(35)(C).
20. 42 U.S.C. §§ 6901-6987 (1976) (RCRA).
21. *See* 42 U.S.C. § 6991-6991i (1984).
22. For example, on Long Island, New York, where the ground water has been designated a sole source aquifer, such corrective action would undoubtedly include decontaminating the ground water - a very expensive proposition.

Judicial Decisions and Other Forces Behind the SARA Amendments

Introduction

In the words of one venerable professor of law, the Comprehensive Environmental Response, Compsensation, and Liability Act,[1] (CERCLA), "more commonly known as the Superfund, was formed in a political crucible at more than usual temperatures.[2]" Many of the key provisions of the Act were drafted in skeletal form or in ambiguous language, and had scant meaning to anyone.[3] In the years following enactment, judicial decisions added content to the provisions. Frequently those decisions accorded great deference to the Environmental Protections Agency's (EPA) interpretation of the law.[4] Sometimes the courts were creative in resolving difficult problems[5] and other times they adhered to a close reading of the statue.[6] When Congress reauthorized CERCLA on October 17, 1986 and SARA[7] (Superfund Amendments and Reauthorization Act of 1986) came into being, many of the amended or added provisions responded directly to these judicial decisions.[8]

This article will consider the substance of some of the new provisions of SARA and the judicial decisions which parallel them. Specific reference will be made to seven cases which were reviewed in volume 3 of the Hofstra Environmental Law Digest (Fall 1986) and which were specifically addressed by Congress in reenacting CERCLA. The holdings of these cases relate to: the amendments to the section 107 liability provisions;[9] the availability of preenforcement judicial review;[10] the section 114 preemption provision of state law,[11] EPA's right of access;[12] and the judicial imposition of fines.[13] Additional subjects that will be discussed are: the right of contribution among potentially responsible parties;[14] the settlement provisions found in SARA section 122;[15] the provision for increased public participation in SARA section 117;[16] and the addition of a private cause of action for citizens suits in SARA section 206.[17] Although these amendments may not have been precipitated by the common law, they are essential components of the new Act and warrant discussion because they enhance the effect of the other amendments. The article will not be a comprehensive discussion of SARA. Rather, it is intended to show what CERCLA has become and by discussing the changes in select provisions of CERCLA, to show the role judges play as legislators, and the integral part lawyers, from both the private and public sector, also play in the legislative process.[18]

Section 107 Liability[19]

Section 107 of CERCLA defines those parties that are liable for the costs of a response effort conducted by either the government or private parties.[20] It is, to say the least, a controversial provision; it means that one party can be liable for the total cost of cleanup, when that party's only connection with the site is to be the current owner.[21] In practice this does not usually happen but the possibility is implicit in the text of section 107 and illustrates one of the most notable omissions in CERCLA. Nowhere in CERCLA is it specifically stated that an owner (or operator, generator, or transporter) is strictly, and jointly and severally liable.[22] This standard of liability can only be deduced by reference to the definitional section of CERCLA which states that " 'liable' or 'liability' under this subchapter should be construed to be the standard of liability which obtains under section 1321 of Title 33 [commonly known as the Clean Water Act].'"[23] By now it is well established by case law, most notably the *Chem-Dyne* line of cases,[24] that strict and joint and several liability lies but even SARA has no such explicit provision.

SARA section 101(f) adds a definition of "contractual relationship" in new CERCLA section 101(35)(A) which affects the liability of an owner who is an "innocent landowner." The defense to liability in CERCLA section 107(b)(3) for a purely contractual relationship is now available to a property owner who finds he is the unwitting owner of a hazardous waste site.[25] It is clear that there must be *no* knowledge, either actual or constructive, for this defense to lie. Therefore, there is a burden on buyers to investigate prior claims of title and prior uses before investing in property.[26]

A second kind of "innocent landowner" situation occurs when title passes to an institutional creditor such as in a mortgage foreclosure or a bankruptcy proceeding. *United States v. Maryland Bank and Trust,*[27] although argued on different grounds, was a generic case of such ownership resulting from a financial relationship. The bank argued that it only "owned" the property because it was protecting its security interest. The court held that the bank was a section 107(a)(1) owner because it had purchased the property at the foreclosure sale and then held the property for over four years, thus converting its security interest into full ownership.[28] Under the facts of the case it was uncertain whether the bank knew of the hazardous substance on the property but *if* the bank could have met its burden of proof that there was *no* knowledge, the bank, although an owner, could now escape liability by asserting the defense available under SARA.[29]

This Congressional retreat from imposing liability on the property owner whose liability rests on mere ownership

when the release or threatened release is discovered, also has import for government acquisition of property. SARA authorizes the government to acquire property to conduct response efforts.[30] By its own terms CERCLA holds a government-owner of a hazardous waste site liable for response costs to the same degree as individuals[31] and this raised an obstacle to certain EPA proposed response efforts. In addition, although CERCLA has never included any provision for compensating victims for personal or property damage, the potential liability under state tort law was a powerful deterrent to even inadvertent ownership of a hazardous waste site. EPA conducted response efforts could also make EPA a generator of hazardous waste under the Resource Conservation and Recovery Act,[32] or owners of last resort where known previous owners were neither owner-operators, generators, or transporters and, thus, the only legally liable party for entire response costs. To prevent these problems, SARA section 101(b) changes the definition of owner to exclude federal or state governments who have taken title involuntarily,[33] or by acquisition pursuant to SARA section 104(o) in order to facilitate the conducting of a response effort.[34]

Right of Contribution[35]

Among the many incentives for cooperation between potentially responsible parties (PRPs) and EPA on a response effort are the substantial cost reductions that accrue to a PRP from contribution by other PRPs. PRPs benefit by entering at the planning stage of a response effort because they can shape the Record of Decision (ROD) (that they will ultimately have to implement or pay for) as well as identify and begin negotiations with other PRPs.[36] Several decisions have impounded a private cause of action[37] and right of contribution[38] among PRPs into CERCLA section 107,[39] and have held that the commencement of an enforcement proceeding is not a prerequisite to the commencement of a private suit by one PRP against another.

