IN MEMORIUM
Dedication to the Honorable Judy M. West

SYMPOSIUM—ENVIRONMENTAL LAW

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DEDICATION
TO THE
HONORABLE JUDY M. WEST

February 19, 1991 is a day all associated with Salmon P. Chase College of Law and Northern Kentucky University will remember with profound sadness. It was on that day that the life of an outstanding jurist, a compassionate humanitarian, a loving wife and mother and Kentucky's first woman Judge of the Court of Appeals came abruptly to an end. In the experience of this writer, few individuals possess the inherent goodness to have their lives serve as examples for others to follow; the life of the Honorable Judy M. West was one of them.

A native of Madison County, Kentucky, Judy began her undergraduate educational career at the University of Kentucky and, typical of the times, dropped out of college upon her marriage to Larry West to undertake the tasks of wife and mother. Her resiliency, compassion and kindness are currently being reflected in the lives of her three children, Chuck, Jim and Nancy. After the birth of their youngest child, Judy returned to college graduating from Northern Kentucky University with a B.A. in Political Science in 1973. She entered Chase College of Law that same year and graduated in the top 10 percent of her class in 1977. The marvelous traits that made Judy a wonderful mother made her a compassionate, care-giving law student to her classmates as well. More than several of her classmates have remembered with fondness how Judy would help guide them through the frustrations that all law students experience with her wonderful "life goes on" attitude as well as one of her robust, contagious laughs!

After a brief career in private practice, Judy West was appointed to the Kenton District Court bench in 1980 where she served unopposed until 1987 when she was appointed by Governor Martha Lane Collins to fill an unexpired term on the Kentucky Court of Appeals. In November of that same year, she ran for and was elected to that same office which she held at her death.

During the last several years of her life, her wisdom and experience had a direct benefit to Chase through her service on the College of Law's Board of Visitors. Her many varied professional accomplishments and humanitarian endeavors caused the
College of Law to present her with an Outstanding Recent Graduate Award in 1986 and Northern Kentucky University to present her with the Outstanding Alumnus of the Year Award in 1988.

Judge West’s compassion and modesty were the human wrappings of an extremely incisive and brilliant jurist. She had a keen appreciation for the nuances of the law but never once lost the perspective that it must be meted out fairly and consistently.

With her son, Jim, as a second year law student at Chase, and her husband, Larry, as an outstanding Northern Kentucky lawyer in the firm of Ware, Bryson, West, Bartlett and Kummer, the law will continue to be very much a part of the day to day lives of the West family. The warm thoughts the memory of Judge West engendered in all who knew her will forever be memorialized by the creation of the Judge Judy M. West Scholarship Fund at Chase College of Law. This issue of the Northern Kentucky Law Review will forever memorialize the outstanding contributions to the law and the human condition this great lady made. All of us who knew her have been forever enriched by her presence and her example. Truly, we are better for having known her. May God rest her soul and confer His blessings upon her family.

Dean Henry L. Stephens, Jr.
AIMING BEFORE WE SHOOT: THE QUIET REVOLUTION IN ENVIRONMENTAL POLICY*

William K. Reilly**

I. INTRODUCTION

The Bush Administration is now twenty months old. In two months the Environmental Protection Agency will be twenty years old. My message today is relevant to both milestones.

A year ago I spoke here at the National Press Club. Now, almost midway through President Bush's first term, I propose to take stock of where we are.

I am also here today to share a proposal for a way to begin charting a new course for environmental policy. This new course is suggested by a report that I am releasing today, a report by EPA's Science Advisory Board. In drawing attention to this report I want to stimulate a broad national debate on a fundamentally important question: How can our society, or any similarly developed country, most effectively use its resources to achieve the greatest possible benefits to human health and to the planet that sustains us? The answers to the environmental policy questions we pose today will determine just how green the next decade will be.

II. KEEPING OUR PROMISES: A REPORT CARD

First, I want to ask you to go back in time a year and a half or so ago. You remember where environmental policy was then.


** William K. Reilly is an alumnus of Yale University and holds a law degree from Harvard University and a master's degree in urban planning from Columbia University. Mr. Reilly was sworn in as Administrator of the United States Environmental Protection Agency by President Bush on February 8, 1989.
Clean air legislation had been stalemated in Congress for ten years. Now it is on the point of passage, and I sincerely hope the Congress will soon send the President a cost-effective clean-air bill he can sign.

Acid rain was on the research agenda, but no president had ever proposed to do anything about it. Now Congress is close to approving a ten-million-ton reduction of sulfur dioxide, reducing by half the acid rain precursors, and doing so through a highly innovative and cost-effective new emissions trading system that will allow government to set the goals, and leave utility companies and their plant managers to choose the cheapest ways to achieve the goals.

Toxic air emissions would come down seventy to ninety percent if the Congress passed the President's air toxics initiative.

These proposals came from President Bush. He broke the stalemate.

President Bush, for nearly ten years, has been a prophetic and pioneering voice for clean fuels. After years in which we ignored the contribution of fuels to air pollution, the President proposed a new thrust, of requiring clean fuels in our most polluted cities. The debate has been fierce—clean fuels do represent a departure from past policies—but his proposal would significantly reduce air pollution in our cities, and also reduce this nation's dependence on foreign oil imports.

We learned from the great Alar/apple controversy and proposed sweeping new food safety reforms, including measures to reduce by half the time it takes to cancel a bad pesticide. I've said before that this nation suspends trading in a bad stock far faster than it stops sales of a bad chemical. The President proposed legislation to address this defect in our food safety laws, and this Congress should act to achieve this long-overdue reform of our pesticide laws.

We proposed to make it unlawful to ship hazardous waste to any nation with which we do not have an agreement that assures us the waste will be safely disposed of. And we signed the Basel Convention committing the United States to that policy.

We've proposed a twelve percent increase in the crucial operating fund for EPA, added almost 2,000 more personnel bringing us close to 17,000, and begun to increase by 500 the number of staff working on Superfund enforcement.
I've set a new "enforcement first" priority for Superfund, and it's no coincidence that last year we issued more administrative cleanup orders and entered into more settlements for responsible party action than in any previous year. And that pace only quickened further in 1990. Through the third quarter of this fiscal year, we issued forty-seven percent more emergency administrative cleanup orders than in the same period two years ago, and sixteen percent more than in 1989. Civil referrals to the Department of Justice for court action for the same period were also up sharply—seventy-one percent higher than two years ago, and ten percent higher than last year.

We've made a record of steady, far-reaching regulatory decisions, some of which had been pending for ten years: We moved to phase out asbestos use, significantly reduced exposure to benzene, proposed canceling most food crop uses of the pesticide EBDC, set regulations to reduce the volatility of gasoline, required removal of sulfur from diesel fuel, proposed a rule to recapture evaporation from car engines, and proposed another regulation to make recycling and source separation a condition of approving new incinerators.

Those are a few of our domestic initiatives. Add to them the President's proposal to plant a billion trees a year for the next ten years and to fund the Land and Water Conservation Fund, zero-budgeted in Administration proposals for years, at $250 million. Then there's the delay in drilling at sensitive offshore oil leases in California and Florida, foregoing a half billion dollars in revenues, in order to ensure a full measure of protection for the environment.

A major thrust of our foreign policy has been to give full expression to the nation's environmental priority. We have accordingly established a new Assistant Administrator for International Activities at EPA. At Secretary of State Baker's invitation, EPA is now part of the annual binational meeting with Mexico and we are working on border issues, proposing to fund construction of a new treatment plant for Tijuana, and advising on Mexico City's air pollution.

In July in Ottawa, I began on the President's behalf the process which will culminate in a new accord with Canada on acid rain and other air pollutants. With this accord we will achieve a long-sought objective, removing the one serious issue in contention
from an otherwise congenial relationship. Such an accord, as Prime Minister Mulroney reminded me, has been a priority of Canadian foreign policy for fifteen years. And we will next move with Canada to give a higher priority to getting the toxics, the pesticides, and the fertilizers out of the Great Lakes.

The President proposed a new Center on the Regional Environment of Central and Eastern Europe, and last month I represented him at the opening of this center. Known throughout the region as the Bush Center, this initiative represents a new venture in institution-building for the new East European democracies, and it promises to greatly strengthen the environmental policies of the region’s countries—all of which seem to feel they are not totally responsible for their environmental problems, since half their pollution comes from their neighbors.

Incidentally, let anyone who doubts the wisdom of pollution control—or who believes there is a conflict between economic growth and environmental protection—let them go to Eastern Europe. Let them see as I have seen, rivers like the Vistula in Poland, so corrosive it is useless over eighty percent of its length even for cooling machinery; let them experience sulfur dioxide levels in Cracow, where 500-year-old statues and monuments have crumbled in just forty years; let them see the high rates of infant mortality, lung disorders, worker absenteeism, and premature deaths, the vast land areas contaminated by heavy metal pollution. Poland’s Environment Minister Kaminsky estimates that environmental contamination represents a drag on Poland’s gross national product of fifteen percent. Policies in Communist Europe designed to stimulate economic development by foregoing pollution controls ended by wrecking the economy and also ravaging the environment.

More than a year ago, the President proposed that the United States fully phase out production and use of chemicals that destroy the world’s stratospheric ozone, which functions as a shield against skin cancers and cataracts. In June the United States led the way to an agreement to commit the world community to that policy, and agreed to contribute funds to help the developing countries make the transition to substitutes for CFCs.

In June of 1989 the President announced a ban on imports of elephant ivory. The European Community and Japan later acted also, and as a result, the price of ivory has plummeted and the incentive to kill African elephants is diminished. Some eighty percent of East Africa’s elephants fell to the poachers’ machine
guns in the 1980's; now, there is new hope for the elephants, thanks to a President and a Secretary of State who believe in animal conservation.

And this past June, the President proposed his Enterprise for the Americas Initiative, including a new readiness to renegotiate public debt owed to the U.S. government by Latin American countries and to apply the interest on the new debt to environmental protection and conservation. Altogether, Latin American nations owe the United States some $12 billion in public debt. They owe governments in Europe and Japan another $38 billion. This proposal, which has been very warmly received in Latin America, has gone almost unnoticed here at home. And yet the prospects that the budgets of parks and pollution-control and forestry agencies can be substantially enhanced as a result of this decision. Should other creditor countries follow our example, this major new debt-for-nature commitment could serve to refocus the priorities of countries so rich in forests and species of plants and wildlife, and so burdened by debt.

Concern for the rapid loss of forests worldwide—new data suggest they are being lost twice as fast as had been believed—led the President to propose an agreement on forestry at the G-7 Economic Summit last July. We hope that agreement will be signed no later than 1992, and will help arrest the destruction of the great forest systems, so many of which will be gone, at present rates of destruction, within ten to fifteen years.

Ah, but what about global climate change? "When will you get serious about this issue?" I often am asked.

In the first place, there is no question that this President clearly places a very high priority on the importance of the global-change issue. Early on, he set up a special group under the Domestic Policy Council to address the issue of global change, directing it to use "the best scientific and economic information available." He asked his Science Advisor, Dr. D. Allan Bromley, to chair that effort to help ensure that we develop our global change policy and actions using the best expertise available. I can tell you from my own participation on that group that some of the most senior Cabinet officers in our government are working hard to find the best approaches for our country to the challenge of the global-change issue.

A number of nations have made ambitious commitments to reduce carbon-dioxide emissions, or to arrest their increase by the year 2000. I would encourage the press to ask their leaders
how they propose to achieve these reductions. I don't doubt for a moment the seriousness of some of these commitments. But I can tell you that answers to questions about specifics are difficult to come by.

Why? Because large reductions are hard to get without substantial new carbon or energy taxes, and without expansion of nuclear energy. The policies of several European nations will no doubt rely on one or both of these measures, with the French nuclear program filling a critical supply requirement.

And while others talk about ambitious—and perhaps unattainable—carbon dioxide emissions reductions in the future, the United States has been spending hundreds of millions of dollars a year—growing to more than $1 billion in the coming fiscal year—to learn more about the scope, causes, effects, and responses to the problem.

Nor are we sitting on our hands waiting for the science to jell. We already are committed to a series of actions that make sense in their own right and will yield benefits should climate change prove to be, as some have suggested, a problem of serious consequence. (It is also possible, as Dr. Bromley points out in a soon-to-be-published article, that other global issues such as ozone depletion, deforestation and loss of genetic diversity "may... turn out to be more serious in terms of human impact than global climate change."

As a result of proposals we already have made—several pending in the Congress, others likely to be implemented—the United States should be generating no more greenhouse gas emissions in the year 2000 than we did in 1987. By passing a new Clean Air Act, phasing out CFCs, carrying out the President's "America the Beautiful" reforestation initiative—if all of these steps are taken effectively—we will reduce greenhouse gas emissions by about twenty-five percent from their projected levels in the year 2000.

Finally, as you know, the President has offered to host the opening session of international negotiations next February on a climate change framework convention.

So the next time you feel the urge to write about climate change, you might consider the questions: How many other countries can point to real action on this issue—and back it up? How many others have laid before the public the details—if these even exist—of how they plan to cut greenhouse gas emissions while maintaining economic growth?
In total, by any objective measure, this Administration is serious, determined, and dedicated to the pursuit of an aggressive, innovative environmental agenda. Public expectations are high, and we have probably raised them further. President Bush has moved the environment from the margins to the mainstream. As a result, the opportunities for genuine environmental progress have never been greater than they are today.

III. THE COST OF A CLEAN ENVIRONMENT

At the same time, we in this Administration are profoundly conscious of the need to achieve continued environmental progress in harmony with the nation's economic aspirations. The Administration's policies are firmly grounded in the recognition that we do not have to choose between a healthy environment and a healthy economy. We can, and must, have both.

Our country's environmental gains over the past two decades—in cleaner air and water, in strict controls on hazardous waste, in protection of wildlife and valuable ecosystems—have not come cheaply. Our economists are now working on a report entitled, The Cost of a Clean Environment, showing that total annual costs for pollution control in the United States, in 1986 dollars, went from $27 billion in 1972 to $85 billion in 1987. This is slightly more than any other Western industrialized nation for which we have data. For this year, we estimate that the public and private sectors are spending more than $90 billion, also in 1986 dollars, for pollution control.

This increase in spending has been accompanied by, has in fact been made possible by, the nation's robust economic growth over much of the same period—a growth of seventy percent in real GNP. This is compelling evidence that environmental quality and economic expansion, far from being mutually exclusive, can go hand in hand. Economic growth financed higher standards of environmental protection. Higher environmental expectations made the growth we achieved good growth.

We also estimate that by the year 2000, pollution control costs from programs now in place will grow to about $155 billion a year, again in 1986 dollars, or about 2.7 percent of GNP. These figures represent only the "cost of clean," without taking into account any of the benefits from this investment; those benefits are, of course substantial. Our economists are now looking at ways to add up the benefits of pollution control as well.
Most of the growth in costs over the next ten years will not be in the traditional areas of air and water pollution control, but instead will be in expenditures for cleaning up pollution on land—primarily from hazardous waste sites, federal facilities, and leaking underground storage tanks. (Incidentally, speaking of federal facilities, we now have in place about seventy new inter-agency agreements to clean up more than eighty federal facility sites on the Superfund list, and within the next six months we expect to have all 115 federal facilities on that list covered by cleanup agreements. These agreements include cleanup targets, deadlines, enforceable penalties and fines. We are carrying out the President’s policy of applying the same requirements to Energy Department and Defense Department facilities as we apply to the private sector. Only one inter-agency cleanup agreement was achieved prior to 1989.)

