HOFSTRA ENVIRONMENTAL LAW DIGEST

Vol. 5, No. 2 Fall 1988

CASE REVIEWS

JUDICIAL, LEGISLATIVE AND REGULATORY UPDATES

Hofstra University School of Law

HOFSTRA
ENVIRONMENTAL LAW DIGEST

HOFSTRA UNIVERSITY SCHOOL OF LAW

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National Southwire Aluminum Co. v. United States Environmental Protection Agency, 838 F.2d 835 (6th Cir.Feb. 1, 1988).

General Issue: Whether the deactivation of an existing air pollution control system constitutes a "modification" of a stationary source of emissions under §111(a) of the Clean Air Act.

The issues in this case are whether National Southwire Aluminum's (NSA) wet scrubbers, which control the emission of gaseous fluoride, are a "stationary source," and if so, whether NSA's cessation of their use constitutes a "modification" of a "stationary source."

Section 111(a)(3) of the Clean Air Act (CAA), 42 U.S.C. §7411(a)(3) defines a "stationary source" as "any building, structure, facility, or installation which emits or may emit any air pollutant." Section 111(a)(4) of CAA, 42 U.S.C. §7411(b) defines a "modification" as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollution emitted by such source." If a modification to a stationary source has been made, the plant is subject to the New Source Performance Standards (NSPS) promulgated in 1972 by the Environmental Protection Agency (EPA) pursuant to §111(b) of CAA, 42 U.S.C. §7411(b). Section 111(b) controls fluoride emissions from new and *modified* primary aluminum reduction plants.

NSA owns and operates an aluminum reduction plant in Hawesville, Kentucky. The plant emits fluoride in both gaseous and particulate forms. According to the EPA, fluoride emissions are welfare-related pollutants because they injure natural vegetation, herbivorous animals, and agricultural crops. Welfare-related pollutants are regulated by §111(d) of CAA, 42 U.S.C. §7411(d) which requires each state to adopt standards to limit fluoride emissions from existing, unmodified plants. When Kentucky's §111(d) standard was approved by the EPA in 1982, NSA was classified as an existing, unmodified plant because the plant was built in 1969. In 1969, the wet scrubbers were the best known technology for the control of gaseous fluoride emissions. However, even with the new §111(d) standards set in 1982, NSA was merely required to maintain the same level of emissions it had been achieving with the wet scrubbers since 1969.

The issue of whether NSA had a new, *modified* plant subject to the stricter standards of the NSPS, rather than the standards of §111(d), arose when NSA sought to turn off the wet scrubbers. In 1982, NSA discovered, during a routine maintenance-related shutdown of the wet scrubbers, that its ambient air monitors did not detect any appreciable change in ambient fluoride levels as a result of not scrubbing the exhaust gases. NSA assumed that ambient air quality standards were the same as performance standards, like the NSPS, and thus believed that the wet scrubbers were having little, if any, effect on controlling gaseous fluoride emission levels.[1] Consequently, NSA sought to avoid what appeared to be an unnecessary substantial expense by obtaining permission to turn off the wet scrubbers. It had rationalized that turning off the wet scrubbers would have resulted in an increase in gaseous fluoride emissions from the plant by 1174 tons per year. NSA needed both state and the EPA approval to effectuate a relaxation in Kentucky's §111(d) standard that would allow the increased rate of emissions. Kentucky approved the relaxed standard, and then submitted it to the EPA for final approval with a stipulation stating that if NSA turned off the wet scrubbers at its plant to take advantage of the relaxed §111(d) standard, the change in operating method would not be a modification that would subject NSA to the NSPS. Although the EPA issued a notice that it would approve the relaxed standard, it did not agree to the state's stipulation. The EPA held that under the plain words of CAA, shutting off the wet scrubbers would constitute a modification and would activate NSPS application. NSA then petitioned the Sixth Circuit to set aside the EPA's ruling on the modification issue.

Since NSA wanted to stop using the wet scrubbers without activating NSPS, NSA requested that the EPA issue a formal determination stating that deactivation of the wet scrubbers would not be a modification of a

1. The court distinguished ambient air quality standards from performance standards in a footnote. An ambient air quality standard specifies a maximum pollutant concentration in ambient air, while a performance standard specifies the maximum rate at which an individual source may emit pollution. The Court then indicated that ambient air quality standards have not been set for gaseous flouoride emissions, and therefore such measurements are not meaningfully transferrable to emissions.

stationary source. Pursuant to 40 C.F.R. §60.5, the EPA was required to rule on the modification issue because a request to do so was made by an owner and operator of a pollution source (NSA). It was held that under the plain words of §111(a)(3) of CAA, pollution control equipment is part of a stationary source, and changes in such equipment that cause increases in emissions are modifications of the source are within the meaning of §111(a)(4). The EPA concluded that in accordance with §111(b) of CAA, NSA should have been subjected to the NSPS. Subsequently, NSA petitioned the Sixth Circuit to set aside the EPA's determination. NSA alleged that the only way to comply with the NSPS would be to tear out the wet scrubbers and install a costly new system utilizing dry scrubbers.

The Circuit Court had the authority to hear this petition by NSA because §307(b)(1) of CAA, 42 U.S.C. §7607(b)(1) provides for judicial review in the court of appeals for agency actions. The court's standard of review on a final agency action, such as the EPA invoking the NSPS, is specified in the Administrative Procedure Act, 5 U.S.C. §7062(a), which allows an agency action to be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."

Nevertheless, the Circuit Court denied NSA's petition for review by a 2-1 majority because the court did not find the EPA's determination to be arbitrary and capricious. Therefore, the agency's decision was not set aside.

The opinion written by Circuit Judge Guy rejected NSA's three arguments to set aside the EPA's determination. Before reaching NSA's arguments, the Court set forth a variety of precedents mandating judicial deference to agency decisions, but ultimately adopted the rule in *Compton v. Tennessee Dept. of Pub. Welfare,* 532 F.2d 561, 565 (6th Cir. 1976) which quoted the Supreme Court ruling in *Udal v. Tallman,* 380 U.S. 1, 16-17 (1965):

> When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order ... . Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt ... . [T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.

With this authority in mind, the Court affirmed the EPA's decision.

First, the Court affirmed the EPA's interpretation of §111(a)(4). The EPA read the statute broadly so as to include *all* pollution equipment because the statute does not specifically exclude any particular equipment from being a "stationary source." NSA's narrow reading that a "stationary source" includes only pollution generating, not controlling equipment was necessarily rejected. The Court agreed with the EPA's determination that there had been a modification because the current regulations specifically state that any change in method of operation that increases emissions into the atmosphere constitutes a "modification."

Next, the Court rejected NSA's plea (which was not made to the EPA) to apply the regulatory exception to the definition of "modification," 40 C.F.R. §60.14(e)(5). The Court held that NSA's proposal to turn off the wet scrubbers did not fit within the exception because it is reserved for *additions to,* not removals of, pollution control systems that would bring about a major decrease in emissions of one pollutant while causing only a *de minimus* increase in emissions of another. The result of allowing NSA's proposal to fall within the exception would be to allow gaseous fluorides to go virtually uncontrolled. This effect would be contrary to a major purpose of CAA — to prevent or minimize any increase in existing levels of pollution.

Finally, the Court affirmed the EPA's rejection of NSA's argument that applying the NSPS under §111(b) undermines the states' authority under §111(d) to be the primary regulators of emissions control from existing *unmodified* sources. In addition, the Court said it is clear that Congress did not intend federal enforcement of federal air pollution standards governing new or *modified* stationary sources to be controlled by the states. If the states were allowed to insulate themselves from the NSPS by having preemptive authority under §111(d), the result, according to the Court, would be to render the "modification" provision of §111(b) meaningless. This would mean that states could authorize unlimited increases in emissions from existing sources so long as the increase did not violate state standards under §111(d).

The dissent would have held that eliminating

the scrubbers would not render NSA's facility a modified source because the purpose of the "modification" rule is to ensure that pollution control measures are undertaken when they can be most effective at the time of new or modified construction. Thus, turning off the scrubbers does not give rise to an opportunity for new construction or new modifications. Therefore, the dissent would have held it as not a modification and, thus not subject to the NSPS.

Colleen M. Kane '90

Vermont v. Thomas, 850 F.2d 99 (2d Cir. June 23, 1988).

General Issue: Whether the Clean Air Act (CAA) 42 U.S.C. §§ 7401 - 7642 (1982), and regulations promulgated pursuant thereto can be construed broadly so as to include a state implementation plan (SIP) focusing on reducing or eliminating out-of-state sources of sulfur dioxide pollution.

The State of Vermont, joined by the Conservation Law Foundation and the Vermont Natural Resources Council, challenged the EPA's authority to refuse to implement Vermont's regional haze reduction plan. The EPA decided that the Vermont SIP required by CAA § 169A, 42 U.S.C. § 7491 (1982) went beyond the current scope of regulations. This determination was upheld by the United States Court of Appeals for the Second Circuit.

Vermont, pursuant to CAA § 169A filed the SIP to improve visibility within the state in areas designated as Class I areas. A Class I area includes "international parks, national wilderness areas exceeding 5,000 acres, national memorial parks exceeding 5,000 acres, and national parks exceeding 6,000 acres. CAA § 169A, 42 USC §§ 7491, 7492(a) (1982). The resulting regulations were proposed to reduce visibility impairments, caused by "man-made" pollutants, on Vermont's only Class I area, the Lye Brook National Wilderness area.

Vermont submitted a 300 page SIP addressing the alleviation of the summertime haze at Lye Brook. The type of haze plaguing the Lye Brook area is classified as regional, which the EPA defines as "widespread, homogeneous haze from a multitude of sources which impairs visibility in large areas often hundreds of miles from the source of the pollution." The SIP targeted out-of-state pollutants as the primary source of the haze. In particular, eight upwind states -- Ohio, Pennsylvania, West Virginia, Kentucky, Tennessee, Illinois, Indiana, and Michigan -- were named the producers of the sulfur dioxide pollutants that were causing the haze. The Vermont plan to improve visibility required these out-of-state sulfur dioxide emissions be reduced. In addition, Vermont asked the EPA to disapprove and revise the SIPs of the eight upwind states pursuant to CAA § 110 (c)(1)(B), 42 U.S.C. § 7410(c)(1)(B). The third part of the Vermont SIP asked that four states -- Ohio, Illinois, Indiana, and Pennsylvania -- not containing Class I areas be added to the list of states required to submit SIP's.

In its proposed ruling on Vermont's SIP in December 1986, the EPA agreed that the primary cause of the visibility impairment at Lye Brook is regional haze; however, the EPA proposed "no action" on those portions of Vermont's SIP concerning strategies to combat regional haze. The EPA's "no action" decision was based on the lack of regulations concerning regional haze. The regulations now in effect are only Phase I toward the goal of national visibility. Phase I limits the program only to plume blight. The EPA defines plume blight as "traceable streams of smoke, dust, or colored gas emanating from single sources or small groups of sources." Phase I excludes from the program regional haze and urban plumes until technology allows for more "source specific" data to be available.

The EPA, in its final ruling on Vermont's SIP in July 1987, denied Vermont's request that the EPA disapprove the SIPS of eight other states. The EPA also declined to add four states to the list of states required to file a SIP. In addition, the EPA took "no action" on the parts of Vermont's plan to combat regional haze because it is outside Phase I of the regulations. It is from this final ruling that Vermont filed a petition for review pursuant to 42 U.S.C. § 7607(b)(1).

The opinion, as written by Circuit Judge Altimari, held that the regulations enacted to implement the Clean Air Act did not allow Vermont's interstate plan which was to combat regional haze to be put into effect. In determining that the regional haze aspect of Vermont's SIP is outside the scope of the current regulations, the court restricted the EPA's interpretation of the

language of the Preamble to the regulations as limited only to plume blight. The court determined the scope of the regulations through the limiting language of the Preamble by relying on *Wiggins Bros., Inc. v. Department of Energy,* 667 F.2d 77,88 (Temp. Emer. Ct. App. 1981), *cert. denied,* 456 U.S. 905 (1982) (the Preamble to a regulation should be used in construing and interpreting the regulation). The court rejected Vermont's plain meaning reading of the regulations, stating that the reading of the regulations must be put into the context of the regulations.

In determining whether Vermont's SIP may regulate out-of-state pollutant producers, the court, sympathetic to Vermont's plight, stated that although it is ". . . lamentable, until such time as a federal regional haze program is in place, Vermont may not impose its standards on the [eight] upwind states." *Vermont* at 850 F.2d 104 The court found that the EPA's denial of Vermont's request to disapprove the SIPs of the eight upwind states was correct. In addition, the court found the EPA's denial of Vermont's request to add four states to the list of states required to file a SIP was reasonable. Finally, the court suggested that Vermont file with the EPA a petition for rulemaking under the Administrative Procedure Act, 5 USC § 553(e), to address the issue of regional haze. Interestingly, the court noted that ten years after the enactment of the regulations no national program is yet in place to combat regional haze.

