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Telephone: (516) 560-5007

ENVIRONMENTAL OVERVIEW

Perspective and Retrospective

Professor William R. Ginsberg*

This issue of the Hofstra Environmental Law Digest marks the fifth anniversary of publication. Such chronological milestones, no matter how modest, often inspire ruminations concerning the history and direction of the subject matter. The editors have suggested that I use this occasion for that purpose.

Environmental law, as a discrete area of practice or as a subject in the law school curriculum, is a relatively recent phenomenon. Historically, particular environmental issues may have been dealt with under the tort rubric or by local ordinances governing the relationship between the location of privies and wells. Over a century ago, the federal government even dabbled with water quality as a subject related to navigation. The Public Health Service Act of 1912[1] recognized the relationship between water pollution and public health early in this century.

As a practical matter, however, environmental law as we now recognize it did not exist prior to the early 1970's. Judicially and conceptually it was previewed in decisions during the mid 1960's, but legislatively it is fair to date the subject to the National Environmental Policy Act of 1969.[2] This beginning opened the door on more than a decade of intense federal activity marked by such statutes as the Clean Air Act of 1970[3], the Water Pollution Control Act Amendments of 1972[4], the Federal Insecticide, Fungicide and Rodenticide Act[5], the Toxic Substances Control Act[6], the Safe Drinking Water Act and Resource Conservation and Recovery Act of 1976.[7]

The creative boom of the 1970's ended as suddenly as it began with the passage of the Comprehensive Environmental Response, Compensation and Liability Act[8] (CERCLA) in December 1980. Several reasons may be suggested for the change. Perhaps the regulatory framework was relatively complete and Congress focused its energies on reauthorizations. Perhaps the political winds had shifted (although the earlier state of environmental legislation began in the Nixon administration and ended with the Carter administration). Logically, the time might have come to consolidate gains, fine tune the machinery and concentrate on administration rather than legislation. But logic is not inexorable, and the early years of the 1980's will hardly be remembered as a time of dedication to the enforcement and administration of environmental laws on a federal level. Yet, while hazardous waste cleanup under CERCLA proceeded slowly, it did spawn considerable litigation in the 1980's, thereby defining the parameters of the ambiguous statute.

In the recent past, public attention has centered on hazardous waste cleanup. State activity has substantially increased, perhaps in recognition of the inadequacy of the federal program.

Predicting the future is a high risk occupation and crystal balls become increasingly cloudy the further ahead one attempts to peer. Meaningful forecasting involves, to a large extent, projections of the present. It would seem safe to expect an increase in the contemporary level of attention to international and global environmental issues, particularly global warming (the "greenhouse effect"), the thinning of the ozone layer and acid rain. Once the obvious is stated however, several words of caution are in order.

Based on past performance it appears safe to predict that if action is taken on global threats to the environment, it will be taken slowly. The risk that chlorofluocarbons (CFCs) pose to our protective ozone layer was predicted 15 years ago.[9] Notwithstanding international attention to the subject in the 1975 annual report of the United Nations Environment Program, twelve years later the much touted Montreal Compact of 1987 was only able to provide for a 50 percent reduction of 1987 production by the end of this century. This is

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*Professor William R. Ginsberg, J.D., Yale University.
Rivkin, Radler, Dunne and Bayh Distinguished Professor of Environmental Law, Hofstra University School of Law

Professor Ginsberg has served as the Faculty Advisor of the Hofstra Environmental Law Digest since its inception in 1984. Professor Ginsberg has published and lectured in a variety of environmental areas. Among his many publications is a report on the Love Canal tragedy for the Interagency Task Force on Hazardous Waste. He is the president of the Catskill Center for Conservation and Development, and is the secretary of the New York State Bar Association Committee on Environmental Law.

1. 37 Stat. 309 (1912), as amended 42 U.S.C. § 241 (1964).
2. 42 U.S.C. §§ 4321-4370a (Pub. L. 91-190).
3. 42 U.S.C. §§ 7401-7642 (Pub. L. 91-604, Pub. L. 95-95).
4. 33 U.S.C. §§ 1251-1376 (Pub. L. 92-500, Pub. L. 95-217).
5. 7 U.S.C. §§ 136-136y (Pub. L. 92-516).
6. 16 U.S.C. §§ 2601-1629 (Pub. L. 94-469).
7. 42 U.S.C. §§ 6901-6991i (Pub. L. 94-580).
8. 42 U.S.C. §§ 9601-9657 (Pub. L. 96-510).
9. *See* New York Times, Dec. 12, 1974, "Experts Testify on Atmospheres", p. 20, col. 1.

an inadequate result, clearly at odds with the urgency and importance of the problem. In March 1989, the European Community countries agreed to eliminate the production and use of CFC's by the year 2000. The seriousness and certainty of the threat is accepted now that a substantial hole has appeared in the ozone layer above the Antarctic, and conditions which could result in a similar loss have recently been observed in the Arctic.[10]

Terminating the use of CFCs is relatively easy from an economic standpoint. Annual sales in the United States are approximately 35 percent of world production. This country, alone, could curtail a third of world production with only 20 countries manufacturing the gas.[11]

The economic stakes involved in controlling acid rain are much larger. In 1980 Congress initiated the "National Acid Precipitation Assessment Program".[12] In September, 1987 a "midpoint assessment" was released, consisting of three volumes and an Executive Summary. Information on the impact of acid rain in Canada, although available, was omitted, and scientists on both sides of the border found the Executive Summary misleading, particularly because the impact of acid rain was minimized. To date, the soft coal industry and coal burning utilities have proven to have more potent political influence than that represented by the destruction of lakes, forests, buildings and by the potential threat to agricultural productivity and human health that has resulted.

The price of controlling the global warming trend may be so high that we are unwilling to pay it, leaving the ultimate cost to be borne by our grandchildren. From the cutting and burning of tropical rain forests to the emissions of the internal combustion engine in our cars, changing behavior and life styles to reduce CO_2 emissions will not be easy. It certainly won't occur through voluntary denial on an individual basis, yet governmentally imposed denial has rarely been a prescription for reelection or governmental stability. The fundamental changes in lifestyle and major economic disruption necessary to substantially reduce the production of CO_2 will not be easily imposed or accepted.

National leaders may be willing to gather at international conferences to discuss global environmental issues. President Bush has indicated that he, for one, will do so. Other major industrial powers are also expressing apprehension. Assuming that we are entering an era of increasing recognition of global environmental issues and concern over their resolution, what is the liklihood of substantial progress?

In the United States, structural impediments have been a major factor inhibiting the passage and implementation of environmental legislation. Notwithstanding very broad federal powers under the Commerce Clause, there is concern about infringing on the rights of states. To some degree this sensitivity may have a practical rather than a constitutional basis. State participation is desirable to administer and enforce the regulatory mechanism. Otherwise a more cumbersome and expensive federal bureaucracy would be required to implement federal environmental statutes.

Interstate economic competition and fears of federally imposed costs and limitations on industrial location have been largely responsible for a lack of enthusiasm for environmental regulation at the state level. Notions of "Home Rule" and analogous concerns have led to resistance by local governments. Despite these difficulties, the substantial financial inducements which the federal government can employ, as well as our constitutional framework, have made progress possible.

The problems of international regulatory cooperation are considerably more difficult than those to be found on the domestic scene. There is no overarching international constitutional structure. Competition between, and animosities among sovereign nations far exceed those which exist domestically. There is no senior government willing to use economic resources on a major scale to induce others to comply with global environmental restrictions. There is no enforcement mechanism other than boycotts or warfare, and it is unlikely that agreement would be reached on the use of either in order to reduce offending emissions from some industrial facility. In addition, the "Third World" nations are already substantially encumbered by debt and do not look favorably on suggestions that would impede the development of their resources. The point is illustrated by recent Brazilian reactions to suggestions made by American environmental

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10. New York Times, Feb. 18, 1989, "Arctic Expedition Finds Chemical Threat to Ozone", p. 1, col. 3.
11. *See* New York Times, Oct. 8, 1980, "E.P.A. to Seek a Curb on Fluorocarbons Production", p. A18, col. 1.
12. The Acid Precipitation Act of 1980, 42 U.S.C. §§ 8901-8905 (Pub. L. 96-294).

organizations that the Brazilians stop destroying their rain forests.

It is unlikely that nations will be willing to take substantial unilateral action to address global issues. International agreements will have to impose an equitable degree of pain on all the signatories. If some countries are required to make greater sacrifices than others, because a problem with a transboundary impact originates within their borders, some *quid pro quo* may be demanded of nations on the receiving end of the pollution.

Global pollution begins at home - or at somebody's home. As the late Rene Dubos said, "Think globally - act locally." The admonition was founded on a truism. There may be a risk that when the public focus shifts to the international scene the mundane drudgery of enforcing domestic water, air and toxic laws already in place will be overlooked. The risk is, however, counterbalanced by the need to address internal sources of pollution in order to satisfy any international commitments that are reached.

As we look forward, the picture is not encouraging. In addition to the constraints already indicated, there is the inverse relationship between the economic impact of any action necessary to resolve an environmental threat and the likelihood of such an action being taken. There are other ratios, however, that will impinge more positively. Hopefully there is a direct relationship between the seriousness of a problem and the possibility of action to resolve it. As a corollary, if the problem progresses and its adverse effects become obvious, action, even unpopular action, becomes more likely. The danger exists, however, that inertia will prevent effective action until a point of irreversible harm has been reached, since the stated corollary assumes that the problem is well advanced before it is addressed.

Broadening our struggle with environmental degradation to include even the relatively recently discovered threats to global ecosystems will require a degree of creativity, courage and statesmanship that appears to be in short supply. Ultimately the outcome will be determined by whether the residents of this globe can recognize and understand the threats to humankind's future and make the necessary adjustments and sacrifices, individually and nationally, to ensure that there is one.

ATTORNEY'S FEES

Save Our Cumberland Mountains v. Hodel, 857 F.2d 1516 (D.C. Cir. Sept. 16, 1988) (SOCM III, en banc).

General Issue: Whether a *for profit* law firm that charges reduced rates in order to serve a particular clientele, should be awarded attorney's fees at the prevailing hourly rate usually charged for comparable work charged by the broader legal community.

The Supreme Court has held that a three-part test should be used when awarding attorney's fees: (1) determine the reasonable hours worked; (2) and multiply that figure by a reasonable hourly rate — the "Lodestar—"; (3) and then multiply the result by certain multipliers for difficulty of the litigation, quality of the work, etc. *SOCM III* at 1517 (*quoting Blum v. Stenson,* 465 U.S. 886, 888 (1984)). The instant case, *SOCM III,* was an action to recover attorney's fees pursuant to Sec. 520(d) of the Surface Mining Control and Reclamation Act, 30 U.S.C. Sec. 1270(d) (1982 & Supp. 1986). It revolved around the second part of the *Blum* test, concerning the determination of an appropriate Lodestar.

The Appeals Court for the District of Columbia Circuit met *en banc* specifically to decide whether to overrule its prior decision in *Laffey v. Northwest Airlines*, 746 F.2d 4, 24 (D.C. Cir. 1984), which, in interpreting *Blum,* held that when awarding attorney's fees to a *for-profit* law firm that reduced its rates in order to service a particular clientele, a court should apply the reasonable rate charged by the law firm itself, instead of the prevailing community rate for comparable work. In *SOCM III,* the court took a second look at the applicability of the *Blum* decision which held that when awarding attorney's fees to a *nonprofit* legal services agency, a court should look to the prevailing community rate for comparable work. *SOCM III* at 1517-18.

In the instant case, one of the attorneys charged his paying customers an average of $100 per hour, while the other charged a "reduced rate"-- of between $75 - $100 per hour to environmental groups. *SOCM III* at 1518. The district court held that *Blum,* not *Laffey,* was controlling, *Save Our Cumberland Mountains v. Hodel,* 622 F. Supp. 1160, 1165 (D.D.C. 1985) *(SOCM I),* and awarded attorney's fees of $150 an hour based on the prevailing community market. *SOCM I,* 622 F. Supp. at 1165. The three-judge panel of the

Circuit ("the panel"), however, felt *Laffey* was controlling and reversed, fixing the attorney's rates at $100 an hour, the level the lawyers charged their paying clients. *Save Our Cumberland Mountains v. Hodel,* 826 F.2d 43, 49 (D.C. Cir. 1987) *(SOCM II).* Although the panel felt bound by precedent to follow *Laffey,* all three judges wrote separate opinions criticizing *Laffey.*

The court, *en banc,* with eight judges in the majority and three dissenting, overruled *Laffey* and vacated and remanded the case, holding that when dealing with a *for-profit* law firm that charges a reduced rate in order to service a particular clientele, a court should look to the prevailing community rate for comparable work. *SOCM III* at 1524.

The court, felt there were two major problems with *Laffey.* First, it created an anomaly because lawyers from high priced law firms would get their customary high rate, assuming it was not unreasonably high, and legal services agencies would get the relatively high community rate, while the rate for *for-profit* lawyers who reduced their rates in order to service poorer clients would be capped at whatever rate they charged their paying clients. *SOCM III* at 1520. This anomaly was contrary to the Supreme Court's finding in *Blum* that "Congress did not intend the calculation of fee awards to vary depending on whether [the] plaintiff was represented by private counsel or by a nonprofit legal services organization". *Id.* at 1519 (quoting *Blum,* 465 U.S. at 894).

Second, *Laffey* was not consistent with Congress' intent as to what was a reasonable fee. To determine congressional intent, the court looked to the Supreme Court's exegesis in *Blum* of Congress' intent behind awarding attorney's fees in the Civil Rights Attorney's Fee Award Act of 1976. (Subsequent caselaw interpreting similar but not identical fee-shifting provisions has applied the Supreme Court's finding of congressional intent in that Act to other statutes. *SOCM III* at 1521, n.4.) The court determined that Congress intended reasonable attorney's fees to be sufficient to attract "competent counsel" without producing a windfall. *Id.* at 1518-19. The court then reasoned that avoiding windfalls did not preclude paying "rates commensurate with prevailing community standards of attorneys of like expertise doing the same sort of work in the same area." *Id.* at 1521. Three of the four cases cited with approval in the Senate Report dealing with the Civil Rights Attorney's Fee Award Act, Sen. Rep. No. 1011, 94th Cong., 2nd Sess. 6 (1976), supported this rationale because in all three cases the court looked at the fee customarily charged by the winning attorney, at the fee charged by opposing counsel, and at fees in the community at large. *Id.* at 1521-24. Thus, an attorney in the situation of the attorneys discussed herein did not have to have their fee capped at the price they charged their paying clients.