IV. PIECEMEAL POLICY MAKING

Given these substantial and growing costs, it seems only prudent to ask ourselves: Are we spending all this money on the right things? Are we spending it in the most effective possible way? Are society’s resources being used in ways that will contribute most directly to the health and well-being of our citizens and our environment?

Not long after my EPA appointment was announced, I made the customary rounds of the members of the Senate Environment and Public Works Committee, to whom it would fall to consider my confirmation.

One of my most memorable visits was with Senator Pat Moynihan; as I expect many of you know, conversations with Senator Moynihan are always memorable.

He sat me in a very nice Windsor chair, about which he said, “This is a Republican chair ... this is appropriate I think, for the new EPA Administrator to sit in.”

Then he perched his little half-reading glasses down on his nose, and he fixed these two fingers, picador-like, on me. And looking over his glasses, he said, “Above all ... above all ... do not allow your agency to become transported by middle-class enthusiasms!”

What he meant was, “Respect sound science; don’t be swayed by the passions of the moment.”
All too often in the past, I think, the guiding principle for making environmental policy has been what has been referred to as the "ready-fire-aim" principle. Budget Director Dick Darman has described the federal budget as the great "PacMan," gobbling up resources. Well, I have looked for a video game analogy for how the nation has made environmental policy.

Perhaps some of you have played a somewhat primitive, pre-Nintendo video game called "Space Invaders." In that game, whenever you see an enemy ship on the screen, you blast at it with both barrels—typically missing the target at least as often as you hit it. You never run out of ammunition, so even though you miss a lot you stay committed to the game.

The last two decades of environmental policy in this country have been similar in some ways to that video game: Every time we saw a blip on the radar screen, we unleashed an arsenal of control measures to eliminate it. In the late 1960's we saw that we had an air pollution problem, so we enacted ambitious clean air laws. At about the same time, we became aware of serious water pollution and we passed an equally ambitious clean water act. We saw that exposure to toxic chemicals was causing human health problems and passed a sweeping law to control toxic substances. And so it went throughout the 1970's and 1980's: drinking water, radiation, pesticides, hazardous waste, medical wastes—each problem dealt with essentially in isolation, without reference to all the others.

As I noted, many of those efforts have been successful—up to a point. But the upshot of this piecemeal approach to pollution control has been that we have set our pollutant- and medium-specific goals over the last twenty years without adequately addressing our overall environmental quality objectives. Rarely did we evaluate the relative importance of individual chemicals or individual environmental media. We didn't assess the combined effects on ecosystems and human health from the total loadings of pollutants deposited through different media, through separate routes of exposure, and at various locations. We have never been directed by law to seek out the best opportunities to reduce environmental risks, in toto; nor to employ the most efficient, cost-effective ways of proceeding.

As a result of this fragmentation, today more than eighty congressional committees and subcommittees dip their spoons into the broth of environmental policy. EPA is pulled in many
directions at once by Congress, other agencies of government, the public, constituency groups, the courts, and of course the news media. We answer to many taskmasters. Many problems, such as local land-use issues, are not in our jurisdiction, yet we tend to be held responsible for solving them. For its part, the press sometimes tends to focus on the “pollutant of the week,” regardless of its importance relative to other environmental problems—or to other social problems, for that matter. This kind of crisis management is certainly not unique to the environment—but when we’re dealing with critical issues of public health and safety every day, at significant economic cost, I think it’s imperative that we step back from time to time and take a broader view.

V. SETTING RISK-BASED PRIORITIES

As we gear up to deal with the environmental problems of the 1990’s and beyond, I think the time has come to start taking aim before we open fire. In short, we have to find a better way of setting environmental priorities. And this is where sound science comes in. Sound science can help us establish priorities and allocate resources based on risk, to the extent that statutory mandates allow. Obviously there are a number of other important factors that go into shaping our priorities—public values and perceptions, economic constraints—but sound science is our most reliable compass in a turbulent sea of siren songs. Science can lend much-needed coherence, order and integrity to the often costly and controversial decisions that must be made.

Risk is a common metric that lets us distinguish the environmental heart attacks and broken bones from indigestion or bruises. Despite the inherent uncertainties in—and continuing controversies over—how to assess risk, comparative risk assessment is still one of the best indicators of where we should be directing our resources. I am very pleased that EPA’s own efforts to bring more uniformity to our risk assessments are to be reinforced by Allan Bromley’s initiative to ensure greater government-wide coherence in risk assessment.

Four years ago my predecessor, Lee Thomas, recognized the need to do a better job of setting priorities across the range of EPA’s programs. He instructed EPA’s in-house scientists and environmental managers to look at the problems we deal with and to try to rank them based on risk. The result of this exercise
was a brave and visionary report published in 1987 under the title, *Unfinished Business: A Comparative Assessment of Environmental Problems*.

One of my first actions as Administrator was to ask EPA's Science Advisory Board, a distinguished and objective panel of independent scientists, engineers, and other technical experts, to review *Unfinished Business*, assess its rankings applying the best technical and scientific knowledge available, and suggest ways to improve the comparative risk assessment process.

I also asked them to extend the original analysis and to identify risk-reduction strategies that could be particularly effective for specific problems, or that could help to mitigate many problems at the same time.

The Science Board has done its job with great patience and perseverance, and it has produced a thoughtful and significant contribution to the debate over the future of environmental protection in this country. Let me take a moment to express my special thanks to the Co-Chairmen of this study: Dr. Ray Loehr of the University of Texas, who is the Chairman of the Science Advisory Board, and Jonathan Lash, until recently the Secretary of the Agency of Natural Resources for the State of Vermont and now Director of the Environmental Law Center at Vermont Law School.

The new report, which I am releasing today, is called, *Reducing Risk: Setting Priorities and Strategies for Environmental Protection*. It builds on the pioneering work of the *Unfinished Business* report in comparing disparate environmental problems according to the degree of risk they pose. But the new report goes well beyond the earlier effort by spelling out a set of fundamental principles for achieving broader, more integrated, and more carefully targeted environmental policy-making. Taken together, these principles provide a basic framework for addressing some of the daunting environmental problems of the 1990's and beyond.

VI. TARGETING RESOURCES FOR RISK REDUCTION

The report's first and most basic recommendation reflects the point I made a moment ago: We must do a better job of setting environmental priorities. We—EPA and society at large—must locate and focus our attention on the most promising opportunities for reducing risk to the environment and to human health and welfare.
To help us move toward that goal, the Science Advisory Board carefully reviewed the risk comparisons in the *Unfinished Business* study. Within the constraints of the limited information and analytical methodology now available—and we clearly need to do a great deal of work to improve both—the Board identified several problems that continue to pose relatively high risks to human health or the environment despite the progress of the last two decades. The human health risks highlighted in the report, based primarily on overall degree of direct public exposure to known toxic agents, are: ambient air pollution, worker exposure to chemicals in industry and agriculture, indoor air pollution, including radon and other pollutants, and drinking water contamination. Additional data, which EPA is now working to gather and analyze, may reveal that other areas also pose high risk.

The report also identifies specific high-risk ecological problems, based especially on their geographic scope and the amount of time it will take to reverse them: habitat alteration and destruction, species extinction and loss of genetic diversity, stratospheric ozone depletion, and global climate change.

Let me be clear: The Science Advisory Board is not suggesting, nor am I, that conventional approaches to environmental problems not cited as high risks, such as hazardous wastes, should be abandoned. EPA is, in fact, firmly committed to continued, intensified enforcement of the environmental laws already on the books, as evidenced by our record enforcement figures last year. But we do need to think carefully about where our limited resources can most effectively be spent.

VII. TOWARD INTEGRATED ENVIRONMENTAL POLICY

That brings me to a second basic principle discussed in the *Reducing Risk* report: How we spend our resources is as important as what we spend them on. It's common sense to spend our money where we can do the most good, to best protect health and reduce risk. If we choose to do otherwise, we should at the least know why.

The traditional approach to environmental protection—prescriptive, command-and-control regulations—has brought us a long way. But by themselves, technology-based regulations are no longer sufficient to do the job before us. In some cases, they can actually be counterproductive, serving only to inhibit inno-
vation and to discourage regulated industries from going beyond minimum legal requirements.

We need to take a broader, more integrated look at the range of environmental programs we administer, and the response tools available to us, with an eye toward finding the most efficient and effective ways to reduce risk. Among the tools identified by the Science Advisory Board are research, public education and information, technical assistance, and market incentives. And above all, we need to mobilize a national effort to prevent pollution before it's created in the first place. Based on the industry response so far, it is clear that one of the most effective instruments for reducing toxic air emissions has been the Community Right-To-Know law requiring industries to estimate and publicly announce toxic emissions, by plant and by chemical.

VIII. RETHINKING THE ENVIRONMENTAL AGENDA

I am today, therefore, calling for a broad, robust national dialogue on the Science Advisory Board's findings and recommendations—including hearings before the relevant congressional committees, and wide-ranging discussions by environmental and industry groups, scientists, academicians, and citizens everywhere. Clearly any effort to set environmental priorities based on relative risk—to rethink the environmental agenda for the 1990's and the Twenty-first Century—is going to be difficult and contentious. But this report takes an essential first step. Much more information is needed; but now at least we have a better idea of what we do need, as well as some basic principles that can help us better target our resources.

Changing the nation's environmental agenda will not be easy, and it won't happen overnight—but many of the Science Board's principles and recommendations already are being adopted by EPA. What Science magazine recently called a "quiet revolution" in the way EPA does business is in fact well under way.

To further that revolution in our culture, all EPA programs are conducting broad strategic planning efforts which are aimed at focusing our attention and resources on areas of greatest risk and greatest potential for risk reduction.

Our budget decisions already are being guided by the risk reduction principles of EPA's long-term strategic planning process. "Pollution Prevention" has become the slogan for all EPA programs, from municipal wastewater treatment to toxic air
pollution to stronger, carefully targeted multi-media enforcement strategies to integrated, ecosystem-wide programs, such as our new initiative to clean up the Great Lakes. The Great Lakes program also reflects the agency's stepped-up emphasis on ecology, in recognition of the fact that the health of natural systems is the foundation for economic health and the well-being of society at large.

Economic incentives, highlighted by the Science Advisory Board as an innovative option, have been central to the Administration's efforts to craft a cost-effective environmental policy—for example, in the ground-breaking emissions trading provisions of the President's Clean Air Act amendments.

IX. A COMMITMENT TO RESULTS

Now, let me suggest a far-reaching response to the Science Advisory Board's report. I propose an ambitious strategy of toxics reduction, not just in air or water or land but wherever toxic chemicals may be found. Recently we asked each EPA program to identify the fifteen or so toxics of greatest concern to them—the really "bad actors" in terms of health risk. We are now selecting those chemicals associated with serious environmental and health problems. The list is likely to include a number of heavy metals such as lead and mercury, as well as certain volatile organic compounds of concern across several programs.

Nationwide, releases of these fifteen contaminants are in the range of one billion pounds a year. By coordinating our activities and targeting our efforts, I want to achieve real and measurable reductions in these emissions—and the health risks they pose—over the next year. I therefore propose the goals of reducing the total releases of these contaminants by one-third by the end of Fiscal Year 1992, and by more than half by 1995, through the most cost-effective methods possible.

These are ambitious goals, but they are within our reach. Our success with the phase-out of the CFCs, and most recently our success in securing an industry commitment to reduce butadiene emissions by eighty percent through voluntary actions—accomplished through negotiations with nine chief executive officers of major chemical and petrochemical firms—demonstrates our ability to obtain results through cooperative action with the regulated community. This is not to say that we will in any way abandon our regulation and enforcement responsibilities. To the
contrary, these new efforts will only have meaning if there is a credible regulatory and enforcement presence at EPA. But let us not forget that the public is expecting results—and accordingly, when voluntary action can obtain results more expeditiously, it should be employed.

With respect to recycling, I also want results. We have advocated a twenty-five percent recycling goal by 1992, and our proposed rules on municipal-waste combustors and other initiatives should go a long way toward achieving that goal. But our commitment to recycling and solid waste reductions cannot be limited to command-and-control approaches. We need to stimulate demand and to fulfill our federal role by providing technical assistance to help create markets.

In that spirit, I propose to:

One, ask the Federal Trade Commission and the U.S. Office of Consumer Affairs to undertake a cooperative effort to begin defining the terms “recyclable,” “recycled content,” “bio-degradable,” and so on, so that the consumer can make intelligent choices;

Two, establish a nationwide network and clearing house to find markets for recycled goods; and

Three, work with other federal agencies to ensure that the federal government uses all of its current authority to procure recycled goods.

X. ENVIRONMENTAL STEWARDSHIP FOR A SUSTAINABLE FUTURE

Last year in this room I asserted that the Bush Administration has a clear, ambitious, and unambiguous environmental vision:

- A vision of a nation moving steadily to provide a greater measure of protection for human health and for natural systems;

- A vision of a public informed and knowledgeable about its realistic choices in an industrialized, economically developed society;

- A vision of a people infused with an ethic of environmental stewardship, working to secure the vital link between sound, sustainable economic growth and a healthy, productive environment.
The broad review and re-evaluation of the nation's environmental agenda that I am calling for today can play a central role in turning that vision into reality. The decision about how best to go about the task of environmental protection and risk reduction must be discussed and debated in the kitchens of American homes, in school classrooms, in the halls of Congress, the boardrooms of industry, the conference rooms of our vigorous environmental groups, in policy councils at all levels of government.

From those discussions and debates will emerge a new approach to environmental policy, and a new generation of environmental programs—programs that will carry the nation forward through the 1990's and into the Twenty-first Century. The great and dramatic environmental battles are between "white hats" and "black hats," and there are still a good many around. But the significant new progress we need is with ourselves—our lifestyles, our energy use, the goods we buy and use, the waste we generate.

The questions we raise today can lead us to the answers we will need to safeguard our environmental legacy to future generations.
ENVIRONMENTAL PROBLEMS AND THEIR EFFECT ON LENDING INSTITUTIONS

Philip J. Schworer and Catherine M. White*

I. INTRODUCTION

Since Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act1 ("CERCLA") in 1980, lending institutions have had to re-evaluate the risks arising from the acquisition of a security interest in real property.2 This article will retrace the history of lender liability arising from environmental problems, highlight the environmental problems that have given rise to lender liability, and make recommendations on how a lender may minimize the risk of loss due to an environmental problem.

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2. Is hazardous waste liability something a lender of funds to purchase property really needs to be concerned about? No, not if the lender does not have real property as collateral on the loan, has no qualms about default on the loan, or has access to a reservoir of millions of dollars tucked away in his coffers (or those of his insurer) just waiting to pay out waste cleanup claims. Otherwise, a lender has every reason to be very concerned.

Weismann, Lenders' Superfund Liability, MORTGAGE BANKING MAG. (February 1987).