Elisabeth Monaco '89

CERCLA

Cadillac Fairview/California, Inc. v. Dow Chemical Co., 18 Envtl. L. Rep. (Envtl.L.Inst.) 20470 (D.C. Cir., Feb. 25, 1988).

General Issue: Whether prior governmental authorization or initiation of a cleanup action is a prerequisite to recovering response costs under CERCLA § 107(a) and whether that same section provides a private cause of action for injunctive relief.

The central issue of this case was whether prior governmental authorization or initiation of a cleanup action - at the local, state, or federal level - is a prerequisite to recovering response costs under section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9607(a)(1980). Overruling the district court's reading of section 107(a), the Circuit Court of Appeals for the District of Columbia, in an opinion by Judge Wallace, held that no such prerequisite exists since that section's plain language compelled the rejection of such an "interpretation of CERCLA that would create a significant obstacle to private response actions". *Cadillac Fairview* at 20472. Thus, private parties need not await governmental approval of their cleanup efforts before seeking to recover the costs from others.

Another important question addressed was whether section 107(a) provided a private cause of action for injunctive relief. The district court determined that, under CERCLA, only the President of the United States, under limited circumstances, had a right to injunctive relief. *See* CERCLA § 106(a), 42 U.S.C. § 9606(a)(1980). The D.C. Circuit upheld this finding.

Facts

In 1976 Cadillac Fairview/California, Inc. (Cadillac Fairview) purchased a site of land (the Site) in Torrance, California. Soon after the purchase, Cadillac Fairview learned that the soil sites there had been contaminated by hazardous substances deposited there prior to the purchase and that the contamination posed a substantial environmental and health threat. Pursuant to a state request that it take steps to protect the neighborhood from the Site, Cadillac Fairview allegedly spent more than seventy thousand dollars ($70,000) in response costs.

Defendants in the case were Cabot, Cabot and Forbes Western Development Company (Western) (from whom Cadillac Fairview bought the Site), International Property Development Company (International), Shell Oil Company (Shell), Dow Chemical Company (Dow), and the General Services Administration (GSA) and the United States of America (the Federal defendants). Since 1942, when the Federal defendants were the owners and had built a rubber producing plant there, each defendant owned and/or operated the site. Until 1955, the government leased the plant to Dow and permitted the dumping of the plant's waste products at the Site. Shell then became the owner and allegedly continued the dumping until 1972.

Procedural Status

In federal district court (C.D. Cal.) Cadillac Fairview sued to recover its response costs from Dow, Shell and the Federal defendants. A declaratory judgment was also sought which would impose liability for all future costs related to the Site's hazardous substances upon the same three defendants and any others who had either owned the Site while contamination occurred or had actually caused it. Finally, Cadillac Fairview requested injunctions directing Dow, Shell, the GSA, and CC & F (the successor in interest to defendants Western and International) to remove the hazardous material from the Site. All of the claims were made under CERCLA § 107(a), 42 U.S.C. §9607(a) (1980). State law claims were also filed.

Cadillac Fairview's action to recover its response costs from Dow and Shell was dismissed by the district court for failing to state a claim upon which relief could be granted. Fed. R. Civ. P. 12(b)(6). The lower court reasoned that the claim was premature, or unripe, because governmental approval of the cleanup costs, which the court believed was required under section 107(a), was missing. The declaratory judgment motions were dismissed for the same reasons. With respect to the Federal defendants, Cadillac Fairview's claims were similarly dismissed when the defendants' summary judgment motion was granted. Cadillac Fairview's applications for injunctive relief were also denied upon the district court's ruling that CERCLA did not grant a private cause of action for such relief. Absent the section 107(a) claims, the pendent state law claims were dismissed for lack of jurisdiction.

The decisions were appealed by Cadillac Fairview and the D.C. Circuit consolidated them. The appellate court reversed the 12(b)(6) dismissals, reversed the dismissal of the declaratory judgment actions and remanded them for reconsideration on the merits,[1] and affirmed the dismissal of the injuctive relief claims. The state law claims were reinstated and remanded.

No Federal Authorization Required Under CERCLA § 107(a)

Supporting the dismissal of Cadillac Fairview's response costs claim, Dow argued that a section 107(a) private action "must be preceded by federal governmental action with respect to the property in question."*Cadillac Fairview* at 20471. First, Dow pointed out that section 107(a)(2)(b) required response costs to be "necessary" and "consistent with the national contingency plan [NCP]" (*i.e.* the 1982 National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. §§ 300.1 - .86 (revised 1985)). Secondly, Dow called attention to the fact that the NCP actually "describe[d] the role of lead agencies [*eg.* the EPA] in examining information and *determining appropriate responses* to environmental hazards." *Cadillac Fairview* at 20471 (emphasis added). From these two facts, Dow then concluded that before any response costs could be deemed necessary and consistent with the NCP (pursuant to section 107(a)(2)(B)) and therefore be deemed recoverable, federal approval in the form of lead agency action was required.

The D.C. Circuit found Dow's arguments *"indistinguishable* from [those] *rejected* in *Wickland* [*Oil Terminals v Asarco, Inc.,* 792 F.2d 887 (9th Cir. 1986)] and *NL Industries* [, *Inc. v. Kaplan,* 792 F.2d 896 (9th Cir. 1986)]," *Cadillac Fairview* at 20471 (emphasis added), and therefore held Dow's position to be equally unacceptable. Notably, the writer of the present opinion, Judge Wallace, also authored the *Wickland* and *NL Industries* decisions. Consequently, his holdings in those cases were incorporated into this one.

In *Wickland,* it was also argued that a private party could only incur recoverable response costs under section 107(a) "if it act[ed] pursuant to a cleanup program . . . authorized by a lead agency." *Wickland* at 891. As in the present case, the *Wickland* defendant relied on section 107(a)(2)(B)'s requirement that response costs be consistent with the NCP, and on the NCP's "references to the role of the lead agency." *Wickland* at 891. The Ninth Circuit rejected this argument, its decision greatly aided by the EPA which, during the pendency of *Wickland,* "presented its interpretation of how the national contingency plan [NCP] [bore] on this issue." *Id.* In the preamble of the 1985 rule revising the NCP, the EPA made "absolutely clear that no Federal approval of any kind is a prerequisite to a cost recovery under section 107." 50 Fed. Reg. 47,934 (1985). This was "buttressed by the lack of any procedure whereby a private party could seek to

1. The Circuit Court held that a declaration of liability under CERCLA became an issue ripe for consideration once it was alleged that defendants had dumped waste at the site.

obtain prior governmental approval." *Wickland* at 892. Such a procedural omission was interpreted by the Ninth Circuit to reflect Congress' intention of making section 107(a) a "remedy independent of governmental actions financed by Superfund", an intention "consistent with CERCLA's broad remedial purpose." *Id.* at 892.

In *NL Industries,* it was claimed that response costs could "not be deemed 'necessary' [pursuant to section 107(a)(2)(b)] since no lead agency approved the cleanup." *NL Industries* at 898. Recognizing this to be a simple "relabeling" of the failed *Wickland* argument, the Ninth Circuit rejected it for the same reasons.

No State or Local Authorization Required Under CERCLA § 107(a)

Shell supported the dismissal by maintaining that the prerequisite to a private suit under section 107(a) was not federal action but rather "significant state or local governmental action." *Cadillac Fairview* at 20471. According to Shell, the state's request that Cadillac Fairview secure the Site from neighborhood contact/trespassing was "too insubstantial to constitute 'significant' governmental action," *id.* and thus the dismissal should stand.

Not needing to determine the significance of the state's action, the D.C. Circuit simply dismissed Shell's interpretation of section 107(a) because "nothing in the plain language of section 107(a) . . . indicate[d] that a party seeking to recover its costs of response must await approval of or action by a state or local entity." *Cadillac Fairview* at 20472. Nor was such a requirement mentioned in the national contingency plan (NCP). *Id.* If Congress had desired such a local governmental prerequisite in section 107(a) then Congress would have put it in as it did in CERCLA § 111(a)(2), 42 U.S.C. § 9611(a)(2)(1980), where the reimbursement of necessary response costs out of Superfund is contingent upon their approval and certification by the responsible federal official. [Editor's Note: Also see *Ohio v. United States Environmental Protection Agency* in this issue.]

Secondly, the D.C. Circuit drew attention to the *failure* of either section 107(a) or the NCP to set down any procedures by "which a party could seek approval from state or local entities or prompt such entities to undertake significant action." *Cadillac Fairview* at 20472. This procedural omission was noted in *Wickland,* with respect to the contention that *federal* approval was required under section 107(a) and the *Wickland* court held that such an omission spoke against requiring federal approval. The D.C. Circuit found *Wickland's* "reasoning persuasive", in not requiring state or local approval. *Id* at 20472.

Touching upon public policy concerns, the Circuit Court also considered the "limited resources" available to state and local governments. *Id.* Requiring approval or initiation of response actions at this level would stretch already strained budgets and since the court found "no indication . . . that Congress contemplated placing this burden on state and local governments" the court would not do so on its own. *Id.*

No Private Cause of Action for Injunctive Relief Under CERCLA § 107(a)

Agreeing with the district court that there was "no mention of a right to injunctive relief in section 107(a)", *Cadillac Fairview* at 20473, the D.C. Circuit upheld the dismissal of Cadillac Fairview's claims for such relief under that section. According to both courts the only party entitled to seek injunctive relief pursuant to CERCLA is the President of the United States under CERCLA § 106(a), 42 U.S.C. § 9696(a)(1980). The only private CERCLA remedy available against private parties was determined to be the section 107(a) action to recover response costs. Considering sections 107(a) and 106(a) together, it was apparent that "when Congress wished to provide for injunctive relief under CERCLA, it knew how to do so and did so expressly" *Cadillac Fairview* at 20473.

James S. Lin '89

Ohio v. United States Environmental Protection Agency, 838 F.2d 1325 (D.C. Cir. Feb. 12, 1988).

General Issue: Whether Congress authorized the Environmental Protection Agency (EPA) to limit private party claims for recovery from the Superfund to those claims which are preauthorized by the EPA and are concerned with the clean up of hazardous waste at a site on the National Priority List (NPL).

At issue in this case is whether § 105 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. §9605 (1982), empowered the Environmental Protection Agency (EPA), the respondent, to revise its National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. §§ 300.1-300.86 (1987) (NCP) to limit the eligibility of private parties to be reimbursed by the Superfund for cleaning up hazardous waste sites. CERCLA was amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613. However, except where noted, the Amendment is not relevant to this case.

CERCLA empowers the EPA to take action against the serious threat of hazardous waste to the public and the environment. 42 U.S.C.A. §9604 (Supp. 1987). The statute created the Superfund to finance such actions. 26 U.S.C.A. §9507 (Supp. 1987). It also directed the EPA to develop the above mentioned NCP which establishes procedures and standards for responding to such actions. Furthermore, CERCLA directed the EPA to establish a national priorities list (NPL) of sites representing the greatest danger to the public or the environment. More pertinent to the case at bar, CERCLA directed the EPA to determine the role that private parties will play in the NCP in responding to the release of hazardous waste. CERCLA limits private party access to Superfund money to those parties who incur clean up costs "[a]s a result of carrying out the national contingency plan." 42 U.S.C.A. §9611(a)(2) (Supp. 1987).

In the instant case, United Technologies Corporation (UTC) petitioned the United States Court of Appeals for the Eighth Circuit to invalidate regulations involving private party claims promulgated by the EPA in its NCP. The regulations require that private claims for reimbursement of response costs by the Superfund must be preauthorized by the EPA and can only be made for sites on the National Priority List. The pertinent parts of these regulations provide:

> §§300.25(d)(1): If any person other than the Federal Government or a state or person operating under Contract or cooperative agreement with the United States takes response action and intends to seek reimbursement from the Fund, such actions, to be in conformity with this plan for purposes of section 111 (a)(2) of CERCLA, may only be reimbursed if such person notifies the Administrator of EPA or his/her designee prior to taking such action and receives prior approval to take such action.
>
> §300.25(d)(2): The process of prior approval of Fund reimbursement requests is preauthorization. Fund preauthorization will be considered only for:
>
> * * *
>
> (iii) Remedial actions at National Priorities List Sites.

40 C.F.R. §3000.25 (1987).

UTC argued that the above regulations frustrated the intent of Congress to make the Superfund available to private parties in order to encourage the cleanup of hazardous waste. Therefore, UTC concluded "[EPA's] promulgation of the regulations are not entitled to the deference ordinarily given to administrative agencies in construing a statute administered by them." *Ohio,* at 20481. UTC then cited §111(a)(2) of CERCLA, 42 U.S.C.A. §9611 (a)(2) (Supp. 1987), to support its policy argument. That section provides that the Government shall use Superfund for "payment of any claim . . . incurred by any [nongovernmental] person as a result of carrying out the NCP." (emphasis supplied by UTC). UTC rationalized that the use of *"any"* without modifiers such as *"preapproved"* established that the EPA exceeded its authority in promulgating the disputed regulations.