The court was also concerned that plaintiffs might not be able to get attorneys with relevant expertise, and this would undermine the policy of providing competent counsel. *See SOCM III,* 857 F.2d at 1520-21. Indeed, five times in the decision the court noted the congressional goal of attracting competent counsel, and in fact highlighted the word in two of the references. *Id.* at 1521.

Three justices dissented, arguing that *Laffey* "faithfully interprets Congress' will" and is "a rational, efficient, and sensible regime." *Id.* at 1526. The dissent disagreed that the cases cited in the Senate Report stood for the proposition that a court should look to the community rate instead of to the rate charged by the lawyer himself. Interpretation of the cases notwithstanding, however, the dissent criticized the majority's reliance on "case cites found in the bowels of secondary materials produced in the word processors of Capitol Hill." *Id.* at 1528.

Instead, the court should look to Congress' intent, and Congress' chief goal was to "enable" individuals and groups to obtain competent counsel. *SOCM III,* at 1529. Therefore, the real issue was what "enabling" meant. "[E]nablement . . . is a minimalist test . . . . 'Adequacy' and 'compentency' are the key words that give life to the statute." *Id.* Enablement did not mean maximizing the choices of legal counsel but rather sufficient renumeration to provide for *an* attorney. *Id.*

The three judges also felt that the regular fee charged by the plaintiffs represented a conscious choice to trade income for the type and quality of legal work. The anomaly complained of was really no different than if both parties had simply hired *for-profit* attorneys who charged significantly different rates. *SOCM III* at 1533. Finally, the dissent felt that *Laffey* provided a workable system because the court retained the discretion to adjust the rate paid to a prevailing attorney if it determined that the attorney's regular rate was "aberrationally high or low." *Id.* at 1530.

Mark A. Silberman, '90

HAZARDOUS WASTE

City of New York v. United States Dept. of Transp., 700 F. Supp 1294 (S.D.N.Y. Dec. 22, 1988).

General Issue: Whether, in the area of hazardous materials transportation, Congress intended to require, or provided authority for the Secretary of the Department of Transportation to require that an applicant for a non-preemption determination first make a threshold showing of "exceptional circumstances" before the validity of a city regulation will be subject to the explicit two-step non-preemption test provided in §112(b) of the Hazardous Materials Transportation Act.

Congress enacted the Hazardous Materials Transportation Act, 49 U.S.C. app. §§1801-1812 ("HMTA"), in 1975 to "improve the regulatory and enforcement authority of the Secretary of Transportation [and] to protect the nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce." 700 F. Supp. 1294, 1295 (citing HMTA §102, 49 U.S.C. app. §1801). The section HMTA which has proven troublesome to New York City and the Department of Transportation (DOT) is HMTA §112, which outlines the possible results associated with enacting State or local regulations that are inconsistent with HMTA. Section 112(a) preempts inconsistent local rules subject to the criteria of subsection (b) which allows a non-preemption ruling. To avoid preemption, according to §112(b), a local rule must "(1) afford[ ] an equal or greater level of protection to the public than is afforded by the requirements of [HMTA], and (2) [the rule must] not unreasonably burden commerce." 700 F. Supp. at 1295 (citing HMTA §1811(b); *See also* 700 F. Supp. at 1299). Furthermore, HMTA authorizes the secretary to issue regulations to safely route the transportation of hazardous materials. *Id.* at 1296 (citing HMTA §105(a), 49 U.S.C. grp. §1804(a)).

An amendment to the New York City Health Code was added in 1976, requiring a Certificate of Emergency Transport before specific hazardous material could be trucked through the city. *Id.* (quoting in part the amendment to the New York City Health Code at n. 2). In effect, the City's action banned transport of such materials from nuclear reactors on Long Island because all routes emanating from Long Island pass through New York City. *Id.*

Challenges as to whether the City's Health Code amendment was preempted by HMTA were made by the Government in 1976 and by a Long Island laboratory operator in 1978; both were unsuccessful. With regards to the 1978 challenge in particular, DOT ruled that the City's amendment was valid because the Secretary of DOT had failed to promulgate rules governing the routing of hazardous materials according to §105(a) of HMTA. However, proposed routing rules and final rules (known as HM-164) were subsequently issued by DOT. Upon each issuance, the City applied to DOT for a non-preemption determination of the City's amendment pursuant to §112(b) of HMTA. In both instances, however, the City's applications were denied. In the "proposed rule" phase DOT felt the City's request was premature because DOT's rules were not final; in the "final rule" phase DOT responded in a letter indicating that the City's application for non-preemption would probably be denied for lack of substantial supporting documentation.

DOT issued final transportation rules in January 1981, which required that highway routes be used for transporting hazardous materials. 700 F. Supp. at 1297 (citing hazardous materials regulations codified at 49 C.F.R. §§171-3, 177 (1981)). It was an undisputed fact that the City's health code amendment was inconsistent with federal law. A third application for non-preemption was also denied by DOT. This denial led to the most recent litigation.

The reason offered by DOT for denying the City's application was that even before DOT could apply the two statutory criteria of §112(b), the City had to make a threshold showing of "exceptional circumstances" in order to impose stricter regulations than those provided in HMTA. 700 F. Supp. at 1298. DOT defined exceptional circumstances as "an objective demonstration that a federal regulation, which provides an adequate level of safety on a nationwide basis fails to provide an adequate level of safety in a given locale because of physical conditions which are unique to that locale." *Id.* The City argued that it was the most densely populated city in the nation and was the only major population center without interstate highway routes around the city servicing locations that generate significant amounts of hazardous material. DOT did not find these facts

exceptional. As a result, DOT felt it was unnecessary to subject the City's amendment to the two-step non-preemption test in §112(b). Thereafter, the City filed an administrative appeal to reverse the Secretary's decision but was denied.

Exhausted of its administrative remedies, the City sought judicial review of the Secretary's decision. Both parties moved for summary judgment when they agreed there was no issue of material fact. The City's motion was granted. In addition to losing its motion, DOT has been ordered to apply the two statutory criteria of §112(b) of HMTA to determine the validity of the City's health code amendment.

The City argued that it was incorrect for the Secretary to require a threshold showing of exceptional circumstances. In accordance with HMTA, the City claimed it needed only to show that its health code amendment satisfies both criteria of §112(b) in order to declare it a valid regulation. Congress' intention under HMTA, according to the City, was to uphold inconsistent local transportation regulations where they provided an equal or greater level of public safety and did not unreasonably burden commerce; thus the plain meaning of the statute should be enforced.

DOT, on the other hand, continued to espouse its most recent interpretation: that before §112(b) could be applied to the City's regulation, the City must show exceptional conditions which warranted stricter routing rules than those already provided by DOT. In support of its claim, DOT pointed to the legislative history of HMTA, to the deference entitled to an administering agency, to the purpose and structure of HMTA, to the alleged danger of localities exporting the risks of transporting hazardous materials and to the destruction of uniformity resulting from adherence to the express language of §112(b).

Judge Cederbaum of the Southern District in New York faced the question of whether Congress intended there to be a threshold showing of exceptional circumstances before a state or local regulation was subject to the non-preemption criteria of §112(b) of HMTA. Before the court could reach this question it first had to determine what the congressional intent was in passing a non-preemption provision.

Following the principle of stare decisis, the court turned to an earlier decision from the Second Circuit which found that Congress' intention in enacting a non-preemption provision was to increase *local* safety above the nationally adequate standard. 700 F. Supp. at 1305 (citing *City of New York v. United States Department of Transp.,* 715 F.2d 732, 740 (2d Cir. 1983) *cert. denied,* 465 U.S. 1055 (1984)) (emphasis added).

As to whether Congress intended there to be a threshold inquiry, the court turned to the language of the statute itself. After reviewing §112, the court found no mention of a threshold mandate and held that Congress did not intend a §112(b) applicant to show exceptional circumstances before the two statutory criteria would be applied to a state or local rule.

Although the best evidence of congressional intention is the statute itself, the court continued its investigation of DOT's claims and rejected DOT's argument that as the administering agency of HMTA its interpretation should be granted considerable deference. While deference to an administering agency is a general principle of law, the court noted that the agency, as well as the court, must defer to the statute when Congress expresses itself in an unambiguous manner. 700 F. Supp. at 1300 (citing *Mahasco Corp. v. Silver,* 447 U.S. 807, 825 (1980); and *Chevron U.S.A. Corp. v. National Resources Defense Council,* 467 U.S. 837, 842-3 (1984)). Furthermore, the court held that DOT's contemporaneous construction of HMTA at the time of enactment and its long-standing interpretation should be given significant deference compared to its recent interpretation. *Id.* at 1300. DOT's procedural regulations implementing §112 in 1976, and responding letters to the City's non-preemption requests showed that DOT continuously required an applicant to satisfy the two criteria of §112(b) - an equal or greater level of public protection than the federal regulation and no unreasonable burden on commerce. In neither public announcements nor prior legal documents did DOT require a threshold inquiry. Not until the City instituted this action in 1987 did DOT insist upon an exceptional circumstances showing before a non-preemption determination would be considered.

In addition to DOT's previous pattern of upholding the plain meaning of the statute, the court was not persuaded by DOT correspondence which mentioned "exceptional circumstances" but failed to explain the significance of the term in relation to §112(b). Finally, the court pointed out that while an agency is not locked into one

interpretation forever, a change in interpretation must be examined closely. *Id.* at 1302 (citing *New York Council v. Federal Labor Relations Authority,* 757 F.2d 502, 509 (2d Cir. 1985), *cert. denied,* 474 U.S. 846 (1985)). According to the court, DOT's new interpretation did not warrant close examination where the plain meaning of the statute was obvious.

The court also rejected DOT's argument that the legislative history supported its interpretation. A reading of the Conference and Senate Reports showed no meaning other than the plain meaning already discussed. *See* 700 F. Supp. at 1302-04 (discussing pertinent congressional documents). The Conference Committee's Report which synthesized the House and Senate bills, made no mention of a threshold requirement of exceptional circumstances. In addition, DOT unsuccessfully focused on language in the Senate Report which mentioned "exceptional circumstances" while discussing the preemption provision, but failed to define what conditions satisfy the standard. The court ultimately refused to be guided by these ambiguous statements and rejected DOT's legislative history argument.

Having decided that Congress did not intend DOT to impose a threshold standard on applicants, the court analyzed whether Congress granted DOT the ability to impose such a standard itself. Again, DOT directed the court's attention to a Senate Report which said in part, "the Secretary may grant approval of regulations which vary from federal regulations, provided that they are equivalent or more stringent and place no burden on interstate commerce." *Id.* at 1304 (citing S. Rep. No. 1192, 93d Cong., 2d Sess. 38 (1974)). The court rejected DOT's claim that the discretionary term "may" allow the Secretary to preempt a state or local law even if it meets the requirements of §112(b). The court found it unreasonable to rely on the Senate Report to alter the clear meaning of §112(b).

Neither was the court persuaded that discretionary language contained within §112(b) provided the Secretary with authority to "establish" a threshold requirement. This section provides that there will be no preemption of a local requirement "if . . . the Secretary determines" that the requirement complies with the dual standard of §112(b). The court found that the phrase "if . . . the Secretary determines" allows the Secretary to use his or her discretion in deciding whether a local law meets the requirements of §112(b). The "exceptional circumstances" standard, on the other hand, is a "separate and independent standard." *Id.* at 1304. Therefore, the discretion alloted to the Secretary did not empower him or her to enforce an "exceptional circumstances" standard.

Finally, the court rejected DOT's argument that adherence to the express language of §112(b) would destroy uniformity and prompt other localities to "export risks of hazardous materials transportation to their neighbors." *Id.* at 1305. The court pointed out that DOT regulations already require an applicant to objectively show the affect of its rule on all surrounding jurisdictions. Furthermore, at the time Judge Cedarbaum wrote this opinion only two localities, including New York City, had applied for a non-preemption determination. *Id.* at 1306 (noting that only New York City and the town of Farmingham, Massachusetts had applied for a non-preemption determination since HMTA was enacted).

In conclusion, this court held that the Secretary of the United States Department of Transportation cannot require a state or locality to make a threshold showing of exceptional circumstances before the application for non-preemption is made pursuant to §112(b) of the Hazardous Materials Transportation Act.

Jennifer Juengst '90

OIL

American Petroleum Institute v. United States Environmental Protection Agency, 858 F.2d 261 (5th Cir. Oct. 26, 1988) (API II).

General Issue: Whether the Environmental Protection Agency (EPA) has authority to require operators of oil drilling rigs to substitute mineral oil for diesel oil as a lubricant even though the discharge of diesel oil may cause minimal environmental damage whereas the use of mineral oil will substantially increase drilling costs.

The American Petroleum Institute (API) in a joint action with four oil companies filed a petition which sought to invalidate EPA regulations that affected the operations of the oil companies in Alaskan waters.

Among the issues raised was the fact that the EPA had characterized diesel oil as an "indicator", that is,

a carrier of toxic pollutants. Such a characterization allowed the EPA to impose stringent measures and prohibit the discharge of diesel oil into the ocean even where the resultant harm to the environment as a result of the discharge could be considered minimal. The EPA had mandated that mineral oil be substituted for diesel oil.

API's most vociferous objection was that the use of mineral oil could greatly increase the cost of drilling on the Alaskan coast. API estimated that added operational costs could go up as high as $30 million over the next ten years. *API II* at 264, n.4. API further estimated that at least one to three oil wells could be lost if only mineral oil were used. API also argued that the EPA was under a duty to make a determination with regard to cost effectiveness. To this, the court ruled that the EPA was under no such obligation to show a "direct cost/benefit correlation". *Id.*

In denying the petition, Judge Jerry Smith, writing for the Fifth Circuit noted that the EPA's position was in line with congressional intent to "push pollution control technology." *API II* at 265 (quoting *Weyerhauser Co. v EPA,* 590 F.2d 1011 (1978)). The congressional intent emphasizes that as long as there is a "technologically and economically achievable" means, API II at 264, n.4 (quoting 33 U.S.C. §1311(b)(2)(a)), to prevent the discharge of pollutants into the environment, those means should be utilized. It is of no consequence that the amount of environmental damage is hardly discernible. *API II* at 265 (quoting *API v. EPA,* 661 F.2d 340, 344 (5th Cir. 1981) *(API I)).*

Under normal drilling conditions, thousands of barrels of what is known in the industry as "muds" lubricate the drilling pipe and bit. The muds carry the drill cuttings to the surface. From time to time, the drilling pipe becomes stuck. When that happens additional lubrication in the form of "pills" are circulated down the drilling hole to help free the pipe. The pills contain a significant amount of diesel or mineral oil. Usually the industry is allowed to dispose of the mud in the surrounding waters. However, if the pill used contains diesel oil, the EPA regulations require its disposal at an approved on land hazardous material management site. This means placing the entire mud system on a barge to be disposed on land. On-site water discharge is allowed, however, where mineral oil has been used in the pill.

