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ADMINISTRATIVE LAW

Waste Management Inc., v. U.S.E.P.A., 669 F. Supp. 536 (D.D.C. Sept. 16, 1987)

At issue in this suit was the Environmental Protection Agency's (EPA) decision to defer issuing a research permit for ocean incineration to Waste Management Inc. until the EPA promulgates new rules under the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1401 et seq.

Waste Management, Inc. challenged the EPA's decision on two grounds. Its first argument claims that the EPA's decision to defer issuing the research permit was a "rule" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 5 et seq., thus, requiring the EPA to comply with the public notice and comment requirements in the Administrative Procedure Act (APA) 5 U.S.C. § 553(b).

APA, 5 U.S.C. § 551(4) defines a rule as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure or practice requirements of an agency ..." The court readily found that the EPA's deferral decision was a rule. The true question was whether the EPA's deferral decision fell within one of the exemptions contained in 5 U.S.C. § 553(b) (A). If it did, then the EPA would not be required to comply with the public notice and comment requirement.

Judge Richey held that the EPA's action was rulemaking activity exempt from the public notice and comment requirement. 669 F. Supp. at 539. Judge Richey explained that there are three categories of rule making activity which are exempt from the public notice and comment requirement. They are rules which are a general statement of policy, rules which interpret existing rules, and those which are procedural in nature. Judge Richey dismissed the first two categories of exemptions as not applicable to the EPA's deferral decision; however, he did find that the decision fell within the third category. To arrive at his decision, Judge Richey explained that he had to determine if the rule "substantially affected" the rights or interests of Waste Management and whether the EPA's decision to defer was arrived at solely for the purpose of impinging upon Waste Managements interests. If the rule did not jeopardize the applicants substantive rights, and if the agency had undertaken its decision for reasons other than affecting Waste Management's interests, the rule was procedural and not substantive in nature.

Judge Richey concluded that the EPA's decision to merely defer the issuance of permits until the promulgation of new rules did not substantially affect Waste Management's interest. He reasoned that Waste Management would be able to pursue its ultimate goal of obtaining a permit once the new rules were in place. The judge stated that the EPA's decision may have delayed the procurement of a permit, but that it did not jeopardize Waste Management's ability to acquire a research permit in the future.

The judge next had to consider whether the EPA's purpose for deferring its decision was intended by the EPA to affect Waste Managements interest. Judge Richey found that the EPA had carried its burden in proving that its decision to defer the issuance of permits was premised on the need for time to consider the massive amount of comments received addressing ocean incineration and therefore the EPA was not seeking to harm Waste Management interest with its deferral decision.

Even though a public notice and comment period was not required, the EPA's decision was subject to judicial review. Therefore, Waste Management, Inc. also argued that the EPA's decision to defer the issuance of research permits for incineration at sea was aribitrary and capricious. To reach a determination, the judge concluded that a different test then the one which is usually employed to decide whether an agency's action is arbitary and capricious was warranted. Here, unlike in normal rulemaking activity the agency sought to maintain the status quo. In such situations the judge discerned that a two prong test was warranted. To satisfy the first prong, the agency must demonstrate that it considered reasonable alternatives to the course of action it chose to follow. As to the second prong, the agency had to show that it had engaged in reasoned decision making.

In the first prong it is implied that if the agency had considered alternatives, then its decision was reasonable. The EPA explained that the alternative action Waste Management sought, namely the issuance of a permit prior to the final rules, was not a better alternative. The EPA stated that it was concerned about the safety of those operating ocean incineration vessels and that there still remained a great deal of uncertainty regarding the hazards posed to the environment by incineration at sea. Judge Richey found the EPA had considered alternatives, and noted that the EPA had also considered the alternative of shutting down the program entirely and had chosen instead to merely defer, thus choosing the least restrictive path

available.

Judge Richey also concluded that the EPA's decision was produced through reasoned decision making. This was due to the fact that the EPA had adequately shown that before it would issue a permit for a burn, numerous specific issues needed further consideration. Among the issues needing further review included but were not limited to: the need for establishing a financial responsibility requirement, assessments to the risks posed by land and marine transport and the need to finalize site selection criteria. The EPA was further able to show that these issues had not been developed post-hoc, but rather have been a continuing concern of the Agency. Therefore Judge Richey held that the EPA's deferral decision was neither arbitrary nor capricious.

Interestingly, Judge Richey stressed in his conclusion that his decision only addressed the EPA's decision to defer issuing research permits and not an EPA decision to forego ever issuing a permit. In light of recent events, the latter question may find itself before the courts. Soon after Judge Richey rendered his decision Waste Management, Inc. announced that it would not appeal the decision. 18 ER 1393. A few months later Waste Management then announced it was abandoning its U.S. ocean incineration plan completely. Not a month had passed between Waste Management's announcement to abandon its U.S. operation then the EPA proclaimed that it was considering dropping its ocean incineration program. The EPA stated that it may abandon the program because of budgetary restraints imposed on it by the fiscal operating plan submitted to Congress on February 1, 1988. However, Waste Management, Inc. was not the only party interested in pursuing an ocean incineration program. SeaBurn, a division of Stolt-Neilsen Inc. has always expressed an interest, and since Waste Management decided not to further pursue its program, SeaBurn has been playing a more active role in seeing that the proposed final rules are forthcoming. Therefore, if the EPA decides to drop the ocean incineration program, perhaps SeaBurn will bring before the courts the question of whether the EPA may lawfully decide not to promulgate the proposed rules.

Susan M. Dorgan, '88

Editor's Note: SeaBurn has since filed suit against the EPA.

AIR

Natural Resources Defense & Council, Inc. v. U.S. Environmental Protection Agency, 804 F. 2d 710 (D.C. Cir. Nov. 4, 1986) *vacated* 810 F. 2d 270 and Natural Resources Defense Council, Inc. v. Environmental Protection Agency, 824 F. 2d 1146 (D.C. Cir. July 28, 1987).

Judge Bork, writing the majority opinions for both cases, addresses the Environmental Protection Agency's (EPA) decision to withdraw its 1977 regulation which set a health based standard for vinyl chloride emissions *NRDC v. EPA,* 804 F. 2d 710 (D.C. Cir. 1986) and replace it with the 1976 technology based standard which required a reduction in vinyl chloride emissions to the lowest level economically feasible. Pursuant to § 112 of the Clean Air Act, the Administrator must set the standard for emissions of hazardous air pollutants "at a level which in his judgment provides an ample margin of safety to protect the public health." 42 U.S.C. § 7412(a)(1)(1982). Hazardous air pollutants are defined as "pollutants to which no ambient air quality standard is applicable and which in the judgment of the Administrator causes or contributes to air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible or incapacitating reversible illness." 42 U.S.C. § 7412(a) (1) (1982).

The EPA, in determining the emission standard for vinyl chloride, admitted that vinyl chloride, a chemical used in producing plastics, is a strong carcinogen. Based on dose response data, the EPA determined that vinyl chloride produces both carcinogenic and noncarcinogenic disorders. 804 F. 2d at 712.

The EPA characterized vinyl chloride as an "apparent non-threshold" pollutant, i.e., a pollutant which appears to create health risks at all levels of emission but because of scientific uncertainty has no ascertainable threshold level below which adverse effects to health do not occur.

The EPA justified its withdrawal of the 1977 health based standard by claiming that such a standard would place "unreasonable costs" on the industry and that "no control technology" existed which would allow reduction to the required level. 804 F. 2d at 712. Thus, the EPA alleged that the cost of reducing vinyl chloride emissions below the level economically feasible would outweigh the benefits of such action, the costs being entire or partial industry closure, whereas the benefits are reduced health risks. The EPA reasoned that in replacing the 1977 health based standard with the 1976 technology based standard it would reduce emissions of vinyl chloride to the extent economically and technologically feasible. The EPA believed that the 1976 "best available technology" standard would impose the most stringent regulation possible on industry while satisfying the statutory "command of providing an ample margin of safety." *Id.* at 712.

In fact, the EPA interpreted § 112 as permitting "the Administrator to assure that the costs of control technology are not grossly disproportionate to the level of emission reduction achieved." *Id.*

The Natural Resources Defense Council (NRDC), however, filed a petition for review of the EPA's action of withdrawing the 1977 health based standard. The NRDC argued that, since vinyl chloride is a carcinogen, the "ample margin of safety" language of the Clean Air Act § 112 did not permit the Administrator of the EPA to base emission standards for hazardous air pollutants on technological and economic feasibility rather than on health considerations.