As a direct result of concern over CERCLA liability a bank in Fredericksburg, Virginia decided not to foreclose on a $200,000 land loan, even though it meant forfeiting the collateral. Steptoe, "Chemical Waste Complicates Many Land Sales Financings" Wall St. J., Nov. 5, 1986 at 39, col. 1. The decision not to foreclose was made when the bank learned that the land was contaminated with creosote, and that cleanup costs might reach $2.5 million. Id. This article went on to report that one bank had reportedly been requiring loan officers to visit loan applicants' property and look for telltale signs of contamination. Id. The article made no mention of the "innocent purchaser defense" even though the amendments to CERCLA had been signed in law some six weeks earlier.
II. THE ADVENT AND DEVELOPMENT OF ENVIRONMENTAL LIABILITY FOR LENDING INSTITUTIONS

A. The Comprehensive Environmental Response, Compensation, and Liability Act

Stunned by the funding nightmares encountered by government officials seeking to remedy the Love Canal hazardous waste disposal site, Congress enacted CERCLA on December 11, 1980. CERCLA has been dubbed “Superfund” because it creates a fund, financed by a tax on chemicals, that may be used to conduct removal and remediation of environmental problems when other responsible parties can not be persuaded (or coerced) to voluntarily conduct the work.

Parties liable for the cost of removing or remediating an environmental problem under CERCLA include:

a) the owner and operator of the facility at the time the hazardous substance is removed or remediated;
b) the person that owned the facility at the time the hazardous substance was released to the environment;
c) any person who arranged for disposal or treatment of hazardous substances at any facility owned or operated by another party or entity and containing such hazardous substances (known as generators);
d) any person who transported hazardous substances to the site subject to the cleanup.

The provisions that may apply to a lending institution include subparagraphs (a) and (b), owners and operators of a facility at the time a hazardous substance is removed and persons who own the facility at the time the hazardous substance was released to the environment.

CERCLA does not expressly provide for strict liability. However “liability” is defined as the standard of liability under the Clean Water Act of 1977. Courts have determined that the Clean

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Water Act imposes strict liability, thus, liability under CERCLA is strict. Liability is also joint and several where more than one person is liable for the cost of the removal or remediation.

In addition, retroactive application of CERCLA does not offend due process. Thus, a lender who foreclosed on property at any time, even prior to CERCLA, and subsequently took title to the property for some period of time, no matter how brief, may be subject to future CERCLA liability.

The defenses to liability under CERCLA, as originally enacted, were limited to three situations: a) an act of God; b) an act of war; c) an act or omission by a third party, other than an employee or agent, that occurs despite due care and precautions on the part of the party seeking to escape liability. Courts have consistently limited CERCLA defenses to these three.

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8. United States v. Tex-Tow, Inc., 589 F.2d 1310, 1313 (7th Cir. 1978) (absolute liability is not unduly harsh or unreasonable).
12. In addition, all costs and damages for which a person is liable under § 107 of CERCLA can be transferred to a lien in favor of the United States. 42 U.S.C. § 9607(l). The lien arises at the later of the following times: (1) the time costs are first incurred by the United States; or (2) the time a person is provided written notice of potential liability. 42 U.S.C. § 9607 (l)(2). The lien arising under Section 107 is subject to prior perfected security interests. 42 U.S.C. § 9607(l)(3).
The defined-term "owner" was crafted by Congress to exclude a person who "without participating in the management of a vessel or facility holds indicia of ownership primarily to protect his security interest in the vessel or facility." Banks have often

15. 42 U.S.C. § 9601(20)(A). A bill is currently pending before Congress to amend the definition of "owner" under CERCLA to limit the liability of lending institutions acquiring facilities through foreclosure or similar means and corporate fiduciaries administering estates or trusts. The bill provides:

(1) EXCLUSION.-Subparagraph (D) of section 101(20) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601(20)(D)) is amended:

(A) by inserting after the first sentence the following new sentence: "Such term also does not include any of the following:

(ii) Any designated lending institution which acquires ownership or control of the facility pursuant to the terms of a security interest held by the person in that facility.

(iii) Any corporate fiduciary which-

(I) has legal title to any facility for purposes of administering an estate or trust of which such facility is a part; or

(II) does not have legal title to the facility but operates or manages the facility pursuant to the terms of any estate or trust of which such facility is a part.

(iii) Any individual or institution or successor thereto that serves as an indenture trustee for outstanding debt securities or any certificates of interest or participation in any such debt securities and acquires ownership or control of a facility as a result of an event of default pursuant to the terms of an indenture agreement or similar financing document between such trustee and the issuing entity.

(iv) Any individual fiduciary who has legal title to any facility for purposes of administering an estate or trust of which such facility is a part; and

(v) Any designated lending institution which acquires ownership of any facility in connection with a lease subject to regulation by applicable Federal or State banking authorities.

(B) in the second sentence (as determined before the amendment made by subparagraph (A) of this paragraph-

(i) by striking "State or local government" each place such term appears and inserting "State or local government or person referred to in the preceding sentence"; and

(ii) by striking "nongovernmental entity" and inserting "any person (other than any person referred to in the preceding sentence)."

(2) CONFORMING AMENDMENT.-Clause (iii) of section 101(20)(A) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601(20)(A)) is amended by inserting after "to a unit of State or local government" the following: "or to any other person covered by subparagraph (D)."

(3) DEFINITION OF DESIGNATED LENDING INSTITUTION.-Section 101 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601) is amended by adding at the end the following new paragraph:

"(39) DESIGNATED LENDING INSTITUTION.-The term 'designated lending institution' means-"
availed themselves of this provision in an attempt to avoid CERCLA liability. 16

B. Judicial Application of CERCLA to Lenders Prior to 1986

Since the enactment of CERCLA, the judicial system has had many occasions to rule on the applicability of CERCLA liability to lending institutions. These cases are outlined below.

"(A) any depository institution (as defined in section 19(b)(1A) of the Federal Reserve Act), and leasing company which is an affiliate thereof, any institution of the Farm Credit System, and any trust company; and

"(B) any other person which is a bona fide lending institution and during the 1-year period beginning 6 months before and ending 6 months after the date on which the security interest in the facility referred to in paragraph (20) was perfected, made real estate loans the aggregate amount of which exceeded $1,000,000 to 25 or more borrowers; for the purposes of this subparagraph a bona fide lending institution shall include-

"(i) any mortgage lender (including any lender whose loan with respect to any facility is secured by a deed of trust); and

"(ii) any agency, department, or other unit of the United States Government or of any State or local government not otherwise described in paragraph (20) which makes loans on the security of any facility, including economic and industrial development agencies."

(b) EFFECTIVE DATE.-The amendment made by subsection (a) shall take effect on the date of the enactment of this Act.


Yet another bill, introduced in the Senate, seeks to enact exemptions from liability for nonculpable activities by insured depository institutions and mortgage lenders. S. 2827, 101st Cong., 2d Sess. (1990) sponsored by S. Garn (R-UT)). That bill provides:

"(b) EXEMPTIONS.-No insured depository institution or mortgage lender shall be liable under any law imposing strict liability for the release, threatened release, storage or disposal of a hazardous substance or similar material from property-

"(1) acquired through foreclosure;

"(2) held in a fiduciary capacity; or

"(3) held, controlled or managed pursuant to the terms of any extension of credit.

"(c) EXCLUSION.-The exemptions provided under (b) shall not apply to any person-

"(1) that has caused the release or threatened release or disposal of a hazardous substance or similar material from property described in subsection (b) that gives rise to a removal, remedial, or similar action;

"(2) with actual knowledge that a hazardous substance or similar material is used, stored, or located on property described in subsection (b), failed to take all reasonable actions necessary to prevent the release or disposal of such substance; or

"(3) that has benefitted from removal, remedial or other response action, but only to the extent of the actual benefit conferred by such action on that person."


In United States v. Mirabile, the United States brought a lawsuit to recover the costs it incurred in the removal of hazardous wastes from property owned at the commencement of the action by Mr. and Mrs. Mirabile. The Mirabiles filed a third-party action against other parties including American Bank and Trust Company ("ABT"), alleging joint and several liability under CERCLA. The Mirabiles acquired the property from ABT after ABT foreclosed on the property and caused a sheriff's sale. ABT was the successful bidder at the sheriff's sale but then assigned its bid to the Mirabiles. In that interim period, ABT took the following actions with respect to the property: it secured the building against vandalism by boarding up windows and changing locks, it made inquiries as to the approximate cost of disposal of drummed waste located on the property, and, through its loan officer, it visited the property on various occasions for the purpose of showing the property to prospective purchasers.

ABT moved for summary judgment on the third-party action on the ground that it was not an "owner" of the site as defined by CERCLA. ABT relied on the definition of "owner," wherein it excludes from the term a person who, without participating in the management of a vessel or facility, holds an indicia of ownership primarily to protect his security interest in the vessel or facility.

The court agreed with ABT and granted summary judgment by ruling that its actions were plainly undertaken to protect its security interest in the property and did not rise to the level of "participation in management of the site." In dicta, the court stated that in order for a secured creditor to be held liable, it must, at a minimum, participate in the day-to-day operational aspects of the site.

18. Id. at 20,995.
19. Id. at 20,996.
20. Id.
21. Id.
22. Id.
23. Id. For full text of the statutory provision, see supra note 15.
24. Id.
25. Id. The court found that here, ABT merely foreclosed on the property after all operations had ceased at the site and thereafter took prudent and routine steps to secure the property against further depreciation. Id.
In In re T.P. Long Chemical Co., a bank that held a perfected security interest in personal property was not liable as an owner because its indicia of ownership primarily protected its security interest and because it did not participate in the management of the facility.\(^{26}\)

In United States v. Maryland Bank & Trust Co., the United States sought to recover expenses incurred by the Environmental Protection Agency ("EPA") from the bank which formerly held a mortgage on the land and later purchased the land at a foreclosure sale and continued to own the property during and after the EPA clean up.\(^{27}\) It was uncontroverted that the wastes were dumped on the property prior to the bank's ownership.\(^{26}\)

The bank defended the action by contending that it was not an "owner" as defined under CERCLA due to the exemption for parties holding an indicia of ownership primarily to protect a security interest.\(^{2}\)

The court ruled against the bank, finding that the security interest exclusion to the term "owner" applied only if the security interest existed at the time of the cleanup.\(^{30}\) The court found quite compelling the fact that the bank acquired the property at the foreclosure sale a full year before the EPA cleanup and continued to own the land during cleanup and beyond.\(^{31}\) The court distinguished the ruling in Mirabile noting that the bank in Mirabile held the property for only four months before assignment.\(^{32}\)

In United States v. Fleet Factors Corp., Fleet held a security interest in equipment, inventory, fixtures and realty at a textile

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28. Id.
29. Id. at 577. For a full text of the statutory provision, see supra note 15.
30. Id. at 579.
31. Id. The court noted that the bank purchased the property at the foreclosure sale not to protect its security interest, but to protect its investment. Id. Only during the life of the mortgage did the bank hold indicia of ownership primarily to protect its security interest in the land. Id. Congress intended to exclude common law title mortgagees from the definition of owner since title was in their hands only by operation of common law. Id. The exclusion did not apply to former mortgagees currently holding title after purchasing the property at a foreclosure sale, at least when as here, the former mortgagee held title for nearly four years and a full year before EPA cleanup. Id.
32. Id. at 579 n.5 and 580.
manufacturing facility. Upon the commencement of bankruptcy proceedings by the factory owner, Fleet foreclosed on the inventory and equipment and authorized a third-party to remove certain equipment from the facility. The United States alleged that during the third-party's removal work, friable asbestos was knocked loose from pipes connected to the machinery. The United States also alleged that the condition of the asbestos and the presence of other chemicals in the facility were an imminent threat to human health and the environment. Thus, the United States EPA conducted an emergency removal and remediation action. Along with all the other parties involved, the United States sued Fleet alleging it was an "owner" of the facility as defined under CERCLA.

The lower court denied Fleet's motion for summary judgment, which argued Fleet was not an "owner" under Section 107(a)(2), because it concluded that Fleet's activities at the facility might rise to the level of participation in management sufficient to impose liability under CERCLA despite the statutory exemption from liability for holders of a security interest. The Eleventh Circuit Court of Appeals agreed with the lower court that material questions of fact remained as to the extent of Fleet's participation in the management of the facility.

The court noted that CERCLA excludes from the definition of owner or operator any person who, without participating in the management of a facility, holds indicia of ownership primarily to

34. Id. at 957-58. Fleet never foreclosed on the real property. Id. at 957.
35. Id. at 958.
36. Id. at 959.
37. Id.
38. Id. at 960.
39. Fleet Factors, 901 F.2d 1550, 1552 (11th Cir. 1990).
40. Id. After the debtor ceased operations, Fleet increased its activities at the site. Id. at 1559. Fleet required the debtor to seek its approval before shipping its goods to customers, established the price for excess inventory, dictated when and to whom finished goods should be delivered, determined when employees should be laid off, supervised the activity of the office of administrator at the site, received and processed the debtor's employment and tax forms, controlled access to the facility, and contracted to dispose of the debtor's fixtures and equipment. Id. The court felt that these facts, if proved, were sufficient to remove Fleet from the protection of the secured creditor exemption. Id.
protect his security interest in the facility. 41 There was no dispute that Fleet held an indicia of ownership in the facility, and that this interest was held primarily to protect its security interest in the facility. 42 The critical issue was whether Fleet participated in the management sufficiently to incur liability under the statute. 43

The court of appeals considered the lower court’s construction of the statute too permissive toward secured creditors involved with toxic waste facilities because it would essentially require a secured creditor to be involved in the operations of the facility in order to incur liability. 44 This construction would ignore the plain language of the exemption and render it meaningless because individuals and entities involved in the operations of a facility are already liable as operators. 45 Although similar, the phrase “participating in the management” and the term “operator” are not congruent. 46

Under the standard adopted by the court, a secured creditor may incur section 107(a)(2) liability by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation’s treatment of hazardous wastes. 47 The secured creditor need not actually involve itself in the day-

41. Id. at 1555-56. For a full text of the statutory provision, see supra note 15.
42. Id. at 1556.
43. Id.
44. Id. at 1557. The court noted that the construction of the secured creditor exemption was one of first impression in the federal appellate courts. Id. at 1556. The government in this case urged the adoption of a narrow and strictly literal interpretation of the exemption that would exclude from its protection any secured creditor that participated in any manner in the management of a facility. Id. The court declined the government’s suggestion because it would largely eviscerate the exemption Congress intended to afford secured creditors. Id. “Secured lenders frequently have some involvement in the financial affairs of their debtors in order to assure that their interests are being adequately protected. To adopt the government’s interpretation of the secured creditor exemption could expose all such lenders to CERCLA liability for engaging in their normal course of business.” Id.

The court also declined to adopt Fleet’s interpretation. Id. at 1557. Fleet suggested the court adopt the distinction delineated by some district courts between permissible participation in the financial management of the facility and impermissible participation in the day-to-day or operational management of the facility, which was seemingly adopted by the lower court. Id. at 1556.
45. Id. at 1557.
46. Id.
47. Id.
to-day operations of the facility in order to be liable, although such conduct will certainly lead to the loss of the protection of the statutory exemption. It is also unnecessary for the secured creditor to participate in management decisions relating to hazardous waste to incur liability. Rather, liability will arise if the secured creditor's involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose. This construction of the secured creditor exemption should give lenders some latitude in their dealings with debtors without exposing themselves to potential liability. Nothing in the court's decision should preclude a secured creditor from monitoring any aspect of a debtor's business. Likewise, a secured creditor can still become involved in occasional and discrete financial decisions relating to the protections of its security interest without incurring liability.