The EPA instituted the on-land disposal requirement for diesel oil pills following its determination that the use of mineral oil was the best available technology (BAT) to prevent the discharge of toxic diesel oil into the environment. Furthermore, since other oil drill operators used mineral oil, the EPA concluded that it was "technologically and economically achievable."

API countered that the use of diesel oil did not pose any discernible hazard. It stated that for 40 years diesel oil had been discharged into the ocean without any visible environmental impact. API also argued that the amount of damage, if any, was so "infinitessimal [sic]", *API II* at 265, n.5, that it was not worth the "monumental" cost that the substitute would impose on the operators. *Id.* In addition, it was claimed that under best conventional pollutant technology (BCT) level control, the EPA was not allowed to impose "treatment for treatment's sake but must consider the reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived." *Id.* (quoting 33 U.S.C. section 1314(b) (4) (B)). The court, however, ruled that "BAT-level limitations are not subject to such a strict cost/benefit correlation." *API II* at 265, n.5. The court went on to say that it is "analogous to a strict liability standard", *API I* at 344, therefore, "so long as the prescribed alternative is technologically and economically achievable the impact of a particular discharge upon the receiving water is not an issue to be considered in setting technology based limitations." *API II* at 265. The court cited to *API I* and the case of *Association of Pac. Fisheries v. EPA,* 615 F.2d 794, 816 (9th Cir. 1980), to support its ruling.

API also challenged the survey data on which the EPA had relied in making its determination. API contended that the EPA applied the wrong standard in making its determination that mineral oil was an appropriate substitute.

The court stated that while the available data was subject to dispute, it could not rule that the EPA's conclusions were without foundation because it had followed its regulations. *API II* at 263. According to the court, the EPA is an administrative agency, therefore when the EPA exercises its statutory mandate, the court is obliged to refrain from any interference with the agency's action. "The agency's decision need not be ideal or even, perhaps, correct so long as not 'arbitrary' or 'capricious' and so long as the agency gave at least minimal consideration to the

relevant facts as contained in the record." *API II* at 264 (quoting *API I* at 349.)

API claimed that in the event of a substitution, "the product substituted must be 'operationally equivalent' to diesel oil before the EPA may require the substitution." *API II* at 264. In other words, according to API, the substitution must be widely used in the industry. The court, however, noted that API's contention lacked any legal support and consequently ruled that the claim was without merit. *API II* at 264. The EPA countered that under 33 U.S.C. section 1311(b) (2) (A), the substitution need only be "technologically and economically achievable."

Abdul A. Sarpong '90

Tribal Village of Akutan v. Hodel, 859 F.2d 651 (9th Cir. Oct. 5, 1988).

General Issue: Whether the United States Secretary of the Interior's decision to go forward with an Outer Continental Shelf Land Lease Sale off Alaskan shores for oil exploration purposes met the standards of regulatory review applicable at the lease sale stage of the Outer Continental Shelf Lands Act.

The principle issues of this case are (1) whether the Secretary of the Interior's (Secretary) rejection of a state governor's recommendations concerning a land lease sale was arbitrary or capricious and therefore in violation of section 19 of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1345 (1982 & Supp. III 1985); (2) whether the environmental impact statement (EIS) prepared for the lease sale was so flawed that it failed to comply with the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 1531-1543 (1982 & Supp. IV 1986); and (3) whether the Secretary had violated the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1543 (1982 & Supp. IV 1986) by rejecting several reasonable and prudent alternatives advised by the National Marine Fisheries Service (NMFS) for the implementation of the lease sale.

In November 1974, the Secretary began studying the possibility of leasing tracts of outer continental shelf (O.C.S.) land in the Northern Aleutian Basin (the Basin) off the southwest coast of Alaska for oil exploration. The fisheries of the Basin are among the largest in the world, making it important to both commercial and sport fishing. The Basin is also home to endangered species of marine mammals and birds. In the Spring and Fall 80% of the current eastern population of Pacific gray whales migrate through the area, specifically through Bristol Bay.

In 1982, after twice cancelling plans at Alaska's request for lease sales in the Basin, the Secretary submitted Lease Sale 92 to the Congress and the President for approval. Lease Sale 92 was a five year oil and gas leasing schedule for 1985, originally proposed for all 32.5 million acres of the Basin. In response to concerns expressed by Alaska's Governor in March 1984, the Secretary restricted the leasing to the southwest corner of the region by deleting nearly 83% of the acreage from Lease Sale 92. On December 16, 1985, the Secretary published the final notice of sale in the Federal Register. 50 Fed. Reg. 51372-80 (1985). Litigation began later that month in an effort to halt the sale. *Akutan* at 654.

Procedural Status

The appellants are the Tribal Village of Akutan, two other tribal villages, the Trustees for Alaska, twelve other environmental organizations, the state of Alaska, and seven organizations concerned with the preservation of Alaska's fisheries (hereinafter collectively referred to as Alaska). The appellees are the Secretary, the NMFS and nineteen intervenors (hereinafter collectively referred to as the Secretary). Alaska appeals a grant of summary judgment for the Secretary which dismissed each of the alleged statutory violations that would have stopped Lease Sale 92.

Alaska initiated the litigation by filing three suits in the United States District Court for the District of Alaska in December 1985. Upon consolidation of the suits, the district court concluded that the Secretary had violated section 810 of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. §§ 3101-3233, 3120 (1982 & Supp. IV 1986), and that such a violation automatically entitled Alaska to injunctive relief stopping Lease Sale 92. In response, the Secretary immediately obtained a partial stay of the district court's preliminary injunction and appealed, but the United States Court of Appeals for the Ninth Circuit upheld the preliminary injunction. A petition for certiorari with the U.S. Supreme Court was then filed by the Secretary. While the petition was pending the high court ruled that ANILCA does not apply to Outer

Continental Shelf (O.C.S) lands and that ANILCA did not mandate automatic injunctions. *Amoco Production Co. v. Gambell,* 480 U.S. 531 (1987). Consequently, the Secretary's *Akutan* petition was granted and the high court remanded the case to the Ninth Circuit for reconsideration in light of *Gambell. Tribal Village of Akutan v. Hodel,* 107 S. Ct. 1598 (1987). However, once remanded, the Secretary did not seek to vacate the preliminary injunction. Instead, he agreed to pursue an expeditious judicial resolution of the claimed statutory violations. The circuit court then remanded to the district court where judgment was finally granted on all claims in favor of the Secretary. However Lease Sale 92 was again enjoined pending the present appeal by the opposing Alaskan parties. On Alaska's appeal, the Ninth Circuit granted the Secretary's motion to stay the injunction after affirming the lower court on all of the claims. *Akutan* at 655.

OCSLA Claim

OCSLA controls the development and operation of offshore oil wells in the Basin. It is intended to carry out the national policy that the O.C.S. shall be made "available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with maintenance of competition and other national needs." *Akutan* at 654 (quoting 43 U.S.C. § 1332(3)). OCSLA is comprised of four distinct stages: (1) the formulation of a five year leasing plan by the Secretary; (2) lease sales; (3) exploration by the lessees; and (4) development and production. *Akutan* at 654. "Each stage involves a separate regulatory review that may, but need not, conclude in the transfer to the lease purchasers of rights to conduct additional activities on the O.C.S." *Id.* (quoting *Secretary of the Interior v. California,* 464 U.S. 312, 337 (1984)).

In the second stage, the Secretary conducts lease sales of tracts on the O.C.S. Here, OCSLA calls for the Secretary to consult with the governor of a state affected by a lease sale with regards to the size, timing and location of the sale. 43 U.S.C. §1345(c). If the governor's recommendations are determined by the Secretary to provide a reasonable balance between the national interest and the well-being of the affected state, then they must be accepted. *Akutan* at 654. The decision of the Secretary to accept or reject the recommendations is final unless it is found to be arbitrary or capricious. *Id.*

Alaska made three arguments based on OCSLA for reversing the Secretary's decision to proceed with Lease Sale 92. First, Alaska, based on its interpretation of section 19 of OCSLA, argued it was the reviewing court's responsibility to determine whether the *Governor's* recommendations were simply reasonable and not as the district court had done, to determine whether the *Secretary's* rejection was arbitrary or capricious. *Akutan* at 656 (emphasis added).

This argument was rejected. The Ninth Circuit held that a court's scope of review was limited to analyzing the rationality of the *Secretary's* decision, whether or not the Secretary acted in an arbitrary or capricious manner. *Id.* (emphasis added) Alaska's approach would be tantamount to substituting the court's judgment for the Secretary's. *Id.* In determining whether the Secretary acted in an arbitrary or capricious manner, the court examined whether or not the Secretary had considered all of the relevent factors or whether there was a clear error in judgment. *Id.* Additionally, the court considered whether the Secretary articulated a rational connection between the facts found and the choice made, and whether the decision was made in accordance with the duties imposed on him by law. *Id.* It was further observed by the circuit court that even if the Governor's recommendations were reasonable, this would not warrant the conclusion that the Secretary was arbitrary in rejecting them. *Id.*

Secondly, Alaska argued that the Secretary's decision was arbitrary or capricious because it was made without due consideration of the Governor's findings and relied on flawed data. These contentions were found meritless. *Akutan* at 657. Such a finding highlights the low level of performance required of the Secretary under OCSLA's "arbitrary or capricious" standard and demonstrated the judiciary's restrictions from raising that level. The Secretary had fulfilled his duties under OCSLA, according to the Ninth Circuit, by discussing the environmental concerns and by comparing the Governor's program with Lease Sale 92. *Akutan* at 657. The Secretary was not required to adopt any of the proposals, but merely to consider them and articulate a rational basis for their rejection. *Id.* As for 'flawed data' in the cost benefit analysis, the Governor's experts may have come to conclusions different from the Secretary's, but the court could not decide the question of which methodology was better. The court found that such expert determinations uncovered no fundamental flaws or irrationality

in the Secretary's decision, since they only expressed a preference for the results reached by a different methodology. *Id.*

Alaska's final claim under OCSLA asserted that the Secretary did not give the Governor a meaningful opportunity to comment on the net economic value calculations of Lease Sale 92. It was the court's finding that the Secretary had solicited the Governor's recommendations on the original lease sale and, even though the lease sale had undergone minor revisions *after* the submission of the Governor's recommendations, OCSLA did not require that the revised lease sale be resubmitted to the Governor. The court placed some importance on the insignificant nature of the changes but left open the question of whether resubmission might be required upon major revisions. *Id.* at 657.

NEPA Claim

"NEPA is a procedural statute designed to 'ensure that federal agencies are fully aware of the impact of their decisions on the environment.' " *Akutan* at 657 (quoting *Oregon Envt'l Council v. Kunzman,* 817 F.2d 484, 492 (9th Cir. 1987)). Alaska contended that the Secretary had made three fundamental errors in the creation of the environmental impact statement (EIS) required for Lease Sale 92 by NEPA: two methodological errors and one procedural. The methodology employed, according to Alaska, resulted in a significant underestimation of the oil that might be spilled and overlooked such variables as seasonal changes in the weather and the movement of fish and wildlife. Alaska also alleged that the Secretary's failure to disclose all of the assumptions underlying the oil spill risk analysis violated his procedural duty, under NEPA, to "make available to the public information of the proposed project's environmental impact and encourage public participation in the development of that information". *Id* at 658 (quoting *Trout Unlimited v. Morton,* 509 F.2d 1276, 1282-1283 (9th Cir. 1974)).

Review by the court of the EIS would be limited to whether or not it was created "without observance of procedure required by law". *Id.* (quoting *Kunzman,* 817 F.2d 492). This would require the Circuit Court to make certain determinations, such as whether the EIS contained a reasonably thorough discussion of the significant aspects of the probable environmental consequences and did it provide information which was reasonably sufficient to encourage informed public participation and enable the decision maker (Secretary) to consider the environmental factors to arrive at a reasoned decision. *See Akutan* at 657 (quoting *Kunzman* at 492-493). Minor technical deficiencies were not enough to nullify an EIS. *Id.* In short, was the Secretary's EIS adequate to meet NEPA requirements?

Rejecting Alaska's methodological arguments, the Ninth Circuit found its earlier decision in *Village of False Pass v. Watt.* 733 F.2d 605 (9th Cir. 1984) (*False Pass),* largely dispositive of the issues. *False Pass* established that the amount and specificity of an EIS will vary according to the OCSLA development stage involved. At the lease sale stage the Secretary need only provide "a reasoned analysis of the evidence before him," *Akutan* at 659 (quoting *Friends of Endangered Species v. Jantzen,* 760 F.2d 976, 986 (9th Cir. 1985)), and this analysis may contain methodological errors, *Id.* at 659, and is not required to be based on the best scientific methodology available. *Id.* NEPA does not require the court to decide which party's methodology is better. *Id.* The court explained that such a standard requiring that the Secretary's actions only be adequate was justified by the unlikelihood of any environmental harm occurring at the early lease sale stage and by the inherent speculative nature of any analysis of oil spill risk prepared before exploration has been done. *Id.* at 658. It was noted by the court that additional EIS's would be required by NEPA at the later OCSLA stages of development and review. *Id.* at 658.

As to Alaska's procedural challenge, the court found that the Secretary fulfilled his responsibility to provide the public with adequate information on oil spill risks. *Id.* This analysis need not disclose every underlying assumption; it must merely identify those methodologies used, a discussion of them being optional. The court further found that the omission of the underlying assumptions was immaterial, once again citing the speculative nature of any analysis at the lease sale stage. *Id.*

ESA Claims

Alaska argued that the Secretary's decision to go forward with Lease Sale 92 had violated the ESA by dispensing with some of the reasonable and prudent alternatives suggested by the National Marine Fisheries Service (NMFS).