In addition, UTC argues that both the pre- and post-SARA language of CERCLA §112, gives further support for its argument. CERCLA

§112(a)42 U.S.C. § 9612(a) (1982) (amended 1986) deals with the rights of nongovernmental persons to recover response costs from responsible parties and the Superfund. The relevant part of the statute reads as follows: "In any case where the claim has not been satisfied within sixty days of presentation [to the responsible parties] . . . the claimant may elect to present an action against such [party] . . . or to present the claim to the fund for payment." *Id.* The SARA amendment restated the same proposition, 42 U.S.C.A. § 9612(a) (Supp. 1987). UTC argued that the amendment renewed the emphasis on its policy argument. And, furthermore, it "[p]laces claims against the [Superfund] on the same basis as cleanup claims against responsible parties, for which neither preauthorization nor relation to a site on the NPL is required." *Ohio* at 20482. Thus, UTC concluded that the disputed regulations are inconsistent with congressional intent and the plain meaning of the statute.

The EPA argued that the court should deny UTC's petition because [1] the court did not have the jurisdiction to review it; and because [2] the regulations promote the overriding goal of Congress, which is to clean-up the hazardous waste sites through the implementation of the NCP.

Judge Sentelle first considered at length the EPA's argument as to whether the court had the jurisdiction to review the UTC petition. The court concluded that it did have the jurisdiction.

Then the court addressed and rejected UTC's statutory interpretation of §§111-112 of CERCLA. The court disagreed with UTC's § 111(a)(2) argument that CERCLA does not empower the EPA to place any limitations on private party claims to the Superfund pursuant to the NCP. Judge Sentelle observed that UTC's reading of §111(a)(2) CERCLA failed to include the important provision that before a private party is eligible to receive Superfund money "[s]uch costs must be approved under said [national contingency] plan and certified by the responsible Federal Official." 42 U.S.C.A. §9611(a)(2) (Supp. 1987). Moreover, §112 does not offer further support for UTC's argument, because it refers back to §111 for a definition of claims eligible for Fund reimbursement.

The court admitted that involving private parties in cleanup efforts is a congressional policy evident in CERCLA. Yet, the court held that "[t]he most fundamental policy is . . . that the cleanup of hazardous waste sites should occur." *Ohio* at 20482. It further observed that the preauthorization requirement probably does not discourage private parties from participating in the cleanup effort. The court offered support for its conclusion by pointing out that a full reading of CERCLA §111, 42 U.S.C.A. §9611(a)(2) (Supp. 1987), makes it clear that the EPA is the designated "protector and distributor" of the limited resources of Superfund, and claims are valid only to the extent there are resources available. *Ohio* at 20482. Therefore, the court rationalized, absent the preauthorization requirement, private persons would proceed at the chance that their claim would be denied because of lack of funds.

The court then cited §105 of CERCLA, 42 U.S.C. §9605 (1983 & Supp. 1987) in further support of its conclusion that CERCLA empowered the EPA to limit the number of private party claims to the fund. The court reasoned that §105 provides that it is the EPA's role, through the promulgation of the NCP, to determine the foundation for allowance of private claims under sections 111 and 112 of CERCLA. Thus, the court concluded that the EPA's position that Congress intended to cleanup hazardous waste through the implementation of the NCP is reasonable. Moreover, the court held that CERCLA required the EPA to compile the NPL for remedial action in the NCP. Therefore, the EPA was not acting unreasonable in using the NPL to determine which private parties will be reimbursed from the limited resources of the Superfund. Finally, the Court disagreed with UTC's conclusion that §112 of CERCLA and SARA places private party claims against the Superfund on the same basis as private party claims against responsible parties. Judge Sentelle distinguished the two situations by rationalizing that the need to marshal the scarce resources of the Superfund "[i]s uninvolved in the pursuit of private actions against responsible parties." *Ohio*, at 20482.

In conclusion, Justice Sentelle denied UTC's petition, holding "[t]hat considerable weight should be given to an executive department's interpretation of a statute which they are administering." *Id.* The court held that "when the choice of the agency in advancing a regulatory scheme represents a reasonable accommodation of conflicting policies . . . we should not disturb it unless it appears from the statue or its legislative history that the accommodation is not one that Congress would have sanctioned." *Id.*

Melissa Beth Saslow '90

INSURANCE

Continental Insurance Cos. v. Northeastern Pharmaceutical & Chemical Co., 842 F.2d 977 (8th Cir. Feb. 26, 1988) (*Continental III*).

General Issue: Whether the term "damages" in an insurance policy context includes claims for cleanup costs under CERCLA and RCRA.

The present case is a *rehearing en banc* by the Eighth Circuit to redetermine the meaning of "damages" within a comprehensive general liability (CGL) insurance policy. The Court of Appeals reversed its earlier panel decision, *Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co.,* 811 F.2d 1180 (8th Cir. 1987) (*Continental II*), ultimately holding that "damages" in the insurance context include monetary claims but not claims for equitable relief. The court then determined that claims for cleanup costs under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA) are equitable actions for monetary relief and therefore not recoverable as damages under the foregoing definition.

This action, brought in 1984 by Continental Insurance Companies (Continental), sought a declaratory judgment concerning its liability to Northeastern Pharmaceutical and Chemical Company (NEPACCO). NEPACCO, starting in 1980, was involved in several lawsuits stemming from the disposal of dioxin and other toxic chemicals in the early 1970's during which time Continental issued several different CGL policies to NEPACCO. In 1980 the EPA cleaned the contaminated sites up and filed an action to recover its cleanup costs from NEPACCO. *United States v. [NEPACCO]*, 579 F.Supp. 823 (W.D. Mo. 1984) (the EPA lawsuit), *aff'd in part, rev'd in part and remanded*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987). In the EPA lawsuit, NEPACCO was held strictly liable for cleanup costs under both RCRA and CERCLA for illegally disposing of hazardous waste. *United States v. [NEPACCO]* at 810 F.2d 726. In 1985, the federal government filed a garnishment action against NEPACCO's insurer, Continental, to secure CERCLA cleanup costs for the cleanup of the contaminated sites. *United States v. Continental Ins. Cos.,* No 85-3069-CV-S-4 (W.D. Mo. filed Feb. 25, 1985).

The present declaratory action was filed by Continental in an attempt to rid itself of liability stemming from the cleanup of sites which its former insured, NEPACCO, was held liable for in two separate actions related to two separate sites. Count I of Continental's complaint pertained to the EPA lawsuit and Count II of the complaint related to a lawsuit which included damages for personal injury and property damages. Since NEPACCO had been liquidated ten years earlier, the state of Missouri was permitted to intervene in this lawsuit in order to protect its interests in related lawsuits.

Addressing Count I, the district court granted summary judgment in favor of Continental's declaratory claim that the state and federal government did not suffer any "loss" or "damages" until the cleanup costs were actually incurred. *Continental Ins. Cos. v. [NEPACCO],* No. 84-5034-CV-S-4, slip op. (W.D. Mo. June 25, 1985) (*Continental I*). Since there was no "occurrence" of loss or damage during the policy period which had expired in the early 1970's, the court held that there was no insurance coverage for the cleanup expenses incurred in 1980. *Continental I*, slip op. at 10. With regard to Count II, the district court held that summary judgment was inappropriate since it was still necessary to determine whether there was an "occurence" of personal injury or property damage during the policy period and whether there was any applicable pollution exclusion in the policy. The part of the *Continental I* decision relating to Count II was affirmed by the Eighth Circuit in both its original panel decision (Continental II) and subsequent *en banc* opinion (Continental III).

The Eighth Circuit's original panel decision, regarding Count I of Continental's action, held that both the state and federal governments suffer "property damage" at the time hazardous waste is improperly released into the environment, *Continental II* at 811 F.2d 1184-87, and that cleanup costs are a recoverable measure of those damages as environmental property damage. *Id.* at 1189-91. The court held that federal and state governments suffer damages to their "quasi-sovereign" interest when the pollutants are released. *Id.* at 1185 (citing *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907)). Citing several Supreme Court opinions, the court further contended that government has a property interest in the environment and can therefore sue for property damages caused to the general public which stems from environmental hazards. *Id.*

(citing *Maryland v. Louisiana*, 451 U.S. 725 (1981); *Toomer v. Witsell*, 334 U.S. 385 (1948); *Missouri v. Illinois*, 180 U.S. 208 (1901)). Thus the property damage incurred by the governments was suffered at the time of the release of the hazardous waste into the environment. *Id.* at 1189[1].

However, the appellate court, in its *rehearing en banc,* reversed its panel decision and held that damages in the CGL policy do *not* include cleanup costs. Holding that the district court correctly interpreted Missouri state insurance law, the Eighth Circuit agreed that the cleanup costs were not considered damages under the CGL policies. See *Continental III*, 842 F.2d 977 (1988).

Missouri law requires insurance contracts be given their plain meaning and if the language is ambiguous then it should be construed against the insurer. *Robin v. Blue Cross Hosp. Serv.*, 637 S.W. 2d 695 (Mo. 1982); *Pearce v. General Am. Life Ins. Co.,* 637 F.2d 536 (8th Cir. 1980). The court, however, held that in the insurance context, the term "damages" was not ambiguous. It defined damages as referring solely to legal damages; equitable monetary relief was excluded. Notably the court does not cite Missouri law for this proposition but rather other jurisdictions. It was reasoned that this limited definition was consistent with the insurance policy in which Continental agreed to pay "all sums which the insured becomes legally obligated to pay *as damages*" as opposed to "all sums which the insured becomes legally obligated to pay." *Continental III* at 986 [emphasis added]. This was, in the court's opinion, consistent with the distinction between monetary damages and injunctive relief.

The court further explained that under CERCLA, cleanup costs are not equivalent to compensatory damages for injuries to the environment. The government had the option of suing for either compensatory damages or the cost of cleanup. This may make little difference to the insured (however in some situations the dollar figure may be substantially different) but the distinction may be critical for insurers since liability would extend only to *legal* damages in CGL policies.

Judge McMillian wrote this opinion using much the same analysis as in his earlier dissent in *Continental II*, 811 F.2d 1193, 1194 (1987). (McMillian concurring in part, dissenting in part). In that earlier panel decision, McMillian stated that "environmental damage is 'damage to property' and that the release into the environment of hazardous waste may cause property damage not only to the actual owners of land, water and air, but also to the quasi-sovereign interests of governmental entities." *Id.* at 1193 (concurring with the panel opinion). He added that since the harmful event occurred during the time the policy was in effect, the government may have grounds to sue for damages to the environment. *Id.* McMillian's dissent in *Continental II,* however, became the basis of the eventual *rehearing en banc* decision, *Continental II, i.e.* that cleanup costs do not constitute compensatory damages but rather monetary relief for equitable action.

Judge Heaney wrote a dissent for the *rehearing en banc.* This decision, *Continental III,* reversed his prior opinion in *Continental II.* 811 F.2d 1180 (1987). In his dissent, Judge Heaney questioned the Court's interpretation of Missouri insurance law which clearly states that an insurance policy must be viewed in light of the meaning ordinary lay people would understand. *Robin* at 698. He explained that the CGL policy in question did not define the term "damages" and because the term is open for varying construction, the court must, in accordance with state law, impose the meaning which lay persons would place on the word. Heaney also pointed out that Missouri courts have held that the cost of restoring real property is an appropriate measure of damages so long as the cleanup cost does not exceed the value of the property. *Jack L. Baker Cos. v. Pasley Mfg. & Distrib. Co.,* 413 S.W.2d 268, 273 (Mo. 1967).

At least one other court has adopted the same position as the majority in this case. In *The Travelers Ins. Co. v. Ross Elec. of Washington,* No. C87-559TB (W.D. Wash. May 27, 1988) (LEXIS, Genfed library, Dist file), the district court, applying Washington state insurance law, stated that the accepted technical meaning of the term "damages", *i.e.* compensatory rather than equitable, is the meaning which should be applied. The court further agreed with the Eighth Circuit

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1. The court further explains that liability is present under CERCLA § 107, 42 U.S.C. § 9607 whenever there is a release or threatened release of hazardous waste which causes the incurrence of response costs. "Release" is defined as "any spilling, leaking, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment" of any hazardous material, 42 U.S.C. § 9601(44). See *Continental II* at 811 F.2d at 1189, n. 23.

that the cleanup costs were equitable in nature and therefore not recoverable under a CGL policy. It also concurred that this distinction between response costs and damages is consistent with the options contained in CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4).

This issue has clearly not been fully resolved by the courts. One possible consequence of the *Continental III* majority interpretation of damages would be to *deter* or *inhibit* government from cleaning a site as quickly as possible because of the real fear that the actual response costs will not be covered by the owner's insurance policy which is often the owner's sole resource for paying these claims. This, despite the government's desire to accelerate the abatement of hazardous waste in the environment. Consequently, the courts might force government to sue for "property damages" in order to receive funds from insurance policies. The property damages are, however, less likely to be as accurate as the actual dollar amount spent on cleanup because of the speculative nature of environmental damages.

Laura E. Peck '89

SOLID WASTES

New York Public Interest Research Group v. Town of Islip, 71 N.Y.2d 292, 520 N.E.2d 517, 525 N.Y.S.2d 798 (1988), *aff'g* 134 A.D.2d 246, 520 N.Y.S.2d 366 (Feb. 11, 1987) (mem).