In Guidice v. BFG Electroplating & Manufacturing Co., a class of residents sued BFG Electroplating, alleging an unlawful con-

48. Id. at 1557-58.
49. Id. at 1558.
50. Id. In adopting this standard, the court specifically rejected the formulation of the secured creditor exemption suggested in Mirabile. Id.
51. Id.
52. Id.
53. Id. The court noted that its interpretation of the exemption: may be challenged as creating disincentives for lenders to extend financial assistance to businesses with potential hazardous waste problems and encouraging secured creditors to distance themselves from the management actions, particularly those related to the hazardous wastes of their debtors. As a result, the improper treatment of hazardous wastes could be perpetuated rather than resolved. These concerns are unfounded. The court's ruling should encourage potential creditors to investigate thoroughly the waste treatment systems and policies of potential debtors. If the treatment systems seem inadequate, the risk of CERCLA liability will be weighed into the terms of the loan agreement. Creditors, therefore, will incur no greater risk than they bargained for and debtors, aware that inadequate hazardous waste treatment will have a significant adverse impact on their loan terms, will have powerful incentives to improve their handling of hazardous wastes.

Similarly, creditors' awareness that they are potentially liable under CERCLA will encourage them to monitor the hazardous waste treatment systems and policies of their debtors and insist upon compliance with acceptable treatment standards as a prerequisite to continued and future financial support. Once a secured creditor's involvement with a facility becomes sufficiently broad that it can anticipate losing its exemption from CERCLA liability, it will have a strong incentive to address hazardous waste problems at the facility rather than studiously avoiding the investigation and amelioration of the hazard. Id. at 1558-59 (citations omitted).
tamination of the environment which caused personal injuries.\textsuperscript{54} BFG filed a third-party complaint against past owners of the property including the National Bank of the Commonwealth ("Bank").\textsuperscript{55} In 1975 the Bank made a loan to a predecessor of BFG, Berlin Metal.\textsuperscript{56} Berlin Metal defaulted on the loan in 1980.\textsuperscript{57} The Bank was then the successful bidder at the sheriff's sale.\textsuperscript{58} During the Bank's ownership, the Bank paid insurance premiums and property taxes on the property.\textsuperscript{59} The Bank sold the property eight months after it took title.\textsuperscript{60}

The Bank moved for summary judgment on the question of the Bank's CERCLA liability.\textsuperscript{61} The Bank sought summary judgment based on the exemption to CERCLA liability for persons who, without participating in the management of a vessel or facility, hold indicia of ownership primarily to protect a security interest in the vessel or facility.\textsuperscript{62} The court bifurcated the Bank's interest in the property.\textsuperscript{63} The court granted the Bank's summary judgment motion on the Bank's liability prior to its foreclosure on the property by finding that the Bank's activities in the business affairs of its debtor prior to foreclosure were "prudent measures undertaken to protect its security interest" and did not constitute sufficient operational control to overcome the secured creditor's exemption.\textsuperscript{64}

The court denied the Bank's motion for summary judgment on the Bank's "owner" liability after foreclosure and purchase at the sheriff's sale.\textsuperscript{65} The court found that CERCLA did not exempt landowning lenders from liability.\textsuperscript{66}

\textit{Mirabile} and \textit{Maryland Bank & Trust} seem to approach the issue of lender liability from opposite directions. The \textit{Mirabile} court was primarily concerned with giving full effect to the security exemp-

\textsuperscript{55} Id.
\textsuperscript{56} Id. at 558.
\textsuperscript{57} Id.
\textsuperscript{58} Id. at 559.
\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{61} Id. at 561.
\textsuperscript{62} Id.
\textsuperscript{63} Id. "There are two time frames in which we must consider whether the Bank was an 'owner or operator' of the Berlin property: the period prior to the Bank's foreclosure and purchase of the Berlin property and the period of the Bank's ownership." Id.
\textsuperscript{64} Id. at 562.
\textsuperscript{65} Id. at 563.
\textsuperscript{66} Id.
tion of Section 101(20)(A). It gave virtually no weight to the passage of title to the foreclosing bank. Indeed, the Mirabile court treated the bank's purchase at the foreclosure sale as merely incident to the holding of a security interest to which the exemption logically extends. Thus, the court limited its analysis to determining whether the lender was precluded from asserting the exemption because of its involvement in the operation and management of the borrower's facilities.67

Maryland Bank & Trust manifested an entirely different concern.68 There, the court sought to avoid establishing a rule that would allow secured lenders to profit from government cleanup actions.69

It approved a narrow reading of the security interest exemption under which the passage of title at foreclosure is dispositive. A secured lender is only exempt from CERCLA liability under this analysis while the security interest is in force. By purchasing the mortgaged property at the foreclosure sale, the lender converts its security interest into full ownership and becomes subject to the same liability as other landowners.70

The Guidice court seems to have followed this narrow interpretation of Maryland Bank & Trust. By bifurcating the bank's interest into the period before foreclosure and the period after foreclosure and purchase and then holding the bank liable only after it became a landowner, it seems clear the courts are beginning to freely extend CERCLA liability to lenders who acquire title to real property.

The Eleventh Circuit, in its recent Fleet Factors decision, arguably goes even further in its attempt to impose liability on lenders. The creditor in that case never held title to any property.71 Still, the creditor would be held liable if facts proved it participated in the financial management of its debtor to a degree indicating a capacity to influence the treatment of hazardous wastes.72 The court stated a creditor may monitor the debtor's

68. Id.
69. Id.; Maryland Bank & Trust, 632 F. Supp. at 580.
70. Note, 38 HASTINGS L.J. at 1285.
72. Fleet Factors, 901 F.2d at 1558.
business and become involved in occasional and discrete financial decisions relating to the protections of its security interest without incurring liability, but provided lenders no clues on how to assure their actions would be considered "occasional" or "discrete." If other circuits follow the Eleventh Circuit's interpretation of this defense, lender liability will be great indeed, and avoiding it very uncertain. Fortunately, CERCLA's amendments may provide lenders some certainty and relief.

C. The Innocent Landowner Defense

In 1986, Congress reauthorized and revitalized CERCLA by enacting the Superfund Amendments and Reauthorization Act ("SARA"). A portion of SARA popularly styled the "innocent purchaser defense" is of particular interest to lenders who maintain a security interest in the property of their borrowers.

1. Statutory Authority for the Innocent Purchaser Defense

As originally enacted, CERCLA limited the defenses for an "owner" of a facility to three situations: that the contamination resulted from an act of God, an act of war, or an act or omission of a third party other than an employee or agent of the defendant, or one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly with the defendant.

The term "contractual relationship" under CERCLA prior to the SARA amendments included, but was not limited to, land contracts, deeds, or other instruments transferring title or possession. Thus, the foreclosing lender who takes title at the foreclosure sale has established a "contractual relationship".

The provisions of SARA which added the innocent purchaser defense provide in relevant part:

(b) There shall be no liability ... for a ... release or threat of release of a hazardous substance and the damages resulting there-
from were caused solely by

(3) an act or omission of a third party other than ..., one whose act or omission occurs in connection with a contractual relationship, ... with the defendant, ... if the defendant establishes ... that he exercised due care with respect to the hazardous substance concerned, ... and took precautions against foreseeable acts or omissions of any such third party. ... 78

SARA also redefined the term "contractual relationship" by providing an exception to the liability created by a "contractual relationship" when:

[T]he real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substances on, in or at the facility, and one or more of the circumstances described in clause (i), (ii), or (iii) is also established by the defendant ...:

(i) At the time the defendant acquired the facility the defendant did not know, and had no reason to know, that any hazardous substance which is the subject of the release or threatened release was disposed of on, in or at the facility;

(ii) The defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation;

(iii) The defendant acquired the facility by inheritance or bequest. 79

The standard of inquiry necessary to hold the "innocent purchaser landowner defense" has also been established by SARA. The landowner must show "he did not know, and had no reason to know," of the presence of hazardous substances on the property. 80 The standard for meeting the burden established by SARA provides:

To establish that the defendant had no reason to know, as provided in clause (i) of subparagraph (A) ... the defendant must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to mini-

78. 42 U.S.C. § 9607(b)(3) (as amended by SARA).
mize liability.81

The "innocent purchaser defense" and the necessary standard of inquiry provided by SARA have fostered what is popularly called the pre-acquisition environmental audit.82 The pre-acquisition environmental audit has reached universal acceptance in commercial and industrial real estate transactions and typically includes:

1) research into previous ownership and user;
2) search of government records at the federal, state, and local levels; and
3) visual inspection of the property and its improvements.83

The inquiry will necessarily expand to environmental media sampling and analysis if any of the above-listed elements indicate that contamination may be present.84

2. Judicial Interpretation of the Innocent Purchaser Defense

In United States v. Pacific Hide & Fur Depot, Inc., the site in question was a receptacle for capacitors containing polychlorinated biphenyl ("PCB") during the 1970's.85 When the property owner died he willed his interest in the property to his children who had not previously taken part in the business; the children subsequently transferred the property to their children.86

84. See Mays, The Blessed State of Innocence: The Innocent Landowner Defense Under Superfund, 20 ENV'T Rptr. (BNA) 809, 812 (1989) ("the presumption [of all appropriate inquiry] does not arise if the audit discloses the presence or likely presence of a release or threat thereof unless the owner has taken reasonable steps to confirm the absence of such release or threat"); Thrift Bulletin, Attachment (Phase II report is performed if "red flags" are apparent to the lender or if they are disclosed during the Phase I investigation; the report consists of all Phase I activities plus combinations of field tests and activities).
86. Id. at 1343-45.
children and grandchildren made no inquiries or inspection of the
property before taking title.\textsuperscript{87}

The EPA used Superfund money to remove the PCB contamina-
tion, and then sued the current landowners, the children and
grandchildren of the individual responsible for the placement
of the PCB capacitors.\textsuperscript{88}

The children and grandchildren asserted the "innocent land-
owner" defense to escape liability.\textsuperscript{89} The court agreed with the
defense and held the children and grandchildren not liable.\textsuperscript{90} The
court found that the PCB releases were caused solely by actions
of third parties.\textsuperscript{91} Third parties did not have contractual relation-
ships with these defendants and these defendants had no reason
to know that PCBs were disposed of on the property.\textsuperscript{92} And even
though these defendants failed to inquire into uses of property
at the time they obtained an ownership interest, their conduct
was reasonable under the circumstances.\textsuperscript{93}

In \textit{United States v. Serafini}, the defendant took title to a landfill
in 1969 without making any inspection of the property.\textsuperscript{94} Later,
in 1983, the EPA conducted an emergency removal of hazardous
wastes from the facility.\textsuperscript{95}

The court denied cross motions for summary judgment on the
issue of the defendant's CERCLA liability, holding that issues of
fact existed as to whether the owners should have inspected the
site prior to purchase.\textsuperscript{96} Had they inspected the site the owners
would have seen over 1,000 55-gallon drums of hazardous wastes.\textsuperscript{97}

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87. \textit{Id.} at 1348.  \\
88. \textit{Id} at 1343.  \\
89. \textit{Id.} at 1346.  \\
90. \textit{Id.} at 1349.  \\
91. \textit{Id.}  \\
92. \textit{Id.}  \\
93. \textit{Id.}  \\
95. \textit{Id.} at 348.  \\
96. \textit{Id.} at 353.  \\
the present landowner plaintiffs attempted to sue the seller defendant for breach of a
contract warranty arguing that the land purchased was chemically contaminated although
it was warranted to be free from governmental regulation. The court struck the allegation,
noting without analysis that CERCLA specifically exempts from liability innocent pur-
chasers such as the plaintiffs. \textit{Id.} at 1531.
\end{flushright}
3. Proposed Definition of “All Appropriate Inquiry”

SARA currently provides no indication of what an “appropriate inquiry” into the previous ownership and prior uses of the property might entail.

Representative Curt Weldon (R.-Pa.) introduced a bill in 1989 entitled “The Innocent Landowner Defense Amendment”.98 The bill would provide the landowner with a rebuttable presumption that he has made all appropriate inquiry if a “Phase I” environmental audit was conducted immediately prior to or at the time of acquisition of the property.99

According to the bill, a Phase I audit would include a 50-year title search, a review of aerial photographs, a determination of the existence of environmental cleanup liens, and a visual site inspection of the property.100

In addition, the owner must retain a compilation, or written report, of the above-listed audit, and the owner must inspect fully any release or threatened release that is suspected through the Phase I audit.101

4. For Lender, What is the Proper Timing of the Appropriate Inquiry?

SARA requires that the appropriate inquiry must be made at the time the facility is acquired.102 The question of when a foreclosing lender “acquires” the property has not been addressed in a judicial proceeding. There are three alternatives. The lender “acquires” the property when the loan is made and the lender records the lien, when the lender forecloses on the property, or when the lender purchases the property at the foreclosure sale. Presently, lenders seem to be proceeding on the assumption that they “acquire” the property at the time the loan is made and the lien is recorded. It is an accepted practice today for lenders to require a Phase I audit.103

99. Id.
100. Id.
101. Id.
It is recommended that lenders conduct a second Phase I audit prior to foreclosure and resale of any industrial property. Thus, the lender will know the exact status of the property immediately before foreclosure and resale. The lender will then be protected if courts rule that a property is not "acquired" until foreclosure.

D. Practical Recommendations

The following are some practical recommendations for lenders who wish to avoid potential CERCLA liability. Lenders should require applicants to perform an environmental audit or have one performed by consultants. The level of inquiry should be on a sliding scale according to the type of property. For instance, a manufacturing facility should receive a relatively high level of review, while undeveloped farm land should only require a walk about. Lenders should also require that the bank be designated an intended third-party beneficiary to any contract between the applicant and its environmental consultant. In that way, lenders have a malpractice cause of action against the consultant if the environmental audit is faulty. Lenders should also require that applicants represent and warrant current and on-going environmental compliance in the loan documents.


105. See also, Id. at 2. Most one-to-four family residential properties do not need a Phase I Environmental Risk Report. Id. Examples of other properties that should have a Phase I audit include: proposed construction properties (other than a proposed one-to-four family residential property), industrial properties on industrially zoned land, properties located close to industrial areas, properties that include or are close to an existing or former gas station site, commercial properties that include an automotive repair facility or a dry cleaning establishment where the work is done on the premises, properties adjacent to railroad tracks or underground pipelines (except one-to-four family residential properties), properties that have served as or are close to a refuse or waste disposal site, properties where the past uses or the surrounding uses include the storage of or usage of hazardous or toxic substances (e.g. pesticides), properties suspected of containing asbestos material that is or may be friable (easily crumbled or crushed into powder and capable of being absorbed into the environment), properties where the emanation of radon gas from the soil may result in detrimental health effects to building occupants, and residential properties where there are known conditions on or in the property's immediate vicinity, e.g., where Superfund sites exist within a one-mile radius, where the site is in close proximity to oil and gas production, where there is asbestos within the building structure, where the site is a corner lot property and is known to have been a gas station, or where the historic use of the property prior to its residential zoning is cause for concern. Id. at 2-3.
Lenders should keep up with their borrowers’ businesses and management of facilities. The news media is a ready source of information on environmental issues.

If a lender suspects a borrower is having financial difficulty or is compromising the integrity of the environment, the lender should not hesitate to accelerate repayment based on a breach of representations and warranties in the loan documents.