The ESA requires federal agencies to consult

with the service having jurisdiction over the relevant endangered species to ensure that any action carried out by such agency "is not likely to jeopardize the continued existence of any endangered species or threatened species." *Akutan* at 659 (quoting 16 U.S.C. §1536(a)(2) (1982 & Supp. IV 1986)). The service then issues a biological opinion, and if the proposed action might threaten the relevant endangered species, it then suggests reasonable and prudent alternatives to the proposal. *Id.* (referring to 16 U.S.C. §1536(b)(3)). The agency consulting the service is not required to accept the alternatives and may, at the risk of not satisfying ESA, reject them. *Id.* (citing *False Pass* at 1060-61). The ESA provides no internal standard of review, therefore the court's scope of review was set by the Administrative Procedure Act, 5 U.S.C. 706(2)(a) (1982). The circuit court's power to set aside the Secretary's decision was limited to circumstances where the decision was found to be arbitrary or capricious. *Akutan* at 659. As demonstrated in Alaska's OCSLA claims, this is an extremely difficult performance level to prove.

By not providing the full twenty-five mile offshore buffer zone to protect the migratory route of the Pacific gray whales, as advised by the NMFS, and only adopting an eleven mile zone, Alaska alleged the Secretary acted arbitrarily and capriciously. Taking note of the varying degrees of responsibility imposed on the Secretary by OCSLA's different stages, the court rejected this argument. The Secretary could properly limit his actions by not adopting the NMFS's recommendations since, at the lease sale stage, the decision did not directly endanger the gray whales. *Id.* at 660. By examining the alternative measures the Secretary did take, the lack of danger to the whales at the lease sale stage and ESA's continuing review process, the court held that the Secretary had fulfilled his ESA obligation.

Stuart R. Jablonski '89

RECYCLING

Kohlbrenner Recycling Enterprises v. Burlington County Board of Chosen Freeholders, 228 N.J. Super. 624, 550 A.2d 771 (N.J. Super. Ct. Law Div. Aug. 5, 1987).

General Issue: Whether Burlington County, New Jersey must give priority consideration to businesses that recycle on behalf of a county or municipality, or is it exempt from giving priority consideration because it has secured markets for at least three recyclable materials?

In an attempt to broaden the implementation of its Solid Waste Management Plan, Burlington County, New Jersey passed an amended Recycling Plan, which was approved by the Department of Environmental Protection (DEP) in 1986. The plan relies in part upon a contract executed with the Occupational Training Center of Burlington County, Inc. (OTC) for the collection and marketing of recycled materials, which includes newspapers, glass and cans.

Kohlbrenner Recycling Enterprises, Inc. (Kohlbrenner) is a recycler of glass, cans, white goods, metals and tires for a number of municipalities, both before and after the 1986 amendment to the Solid Waste Management Plan. Discontented with its exclusion from the County's Recycling Plan, Kohlbrenner filed suit in the New Jersey Superior Court against the Burlington County Board of Chosen Freeholders to be included in the program and to prevent the completion of a new recycling facility in the Township of Delran. Kohlbrenner relied mainly on the provisions of the Mandatory Recycling Program, which requires every county to "accord priority consideration to persons engaging in the business of recycling . . . on behalf of a county or municipality on January 1, 1986.[1]" In an opinion written by Judge Haines, the court dismissed the case on jurisdictional and statute of limitations grounds. However, in dictum, the court stated that Burlington County should have given priority consideration to Kohlbrenner.

Exemption Provisions

The Solid Waste Management Plan provides an exemption from the priority consideration

1. Kohlbrenner at 773 (citing Section 3 of the Mandatory Recycling Program, L. 1987, c. 102).

requirement to counties that comply with the exemption requirements. The Plan grants an exemption if "a county shall have established and implemented a county-wide mandatory source separation and recycling program for at least three recyclable materials, in addition to leaves, and shall have demonstrated that it has secured markets for these materials."[2]

The legislative purpose in creating this exemption was to protect those plans already in effect before these provisions were passed. Mandatory compliance with the priority consideration provision may have conflicted with and destroyed plans already in existence. Therefore, the exemption was created.

The crucial issue in this case was whether the County had "secured markets" for at least three recyclable materials in order to qualify for the exemption. The court read the Act's definition of "market" as:

> the disposition of designated recyclable materials source separated in a municipality which entails a disposition cost of transporting the recyclable materials to solid waste facilities and disposing of them as municipal solid waste at the facility utilized by the municipality.[3]

The only contract the County had was with OTC, which required OTC to find the markets. The court viewed OTC as an "alter ego" of the County, and concluded that it "cannot be the 'market' to which the act refers."[4] It is rather a step toward securing a market for the recyclable materials. Other than that, there was no demonstration of any marketing arrangements that would satisfy the requirements of the exemption.

The court did note that the County would be able to demonstrate it had secured markets if it could show that there were markets available to its municipalities. If there was evidence that "markets," as defined in the Act, were available, Burlington County would qualify for the exemption. However, no such evidence was presented.

Jurisdictional Issue

Despite the court's discussion of the exemption provision, the case was dismissed because the court did not have jurisdiction over the action, and it was barred by all applicable statutes of limitations. The Superior Court of New Jersey refused to exercise jurisdiction over the case because Kohlbrenner had mistakenly relied on the statute which provided that each "recycling *plan* . . . shall accord priority consideration"[5] to Kohlbrenner. The statute dictated that the plan itself must give the consideration. Therefore it was the action of the DEP in approving the plan that should have been the basis for Kohlbrenner's action. Since the DEP was not a party to the action the court could not decide the issue.

Furthermore, even if the DEP was a party, New Jersey law provides that any action by a state administrative agency is reviewable in the Appellate Division.[6] If the DEP did not give priority consideration to Kohlbrenner, the proper forum was not the Superior Court but the Appellate Division.[7]

Statute of Limitations

Alternatively, the court dismissed the case because under New Jersey law, three time bars prevented Kohlbrenner from bringing the action. An appeal to the Appellate Division against the DEP must be made within 45 days from the date the DEP approved the plan.[8] Furthermore, an action to review the County's plan must be brought within 30 days after its adoption by the County.[9] Lastly, a complaint must be filed within 45 days from the date when the cause of action accrued.[10] The court held that either the action accrued when the County adopted the plan or when the DEP approved the plan. In either case, the statute of limitations had long since passed. Therefore the court dismissed on these grounds.

Joseph Welter '89

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2. Kohlbrenner at 774.
3. Kohlbrenner at 776.
4. Kohlbrenner at 775.
5. Kohlbrenner at 773 (citing the Mandatory Recycling Program, L. 1987, C. 102 (emphasis added)).
6. R. 2.2:3(a)(2) provides for "jurisdiction in the Appellate Division" . . . to review final decisions or actions of any state administrative agency or office . . ." Kohlbrenner at 773.
7. Kohlbrenner at 773. Kohlbrenner's action to prevent the construction of the Delran Recycling Plant also involves DEP action, and the court held that the proper forum was the Appellate Division. *See Id.*
8. R. 2:2-3(a)(2). Kohlbrenner at 773-774.
9. N.J.S.A. 13:1E-23(f). Kohlbrenner at 774.
10. R.4:69-6. Kohlbrenner at 774.

WATER

Arkansas Poultry Federation v. United States Environmental Protection Agency, 852 F.2d 324 (8th Cir. June 30, 1988).

General Issue: Whether the Environmental Protection Agency's (EPA) 1987 definitions of the terms "interference" and "pass through" for purposes of the General Pretreatment Standards are inconsistent with the Federal Water Pollution Control Act Amendments of 1972, as amended by the Water Quality Act of 1987, and are unconstitutionally vague.

This case arose when the Arkansas Poultry Federation (APF) filed a petition, in the Court of Appeals for the Eighth Circuit, seeking judicial review of the definitions of "interference" and "pass through," as promulgated by the Administrator of the Environmental Protection Agency (EPA Administrator) in 1987, for purposes of the National Pretreatment Standards. *Arkansas* at 325 (citing 40 C.F.R. 403.3 (i) & (n) (1987)). The APF is an industrial user of municipal sewage systems or publically owned treatment works (POTWs), consisting of poultry producers who discharge biological wastes into POTWs. The APF argued that the 1987 definitions were inconsistent with §307(b)(1) of the Federal Water Pollutions Control Act Amendments of 1972 (FWPCAA), 33 U.S.C. §1317(b)(1), as amended by the Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 41 (1987), and as construed by the Third Circuit in *National Association of Metal Finishers v. United States Environmental Protection Agency,* 719 F.2d 624 (3d Cir. 1983)*(NAMF).* The petitioners also argued that the definitions were unconstitutionally vague.

The Eighth Circuit, in an opinion by Judge McMillian, held that the 1987 definitions of "interference" and "pass through" were neither inconsistent with the FWPCAA as construed by the Third Circuit in *NAMF* nor unconstitutionally vague. The court decided that industrial users of a POTW would be liable under the FWPCAA where the user's discharge was *a cause* of the POTW's violation of its discharge permit. *Id.* at 328 (emphasis added). Therefore, the court denied the petition for review. *Id.* at 330.

POTWs treat waste water and then discharge the treated water into the nation's waters. *Id.* at 326. POTWs, which are regarded as "direct dischargers" of wastes, are issued a permit under the National Pollutant Discharge Elimination System (the NPDES permit). *Id.* They are required to meet effluent limitations regarding "the numerical limitations of the amount, rate or concentration of specific pollutants,"*Id.* (citing 33 U.S.C. 1342), that can be discharged into the nation's waters, which are contained in the NPDES permit. In addition, POTWs must meet requirements governing the use or disposal of sewage sludge, a by-product of the POTWs' treatment process.

Aware that most POTWs "were designed and built to treat domestic sewage, . . . Congress recognized that the pollutants discharged by . . . industrial users of POTWs could *interfere* with the operation of the POTWs or could *pass through* the POTWs without adequate treatment." *Id.* (emphasis added). Either occurrence would prevent the POTWs from complying with both their NPDES permit limits and their requirements for the use or disposal of sewage sludge. *Id.* Therefore, Congress required industrial users to pretreat wastes before discharging them into POTWs. *Id.* In addition, Congress gave the EPA Administrator authority, under §307(b) of the FWPCAA, to establish waste pretreatment standards in order "to prevent the discharge of any pollutant through POTWs which . . . interferes with, passes through or is otherwise incompatible with the POTWs. *Arkansas* at 326 (citing 33 U.S.C. §1317(b)(1)).

In 1987, the EPA Administrator, acting under the power granted him by §307(b) of the FWPCAA and in response to the Third Circuit's decision in *NAMF,* redefined the terms "interference" and "pass through". *Id.* at 327. The court in *NAMF,* remanding both definitions to the EPA for revision, had held that the 1981 definition of "interference" was inconsistent with the FWPCAA and that it would not decide the merits of the claim regarding the 1981 definition of "pass through" because that definition did not comply with the notice and comment requirements of the Administrative Procedure Act. *Arkansas* at 327.

The 1987 regulations defining "interference" and "pass through" and establishing two affirmative defenses to an industrial user's liability for causing a POTW to violate its NPDES permit are at issue in this case. "Interference" was defined by the EPA in 1987 as:

> a Discharge which, alone or in conjunction with a discharge or discharges from other

sources, both:

(1) Inhibits or disrupts the POTW, its treatment processor operations or its sludge processes, use or disposal; and

(2) Therefore is a *cause* of a violation of any requirement of the POTW's NPDES permit (including an increase in the magnitude or duration of a violation) or of the prevention of sewage sludge use or disposal in compliance with . . . statutory provisions and regulations or permits issued thereunder.

Arkansas at 327 (citing 40 C.F.R. 403.3 (i)) (emphasis added).

In addition, "pass through," was defined by the EPA in 1987 as a:

> Discharge which exits the POTW into waters of the United States in quantities or concentrations which, alone or in conjunction with a discharge or discharges from other sources, is *a cause* of a violation of any requirement of the POTW's permit (including an increase in the magnitude or duration of a violation).

Arkansas at 327 (citing 40 C.F.R. 403.3 (n) (1987)) (emphasis added)).

The 1987 EPA regulations also established two affirmative defenses to liability for "interference" and "pass through," which contain a two part test. The industrial user of a POTW can escape liability if it first shows that it "did not know that its discharge, alone or in combination with discharges from other sources, would result in [a] violation of a POTW's NPDES permit or would prevent lawful sludge use or disposal." *Id.* at 328. The user must then also establish either the "local limit compliance defense" or the "unchanged discharge defense." *Id.* The "local limit compliance" defense requires that the industrial user show that the local numerical limits for each pollutant in the discharge which caused either "interference" or "pass through" were met. *Id* (citing 40 C.F.R. §403, 311(c)). The "unchanged discharge defense" allows the industrial user, where local numerical limits have not been established, to show that prior to and during the "interference" or "pass through" the discharge "did not differ substantially in nature or condition" from the discharge when the POTW was in compliance with both its NPDES permit and its sludge and disposal requirements. *Id.*

APF argued that the 1987 definition of "interference" and "pass through" were inconsistent with the FWPCAA as construed by the Third Circuit in *NAMF* because that court held that an industrial user is liable only if its discharge "caused *and* significantly contributed" to the POTW's violations of its NPDES permit. *Id.* (emphasis added). Judge McMillian, in the present case, held that APF misread the *NAMF* decision. As clarified by Judge McMillian, the *NAMF* decision only concluded that liability could not be imposed on industrial users without proof of causation. According to Judge McMillian, the *NAMF* decision determined that the 1981 definition of "interference" violated the clear meaning of the FWPCAA because it allowed an industrial user of POTW's to be held liable for a POTW's NPDES permit violation where the user significantly contributed to the POTW's violation but did not cause it. *Arkansas* at 328. Judge McMillian held that the FWPCAA definitions of "interference" and "pass through" did not require that the user both cause *and* significantly contribute to the POTW's violation of its NPDES permit *Id.* at 328 (emphasis added). Therefore Judge McMillian concluded that the 1987 definitions were consistent with the FWPCAA because they require proof of causation - alone - before holding the industrial POTW user liable.