Congress amended CERCLA section 113 with SARA section 113(b)[40] which now *specifically* provides for litigation among PRPs for contribution. The essence of this provision is that contribution may be sought by a PRP from any other PRP, during or following any civil action under CERCLA sections 106 or 107(a). Any action for contribution may also be brought even though there has been no civil action under CERCLA sections 106 and 107(a). In resolving contribution claims, a court may allocate response costs among liable parties using equitable factors as it deems appropriate. *De minimis* PRPs, however, can settle with the government and have repose.[41] In addition, SARA section 117, by providing for informed public participation in the remedial decision-making process,[42] also provides a public forum for inter-PRP discussions on technical methodology[43] with the attendant opportunity for media exposure. PRPs drawn into a settlement after the ROD is built, have the comfort of knowing they have had the benefit of a due process of sorts.

Settlement[44]

Although the Congressional adjustments to CERCLA's section 107 liability machinery were necessary, the inclusion of a settlement provision was critical.[45] After six years and 1.6 billion dollars there was no completed cleanup of a hazardous waste site. A skeptic could explain this by inefficient beaurocracy. A realist would know that it is because the enormity and complexity of conducting remedial actions is just beginning to emerge. The future of truly comprehensive environmental response action depends on the willingness of parties to settle with EPA.[46] It is simply not possible for the Federal government to accomplish the task of cleaning up the nation's hazardous waste sites by paying for the work out of the Superfund or becoming involved in protracted enforcement litigation.[47] The newly added settlement section is critical because it inspires PRPs to participate in cooperative efforts; private entities stand to save huge sums by settling, designing and conducting their own responses,[48] and apportioning the costs among themselves.[49]

Whether recognition of the value of voluntary compliance was born out of wisdom or need may never be known. In either event, the EPA initiated a settlement process,[50] and Congress, understanding its value, has made it part of the law. SARA section 122[51] works in conjunction with CERCLA section 107[52] and the National Contigency Plan,[53] to affect the purpose of the Act.

Economic benefits provide the incentive for PRPs and EPA to settle. The Federal government does not have to use Superfund money for a non-orphan site in a section 104[54] action, and is spared expenditure of human and financial resources in bringing a section 106[55] enforcement or cost recovery action. The benefits to PRPs of voluntary compliance are the same; savings in litigation costs plus the tremendous savings that result from a privately conducted response effort. It is estimated that a government response effort costs nearly twice as much as a private one.[56] The PRP also saves possible fines and penalties,[57] and interest cost.[58]

A. Cleanup Standards[59]

The settlement agreements reached in the six years since CERCLA's enactment have allocated costs at different stages of a response effort; frequently reimbursement for completed RI/FSs has been agreed upon. The fact that remedial actions have not been completed at major hazardous waste sites may be explained by the policy decision to concentrate resources on the hazardous waste sites with the highest ranking on the NPL.[60] Because of the vast dimension of pollution at NPL sites, there has been no determination or consensus among the parties involved on the most effective method of long term remediation. Analysts of the SARA amendments are concerned that Congress has imposed costly standards on PRPs by enacting strict cleanup standards,[61] and that the cleanup standards will threaten voluntary compliance with administrative orders or induce an unwillingness to enter into consent orders.[62] Closer examination of prior CERCLA sections 105,[63] (the NCP), and 107(a)(4)(A) and (B)[64] may lead to the conclusion that this is not so.

CERCLA section 105 governed the method for conducting response efforts, including preparation of RI/FSs and RODs. CERCLA section 107(a)(4)(A) and (B) state respectively that PRPs are liable for government expenditures "*not inconsistent* with the national contingency plan"[65] and "any other necessary costs of response incurred by any other person *consistent* with the national contingency plan."[66] It is arguable that private persons in their conduct of response efforts, are held to stricter standards of proficiency than the government if all that is required of government efforts is that they be "not inconsistent" with

the NCP.[67] While this distinction is largely academic, it does support the view that the new cleanup standards, although costly, will not defeat the benefits of the new settlement provision. PRPs have *always* been required to use methods and achieve standards required by EPA; the SARA section 121 cleanup standards[68] conceptually add nothing. Pre-SARA settlement agreements did not necessarily release PRPs from future obligations because they had financially participated in one stage of a response effort. Nor were PRPs allowed to clean up using halfway methods. They may have been allowed to contribute less than 100% of the costs, but this was not a license to compromise on standards. The requirement that remedial actions be chosen in accordance with SARA section 121[69] can be viewed as calibrating the NCP to state of the art technology and applicable and relevant or appropriate state or federal standards (ARARs).

Section 121 of SARA also gives EPA authority to grant waiver from attaining the new cleanup standards where "compliance with [the] requirements [imposed] is technically impracticable from an engineering perspective."[70] This appears to continue to leave EPA negotiators free to work within the realities of the hazardous substance removal or remedial world rather than rigidly adhere to the attainment of desirable but impracticable cleanup standards. Additionally, the first paragraph of new CERCLA section 121 refers to evaluation of plans for cost-effectiveness and selection that corresponds to the NCP to the extent practicable.[71] This language cannot be read to mean that the health standards are to be achieved at any cost, but rather to decide how much benefit is achieved at the margins.