Judge Bork denied the NRDC's petition to review the EPA's actions, thus, affirming the EPA's withdrawal of the 1977 health based standard for vinyl chloride emission. In deciding this case, Judge Bork applied the test adopted by the U.S. Supreme Court in ***Chevron USA v. Natural***

Resources Defense Council, 467 U.S. 837, 843 (1984), where the Congressional intent of the statute is unambiguous, the court must comply with it; however, where the Congressional intent is ambiguous, the agency's interpretation of the statute will prevail unless it is unreasonable. Judge Bork found that the Congressional intent of § 112 of the Clean Air Act was the result of a compromise between a House bill setting air pollution standards on the best available technology basis and a Senate bill considering only health risks. Based on such findings, Judge Bork held that the EPA's interpretation of "the ample margin of safety" requirement of § 112 was reasonable because he concluded that § 112 was ambiguous despite unambiguous language.

Thus, Judge Bork would allow the EPA to consider solely economic and technological considerations in setting standards for hazardous air pollutants because the magnitude of health risks at specific levels of emissions can only be estimated and not measured, due to scientific uncertainty.

Judge Skelly Wright in his dissent noted that § 112 of the Clean Air Act was very similar to the Senate bill. *Id.* at 733. Judge Wright stressed the fact that the clause defining hazardous air pollutants in § 112 mirrored the definition given for hazardous agents in the Senate bill. *Id.* at 729. Thus, Judge Wright concluded that in understanding § 112 the court should be guided by the Senate's interpretation, which opted for health based standards.

Judge Wright continued, stating that the Clean Air Act of 1970 was a response to the public concern over the ineffectiveness of the Air Quality Act of 1967 to improve air quality. *Id.* at 724. By enacting the Clean Air Act, Congress intended to "force industries to produce the equipment necessary for effective control of hazardous air pollutants by imposing air quality standards that are presently difficult to attain." *Id.* at 729. Judge Wright concluded by finding that § 112 required a standard providing for "an ample margin of safety to protect human health" premised on health and not technological considerations. *Id.* at 713.

Less than one year later, the NRDC again petitioned for a review of the EPA's withdrawal of the proposed standards for vinyl chloride under the Clean Air Act and this time the petition was granted with Judge Bork again writing for the court. The NRDC was able to petition for another review because on Jan. 28, 1987 the earlier decision had been vacated. 810 F. 2d 270.

In *Natural Resources Defense Council v. EPA,* 824 F. 2d 1146 (D.C. Cir. 1987) the court held, unlike the first case, that the EPA must reconsider the 1977 proposed rule. *NRDC v. EPA, Id.* The opinion, however, varied little from the prior decision. The difference was merely that the court now required the EPA to first determine a "safe" level of emissions, prior to cost and technological factors being employed to determine the emission standard. Judge Bork in this decision found that Congress had not precluded the consideration of cost and feasibility factors. Judge Bork did note in this decision that § 112 of the Clean Air Act included the language "to protect the public health" and that this would seem to "evince an intent to make health the primary consideration." *Id.* at 1155. However, Judge Bork later declared that the court cannot discern clear congressional intent to preclude consideration of cost and technological feasibility in setting emission standards under section 112. Thus permitting the court to find that the Administrator may consider these factors." *Id.* at 1158.

Thus, what if any changes will be brought about by the reversal of the panel's earlier decision remains to be seen.

Leslie Lombardo, '89
Jonathon J. Mincis, '89

ATTORNEY'S FEES

Pennsylvania v. Delaware Valley Citizen's Council for Clean Air, 106 S. Ct. 3088 (July 2, 1986).

The present suit was brought in the District Court for the Eastern District of Pennsylvania by Delaware Valley Citizens Council for Clean Air (Delaware Valley) seeking attorney's fees and costs expended in administrative proceedings related to a prior suit against the Commonwealth of Pennsylvania (Commonwealth).

In 1977, Delaware Valley filed suit to compel the Commonwealth to meet federal air quality standards as required by the Clean Air Act, 42 U.S.C. §§ 7410-7642 (1982, Supp. 1986). As a result of the suit, a consent decree was entered in 1978, in which the state agreed to establish, by August of 1980, a program for inspection and maintenance of auto emissions (I/M program) in ten counties. Following a number of requests (some granted) by Pennsylvania Department of Transportation (DOT) to postpone implementation of the decree, as well as enactment of a statute (later overturned) by the Pennsylvania General Assembly to prohibit expenditure of state money to fund the program, Delaware Valley succeeded in forcing the Commonwealth to abide by the consent decree. The primary issue before the United State Supreme Court was whether § 304(d) of the Clean Air Act, 42 U.S.C. § 7604(d), authorized attorney's fees for involvement in these post-consent decree administrative proceedings.

Also at issue before the Court was whether the lower courts erred in enhancing attorney's fees based on the superior quality of counsel's performance and whether an upward adjustment of the "lodestar" (calculated by multiplying the reasonable number of hours spent on the case by a reasonable hourly rate) based on the low likelihood of success was proper.

The first issue that the Court addressed was whether § 304(d) of the Clean Air act, 42 U.S.C. § 7604, authorizes attorney's fees for work done in administrative proceedings as opposed to traditional judicial proceedings. Section 304(d) of the Clean Air Act provides: "[t]he Court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert fees) to any party, whenever the Court determines such award is appropriate." The Commonwealth argued that § 304(d) was limited to judicial actions only, thus excluding

attorney fee awards for any work in, or related to, administrative proceedings.

The Court upheld that § 304(d) of the Clean Air Act did indeed authorize attorney's fees for administrative proceedings. This decision was based on a comparison of § 304(d), which authorizes attorney's fees for "any action" to enforce the Act to § 1988 of the Civil Rights Act, 42 U.S.C. § 1988, which authorizes attorney's fees "in any action or proceeding" brought to enforce the Act. The Court ruled that the slightly different wording did not represent Congressional intent to limit litigant compensation under the Clean Air Act to judicial proceedings merely on the basis of the absence of the words "or proceeding" in § 304(d). First, the Court found that Congress used the words "action" and "proceeding" interchangeably throughout the legislative history of § 304. Second, and more important, the Court found that § 304 of the Clean Air Act and § 1988 of the Civil Rights Act have purposes which are almost identical and should therefore be interpreted in a similar manner. "Section 1988 was enacted to ensure that private citizens have a meaningful opportunity to vindicate their rights protected by the Civil Rights Laws." 106 S. Ct. at 3095. The provision for attorney's fees in the Clean Air Act was included for the purpose of promoting "citizen participation in the enforcement of standards and regulations established under this Act," S. Rep. NO. 91-1196, p. 36 (1970). Therefore, since courts have held that under § 1988 of the Civil Rights Act post-judgment monitoring of a consent decree is a compensable activity for which counsel is entitled to a reasonable fee, § 304 of the Clean Air Act authorizes attorney's fees for this activity as well.

Once the Court held that attorney's fees were authorized for administrative-related proceedings, it next had to decide whether an award for fees and costs to Delaware Valley would be appropriate in this instance. In determining whether *all* legal expenditures made by Delaware Valley in pursuing enforcement of the consent decree were compensable, the Supreme Court followed the method employed by the lower courts of separating the post-decree developments into nine phases, with each phase representing a different aspect of the litigation. The award of fees and costs to Delaware Valley for judicial litigation phases was not challenged by the Commonwealth in this appeal.

The post-decree phases which did not take place in the context of traditional judicial litigation involved Delaware Valley's monitoring of the Commonwealth's performance in developing an I/M program that would satisfy the consent decree, as well as Delaware Valley's submission of comments concerning regulations proposed by the Pennsylvania DOT. Delaware Valley also thwarted the Commonwealth's attempt to seek Environmental Protection Agency approval of an I/M program covering a smaller geographic area than that which was mandated by the decree. The Court held that "enforcement of the decree, whether in the courtroom before a judge, or in front of a regulatory agency with power to modify the substance of the program ordered by the Court, involved the type of work which is properly compensable as a cost of litigation under § 304," 106 S. Ct. at 3095. The Court found that the measures taken by Delaware Valley were necessary to protect the remedies afforded to them in the consent decree. *Id.*

The second issue addressed by the Court was whether the lower court erred by enhancing the fee award for one of the nine phases based on the superior quality of counsels' performance. The District Court for the Eastern District of Pennsylvania applied three different hourly rates in calculating the lodestar based on the difficulty level of the particular task performed. The district court also stated that included in their determination was the attorney's reputation, status and the type of activity being performed. The most difficult work was valued at one hundred dollars per hour; work that could be done at the associate level was valued at sixty-five dollars per hour; and a rate of twenty-five dollars per hour was applied for tasks that required little or no legal ability. The lodestar figure for all of the phases equaled $82,233.50. Lodestar figures were increased in three of the nine phases by a multiplier of two because the trial court found that there was a low likelihood of success in those phases. One of these three phases (phase V) was again multiplied by two to reflect superior work that culminated in what the court felt was an outstanding result. The court awarded fees of $209,813.00 106 S. Ct. at 3093.