The petitioner further argued that the 1987 definitions are inconsistent with the FWPCAA because an industrial user may be held liable even if its discharge is only *a cause* of the POTW's NPDES permit violation. *Id.* at 328 (emphasis added). Judge McMillian agreed with the *NAMF* court that the FWPCAA does not require the industrial user to be *the sole cause* of the POTW's permit violation in order for liability to attach. *Id.* at 328 (emphasis added). Thus it was concluded that it was reasonable and consistent with the FWPCAA to hold an industrial POTW user liable for the POTW's permit violation regardless of whether another factor alone or in conjunction with the user's discharge was an independent cause of such violation. *Id.* at 328 (emphasis added).

Other arguments advanced by the petitioner were that under the 1987 definitions the industrial user could be held liable even where the sole cause of the POTW's violation of its NDPES permit was the POTW's own inefficiency or "improper operation or where the industrial user's discharge was only a *de minimus* cause of the permit violation." *Id.* at 330.

In response, the court held that the supplementary information accompanying the

1987 regulation expressly provided that the industrial user cannot be a cause of "interference" or "pass through" where the POTW's own actions are the sole cause of its permit violation. As to the 'de minimus' argument, the court accepted the EPA's statement that the 1987 regulations require the industrial user's discharge to be more than de minimus for the user to be held liable.

It was also argued by APF that the 1987 definitions were unconstitutionally vague because they failed to provide industrial users with notice of those activities that cause "interference" and "pass through" and therefore failed to establish a user's pretreatment obligations. The court disagreed and held to the contrary, stating that the definitions specify "the industrial user's pretreatment obligations in terms of the POTW's compliance with the effluent limitation contained in its NDPES permit and with federal environmental statutes regulating sludge use or disposal." *Id.* at 329. Therefore, the court concluded that the 1987 definitions are not unconstitutionally vague.

Frederica E. Jeffries '90

LEGISLATIVE UPDATES

CONGRESS TO PHASE OUT SEWAGE SLUDGE AND INDUSTRIAL WASTE DUMPING BY 1992

Ocean Dumping Ban Act of 1988

In another step[1] to fight the war on water pollution, Congress has enacted legislation that will result in an ultimate ban on ocean dumping of sewage sludge[2] and industrial waste.[3] The Ocean Dumping Ban Act of 1988 proposes a three year phase out program that will involve both the Environmental Protection Agency (EPA) and the states. Dumpers will be forced to enter into agreements to develop alternative methods of disposing of sewage sludge and industrial waste. In addition, Congress plans to fund the development of alternative methods by charging fees and penalties to those who will be permitted to dump between 1989 and the end of 1991. Afterwards, a total ban on ocean dumping will take effect.

Prohibition on Dumping

After the enactment of the legislation[4] and up until 1992, no person[5] "shall dump into ocean waters, or transport for the purpose of dumping into ocean waters, sewage sludge or industrial waste unless"[6] the person has entered into a compliance or enforcement agreement[7] and obtained a permit to transport or dump the waste.[8] After 1991, Congress has imposed a total ban on all ocean dumping of sewage sludge or industrial waste.[9] In order to curb ocean dumping in the interim, the Administrator of the program will not issue permits to dump unless the person was authorized[10] to do so on September 1, 1988.[11]

Compliance and Enforcement Agreements

In addition to preventing the issuance of any further dumping or transporting permits, the compliance and enforcement agreements are designed to effectively phase out ocean dumping by 1992. Under the agreements, the dumpers will be forced to adhere to a plan which will "result in the phasing out and termination of ocean dumping, and transportation for the purpose of ocean dumping . . . ."[12]

Under a compliance agreement, the plan must be negotiated between the person, the EPA and the state in which the person is located, and must

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1. For an update on Congressional legislation addressing the problem of medical waste dumping on the east coast, *see Ocean Dumping of Medical Wastes*, Vol. 5, No. 2 Hofstra Environmental Law Digest 20-24 (Fall 1988).

2. Congress has defined sewage sludge as "any solid, semisolid, or liquid waste generated by a waste water treatment plant other than an excluded material." Congressional Record at H10309 (October 18, 1988). Congress goes on to define "excluded material" as:

> (A) any dredged material discharged by the United States Army Corps of Engineers or discharged pursuant to a permit issued by the Secretary in accordance with section 103 [of the Marine Protection, Research, and Sanctuaries Act]; and
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> (B) any waste from a tuna cannery operation located in American Samoa or Puerto Rico discharged pursuant to a permit issued by the Administrator under section 102 [of the Marine Protection, Research, and Sanctuaries Act].

Id.

3. Congress defines industrial waste as "any solid, semisolid, or liquid waste generated by a manufacturing or processing plant, other than an excluded material." Congressional Record at H10309 (October 18, 1988); *see supra* note 2 (defining "excluded material").

4. The Act specifically provides that on or after the 279th day after the date of the enactment of the legislation, no person shall dump ocean sewage unless permitted by the Act. Congressional Record at H10307 (October 18, 1988).

5. A "person" includes anyone described in § 104A(a)(1)(C) of the Marine Protection, Research, and Sanctuaries Act of 1972.

6. Congressional Record at H10307 (October 18, 1988).

7. *See infra* notes 12-19 and accompanying text.

8. Congressional Record at H10307 (October 18, 1988).

9. *Id.*

10. The person must have been authorized by a permit issued under §102 of the Marine, Protection, Research, and Sanctuaries Act of 1972 or must have been authorized by a court order to dump or transport waste. Congressional Record at H10307 (October 18, 1988).

11. Congressional Record at H10307 (October 18, 1988).

12. *Id.* The EPA is required to allow for public comment regarding the establishment and implementation of compliance and enforcement agreements. Congressional Record at H10308 (October 18, 1988).

be adhered to by the person in good faith.[13] The agreement must phase out the transporting and dumping of waste by 1992 through the development of an alternative system[14] for waste disposal.[15] The EPA, which has ultimate approval over the plan, will establish a schedule for the implementation of the alternative system.[16] In addition, the EPA, as well as the State, has the responsibility to evaluate the compliance of the person with the schedule the EPA establishes.[17] The compliance agreement also places certain burdens on the person dumping, which include notifying the EPA and the governor of the state of any compliance problems and paying any fees or penalties prescribed by the legislation.[18]

The legislation provides for an alternative type of enforcement agreement for those dumpers who cannot adhere to the 1992 deadline.[19] Other than this difference, an enforcement agreement is identical and has the same force and effect as a compliance agreement.[20]

In order to recover the federal agency's costs of administering the ocean dumping program, Congress has imposed a fee on any person who dumps or transports for the purpose of dumping sewage sludge or industrial waste.[21] The fees imposed are based on the dry tonnage of sewage sludge or industrial waste that is transported or dumped. In 1989, dumpers will be forced to pay a fee of $100 for each dry ton of waste.[22] In 1990, the fee will be increased to $150 per dry ton, and in 1992, it will cost dumpers $200 per dry ton to dump or transport waste.[23]

For those persons who have entered into a compliance or enforcement agreement with the EPA and the state, the EPA is required to waive a large portion of these fees.[24] However, the fees will be reimposed if the person fails to comply with the compliance or enforcement agreement and will not be able to terminate dumping by 1992.[25]

In addition to fees for dumping, Congress has provided for penalties to be imposed on dumpers after 1991, when a total ban on dumping will take effect. These penalties are in lieu of any other civil liability and can cost a dumper $600 in 1992 and a greater amount with each passing year.[26]

If a person is subject to penalties for noncompliance, the EPA shall issue an order preventing that person from dumping or transporting until he or she enters into a compliance agreeement and obtains a permit which authorizes such dumping.[27] In addition, the EPA can request that the Attorney General commence an action for the appropriate relief, including injunctive relief and the imposition of dumping penalties.[28]

Use of Fees and Penalties

Congress has developed a comprehensive scheme for the distribution and use of the dumping fees and penalties. The largest portion of the fees[29] and penalties[30] will be placed in a trust account to be used by the dumpers to develop and implement

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13. Congressional Record at H10308 (October 19, 1988).

14. Congress defines alternative system as "any method for the management of sewage sludge or industrial waste which does not require a permit under this Act." Congressional Record at H10309 (October 18, 1988).

15. The legislation provides that the phasing out of the ocean dumping must be done "through the design, construction, and full implementation of an alternative system for the management of sewage sludge and industrial waste transported or dumped by the person." Congressional Record at H10307 (October 18, 1988).

16. *Id.* The schedule established by the EPA shall include deadlines for:

> (A) preparation of engineering designs and related specifications for the alternative system . . .;
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> (B) compliance with appropriate Federal, State and local statutes, regulations, and ordinances;
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> (C) site and equipment acquisitions for such alternative system;
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> (D) construction and testing of such alternative system;
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> (E) operation of such alternative system at full capacity; and
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> (F) any other activities including interim measures that the [EPA] considers necessary or appropriate.

Congressional Record at H10307 (October 18, 1988).

17. *Id.*

18. *Id. See infra* notes 21-28 and accompanying text (discussing fees and penalties).

19. Congressional Record at H10314 (October 18, 1988).

20. *See supra* notes 13-18 and accompanying text (discussing compliance agreements).

21. Congressional Record at H10307, H10314 (October 18, 1988).

22. Congressional Record at H10307 (October 18, 1988).

23. *Id.*

24. The EPA will waive all fees except for a $15 per dry ton fee that is required to be paid for the EPA's activities in running the program. *See infra* text accompanying note 31.

25. Congressional Record at H10307 (October 18, 1988). The EPA can waive the reimposition of the fee when the person has returned to compliance with the agreement. *Id.*

26. The legislation provides that any violation after 1992 will result in a fine equal to the amount of the violation in the preceding year plus 10 percent of that amount, plus 1 percent for each year after 1991. Congressional Record at H10308 (October 18, 1988). "For example, for dumping that occurs in 1993, a dumper will be liable for a penalty of $600 per dry ton (the amount paid in 1992) plus 11 percent of that amount. In 1994, the penalty will increase by 12 percent of the amount paid in 1993." *Id.* at H10315.

27. The Order must be delivered by personal service to the person named in the Order and shall state with specifity the nature of the violation. Furthermore, the Order must specify that the person must enter into a compliance agreement and obtain a permit to dump. Congressional Record at H10309 (October 18, 1988).

28. *Id.*

29. Congress has provided that 85 percent of the fees collected should be placed in a trust account. Congressional Record at H10307.

30. Congress has provided that 90 percent of any penalties paid, reduced by 5 percent for each since December 31, 1991, should be placed in a trust account. Congressional Record at H10308 (October 18, 1988).

an alternative system for dumping.[31] In addition, $15 per dry ton of the fee or penalty shall be paid to the EPA to finance the EPA's activities in carrying out the legislation.[32]

The balance of the fees and penalties paid will be equally distributed and deposited into the state's Clean Oceans Fund[33] and the state's Water Pollution Control Revolving Fund.[34] The money deposited in the Water Pollution Control Revolving Fund is forfeited by the dumpers and cannot be used to provide assistance to those dumpers in developing an alternative system.[35] However, the dumpers are able to recover the money deposited into the Clean Oceans Fund. In accordance with the legislation, each state is obligated to establish a Clean Oceans Fund (Fund) account[36] into which a portion of all fees and penalties are to be deposited. The state will then pay from the Fund an amount equal to each person's contribution to the Fund during the year, including interest, at the end of the year to any person who has entered into a compliance or enforcement agreement.[37]

Progress Report

Pursuant to any compliance or enforcement agreements entered into by a state, the governor must submit a report[38] to the EPA each year describing the efforts of the people in the state to comply with the agreements.[39] In addition, the report must describe the efforts of the state in permitting the development of alternative systems, and must provide an accounting of the Clean Oceans Fund account established by the state.[40]

In addition to the state's report, the EPA must also submit a progress report to Congress on the progress of the development of alternative systems by those people who have dumping permits and have entered into compliance or enforcement agreements. The EPA must also report on the dumpers' efforts in effectively meeting the deadlines set by the EPA.[41] Lastly, the report must describe the progress of the EPA in identifying and implementing alternative systems for terminating the dumping of sewage sludge and industrial waste.[42]

Environmental Monitoring

In order to track the effect of curbing ocean dumping, Congress has developed a system of monitoring ocean dumping sites. Under the legislation, the EPA in conjunction with the Under Secretary of Commerce for Oceans and Atmosphere is required to develop a program to monitor environmental conditions at certain dumping sites.[43] At the end of each year the EPA and the Under Secretary must submit a report to Congress on the nature of the monitoring program and its progress.[44]

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31. To qualify as a trust account the establishment of the account must meet the following requirements:

(A) Amounts in the account may be used only with the concurrence of the person who establishes the account and the Administrator; except that the person may use the amounts in the account for a purpose authorized by subparagraph (B) after 60 days after notification of the Administrator if the Administrator does not disapprove such use before the end of such 60-day period.

(B) Amounts in the account may be used only for projects which will identify, develop, and implement -

(i) an alternative system, and any interim measures, for the management of sewage sludge and industrial waste, including but not limited to any such system or measures utilizing resource recycling, thermal reduction, or composting techniques; or

(ii) improvements in pretreatment, treatment, and storage techniques for sewage sludge and industrial waste to facilitate the implementation of such alternative system or interim measures.

Congressional Record at H10308 (October 18, 1988).

32. Congressional Record at H10307-08 (October 18, 1988).

33. Congressional Record at H10307-08 (October 18, 1988).

34. After 1994, that portion of the penalties will no longer go to these funds. Instead, the penalty payment will be made to the State, which will use those funds to provide assistance to any person for implementing or developing management programs under the Federal Water Pollution Control Act. Congressional Record at H10308-09 (October 18, 1988).

35. Congressional Record at H10308 (October 18, 1988).

36. For those states that have not established a Clean Oceans Fund at the time the fees and penalties are being paid, the EPA will set up an escrow account for such funds, to be payable to the State upon the establishment of such an account. Congressional Record at H10307 (October 18, 1988). At the end of the year, if a Clean Oceans Fund has not been established, the money will revert back to the Treasury. *Id.*

37. Congressional Record at H10308 (October 18, 1988).

38. Failure to submit a report by the state could result in the withholding of federal funding under the Federal Water Pollution Control Act. Congressional Record at H10309 (October 18, 1988).

39. Congressional Record at H10309 (October 18, 1988).

40. *Id.*

41. *See supra* notes 16-17 and accompanying text.

42. Congressional Record at H10309 (October 18, 1988).

43. The EPA must monitor conditions at the Apex site (as defined by section 104A), the 106-Mile Ocean Waste Dump Site (as described in 49 F.R. 19005), the site at which industrial waste is dumped and "within the potential area of influence of the sewage sludge and industrial waste dumped at those sites." Congressional Record at H10309 (October 18, 1988).