General Issue: Whether a New York State trial court correctly interpreted an "expansion", limited by the Long Island Landfill Closure Law, to be a lateral, horizontal expansion of a landfill and not a vertical addition of solid waste to an existing slope.

In the midst of Long Island's continuing struggle with the problem of how to dispose of its solid wastes without contaminating its underground water supply, this case came to the New York State Court of Appeals out of a long series of disputes between the New York State Department of Environmental Conservation (DEC) and the Town of Islip. These disputes revolved around Islip's compliance with the state's regulation of its landfill, creating a backdrop of administrative and judicial battles, pursuant consent orders governing the preparation of Blydenburgh Landfill for capping and closure, as well as public attention focused on the voyage of the "infamous garbage barge" *Mobro* loaded with Islip garbage. *See* 71 N.Y.2d at 308-09.

Long Island's drinking water is supplied by its groundwater aquifer, the sole source of drinking water for the populations of both Nassau and Suffolk Counties. The municipalities of Long Island have depended on the use of landfills to dispose of the solid wastes generated by their residents, and many of these landfills came into existence long before the realization that buried wastes would contaminate drinking water. Therefore, Blydenburgh Landfill, built in 1927, is a perfect example of these disposal sites which were built without liners or other safety design features to protect the water supply from dangerous leachate seepage. *See* 71 N.Y.2d at 298.

In the 1970s, New York State's DEC became aware of the danger of the aquifer's contamination from hazardous wastes seeping into the groundwater from landfills located in the deep flow recharge area, that area where surface water is reabsorbed to replenish the aquifer. In response to this danger, the New York State Legislature enacted a series of statutes designed to protect the aquifer by means such as mandating the capping and closing of these landfill disposal sites by 1990. In its resolution of this case the New York Court of Appeals has interpreted three provisions of this statutory scheme: the Long Island Landfill Closure Law, N.Y. Envtl. Conserv. Law § 27-0704 (McKinney 1984), the Ashfill Law, N.Y. Envtl. Conserv. Law § 27-0704 (McKinney 1987) (amending the Landfill Closure Law), and the State Environmental Quality Review Act (SEQRA), N.Y. Envtl. Conserv. Law § 8-0105 (McKinney 1984).

At issue in this decision is the third in a series of Islip-DEC consent orders. This order of May 12, 1987, modifying a prior order, represented a final hard-fought agreement between Islip and the DEC, only to be challenged in this suit by third parties, an environmental organization, the New York Public Interest Research Group (NYPIRG), and an intervenor petitioner, the Board of Education of Hauppauge Union Free School District, which operates a school within 3000 feet of a proposed ash burial site at Blydenburgh Landfill. NYPIRG sought to annul the May 12, 1987 consent order (The Order) by means of an Article 78 proceeding challenging an

administrative decision. *See* N.Y. Civ. Prac. L. & R. §§ 7801-04 (McKinney 1984). The trial court had held The Order to be valid within all three of the statutes forming the basis of the petitioners' challenges, and the Appellate Division affirmed. Four New York State Court of Appeals judges, joining in the majority opinion written by Judge Hancock, affirmed the lower court decisions, while a fervent dissent was written by Judge Kaye, who was joined by Judge Bellacosa.

A Section 27-0704(3) "Expansion" of an Existing Landfill

The consent order at issue required Islip to take specific steps to remediate and close its landfill, but it also approved Islip's requests to add more solid nonhazardous waste to its existing landfill slope and to bury ash from its new resource recovery system in a landfill area that had been capped previously. The petitioners charged that these additions to the landfill would violate the Long Island Landfill Closure Law by allowing "expansion to an existing landfill ... located in a deep flow recharge area." § 27-0704(3). If the proposed additions of solid waste were indeed "expansions" within the meaning of the statute, then, for The Order to be valid, the DEC would have been required to (1) hold a public hearing and (2) make a finding that Islip had no alternative feasible means to dispose of its solid waste. The Court of Appeals held that Islip's proposed additions to its landfill were not "expansions" requiring these two measures and, therefore, had been properly approved by the DEC in The Order.

In construing the statute, the Court held that "expansion" of an existing landfill under the statute was intended to include lateral, horizontal expansion, but not vertical expansion, such as the proposed additions to the existing landfill slope. The Court arrived at its holding for three reasons. First, the Court concluded that the word "expansion" itself, when read in its statutory context, required this result. Second, the Court recognized that the DEC had been given the authority to administer the statute and had consistently applied this meaning of the term "expansion." Third, recognizing that the underlying purpose of the statute was to protect Long Island's drinking water from hazardous wastes seeping from landfills, the Court accepted the DEC's technical judgment that vertical expansion does not pose a significant increased threat to the groundwater from leachate.

The Court's textual interpretation focused on the following language:

> On or after the effective date of this section and except as provided herein, no person shall commence operation, including site preparation, of a new landfill or of an expansion to an existing landfill which is located in a deep flow recharge area. However, the commissioner, after conducting a public hearing, may approve a limited expansion of any existing landfill in a deep flow recharge area for the sole purpose of providing for solid waste disposal capacity prior to the implementation of a resource recovery system...

Long Island Landfill Closure Law, N.Y. Envtl. Conserv. Law § 27-0704(3) (McKinney 1984).

Noting that "expansion" is not included in the statute's definition section, the Court reasoned that the surrounding language makes clear that the term could not have been intended to include vertical expansion because a vertical expansion would not require that Islip "commence operation" or "site preparation" — acts that logically only pertain to new adjacent areas, as opposed to piles of waste already accumulated there.

This construction of Section 27-0704(3) also demonstrates the Court's reliance on the DEC on two grounds. First, the Court found it significant that the DEC, in administering the statute since its 1983 enactment, has consistently viewed vertical expansion to be outside the meaning of an "expansion" which is limited by Section 27-0704(3). In relying on past DEC action, the Court referred to guidelines the DEC had drafted for the implementation of the Landfill Closure Law with help from the New York State Legislative Commission on Water Resource Needs of Long Island. These guidelines were adopted by the commissioner in 1984, and they expressly define "expansion" as: "a lateral extension of a landfill beyond the boundaries of an existing landfill." 71 N.Y.2d at 303 (quoting Long Island Law Implementation Guidelines § 3.8). The Court pointed out that this definition has been consistently applied by the DEC in its disposition of Section 27-0704(3) proceedings. 71 N.Y.2d at 303.

The DEC's technical expertise is also given significant deference in this majority opinion. It is the basis of the Court of Appeals' conclusion that its reading of a limited "expansion" as only a

lateral expansion is consistent with the statute's purpose to protect Long Island's groundwater, while phasing out landfills and accelerating the transition to resource recovery. The Court accepts the DEC judgment that a vertical expansion of a landfill does not pose a significant threat to the aquifer because "there is a 'reduced potential for leachate formation from a vertical versus a lateral expansion.' " 71 N.Y.2d at 303.

Underlying this decision is the Court's concern with the crucial question facing Long Island communities — where can this solid waste go? The majority argues that while the statutory scheme prohibits any new landfills, it contemplates continuing use by Long Islanders of their existing landfills during the seven years allotted to phase them out, recognizing that the transition to resource recovery will take time. *Id.* at 304. The Court focuses on the available alternative of trucking garbage off Long Island, articulating the concern that it may indeed be so expensive as to make its feasibility questionable. *Id.* at 299-300 (citing *Town of Islip v. Williams,* 126 A.D.2d 276, 513 N.Y.S.2d 449 (1987), for the Appellate Division opinion that off-island trucking is not so exorbitant as to be irrational but that the acceptability of such costs may be debatable).

Judge Kaye's dissent deplores the majority's interpretation of the word "expansion," characterizing the decision as the Court of Appeals' sanction of an order to defeat the statutory procedure and the clear mandate of the legislature. 71 N.Y.2d at 312. Charging that the majority gives undue deference to the DEC's scientific evidence, Judge Kaye warns that this legislative mandate, even if it does allow the DEC to approve a limited expansion of a landfill, still requires that the issues of waste disposal that are raised and the technical evidence concerning Long Island's groundwater underlying those decisions must be exposed to public scrutiny and confrontation at public hearings. Moreover, Judge Kaye questions the DEC's opinion that a vertical expansion of Islip's landfill would not be hazardous to the aquifer, referring to NYPIRG'S evidence to the contrary. 71 N.Y.2d at 311. Judge Kaye defines the challenged provisions of The Order as "expansions" limited by the Long Island Landfill Closure Law and describes the decision as one that is "breathing new life into the Blydenburgh Landfill," 71 N.Y.2d at 307, extending the landfill's life by three years and its capacity by up to 900,000 tons of extra solid waste. Judge Kaye concludes that this is certainly an "expansion" of a landfill targeted by the Law for closure, and calls for these administrative actions to be subject to a showing that there is no feasible alternative, as well as to public scrutiny through public hearings.

"Enforcement Proceeding" Within the Meaning of SEQRA

In interpreting SEQRA, the majority also rejected the contention that The Order was invalid because it was an expansion agreement, requiring compliance with sections of SEQRA. The Court agreed with the DEC argument that The Order fell within SEQRA exemption of those orders that issue from enforcement proceedings. N.Y. Envtl. Conserv. Law § 8-0105 (McKinney 1984). The Court held that The Order fell within DEC's own definition of an exempt action, which includes "civil or criminal enforcement proceedings, whether administrative or judicial, *including a particular course of action required to be undertaken pursuant to a judgment or order,* or the exercise of prosecutorial discretion." 6 N.Y. Comp. Codes R. & Regs. § 617.2[q][l] (emphasis added). The Court reasoned that The Order fell within this definition because, not only did it modify a previous enforcement proceeding consent order, but the new order imposed substantial new obligations on Islip. Furthermore, the majority concluded that the modifications approved by the DEC were well within its prosecutorial discretion, authorized by its statutory authority to control the operation of Long Island's landfills. *See* N.Y. Envtl. Conserv. Law § 71-2727[2].

The Ashfill Law

A third and last unsuccessful challenge to The Order was raised by the Hauppauge School Board, which claimed that The Order violated the Ashfill Law, N.Y. Envtl. Conserv. Law § 27-0704 (McKinney 1987), by allowing an ash burial site to be located within 3000 feet of a school. The Court dismissed this proposition as one without merit, explaining that the Ashfill Law is an act to establish procedures for selecting a site on Long Island on which to build a regional ashfill disposal facility. The Court noted that the statute does prohibit building that proposed regional facility within 3000 feet of a school, but held that it is irrelevant to the regulation of landfills. 71 N.Y.2d at 799 n.2.

Claire R. Telecki '89

TOXIC TORT LIABILITY

Sterling v. Velsicol Chemical Corp.,
855 F.2d 1189 (6th Cir. Aug. 29, 1988)
(Sterling II).

General Issues: Whether the standards for finding damages by the District Court were correct with respect to the following issues: proximate causation, prejudgment interest, punitive damages for post traumatic stress disorder, fear of increased risk of disease, impaired quality of life and property damage.

The significance of the instant case relates to the dual problems of proximate causation and compensatory damages in a class action suit.

The present suit was originally brought in 1978. Forty-two plaintiffs sued Velsicol Chemical Corp. (Velsicol) in the Circuit Court of Hardeman County, Tennessee, alleging that Velsicol had contaminated the well water, thereby causing serious physical injury. Velsicol had the case removed to the U.S. District Court for the Western District of Tennessee on the basis of diversity. The District Court then directed the plaintiffs to designate five representative participants to establish liability both for themselves and for the class as a whole. After a bench trial, the Court found that Velsicol contaminated the plaintiffs well water and was the proximate cause of their injuries. The Court then awarded compensatory damages for personal injuries and property, punitive damages, and prejudgment interest in excess of five million dollars. *Sterling v. Velsicol Chemical Corp.,* 647 F. Supp. 303 (W.D. Tenn. 1986), *(Sterling I).*

In 1988, the Court of Appeals in the 6th Circuit unanimously affirmed in part, reversed in part, and remanded for the recalculation of damages.

Velsicol is a chemical company that had purchased 242 acres of land in Hardeman County, Tennessee in 1964, for use as a chemical landfill. Between 1964 and 1972 Vesicol buried 300,000 fifty-five gallon steel drums and hundreds of fiberboard cartons containing ultrahazardous chemical waste.

In 1972 the State of Tennessee ordered Velsicol to cease disposal of all toxic chemicals by August of 1972 and all other chemicals by June of 1973.

Numerous tests were done between 1967 and 1978 to determine if there was seepage and, if there was, the extent of it. The tests were done by the defendant and numerous agencies. The first published report was completed by the United States Geological Survey (USGS) in 1967. The report indicated that chlorinated hydrocarbons had migrated into the subsoil and had contaminated portions of the environment adjacent to the disposal site. The USGS concluded that the local and contiguous ground water was in danger of contamination. In 1978 the USGS, in conjunction with State authorities, issued an update of the 1967 report. The report stated that the local aquifer was polluted. Additionally, the State, USGS, EPA, and Velsicol all conducted ground water surveys of the site and found that numerous wells had been contaminated with tetrachloride and chloroform. All residents within 1000 acres of the site were then directed to stop using well water for any purpose.