The Court of Appeals for the Third Circuit upheld the district court's use of multipliers in these phases. However, the Supreme Court reversed since the lodestar figure already included the relevant factors comprising a reasonable fee. The Supreme Court stated that both lower courts had included the quality of service in the lodestar by assigning different hourly rates for the level of difficulty of the work. Thus, to avoid double counting, the Supreme Court held that the lodestar could not be enhanced for quality of work. The Court found that Delaware Valley did not present evidence to show that the result obtained was so outstanding as to merit an additional differential or that the figure was lower than awards in similar cases. 106 S. Ct. at 3099.

The Supreme Court left open for reargument the third issue: whether an upward adjustment of the lodestar for three of the phases based on low likelihood of success is proper. The Court in *Hensley v. Eckerhart,* 461 U.S. 424 (1983), held that a lodestar calculation may be enhanced in certain situations, one of which is the undesirability of the case. 106 S. Ct. at 3098 (citing *Hensley,* 461 U.S. at 434). *Hensley* was limited by the Court's decision in *Blum v. Stenson,* 465 U.S. 886 (1984), where it held that a lodestar figure may be enhanced in "certain rare and exceptional cases." 106 S. Ct. at 3098 (quoting *Blum,* 465 U.S. at 898). The questions remaining are: Whether there was a low likelihood of success in seeking to enforce the consent decree; and if so, whether Delaware Valley's efforts consitute a rare and exceptional situation as *Blum* requires, yet failed to define.

Roberta Hertz '88
Rhonda Meyer '88

COMMERCE CLAUSE

Norfolk Southern Corp. v. Oberly, 822 F. 2d 388 (3rd Cir. June 30, 1987).

The federal Coastal Zone Management Act, 16 U.S.C. § 1451 *et seq.* (1982) (CZMA), was enacted "to preserve ... and where possible, to restore... the resources of the Nation's coastal zone..." 16 U.S.C. § 1452 (1). The Act authorizes the Secretary of Commerce (Secretary) to make grants to the states for the development and implementation of state coastal zone management programs, which programs must then receive his approval. 16 U.S.C. § 1545 & 1455.

In *Norfolk Southern Corp. v. Oberly,* 822 F. 2d 388 (3rd Cir. 1987), the question arose as to whether the Secretary's approval of the Delaware Coastal Zone Management Program (CZMP) immunizes a state law, enacted to implement the program, from Commerce Clause scrutiny.

Norfolk Southern Corp. (appellant) sought a declaration, in the United States District Court for the District of Delaware, that the Delaware Coastal Zone Act (CZA) was unconstitutional as applied to its proposal to operate a coal transfer station at a deep water anchorage within Delaware territorial limits. The CZA provides that "offshore gas, liquid or solid bulk transfer facilities ... are prohibited in the coastal zone ...." Del. Code Ann. § 7003 (Supp. 1986). The State of Delaware (appellee) argued that the approval of the CZMP (of which the CZA is a part) by the Secretary "immunized" the ban on off-shore bulk product transfer facilities from Commerce Clause scrutiny. In the alternative, it argued that the CZA ban on bulk transfers was not violative of the Commerce Clause. 822 F. 2d at 392.

The district court, in denying the request for a declaration of unconstitutionality, agreed, and held that "Congress, through the CZMA and the Secretary's approval of the DCMP, had consented to the CZA and thus the CZA was immune from Commerce Clause scrutiny." *Id.* The Commerce Clause grants to Congress the power "to regulate Commerce ... among the several states." U.S. Const., Art. I, § 8, Cl. 3.

Noting that the "dormant" Commerce Clause, "as the term ... implies, limits the power of the states [to regulate commerce] in areas where Congress has not affirmatively acted to either authorize or forbid the challenged state action," 822 F. 2d at 392, the Court of Appeals for the Third Circuit, hearing the case on appeal, proceeded to analyze the CZMA and relevant legislative history for any signs that Congress intended to authorize the states to regulate interstate commerce in ways that would otherwise be invalid under the Commerce Clause. This inquiry was guided by the now well-established rule that Congressional consent to state regulation of interstate commerce must be clearly indicated in order to support a finding of intent to authorize such state regulation. *Id.* at 396., (citing *Northeast Bancorp, Inc. v. Federal Reserve System,* 105 S. Ct. 2545 (1985); *Western & Suffolk Life Insurance v. State Board of Equalization, of California,* 451 U.S. 648 (1981); *South Central Timber Development, Inc. v. Wunnicke,* 467 U.S. 82 1984); *White v. Massachusetts Council of Construction Employers, Inc.,* 460 U.S. 204 (1983); *New England Power Col v. New Hampshire,* 455 U.S. 331 (1982); and *Prudential Ins. Inc. v. Benjamin,* 328 U.S. 408 (1946)).

The court was unable to find a clear expression of consent in either the CZMA or the legislative history. Indeed, a lack of such intent is readily inferrable from the CZMA:

> Nothing in this chapter shall be construed - (1) to diminish either Federal or state jurisdiction, responsibility or rights in the field of planning, development, or control of water resources ..."

16 U.S.C. § 1456(e). Furthermore, the Court found an express House Committee statement confining state power within recognized constitutional limits:

> [The State] must ... recognize that there is no provision of this title which relinquishes ... any of the constitutional powers of the federal government.

H.R. Rep. No. 1044, 92d Cong., 2d Sess. 17-18. Thus, the court held that Congress did not intend to expand state authority over the regulation of commerce in the CZA. 822 F. 2d 388, 393-396.

The court next considered whether the ban on bulk product transfer facilities in § 7003 of the CZA was invalid as violative of the dormant Commerce Clause. Norfolk Southern argued that the law should be submitted to strict scrutiny because it discriminates against interstate commerce. The strict scrutiny standard of review is "a virtually *per se* rule of invalidity." *Id.* at 400. *(quoting Philadelphia v. New Jersey),* 437 U.S. 617, 624 (1978).

The court refused to adopt this standard, as opposed to the more deferential balancing test standard, as it was unable to find any intent to discriminate in the law or its history. Attempting to distinguish between laws that purposefully discriminate and laws that merely impose an incidental burden on interstate commerce, the court determined that even a law which "overtly blocks the flow of interstate commerce at a state's borders" is not necessarily discriminatory. *Id.* at 401, *(quoting Philadelphia v. New Jersey),* 437 U.S. at 624. The factor distinguishing incidental from purposeful burdens was not the "blockage of the interstate flow *per se,"* but whether the in-state trade of a particular good was beneficially affected. *Id.* In *Philadelphia v. New Jersey,* where barring out-of-state garbage shipments was found to benefit in-state garbage disposal, the discriminatory purpose could be observe from the in-state benefit (greater landfill availability) gained at the expense of the out-of-state interests.

In the instant case, the ban on "supercolliers" (supertankers carrying coal cargo) mooring at a deepwater anchorage does not discriminate in favor of an in-state competitor. Since any interest, regardless of state affiliation, would be similarly barred, there is no discrimination. To further support this proposition, the court cited *Exxon Corp. v. Maryland,* 437 U.S. 117 (1978), where the mere fact that the only petroleum producers and refiners barred from operating retail gas stations in Maryland were out-of state interests, did not establish

discriminatory purpose. Simply because out-of-state interests are alone in pursuing a form of commerce, a law barring this commerce from the state is not thereby discriminatory in purpose or effect. 822 F. 2d at 402.

The court also rejected the appellants contention that the strict scrutiny standard should apply because § 7003 burdens foreign commerce. The appellants aruged that the ban on transfer facilities would make shipping coal overseas more expensive, thereby burdening foreign commerce. Yet even though it is "well accepted that state restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny," *Id.* at 404, *(quoting South Central Timber,* 467 U.S. at 100), the meaning of the term "burdening" is narrowly construed. In the foreign commerce context, only laws which "manipulate the terms of international trade for the state's economic benefit," or "impinge on the need for federal uniformity in the area of foreign trade policy" burden foreign commerce. *Id.,* 404-405. Clearly, the ban on bulk transfer stations does neither.