Finally, a lender should conduct a second environmental audit prior to foreclosure or, at a minimum, prior to purchasing property at the sheriff’s sale.
THE IMPACT OF THE EUROPEAN COMMUNITY ON UNITED KINGDOM ENVIRONMENTAL LAW

Joan Himan*

I. INTRODUCTION

It seems pertinent, with increasing international concern for environmental issues at this particular time, to assess the impact of the European Community in this sphere and, perhaps more significantly, the corresponding duties upon Member States. This impact may be viewed on several levels. Firstly, in the creation of equal environmental standards across international boundaries, and, secondly, the achievement of such standards through a supranational legal system. It is the latter which highlights the unique character of the European Community and constitutes the focus of this discussion, with reference to specific policies by way of illustration. The purpose of this paper is to consider the extent to which, if at all, the emerging Community framework has created a regime which will secure and enhance legitimate environmental protection.

The European Community, as originally envisaged, was purely economic in nature.1 There is no direct mention of the environ-

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1. Article 2 of the Treaty of Rome provides:

[T]he establishment of a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.


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ment in the original Treaty of Rome ("Treaty") on which to base a Community environmental policy, and indeed, before the Single European Act 1986 the vires of Community environmental policy could be questioned.3

Formal Community interest in environmental issues did not arise until the Paris Summit of 1972,4 during which Community Heads of State recognised that economic success should be reflected in improved environmental quality and protection.5 The Summit resulted in the first Environmental Action Programme of 1973 ("EAP").6 Since the first EAP, the Community has maintained its interest in environmental quality through successive programmes7 and a wealth of European legislation, generally in the form of Directives, taking as its original constitutional base, Article 235 of the Treaty,8 and subsequently, Article 130 r-t of the Single European Act 1986.9

There are commentators who would suggest that Community environmental policy has been "an undeniable success,"10 particularly in comparison to other Community policies. This success,
however, must be tempered by recognition that environmental directives represent the third largest body of unimplemented European legislation;\textsuperscript{11} a problem which shall be considered in some detail below.

II. THE LEGAL BASIS OF THE COMMUNITY

The United Kingdom acceded to the European Community by the terms of the European Communities Act 1972.\textsuperscript{12} By the provisions of section 2(1),\textsuperscript{13} Community law becomes directly applicable in the United Kingdom, placing obligations on our government, and providing rights exercisable within our domestic courts. In the words of Lord Denning M.R.: "[A]ny rights or obligations created by the Treaty are to be given legal effect in England without more ado."\textsuperscript{14} In particular, it then falls upon the governments of Member States to fulfill their general obligation under Article 5 of the Treaty,\textsuperscript{15} to act for the benefit and furtherance of Community aims.

Membership of the Community superimposes upon all domestic regimes the equivalent of a European hierarchy of State, although the Community is not recognised as such and has limited juris-

\textsuperscript{12} European Communities Act, 1972, ch. 68.
\textsuperscript{13} The European Communities Act provides:
All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression 'enforceable Community right' and similar expressions shall be read as referring to one to which this subsection applies.
European Communities Act, 1972, ch. 68, § 2(1).
\textsuperscript{15} Article 5 of the Treaty provides:
[T]ake all appropriate measures, whether general or particular, to ensure the fulfillment of the obligations arising out of this Treaty or resulting from actions taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.
They shall abstain from any measures likely to jeopardize the attainment of the objectives of this Treaty.
Treaty, \textit{supra} note 1, art. 5, 298 U.N.T.S. at 17.
Treaties, \textit{supra} note 1, 2 B.D.I.E.L. 45.
diction. Power is separated between four major institutions, namely: Parliament, now freely elected; the Commission, composed of nominees from the Member States, whose role is as Community representatives; the Council, comprised of Government representatives; and the European Court of Justice\textsuperscript{16} ("ECJ"), which together with the domestic courts, comprises the legal system of the European Community.

The nature of Community law is to be discovered by reference to the work of the ECJ, whose role, by virtue of the Civil Law\textsuperscript{17} tradition of mainland Europe, is declaratory. Community law is common to all Member States and, in order to maintain a unified standard throughout the Twelve, must prevail over domestic law.\textsuperscript{18} It is through the ECJ that the primacy of Community law is maintained. Indeed, as the ECJ considered in the landmark case of Costa v. ENEL:

The reception, within the laws of each Member State, of provisions having a Community source, and more particularly of the terms and of the spirit of the Treaty, has as a corollary the impossibility, for the Member State, to give preference to a unilateral and subsequent measure against a legal order accepted by them on a basis of reciprocity. . . . The transfer, by member states, from their national orders in favour of the Community order of the rights and obligations arising from the treaty carries with it a clear limitation of their sovereign right upon which a subsequent unilateral law, incompatible with the aims of the Community, cannot prevail.\textsuperscript{19}

The emergent Community environmental policy recognised that such matters could not continue to develop on a State-by-State basis,\textsuperscript{20} but must progress on the assumption of uniform standards throughout the twelve Member States. Whilst the Environmental Action Programmes establish the governing principles of com-

\begin{footnotesize}
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\item J. Merryman, \textit{The Civil Law Tradition} (2d ed. 1985).
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Community policy, including the governing principle that the 'polluter should pay,' it is for Community legislation to fulfill these aims, by setting standards for incorporation into domestic legislation.

The characteristics of Community legislation are to be found in Article 18921 of the Treaty, the two major forms being the Regulation and the Directive. The Regulation is 'directly applicable,' and thus forms part of national law without further enactment. Indeed, Member States are prohibited from such action.22

More important, for our purpose, is the Directive. Unlike the Regulation, the Directive does not provide the final form of words, it is not 'directly applicable,' but rather states aims and objectives to be achieved by a given date, leaving the detail of implementation to the individual Member States. Directives are the main source of Community environmental laws, and represent the product of a consultation procedure emanating from the Commission.23 The form is akin to the relationship in the United States between federal legislation and the implementation of standards at the state level, as illustrated in the area of the United States' air pollution control initiatives.24

The European Commission is divided into a series of Directorates General, individual Commissioners having a particular port-

21. Article 189 of the Treaty provides:
   In order to carry out their task the Council and the Commission shall, in accordance with the provisions of this Treaty, make regulations, issue directives, take decisions, make recommendations or deliver opinions.
   A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
   A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. . . .


23. The Treaty provides:
   The Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market.
   The European Parliament and the Economic and Social Committee shall be consulted in the case of directives whose implementation would, in one or more Member States, involve the amendment of legislation.

folio interest. Proposals are made by the Commission to the Council of Ministers, from which reference is then made to the European Parliament and the Economic and Social Committee. Proposals are then returned to the Commission, who may amend the developing legislation. The Council then confirms and the Directive is complete, although it may require a decision to provide the date of implementation (generally a period of eighteen months to two years). In the case of environmental legislation, the period for compliance is frequently extended to take account of the high investment and long-term response period.

As we have considered, the completed Directive lays down a series of aims and objectives to be incorporated into domestic law, by whatever mechanism the individual Member State considers to be the appropriate means of achieving such ends within that jurisdiction. The United Kingdom government has, from time to time, had to resort to Statute, Regulations under the European Communities Act itself, and, more simply, Departmental Circular. The implementation of environmental directives is not without its problems, failure to comply with environmental directives falling into third worst position with regard to complaints and infringements by the Commission, behind Industry and Agriculture, both of which form much larger bodies of Community provision.

25. Environmental issues are currently the portfolio of Directorates General XI, headed by Carlo Ripa di Meana.
26. The Economic and Social Committee, set up under Article 193, is compiled of some 150 representatives of Trade Unions, employers, consumer groups, professional groups, and other organisations appointed by the Council of Ministers, forming for some purposes, a mandatory or discretionary consultative body.
27. For instance, the implementation date for EC Council Directive 76/160 of December 1975 concerning quality of bathing water is December 10, 1977. The date by which standards are to be achieved is December 10, 1985. 19 O.J. EUR. COMM (No. L 31) 1 (1976).
28. For instance, the implementation date for the Control of Pollution Act, 1974 (ch. 40), complying with the framework EC Council Waste Directive 75/442, was July 18, 1977. The relevant provisions contained in the Act, however, did not come into force until 1978. 18 O.J. EUR. COMM. (No. 194) 39 (1975).
31. See S. Johnson & G. Corcelle, supra note 5, at 338; Geddes, supra note 11.
This shortfall between agreed policy and implementation is perhaps surprising, when one recalls that the dominant institution in the legislative process is the Council, whose members are drawn from the Governmental Ministers of the Member States. Who, unlike the membership of the Commission, are not obliged to assume the ambitions and interests of the Community. The obligation of a Community Directive should, therefore, come as no surprise to the individual Member State governments. Why then are the Twelve failing to fulfill their obligations to comply with environmental directives under Article 5 of the Treaty?

While the United Kingdom has a surprisingly good reputation for implementing Directives in general, the Commission, in its watch-dog role, is currently taking the United Kingdom to the ECJ for failure to implement the 1975 Directive on the quality of bathing water. The basis of the charge by the Commission is that five years after the final date for implementation of the Bathing Water Directive some ninety-four designated United Kingdom beaches remain below the Community minimum standard, largely as a result of sewage outfalls. Of particular interest to the Commission are beaches at Blackpool, Southport and Formby in Lancashire. Blackpool alone entertains some ten million visitors per year. In its defence, the government claims to have achieved seventy-six percent compliance over the 440 designated sites. Why? It is suggested that compliance with the Directive would require a minimum investment of some £300 million for the development of new sewage treatment facilities.

One answer can then be seen to be cost. Directives are aims, they are standards which the Council would like to achieve, but for individual nations their own domestic political arenas remain. For the United Kingdom, the Bathing Water and Drinking Water

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32. Article 155 of the Treaty provides:

"In order to ensure the proper functioning and development of the common market, the Commission shall . . . ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied." Treaty, supra note 1, art. 155, 298 U.N.T.S. at 71. Treaties, supra note 1, 2 B.D.I.E.L. 45.


35. Id.

Directives in particular have matured against a background of public sector cuts, and latterly, privatisation of water undertakings. Even if the mind and the body are willing, the bank balance may be incapable of shouldering the economic burden.

III. ENFORCEMENT

The procedure by which Member States are brought into line calls upon the watch-dog function of the Commission. Article 169 of the Treaty empowers the Commission, after giving the Member State concerned an opportunity to respond to their allegations, to take the recalcitrant Member State to the ECJ.

Judicial sanction provides, on the face of it, a most satisfactory conclusion. However, whilst the Commission may bring the action, and the ECJ may support the Commission, the judgement is without teeth. The only sanction available, if one would call it a sanction, is peer pressure. Such a sanction is without punity on those occasions when the Member State is simply one of several who have failed to comply. Indeed, a recent report from the Environmental Commissioner, Carlo Ripa di Meana, highlighted the problem, and stated the need for new powers to call Member States into line (particularly Belgium and Italy), suggesting withholding of environmental funding from Member States failing to implement Community legislation.

The Commission has a dual role in the enforcement process. The first role involves ensuring that Member States fulfill their obligation in implementing the mechanisms by which Community aims and objectives may be met. The second role involves the practical implementation. Once the procedures are set for the

38. Article 169 of the Treaty provides:

If the Commission considers that a Member State has failed to fulfill an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.

Treaty, supra note 1, art. 169, 298 U.N.T.S. at 75. Treaties, supra note 1, 2 B.D.I.E.L. 45.
40. Id.
implementation of Community objectives, it remains to be seen whether these controls are exercised in practice.

The Commission itself has identified several major problems faced in the former role of ensuring implementation.\(^{41}\) Member States often delay their implementation, and may frequently only partially succeed. The requirements of the Directives have been viewed from time to time as recommendations, rather than provisions having strict legal effect. Finally, the Commission points to cases where the recalcitrance is confirmed by the ECJ, yet compliance remains to be achieved.\(^{42}\)

Identifying the problem, the Fourth Environmental Action Programme,\(^{43}\) at the recommendation of the European Parliament, pays particular attention to the monitoring of environmental legislation. The practical implications of this policy are an increase in discussions between the Commission and domestic governments. Indeed, it is with an eye to improved environmental regulation that the Fourth Programme makes proposals for a 'Freedom of Environmental Information' Directive.\(^{44}\)

Nonetheless, the Commission has no inspectorate to undertake physical checks, but remains reliant upon two sources of information.\(^{45}\) Firstly, a given Directive may contain an obligation on the part of Member States to report to the Commission periodically. Secondly, the right remains for the individual citizen or pressure group to voice their complaint to the Commission that a Member State is failing to give practical implementation to incorporated Community law.\(^{46}\)

\(^{41}\) S. JOHNSON & G. CORCELLE, supra note 5, at 340-41.


\(^{46}\) Friends of the Earth's current (1990) application for Judicial Review concerns the effects of water privatisation on the achievement of EEC standards.
Even so, there are instances where the Member States have implemented the Directive and yet the domestic provisions remain unused. Such an example may be found in the United Kingdom legislative protection given to vulnerable ground-water. Part I of the Control of Pollution Act 1974 ("COPA"), empowers public authorities to restrict the authorisation of waste disposal, where such activity would be likely to endanger ground-water reserves. Part II of COPA provides Water Authorities with the power to grant or withhold, authorisation for the discharge of effluent to ground-water, section 31 providing that unauthorised discharges may constitute an offence under the Act. Under such power, informal Aquifer Protection Zones were established by some Water Authorities. None, however, were as a result of the Ground-Water Directive 80/68, which had an implementation date of December 19, 1981. These provisions have been replaced by section 111 of the Water Act.

To ensure the practical implementation of the Ground-Water Directives, the Department of the Environment has now made moves towards the establishment of Ground-Water Protection Zones, some sixteen years after the original provisions were placed on the statute book, and eight years after the implementation of the Community Directive.

In addition to the watch-dog function of the Commission, the Member States themselves play a marginal role in the policing of Community obligations. Article 170 provides that an action may be brought in the ECJ by one Member State against another. Before such an action may commence, however, it must be brought to the attention of the Commission, who has the opportunity to give an opinion, although absence of such opinion does not prevent the action from being heard.

48. Id.
49. J. Himan, Ground-Water Protection Zones (forthcoming).
52. The Government of the United Kingdom announced in company prospectus preceding the flotation of the privatised Water companies in 1989, that a list of pilot Nitrate Sensitive Areas would be announced July 31, 1989.
53. The Treaty provides: "If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such
IV. DIRECT EFFECT

This leads us to the interesting possibility of direct citizen challenge. Nothing in the Treaty provides, or even hints at the possibility of direct effect.\textsuperscript{54} Such rights and obligations as are to be found in the Treaty were originally thought only to place requirements upon governments under the obligations enshrined in their document of accession\textsuperscript{55} and Article 5.\textsuperscript{56} Nonetheless, the ECJ has interpreted both the Treaty, Regulations, and Directives as being capable of providing rights exercisable in the domestic courts by individual citizens. In establishing these principles, the ECJ considered that:

The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of member states, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their own legal heritage.\textsuperscript{57}

The conference of such rights was deemed to be dependent upon the measure concerned having the characteristics of 'direct applicability,' that is, having legal effect 'without more ado,' which is ascertainable in the case of Treaty provisions from the document of accedence,\textsuperscript{58} and in the case of Regulations, the terms of Article 189.\textsuperscript{59} The Directive, under which most Community environmental provisions are made, was thus originally deemed by the domestic courts to be incapable of direct effect.