44. Congressional Record at H10309 (October 18, 1988).

CONGRESS ENACTS LEGISLATION TO CURB SOLID WASTE AND MEDICAL WASTE DUMPING BY VESSELS

Shore Protection Act of 1988[1]

The sewage sludge found on both the New York and New Jersey beaches has been a recurring environmental problem for the past two years. A recent Environmental Protection Agency (EPA) Report (dated March 1988) confirmed that the floatable waste found was largely a result of Fresh Kills landfill located in Staten Island, New York. This landfill holds tons of municipal and commercial waste which, when delivered by barges, was deposited into coastal waters.[2] Besides assessing the refuse found on the beaches and the harbor areas, the EPA report concluded that the landfill waste "reduc[ed] the quality of the coastal waters, endangering the health of humans, marine mammals, water fowl and fish, and causing severe decline in coastal economies driven by tourism and recreational uses."[3]

The concerns of the EPA have led to the enactment of the Shore Protection Act of 1988. This Act provides guidelines and regulations designed to prevent solid waste, which is carried by vessels, from being deposited into coastal waters.[4] Additionally, the legislation seeks to prevent "trash, medical debris and other unsightly and potentially harmful materials" from being dumped into coastal waters.[5] In order to prevent this dumping, Congress has decided to regulate the procedures used by vessels that transport solid wastes.

The Act will be implemented and enforced by the EPA,[6] with the aid of the Secretary of Transportation's aid in certain areas.[7] In implementing the legislation and enforcing the regulations, the EPA's main focus will be on the territorial waters of the United States and the Great Lakes with their connecting waters.[8]

The substance of the legislation focuses on transporting vessels. The most basic provision of the Act requires that a vessel[9] cannot transport municipal or commercial waste in the specified coastal waters without a permit issued by the Secretary of Transportation.[10] The permit must display a corresponding number or marking on the vessel.[11] In issuing permits, the Act provides specific information and guidelines for the obtainment, maintenance, and denial of vessel permits.[12]

Once a permit is issued, the Act outlines the waste handling practices for the permitted vessels to follow. Loading, offloading, securing and cleanup procedures are set out in order to guarantee that there is no improper dumping into the coastal waters.[13] The Secretary of Transportation has the power to conduct periodic examinations to determine if vessels are complying with the permit requirements under this Act.[14] If the Secretary shall find that a vessel owner or operator is not in compliance with the permit requirements, that permit is subject to suspension, revocation, or injunction, after due process rights have been observed.[15] Pursuant to his or her power to conduct on-board examinations, the Secretary may conduct investigations, refuse entry of vessels into the United States, detain a vessel's departure from U.S. ports, subpoena parties and records, or file contempt charges in the United States District Court when necessary with respect to vessels that violate any provision of the Act.[16]

In addition to the Secretary's power, violators are subject to both civil and criminal penalties.[17] Civil fines of not more than $10,000 for permit violations or not more than $25,000 for other violations may result.[18] However, these civil penalties may be remitted or refunded if the Secretary finds that such penalty was imposed improperly or unlawfully.[19] Criminal penalties may entail imprisonment of not more than three

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1. The Shore Protection Act of 1988, Pub. L. No. 100-688, 1988 U.S. Code Cong. & Admin. News (102 Stat.) 456.
2. 134 Con. Rec. H10312, 10318 (daily ed. October 18, 1988) (Joint Explanatory Statement of the Comm. of Conference) concerning the Shore Protection Act of 1988.
3. *Id.*
4. *Id.*
5. *Id.*
6. *See* Shore Protection Act §§4101(1), 4102(e), 4103(b).
7. *See* Shore Protection Act §4105(a)-(b)
8. *See* Shore Protection Act §4101(2)(A)-(B). In addition, coastal waters also include - "the marine and estuarine waters of the United States up to the head of tidal influence . . . and the exclusive economic zone as established by Presidential Proclamation Number 5030 dated March 10, 1983." *Id.*
9. The term "vessel" excludes a public vessel as defined in 46 U.S.C. §2101. Shore Protection Act §4102(a).
10. *See* Shore Protection Act §4102(a)(1).
11. *See* Shore Protection Act §4102(a)(2).
12. *See* Shore Protection Act §4102(a)(2), (b),(d),(f).
13. *See* Shore Protection Act §4103(a)(1)-(4).
14. *See* Shore Protection Act §4105(b).
15. *See* Shore Protection Act §4104(a)-(b).
16. *See* Shore Protection Act §§4105(a),(b),(d), 4106.
17. *See* Shore Protection Act §4109.
18. *See* Shore Protection Act §4109(a)-(b). In addition civil violations may include in rem liability. *Id.*
19. *See* Shore Protection Act §4108(d).

years for some violations.[20] Lastly, in order to encourage the reporting of illegal dumping, the Act provides that up to one half in fees will be paid to anyone providing information leading to the imposition of a fine or penalty.[21]

At first blush, the Act seems only to regulate and impose penalties on vessel permit violators. However, it also provides for continuous research and development to address the problem of coastal waste deposit. The EPA and the Secretary are charged to collect data, and to report and recommend additional tracking systems within two years of the enactment of the legislation.[22] In order to continue research and to implement this program, Congress has allocated a nominal sum of $150,000[23] for each of the next two years (1989 and 1990).[24] However, over the long term, the money necessary to research and solve this problem will far exceed Congress' allocation.

The sludge factor has been an active concern of the country at large.[25] Beaches and coastal areas are enjoyed by many. Additionally, they provide important environmental contributions to fish and mammal alike.[26] The Shore Protection Act seeks to deter inefficient vessel procedures which lead to waste deposits in coastal waters. Ultimately, it will attempt to eliminate the sludge factor from our beaches and coastal waters.

United States Public Vessel Medical Waste Anti-Dumping Act of 1988[27]

In addition to the Shore Protection Act, Congress has also limited the power of public vessels[28] to dispose of potentially infectious medical waste[29] in the ocean. The United States Public Vessel Medical Waste Anti-Dumping Act of 1988 mandates that no public vessel shall dispose of potentially infectious medical waste into ocean waters unless-

> (1) (A) the health or safety of individuals on board the vessel is threatened; or
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> (B) during time of war or a declared national emergency;
>
> (2) the waste is disposed of beyond 50 nautical miles from the nearest land; and
>
> (3) (A) in the case of a public vessel which is not submersible, the waste is properly packaged and sufficiently weighted to prevent the waste from coming ashore after disposal; and
>
> (B) in the case of a public vessel which is submersible, the waste is properly packaged and sufficiently weighted to prevent the waste from coming ashore after disposal.[30]

The EPA, as well as the heads of the Secretary of Defense and the heads of each affected department, are given the absolute responsibility for providing guidance[31] for public vessels in implementing the legislation.

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20. *See* Shore Protection Act §4109(c).
21. *See* Shore Protection Act §4109(d).
22. *See* Shore Protection Act §4201.
23. Although this sum does not appear to be a large financial commitment, at this point, it is at least a start to resolving this important environmental concern.
24. *See* Shore Protection Act §4203.
25. *See* 134 Con Reg. at H10318.
26. *Id.*
27. United States Public Vessel Medical Waste Anti-Dumping Act of 1988, Pub. L. No. 100-688, 1988 U.S. Code Cong. & Admin. News (102 Stat.) 4152.
28. "The term 'public vessel' means . . . marine environment." Anti-Dumping Act §3103(2).
29. Anti-Dumping Act §3103(1).
30. Anti-Dumping Act §3104.
31. Although the legislation provides for guidance, it does not expressly provide enforcement standards or remedies for violation of the provisions.

ARTICLES

The Effect of Pending SIP Revisions on Clean Air Act Enforcement

Joseph A. Siegel, Esq.*

Statutory Framework

When Congress established the Clean Air Act[1] ("Act") in 1970, it provided a structure of state/federal interaction for control of air pollution. Pursuant to section 109 of the Act,[2] the Administrator of the Environmental Protection Agency ("EPA") was required to publish national ambient air quality standards ("NAAQS") and must review those standards periodically. The standards are promulgated at *40 CFR Part 50.*

Section 110 of the Act[3] requires each State to submit to the EPA a plan, known as a state

* Joseph A. Siegel is an Assistant Regional Counsel of the United States Environmental Protection Agency, Region II. He is also an alumnus of Hofstra University School of Law Any views expressed in this article are personal to the author and should not be construed as an expression of the official position of the Environmental Protection Agency.

1. 42 U.S.C. §§7401 *et seq* (1970).
2. 42 U.S.C. §7409.
3. 42 U.S.C. §7410(a)(2).

implementation plan ("SIP"), for achieving each NAAQS after a standard is promulgated by the EPA. The EPA thereafter has four months to either approve or disapprove the SIP by determining whether it meets a number of statutory requirements designed to ensure attainment of the standard.[4]

The Act provides for revision of the SIP and requires that the EPA Administrator ("Administrator") "approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings."[5] The "requirements of paragraph (2)" refer to those requirements of 42 U.S.C. §7410(a)(2) which applied to the initial approval or disapproval of a proposed SIP.

SIPs are typically embodied in state regulations which must be complied with by individual sources of air pollution. As such, SIP revisions often are requested by a state in the form of a variance to a particular regulation on behalf of an individual source of pollution ("source"). In order for a variance to be considered for approval as a SIP revision, the state must submit the variance as it would any SIP revision.[6] SIP revisions are not considered part of the SIP until they have been approved by the Administrator.[7]

EPA Approval of SIP Revisions-General Enforcement Rule

Pursuant to Sections 13 and 120 of the Act,[8] the EPA may take an enforcement action against sources which violate the applicable SIP regulations. Section 113 allows the EPA to collect penalties and obtain injunctive relief in United States District Court.[9] Under Section 113, the EPA must first issue a Notice of Violation ("NOV") to a source and be able to demonstrate that the violation continued for thirty days before filing in district court for penalties and injunctive relief.[10] Section 120 provides for collection of administrative penalties for noncompliance.[11] This type of action is commenced when the EPA issues its Notice of Noncompliance ("NON") which results in the immediate accrual of administrative penalties.[12] The penalty periods under Sections 113 and 120 of the Act differ in that Section 120 penalties begin only upon issuance of the NON whereas Section 113 penalties may predate the NOV, to the first day of violation.[13]

In *Train v. Natural Resources Defense Council,*[14] the Supreme Court stated that while a SIP revision is pending, "the original regulations remain in effect, and the *polluter's* failure to comply may subject him to a variety of enforcement procedures."[15] This well established principle, that a source must comply with the regulations currently in effect until a revision is approved by the EPA, has been enunciated in a number of circuits. For example, the court in *United States v. Ford Motor Co.,*[16] stated that "the original [SIP] emission limit remains fully enforceable until a revision or variance is approved by both the State and the EPA."[17] The D.C. Circuit also required the EPA approval prior to effectiveness of a proposed revision.[18] In addition, this principle has been relied on by the Third Circuit,[19] as well as by the Ninth Circuit.[20]

The Four Month Deadline

The Act is clear that the EPA has four months to either approve or disapprove a general SIP which is initially submitted to the EPA.[21] However, the circuits are split on whether this four month deadline applies to revisions of the SIP and on the extent to which this deadline limits the EPA's enforcement authority under §§113 and 120 of the Act.[22]

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4. 42 U.S.C. §7410(a)(3)(a).
5. 42 U.S.C. §7410(a)(3)(a).
6. 40 C.F.R. §51.104(g).
7. 40 C.F.R. §51.105.
8. 42 U.S.C. §§7413, 7420.
9. 42 U.S.C. §7413(b).
10. 42 U.S.C. §7413(a)(2).
11. 42 U.S.C. §7420.
12. 42 U.S.C. §7420(d)(3)(c)(ii).
13. See, e.g., Duquesne Light Co. v. EPA, 698 F.2d 456, 464 (D.C. Cir. 1983); United States v. SCM Corp., 667 F. Supp. 1110, 1121-23 (D. Md. 1987).
14. 421 U.S. 60, 14.421 U.S. 60 (1975).
15. *Id.* at 92.
16. 814 F.2d 1099, 1103 (6th Cir. 1987).
17. See also, Ohio Environmental Council v. United States Southern District of Ohio, 565 F.2d 393, 398 (6th Cir. 1977), wherein the sixth circuit stated that "if a plan became unenforceable every time such a revision became a possibility, the entire enforcement procedure of the Clean Air Act would be crippled."
18. Metropolitan Washington Coalition for Clean Air v. District of Columbia, 511 F.2d 809, 813 (D.C. Cir. 1985).
19. United States v. Wheeling-Pittsburgh Steel Corp., 818 F.2d 1077, 1084-85 (3d Cir. 1987).
20. National Resources Defense Council v. EPA, 507 F.2d 905, 915 (9th Cir. 1974).
21. 42 U.S.C. § 7410(a)(2); See, e.g., Council of Commuter Orgs. v. Gorsuch, 683 F.2d 648, 651-52, n. 2. (2nd Cir. 1982).
22. *See* American Cynamid Co. v. EPA, 810 F.2d 493 (5th Cir. 1987); Council of Commuter Orgs. v. Thomas, 799 F.2d 879 (2d Cir. 1986); United States v. National Steel Corp., 767 F.2d 1176 (6th Cir. 1985); Duquesne Light Co. v. EPA, 698 F.2d 456 (D.C. Cir. 1983).

The Sixth Circuit is the only one which has found that the four month deadline applies only to general state SIP submissions and not to revisions of the SIP.[23] The other circuits which have ruled on this issue hold that the four month time period does apply to SIP revisions but take different approaches in deciding how exceeding the four month deadline limits the EPA's enforcement authority. *Amercian Cyanamid*[24] involved an appeal of an EPA imposed administrative penalty under Section 120 of the Act. The court therein held that where the EPA has not acted on a SIP revision more than four months after it is proposed and thereafter issues an administrative Notice of Noncompliance under Section 120 of the Act, the proceeding will not be considered commenced until after the EPA rejects the proposed SIP revision.[25] Thus, the EPA cannot collect penalties for the period between issuance of the Section 120 notice and rejection of the SIP revision.[26] The court also held that where the EPA commences a Section 120 action prior to the proposed SIP revision, it may collect penalties from the time it commences the action to four months after the SIP revision is submitted by the state.[27] The penalty period would then recommence if and when the EPA rejects the proposed revision.[28]

The *American Cyanamid* decision conflicts with the D.C. Circuit's holding in *Duquesne Light,*[29] that the EPA may collect penalties under Section 120 for the period beyond the four month deadline but that the penalty will be held in abeyance until the EPA rejects the proposed SIP revision.