In place of the strict scrutiny standard of review, the court adopted the balancing test standard used where the "statute regulates 'evenhandedly' and imposes only incidental burdens on interstate commerce." *Id.* at 405, *(quoting Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970)). The balancing test is used to strike down such laws that impose burdens on interstate commerce that are "clearly excessive in relation to the putative local benefits." *Id.* For the purpose of this test, the court required that the burden imposed on commerce be discriminatory against interstate commerce, and not just commerce generally. Having already established that the § 7003 ban is a "burden that must be shouldered by any coal transporter, regardless of state affiliation," the court found no "legally relevant incidental burden." *Id.* at 406. Thus, the court was able to uphold § 7003 of the CZA from Commerce Clause attack, despite the court's finding that Congress, through the Secretary of Commerce, did not immunize the CZA from Commerce Clause scrutiny.

Clifford J. Petroske, '89

HAZARDOUS WASTE

In re Acushnet River & New Bedford Harbor Proceedings Re Alleged PCB Pollution, 675 F. Supp. 22 (D. Mass. Nov. 6, 1987).

This analysis will address two of the three issues raised in summary judgement motions arising in suits brought by the federal government and the state of Massachusetts in the District Court for the District of Massachusetts. The sovereigns alleged in their complaints that the defendants, AVX, Inc., Belleville Industries Inc., Aerovox, Inc., RTE Corp., Cornell-Dubilier Electronics Co., and Federal Pacific Electronic Co. polluted the New Bedford Harbor and the Acushnet River with polychlorinated biphenyls (PCBs). Judge McNaught rendered his oral decision on the summary judgement motions from the bench. The memorandum opinions, the subject of this analysis, were subsequently issued by the District Court for the District of Massachusetts to explain and support the earlier oral decisions.

The first issue addressed by the court was whether the government entities had tendered proper notice to the defendants with respect to the claims arising out of provisions contained with the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) 42 U.S.C. §§ 9601-9615 and the Resource Conservation and Recovery Act (RCRA) 42 U.S.C. § 6972 et seq. The defendants argued that § 112(a) of CERCLA requires that the governments give sixty days notice before filing a CERCLA claim. Section 112(a) provides in relevant part that:

> "All claims which may be asserted against the Fund pursuant to section 111 of this title shall be presented in the first instance to the owner, operator, or guarantor of the ... facility from which the hazardous substance has been released .... In any case where the claim has not been satisfied within sixty days of presentation or in accordance with this subchapter, the claimant may elect to commence an action in court against such owner, operator . . . or present the claim to the Fund for payment."

The court did not agree with the defendants and denied the defendants motion to dismiss for lack of subject matter jurisdiction. 675 F. Supp. 27. The court reached its conclusion after reviewing all the litigation which had addressed this issue in the District Court for the District of Massachusetts and the First Circuit Court of Appeals.

The first time the District Court for the the District of Massachusetts confronted section 112(a) of CERCLA was in *Dedham Water Co. v. Cumberland Farms Dairy,* 588 F. Supp. 515 (D. Mass. 1983) (Dedham I). In *Dedham I,* Judge McNaught held that "constructive notice" was all that was required to satisfy the notice requirement contained within § 112(a). However, two years later the First Circuit Court of Appeals held in *Garcia v. Cecos International Inc.,* 761 F. 2d 76 (1st Cir. 1985) (Garcia), that "actual notice" was required by a somewhat similar notice provision contained withing RCRA § 7002(b), 42 U.S.C. § 6972(b). Judge McNaught then reversed his decision in *Dedham I* to be consistent with the First Circuit's holding in *Garcia. Dedham Water Co. v. Cumberland Farms Dairy, Inc.,* No. 82-3155 Mc., slip op. (D. Mass. January 3, 1986) (Dedham II). Subsequently, Judge McNaught's decision in *Dedham II* was reversed by the First Circuit. The First Circuit distinguished CERCLA and the CERCLA sixty day notice requirement from RCRA and the RCRA notice provisions. The First Circuit held that if the plaintiffs were not looking to the Fund established by CERCLA for payment, they did not have to comply with the sixty day notice provision. *Dedham Water Co. v. Cumberland Farms Dairy, Inc.,* No. 86-1216, slip Op. (1st Cir. November 14, 1986).Therefore, since the sovereigns in the instance case were bringing suit directly against the defendants and not looking to the Fund for relief, the court denied the defendants summary judgment motion seeking to dismiss the CERCLA claims.

The court also denied the defendants summary judgment motion seeking to have the RCRA claims dismissed. *Id.* The court explained that the 1984 amendment to RCRA, 42 U.S.C. § 6972 which eliminated the sixty day notice requirement in suits alleging hazardous

waste mismanagement applied retroactively.

The second issue confronting the court was whether the governments could obtain personal jurisdiction over RTE Corp., the parent corporation of Aerovox, Inc. The governments acknowledged that RTE Corp. did not have the minimum contacts necessary for the court to acquire personal jurisdiction over RTE Corp. However, the governments argued that CERCLA § 106, 42 U.S.C. § 9606 should be read to permit nationwide service of process. CERCLA § 106 provides that when there is an imminent threat of substantial endangerment to the public health of an actual or threatened release of hazardous substances, the President may require the Attorney General to bring suit in the district where the threat occurs. The governments argued that the Attorney General is limited to bringing suits alleging such threats only in the one venue provided for in § 106, therefore implying nationwide service of process. The reasoning underlying this assertion is that Congress could not have intended, when it limited jurisdiction to one venue, to limit the class of defendants to those subject only to the personal jurisdiction of that particular venue. The government relied on *U.S. v. Congress Construction Co.,* 222 U.S. 199 (1911), where the Materialmen Act of 1894 required that actions brought in the name of the government be brought in the district court of the United States in the district where the contract in dispute had been performed. *Id* at 28, citing to 222 U.S. at 203. The United States Supreme Court in *Congress Contruction Co.* stated in dicta that if the suit is restricted to one venue then the court could obtain jurisdiction over the defendants by nationwide service of process.

The governments' argument failed in the instant case because the court concluded that CERCLA § 113, 42 U.S.C. 9613, which contains the general venue provision governing CERCLA claims, provides for numerous venues, including those where the release occurs and where the damage is incurred. The court reasoned that section 106 was added in the event that a threat occured outside of the above jurisdictions to provide an additional venue for the governments to bring suit, and not as the government argued, for the purpose of limiting suits alleging threats to the district where the threat occurred. In reaching its decision, the court refused to follow *U.S. v. Bliss,* 23, ERC 1638 (E.D. Mo. 1985) where that court did hold that § 106 was a provision limiting suites alleging threats to the district court where the threat occurred, thus triggering nationwide service of process.

Subsequent to the oral decision rendered by Judge McNaught, Congress enacted the Superfund Amendments and Reauthorization Act of 1986, P.L. 99-499 (SARA) which provided for nationwide service of process. SARA's legislative history indicated that Congress had intended, at the time that CERCLA was originally enacted, to provide for nationwide service of process for claims under CERCLA. Despite the new revelations by Congress of what they had intended when CERCLA was first enacted, the court upheld its earlier oral decision. *Id.* at 37. The court cited as its authority *Consumer Products Safety Commission v. GTE Sylvania, Inc.,* 447 U.S. 102 (1980). The Supreme Court in that case stated that subsequent legislative history will rarely override a reasonable interpretation of a statute that can be extracted from its legislative history prior to its enactment. 447 U.S. at 118 n. 13. The district court scrutinized Judge McNaught's decision according to the directives in *Consumer Product* and found that Judge McNaught's decision was reasonable. The court further added that Congress had had ample opportunity to state that nationwide service of process was to apply when it originally enacted CERCLA.

Alternatively, the governments argued that the court should acquire personal jurisdiction over RTE by piercing Aerovox's corporate veil because of the significant degree of involvement of RTE in Aerovox's business affairs. Examples of RTE's alleged involvement in Aerovox included but were not limited to such activities as: the existence of a central cash management system between RTE and its subsidiary corporations of which Aerovox was one: Aerovox's need for RTE's approval prior to making large cash expenditures; Aerovox switching to a different accounting system at RTE's request: and the existence of RTE's umbrella insurance policy which listed Aerovox as one of its insured.