On appeal Velsicol raised three main substantive issues and the procedural issues of subject matter jurisdiction and class action certification under the Federal Rules of Civil Procedure.

The first substantive issue raised was that there was insufficient and flawed evidence to prove causation between Velsicol's disposal of toxic chemicals and plaintiffs' injuries.

The Sixth Circuit held that the District Court carefully considered all of plaintiffs' evidence, including evidence that had been validated by numerous other courts. The Circuit Court then stated that the District Court did not err in finding that Velsicol's chemicals contaminated the plaintiffs' wells based upon the evidence presented. The Court's rationale was based upon *United States v. Yellow Cab Co.,* 338 U.S. 338 (1949), which stated that if the District Court's account of the evidence is plausible, it may not be reversed even if the reviewing court is convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. This Court, based on *Anderson v. City of Bessemer,* 470 U.S. 564 (1985), felt that a reviewing court oversteps its bounds of duty under Federal Rules of Civil Procedure 52(a) if it undertakes to duplicate the role of the lower court as the trier of fact.

In addition, Velsicol argued that plaintiffs presented insufficient evidence to prove causation between the use of the contaiminated water and their individual injuries. The Court concluded that in a class action a court is permitted to allow the plaintiffs to prove defendant's liability without regard for any individual injuries. Thus, plaintiffs

must only prove that the contaminated water was *capable* of producing the alleged injuries, which was done to the satisfaction of the Court. The Court then held that for any damages to be awarded, individual plantiffs must prove proximate causation for their individual injuries.

Velsicol then argued in the alternative that even if the Court assumes proximate causation, the District Court improperly awarded the plaintiffs compensatory damages for their individual injuries and disabilities.

The Court addressed this issue by applying the standard it had established in *Thompson v. Underwood,* 407 F.2d 994 (6th Cir. 1969), and held that any injuries must be shown to be a "reasonable medical certainty", which can be shown by the use of expert testimony in which generally accepted scientific theories are presented. Conclusions based upon a "probability" or that an injury is "more likely than not" will not be acceptable. *See Sterling II* at 1200.

Plaintiffs' expert testimony concerning their respective injuries included descriptions that "it's more likely than not", "that exposure to the chemicals was a 'reasonable cause' for his kidney cancer, the injury was 'compatible with toxic exposure', and that plaintiffs liver damage was 'probably due' to exposure to toxic chemicals". *Sterling II* at 1203-4., Thus, the Court held that plaintiffs did not prove that their injuries were a "reasonable medical certainty" and remanded for recalculation to exclude those portions of the awards. *See Sterling II* at 1200.

The Court also remanded for recalculation of damages in reference to the awards for increased risks of cancer and other diseases. The Court, relying on the standard in Tennessee law, stated that the plantiffs did not have to prove conclusively, but with a "reasonable medical certainty" that the diseases would occur. *See Sterling II* at 1200. Additionally, the court found the reasoning persuasive in *Ayers v. Jackson,* 189 N.J. Super. 561, 461 A.2d 184 (1983), a well water contamination case. The Sixth Circuit held, based on *Ayers,* that if "plaintiffs experts could not formulate a quantitative measure to a reasonable medical certainty of . . . cancer risk, it was left to speculation as to possible consequences of the ingestion of the alleged carcinogens on the future of each plaintiff." *Sterling II* at 1205, (quoting *Ayers v. Jackson,* 189 N.J. Super. 561, 461 A.2d 184 (1983). In the instant case the District Court found only a twenty-five to thirty percent susceptibility to cancer and other diseases, which does not constitute a "reasonable medical certainty". See *Sterling II* at 1200. Thus, the Circuit Court remanded the case to exclude the damage award for increased risk to cancer and other diseases. Judge Jones concurred with the Court in the use of the standard of "reasonable medical certainty" for assessing the damages for present injuries and increased risk of disease. Nevertheless, Judge Jones wrote that the Court should not have disregarded expert testimony merely because it "fails to use the magic words reasonable medical certainty". *Sterling II* at 1217 (Jones, J. concurring), (quoting *Thompson v. Underwood,* 407 F.2d 994, 997 (6th Cir. 1969)).

Plaintiffs were also awarded compensation for the fear of increased risk of cancer or disease. However, the Sixth Circuit remanded for a recalculation of the award. In Tennessee, damages for fear arising from an increased risk of disease are recoverable. Therefore, the District Court awarded damages for fear of increased risk of disease ranging from $50,000 to $250,000. The Circuit Court then vacated the damage awards and using *Laxton v. Orkin Exterminating Co.,* 639 S.W.2d 431 (Tenn. 1982), as a guide, directed that damages be awarded in the range $18,000 to $72,000.

The Sixth Circuit also reversed the District Court's award of damages for immune system impairment. The Court's reasoning was that in accordance with the Federal Rule of Evidence "702, the admission of expert testimony [must be] in conformity with a generally accepted explanatory theory." *Sterling II* at 1208, (quoting *United States v. Kozminski,* 821 F.2d 1186, 1194 (6th Cir.), *cert. granted,* 108 S. Ct. 225 (1987)). In reversing the District Court, the Circuit Court held that plaintiffs' expert testimony was not a generally accepted medical theory.

The Court also rejected plaintiffs awards for Post-Traumatic Stress Disorder (PTSD). Consumption of contaminated water may be upsetting, but it is not the type of event that the Court considered to be a universal stressor. Courts have historically awarded damages for PTSD only in violent circumstances such as rape, assault, combat, earthquakes, car and airplane crashes. *Sterling II* at 1210, (citing *Smith v. Smith,* 830 F.2d 11 (2d Cir. 1987)).

The Court reversed the District Court's award for impaired quality of life based on the nuisance

theory, due to the plaintiffs' lack of standing. Three of the five plaintiffs were non-residents, and the remainder relocated prior to any warnings from private or public sources concerning the contaminated wells.

Additionally, the Sixth Circuit reversed the District Court on the issue of prejudgment interest. The Court held that "no common or statutory law in Tennessee provides for prejudgment interest on compensatory awards for physical or emotional damages". *Sterling II* at 1214. However, the award of prejudgment interest for property damage was correct, since it is well entrenched in Tennessee statutory law.

The final issue addressed by the Court involves the award of punitive damages. The District Court based its award on three factors. First, Velsicol's failure to cease its operations of the site after being notified by several governmental agencies "constituted gross, willful and wanton disregard for health and well-being of the plaintiffs". *Sterling II* at 1215 (quoting Sterling I at 307). Second, Velsicol's actions and defenses during the course of the litigation were in bad faith, in that "Velsicol's attempt to allege that plaintiffs were guilty of assuming the risk, or were guilty of contributory negligence is . . . so outrageous as to subject the defendant to punitive damages". *Id.* at 1216. (quoting *Sterling I* at 323-4). Lastly, the District Court found Velsicol attempted to shift liability and causation for the psychological disorders suffered by the plaintiffs to various governmental authorities. Therefore, the District Court found that punitive damages were warranted.

The Circuit Court held that there was no evidence that Velsicol's defense was in bad faith. The Court stated that if any court sets too strict of a standard in deciding whether counsel's positions warrants punitive damages, then a possible outcome might be to chill an attorney's advocacy. Nonetheless, the Court did find that punitive damages were warranted when Velsicol established, utilized, and then refused to cease disposal operations. Therefore, the Court remanded for the recalculation of punitive damages.

Jonathan Dobbs '90

WATER

Texas Municipal Power Agency v. Administrator of the United States Environmental Protection Agency, 832 F.2d 1482 (5th Cir. Feb. 10, 1988).

General Issue: Whether the EPA committed a technical mistake in its denial of a Power Agency's petition to modify a current National Pollution discharge and Elimination System permit.

The issue presented in this suit is whether the United States Environmental Protection Agency (EPA) committed a "technical mistake" or a "mistaken interpretation of law" under 40 C.F.R. § 122.62(a)(16) (1986), when it denied the Texas Municipal Power Agency's (TMPA) petition to modify the National Pollution Discharge and Elimination System (NPDES) permit regulating a settling pond known as outfall 301. The court determined that the EPA did not err in either instance, and the TMPA's request for modification was denied. This issue is part of a dispute over whether the EPA may regulate the internal waters which are an integral part of the waste treatment system of the TMPA.

In July 1985, the TMPA petitioned the United States Court of Appeals for the Fifth Circuit for a review of the restrictions for outfall 301, contending that the restrictions should be eliminated. The petition was dismissed because it was not timely filed. The TMPA then applied to the EPA requesting that the permit for outfall 301 be modified to delete the restrictions on outfall 301. The EPA denied the modification request in November 1986. The TMPA applied to the United States Court of Appeals for the Fifth Circuit to review this denial. After determining that it had jurisdiction to review the case because it was a request for modification, the court addressed itself to the issue of whether there was a mistaken interpretation of law by the EPA.

The TMPA is an electric utility which operates a plant next to the Gibbons Creek Reservoir in Grimes County, Texas. The waste treatment system for the plant functions by utilizing a series of settling ponds to allow suspended solids to settle out of the water before it is ultimately discharged into the Gibbons Creek Reservoir. At outfall 301, the treated wastewater flows from a sewage treatment facility serving the employees at the TMPA rather than from the TMPA's generating plant.

The EPA regulates the discharge of waste from the TMPA through several NPDES permits. The Clean Water Act (CWA) is the enabling statute giving the EPA the ability to regulate the pollutant discharge into the nation's waters. 33 U.S.C. § 125(1)(a) (1986). These waters do not generally include waters internal to a waste processing system such as outfall 301. However, in 1979 the EPA promulgated the "internal waste stream rule" which allows the EPA to impose restrictions on internal waste streams when it is impractical or unfeasible to regulate at the point of discharge. The Gibbons Creek Reservoir in this suit is an example. The TMPA argued that the internal waste stream rule exceeds the EPA's authority and that internal waste streams are not part of the nation's waters. Although the CWA does not define the waters of the United States, in 1986, the EPA promulgated 40 C.F.R. § 122.2 to define waters of the United States. However, the definition contained one exception which stated that treatment ponds such as outfall 301 are excluded from the waters of the United States. Therefore, reasoned the TMPA, this exception renders *ultra vires* the internal waste stream rule. Thus, the TMPA concluded, the EPA has regulated outfall 301 under a mistaken interpretation of law.

The EPA contended that the internal waste stream rule is an exception to the treatment pond exception, and that there is no conflict between the two regulations. In accordance with the NPDES permit regulations, the EPA may establish permit effluent standards for each outfall or discharge point unless otherwise provided under the limitations on internal waste streams. 40 C.F.R. § 122.45(h) (1986). The EPA provided otherwise.

Judge Wisdom held that the EPA's construction of the internal waste stream rule and the treatment pond exception was not erroneous or inconsistent. Judge Wisdom also stated that the court is "required to defer to any reasonable EPA construction of its enabling statutes [especially] when resolving an apparent conflict among EPA regulations," *Texas* at 1488, and unless the EPA interpretation is plainly erroneous or inconsistent with the regulations, it becomes the controlling weight. See *Udall v. Tallman,* 380 U.S. 1 (1965).

The court found two justifications for the internal waste stream rule. The first is the EPA's "responsibility to measure and control the discharge of particular effluents." *Texas* at 1489. Some effluents may be diluted enough so that they become untraceable, yet they are still harmful toxins present in the water. Also, by all the effluents discharging into one final pool, complications in monitoring each individually may arise.

The second justification the court found is the EPA's "responsibility to monitor the effectiveness of each polluter's treatment technology. *Id.* at 1490. The EPA, if it determines the polluter's treatment technology will not maximize the elimination of pollutants, specifically in this case, Biological Oxygen Demand (BOD) and Total Suspended Solids (TSS), may enforce the best conventional pollution control technology available. 33 U.S.C. §§ 1311(b)(2)(E), 1314(b)(4) (1986). The TMPA has had technology standards imposed by the EPA on outfall 301 with respect to BOD and TSS. The court thus determined that the EPA committed no mistaken interpretation of law in regulating outfall 301.

Congress' purpose in the CWA was to reduce and ultimately eliminate pollution from the nation's waters. The court stated that the holding the TMPA urges would frustrate this purpose. In order for the EPA to achieve this goal, it is "sometimes necessary to regulate the discharges within the treatment process to control the discharge at the end." *Texas* at 1488. Congress desires to eliminate or at least reduce the pollutants in the nation's water, not merely to dilute the pollutants as the TMPA urges.

The court then addressed the issue whether the EPA committed a "technical mistake". The TMPA, under the term "technical mistake", challenged the EPA's determination that it could not effectively monitor the TMPA's technical standard with respect to BOD and TSS at the final discharge point in the Gibbons Creek Reservoir. Thus, TMPA argued that they had to regulate outfall 301. The court held that this argument had nothing to do with "technical mistake", that the TMPA was calling into question the EPA's fact-finding. The term technical mistake is narrowly defined in 40 C.F.R. § 122.62(a)(16) (1986), this regulation seeks "to correct technical mistakes, such as errors in calculation", not technical fact-findings. The statute of limitations for the TMPA to question this had expired, hence the court determined it had no jurisdiction to review the fact-finding on a petition for modification.