The Second Circuit has ruled that while the four month deadline applied to SIP revision, "tardiness by the EPA is not a basis for granting a petition for review of action that satisfied the substantive requirements of the Act."[30] However, it should be noted that the Second Circuit rulings were not in the context of an enforcement action by the EPA, but rather, involved a petition for review by a citizen group which challenged the EPA's approval of the New York State SIP and revisions to the SIP.[31]

Several district court rulings have come in the wake of the various circuit court decisions on the issue of SIP revisions.[32]

In *Alcan Foil,*[33] the Western District of Kentucky did not follow the approach of its own Circuit Court which had held that the four month deadline does not apply to SIP revisions.[34] Rather, it relied on the *American Cyanamid* decision.[35] The court in *Alcan Foil* stated that since the EPA's action began more than four months after the proposed SIP revision, it could not properly commence enforcement proceedings until after it acted on the SIP revision.[36] This was the first decision extending the *American Cyanamid* approach on the four month issue from administrative actions under Section 120 of the Act to district court enforcement actions by the EPA under Section 113 of the Act.[37] The *Alcan Foil* court[38] rejected the EPA's argument that the alleged violator must, at a minimum, be in compliance with the proposed SIP revision in order to estop the EPA from commencing an action under the existing SIP. The court instead reasoned that the emphasis should be on whether the EPA has "acted responsibly to avoid a state regulatory limbo."[39]

In *General Motors,*[40] the District Court of Massachusetts also extended the reasoning of *American Cyanamid* to enforcement actions under Section 113 of the Act. The court therein held that if a decision is delayed beyond four months, the "EPA is prohibited from bringing or continuing enforcement proceedings under the original SIP until final action is taken"[41] on the proposed SIP revision.[42] The court indicated that four months is a reasonable time in which to review and act upon proposed SIP revisions.[43]

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23. National Steel, 767 F.2d at 1183.
24. 810 F.2d at 498-9.
25. *Id.* at 500.
26. *Id.*
27. *Id.*
28. *Id.*
29. 698 F.2d at 472.
30. Council v. Thomas, 799 F.2d at 888; See also Council v. Gorsuch, 683 F.2d at 661.
31. Council v. Thomas, 799 F.2d at 888.
32. *United States v. Alcan Foil Prods., 694 F. Supp. 1280 (W.D. Ky., March 15, 1988);* United States v. General Motors, C.A. No. 87-2068 MC (D. Mass., May 16, 1988). United States v. Arkwright, Inc., 690 F. Supp. 1133 (D. N.H. *1988).*
33. Alcan Foil, 694 F. Supp. 1280.
34. See National Steel, 767 F.2d at 1183.
35. Alcan Foil, 694 F. Supp. at 1283.
36. *Id.*
37. *But see* Dunn-Edwards Corp., et. al., v. Thomas, No. C-87-3157 MHP (N.D. Cal., August 4, 1987), wherein the court distinguished the issuance of an NOV by the EPA under Section 113 of the Act from an administrative NOV under Section 120 of the Act. Since penalties do not attach to the Section 113 NOV in the absence of a subsequent Section 113 district court enforcement action by the EPA, the court did not extend the American Cyanamid ruling.
38. 694 F. Supp. at 1283.
39. *Id.*
40. C.A. No. 87-2068 Mc, slip op. at 5-8.
41. *Id.* at 8.
42. *Id.* at 8.
43. *Id.* at 7.

One reason the court cited for holding the EPA to this four month period is that the EPA may "at any time during or after the allowed four month period reject the proposal and invoke enforcement proceedings under the original SIP.[44] Neither the *General Motors* court nor the *Alcan Foil* court addressed the issue of what an appropriate penalty period would be once the EPA rejects the proposed SIP revision.

In *Arkwright,*[45] the District of New Hampshire held that the EPA's failure to approve or disapprove a proposed SIP revision within four months does not bar the EPA's enforcement proceeding under Section 113 of the Act. The court rejected the *American Cyanamid* approach and noted that "the Act does not provide for the imposition of a penalty [on the EPA] or waiver of rights if the EPA fails to abide by the deadline."[46] The court further held that the EPA's enforcement action could not be equitably estopped since the EPA's inaction did not constitute affirmative misconduct, a necessary element for equitable estoppel.[47]

On the issue of penalties, the court indicated that it would take the approach used in *Duquesne Light,* and allow the EPA to collect retroactive penalties but hold those penalties in abeyance until the EPA rejects the proposed SIP revision.[48] The court adopted this approach because the proposed SIP revision was submitted prior to commencement of the EPA's action.[49] The court then indicated that it would only allow imposition of penalties retroactive to four months after the SIP revision was submitted,[50] although there were violations long before the SIP revisions. It rejected the EPA's argument, on Motion for Clarification, that unlike Section 120 actions which allow penalties only from the date of commencement of the action, Section 113 requires penalties back to the first date of violation.[51] The court concluded that it had substantial discretion to fashion a penalty period.[52]

There are several aspects of the four month deadline issue on which the courts are divided: (1) whether the four month rule even applies to SIP revisions; (2) whether it bars the EPA's enforcement action where the four month rule is held to apply; and (3) how to calculate the penalty period where the four month rule is held to apply. Although the early cases involved only administrative Section 120 actions, the courts have more recent rules on these issues in the Section 113 context. Future cases will hopefully clarify the extent to which the different nature of Section 120 and 113 actions impact on the EPA enforcement authority where SIP revisions are pending. Given the variety of rulings on these issues and the attendant uncertainty in the outcome of these kind of cases, sources are well advised to refrain from relying on pending SIP revisions as a means to avoid compliance with existing SIP regulations.[53]

44. *Id.*
45. 690 F. Supp. at 1142.
46. *Id.*
47. *Id.* at 1142-3.
48. Arkwright, 690 F. Supp. at 1144.
49. *Id.*
50. *Id.* at 1144 n.7
51. United States v. Arkwright, Inc. Civ No. 87-2000-D (D. N.H., October 13, 1988).
52. *Id.*

53. In addition, the EPA has taken steps to reduce the amount of time for SIP revision processing. Specifically, the EPA has proposed criteria for SIP revision submittals which must be met before the submittal is considered complete and reviewable, Fed. Reg., Vol. 54, No. 12, January 19, 1989, State Implementation Plan Completeness Review, and has proposed procedural changes to streamline SIP revision processing. Fed. Reg., Vol. 54, No. 12, January 19, 1989, State Implementation Plan Processing Reform.

New York's Movement Toward An Environmental Cleanup Responsibility Act: Learning From the New Jersey Experience

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By John M. Scagnelli and Carol A. Casazza *

New Jersey, a state fraught with significant environmental problems, has moved to the forefront in developing progressive environmental legislation and enforcing its regulatory programs.[1] New Jersey is perhaps best known for the 1983 enactment of its Environmental Cleanup Responsibility Act ("ECRA"), N.J.S.A. 13:1K-6 *et seq.*

ECRA is a national environmental landmark statute. It holds private parties, not federal or state government, responsible for environmental cleanup by imposing this obligation on the parties at the point of certain transactions. Before properties, businesses or activities subject to

*Mr. Scagnelli is Head of the Environmental Department at the firm of Clapp and Eisenberg in Newark, New Jersey. Ms. Casazza, formerly of the United States Environmental Protection Agency, is an associate in the Environmental Department. She is also the founder of the Hofstra Environmental Law Society and the first editor of the Environmental Law Digest.

1. New Jersey, after Federal leadership has waned, has become an environmental leader. *Wall Street Journal,* July 5, 1988, at p. 44, col. 1.

ECRA can be sold, transferred or closed, ECRA must be complied with to ensure that the site is acceptably clean. This can be done either through the execution of an approved cleanup plan detailing necessary cleanup measures or through approval of a negative declaration, stating that there has been no discharge of hazardous substances on or from the site or that any such discharge has been cleaned up.

ECRA puts its teeth directly on the transaction which triggers its application. Failure to comply with ECRA constitutes grounds for either the transferee or the New Jersey Department of Environmental Protection ("NJDEP"), or both, to void the transaction. While several states, including New York, are considering following New Jersey's lead, no other state has adopted as stringent a program.

While NJDEP relishes New Jersey's role as an environmental bellwether, the agency has had to bear the responsibility of working the kinks out of its ECRA Program. Not only can New Jersey's ECRA serve as a framework for other similar state statutes, but other states can benefit from the lessons which New Jersey has learned in developing its ECRA Program.

New York currently is considering two ECRA-type bills: Assembly Bill No. 11618, known as the Attorney General's Legislative Program Bill, and Assembly Bill No. 1474-C, known as the Governor's Program Bill. This article will evaluate and analyze both New York bills in light of New Jersey's experience.

New Jersey's ECRA Program

The New Jersey ECRA statute applies to the closing, terminating or transferring of operations at covered industrial establishments. Covered industrial establishments are defined as any activity, place of business, or real property engaged in operations on or after December 31, 1983, involving the generation, manufacture, refining, transportation, treatment, storage, handling, or disposal of hazardous substances and wastes,[2] and having certain statutorily designated Standard Industrial Classification ("SIC") numbers, listed in the Standard Industrial Classification Manual prepared by the Federal Office of Management and Budget. N.J.S.A. 13:1K-8.f; N.J.A.C. 7:26B-1.3.

Transactions covered by ECRA include sales or other conveyances of real property of industrial establishments, transfers of a controlling share of assets of industrial establishments other than real estate (whether in one or several independent transactions), lease terminations or expirations, and changes in control of ownership of industrial establishments at any ownership level.[3] N.J.S.A. 13:1K-8.b; N.J.A.C. 7:26B1.3. *See also,* N.J.A.C. 7:26B-1.5(b); and N.J.A.C. 7:26B-1.8. ECRA also covers complete or substantial cessations of operations of industrial establishments (permanent or for two years or more), certain events in receivership actions or bankruptcy proceedings, foreclosure sales, changes in operations of industrial establishments which change the primary SIC Number from an ECRA subject SIC Number to one that is not, and execution of a lease for 99 years or longer. N.J.S.A. 13:1K-8.b; N.J.A.C. 7:26B-1.3; N.J.A.C. 7:26B-1.5(b).

Certain transactions are *not* covered by ECRA, including execution of real property mortgages, granting of security interests, the filing of liens and debt refinancings by or against industrial establishment owners or operators and corporate reorganizations not substantially affecting ownership.[4]

Once it is determined that ECRA applies, the owner or operator of the industrial establishment must submit to NJDEP within five days of the ECRA transactional "trigger" the first part of the ECRA Notification, the General Information Submission ("GIS"). The GIS contains general information regarding the site, the ECRA-subject transaction, and site ownership. N.J.A.C. 7:26B-1.6. N.J.A.C. 7:26B-3.2(b). The second part of the

2. Except where the industrial establishment qualifies for a *de minimus* quantity exemption, N.J.A.C. 7:26B-10.1.

3. Changes in control of ownership include (a) transfers of corporate shares which change the identity of the person(s) holding the majority interest of the corporation or a parent corporation, however remote; (b) statutory mergers or consolidations; (c) corporate dissolutions; and (d) sales or transfers of the entire interest of any partner in a general partnership, regardless of size of percentage interest, the entire interest of any general partner in a limited partnership, or the entire interest of a limited partner in a limited partnership in certain circumstances, N.J.A.C. 7:26B 1.3; N.J.A.C. 7:26B-1.5(b).

4. The exemption is narrowly defined as "the restructuring or reincorporation by the board of directors or the shareholders of a corporation, which does not result in a change of ownership or control, change in the majority interest, termination of the corporate business, or liquidation and distribution of corporate assets and where the purpose is merely to: (1) correct illegalities or defects in the original incorporation, (2) to broaden the scope of the powers of the organization (including the amendment as well as extension or revival of charters), or (3) to place the corporation on a sound management and financial basis that enables it to take care of its obligations. N.J.A.C. 7:26B-1.3; N.J.A.C. 7-26B-1.8(a)(4).

ECRA Notification, the Site Evaluation Submission ("SES"), must be submitted to NJDEP within 45 days of the ECRA transaction trigger. N.J.A.C. 7:26B3.2(c). The SES must be a comprehensive report on site history from January 1, 1940, to the present, the status of permits and enforcement actions, current and past operations, areas of environmental concern, sampling results, previous spills, geographic, soil, geologic, and hydrogeologic data and may include other information requested in writing by the NJDEP, N.J.A.C. 7:26B-3.2(c).

Following completion of the ECRA notification process, the owner or operator of the industrial establishment must submit either a negative declaration or a cleanup plan to NJDEP, N.J.S.A. 13:1K-9; N.J.A.C. 7:26B-5.1. The negative declaration is the affidavit of the owner or operator which certifies that either there has been no discharge of hazardous substances and wastes on or from the industrial establishment or that any such discharge has been cleaned up to NJDEP's satisfaction. N.J.A.C. 7:26B-5.2(a). Where the negative declaration cannot be used, a cleanup plan must be submitted. The cleanup plan addresses the areas of environmental concern identified in the SES and sampling plan with the cleanup performed to NJDEP-specified levels. It also must include an estimate of the cost of implementing the plan. N.J.A.C. 7:26B-5.3(a).

ECRA requires NJDEP to develop "minimum standards for soil, groundwater and surface water quality necessary for the detoxification of the site." N.J.S.A. 13:1K-10. NJDEP has not yet promulgated regulations specifying cleanup standards but is authorized to review and approve negative declarations and cleanup plans on a case-by-case basis. N.J.A.C. 7:26B-11.1. The only direction offered to the regulated community is a "Draft Sampling Plan Guide" distributed by the NJDEP.

NJDEP must either approve or disapprove the negative declaration within 45 days of its submission; there is no time limit for NJDEP's review and approval of the cleanup land after submission. N.J.S.A. 13:1K-10.b; N.J.A.C. 7:26B-5(c).