The court did not find these involvements warranted the disregard of Aerovox's seperate corporate status. However, in reaching its conclusion, the court agreed with the governments that federal and not state law would determine at what point the corporate veil was to pierced. The court stated that the appropriate level for undertaking such a task could be discerned from prior federal cases which had already addressed the issue. The court applied a standard which would look to seven factors relevant for determining if the corporation existed and conducted business as a seperate entity. The seven factors are 1) inadequate capitalization in light of the purposes for which the corporation was organized for, 2) extensive control by the shareholder or shareholders, 3) intermingling of the corporation's properties or accounts with its owner, 4) failure to observe corporate formalities and seperateness, 5) siphoning of funds from the corporation, 6) absence of corporate records, and 7) non-functioning officers or directors. The court would not apply a lower threshold level as the governments sought absent the expressed intent of Congress that a more relaxed standard applied when piercing the corporate veil in suits involving the environment. The court noted that in applying the factors already established by federal case law that the policy of the underlying statute (in this case CERCLA) would be taken into consideration.

The court also explained that had it adopted the governments' lower threshold level for disregarding corporate entities, it would discourage future investors in hazardous waste management corporations, ultimately leading to a reduction in the number of solvent entities the government could look toward in future litigation for clean-up costs and damages. Therefore, the court granted RTE's motion to dismiss for lack of personal jurisdiction *Id.* at 35.

The last issue addressed by the court was whether Belleville, Inc., was a legal entity capable of being sued. The court held that according to the Massachusetts law, Belleville had been lawfully revived and therefore its

dissolution would not bar the corporation from defending itself in the present litigation. *Id.* at 41.

Susan M. Dorgan '88

HAZARDOUS WASTE

United States v. Charles Trucking Co., 823 F. 2d 685 (1st Cir. July 13, 1987)

Section 3008(g) of the Resource Conservation and Recovery Act (RCRA), § 6928(g), 42 U.S.C. §§ 6901-6991i (1984), provides the Environmental Protection Agency (EPA) with a tool for controlling and policing the handling, storage, and disposal of hazardous wastes. This civil penalty section allows the United States, as representative for the EPA, to impose a fine upon any party who violates any requirement set out in RCRA.

The principal issue in the present case is whether RCRA § 3008(g) authorizes the imposition of penalties on the operators of a hazardous waste site who failed to respond in timely fashion to an EPA request for information issued pursuant to RCRA § 3007(a).

This case arose during the EPA's investigation into the possible contamination of the Tyngsboro, Massachusetts water supply. The EPA sent a written request for information to the Georges, the owners and operators of a hazardous waste site in the Tyngsboro area, concerning the operation of their site. The EPA alleged that the request was made according to the authority given by RCRA § 3007(a), and § 104 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9604. Section 3007 of RCRA provides that "any person who ... handles or has handled hazardous waste shall, upon request of any officer of the Environmental Protection Agency ... furnish information relating to such wastes ..." EPA's letter also informed the Georges that any failure to respond to the request, or to adequately justify any failure, within thirty days, could result in an enforcement action under which EPA would be permitted, pursuant to RCRA § 3008(g), to seek a penalty of up to $25,000 for each day of non-compliance with the information request. After thirty-two days, the Georges applied for a sixty day extension, and the EPA refused on the grounds that it wanted the information as soon as possible.

The EPA, the respondents, brought the initial action in the United States District Court for the District of Massachusetts, ninety-nine days after the deadline that was established in the information request. The action sought (1) a finding that the defendants had violated both RCRA and CERCLA provisions, (2) an order compelling the defendants to comply with the information request, and (3) the imposition of penalties under RCRA, § 3008(g). The EPA argued that the RCRA and CERCLA sections mandate that a timely response be returned to the EPA, and that the failure to provide a timely response is one of the requirement violations contemplated by RCRA § 3008(g). EPA further argued that such violation was grounds for imposing the penalties on the Georges. The district court agreed with EPA's contentions, granted EPA's motion for a partial summary judgment against the Georges, ordered the Georges to answer nineteen of the twenty-six questions that were presented in the information request, and fined Mr. and Mrs. George $20,000 each for their failure to respond. *United States v. Charles George Trucking Co.,* 624 F. Supp. 1185 (D. Mass. 1986).

Appealing to the United States Court of Appeals for the First Circuit, the Georges contested the imposition of the civil penalties on two grounds. First, they argued that RCRA 3008(g) did not apply to them because an analysis of the legislative history supports the argument that the intent of the section was to impose penalties upon parties who had handled any hazardous materials in an unauthorized manner. The Georges maintained that the legislature did not wish to have the penalty provision apply to parties who had merely made a paperwork error. The Georges also argued, on constitutional grounds, that the use of the RCRA § 3008(g) sanction in this particular case was so coercive that it restricted the Georges' rights under the fourth and fifth amendments of the United States Constitution. The First Circuit disagreed with both of the Georges' arguments, and affirmed the district court's decision.

As to the first argument, Circuit Judge Selya looked directly to the language incorporated in the statute. The Court held that statutory construction, not legislative history analysis, is the primary vehicle for determining legislative intent. Using that guideline, the Court found that the clear and unambiguous language of RCRA § 3008(g) clearly linked it to RCRA § 3007(a); thus, the section controlled the Georges' actions. The Court reasoned that if the Georges' argument were upheld and the Court looked to the legislative history of RCRA § 3008 instead of employing standard statutory construction, one of the primary purposes of RCRA would be lost, that being the authority that the Act vests in the EPA to gather pertinent information in reference to the transportation, storage and disposal of hazardous waste. Had the Georges' been allowed to ignore the request, they would have been handicapping the EPA's efforts to insure the safe handling and storage of hazardous waste. 823 F. 2d at 688-689.

As to the George' second argument, the Court disagreed that the questionnaire amounted to an illegal search under the fourth amendment or that it deprived the Georges' of an opportunity to be heard at a reasonable time as required by the fifth amendment. The Georges argued that the statutory scheme left them in a position where if they did not answer the request, they would have exposed themselves to a penalty of up to $25,000 per day per person. The George further argued that the pressure of the prospective fines effectively precluded them from challenging the request in an administrative proceeding. This, the George contended, amounted to an unreasonable search because they had no choice but to answer or be fined; thus, they argued that their right to procedural due process had been abridged.

The Court first voiced its opinion that the Georges took questionable steps in their attempt to avoid the spectre of the fines. The Court reasoned that sitting idly by was not

the proper procedure and that, since the information request "presented [the Georges] with timely notice and a meaningful opportunity to object," 823 F. 2d at 690, the Georges' did have an opportunity to be heard at an administrative level. The Court agreed with the district court that once the Georges' failed to challenge the request "through the administrative procedure which had been provided and of which they had due notice, [they] must pay the forfeit." *id.* at 691.

Finally, the Court concluded that if the Georges' had made a timely objection, it would have been unlikely that the daily penalties would have accrued during a judicial review. Furthermore, the penalties levied by the district court were not unreasonable or intimidating because the penalties were imposed only after a hearing, and the total amount was well below what each appellant could have been fined for one day.

The Georges' also argued that the request amounted to an invasion of their privacy because some of the questions did not pertain to the operation or management of their hazardous waste landfill. The Court reasoned that under § 3007(a), the EPA is authorized to seek only the information that pertains to hazardous wastes and that the district court, be removing seven questions from the twenty-six question request, restricted the scope of the request to matters that relate only to the operation of the Georges' waste site. The Court further determined that none of the remaining questions pertained to any topic outside the realm of hazardous waste management, that the EPA's information request was proper and did not constitute an invasion of privacy. Additionally, the Court reasoned that since the Georges' had applied for extensions in order to "respond accurately and fully to [the EPA's] request" *Id.* at 690, and since no mention was made in those applications as to the validity of the questions or the Georges' duty to answer, then the Georges' actions" seem [ ] logically to suggest awareness that the inquiries were in order." *Id.*

Anthony E. Pizza, '89

INSURANCE

CPS Chemical Co. Inc. v. The Continental Insurance Co., 536 A. 2d 311 (N.J. Super. Jan 15, 1988)

The problem of toxic chemical accidents has reached epidemic proportions. Once the accident occurs the immediate need becomes clean up, before the damage is compounded. Who must bear the costly burden of clean up has become the focal point of many recently litigated cases.

The principal issue in this case is whether a liability insurance carrier has the duty to indemnify its insured for the cost of clean up in toxic accident situations. Found within the main question is the subissue of whether the monies in question constitute equitable relief or damages subject to the carriers obligations to indemnify.

This case arose when CPS Chemical Co., engaged in the business of processing various organic compounds, discharged these chemicals into both Prickett's Brook and the ground water supply of Runyon well field, thereby completely contaminating the City of Perth Amboy's water supply.