The TMPA then challenged the EPA's refusal

to modify the TMPA's NPDES permit on the basis of a procedural flaw. The court again determined it had no jurisdiction because the allegations had nothing to do with the petition for modification.

The CWA § 402 provides that the EPA may modify NPDES permits for cause. 33 U.S.C. § 1342(b)(1)(c) (1986). The EPA is given a broad range of discretion in modifying NPDES permits in order that it may respond to a change in circumstances, but the terms of a NPDES permit may only be reviewed within the statutory time limits. This limit is strictly enforced so that there is a finality to the administrative process entrusted to the EPA. The court, thus, held that the TMPA was not entitled to have the NPDES permit modified. The TMPA may not be granted a full review of the NPDES permit under the guise of modification as it attempted to do in this suit.

In addition, the NPDES permits run for a fixed term not exceeding five years. 33 U.S.C. § 1342(b)(1)(B) (1986). The NPDES permit that the TMPA wanted modified was issued in March 1984 and will expire in April 1989. Since the permit will expire in April 1989, the TMPA will probably apply for a renewal of this NPDES permit before April 1989. The TMPA may request that the present NPDES permit be modified to the specifications they requested the court to allow in this suit when renewing it. Thus, in the coming year and within the statutory time period, the TMPA can challenge, upon renewal, the terms of the NPDES permit regulating outfall 301.

Nanci Hirsch '89

WETLAND

Bersani v. Robichaud, 850 F.2d 36 (2d Cir. June 8, 1988).

General Issue: Whether the EPA's use of a market entry theory in vetoing the approval of a developer's request for a permit to fill a wetland complies with the guidelines of the Clean Water Act.

The principle issues in the present case are (1) whether the Environmental Protection Agency's (EPA) market entry theory was consistent with both Federal regulatory language and past practice; (2) whether the EPA's interpretation of the Clean Water Act guidelines was entitled to deference; and (3) whether the EPA's approach was arbitrary and capricious. *Bersani* at 38.

This case arose when Pyramid Companies, the purchasers of a wetland known as the Sweedens Swamps, requested a permit from the United States Army Corps of Engineers (Corps) allowing it to construct a shopping mall on the swamps. After submission of the application, Pyramid proposed to mitigate the adverse impact of construction on the swamp. The Corps concluded that Pyramid's proposed mitigation factors would diminish the adverse effects to the wetland site and decided to grant the permit. However, the EPA, pursuant to §404(c) of the Clean Water Act, vetoed the permit granted by the Corps stating that Pyramid's proposal was inconsistent with the §404(b)(1) guidelines of the Clean Water Act. The EPA based its decision, *interalia*, on the following two reasons: (1) Pyramid failed to overcome the presumption of available alternatives and (2) Pyramid failed to mitigate adequately the adverse impact on wildlife. *Bersani* at 41.

In its decision, the EPA acted pursuant to §404 of the Clean Water Act, 33 U.S.C. §1344 (1982 & Supp. III 1985). Section 404 provides that the EPA and the Corps have the responsibility to enforce the regulation pertaining to the discharge of dredged or fill materials in wetland sites. Specifically §404(a) of the Act gives the Corps authority to issue permits allowing developers to engage in the activity of discharge in such sites. Further, according to §404(b), the Corps must base its decision on the guidelines of §404(b)(1), 40 C.F.R. Part 230 (1987), which contain requirements for issuing a permit for the discharge of dredged or fill materials. According to the guidelines the Corps must determine if a "practicable alternative" site is available that would cause less harm to the wetlands. The practicable alternatives "may include an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed to fulfill the basic purpose of the proposed activity." 40 C.R.F. 230.10(a)(2). The guidelines also provide that "unless clearly demonstrated otherwise, practicable alternatives are (1) presumed to be available and (2) presumed to have less adverse impact on the aquatic ecosystem." *Bersani* at 46. Ultimately, the EPA, according to §404(c) of the Act, has veto power over the Corps' decision.

The action was initially brought in the U.S. District Court for the Northern District of New York by Pyramid Companies, represented by Bersani. In the District Court, Pyramid challenged the EPA's final determination, which denied Pyramid a permit to build a shopping mall on Sweeden Swamps. Pyramid principally argued that the EPA's final determination was arbitrary and capricious.

The EPA, however, claimed that it vetoed the Corps' approval for a permit because it found that an alternative site was available to Pyramid at the time Pyramid entered the market and began to search for a mall site. *Id.* at 41. According to the EPA, the §404(b)(1) guidelines require consideration of alternative sites to wetland development at the time the developer enters the market instead of at the time the developer applies for a permit. (This interpretation of the guidelines is referred to as the market entry approach by Pyramid.)

The EPA concluded that since Pyramid failed to provide information on the availability of the North Attleboro site as an alternative having a less adverse impact on wetlands than would construction on Sweeden Swamps and since Pyramid's mitigation proposals were too speculative, the permit could not be granted. The District Court agreed with the EPA's market entry approach and thus granted summary judgment for the EPA.

Pyramid brought the present action in the United States Court of Appeals for the Second Circuit contesting the District Court's finding on three primary grounds. Firstly, Pyramid argued that the market entry approach employed by the EPA was contrary to regulatory language and past practice. Secondly, Pyramid argued that since the Corps, an agency jointly responsible for administering the program in question, interpreted the pertinent regulation in a different way than the EPA had and since the market entry issue does not involve environmental expertise, the Court should not defer to the EPA's interpretation of the regulation. Thirdly, Pyramid argued that the EPA's approach was arbitrary and capricious. *Bersani* at 46. Pyramid reasoned that the language of §404(b)(1) of the Clean Water Act is framed in the present tense. Yet, Pyramid contended that the market entry approach focuses on the past by considering whether a practicable alternative "was" available at the time the applicant entered the market to search for a site. Pyramid relied on the language of §404(b)(1) of the Clean Water Act which provides that "[a]n alternative is practicable if it is available ... . If it is otherwise a practicable alternative, and not *presently* owned by the applicant which *could* reasonably *be* obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity *may* be considered." 4 C.F.R. §230 19(a)(2). Pyramid also argued, citing to *Gwaltney v. Chesapeake Bay Found.,* 108 Sup. Ct. 376, 381 (1987), that the EPA says "is" means "was." However, Justice Timbers for the Court of Appeals Second Circuit rejected these contentions.

In his opinion Justice Timbers agreed with the EPA and reasoned that Pyramid's first argument that the EPA incorrectly relied on the past tense "was" instead of the statute's present tense "is," was an overly narrow lateral reading which is contrary to a common sense reading of the statute. The Court stated, as did the EPA, that the statute was silent as to the relevant issue of the time of entry into the market for a site. Therefore, the court looked to the intent of the legislature in its enactment of §404 of the Clean Water Act, 33 U.S.C. §1344 (1982 & Supp. III 1985). The Court found that the legislative intent with regard to the practicable alternatives analysis was to recognize the special value of the wetlands and to avoid their unnecessary destruction in cases where practicable alternatives were available in nonaquatic areas. *Bersani* at 44. Thus, the legislative intent was to provide a deterrent to developers' use of valuable wetland area over available nonaquatic sites. The threat of permit denial would then act as an incentive for developers such as Pyramid to search for all possible alternatives before selecting a wetland site. Thus, the court rejected Pyramid's first argument.

The Court also asserted that the issue of the time at which a practicable alternative is available was one of first impression. Therefore, the Court held that the EPA did not act contrary to prior practice under the regulations and concluded that a common sense reading of the statute can only lead to the use of the market entry approach which was used by the EPA.

With regard to Pyramid's second argument that deference was unwarranted to the EPA, the Court concluded that even if it was not thoroughly persuaded by the EPA's interpretation of the Clean Water Act guidelines, the District Court's ruling in the EPA's favor must be upheld. In

arriving at the decision, the Court of Appeals applied the standard of plenary review to the lower court decision citing *Potenzer v. New York Ship'g Ass'n,* 804 F.2d 235, 239 (2d Cir. 1986). The Court of Appeals stated that the district court "shall set aside the EPA's finding, conclusions or actions only if they are arbitrary and capricious, an abuse of discretion or otherwise not in accordance with the law". Administrative Procedure Act §10(e), 5 U.S.C. §706(2)(a)(1982). However, according to the Supreme Court in the *Motor Vehicle Mfrs. Assn. v. State Fair Auto Ins. Co.,* 403 U.S. 29 (1983), "[a] reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by the statute." *Id.* Thus, applying this standard to the facts, the court found that the EPA's use of a market entry theory in interpreting the Clean Water Act guidelines was within the standard.

The Court decided that the EPA's arguments were not fully persuasive because the Corps found that the North Attleboro site was unavailable to Pyramid at the time of the suit and thus it appears that the Corps was applying a time of application test, which is contrary to the EPA's market entry theory test. Another reason for the courts lack of persuasion with EPA's counter argument was the fact that the Corps may have believed the Pyramid did not enter the market until after another developer purchased the North Attleboro site. *Bersani* at 46.

Although the Court of Appeals had some difficulty with the persuasiveness of the EPA's interpretation, the Court of Appeals was bound by the standard of review. Thus, the Court of Appeals concluded that the market entry theory was both consistent with regulatory language and past practice and that while the EPA's approach was not necessarily entitled to deference over the Corps, the EPA's interpretation was not arbitrary and capricious. *Bersani* at 47.

However, Justice Pratt argued, *interalia,* in his dissenting opinion, that the intent of the Clean Water Act was really to balance the environmental needs with the need for industry without regard to when the developer entered the market. *Bersani* at 47. Justice Pratt also stated that the market entry theory actually punishes developer A for entering the market when an alternative site to the wetland exists because developer A will be forced to take the alternative site while developer B, entering the market later, would be granted the permit to develop the wetland that developer A originally wanted. Thus, Justice Pratt contended that the EPA's market entry theory is vague and unfair to potential developers. *Bersani* at 46.

Susan McLendon '90

JUDICIAL, LEGISLATIVE AND REGULATORY UPDATES

OCEAN DUMPING OF MEDICAL WASTES: CONGRESS AUTHORIZES THE EPA TO ESTABLISH A FEDERAL MEDICAL WASTE TRACKING PROGRAM

The hazardous waste that has washed up on the shores of New York, New Jersey and Connecticut this past summer, and the danger it has posed to people on the beaches has prompted the federal government to take action. Congress is in the process of establishing a pilot program to track medical waste being dumped off the east coast. Organization and enforcement of the program will be left in the hands of the Environmental Protection Agency (EPA), which has refused to develop a federal medical waste tracking program without an express Congressional delegation of authority. The New Jersey-New York-Connecticut Medical Waste Tracking Act of 1988 has received Senate approval and awaits approval from the House of Representatives.

Background

Currently, thirty-nine states have developed some form of infectious waste regulation. Furthermore, several states are in the process of developing medical waste tracking systems. However, the states' ability to develop a tracking system that will effectively deter illegal dumping of infectious waste is limited because generators can transport medical waste across state boundaries in order to avoid state regulations. A federal medical waste tracking program can patrol dumping on a regional basis and remedy the problem that the states face.

The legislation has been a direct result of the uncertainty of the EPA's power to set up such a regional tracking system. Although Senator Frank Lautenberg, who sponsored the bill in the Senate,

has characterized the EPA's inaction as procrastination, the EPA has been at work on this issue since 1978. The EPA proposed regulations under the Solid Waste Disposal Act which would classify certain infectious wastes as hazardous. However, after public comment on the proposal, the final regulation published in 1980 omitted infectious waste from the list of hazardous wastes.[1] In 1982 the EPA drafted a guidance document on infectious waste management; the final version was published in 1986. Furthermore, the EPA has taken an active role in providing training to health care professionals in managing infectious wastes.[2] In May 1988 the EPA published a notice of data availability[3] and request for comment on issues pertaining to infectious waste. Among the questions that the EPA has solicited comment on are: what role should the EPA play in infectious waste management, and whether there should be a federal regulatory structure or a federal provision for technical assistance and guidelines for state infectious waste programs. If the proposed legislation is passed in the House of Representatives, the EPA will be required to promulgate regulations which establish a federal tracking program within nine months of the enactment of the legislation.[4]

The Problem of Infectious Waste

The EPA currently defines infectious waste as "waste capable of causing infectious disease."[5] Factors such as the presence of a pathogen of sufficient virulence, the dose of pathogen, the portal of entry, and the resistance of host are viewed as contributing to the introduction of such diseases. Under the proposed legislation, the EPA will be required to define infectious waste, and such definition will probably resemble the six categories of infectious waste already identified by the EPA: (1) Isolation wastes; (2) Cultures and stocks of infectious agents and associated biologicals; (3) Human blood and blood products; (4) Pathological wastes; (5) contaminated sharps; and (6) contaminated carasses [sic], body parts and bedding.[6]

Most of these infectious wastes are disposed of through incineration, landfill, or disposal in public sewers. Only fifty-six percent of the states require some type of pretreatment in the form of sterilization before disposal. Currently eleven states allow disposal of certain infectious wastes without any pretreatment. In those cases the greatest threat is to anyone who encounters the waste from the point of generation to disposal. As a result of the incidents on the beaches this past summer, that threat has been extended beyond the point of disposal. The need for the legislation is clear if some states allow untreated infectious waste to be disposed of in a way that would pose a threat to the public if such waste should wash up on the beaches.