The rationale for such a conclusion is to be found in the definition of the forms of legislation in Article 189. With the opinion shall not prevent the matter from being brought before the Court of Justice." Treaty, supra note 1, art. 170, 298 U.N.T.S. at 75. Treaties, supra note 1, 2 B.D.I.E.L. 45.

\textsuperscript{54} WINTER, DIRECT APPLICABILITY AND DIRECT EFFECT, TWO DISTINCT AND DIFFERENT CONCEPTS IN COMMUNITY LAW, 9 CMLR 1972, 425.

\textsuperscript{55} In the case of the United Kingdom, The European Communities Act, 1972, ch. 68.

\textsuperscript{56} Article 5, supra note 15.


\textsuperscript{58} European Communities Act, 1972, ch. 68, § 2.

\textsuperscript{59} The Treaty provides: "A Regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States...." Treaty, supra note 1, art. 189, 298 U.N.T.S. at 78-79. Treaties, supra note 1, 2 B.D.I.E.L. 45.
Regulation only being referred to specifically as being directly applicable, the conclusion drawn was that the Directive was therefore incapable of direct applicability and thus direct effect.

The ECJ has, in contrast, developed the concept to provide rights exercisable by the individual, drawn directly from the source directive. The question of direct applicability has been resolved by the ECJ by reference to the formal date of implementation. Until such time as that date has passed, the directive confers no rights exercisable directly in the courts by citizens.

After the implementation date, rights may then extend to individual citizens or groups, whether the Member State has failed completely in its obligation to achieve the aims of the directive, or where the provision fails to satisfy all its demands. Such rights will, however, only flow where the directive itself satisfies three preconditions. The provision must be: 1) clear and precise, 2) unconditional, and 3) leave no room for discretion. Clearly, any room for discretion which may exist with regard to implementation of a directive at the domestic level is brought to an end by the passing of the formal date for implementation.

The extension of the concept of direct effect to directives by the ECJ did not prove popular with the domestic courts. Indeed, some domestic courts have ignored ECJ authority on this point. In the case of Cohn-Bendit, the French Conseil d'état refused to follow the authority of Van Duyn, a case emanating from the United Kingdom, in which the ECJ had laid down the principle that the concept of direct effect should extend to directives, disallowing the claim of the plaintiff. Rather than be seen to


flaunt a decision of the ECJ, the French court simply ignored it, basing their refusal to make a reference to the ECJ under Article 177 on the principle of ‘Acte Clair.’

It would seem that the domestic courts have now accepted the proposition that the directive is capable of direct effect. It appears, however, that this is only at the cost of the ECJ limiting that possibility to direct effect on a vertical plane, that is, where the individual seeks to exercise the right against an organ of government. A broad interpretation is, however, given to the term ‘organ of government.’ In the case of Marshall, where the ECJ made this distinction between the vertical and the horizontal, the plaintiff was an employee of the Area Health Authority (“AHA”) and therefore able to rely upon the directive in question, as the AHA was adjudged to be an ‘organ of government.’ This distinction has been criticised. The decision is based on the rationale that Governments owe a duty to implement directives and should not therefore be able to rely, as a defence, upon their own failure to implement. And yet, bodies such as the AHA have no role to play in the legislative process.

Clearly, this restriction of the principal of direct effect with reference to its application to directives is somewhat artificial. Mrs. Marshall could rely on the Equal Treatment Directive to prevent her employer, the AHA, an organ of government, from operating a retirement age policy which distinguished between male and female employees. This policy was acceptable to the Sex Discrimination Act 1975, which purportedly anticipated and satisfied the Equal Treatment Directive. Had she been employed in the private sector, she would have had no recourse to the courts.

If we give the case of Marshall a wider perspective, it may be explained as a peace offering to the domestic courts, in order to

regain an equilibrium within the broader Community legal system.\textsuperscript{72} Indeed, it has been suggested that the case of\textit{Marshall} may merely represent a temporary respite, with regard to the restrictions which it places upon the availability of direct effect.\textsuperscript{73} How does this affect the operation of Community environmental law within the United Kingdom?

The recent movement of major polluting industries from the public to the private sector must then restrict the rights available to United Kingdom citizens. Before privatisation, individual citizens could, theoretically, claim rights directly from directives,\textsuperscript{74} provided that the directive in question satisfied the requirements of 'precision,' 'unconditionality,' and 'lack of discretion.' Since\textit{Marshall}, however, privatisation has eradicated such potential rights, by moving the question from the 'vertical' to the 'horizontal' plane. For reasons of equilibrium, this is likely to remain the position for some time, although that is not to say that the distinction will remain indefinitely.\textsuperscript{75}

V. \textit{LOCUS STANDI}

The question of direct effect of environmental directives adds the additional problem of \textit{locus standi}. In order that an individual citizen may challenge directly the failure of the United Kingdom Government of a Member State to implement an environmental directive, it is necessary for that citizen to show a sufficient interest. Exactly what may constitute 'sufficient interest' is, at present, a matter for conjecture, the mechanism for direct challenge remaining to be tested in this field. It is easy to point to the direct interest of an employee, whose employment terms are differentiated from fellow employees on the sole ground of gender.\textsuperscript{76} It may be more difficult to ascertain particular damage resultant of impaired drinking water, which falls below Community standards.

\textsuperscript{74} See Minör, supra note 3.
\textsuperscript{75} See Wyatt, supra note 73.
More difficult still, will be resort to direct effect, with regard to directives which establish the format of uniform Community procedures. As Geddes points out, with reference to the 1985 Directive on Environmental Impact Assessment: "[B]oth requirements - that there be an Environmental Impact Assessment and that the public concerned should be consulted - are capable of having direct effect."  

Thus, if no such assessment were made, or, if during the assessment procedure the authorities failed in their obligation to consult, it would be open to a member of the public to make a direct challenge. However, the plaintiff must be a 'member of the public concerned.' Some assistance may be available by reference to the directive, but where this is not the case the court must: 1) establish that the plaintiff was directly affected by the Planning Authority's failure to fulfill its obligations; 2) make an order requiring the Planning Authority to define 'public concerned,' and 3) adopt proper procedures for their consultation. The individual may then find it difficult to establish requisite locus standi to bring his or her action, without reference first to the court for confirmation.

VI. FUTURE DEVELOPMENTS

The current EAP differs somewhat from its predecessors, concentrating on a multi-media approach. Developing the themes from the Third EAP, the Fourth EAP favours the integration of environmental policy into other area of Community life. Thus, in addition to the traditional media 'standard' approach, future developments of Community environmental policy show a con-
centration on aspects which may broadly be referred to as policing.

In 1989, the Commission proposed the creation of a European Environmental Agency, aimed at increasing internal and international cooperation in the area of research and development, although this development is not without its critics. Clearly such a development highlights the need for the draft Directive on Freedom of Environmental Information (which is not to suggest that such a provision could not stand on its own merits). As Stanley Clinton Davis remarked: "If ... pollution does not recognise frontiers, then is it not a *sine qua non* that information relating to the control of pollution and the prevention of damage cannot recognise frontiers either?" The aim of the proposal is to provide for a Community-wide exchange of environmental information, relating to data held by public authorities concerning polluting activities and necessary remedial action. This is based on the assumption that such information should be available to the public at large, regardless of the storage media, or the 'interest' of the individual.

It is clearly the belief of the European Parliament, that the provisions relating to Freedom of Environmental Information, should be firmly rooted in the principle that all information should be available, unless it can be shown to be contrary to the national interest, the onus of proof lying with the Member State wishing to restrict such freedom.

A further development of interest, is the Commission's proposal for a system of civil liability for damage caused by waste, the so called Strict Liability Draft Directive. The aim of the proposal is, in the words of Carlo Ripa di Meana, "to apply the principle that the polluter must pay," a governing principle of Community environmental policy since the first EAP. The idea being that, by placing the responsibility for risks with the producer, "clean technologies will become more attractive."

86. Davis, *supra* note 44.
88. Davis, *supra* note 44.
90. *Id.*
The proposal places strict liability upon the producer of waste, although the producer will not be held liable for the 'fault' of third parties, where appropriate steps have been taken for an approved disposal. Where the producer cannot be found, liability will be with the 'holder.'\textsuperscript{91} The proposal is based largely on pre-existing Community provisions regarding civil liability for damage caused by defective products. Clearly, the enforcement potential of such a provision is not ascertainable at this stage.

VII. CONCLUSION

The organs of state of the European Community and its legislative function provide a discreet mechanism by which intra-community environmental standards may be set and maintained. The Community provides a suitable body for such functions, operating as it does, across traditional national boundaries. The developing environmental policy is, in turn, an appropriate area of Community concern. Bearing in mind the aims of the Economic Community laid down in the Treaty of Rome, in which the original members affirmed, that, as an Economic Community, the elimination of all inequalities between competitive nations is of intrinsic value. And, that, "as the essential objective of their efforts the constant improvement of the living and working conditions of their peoples"\textsuperscript{92} is a fundamental objective.

As an Economic Community, the elimination of all inequalities between competitive nations is of intrinsic value. Indeed, since the implementation of successive EAPs and the legitimatisation of environmental policy through the Single European Act 1986, it would now seem inappropriate to consider the environmental law of any individual member state without reference to the Community. It can be seen that Community law provides a network of standards and controls throughout the Member States. It is likely, therefore, that such provisions and the high standards thereunder could pose initial problems for prospective members whose regulatory controls are less developed in this area. This is particularly pertinent given the current trans-european climate. In addition, the Community represents its membership in a

\textsuperscript{91}. Id.
\textsuperscript{92}. Treaty, supra note 1, Preamble, 298 U.N.T.S. at 14. Treaties, supra note 1, 2 B.D.I.E.L. at 45.
worldwide arena in dealings with international bodies, and is signatory to Conventions and Protocols in the name of the Community itself. With regard then to environmental matters, the nature of the European Community must be viewed as far more than a simple collection of signatory states.
LOCAL HEALTH AGENCIES: THE SILENT PARTNERS IN THE ENVIRONMENTAL ENFORCEMENT NETWORK

D. David Altman*

[As the tide of chemicals born of the Industrial Age has arisen to engulf our environment, a drastic change has come about in the nature of the most serious public health problems .... Now our major concern is no longer with disease organisms that once were omnipresent .... Today we are concerned with a different kind of hazard that lurks in our environment ....]

The new environmental health problems are multiple ... born of the never-ending stream of chemicals of which pesticides are a part, chemicals now pervading the world in which we live, acting upon us directly and indirectly, separately and collectively.

Rachel Carson - 1962

I. INTRODUCTION

Whether current thought would anoint Ms. Carson a prophet or brand her an alarmist, few would disagree that it is the job of government, via its police power, to uncover the threats to the public, and to adopt measures to both relieve groundless fears and prevent damage to health and the environment. Local health agencies are the institutions of local government charged

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2. Ohio Const. art. XVIII, § 3. The Toledo, Ohio Charter provides the following charge:
To supervise, regulate or suppress in the interest of public morals, public recreations, amusements and entertainments and to define, prohibit, abate or suppress all things detrimental to the health, morals, comfort, safety, convenience and welfare of the people and all nuisances and causes thereof.


3. Reports of releases of hazardous substances into the environment under Title 313 of the Superfund Amendments and Reauthorization Act of 1986 reveal that chronic exposure has been more pervasive and more intense than originally believed. See Caution:
with this mission. 5 While health officials have developed the skill, and the appropriations, to detect contamination in milk and roach parts in omelets, most have not yet determined how to evaluate the hazard, for example, of children breathing high levels of solvent on a daily basis in a residential/industrial "non-attainment" area. 6

As a result, nearly thirty years after Rachel Carson's alarm was first sounded, local health agencies remain the silent partner in the environmental protection network. The silence is ironic because, as set forth in this article, local government has both the right to enforce the minimum standards set forth in various federal and state environmental laws and the right to create more stringent environmental requirements. 7

In addition to their legal latitude, the irony of local government's silence is heightened by three current trends. First, local communities are elevating environmental and health concerns to the top of their agenda. 8 Second, polls demonstrate that more people are comfortable with the idea of the government spending more money on the protection of health and environmental concerns. 9 Third, purely federal solutions are proving to be inadequate. 10 These three trends portend the recognition of the need for inter-governmental networks in the form of state, federal, and local partnerships involving the sharing of information, re-

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The Air You Breathe, LEAGUE OF WOMEN VOTERS, NATIONAL VOTERS, June-July 1990, 4:

'The magnitude of this problem exceeds our worst fears,' [Rep. Henry Waxman, CA Dem., Chairman of the House Subcommittee on Health and Environment] said at a March 1989 press conference in which the 1987 [EPA] inventory results were released. 'There is more at stake than just numbers. (My) subcommittee has received testimony which is truly shocking.'

Id. at 8.

4. Some common examples of health agencies include Boards of Health, health districts, and health departments.

5. See, e.g., OHIO REV. CODE ANN. §§ 3709.20-21, 3707.01 (Anderson 1988).


7. See, infra, note 56.


9. 54 THE GALLUP POLL, NEWS SERVICE, No. 22 (Oct. 11, 1989) indicated that 59 percent of those polled favored a spending increase to combat pollution while 67 percent favored a spending increase for health care.

sources, and overall communication concerning health and environmental problems.

The function of the new inter-governmental networks is best illustrated by the truism that local agencies which are closest to the problem are, at least initially, best able to make preliminary evaluations and investigations. Government officials often learn of chronic environmental problems by a single complaint or a cluster of a few complaints. The gravamen of each complaint is usually this question: "What will this hazard do to me and my family?" Obviously it would be more efficient for a local agency to promptly investigate, respond to, and evaluate each environmental hazard. It would be inefficient for state or federal governments to offer the initial response. These levels of government are too distant and too overburdened with already established environmental priorities to be truly responsive at the initial complaint stage. Local government can help determine the level of response if it has the human and hardware infrastructure to distinguish the problems which need to be "federal cases" from those which need prompt local attention.

The question arises as to why the local health agency should be the first to respond to complaints of chronic environmental hazards. Health is a benchmark used in the various environmental laws, with protection of health and the environment being the ultimate purpose of such laws.\(^1\) Local health agencies are traditionally entrusted with the duty to protect the public health and to ensure that public health nuisances are abated.\(^2\) Unfortunately, many state environmental agencies have few health professionals on staff, and yet have numerous engineers and scientists (such as chemists, geologists, and biologists) who eventually make the health-related decisions.\(^3\) On the other hand,


\(^{13}\) The Ohio Environmental Protection Agency, for example, has only five health related environmental scientists, such as epidemiologists or toxicologists, out of approx-
Congress did require the creation of a group of health professionals at the federal level.\textsuperscript{14} ATSDR was created to address the nation's most pressing environmental health problems.\textsuperscript{15} ATSDR, however, has the overwhelming job of providing health data for the entire nation and has had problems in fully addressing all health concerns of the highest priority, let alone those of lower priority which still warrant local review.\textsuperscript{16} That is why the ATSDR recognizes its need to work in harmony with state and local health officials in order to evaluate hazards and carry out studies.\textsuperscript{17}

Even though there is a standing invitation to cooperate, local health agencies appear, in large part, to be unaware of this potential role. These agencies also appear to be unaware of their ability to use environmental laws directly to prevent health
problems which are caused by, or compounded by, environmental contamination within their jurisdictions. It is the purpose of this article to introduce local health agencies to some of the mechanisms available to them to investigate and address these environmental elements, "acting upon us directly and indirectly, separately and collectively," and to reinforce the local role in an intergovernmental environmental protection network.