In the underlying litigation the trial court held CPS legally obligated to clean up the hazardous material emitted from its chemical plant. In response to this judgement, Continental, the applicable insurance carrier, determined that the relief granted was equitable in nature and therefore their duty to indemnify CPS, as to the clean up costs, had not been triggered.

In a seperate action, the City of Perth Amboy filed suit against CPS claiming that they were liable in part for property damage caused by the discharge of the environmental contaminates. The City sought monetary damages, interest and costs of suit. The judge awarded 5.2 million dollars to be used to employ various clean up procedures, so that restoration of the affected area could be accomplished.

CPS filed the case, under analysis, seeking a partial summary judgement against Continental claiming that they had a contractual obligation to indemnify CPS as to both defense costs and pecuniary damages incurred.

Writing the opinion of this Appeal, for partial summary judgement, Judge Baime, held in favor of CPS Chemical Co., by reversing and remanding the original summary judgement granted to Continental Insurance Co. The Court, in its reasoning, likened the monetary judgement against CPS to damages award to compensate an injured party and thus falling within the meaning of damages in an insurance policy. In essence they found the damages to be amounts necessary to restore the property to its original tenor. Insurance protection is designed to protect the insured against liability, incurred by tortious conduct, which goes towards visiting physical harm on others.

The facts of this case fall neatly into this well reasoned theory. CPS tortiously contaminated the environment thereby physicall harming the property of others. The policy surrounding liability insurance coverage encompasses this type of damages situation.

The Court, in expanding and explaining its rational, cited to both *Township of Glouster v. Maryland Casuality Co.,* 668 F. Supp. 394 (D.N.J. 1987) and *American White Cross Labs., Inc. v. Continental Insurance Co.* 202 N.J. Super. 372, 495 A. 2d. 152 (App. Div. 1985). In *Glouster T.P.,* the same issue, as in this case, indemnification for clean-up costs was litigated. Here the defendants argued, similiarly, that equitable and not legal (damages) relief was being sought and that no duty to indemnify exists for equitable relief, *Id.* at 396. The Court held that, "where property of third parties is involved, clean up costs incurred by or to be charged to against an insured constitute property damages within the meaning of the term as used in CGL insurance policies," *Id.* at 398. In addition, they found that the costs were not preventative in nature, but rather to repair already incurred damage. The aforementioned rationale combined with growing public policy concerns led the Court to hold in favor of the insured.

Again in *White Cross Labs,* the Court held that clean-up costs were equivalent to damages, under CGL policies, and

thus the insurer had a contractual obligation to indemnify the costs, *Id* at 154.

In addition to equating clean-up costs with damages, the *Glouster T.P.* and *White Cross Labs* Courts also held, in accordance with insurance law theory that any ambiquity in the insurance policy terms were to be construed against the insurer. The issue in the case under review is centered around whether or not the insured is to be indemnified under the terms of the policy. The language is not clear and therefore requires the Court's interpretation. Any ambiquity in the insurance contract is to be resolved in favor of the insured.

Allison Hellbraun '88

RESTRICTIVE ZONING FIFTH AMENDMENT

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S. Ct. 2378 (June 9, 1987) and **Nollan v. California Coastal Commission,** 107 S. Ct. 3141 (June 26, 1987).

This past June, The Supreme Court of the United States granted certiorari to re-examine how the Takings Clause of the fifth amendment, as incorporated against the states by the fourteenth amendment, can be applied to regulatory taking cases. The fifth amendment provides that "private property shall not be taken for public use without just compensation."

In *Nollan v. California Coastal Commission* the Court further defined when a land use regulation may be found invalid and constitute a taking. In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles* the Court decided the question of whether the government should grant monetary compensation for a "temporary" regulatory taking.

In *Nollan,* the Supreme Court upheld the ruling in *Agins v. Tiburon,* 447 U.S. 255 (1980) that a land use regulation does not effect a taking if it "substantially advances legitimate state interests" and does not "deny an owner economically viable use of his land." 107 S. Ct. at 3146 (quoting *Agins* 447 U.S. at 260). The ruling in *Agins* was, however, considered from a new angle: does a regulation which is valid as a complete restraint automatically retain its validity as partial restraint (that is, as a grant of conditional permission)?

The appellants own beachfront property which is bordered on both the north and the south by public beaches. They submitted a building permit application to the California Coastal Commission in order to build a larger house on property they exercised an option to buy. The Commission ruled that a permit would only be granted on the condition that the Nollans convey an easement along the beachfront of their property, enabling public access to the bordering public beaches. The appellants opposed this condition, and filed a petition for writ of administrative mandamus to the Ventura County Superior Court. 107 S. Ct. at 3144.

After a public hearing in which the Commission reaffirmed its position, the Nollans filed a supplemented petition with the Superior Court in which they argued and prevailed that the access condition "violated the Takings Clause of the fifth amendment." *Id.*

The Commission appealed to the California Court of Appeals which reversed the prior holding and reasoned that the condition could be legitimately imposed, even if there was only an indirect relationship between the access exacted by the Commission and the legitimate state interest embodied in the California Coastal Act of 1976, Cal. Pub. Res., Code Ann. § 3000 *et seq.*. As the Commission's Public Access Interpretive Guidelines state, it is the state's interest to "buffer public access to the tidelands from the burdens generated on access by private development." *Nollan,* 107 S. Ct. at _____, n. 5. The court further held that the easement condition did not deprive the Nollans of all reasonable use of their property. 107 S. Ct. at 3144.

The United States Supreme Court reversed the California Court of Appeals. Relying on the rule in *Agins* Justice Scalia, writing for the majority, found that the state interest in providing public access to the shoreline was not substantially advanced by imposing the access condition. For a state interest to be the supporting rationale of a regulation, the Court required that the regulation must impose a use restriction that is logically related to the state interest, given the particular facts of the case.

In the case at hand, the rationale for imposing the condition took into consideration the fact that the new house would both block the view of the ocean, and increase private use of the shorefront, especially in light of other nearby residential developments. However this Court could not see the relationship between the easement condition required by the Commission and the putative purposes of the regulation. Justice Scalia described the relationship between the easement creating lateral public access on the shoreline and the desired effect of relieving congestion caused by increased public use of the adjacent public beaches as "impossible to understand." 107 S. Ct. at 3149. Likewise, a beachfront easement could not logically aid visual access to the water since the house, and not the beach would be an obstacle.

Regarding visual access, the Court acknowledged that if the Commission had attached to the permit a condition that would have protected the public's ability to see the beach -- for example, a height limitation, a width restriction, or a ban on fences -- the nexus between the permit and public access would have been established and the condition would have been constitutional. 107 S. Ct. at 3147. Because this nexus was lacking, the purpose of the regulation became obtaining an easement without paying just compensation, rather than the purpose as stated in the California Act.

Ironically, the Court assumed that the Commission "could have exercised its police power to forbid construction of the house altogether." 107 S. Ct. at 3147-3148. A complete denial of the building permit application would clearly have maintained public visual access to the beach, and so the nexus between restraint on use and public purpose would have remained intact. Thus, even where an

entire restraint on some form of use is valid, a partial restraint may not be. 107 S. Ct. at 3148.

In a strong dissent, Justices Brennan and Marshall argued that the majority's nexus requirement is too restrictive, and that in this case, it is being applied too stringently. The dissent contended that this requirement will change the traditional standard by which a state may constitutionally impose conditions on private development. This standard, as expressed in *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 466 (1981), requires that the State "could rationally have decided" that the measure adopted might achieve the state's purpose. According to the dissent, where imposing a land use restriction upon private property has the net effect of fulfilling the regulatory purpose (i.e. "preserve the net amount of public access to the coastline" 107 S. Ct. at 3153), the the rational basis test has been met. Following this "trade-off" between restriction and private burden approach, *Id.,* the State agency is afforded the flexibility necessary to fulfill the legislative purpose under which the regulations it enforces are promulgated. Marshall and Brennan maintain that the "precise fit" requirement propounded by the majority stymies this flexibility, thereby frustrating thorough implementation of legislation.

Further, the dissent finds fault with the majority's analysis of the facts and, using the majority's nexus approach, finds a sufficient connection between the easement condition and the particular burden imposed by the Nollan's plan to build a larger beachhouse. 107 S. Ct. at 3154-3156.