It should be noted that SARA focuses on health concerns in a way that CERCLA did not.[72] The attainability of health standards "to the extent feasible" is a subject that has embroiled many an administrative official in technological debate over what abatement action is feasible. The matter could have been settled by the United States Supreme Court in *American Textile Manufacturers Inc. v. Donovan,*[73] when the Court held that cost effective calculations had been computed into cotton dust standards promulgated by OSHA and could not be reintroduced at a second level of negotiation involving an abatement action.[74] However, this holding has not resolved the dilemma in other worker health-related controversies.[75] It is relevant here because it shows that the attainment of health standards is a slippery concept. Even though state ARARs, which require higher standards, must be achieved under SARA's cleanup standards,[76] or water quality criteria according to sections 303 or 304 of the Clean Water Act[77] must be observed, if the technology is not available, or the cost is too exacting, the "best you can do" becomes the standard. Despite this, cleanup standards, when they *can* be obtained, *should* be. They should not be viewed, or allowed to operate, to defeat settlement procedures that carry out the real mandate of CERCLA.

B. Insurance Liability

Notwithstanding SARA section 121,[78] many of the SARA provisions militate in favor of voluntary compliance. When improved technology allows a higher level of attainment, and drives up costs of remediation, the incentive for PRP compliance grows. Higher costs create a powerful financial incentive for private development of improved technological procedures for responding to hazardous waste sites. PRPs will be shopping for cost efficient techniques.[79] Consequently, contractors who have a well developed plan will be in demand. Section 119 of SARA[80] is a new section which encourages private contractors by releasing them from liability under CERCLA or any other Federal law, except in cases of negligence, gross negligence, or intentional misconduct.[8] It also provides for contractor indemnification in certain circumstances.[82] This provision aids the entire environmental movement. There is a present need for licensed landfills with Part B permits under RCRA.[83] However, to become licensed, and attract customers, one must demonstrate financial responsibility. SARA section 119 allows contractors with "insurance at a fair and reasonable price"[84] to participate in the lucrative business of response efforts. Without the threat of endless liability and astronomical insurance premiums, contractors can accrue the kind of capital necessary to be licensed under RCRA. Theoretically this will well serve society; no new hazardous waste sites will be created while we are attending to the existing ones. A second reason to encourage private contractors who use modern technology is lodged in SARA section 121(a).[85] The President is encouraged to pursue onsite, permanent remediation to the extent practicable.[86] This becomes important because under SARA section 104(k) a state must demonstrate adequate waste treatment and disposal facilities within three years or lose Superfund financed remedial action.[87]

C. Public Participation

Sections 117[88] and 206[89] of SARA that allow increased state and citizen participation may have a positive effect on a PRP's willingness to settle. Under the amendment, a state may now be a party to all EPA settlement negotiations. In a case where state ARARs simply cannot be met or would be so financially onerous as to result in abandonment of the facility,[90] the state might be expected to negotiate terms of agreement with a willing PRP rather than lose the whole effort. The choice will become one between a PRP who will do what is economically and technologically feasible and the government embarking on an enforcement action against hundreds of PRPs involving many years and gallons of hazardous substance disposal. Additionally, Congress has now structured CERCLA so that EPA has authority to reward PRPs for cooperation while EPA benefits from the economic efficiencies associated with private response efforts. SARA section 122[91] allows for mixed fundings, i.e., a combination of federal, state and private money. EPA can also punish recalcitrant PRPs; attorney fees can be assessed,[92] interest can be recovered on the cost of Superfund expenditures,[93] and meaningful fines can be levied.[94] In addition, in an action to contest an EPA response action, review will be limited to the administrative record.[95]

If all of this seems like a tremendous grant of power to EPA to leverage PRPs into settlement agreements, it must be remembered that SARA codifies the settlement procedures[96] (including provisions for limited review) and provides for citizen review[97] and citizen suits.[98] The 30 day period for public comment on a consent decree[99] is a powerful tool in the hands of a PRP, as is public meeting before the adoption of a plan. While ideally the benefits of public hearings are manifested in improved decision making, and the public satisfaction that evolves from having had an opportunity to speak and be heard, the realities are

that the public includes PRPs and a public forum provides an end run on the prohibition on preenforcement judicial review. Where differences exist over the ROD, and PRPs have a public forum in which to present their choice of remedy, both PRPs and the government are subject to the harshest judge of all—the public. Public debate over proposed remedial efforts can put both sides in an equal bargaining position. Thus, the product can be a better plan without the incapacitating delay of judicial review.

D. Responsibility

It is appropriate to end this lengthy section on settlements with a note on responsibility. Congress, in enacting CERCLA, with its implicit, strict and joint and several liability provision, seemed unconcerned with causation and was intent only on the exigencies of hazardous waste sites. Six years have passed since enactment and industry has tried to choke down this bitter pill of liability. Perhaps it is time for a larger segment of American society to swallow the pill. It is easy and simplistic to point to decisions of the past and explain present problems by them. Holdings of cases like *Rose v. Socony-Vacuum Corp.*[100] show the policy choice that was made long ago in favor of industrial development. Now we know we can not disregard the environment in making such policy decisions. However, all Americans profited from the choice; indeed, the social utility of the pollutor's conduct was the very basis for the decision.[101] Now we should accept responsibility with the pollutors. Perhaps the best provision in SARA is the one that will result in public exposure.[102] As, one by one, response efforts commence at the nation's hazardous waste sites, a mounting number of Americans will come to know that there are no right answers, certainly no easy ones, but only the hope of balanced agreements that will correct harm to the environment. Pollutors must no longer hold out and Americans must share in the responsibility.