Proposed Legislation

Purpose

The proposed legislation authorizes the EPA to promulgate regulations which establish a demonstration program for the tracking of medical waste generated and disposed of in the states of New York, New Jersey and Connecticut. Specifically, the EPA will have the job of defining

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1. Congressional Record at S10739 (August 3, 1988).
2. *Id.*
3. The EPA has issued several pamphlets designed to assist the states and others interested in the management of infectious waste. These documents include: (1) "EPA Guide for Infectious Waste Management", U.S. EPA, Office of Solid Waste and Emergency Response, EPA/530-SW-86-014, May 1986; and (2) "Hospital Waste Combustion Study, Data Gathering Phase, Final Draft Report", prepared by Radian Corporation, Research Triangle Park NC for US EPA Office of Air Quality Planning and Standards, EPA Contract No. 68-02-4330, October, 1987. Congressional Record at S10739 (August 3, 1988).
4. Section 2(a) of the legislation sets out the purpose of the legislation and the duties of the EPA:

> (a) REGULATIONS — Not later than 9 months after the date of the enactment of this Act, and after notice and opportunity for public hearings, the Administrator shall promulgate regulations which establish a demonstration program for the tracking of medical waste generated and disposed of in the States of New York, New Jersey and Connecticut. Such regulations shall
>
> (1) define medical waste;
>
> (2) apply to generators of medical waste, and owners and operators of facilities for the treatment, storage, transport, and disposal of medical waste;
>
> (3) establish a manifest system for accountability and tracking of medical wastes from their point of generation to point of disposal; and
>
> (4) include such other requirements as may be necessary to protect human health and the environment, including monitoring of beaches in New Jersey, New York, Connecticut, and New England, where there have been reported incidences of medical wastes being washed up on shore. Such monitoring shall include assessment of ocean currents, wind, and other environmental factors which may be responsible for the migration of medical waste in coastal areas of the mid-Atlantic and New England regions.
>
> In conducting such monitoring the Administrator shall consult and coordinate activities with the Administrator of the National Oceanic and Atmospheric Administration.

Congressional Record at 10745 (August 3, 1988).

5. Congressional Record at S10740 (August 3, 1988) (citing to the EPA Notice of Data Availability and request for comment).
6. *Id.*

medical waste, applying to the generators of the waste for the treatment, storage, transport and disposal of medical waste, developing a medical waste tracking system from the point of generation to the point of disposal, and passing any regulations necessary in protecting human health and the environment.[7] The legislation stresses that this system should include the monitoring and assessment of ocean currents, wind, and other environmental factors which may be responsible for the medical waste on the Northeast coast.[8]

Inspection and Penalties

Although most of the specifics in developing the program are left in the hands of the EPA, the legislation does provide for methods of inspection and specific civil and criminal penalties for noncompliance.

Any person who generates, stores, treats, transports, or disposes of medical waste is subject to an inspection by the Administrator of the EPA of all records relating to that medical waste. Furthermore, the EPA can take samples of the medical waste from the person, provided the representative provides a receipt describing the waste confiscated.

Should the EPA find any person in violation of the regulations, the Administrator may impose civil penalties for past or current violations, as well as issue a Compliance Order requiring immediate adherence to the regulations. The statute also gives the Administrator the option of commencing an action in the United States District Court where the violation occurred.[9] If the Administrator chooses to issue a Compliance Order, the Order must state with specificity the nature of the violation, may include fines for each violation up to $25,000 per day for noncompliance[10] and can order the suspension or revocation of any license or permit issued by the Administrator. Unless a request for a Public Hearing is made within thirty days after the Order is issued, the Order becomes final.

The proposed legislation provides for criminal penalties as well. Anyone who knowingly transports, treats, stores, or disposes of medical waste in violation of the regulations is subject to a fine of up to $50,000 for each day of the violation or up to five years of imprisonment, or both. The penalties are doubled for second time offenders. There are three specific violations which will subject a person to a fine of up to $50,000 per day and imprisonment up to two years, or both: (1) any person who knowingly omits material information or makes a false statement or representation on any document used for compliance with the regulations; (2) any person who handles medical waste in any way, before or after the enactment of the regulations, and who destroys, alters, conceals or fails to file any record required to be maintained or files for purposes of compliance with the regulations; and (3) any person who knowingly transports without a manifest any medical waste required to be transported with a manifest. Similarly the penalties are doubled for second time offenders.

Furthermore, anyone who commits the above mentioned crimes and who knowingly places a person in imminent danger of death or serious bodily injury is subject to a fine of up to $250,000 or up to fifteen years imprisonment, or both.[11] If

7. In establishing the program, the legislation requires that three years after the date of the enactment the Administrator must report to Congress on the progress of the program. Furthermore, a total of $300,000 for each of the three years will be allocated for the development of the program. Congressional Record at S10746 (August 3, 1988).

8. *See supra,* n.1.

9. Congressional Record at S10745 (August 3, 1988).

10. In assessing such fines the Administrator is allowed to take into account factors such as the seriousness of the violations and any good faith efforts to comply with the Order.

11. For purposes of this provision the proposed legislation sets forth the following definitions:

(7) Special Rules—For the purposes of paragraph 6

(A) A person's state of mind is knowing with respect to—

(i) his conduct, if he is aware of the nature of his conduct;

(ii) an existing circumstance, if he is aware or believes that the circumstances exist; or

(iii) a result of his conduct, if he is aware or believes that his conduct is substantially certain to cause danger of death or serious bodily injury.

(B) In determining whether a defendant who is a natural person knew that his conduct placed another person in imminent danger of death or serious bodily injury—

(i) the person is responsible only for actual awareness or actual belief that he possessed; and

(ii) knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant;

provided, that in proving the defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information.

(C) It is an affirmative defense to a prosecution that the conduct charged was consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of—

(i) an occupation, a business, or a profession; or

(ii) medical treatment or medical or scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved

the violator of this provision is a corporation the fine can be increased to a maximum $1,000,000.

Other aspects of the legislation are that it in no way precludes the states from developing their own tracking systems, and that the legislation is not intended to affect 42 U.S.C. 7003, the Solid Waste Disposal Act.[12]

Joseph Welter '89

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prior to giving consent.

The defendant may establish an affirmative defense under this subsection by a preponderance of the evidence.

(D) All general defenses, affirmative defenses, and bars to prosecution that may apply with respect to other Federal criminal offenses may apply under paragraph (6) and shall be determined by the courts of the United States according to the principles of common law as they may be interpreted in the light of reason and experience. Concepts of justification and excuse applicable under this section may be developed in the light of reason and experience.

(E) The Term "organization" means a legal entity, other than a government, established or organized for any purpose, and such term includes a corporation, company, association, firm partnership, joint stock company, foundation, institution, trust, society, union, or any other association of persons.

(F) The term "serious bodily injury" means—

(i) bodily injury which involves a substantial risk of death.

(ii) unconsciousness;

(iii) extreme physicial pain;

(iv) protracted and obvious disfigurement; or

(v) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

Congressional Record at S10746 (August 3, 1988).

12. The provision is as follows:

APPLICABILITY OF SEC. 7003 OF THE SOLID WASTE DISPOSAL ACT

(a) The Congress finds that:

(1) Large quantities of medical waste, including syringes, hypodermic needles, vials containing contaminated blood specimens, and surgical gloves have washed up on the beaches in New York, New Jersey and New England:

(2) beaches in New York and New Jersey have been closed as a result of medical waste washing up on shore, and the imminent and substantial endangerment to human health and the environment presented by such waste:

(3) the improper disposal of medical waste is presenting an imminent and substantial endangerment to public health and the environment in certain coastal areas of the mid-Atlantic and New England regions.

(b) Based in the finding in subsection (a), the Administrator is empowered and, in appropriate cases, directed to use the authority provided in section 7003 of the Solid Waste Disposal Act to immediately address and correct such improper disposal of medical waste. In addition, the Administrator is empowered and directed to use the authorities of this Act to seek imposition of criminal penalties where appropriate.

Congressional Record at S10746 (August 3, 1988).

The entire text of the statute is as follows:

S.2680

Be it enacted by the Senate and House of Representatives [sic] of the United States of America in Congress assembled,

SECTION 1. TITLE.

This Act may be cited as the "New Jersey-New York-Connecticut Medical Waste Tracking Act of 1988."

SECTION 2. REGULATION OF MEDICAL WASTES.

(a) REGUALTIONS—Not later than 9 months after the date of the enactment of this Act, and after notice and opportunity for public hearings, the Administrator shall promulgate regulations which establish a demonstration program for the tracking of medical waste generated and disposed of in the States of New York, New Jersey and Connecticut. Such regulations shall—

(1) define medical waste;

(2) apply to generators of medical waste, and owners and operators of facilities for the treatment, storage, transport, and disposal of medical waste;

(3) establish a manifest system for accountability and tracking of medical wastes from their point of generation to point of disposal; and

(4) include such other requirements as may be necessary to protect human health and the environment, including monitoring of beaches in New Jersey, New York, Connecticut, and New England, where there have been reported incidences of medical wastes being washed up on shore. Such monitoring shall include assessment of ocean currents, wind, and other environmental factors which may be responsible for the migration of medical waste in coastal areas of the mid-Atlantic and New England regions.

In conducting such monitoring the Administrator shall consult and coordinate activities with the Administrators of the National Oceanic and Atmospheric Administration.

(b) INSPECTIONS.—(1) For purposes of developing any regulation under this section, or to assure compliance with such regulations, any person who generates, stores, treats, transports, or disposes of medical waste shall upon, [sic] request of any authorized and designated representative of the Environmental Protection Agency, permit access to and provide copies of all records relating to such wastes to any designated representative of the Environmental Protection Agency.

(2) Any Representative of the Environmental Protection Agency who obtains samples of medical waste from any facility under the authority of this section shall furnish upon receipt describing such sample to the owner or operator of such facility prior to leaving the premises.

(c) COMPLIANCE ORDERS.—(1) Whenever on the basis of any information the Administrator determines that any person has violated or is in violation of any requirement under this section the Administrator may issue an order assessing a civil penalty for any past of [sic] current violation, requiring compliance immediately or within a specified time period, or both, or the Administrator may commence a civil action in the district court in the district in which the violation occurred for appropriate relief, including a temporary or permanent injunction.

(2) Any order issued pursuant to this subsection may include a suspension or revocation of any permit issued by the Administrator under this section and shall state with reasonable specificity the nature of the violation. Any penalty assessed in the order shall not exceed $25,000 per day of noncompliance for each violation of a requirement of this section. In assessing such a penalty, the Administrator shall take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

(3) PUBLIC HEARINGS. - Any order issued under this section shall become final unless, not later than thirty days after the order or persons named therein request a public hearing. Upon such request the Administrator shall promptly conduct a public hearing. In connection with any proceeding under this section the Administrator may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and may promulgate rules for discovery procedures.

(4) VIOLATION OF COMPLIANCE ORDERS. - If a violator fails to take corrective action within the time specified in a compliance order, the Administrator may assess a civil penalty of not more than $25,000 for each day of continued noncompliance with the order and the Administrator may suspend or revoke any permit

issued to the violator.

(5) CRIMINAL PENALTIES. - Any person who -

(A) Knowingly transports or causes to be transported any medical waste in violation of regulations promulgated under this section;

(B) knowingly treats, stores, or disposes of any medical waste in violation of regulations promulgated under this section;

(C) knowingly omits material information or makes any false material statement or representation in any application, label, manifest, record, report, permit, or other document filed, maintained, or used for purposes of compliance with regulations promulgated by the Administrator under this section;

(D) knowingly generates, stores, treats, transports, disposes of, exports or otherwise handles any medical waste (whether such activity took place before or takes place after the date of the enactment of this paragraph) and who knowingly destroys, alters, conceals, or fails to file any record, application, manifest, report, or other document required to be maintained or files for purposes of compliance with regulations promulgated by the Administrator under this section;

(E) knowingly transports without a manifest, or causes to be transported without a manifest, any medical waste required by regulations promulgated under this section to be accompanied by a manifest;

shall upon conviction, be subject to a fine of not more than $50,000 for each day of violation, or imprisonment not to exceed two years (five years in the case of a violation of subparagraph (a) or (B), or both). If the conviction is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment under the respective paragraph shall be doubled with respect to both fine and imprisonment.

(6) KNOWING ENDANGERMENT. - Any person who knowingly transports, treats, stores, disposes of, or exports any medical waste in violation of subparagraph (A) (B) (C) (D) or (E) paragraph (5) of this section who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment for not more than fifteen years, or both. A defendant that is an organization shall upon conviction of violating this subsection, be subject to a fine of not more than $1,000,000.