The dissent also contends that the public's expectations of continued access along the beachfront are paramount to the Nollan's "investment-backed expectations." 107 S. Ct. at 3158 (citing *Penn Central Transportation Co.v. New York City,* 438 U.S. 104, 124 [1978]. It cites to Article X, § 4 of the California Constitution in support of the notion that the public is guaranteed access to the waterfront. It then reveals the Nollan's claim for compensation as lacking even a property right foundation since a building permit is not a property right. Moreover, the prior owners and their lessees (of whom the Nollans were but the most recent representatives) had never interfered with public use of the beachfront. Thus, the Nollan's were not deprived of a "reasonable expectation to exclude." 107 S. Ct. at 3158.

Although the dissent's analysis is certainly thorough, the fact remains that Justice Scalia was able to hang his hat on the first part of the *Agins* test, whereby a regulation must "substantially advance legitimate state interests." 447 U.S. at 260. The failure of a regulatory act to comport with the public interest in a particular instance is sufficient to constitute a regulatory taking. The question of whether an owner is denied "economically viable use of his land," *Agins* 447 U.S. at 260, in accordance with "investment-backed expectations," 107 S. Ct. at 3158, does not arise in such a case.

Yet even with such a norrowed scope of inquiry, *Nollan* provides no real guidelines for determining whether a nexus between a regulation and the particular burden of a private use exits. The very fact that the majority and the dissent provide conflicting analyses of the way the permit condition relates to the need for public access to the beach attests to the lack of demonstrable standards. Common sense seems to be the rule.

As the dissent in *Nollan* makes clear, not every landowner able to escape the imposition of a regulation can claim that the economically viable use of his land was threatened by the regulation. In those instances where he must make such a claim to escape the confiscatory effect of an otherwise valid regulation, he is entitled to compensation through an action in inverse condemnation. The issue in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 107 S. Ct. 2378 (1987), is whether a landowner is entitled to compensation for the entire period that a temporary regulation is in effect.

In *First English,* the appellant Church sought damages in the Superior Court of California for a period of time when all property use was denied them due to a temporary regulatory action. Appellants owned a 21-acre plot of land, half of which they operated as a campsite called Lutherglen. In July 1977, a flood destroyed some of the buildings of the campground. In response to the flooding, the appellee, County, adopted Interim Ordinance No. 11,855, which provided that "[A] person shall not construct, reconstruct, place or enlarge any building or structure ... located within the outer boundary lines of the flood protection area." 107 S. Ct. at 2381. Appellee relied on *Agins v. Tiburon,* 24 Cal. 3d 266, 598 P. 2d 25, which held that a property owner can receive compensation for a regulatory taking only for the deprivation of use during the period after the regulation has been declared unconstitutional, and then only if the state government persists in enforcing it. Based on this ruling the County of Los Angeles was able to secure a motion to strike that portion of the complaint alleging that the county's ordinance denied the appellant all use of Lutherglen. The proper pleading would merely have alleged that the ordinance, which barred the Church from re-building its campground, was excessive in an action for declaratory relief or a writ of mandamus. *Id.*

The California Court of Appeal affirmed on the same grounds, essentially denying the appellant a right to sue in inverse condemnation for the value of the deprived use prior to any finding that the ordinance was unconstitutional. Finally, because the allegation that all use of Lutherglen had been denied was not contested as false in the courts below, the United States Supreme Court, in hearing the case on appeal, was able to assume the allegation was true.

In deciding whether compensation could be awarded in this case, the Court analogized to cases where the government had only temporarily exercised its right to use private property; for example, appropriation of private land by the United States for use during World War II. The Court held that there was no difference between these "temporary" takings which deny a landowner all use of his property and permanent takings for which the Constitution clearly requires compensation. *First English* 107 S. Ct. at 2387 (quoting *San Diego Gas & Electric Co. v. San Diego,* 450 U.S. 621, 657 (1981). Thus, the Court concluded that under these circumstances, the Fifth and Fourteenth

Amendments would require compensation during the time before the regulation was invalidated.

Chief Justice Rehnquist writing for the majority limited the holding to the facts of this case. Yet the general rule that a regulation constitutes a taking when "it destroys a major portion of the property's value," *First English,* 107 S. Ct. at 2393 (dissenting opinion) (citing *Hodel v. Virtinia Surface Mining & Reclamation Assn.,* 452 U.S. 264, 296 [1981]; *Agins v. Tiburon,* 447 U.S. 255, 260 (1980), presumably still holds true here. By being denied all use, a major portion of Lutherglen's value was destroyed while the prohibition ordinance was in effect.

Justice Stevens, Blackmun, and O'Connor note in the dissent that government may condemn unsafe structures and act to restrict access to hazardous areas in an effort to preserve public safety without paying compensation. 107 S. Ct. at 2391-2392 (citing *Keystone Bituminous Coal Assn. v. DeBenedictus,* 480 U.S. _____ / _____ (1987); *Goldblatt v. Hempstead,* 369 U.S. 590 (1962); *Hadacheck v. Los Angeles,* 239 U.S. 394 (1915)). Given such a case here the issue of compensation should never arise.

Furthermore, the dissenting opinion finds some of the distinctions drawn by the Court to be misleading. It rejected the analogy to temporary physical takings as inapposite in the regulatory context. The better analogy to a temporary denial of all use of a permanent restriction on some minor fraction of property use, since the net effect over time is the same. In the case of a temporary regulation, even the denial of all use will quickly become a mere restriction on some minor portion of the total use of the property over time, once the temporary restraint is invalidated or lifted. Looked at this way, the requirement that a major portion of property value must be destroyed for a regulation to be a taking, makes a temporary regulation an uncompensable government act. 107 S. Ct. at 2395.

The dissent also rejects the Court's distinction between normal delays from pending zoning board decisions (granting building permits, *etc.)* and delays from litigation needed to prove a regulation is invalid. The delay from a legal procedure is just as "normal" as the delay from an administrative procedure. If the latter is uncompensable, neither should the former be. In essence the Court found that the latter requires compensation, given the accepted means of challenging regulations under *Agins* but that the former does not. Furthermore, the dissent maintains that a delay which substantially affects the value of land may be compensable under the Due Process Clause, *see* 42 U.S.C. § 1983, but not under the fifth amendment. 107 S. Ct. at 2399.

Both the Court and the dissenting opinion do agree on one thing, however. Bother fear that the flexibility of land-use planners will be hampered by the nexus requirement announced here. Though the Court views this effect as inevitable, the dissent sees it as quite avoidable.

Elizabeth Matus '88
Shelly Sheetz '88

SEARCH & SEIZURE

In Re Search of Erie St., 824 F. 2d 538 (7th Cir. June 22, 1987).

When the property of an active business is seized during a search by the Environmental Protection Agency ("EPA"), and the business feels that the search was unlawful, it may file a pre-indictment motion with the district court under FED. R. CRIM. P. 41(e) for the return of the property and its suppression as evidence in any subsequent trial or hearing. Unlike interlocutory suppression motions in general, a 41(e) motion is immediately appealable.

The *Erie* court noted the strong policy considerations against finding jurisdiction when reviewing denials of pre-indictment motions such as a 41(e) motion. One major consideration is that the EPA could lose the use of the seized property as evidence. Consequently, if that evidence formed the crux of the government's case, its loss would force a dismissal, with no later right to appeal. Additional factors considered by the court included the possibility of serious disruption to the trial, and potential harassment. 824 F. 2d at 540.

Therefore, jurisdiction in a federal court of appeals to review such interlocutory orders is strictly limited to instances where the appellants direct the motion only toward the return of the property, and not merely to suppress it as evidence in a forthcoming criminal proceeding. The principal issue in the present case is whether a federal appeals court has such jurisdiction where the appellants direct their motion toward the return of seized property, but fail to demonstrate a need for the specific property involved.

This case arose when Enviro-Analysts, Inc., and Shepard Plating Co., Inc. (hereinafter "Appellants"), filed a motion under FED. R. CRIM. P. 41(e) in the District Court for the Eastern District of Wisconsin, requesting an order for the return of property seized by EPA agents during a two-day search of their premises at 949 Erie St., Racine, Wisconsin. 824 F. 2d at 539. Appellants alleged that the search was unlawful because the warrant authorizing it was an unconstitutionally broad "general" warrant, and that they were therefore entitled to the return of the property seized. 824 F. 2d at 539. The district court dismissed the 41(e) motion, denied return of the property, and upheld the validity of the warrant. *Id.* Appellants then sought review by the U.S. Court of Appeals for the Seventh Circuit.