Information Gathering and Access Authorities[103]

SARA section 104(m), which amends CERCLA section 104(e),[104] authorizes the President and his representatives to gain access to sites when necessary to proceed with a response effort. This section is the most vivid demonstration of the interaction between Congress and the courts in shaping a practicable way to deal with releases of hazardous substances. In September, 1985, the United States Court of Appeals for the Seventh Circuit in *Outboard Marine Corp. v. Thomas,*[105] ruled that CERCLA section 104(e) did not grant EPA the requisite authority to enter defendant's property in the absence of an emergency. The court stated "that [power] may be what EPA needs and does not have. Only Congress, not we, can supply that power."[106]

Under old CERCLA section 104(e), EPA had the right of access only to information that would assist in determining the need for a response effort. In accordance with administrative search principles under the Fourth Amendment,[107] if access was not granted EPA was required to secure a search warrant.[108] The information to be made available included records, reports and samples;[109] EPA could "enter. . .any establishment or other place where such hazardous substances are, or have been generated, stored, treated, or disposed of or transported from. . . ."[110] Clearly this provided no authority to enter property adjacent to a hazardous waste site to put down monitoring wells, one of the activities EPA frequently needs to conduct to proceed to the next stage of cleanup.[111] This situation arose in the *Outboard Marine* case[112] where the PCBs were in an adjacent harbor, not in OMC's parking lot. Nor were they generated, stored, treated, or disposed of from that parking lot. It was only by using the parking lot that EPA could get at the PCBs. However, OMC was not willing to do the work itself, nor permit EPA entry.

Congress responded to the *Outboard Marine* case[113] by granting a broad range of powers to EPA to gain access to sites or obtain information.[114] The section provides relief for the *OMC* situation by authorizing designated officials to enter any facility[115] "to determine the need for response or the appropriate response or to effectuate a response action. . . ."[116] *OMC* is presently before the Seventh Circuit Court again[117] to be reinterpreted in light of the new amendment. The Supreme Court granted certiorari on October 6, 1986[118] and on December 8, 1986 the Supreme Court vacated the judgment of the Court of Appeals.[119]

The saga of cleaning up the alleged OMC PCB contamination in Waukegan Harbor may continue. Until the Seventh Circuit Court of Appeals decides the *Outboard Marine* case EPA does not have access to the company's property. An additional issue is the possibility of a Fifth Amendment violation.[120] SARA section 104(o)[121] authorizes the President to acquire property by purchase or condemnation to carry out remedial actions. SARA section 104(o) would not assist EPA to conduct the preparatory stage of a response effort that was necessary at the OMC site. What EPA needs, as the *OMC* Court astutely stated, is an easement which is possible under SARA section 104(m)[122] but which gives rise to a possible takings question. To win, the distressed landowner would have to show that the value of his property was so substantially reduced that the court would find he was bearing the entire cost of a public benefit. The physical presence of EPA epuipment and manpower would contribute to the possibility of such a finding. However, the proper remedy for a taking that occurs when government has made a trespassory invasion of private property without the intent to appropriate for public use is undecided.[123] The Supreme Court has three cases docketed[124] on inverse condemnation and it is possible that the Court will decide the question it was unable to answer last year in *Yolo County,* i.e. whether the Constitution requires a monetary remedy to redress some regulatory takings.[125]

An additional Supreme Court decision may be useful in forecasting the resolution of EPA's access disputes. In May 1986, in *Dow Chemical Co. v. United States,*[126] the Supreme Court unanimously held that EPA's use of a commercial aerial photographer to take pictures of a Dow manufacturing facility was within the agency's authority under section 114(a) of the Clean Air Act.[127] Dow argued that there was no statutory authority for EPA to investigate in such a manner. The Court reasoned:

> Congress has vested in EPA certain investigatory and enforcement authority, without spelling out precisely how this authority was to be exercised in all the myriad circumstances that might arise. . . . It is not necessary [for Congress] to identify explicitly each. . .technique that may be used. . . . Regulatory or en-

> forcement authority generally carries with it all the modes of inquiry and investigation. . .employed or used to execute the authority granted.[128]

This language may be relevant for two reasons. First, although the authority under which EPA was acting was the Clean Air Act, both air and water are included in the CERCLA section 101(8) definition of the environment.[129] Second, CERCLA, as amended by SARA, carries statutory authority similar to that in the Clean Air Act. Congress could have limited EPA's authority in SARA if it did not favor such an expansive reading of authority as that given by the Supreme Court in *Dow.*

State Preemption

One of the more oblique provisions of CERCLA was section 114.[130] While section 114(a) stated that no provision of the Act was intended to preempt any state "from imposing any additional liability or requirements. . .,"[131] section 114(c) directed that "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."[132] The Supreme Court valiantly wrestled with this language in *Exxon Corp. v. Hunt*[133] in March 1986. The Court reversed lower court rulings that taxation for the New Jersey Spill Fund was not preempted by CERCLA and held that the chemical companies, by being taxed by the state, were being forced to contribute to the same claims that were compensable by the Superfund. Although the Court's interpretation was logical and certainly gave credence to Congressional concern for overtaxing certain industries, Congress must have meant something different when it passed CERCLA section 114. SARA section 114(a) deletes CERCLA section 114(c)[134] and makes the *Exxon* decision moot.

SARA now allows states to tax individuals that are also taxed under the federal program. The 8.5 billion dollar Superfund appropriation for five years is to be funded by:

1.3 billion tax on chemical feed stock and imported chemical derivatives
2.7 billion on petroleum products with a lower tax on domestic than imported petroleum
2.5 billion Environmental tax on corporations
1.2 billion from general revenues.[135]

CERCLA was originally formed with the intention that the pollutor pays. Recently there have been cogent arguments in Congressional debates that toxic waste cleanup is a societal cost.[136] With the new allocation of responsibility and participation to the states[137] and the clarification on the state preemption issue,[138] it seems that Congress is willing to have the decision on who pays made on a more localized level. The prior restraints on Superfund expenditure in any one state have been loosened.[139] In addition, states are included as a matter of right in settlement negotiations.[140] State standards are included in cleanup standards and states have more freedom to clean up on their own and seek reimbursement from the Fund. It is clear that if the states are to participate as partners of the federal government in cleaning up hazardous waste sites, they must have a fund to operate on.[141] Congress in deleting section 114(c) of CERCLA left the states free to decide who would assume the financial burden of local hazardous waste sites.