In view of the length and complexity of the ECRA administrative and technical review process, NJDEP now issues Administrative Consent Orders ("ACOs") which allow an ECRA covered transaction to close prior to NJDEP's approval of a negative declaration or cleanup plan. N.J.A.C. 7:26B-7.1. To obtain an ACO, the owner or operator must post financial assurance in an amount equal to or greater than NJDEP's current estimate of the cleanup. The financial assurance may be provided by surety bond, performance bond, a letter of credit, selfbonding, or a fully funded trust fund. N.J.A.C. 7:26B-6.1(a)

ECRA sets forth stiff penalties for noncompliance. The failure of the transferor to comply with any of the ECRA provisions is grounds for either the transferee or NJDEP, or both, to void the transaction, entitles the transferee to recover damages from the transferor, and renders the owner or operator strictly liable, without regard to fault, for all cleanup costs and for all direct and indirect damages which result from the failure to implement the cleanup plan. Any person who knowingly gives any false information or fails to comply with the provisions of ECRA may be liable for penalties of not more than $25,000 for each offense. N.J.S.A. 13:1K-13; N.J.A.C. 7:26B-9.1.

The New York State Bills

The two current New York State ECRA-type bills before the State Assembly vary dramatically in structure and approach. The Attorney General's Legislative Program Bill covers a different category of transactions than ECRA—all transfers of an interest in nonresidential real property. It also relies on the exchange of privately prepared certificates of compliance, with little agency supervision of the process.

The Governor's Program Bill is patterned on New Jersey's ECRA and has similar coverage and enforcement mechanisms, with some significant differences.

The Attorney General's Bill — The Real Property Transfer and Certification Approach

The Attorney General's Bill applies to all transfers of nonresidential real property. Nonresidential real property is not defined. It should be defined to explicitly exclude coverage of multi-unit apartment, cooperative and condominium units which could be considered nonresidential real property, and some thought should be given to excluding mixed residential/commercial property uses from coverage. The definition of covered transfer broadly includes every transaction creating any

estate or interest in nonresidential real property.[5] The Bill covers the mortgaging of real property, the granting of security interests, the filing of liens and the execution of leases for terms of over three years, transactions not covered by New Jersey's ECRA

The Attorney General's Bill's coverage of nonresidential real property and the expansive definition of a covered real estate transfer would have significant consequences if enacted. The Bill does not limit its application to covered industrial establishments — all nonresidential property is covered. While the Bill covers real property transfers only; the definition of a covered transfer, albeit in the real estate context only, is far broader than New Jersey ECRA covered real estate transactions. Strong consideration should be given to exempting these transactions from the Bill's coverage; otherwise, the impact of the Bill upon the New York mortgage and real estate industries will be unnecessarily burdensome.

Also, the Attorney General's Bill's mechanism for defining environmental contamination and for providing for remediation relies heavily upon the private parties involved in the transaction for implementation. The NYS-DEC's supervision and involvement would apparently be minimal. The Bill provides that the owner of nonresidential real property may not complete transfer of the property without providing the transferee with either a certificate of public safety or a certificate of compliance executed by the parties themselves. Proposed §27-1607.1. The certificate of public safety is a sworn declaration on a NYSDEC-approved form, stating either that there has been no release or threat of release of any hazardous substance or petroleum at the property which is the subject of a transfer or that if there has been a release or threat of release, all remediation obligations required in a certificate of compliance have been discharged. Proposed §27-1605.2. The certificate of public safety is substantially equivalent to the New Jersey ECRA negative declaration.

The property owner executing the certificate of public safety must conduct a diligent investigation into the current and previous ownership and uses of the property consistent with "good commercial or customary practices."[6] The owner must therefore conduct a detailed environmental site investigation before executing the certificate of public safety. However, the use of the phrase "consistent with good commercial or customary practices" sets a standard of inquiry that is, at best, vague. We suggest that regulations promulgated under the authority of Proposed §27-1611 delineate the specific technical procedures and standards that owners may follow for the performance of the diligence investigation.

New Jersey's ECRA negative declaration approval is effective only as long as all the information remains unchanged but not longer than 60 days. N.J.A.C. 7:26B-5.4(b). A similar limitation should be placed on the life of the certificate of public safety to prevent the situation where the certificate is obtained well before the completion of the transaction and does not reflect the condition of the property at the time of the transaction.

If the investigation required for a certificate of public safety reveals environmental contamination, the owner may not transfer the property without providing the transferee with an executed certificate of compliance. The certificate of compliance is also written on an NYSDEC-approved form. It states that the owner will remediate the effects of any hazardous substance release or threat of release under a work plan certified by a licensed professional engineer in conformance with NYSDEC-approved cleanup standards. Proposed §27-1605.3; §27-1607.3. Certificates of compliance require a showing of the transferor's financial responsibility to complete the environmental remediation in the form of any one or any combination of insurance, guarantee surety bond, letter of credit or

5."Transfer" means every transaction by which any estate or interest in nonresidential real property is created, transferred, mortgaged or assigned, or by which the title to any real property may be affected, including the execution of a power, although the power be one of revocation only, and the execution of an instrument postponing or subordinating a mortgage lien; except the execution of a will, a lease for a term not exceeding three years, an executory contract for the sale or purchase of lands, and an instrument containing a power to convey real property as the agent or attorney for the owner of such property. The acquisition of real property by a government entity through escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation, shall not be considered a transfer for purposes of this title. Proposed §27-1605.4.

6. No owner shall execute a certificate of public safety without first having conducted an investigation into the current and previous ownership and uses of the property consistent with good commercial or customary practices. Such investigation must take into account any specialized knowledge or experience of the owner or other person involved in the transfer, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination, and the ability to detect such contamination by appropriate inspection. Proposed §27-1607.2

qualification as a self-insurer. Proposed §27-1607.4.

The Attorney General's approach thus varies substantially from ECRA. It places primary responsibility for environmental investigation and cleanup upon the transferor. There is no direct mechanism for NYSDEC's review and approval of these certificates. Without a mechanism for NYSDEC involvement, an opportunity is created for circumvention of the law's requirements. The certificates can be misleadingly structured and there is no provision to ensure that the transferor's posted financial security can be reached by NYSDEC for cleanup, if required. While some of these issues can perhaps be dealt with by regulation, it is suggested that the Bill be redrafted to give NYSDEC a mechanism for reviewing and approving the certificates.

The Attorney General's Bill places the compliance responsibility only on the property owner, not the operator, unlike the New Jersey ECRA approach. The New Jersey drafters recognized that the facility operator is in an equal position with the property owner to comply, due to its familiarity with the property and facility operations. Consideration should be given to providing for this flexibility in the Attorney General's Bill.

While the Attorney General's Bill provides for both civil and criminal penalties, it lacks the teeth of the New Jersey ECRA statute, because it does not contain a transaction voidance provision whereby either the transferee or NYSDEC, or both could void the transaction for failure to comply with the requirements of the statute. Proposed §71-2705. The Bill therefore lacks what is perhaps the most compelling incentive for the business community to comply.

The Governor's Program Bill — The Transaction Rescission Approach

The New York Governor's Program Bill ("Governor's Bill") is patterned upon New Jersey ECRA and provides for greater NYSDEC involvement than does the Attorney General's Bill. There are, however, some significant differences from the New Jersey ECRA statute.

The Governor's Bill covers hazardous substance facilities which are defined as facilities engaged since January 1, 1987, in the generation, manufacture, refining, transportation, treatment, storage, handling, or disposal of substances "hazardous or acutely hazardous to public health, safety or the environment" on-site, above or below ground, with specified SIC Numbers. Proposed §27-1605.4. The definition of hazardous substance facilities is consistent with the New Jersey ECRA definition of industrial establishments, with the significant difference that gasoline stations, not covered in New Jersey under ECRA, are covered in New York under SIC Number 55. The exclusion of gasoline stations from ECRA coverage in New Jersey was a significant omission and its inclusion in the Governor's Bill is important.

The benefits of the inclusion of gasoline stations under the Governor's Bill may be lost, however, because of one significant omission from the definition of covered hazardous substances. Unlike the Attorney General's Bill, petroleum products are not covered by the definition of "substances hazardous or acutely hazardous to public health, safety or the environment" in the Bill. Proposed §27-1605.6. Furthermore, in light of the "petroleum exclusion" contained in the Comprehensive Environmental Response, Compensation and Liability Act, 41 U.S.C. §9601(14), coverage of petroleum spills at the state level is critical. Petroleum products represent a significant source of environmental contamination for all properties, and it is suggested petroleum be included in the Bill.

The Governor's Bill defines triggering transactions as those which involve the "closure, termination or transfer of operations" of over 120 days or transactions which involve a change in ownership of a covered hazardous substance facility, including, but not limited to, sales or transfers of a controlling share of the stock or assets or conveyance of the real property in fee. Proposed §27-1605.1. There is an exemption for changes in ownership resulting solely from a corporate reorganization not substantially affecting the ownership of a hazardous substance facility, the death or adjudicated incompetency of the owner, or a mortgage or pledge of the real property or assets as security or collateral. Proposed §27-1605.1. The exclusion of mortgages or pledges of real property or assets as security or collateral is consistent with the New Jersey approach and removes a substantial potential hardship from the New York mortgage and real estate industries. The exclusion for corporate reorganizations not substantially affecting ownership does not provide adequate guidance

and is overboard. it opens the door to technical arguments for exemption from the environmental cleanup requirements. ECRA contained a similar exclusion which was gradually narrowed by NJDEP on a day-by-day, case-by-case basis, culminating in a new regulatory definition which has virtually eliminated the exemption. N.J.A.C. 7:26B-1.3; N.J.A.C. 7:26B-1.8(a)4.

The Governor's Bill is more stringent than ECRA in its coverage of cessations of operation. ECRA permits temporary cessations of operations of up to two years before ECRA is triggered. We question whether the Governor's Bill's applicability to cessations of operations longer than three months is appropriate. Such cessations may be due to truly temporary business cessations caused by seasonal or market fluctuations.

The Governor's Bill contains a procedure whereby the NYSDEC will determine the applicability of the statute to a particular transaction and hazardous substance facility. Proposed §27-1607. This is similar to the New Jersey ECRA Program where a nonapplicability procedure has been provided for by regulation.[7]

The Governor's Bill requires that the owner of a hazardous substance facility submit to NYSDEC, at least thirty days prior to a covered transaction either a statement of compliance that there are no hazardous substances at the facility or, if there are, a remedial plan designed to deal with them. The plan must describe the method of cleanup, a timetable, a cost estimate, and give evidence of financial assurance sufficient to guarantee cleanup implementation. Proposed §27-1609. The required statement of compliance and the remedial plans are patterned on New Jersey's negative declaration and cleanup plan procedures. *See* N.J.A.C. 7:26B-5.1 *et seq.* NYSDEC must review and approve the statement of compliance or remedial plan before any person may close, terminate, or transfer operation of a hazardous substance facility.

The Governor's Bill, like the Attorney General's Bill, places the onus of compliance on the property owner only, in contrast to New Jersey's ECRA which allows either the property owner or facility operator to comply. Again, we suggest that the operator of a facility is in an equal position to comply and that the Bill be revised to reflect this.

As we noted in discussing the Attorney General's Bill's certificate of public safety, the statement of compliance in the Governor's Bill should be made effective for a limited period so as to prevent the situation where an outdated certificate does not reflect the condition of the property at the time of the transaction.

As in New Jersey ECRA, the Governor's Bill allows the transaction to close prior to the implementation of the remedial plan, if the property owner and transferee enter into a consent order with NYSDEC binding the owner and transferee to implement the plan and to assume all related responsibilities and liabilities. Proposed §27-1609.4. These requirements appear to make the owner and transferee jointly and severally responsible for cleanup. In New Jersey, the ECRA Administrative Consent Order generally makes the owner or operator, not the transferee, responsible for ECRA compliance. N.J.A.C. 7:26B-7.5(b).

The Governor's Bill allows both the transferee and NYSDEC to seek rescission of the transaction in a court of competent jurisdiction. Proposed §27-1612. This provision is analogous to New Jersey's ECRA transaction voidance provision and provides the real teeth behind the statute.

General Comments Concerning Both New York Bills

We offer two general comments applicable to both the Attorney General's and Governor's Bills from lessons learned in New Jersey. Deadlines limiting the time allotted for agency review are necessary to prevent a backlog in the review process. ECRA presently limits the NJDEP to 45 days to approve a negative declaration or to inform the applicant that a clean-up plan is necessary. N.J.S.A. 13:1K-10. Experience has shown that this restriction has not reduced the backlog of cleanup plan reviews. New Jersey's own proposed amendment to ECRA, Assembly Bill No. 4151 (known as the Albohn Bill) sets deadlines for minimal, detailed, and complex reviews of cleanup plans performed by NJDEP of 60, 180 and 360 days, respectively.

Deadlines which require NYSDEC to establish levels of cleanup must be incorporated into the bills. Under ECRA, while NJDEP is authorized to promulgate regulations regarding levels of

7. The New Jersey non-applicability procedure was codified in the New Jersey ECRA regulations, effective January 1, 1988. *See* N.J.A.C. 7:26B-1.9.

cleanup, it has, not surprisingly, not done so. The result has been uncertainty and confusion on the part of the New Jersey ECRA applicants as to what level of cleanup NJDEP will require and time consuming negotiations regarding each cleanup.

New York should learn from these experiences. Both bills should provide timeframes for mandatory agency review and deadlines requiring NYSDEC to establish levels of cleanup.

Conclusion

The Governor's Bill, patterned upon ECRA, is different from the Attorney General's Bill in several fundamental respects. The universe of covered properties in the Governor's Bill, like ECRA's, is limited to hazardous waste facilities, defined with reference to the SIC Manual. The Attorney General's Bill covers all nonresidential real properties. The universe of covered transactions in the Governor's Bill is broader than the Attorney General's Bill, as it extends beyond real estate transfers to cover transactions involving closure, termination, or transfer of operations of hazardous waste facilities. The Governor's Bill, unlike the Attorney General's Bill, actively involves NYSDEC in the environmental review and clearance procedure, with the attendant benefits of NYSDEC's involvement and input in the environmental cleanup process.

New York State has the unique opportunity to learn from the experience New Jersey has gained in the first four years of its ECRA program. By addressing the issues raised here, New York will avoid some pitfalls in implementing this important environmental program.

Acknowledgement

This marks the Fifth Anniversary of the Hofstra Environmental Law Digest. The design and intent of the Digest is to report significant environmental issues. These reports address current law and public policy and their relevancy and appropriateness as related to the protection of our environment. We wish to acknowledge the past editorial boards of the Digest for their dedication and commitment to the field of environmental law.

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