Under 41(e), "[a] person aggrieved by an unlawful search and seizure may move the district court ... for the return of the property which was illegally seized." The problem with a 41(e) motion is that once granted, not only is the property returned, but its use as evidence is suppressed in any subsequent trial or hearing. As a result, it is possible to circumvent the ordinary restrictions on motions to suppress evidence by utilizing Rule 41(e), disguising the desire to suppress the evidence as merely desire for the return of the seized property.

In *DiBella v. United States,* 369 U.S. 121 (1962), the

U.S. Supreme Court set a standard to determine when the motion becomes available. *DiBella* merely states that jurisdiction is to be found "only if the motion is solely for the return of property and is in no way tied to a criminal prosecution *in esse* against the movant ..." *Id.* at 131, 132. The significance of *Erie* is its demonstration of a working application of the standard announced in *DiBella.*

The only way for appellants in the present case to satisfy this standard was to successfully demonstrate a need for the specific properly seized. The court, in effect, required the appellants not only to show that their use of 41(e) was to secure the return of their property, but that they actually needed it returned as well.

The court found the crucial fact in the present case to be that the EPA had offered Appellants xerox copies of all the documents seized, which apparently constituted the total of the property requested in their motion. The court reasoned that since the Appellants failed to demonstrate any need for the originals, and showed no reason why copies would not suffice in allowing them to continue operations, the "true motive" behind the motion was suppression of evidence, and not the return of the property. Without this showing of need, the court held that the *DiBella* test could not be satisfied. 824 F. 2d at 541.

In effect, what this court has done is to further the policy of *DiBella* by restricting access to a potentially disruptive procedural device by narrowing its application to instances where a party can show need. When the EPA only seizes documents which can be easily and satisfactorily copied, it becomes very difficult to show any true need. If a business can be adequately run with the copies supplied by the EPA, an appellate court applying the reasoning in *Erie* will never find jurisdiction on a denial of a Rule 41(e) motion.

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WATER

Tull v. United States, 107 S. Ct. 1831 (April 28, 1987).

Federal pollution control laws impose a variety of sanctions, including civil fines, injunctions and penalties. In many cases, although defendants are accused of creating public nuisances, government prosecutors seek to impose civil penalties that go beyond the confines of equitable relief.

This tension between law and equitable remedies raises the question of whether a jury trial is required for determining the defendant's liability and for assessing penalties. The Supreme Court bifurcated its answer in a recent decision involving violations of the Clean Water Act. In *Tull v. United States,* 107 S. Ct. 1831 (1987), the court held that defendants had the right to a jury trial to determine liability in federal government actions to impose penalties for destroying wetlands, but that a trial court should assess penalties.

Under the Clean Water Act (CWA), 33 U.S.C. § 1251 *et seq.,* the federal government can assess civil penalties and seek injunctive relief against persons who, without a permit, dump dredged or fill material into navigable waters and adjacent wetlands of the United States. 33 U.S.C. §§ 1311, 1344, and 1362(7). The CWA authorizes the prosecutor to seek injunctive relief, § 1319(b), as well as civil penalties, § 1319(d), as high as $25,000 a day. (At the time this suit was brought the maximum civil penalty was $10,000 a day).

Tull v. United States involved a real estate developer who was charged by the federal government with putting fill onto three wetlands areas and into an artifical waterway on Chincoteague Island, Virginia without a permit. Although Tull admitted that he had dumped fill, he denied that the areas were wetlands covered by the CWA. 107 S. Ct. at 1834. The government sought injunctive relief and almost $23 million in civil penalties under section 1319(d) for violations involving over 1 million cubic feet of wetlands.

The District Court for the Eastern District of Virginia, fined the defendant $75,000, less than half of which was based on profits that Tull had made by selling the filled lots. Tull was also conditionally fined $250,000 if he did not restore the artificial waterway that he had filled. In addition, the court imposed injuctive relief on some of Tull's properties, ordering the defendant to restore some of the wetlands, and to remove fill from others unless he was granted an after-the-fact permit. 107 S. Ct. at 1834. During the trial, the judge rejected a timely motion by the defendant for a jury trial. The defendant appealed the lower court's ruling on the grounds that the denial of his motion violated his seventh amendment right to a jury trial. The seventh amendment to the Constitution provides that the right to a trial by jury is limited to "[s]uits at common law, where the value in controversy shall exceed twenty dollars." *Id.* at 1835.

Tull claimed that he had a right to a jury because the imposition of civil penalties was an action in law. The Fourth Circuit Court of Appeals rejected his argument and affirmed the lower court's verdict, holding that where "the assessment of penalties intertwines with the imposition of traditional equitable relief," the seventh amendment is "inapplicable." *United States v. Tull,* 769 F. 2d 182, 187 (4th Cir. 1985). The right to a jury trial was held to be limited to "suits in the nature of an action existing at common law when the amendment was adopted." *Tull,* 769 F. 2d at 186. Traditionally, English courts of law required juries, whereas courts of equity did not.

Before the Supreme Court, the defendant continued his argument, saying that the action for civil penalties was analogous to an action in debt in the common law, and required a jury trial. *Tull* 107 S. Ct. at 1836. The government, on the other hand, argued that the suit was more similar to an action in equity to abate a public

nuisance, which did not require a jury trial. 107 S. Ct. at 1837. The Court rejected both the petitioner's and the government's arguments, saying that a precise analogy was not the real test for determining whether the seventh amendment applied. Rather, "characterizing the relief sought is '[m]ore important' than finding a precisely analogous common law cause of action." *Id.*, (citing *Curtis v. Loether,* 415 U.S. 189, 196 (1974)). Looking at the legislative history of the Clean Water Act, the Court found that fines under 1319(d), the civil penalties section, were punative -- they were not supposed to be "calculated solely on the basis of equitable determinations" and were "traditionally available only in a court of law." 107 S. Ct. at 1838.

The government then contended that the civil penalties sought were "similar to an action for disgorgement of improper profits, traditionally considered an equitable remedy." *Id.* at 1839. Lastly, the government argued, even if the civil penalties were legal in nature, equity courts were allowed to assess monetary awards that were "incidental to or intertwined with injunctive relief." *Id.*

The Court rejected these arguments. First, it held that the fines were not similar to a disgorgement of improper profits, because that equitable remedy was directed at restitution. *Id.* Since only half of the penalties levied against Tull were based on profits Tull realized through his illegal actions, the penalties could not have been calculated on the basis of restitution. The Court also rejected the argument that the penalties were intertwined with the equitable relief, noting that courts of equity "may not enforce civil penalties" and that there was no need for the government to intertwine them because section 1319 authorized both kinds of relief. *Id.* Finally, the Court pointed out that the $23 million fine in the original complaint was "hardly ... incidental to the modest equitable relief sought in this case." *Id.*

Thus, the Court held that "the District Court intended not simply to disgorge profits but also to impose punishment. Because the nature of the relief authorized by subsection 1319(d) was traditionally available only in a court of law, [the seventh amendment applies and] the petitioner ... is entitled to a jury trial [to determine liability]." *Id.*

The final issue was whether the defendant was also entitled to a jury assessment of the penalty. Relying on *Colgrove v. Battin,* 413 U.S. 149 (1973), the Court applied the test of whether the jury "must shoulder this responsibility ... [in order] to preserve the 'substance of the common-law right of trail by jury.' " 107 S. Ct. at 1840. The Court held that a jury assessment of civil penalties was not a fundamental element" of the right to a jury trial. *Id.* It noted that Congress had the authority to fix penalties by statute and could also delegate this authority to trial judges. Looking at the legislative history of the Clean Water Act, the Court found that "Congress intended that trial judges perform the highly discretionary calculations necessary to award civil penalties." *Id.* at 1839. The Court concluded that it was permissible for penalties to be assessed by a judge, although culpability would be determined by a jury.

The dissent, written by Justice Scalia, was directed at the majority's holding that a jury trial was not necessary for the assessment of penalties. "I can recall no precendent for judgement of civil liability by jury but assessment of amount by the court." 107 S. Ct. at 1841. He noted that the structure created by the majority was similar to that of a sentencing judge in a criminal action. But if this was the model, Justice Scalia argued, then the burden of proof should also be similar to the "beyond a reasonable doubt" standard of a criminal trial, as opposed to the easier "preponderance of the evidence" standard used in civil proceedings.

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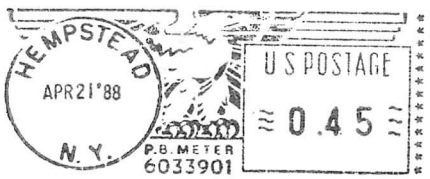

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