Preenforcement Judicial Review

Another provision, added by SARA section 113(c),[142] which responds directly to judicial decisions, is the explicit prohibition of judicial review of any challenge to an administrative order issued under CERCLA section 106(a).[143] The United States Court of Appeals for the Second Circuit recently held against preenforcement judicial review in *Wagner Seed Co. v. Daggett.*[144] The court explained that Congress' intent in passing CERCLA was to begin the cleanup of hazardous waste sites across the country. To allow endless delays caused by prolonged litigation would utterly frustrate that intent. The court cited to decisions by the Court of Appeals for the Third[145] and Sixth Circuits[146] for the proposition that "Congress envisioned a procedure that permits the EPA to move expeditiously in the face of a potential environmental disaster."[147] In effect, Congress has codified the holding of *Wagner Seed* in SARA section 113(c) in order to ensure that cleanups will be accomplished without being delayed by litigation brought by PRPs before the cleanup is finished.

Penalties

The *Wagner Seed* decision[148] is also the source of one final amendment to CERCLA by SARA.[149] This decision was in the curious position of being moot to the parties when it was decided, although of major importance to others.

Wagner could not assert its "Act of God" defense without risking major fines and penalties. At the same time, if Wagner cleaned up it assumed major costs. The court resolved this due process dilemma without granting preenforcement review but by writing a good faith defense into the statute.[150] The court held that fines would be judicially assessed so there was no threat of Wagner being treated unfairly. Congress did not actually amend CERCLA section 107(b)[151] with a "good faith" defense, but SARA section 109(c) follows the court's lead by granting a district court "jurisdiction to hear and decide any such action."[152] This is particularly meaningful because the $5,000 per day fines that Wagner would have been subjected to are now $25,000[153] and violations of consent orders under SARA section 122 are subject to the same fine.[154]

Conclusion

The far reaching amendments to CERCLA have helped clarify the ambiguous provisions in the statute and will facilitate accomplishing its intent. Many of the new provisions that increase the costs can be avoided through voluntary compliance with an administrative order or participation in a settlement. And, costs are recoverable from liable parties. Compliance with cleanup standards remains within agency control. Superfund continues the basic scheme embodied in the hastily enacted law by the 96th Congress and implemented by the courts in the intervening years. Additionally, SARA recognizes that the Superfund is most effectively spent not on actually cleaning up or in litigation, but in administering the program that, at the least, causes the pollutor to clean up.