(7) Special Rules - For the purpose of paragraph 6 -

(A) A person's state of mind is knowing with respect to -

(i) his conduct, if he is aware of the nature of his conduct;

(ii) an existing circumstance, if he is aware or believes that the circumstances exist; or

(iii) a result of his conduct, if he is aware or believes that his conduct is substantially certain to cause danger of death or serious bodily injury.

(B) In determining whether a defendant who is a natural person knew that his conduct placed another person in imminent danger of death or serious bodily injury -

(i) the person is responsible only for actual awareness or actual belief that he possessed; and

(ii) knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant; provided, that in proving the defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information.

(C) It is an affirmative defense to a prosecution that the conduct charged was consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of -

(i) an occupation, a business, or a profession; or

(ii) medical treatment or medical or scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved prior to giving consent.

The defendant may establish an affirmative defense under this subsection by a preponderance of the evidence.

(D) All general defenses, affirmative defenses, and bars to prosecution that may apply with respect to other Federal criminal offenses may apply under paragraph (6) and shall be determined by the courts of the United States according to the principles of common law as they may be interpreted in the light of reason and experience. Concepts of justification and excuse applicable under this section may be developed in the light of reason and experience.

(E) The term "organization" means a legal entity, other than a government, established or organized for any purpose, and such term includes a corporation, company, association, firm partnership, joint stock company, foundation, institution, trust, society, union, or any other association of persons.

(F) The term "serious bodily injury" means -

(i) bodily injury which involves a substantial risk of death;

(ii) unconsciousness;

(iii) extreme physical pain;

(iv) protracted and obvious disfigurement; or

(v) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

(8) CIVIL PENALTY. - Any person who violates any requirement of this section shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each violation. Each day of such violation shall, for purposes of this section, constitute a separate violation.

(d) RELATIONSHIP TO STATE LAW. - (1) Nothing in this section shall be construed to prohibit any State or political subdivision of a State from imposing any requirements for the control or monitoring of medical waste that are more stringent than those imposed by this section.

(2) Nothing in this section (or in any regulation adopted under this section) shall be construed to prohibit any State from requiring that the State be provided with a copy of each manifest used in connection with medical waste which is generated within that State or transported to a treatment, storage, or disposal facility within that State.

(e) REPORT. - Three years after the date of enactment of this section, the Administrator shall report to the Congress on the progress and success of the program outlined in this section.

(f) AUTHORIZATIONS. - There are authorized to be appropriated $300.000 for each of the fiscal years between 1989, 1990 and 1991 for the purpose of carrying out activities under this section.

(g) RELATIONSHIP TO SOLID WASTE DISPOSAL ACT. - Nothing in this section shall be construed to affect or modify the authorities or requirements of the Solid Waste Disposal Act (42 U.S.C. § 6901 et seq.)

SEC. 3. APPLICABILITY OF SEC. 7003 OF THE SOLID WASTE DISPOSAL ACT.

(a) The Congress finds that:

(1) Large quantities of medical waste, including syringes, hypodermic needles, vials containing contaminated blood specimens, and surgical gloves have washed up on the beaches in New York, New Jersey and New England:

(2) beaches in New York and New Jersey have been closed as a result of medical waste washing up on shore, and the imminent and substantial endangerment to human health and the enivronment presented by such waste:

(3) the improper disposal of medical waste is presenting an imminent and substantial endangerment to public health and the environment in certain coastal areas of the mid-Atlantic and New England regions.

(b) Based in the finding in subsection (a), the Administrator is empowered and, in appropriate cases, directed to use the authority provided in section 7003 of the Solid Waste Disposal Act to immediately address and correct such improper disposal of medical waste. In addition, the Administrator is empowered and directed to use the authorities of this Act to seek imposition of criminal penalties where appropriate.

Congressional Record at 10745-46 (August 3, 1988).

WATER POLLUTION —
Wastewater Treatment Works Financing

*Tierre Ange Jeanne, Esquire**

In 1987, extensive amendments to the Clean Water Act impacted the Title II construction grants program by creating a new financial assistance program known as the "State Water Pollution Control Revolving Fund" (SRF). An SRF is a financial assistance plan that requires States to facilitate municipal financing for the construction of publicly owned wastewater treatment works and the implementation of programs for nonpoint source management and estuary protection. SRF requirements are embodied in Title VI of the Clean Water Act, 33 U.S.C. §1381 *et seq.*, and authorize the United States Environmental Protection Agency (EPA) to make grants to States for the capitalization of State Revolving Fund programs.

The primary purpose of the SRF program is to effect a transition from a federally focused grant program to a State operated assistance program. In furtherance of this goal, the Water Pollution Control Revolving Fund program was designed to provide continuing sources of financing for State wastewater infrastructure. In enacting this legislation, Congress envisioned that the SRF capitalization grant awards would enable States to establish and maintain self-perpetuating funds for future wastewater treatment needs.

The fundamental difference between the existing construction grants program and the one established by the 1987 amendments is that the financial assistance furnished to municipalities under Title II does not require repayment while Title VI expressly prohibits such grants. Additionally, in the current program, EPA provides direct assistance to municipalities with the managerial responsibilities for municipal projects delegated to and performed by the State. Yet in the SRF capitalization grant program, ultimate responsibility for construction award assistance and operations is transferred to the States.

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* Tierre Ange Jeanne is an Assistant Regional Counsel of the United States Environmental Protection Agency, Region II. This article contains her personal views and should not be construed as an expression of the official position of the Environmental Protection Agency.

States that establish and implement SRF programs in accordance with Clean Water Act requirements are eligible to receive capitalization grant awards. The Clean Water Act mandates that States provide documentation of adequate legal authority to implement and operate such SRF programs. Adequate legal authority can be demonstrated through the passage of SRF enabling legislation, regulations, executive orders or by Attorney General opinion if the State has an existing revolving fund program. Further legislative or regulatory action to be taken by States include the development of a "NEPA-like" State Environmental Review Process. The next step in the SRF implementation process requires the State to enter into a capitalization grant agreement with the Administrator of the EPA. Other requirements include agreements by the State to accept grant payments, provide a 20% State match, commit to timely expenditure of SRF funds and to establish accounting and auditing procedures.

The scheduled shift of responsibility for the wastewater construction program also requires the States to administer SRF assistance activities. Types of SRF assistance to municipalities include: zero-interest or below market rate loans, refinancing of existing debt obligations, guarantee or purchase insurance for local debt obligations, leveraging and loan guarantees for substate revolving funds. Moreover, fund accounts may earn interest prior to the disbursement of SRF assistance and up to 4% of the capitalization grant award may be used for SRF administrative expenses. Other activities eligible for SRF assistance are loan servicing and debt issuance costs, SRF program start-up costs, fees incurred for financial management and legal consultations as well as reimbursement costs for support services from other State agencies.

In fiscal years 1987 and 1988, States were permitted to transfer a percentage of allotted Title II monies to establish SRF's. Title II monies will continue to be appropriated through 1990, however, direct construction grant assistance is scheduled to be completely phased out at the end of that fiscal year. Specific SRF appropriations are authorized for fiscal years 1989-1994 with an expected total sum of $8.1 billion expended for the creation of such programs.

States are well advised to expeditiously implement SRF programs because separate SRF appropriations begin in fiscal year 1989. Those

States without established programs cannot participate in the first year availability of SRF allocations. Monies not used are subject to deobligation and will be reallotted to States with established SRF programs. To date, eight States have met the essential statutory requisites for grant awards. Participating states include Texas, Georgia, Utah, Tennessee, New Mexico, Virginia, Connecticut and New Jersey. At least twenty-five more States are expected to receive SRF capitalization grant funding by the end of fiscal year 1989. The capitalization grant assistance program terminates after fiscal year 1994.

WILDLIFE PRESERVATION UPDATE

The critical issue raised by section 9 of the Endangered Species Act of 1973 (ESA)[1] is how broadly or narrowly the term "take"[2] should be defined.[3] A leading case on this precise issue was *Palila v. Hawaii Department of Land and Natural Resources (Palila I).*[4] There the district court for the district of Hawaii found that the Hawaii Department of Land and Natural Resources' practice of maintaining feral sheep and goats in the Palila birds' critical habitat constituted an unlawful taking of the Palila under the ESA, and ordered the sheep and goats be removed.[5].

After *Palila I* had been decided, and affirmed in *Palila II*, the Sierra Club, an original plaintiff, reopened the proceeding by moving to amend its original complaint to add mouflon sheep to the list of destructive animals that should be removed from the Palila's habitat.[6] The district court found that the mouflon sheep had "harmed"[7] the Palila in the same way that the feral sheep had, thus constituting a taking, and it ordered the mouflon sheep be removed.[8] The decision was again appealed to the Ninth Circuit, and it was again affirmed.[9]

Palila IV is significant because it gave the Ninth Circuit the opportunity to explicitly outline the expansive definition of "harm" which had previously been implied but not enunciated. The Court discussed the ESA's definition of "harm" as being the important limitation on what would constitute a taking of an endangered or threatened species. The Court found that "harm" included not only immediate destruction of habitat, but also any "habitat destruction that *could* drive the Palila to extinction."[10] The Court further found that this broad construction of "harm" is consistent with the Interior Secretary's interpretation and congressional intent:

> In June 1981, in reaction to *Palila I,* the Secretary promulgated a definition of harm which apparently left no room for any form of habitat destruction. However, the Secretary withdrew this new definition as the result of a large number of negative comments. Instead, in November 1981, the Secretary introduced the present definition. In 1982, after the *Palila I* decision and the Secretary's redefinition of harm, Congress amended the [ESA]. So, Congress presumably was aware of the current interpretation of harm when it amended the Act in 1982. But Congress did not modify the taking prohibition in any matter. Thus, Congress' failure to act indicates satisfaction with the current definition of harm and its interpretation by the Secretary and the judiciary.[11]

A second recent development in the case law regarding the ESA relates to the section 7(b) biological opinion.[12] According to that section, the Fish and Wildlife Service (FWS), after consultation with the agency which is involved with the proposed action, is required to issue a comprehensive biological opinion based upon the "best scientific and commercial data available" whenever a threatened or endangered species is present in the area of the proposed action.[13] If the FWS opinion finds that an action would

1. 16 U.S.C. §1538 (1982).
2. To take "means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" an endangered species. 16 U.S.C. §1532(19).
3. For a more complete discussion of the Endangered Species Act, *see* 5 Hofstra Envtl. L. Digest 6 (Spr. 1988).
4. 471 F. Supp. 985 (D. Hawaii 1979), *aff'd,* 639 F.2d 495 (9th Cir. 1981) *(Palila II).*
5. *Id.*
6. *Palila v. Hawaii Dep't of Land and Natural Resources,* 649 F. Supp,. 1070 (D. Hawaii 1986) *(Palila III).*
7. "Harm" is defined to mean an act "which actually kills or injures wildlife. Such may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." 50 C.F.R. §17.3 (1985).
8. *Id.*
9. *Palila v. Hawaii Dep't of Land and Natural Resources, 852* F.2d 1106 (9th Cir. 1988) *(Palila IV).*
10. *Id.* at 1108.
11. *Id.* at 1109, n. 6 (citation omitted).
12. 16 U.S.C. §1536(b).
13. *Id.*

jeopardize a threatened or endangered species, the action must be altered or eliminated altogether.[14]

In *Bob Marshall Alliance v. Hodel,*[15] plaintiffs sued to enjoin the issuance of oil and gas leases based, in part, on an argument that the biological opinion issued by the FWS was not adequate. The biological opinion had found that issuing the leases in itself would not jeopardize any threatened or endangered species, but the FWS added that there was insufficient information available to issue a comprehensive opinion beyond the leasing phase.[16]

The Ninth Circuit, in affirming the lower court's decision, held that the biological opinion must consider the "impact of the issuance of the ... leases *and of all post-leasing activities* on threatened and endangered species."[17] The Circuit Court, relying on its own analysis as found in *Conner v. Burford,*[18] held that the agency activity to be considered was the issuance of the leases *and* all post-leasing activity.

Bob Marshall Alliance is an important case because in it the Ninth Circuit took a broader view of what is required in the section 7(b) biological opinion. This view is more encompassing than the view taken in *North Slope Borough v. Andrus,*[19] where the District of Columbia Circuit Court held that each phase of the leasing and post-leasing activities were separate actions with regard to the section 7(b) biological opinion requirement. The *Bob Marshall Alliance* decision is also important because it may have the affect of stopping or altering agency actions at an earlier stage, before any species are further imperiled and before an irretrievable and irreversible resource commitment is made toward an agency action.

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14. *Id.*
15. 852 F.2d 1223 (9th Cir. 1988).
16. *Id.* at 1226.
17. *Id.* at 1228 (emphasis added).
18. 836 F.2d 1521 (9th Cir. 1988).
19. 486 F. Supp. 332 (D.D.C.), *aff'd in part, rev'd in part,* 642 F.2d 589 (D.C. Cir. 1980). *See also,* 5 Hofstra Envtl. L. Digest at 8, n. 41, and accompanying text.