II. MECHANISMS FOR ENFORCEMENT

Local health agencies have numerous mechanisms available to them with which to remedy pollution problems within their jurisdictions. Direct enforcement of federal pollution control laws is possible through the use of the various citizen suit provisions. Also, local health agencies can address pollution problems through the abatement of nuisances under the applicable state statutory scheme, common law, or under their own health regulations. Finally, federal cooperative agreements under CERCLA could allow local health agencies to obtain agency authority to clean up releases of hazardous substances.


1. Violations of Federal or State Laws and Regulations

Local health agencies may directly enforce violations of environmental laws and regulations, as may any affected person, under the applicable citizen suit provision. Local health agencies

18. Yet the precedent has been set for the special role of the health department in dealing with pollution problems. For example, under OHIO REV. CODE ANN. § 3709.085 (Anderson 1988 & Supp. 1990), health districts have the authority to obtain or provide services for the enforcement of air pollution laws.


22. "Citizen Suit" provisions generally provide that any person may "commence a civil action on his own behalf against any person ... who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition or order which has become effective pursuant to this chapter ...." RCRA § 7002, 42 U.S.C. § 6972 (1988). See also Clean Air Act § 304, 42 U.S.C. § 7604 (1982); FWPCA § 505, 33 U.S.C. § 1365 (1988); and CERCLA § 206, 42 U.S.C. § 9659 (1988) for similar provisions.
should be able to use these provisions given the broad definition of "person" or "citizen" under these statutes. In order to meet the requirements of the provision, a local health agency would have to show that the agency was a person "with an interest which is or may be adversely affected."

2. Imminent and Substantial Endangerment

Citizen suits unlock one of the most sweeping tools for the protection of human health and the environment. Via these suits, local health agencies have available to them the imminent and substantial endangerment provision of RCRA. This provision provides that:

[A]ny person may commence a civil action on his own behalf against any person ... who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment. (emphasis added)

This provision allows local health agencies to address potentially dangerous situations where actual harm may not be scientifically or medically demonstrable, but where the threat to health or the environment is real. The imminent and substantial endangerment provision recognizes the universal fact that the best way to protect the health and environment is to prevent the harm from occurring in the first place, and offers government and citizens the mechanism to address pollution problems before


24. RCRA, § 1004(15), 42 U.S.C. § 6903(15) (1988), defines person as "an individual, trust, firm, joint stock company, corporation, ... State, municipality, commission, political subdivision of a State, or any interstate body."


26. 42 U.S.C. § 6972(a)(1)(B) (1988). To establish a prima facie case under this section one must show "1) conditions at the site present an imminent and substantial endangerment; 2) that the endangerment stems from the handling, storage, treatment, transportation, or disposal of a solid or hazardous waste, and 3) that the defendant has contributed to or is contributing to such handling, storage, treatment, transportation or disposal." United States v. Aceto Agric. Chemicals Corp., 872 F.2d 1373, 1377 (8th Cir. 1989), (citing United States v. Bliss, 667 F. Supp. 1298, 1313 (E.D. Mo. 1987)).
those situations have actually resulted in harm to the public health, welfare or the environment.27

The benefit of using this standard is that in order to establish an imminent and substantial endangerment one need not prove actual harm. Since endangerment refers to a threatened or potential harm, the focus is on the risk of a harm occurring rather than the actual harm itself.28

Given its role in evaluating and protecting the public health, a local health agency would be uniquely situated to evaluate whether a given pollution problem rises to the level of an endangerment. In making this determination, the health agency must evaluate the nature and the degree of the risk posed by the presence of the hazardous substances, rather than the degree of harm which has actually resulted.29 It is this endangerment, that is, this risk of harm, rather than the harm itself, which must be imminent and substantial for this standard to be satisfied.30

27. See Aceto Agric., 872 F.2d at 1383, which sees the purpose of the statute as giving "broad authority to the courts to grant all relief necessary to ensure complete protection of the public health and the environment." (citing United States v. Conservation Chem. Corp., 619 F. Supp. 162, 199 (W.D. Mo. 1985)). See also Middlesex County Bd. of Chosen Freeholders v. New Jersey, 645 F. Supp. 715, 721-22 (D.N.J. 1986) (citing United States v. Price, 688 F.2d 204, 213-14 (3d Cir. 1982)), (noting that RCRA § 7003 "confer[red] upon the Courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risk posed by toxic wastes."); and United States v. Ottati & Goss Inc., 630 F. Supp. 1361, 1394 (D.N.H. 1985), aff'd in part, vacated in part on other grounds, 900 F.2d 429 (1st Cir. 1990), (citing Environmental Defense Fund v. EPA, 465 F.2d 528, 535 (D.C. Cir. 1972) where the court held "An 'imminent hazard' may be declared at any point in a chain of events which may ultimately result in harm to the public. It is not necessary that the final anticipated injury actually have occurred prior to a determination that an 'imminent hazard' exists." (quoting EPA Statement of Reasons Underlying the Registration Decision, March 18, 1971)).


Therefore, this standard allows a potentially dangerous situation to be remedied before an actual emergency situation arises.\textsuperscript{31}

Nor does a local health agency have to wait until the actual harm is merely days away before it would be entitled to injunctive relief under this provision. The actual harm could still be years away. It is only necessary that the conditions which give rise to that harm are present.\textsuperscript{32} In this respect, the imminent and substantial standard is qualified by the nature of pollution abatement actions:

Given the importance of any threat to the public health and the reality that implementation of the remedial plan might take years, "imminence" in the pollution abatement context should be considered in light of the time it may take to prepare administrative orders or moving papers to commence and complete litigation and to permit issuance, notification, implementation and enforcement of administrative or court orders to protect the public health.\textsuperscript{33}

The word substantial, in turn, does not require actual quantification of that endangerment. One need not establish "that a certain number of persons will be exposed, that 'excessive deaths' will occur, or that the water supply will be contaminated to a specific degree."\textsuperscript{34} As the court in Conservation Chemical stated,

\textsuperscript{31} B.F. Goodrich, 697 F. Supp. at 97, (citing United States v. Wade, 546 F. Supp. 785, 794 (E.D. Pa. 1982)). But see United States v. Solvent Recovery Services, 496 F. Supp. 1127, 1143 (D. Conn. 1980), in which the court stated that some of the extensive injunctive relief requested by the plaintiffs could only be granted upon proof of a "health or environmental emergency" whereas other types of injunctive relief would not need such a showing. The court held that injunctive relief is to be "carefully tailored to the need for remedial action which is ultimately established at trial."

\textsuperscript{32} B.F. Goodrich, 697 F. Supp. at 96.

\textsuperscript{33} Id. See also Solvent Recovery Serv., 496 F. Supp. at 1141, wherein the court held that under RCRA § 7003: "imminence ... applies to the nature of the threat rather than identification of the time when the endangerment initially arose. This section, therefore, may be used for events which took place at some time in the past but which continue to present a threat to the public health and environment." Id. (citing the Report on Hazardous Waste Disposal by the Subcommittee on Oversight and Investigation of the House Committee on Interstate and Foreign Commerce, 96 Cong. 1st Session (Comm. Print 1979)). But see Fishel v. Westinghouse Elec. Corp., 640 F. Supp. 442, 446 (M.D. Pa. 1986) (court held the two year-old data provided by the plaintiffs was too old to be of probative value as to whether an imminent and substantial endangerment existed in light of defendants' arguments that circumstances had changed at the site due to a cleanup having been conducted and an alternate water supply provided).

an imminent and substantial endangerment is shown where there exists:

reasonable cause for concern that someone or something may be exposed to a risk of harm by the release of a hazardous substance if remedial action is not taken, keeping in mind that protection of the public health, welfare and the environment is of primary importance. A number of factors ([for example], the quantities of hazardous substances involved, the nature and degree of their hazards, whether the potential be human or environmental exposure) may be considered in determining whether there is a reasonable cause for concern that in any given case one or two factors may be so predominant as to be determinant of the issue.35

In assessing the degree of risk, the health agencies would not have to show conclusively that a given injury would result, rather courts have held that such a risk may be assessed “from suspected, but not completely substantiated, relationships between facts, from trends among facts, from theoretical projections, from imperfect data or from probative preliminary data not yet certifiable as ‘fact’.”36

The determination of whether an imminent and substantial endangerment exists involves a case-by-case determination. In holding that certain situations are sufficient to satisfy the standard, courts have looked to such facts as: known carcinogens moving toward drinking water wells and surface water;37 dioxin

35. Id.
36. United States v. Vertac Chem. Corp., 489 F. Supp. 870, 885 (E.D. Ark. 1980), (citing Ethyl Corp. v. EPA, 541 F.2d 1, 13 (D.C. Cir. 1976)), cert. denied sub nom. E.I. DuPont de Nemours & Co. v. EPA, 426 U.S. 941 (1976). The court held that an endangerment was shown even though no absolute evidence existed that exposure to dioxin in the levels present would cause actual injury. The court considered the fact that “[t]he medical and scientific opinions and testing adduced in this case clearly lie on the frontiers of scientific knowledge,” in holding that even though the probability of harm from dioxin exposure may be low, there is a serious and dire risk from exposure to dioxin should the hypothesis advanced by the plaintiffs prove to be valid. These concepts of potential harm, whether they be assessed as ‘probabilities and consequences’ or ‘risk and harm’ necessarily must apply in its determination of whether any release should be given in cases of this kind in which proof of certainty is impossible.
37. B.F. Goodrich v. Murtha, 697 F. Supp. 89, 96-97. In finding an imminent and substantial endangerment, the court considered the following factors: 1) the soil, leachate and groundwater was contaminated by numerous hazardous substances including carcinogens; 2) the risk of migration through the groundwater toward residential wells and a nearby brook was significant, with two residential wells already being contaminated; and 3) the contaminants could potentially be ingested by humans and animals. The court found that unless remediation was performed, the contaminants would continue to move toward the wells and surface water. Id. (citing United States v. Seymour Recycling Corp.,
escaping into a nearby creek and river; and contaminated leachate reaching ground and surface water which could "kill a vertebrate in the food chain." Given its aim of eliminating the risk of harm before the actual harm materializes, the imminent and substantial endangerment provision offers an invaluable mechanism that local health agencies could use in approaching releases of contaminants threatening the public health, welfare and the environment. In fact, the imminent and substantial endangerment standard of the federal laws would be the most protective standard local health agencies or other local governmental entities could establish under their police powers.

B. Abatement of Nuisance Through State and Local Nuisance Law

Local health agencies also have access to a wealth of nuisance law, both from common and statutory law, on which they may

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618 F. Supp. 1, 4-5 (S.D. Ind. 1984) wherein the court held that the flow of contaminated groundwater toward residential wells, even without the actual contamination of those wells, was sufficient to constitute an imminent and substantial endangerment. See also, United States v. Waste Indus., Inc., 734 F.2d 159, 165-68 (4th Cir. 1984) (the court held that threats caused by continued leaking rather than active human conduct, was a sufficient basis for proceeding under this provision).

38. Vertac Chem., 489 F. Supp. at 885. The court held that evidence of a risk of harm from exposure to dioxin was sufficient to constitute an imminent and substantial endangerment. The fact that dioxin was escaping from the Vertac plant site "in quantities that, under an acceptable but unproved theory may be considered as teratogenic, mutagenic, fetotoxic and carcinogenic gives rise to reasonable medical concern over the public health." Similarly, in United States v. Northeastern Pharmaceutical and Chem. Co. (NEPPACCO), 810 F.2d 726, 731 (8th Cir. 1986) cert. denied, 484 U.S. 848 (1987), an imminent and substantial endangerment existed where dioxin was present in soils 30 inches deep with the ability to move rapidly into the groundwater even though no dioxin had been found in nearby wells. See also United States v. Outboard Marine Corp., 556 F. Supp. 54, 57 (N.D. Ill. 1982). In denying defendants motion to dismiss, the court ruled that the complaint sufficiently alleged imminent and substantial endangerment even though it merely alleged a release of large amounts of PCBs without any allegation of any particular illness or damage that such PCBs would cause. See also United States v. Aceto Agric. Chem. Corp., 872 F.2d 1373, 1383 (8th Cir. 1989), where the court held that hazardous waste in deteriorating containers, in fauna samples, in shallow groundwater and in surface soil which threatened the irrigation and drinking water supply could constitute an imminent and substantial endangerment.

39. In Dague v. City of Burlington, 30 Env't Rep. Cas. (BNA) 1815, 1824 (D. Vt., Oct. 16, 1989), the court held that even though the "leachate collection system [was] approximately 90 percent efficient, hazardous wastes are still being discharged into the soil, groundwater and surface water" and were causing an imminent and substantial endangerment. The court found that one need not establish "evidence of stress" on the surrounding environment, although the court did consider evidence of seeps in the landfill, the quality of vegetation on the area, the visual signs of stress or of animal activity.
proceed against polluting industries. Public nuisance claims exist where there is an unreasonable interference with a right common to the general public.\textsuperscript{40} Nuisances have been found to exist based on the interference with "recognized aesthetic values or established principles of conservation" caused by the contamination of waterways;\textsuperscript{41} contamination of groundwater;\textsuperscript{42} and, interference with the public comfort and threats to the public health based on odors from chicken farms,\textsuperscript{43} fur businesses,\textsuperscript{44} or hog pens.\textsuperscript{45} Nuisances have also been found to result from waste disposal practices,\textsuperscript{46} as well as from the emissions of air pollutants.\textsuperscript{47}

In determining the extent to which they can use these laws, local health agencies must consider whether the nuisance laws can be used to address situations which are also covered by pollution control laws. An additional consideration is whether compliance with those pollution control laws bars a nuisance action.\textsuperscript{48} Most local health agencies have statutory authority to abate nuisances.\textsuperscript{49} If not, most have powers to create their own regulations relating to the public health.\textsuperscript{50} This would include

\textsuperscript{40} State \textit{ex rel.} Dresser Indus., Inc. v. Ruddy, 592 S.W.2d 789, 792 (Mo. 1980) (citing Restatement (Second) of Torts § 821(B) (1977) providing that a public nuisance consists of behavior which interferes with the public health, safety, peace, comfort or convenience of the general community).

\textsuperscript{41} \textit{Dresser Indus.}, 592 S.W.2d at 793, (citing Georgia v. Tennessee Copper Co., 206 U.S. 230, 257 (1907) wherein the Court noted that "the state has an interest ... in all the earth and air within its domain").


\textsuperscript{43} Id.

\textsuperscript{44} City of Ft. Smith v. Western Hide and Fur Co., 153 Ark. 99, 100, 239 S.W. 724, 725-26 (1922).

\textsuperscript{45} Potashnick Truck Service v. City of Sikeston, 351 Mo. 505, 511-12, 173 S.W.2d 96, 99 (1943).


\textsuperscript{47} Hindman v. Texas Lime Co., 305 S.W.2d 947 (1957); see also Louisville Brick & Tile Co. v. Calmelat, 6 Ohio App. 435, 438 (1917), (private nuisance suit in which the court held that soot, cinders and offensive gas from the defendants brick burning business rendered the plaintiff's premises "uncomfortable for habitation"); E. Rauh & Sons v. Fertilizer Co. v. Shreffler, 139 F.2d 38, 39 (6th Cir. 1943) (nuisance existed from gaseous emissions from defendant's fertilizer plant).