Jo-Ann Browne, '87

FOOTNOTES

1. 42 U.S.C. §§ 9601 - 9657 (1980).
2. W. Ginsberg, Environmental Law Materials, "CERCLA and the Courts" 1 (1981) (unpublished manuscript).
3. Some of the most litigated issues are strict and joint and several liability, pre-enforcement judicial review, liability, contractual defense, right of contribution, and right of access.
4. For example, in Wickland Oil Terminals v. ASARCO Inc., 792 F.2d 887 (9th Cir. 1986), the court of appeals adopted EPA's official interpretation of the phrase "costs of response . . . consistent with the national contingency plan . . ." found in CERCLA section 107 (a)(4)(B), 42 U.S.C. § 9607(a)(4)(B).
5. *See, e.g.*, Wagner Seed Co. v. Daggett, 800 F.2d 310 (2d Cir. 1986).
6. *See, e.g.*, Exxon Corp. v. Hunt, 106 S. Ct. 1103 (1986); Outboard Marine Corp. v. Thomas, 773 F.2d 883 (7th Cir. 1986).
7. Pub. L. No. 99-499, 100 Stat. 1613 A (1986) (amending and extending CERCLA, 42 U.S.C. §§ 9601 *et. seq.).*
8. Cases which were affected by or dealt with by SARA include: Exxon Corp. v. Hunt, 106 S. Ct. 1103 (1986) (rendered moot by section 114(a) of SARA which struck out section 114(c) of CERCLA and thereby repealed the prohibition on state taxation to fund Superfund purposes); Wagner Seed Co. v. Daggett, 800 F.2d 310 (2d Cir. 1986) (no pre-enforcement judicial review holding codified in SARA section 113(c) which inserts a new CERCLA section 113(h)); Outboard Marine Corp. v. Thomas, 773 F.2d 883 (7th Cir. 1985), *cert. granted,* 107 S. Ct. 58 (1986) (section 104(m) and (n) of SARA amends section 104(e) of CERCLA and clarifies EPA's investigatory powers and right to enter private property by *explicitly* authorizing EPA to enter private property and adjacent disposal areas to inspect and take samples); Wickland Oil Terminals v. ASARCO, Inc., 792 F.2d 887 (9th Cir. 1986) and companion case, N.L. Industries v. Kaplan, 792 F.2d 896 (9th Cir. 1986) (section 122(a) of SARA now adds an *explicit* right of contribution among PRPs into new CERCLA section 122(g)).
9. Wagner Seed Co. v. Daggett, 800 F.2d 310 (2d Cir. 1986); United States v. Maryland Bank and Trust Co., 632 F. Supp. 573 (D. Md. 1986).
10. Wagner Seed Co. v. Daggett, 800 F.2d 310 (2d Cir. 1986).
11. Exxon Corp. v. Hunt, 106 S. Ct. 1103 (1986).
12. Outboard Marine Corp. v. Thomas, 773 F.2d 883 (7th Cir. 1985).
13. Wagner Seed Co. v. Daggett, 800 F.2d 310 (2d Cir. 1986).
14. Section 113(b) of SARA creates a new CERCLA section 113(f), 42 U.S.C. § 9613(f), that gives PRPs an explicit right to contribution from other PRPs.
15. Section 122 of SARA adds a broad new section 122 on settlements into CERCLA, 42 U.S.C. § 9622.
16. Section 117 of SARA inserts a new CERCLA section 117 on public participation, 42 U.S.C. § 9617.
17. SARA section 206 inserts a new CERCLA section 310 on citizen suits.
18. As stated earlier, judges accord great weight to agency interpretation of the law the agency is charged with enforcing. Sometimes this results in a wholesale adoption of agency policy, and other times it is one of many bases for judicial decisions. Private attorneys have a hand in shaping the law in the respect that judges usually reach their decision based on the case law argued and briefed before them.
19. 42 U.S.C. § 9607.
20. *Id.* at § 9607(a).
21. *See, e.g.*, State of New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985).
22. This is particularly alarming when one realizes that, at least in New Jersey, the state sanctioned the disposal of chemicals at landfills now appearing on the NPL.
23. 42 U.S.C. § 9601(32). The Clean Water Act does not have an explicit liability provision in the definitional section. *See* 33 U.S.C. § 1321(a). However, section 1321(g) of the Clean Water Act, 33 U.S.C. § 1321(g), covers liability for actual costs of removal, and cases interpreting the Clean Water Act have held that the standard of liability under section 1321 is strict liability.
24. United States v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1983).
25. However, this defense is not available to any party "who, by any act or omission, caused or contributed to the release . . . of a hazardous substance . . ." SARA § 101(f), new CERCLA § 101(f), new CERCLA § 101(35)(D), 42 U.S.C. § 101(35)(D). Thus, for example, any "innocent landowner" who inadvertently punctures a drum would be liable. In addition, SARA § 101(f), new CERCLA (35)(c),42 U.S.C. § 9601 (35)(c) increases the reach of CERCLA § 107(a), 42 U.S.C. § 107(a), by holding a prior owner liable under CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1), if the prior owner had actual knowledge of the release while he owned the property and subsequently transferred the property without disclosing such knowledge to the buyer. If a situation like this occurs, the prior owner cannot avail himself of the defense in CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3).
26. *See* SARA § 101(f), new CERCLA § 101 (35)(A)(i) and (35)(B), 42 U.S.C. § 9601 (35)(A)(i) and (35)(B).
27. 632 F. Supp. 573 (D. Md. 1986). *See* 3 Hofstra Envtl. L. Dig. 17 (Fall 1986), for a discussion of *Maryland Bank.*
28. The situation in *Maryland Bank* is distinguishable from United States v. Mirabile, 15 Envtl. L. Rep. 20992 (E.D. Pa. 1985), where the bank *quickly* assigned its interest in the foreclosed property and thus was allowed to claim the exception to liability in section 101(20)(A) of CERCLA, 42 U.S.C. § 9601(20)(A).
29. SARA § 101(f), new CERCLA § 101(35)(A)(i) and (35)(B), 42 U.S.C. § 9601(35)(A)(i) and (35)(B). It should be noted that the "innocent landowner" provision in SARA, which hinges on lack of knowledge, also places a burden on financial institutions to be prudent and cautious in making secured loans.
30. SARA § 104(o), new CERCLA § 104(j), 42 U.S.C. § 9604(j).
31. *See* CERCLA § 101(20)(A) and (21), 42 U.S.C. § 9601(20)(A) and (21).
32. 42 U.S.C. §§ 6901-6987 (1984) (RCRA).
33. SARA § 101(b) amends CERCLA § 101(20), 42 U.S.C. § 9601(20).
34. *See* note 30 *supra.*
35. SARA § 113(b) creates a new CERCLA § 113(f), 42 U.S.C. § 9613(f), that gives PRPs an *explicit* right to contribution from other PRPs. *See also* 42 U.S.C. § 9607(a)(4)(A), (B) and (C) (sections in CERCLA that have been held to authorize a private cause of action for contribution).
36. SARA § 122(a) adds a new CERCLA § 122(e), 42 U.S.C. § 9622(e), which enables EPA to promote discussions among PRPs. If EPA thinks it would facilitate voluntary settlement and would expedite remedial action, EPA can notify all PRPs as to the identity of all PRPs at a site. *Id.* In addition, SARA § 104(a) amends CERCLA § 104(a)(1), 42 U.S.C. § 9604(a)(1), to authorize EPA to allow PRPs to conduct removal or remedial actions and to prepare a RI/FS.
37. *See* Artesian Water Co. v. Government of New Castle County, 605 F. Supp. 1348 (D. Del. 1985); State of Colorado v. ASARCO, Inc., 608 F. Supp. 1484 (D. Colo. 1985); Pinole Point Properties v. Bethlehem Steel Corp., 596 F. Supp. 283 (N.D. Cal. 1984); City of Philadelphia v. Stepan Chemical Co., 544 F. Supp. 1135 (E.D. Pa. 1982).
38. *See* Wickland Oil Terminals v. ASARCO, Inc., 792 F.2d 887 (9th Cir. 1986); N.L. Industries v. Kaplan, 792, F.2d 896 (9th Cir. 1986); United States v. New Castle County, 642 F. Supp. 1258 (D. Del. 1986).
39. 42 U.S.C. § 9607.
40. *See* note 35 *supra.*
41. SARA § 122(a), new CERCLA § 122(g), 42 U.S.C. § 9622 (g).
42. SARA § 117, new CERCLA § 117, 42 U.S.C. § 9617. This new section assures public participation on the selection of plans for cleanup remedies, including those to be carried out by EPA under CERCLA § 104, 42 U.S.C. § 9604, those called for in an enforcement action under CERCLA § 106, 42 U.S.C. § 9606, those selected in a voluntary settlement with PRPs, and those governing federal facilities.
43. *Id.* This new section of CERCLA is an example of EPA's role in fashioning the law, although this provision is not a result of any case law. It is a long standing policy of EPA to sponsor public meetings to field questions from citizens on the extent of the hazard, as well as the reasons for adopting a certain response effort. These meetings also provide a forum for the presentation of opposing views on the best means to conduct the clean up.
44. SARA § 122, new CERCLA § 122, 42 U.S.C. § 9622.
45. *Id.* There was no existing case law that influenced Congress on this subject. However, the settlement policy that was developed and followed by counsel at EPA seems to have been the foundation for this new provision. *See* Atkeson, Goldberg, Ellrod & Connors, *An Annotated Legislative History of the Superfund Amendments and Reauthorization Act of 1986 (SARA),* 16 Envtl. L. Rep. 10412 (1986) (hereinafter cited as *Annotated History).*
46. For an interesting discussion of EPA's settlement policy *See* Miller, *The Environmental Protection Agency's (EPA) Use of Settlement as an Alternative Dispute Resolution Method: An Everchanging EPA Policy,* 3 Hofstra Envtl. L. Dig. 8 (Spring 1986).

47. It should be noted that there are cases on record where the costs of litigation have exceeded the cost of the response effort. *See e.g.*, United States v. Outboard Marine Corp., 789 F.2d 497 (7th Cir. 1986) (an example of the unconscionable delay and cost resulting from court battles).
48. *See* Bayko & Share, *Stormy Weather on Superfund Front Forecast as 'Hurricane SARA' Hits*, 9 Nat'l L.J. 24 (Feb. 16, 1987) [hereinafter cited as *Hurricane SARA*], wherein it was stated that "[o]nce PRPs are convinced that they ultimately will have to pay for a clean up, they generally prefer to take control and avoid the greater expense commonly believed to accompany government projects."
49. Whereas the government may choose to single out a few of the PRPs and issue an order to clean up the site, there is nothing to prevent the target group from seeking reimbursement from other PRPs. The government increases its expenses by expanding the class of defendants; the PRPs narrow their expenses by so doing.
50. *See* note 46 *supra. See also Hurricane SARA, supra* note 48.
51. *See* note 44 *supra.*
52. 42 U.S.C. § 9607.
53. CERCLA § 105, 42 U.S.C. § 9605.
54. CERCLA § 104(a), 42 U.S.C. § 9604(a).
55. CERCLA § 106, 42 U.S.C. § 9606.
56. *See* Anderson, *Negotiations and Informal Agency Action; The Case of Superfund,* 1985 Duke L.J. 261, 301-02.
57. SARA § 109 amends various provisions of CERCLA and increases both civil and criminal penalties for Superfund violations.
58. SARA § 107(b) amends CERCLA § 107(a), 42 U.S.C. § 9607(a), to now read "[t]he amounts recoverable under [section 107(a)(4)(A)-(D)] shall include interest. . . ."
59. SARA § 121(a), new CERCLA § 121, 42 U.S.C. § 9621.
60. CERCLA § 105(8)(B), 42 U.S.C. § 9605(8)(B).
61. SARA § 121(a), new CERCLA § 121, 42 U.S.C. § 9621. CERCLA § 121(b)(1), 42 U.S.C. § 9621(b)(1), states a preference for remedial actions in which treatment "permanently and significantly reduces the volume, toxicity, or mobility of the hazardous substances" and that offsite transport and disposal is the least favored method of treatment. *Id.*
62. *See, e.g., Hurricane SARA, supra* note 48, at 25.
63. 42 U.S.C. § 9605.
64. *Id.* at § 9607(a)(4)(A), (B).
65. *Id.* at § 9607(a)(4)(A) (emphasis added).
66. *Id.* at § 9607(a)(4)(B) (emphasis added).
67. However, a close reading of CERCLA indicates some confusion in language. Although CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A), states that government expenditures must not be *"inconsistent"* with the NCP, CERCLA § 104(a)(1), 42 U.S.C. § 9604(a)(1), states that the "President is authorized to act, *consistent* with the [NCP]." (emphasis added).
68. *See* note 59 *supra.*
69. *Id.*
70. SARA § 121(a), new CERCLA § 121(d)(4)(C), 42 U.S.C. § 9621(d)(4)(C).
71. SARA § 121(a), new CERCLA 121(a), 42 U.S.C. § 9621(a).
72. *See* SARA § 110, amending CERCLA § 104(i), 42 U.S.C. § 9604(i); SARA § 105(b), adding new CERCLA § 105(c)(2), 42 U.S.C. § 9605(c)(2). *See also* SARA § 107(b), adding new CERCLA § 107(a)(4)(D), 42 U.S.C. § 9607(a)(4)(D) (PRPs are liable for the cost of health studies).
73. 452 U.S. 490 (1981).
74. *Id.* at 514-22.
75. For example, there has been little progress in industrial noise reduction because the costs of technologically achieving abatement are very high and hence not "feasible." There is a less expensive alternative, ear plugs, but their use is not enforced.
76. *See* note 59 *supra.*
77. 33 U.S.C. §§ 1313, 1314 (1984).
78. *See* note 59 *supra.*
79. It should be noted that the concerns which motivate PRPs in selecting a contractor are different than the concerns which motivate the government. Presumably, PRPs are interested in cost minimization, whereas the government is more concerned with an adherence to regulations.
80. SARA § 119, new CERCLA § 119, 42 U.S.C. § 6919.
81. SARA § 119, new CERCLA § 119(a)(1) and (2), 42 U.S.C. § 6919(a)(1) and (2).
82. SARA § 119, new CERCLA § 119(c), 42 U.S.C. § 9619(c).
83. 42 U.S.C. § 6901 (1984).
84. SARA § 119, new CERCLA § 119(c)(4)(A), 42 U.S.C. § 9619(c)(4)(A).
85. SARA § 121(a), new CERCLA § 121(b), 42 U.S.C. § 9621(b).
86. *Id.*
87. SARA § 104(k), new CERCLA § 104(c)(9), 42 U.S.C. § 9604(c)(9).
88. SARA § 117, new CERCLA § 117, 42 U.S.C. § 9617 (public participation).
89. SARA § 206, new CERCLA § 310 (citizen suits).
90. It should be noted that the United States Supreme Court has held that a trustee in bankruptcy cannot abandon a hazardous waste site despite it having no value to the bankruptcy estate. Midlantic National Bank v. New Jersey Department of Environmental Protection, 106 S. Ct. 755 (1986).
91. SARA § 122, new CERCLA § 122(b)(1), 42 U.S.C. § 9622(b)(1).
92. *See* Pennsylvania v. Delaware Valley Citizen's Council for Clean Air, 106 S. Ct. 3088 (1986).

93. SARA § 107(b), amending CERCLA § 107(a), 42 U.S.C. § 9607(a).
94. *See* SARA § 109 (which amends various provisions of CERCLA).
95. SARA § 113(b), new CERCLA § 113(j)(1) and (2), 42 U.S.C. § 9613(j)(1) and (2).
96. SARA § 122(a), new CERCLA § 122, 42 U.S.C. § 9622.
97. SARA § 117, new CERCLA § 117(a), 42 U.S.C. § 9617(a).
98. SARA § 206, new CERCLA § 310.
99. SARA § 122(a), new CERCLA § 122(d)(2).
100. 54 R.I. 411, 173 A. 627 (1934).
101. *See* Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970) (wherein the New York Court of Appeals refused to enjoin a nuisance because the social utility of the activity causing the nuisance outweighed the environmental harm).
102. *See* SARA § 117, new CERCLA § 117, 42 U.S.C. § 9617.
103. SARA § 104(m), amending CERCLA § 104(e), 42 U.S.C. § 9604(e).
104. *Id.*
105. 773 F.2d 883 (7th Cir. 1985).
106. *Id.* at 890.
107. U.S. Const. amend. IV.
108. *See* Marshall v. Barlows, Inc., 436 U.S. 307 (1978); See v. Seattle, 387 U.S. 541 (1967).
109. Old CERCLA § 104(e), 42 U.S.C. § 9604(e).
110. *Id.*
111. The nature of ground water contamination will frequently necessitate approach from the perimeter of a site in order to contain or treat the waste. EPA's response efforts would be seriously hampered if they were denied access to private property.
112. 773 F.2d 883 (7th Cir. 1985) (OMC).
113. *Id.*
114. SARA § 104(m), amending CERCLA § 104(e), 42 U.S.C. *F* 9604(e).
115. *See* CERCLA § 101(9), 42 U.S.C. § 9601(9) for a definition of "facility."
116. SARA § 104(m), CERCLA § 104(e)(3)(D), 42 U.S.C. § 9604(e)(3)(D).
117. 55 U.S.L.W 3410 (U.S. Dec. 8, 1986) (No. 85-1735).
118. 55 U.S.L.W 3231 (U.S. Oct. 6, 1986) (No. 85-1735).
119. 55 U.S.L.W 3410.
120. U.S. Const. amend. V.
121. SARA § 104(o), new CERCLA § 104(j), 42 U.S.C. § 9604(j).
122. SARA § 104(m), amending CERCLA § 104(e), 42 U.S.C. § 9604(e).
123. MacDonald, Sommer & Frates v. Yolo County, 106 S. Ct. 2561 (1986) (Yolo County). *See* 3 Hofstra Envtl. L. Dig. 25 (Fall 1986) for a discussion of *Yolo County.*
124. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles (No. 85-1199); Nollan v. California Coastal Commission (No. 86-133); Keystone Bituminous Coal Association v. DeBenedictis (No. 85-1092). *See* 73 ABA J. 22 (April 1987), for a discussion of these cases.
125. 106 S. Ct. 2561.
126. 106 S. Ct. 1819 (1986) (Dow). For a discussion of *Dow see* 3 Hofstra Envtl. L. Dig. 26 (Fall 1986).
127. 42 U.S.C. § 7414(a).
128. 106 S. Ct. at 1824.
129. 42 U.S.C. / 9601(8).
130. 42 U.S.C. § 9614.
131. *Id.* at § 9614(a).
132. *Id.* at § 9614(c).
133. 106 S. Ct. 1103 (1986) (Exxon). For a discussion of *Exxon see* 3 Hofstra Envtl. L. Dig. 23 (Fall 1986).
134. 42 U.S.C. 9614(c).
135. *See generally* Title V of SARA which enacted the Superfund Revenue Act of 1986, SARA §§ 501-531.
136. *See, e.g.,* Senate Finance Committee Report, S. Rep. No. 73, 99th Cong., 1st Sess. at 13 (1985).
137. *See generally* SARA §§ 104, 122, 173.
138. SARA § 114(a).
139. SARA § 104(h), amending CERCLA § 104(c)(5), 42 U.S.C. § 9604(c)(5).
140. SARA § new CERCLA § 122, 42 U.S.C. § 9622.
141. This delegation of responsibility can be interpreted as another recognition by Congress that the original intent, to rely on Superfund to clean up and later be reimbursed, lacked both a carrot and a stick.
142. SARA § 113(c), new CERCLA § 113(h), 42 U.S.C. § 9613(h).
143. *Id.,* new CERCLA § 113(h)(2), 42 U.S.C. § 9613(h)(2).
144. 800 F.2d 310 (2d Cir. 1986) (Wagner Seed). For a discussion of *Wagner Seed see* 3 Hofstra Envtl. L. Dig. 21 (Fall 1986).
145. Wheaton Industries v. United States Environmental Protection Agency, 781 F.2d 354 (3d Cir. 1986).
146. J.V. Peters & Co. v. United States Environmental Protection Agency, 767 F.2d 263 (6th Cir. 1985).
147. 800 F.2d at 315.
148. 800 F.2d 310.
149. SARA § 109 (penalties).
150. 800 F.2d at 316-17.
151. 42 U.S.C. § 9607(b).
152. SARA § 109(c), amending CERCLA § 109(a)(4), 42 U.S.C. § 9609(a)(4).
153. SARA § 109(b), amending CERCLA § 106(b), 42 U.S.C. § 9606(b).
154. SARA § 122(a), new CERCLA § 122(1), 42 U.S.C. § 9622(1).

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