\textsuperscript{49} In Ohio, for example, see \textit{Ohio Rev. Code Ann.} §§ 3709.20-21 (Anderson 1988); see also infra note 50.

\textsuperscript{50} In Ohio, for example, § 3709.20 of the Ohio Revised Code provides that "the board of health of a city health district may make such orders and regulations as are necessary for its own government, for the public health, the prevention or restriction of disease,
abating nuisances caused by pollution. For example, Ohio law bestows upon local boards of health the duty to abate nuisances within their jurisdiction. Since the term nuisance is seldom specifically defined in these statutory provisions, health agencies may look to general nuisance statutes and the specific state environmental laws to provide definitions of nuisance which could then be used to abate pollution problems.

and the prevention, abatement or suppression of nuisances.” Ohio Rev. Code Ann. § 3709.20 (Anderson 1988). If under various state laws, local health agencies cannot enact their own regulations empowering them to investigate and abate nuisances, they may work in conjunction with local units of governments which do have this authority. While health agencies are generally creatures of statute in Ohio and therefore limited in their authority to that which is granted them by the legislature, municipalities are granted the authority to exercise police powers in the Ohio Constitution. Ohio Const. art. XVIII § 3. Under this section, however, municipalities can only pass those regulations not in conflict with the general laws of the state. Fondessy Enterprise, Inc. v. Oregon, 23 Ohio St. 3d 213, 215, 492 N.E.2d 797, 801 (1986). A “conflict” occurs if the ordinance “permits or licenses that which the statute forbids and prohibits or vice versa.” Id. Therefore, while the legislature cannot nullify the municipalities’ powers, it can limit those powers. Id. Here, the Ohio Supreme Court found that Ohio’s Hazardous Waste Statute, did allow room for political subdivisions to impose additional reporting requirements on local hazardous waste facilities, although, as the court previously held, political subdivisions cannot completely ban the location of facilities through zoning or permitting requirements. Clermont Envtl. Reclamation Co. v. Wiederland, 2 Ohio St. 3d 44, 49, 442 N.E.2d 1278, 1282 (1982). The applicable statutory section provides that:

No political subdivision of this state shall require any additional zoning or other approval, consent, permit, certificate, or other condition for the construction or operation of a hazardous waste facility installation and operation permit issued pursuant to this chapter, nor shall any political subdivision adopt or enforce any law, ordinance, or regulation that in any way alters, impairs, or limits the authority granted in the permit.


51. Ohio Revised Code § 3707.01 provides that: “The board of health of a city or general health district shall abate and remove all nuisances within its jurisdiction....” Ohio Rev. Code Ann. § 3707.01 (Anderson 1988). The term nuisance is not specifically defined in this section, although it does provide that in addition to its other abilities: [w]hen a building, erection, excavation, premise, business, pursuit, matter, or thing, or the sewerage, drainage, plumbing, or ventilation thereof is, in the opinion of the board, in a condition dangerous to life or health, ... the board may declare it a public nuisance and order it to be removed, abated, suspended, altered or otherwise improved or purified by the other ....

Id.

52. Ohio Revised Code § 3767.13, Ohio’s general nuisance statute, provides:

(A) No person shall erect, continue, use, or maintain a building, structure, or place for the exercise of a trade, employment or business ... which, by occasioning noxious exhalations or noisome or offensive smells, becomes injurious to the health, comfort, or property of individuals or of the public.

(B) No person shall cause or allow offal, filth, or noisome substances to be collected
In determining whether a local health agency may use its authority under state or local statutory or common law to abate nuisances, one must first address the question of whether state or local nuisance law has been preempted by the federal or state pollution control statutes. Courts have repeatedly held that the various federal pollution control laws do not preempt state and local laws, including common law.

These federal laws contain two types of "savings clauses" preserving actions based on state and local laws, including the common law of nuisance. The first allows persons to use other remedies besides the citizen's suit provision to address pollution problems. The second specifically retains the right of states and political subdivisions rights to adopt laws and regulations more stringent than the federal counterpart in order to control pollution within its boundaries. This includes greater common law.
as well as greater statutory restrictions. Despite the comprehensive nature of the pollution control statutes, the courts have looked to these savings clauses, indicating Congress’ specific intent not to preempt the field of environmental regulations.

A similar analysis must be made of state environmental laws to determine whether they have preempted a political subdivision's ability to enact more stringent regulations or enforce state common law of nuisance. As with the federal environmental laws, many state environmental laws contain “savings clauses” which preserve all other remedies. In Ohio, for example, the hazardous waste law contains a savings provision which states:

This chapter does not abridge rights of action or remedies in equity, under common law, or as provided by statute or prevent the state or any municipal corporation or person in the exercise of their rights and equity, under common law, or as provided by statute to suppress nuisances or to abate or prevent pollution.

limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this Act, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this Act.

RCRA provides that:

Upon the effective date of regulations under this subchapter, no State or political subdivision may impose any requirements less stringent than those authorized under this subchapter respecting the same matter as governed by such regulations, except that if application of a regulation with respect to any matter under this subchapter is postponed or enjoined by the action of any court, no State or political subdivision shall be prohibited from acting with respect to the same aspect of such matter until such time as such regulation takes effect. Nothing in this Chapter shall be construed to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by such regulations. (emphasis added).


58. See, Milwaukee II, 451 U.S. at 328.


60. Ohio Rev. Code Ann. § 3734.30 (Anderson 1988). The extent to which this provision
Other Ohio environmental statutes contain similar savings clauses, some which specifically refer to one's right to maintain nuisance actions and others which do not. Similar savings clauses in other state's statutes have been interpreted as retaining one's right to proceed under the common law of nuisance. The more
difficult question is the breadth of these savings clauses and whether compliance with federal or state pollution control laws and regulations bars nuisance actions. Many courts have found that saving clauses which allow the imposition of more stringent standards include those standards imposed by nuisance law, whether it be statutory or common law,63 thereby rendering compliance with the environmental statutes insufficient to preclude a nuisance action.64 Under this theory, compliance would merely be evidence for a jury to consider in determining whether a nuisance exists.65

On the other hand, other courts reason that since the legislature has deemed certain activity to be lawful, that determination should not be disturbed by a court.66 In Toledo Disposal Co. v. State,67 the Ohio Supreme Court established the principle that "an act which has been authorized by the law cannot be a public nuisance, and ... the state cannot prosecute a nuisance which it has authorized." This doctrine, however, articulated before the savings clauses became part of the statutory scheme, might be abridged by the savings clauses. Under a broad reading of the savings clauses, the mere act of compliance does not guarantee that a nuisance will not be created, nor does it destroy one's municipal corporations only have those powers specifically granted to it by the legislature. Here, the city's authority was clear since the state's statutory scheme specifically empowered a municipality to abate public nuisances. (W. Va. Code § 8-12-5(23a) (1989)). Schenectady Sharon Steel, 334 S.E.2d at 625. Similar analyses should be performed to ensure that a given health agency has the authority to pass regulations allowing it to investigate and abate nuisances.

63. See Milwaukee II, 451 U.S. at 304.
66. See New England Legal Found. v. Costle, 666 F.2d 30, 32-33 (2d Cir. 1981). Here the court refused to enjoin activity based on the federal common law of nuisance where the USEPA had approved the conduct in question. The court reasoned that Federal courts could not "write their own ticket" under federal common law when the defendants had already received permits for the activity under the federal statutory scheme.

While arguably the same reasoning would apply to state common law nuisance action, the court in Neal, citing Milwaukee II, distinguished New England, as applying only to the federal courts' ability to "fashion federal equitable remedies," based on federal common law, to enjoin activity approved by a federal agency. However, Neal involved the application of state, not the preempted federal, common law and the nuisance action was allowed since the federal statutes specifically allowed more stringent state laws.

67. 89 Ohio St. 230, 106 N.E. 6 (1914); see also Heckler v. State, 111 Ohio St. 168, 174, 144 N.E. 700, 702 (1924).
right to enjoin that act.\textsuperscript{68} A more limited reading of the savings clause, however, would be to allow a nuisance suit only if the nuisance is caused by a violation of the law.

In applying savings clauses, some courts have decided that mere compliance with environmental regulations does not preclude a nuisance action. The courts in Reedley and Venuto v. Owens-Corning Fiberglass Corp.\textsuperscript{69} ruled that statutory language stating that “[n]othing which is done or maintained under the express authority of a statute can be deemed a nuisance” did not preclude a nuisance action for permitted activity.\textsuperscript{70} The Court in Reedley held that such a provision did not “empower (agencies) to issue a permit authorizing any person to create a nuisance or continue a nuisance.” The mere fact a business is lawful does not preclude the application of nuisance principles.\textsuperscript{71}

\begin{itemize}
\item \textsuperscript{68} For example, while the savings clause in chapter 3734 of the Ohio Revised Code makes it clear that facilities under this statute would still be subject to nuisance provisions, it does not clarify whether this is so only if they are in violation of the provisions of chapter 3734 or not.
\item \textsuperscript{70} Reedley, 226 P. at 409; Venuto, 22 Cal. App. 3d at 128, 99 Cal. Rptr. at 358. The court in Venuto held that this doctrine only applied to acts specifically authorized by statute. To be applicable, the legislature must be said to have contemplated the very doing of the act which resulted in the injury. Here, the court found that the legislature showed no intention that the environmental regulations preempted the area of air pollution control and without a specific provision indicating that compliance with the regulations precluded an action for nuisance, such an action was not precluded.
\item \textsuperscript{71} Reedley, 226 P. at 409. See also Neal, 318 S.E.2d at 23, where the court concluded
\end{itemize}
Often, language in the permits themselves provide a basis for concluding that all nuisance laws must be abided by in addition to the other requirements of the permit. Permit provisions which require compliance with all other laws and regulations may be interpreted to include all nuisance laws and regulations.\(^2\) In Ohio, for example, the air pollution control laws make implicit in every term of the permit the condition that said source shall not operate to cause a nuisance.

The Ohio Administrative Code defines a permit by providing: "All requirements of statutes or regulations applicable to the permittee or licensee shall be conditions of such permit, license, or variance although not set forth on the permit..."\(^3\) This necessarily includes the regulatory requirement that no air source operate as a nuisance.\(^4\) Therefore, all permits necessarily contain the condition that they shall not operate as an air nuisance. This argument is further enhanced by other provisions which state: "Possession of a permit to operate shall not relieve any person of the responsibility continuously to comply with applicable emissions limitations and other provisions of applicable air pollution control law."\(^5\) This, too, would include Ohio Administrative Code section 3745-15-07.\(^6\)

that a "nuisance is not excused by the fact it arises from a lawful business." As the Supreme Court articulated in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926): "A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard." Village of Euclid, 272 U.S. at 388.

\(^2\) See Biggane v. City of Lackawanna, 365 N.Y.S.2d 107, 108 (N.Y. Sup. Ct. 1974). The court held that an action for an injunction was not barred merely because the defendant had a National Pollutant Discharge Elimination System (NPDES) permit authorizing discharges into a creek. The suit sought to enjoin the defendant's discharge of sanitary sewage waste into a creek without secondary treatment as required by New York statutes. The court held that the NPDES regulation and the secondary treatment regulation were "distinct and separate." Also, the permit itself contained language that: "Nothing in this permit shall be construed to preclude the institution of any legal action nor relieve the permittee from any responsibilities, liabilities, or penalties established pursuant to any applicable State law or regulation under authority preserved... by Section 510 [sic] of the Act."

\(^3\) Ohio Administrative Code § 3745-47-03 (1988).

\(^4\) Ohio Administrative Code § 3745-15-07 (1988) provides:

the emission or escape into the open air from any source or sources whatsoever of smoke, ash, dust, dirt, grime, acids, fumes, gases, vapors, odors, or any other substances or combination of substances in such manner or such amounts to endanger the health, safety or welfare of the public or cause unreasonable injury or damage to property is hereby found and declared to be a public nuisance.

\(^5\) Ohio Administrative Code § 3745-35-02(g) (1988).

\(^6\) Under the Ohio regulatory scheme, Administrative Code § 3745-35-03 (Anderson
C. CERCLA § 104(d): Federal, State, and Local Cooperative Agreements

CERCLA empowers the federal government either to use superfund money to clean up a contaminated site before it proceeds against the responsible party for reimbursement of costs, or to force responsible parties to remediate a contaminated site.\footnote{The threat of the use of these provisions has caused a substantial number of “voluntary” cleanups. Local health agencies could obtain the authority to carry out such action by entering into cooperative agreements with the United States Environmental Protection Agency\footnote{and the appropriate state environmental agency.\footnote{To enter into a cooperative agreement, the local health agency must qualify as a political subdivision under the laws of that particular state.\footnote{Cooperative agreements may be used to perform either pre-remedial action,\footnote{remedial or removal action\footnote{or}} or}}\footnote{Under the Ohio regulatory scheme, Administrative Code § 3745-35-03 (Anderson 1988) the Director may revoke a permit if he finds that the limits therein create a nuisance in violation of § 3745.35-02(F)(1) of the Ohio Administrative Code. OHIO ADMIN. CODE § 3745.35-02(F)(1) (1988).}77.}

To enter into a cooperative agreement, the local health agency must qualify as a political subdivision under the laws of that particular state.\footnote{78. CERCLA § 104(d)(1)(A) provides: A State or political subdivision thereof ... may apply to the President to carry out actions authorized in this section. If the President determines that the State or political subdivision ... has the capability to carry out any or all of such actions in accordance with the criteria and priorities established pursuant to section 9605(a)(8) of this title and to carry out related enforcement actions, the President may enter into a contract or cooperative agreement with the State or political subdivision ... to carry out such actions. ... 42 U.S.C. § 9604(d)(1)(A) (1988).}79. Cooperative agreements may be used to perform either pre-remedial action,\footnote{80. See 40 C.F.R. § 35.615(a)(31) (1990); Political Subdivision at 3.} remedial or removal action\footnote{81. While the USEPA allows political subdvisions to apply for preremedial cooperative agreements, its general position is that the administrative burden of obtaining such agreements is too great to justify such an agreement. 55 Fed. Reg. 22994, 23000 (1990). Under the regulations, however, if the USEPA Award Officer finds that it would be more effective and efficient to allow the political subdivision to perform the pre-remedial activities (preliminary assessment/site investigation) then a cooperative agreement may be formed. 55 Fed. Reg. 22994, 23014 (1990) (to be codified at 40 C.F.R. § 35.6055).} or
enforcement action.\textsuperscript{83} If a health agency is deemed by the state and the USEPA to meet the regulatory requirements for carrying out the proposed activity, the three may enter into an agreement authorizing the local health agency to conduct the preliminary investigation, manage the site cleanup, or enforce the remedial action, depending on the form of cooperative agreement.\textsuperscript{84} The local health agency would then have at its disposal the resources of the federal and state governments.

Another option for a local health agency is to enter into a Support Agency Cooperative Agreement with the state and the USEPA. This allows a health agency to be involved in the oversight of the remedial action without actually leading that action.\textsuperscript{85} For example, a health agency could participate in the negotiations between PRPs and the USEPA regarding land within its jurisdiction.\textsuperscript{86}

To qualify for a cooperative agreement, a local health agency must have the means by which to manage the site. As part of its inquiry, the USEPA and the state consider whether: 1) the health agency has experience in performing the work set forth in the agreement; 2) the health agency-led clean up is more economical or efficient than one led by the State or USEPA; 3) the health agency has the existing authority to conduct a remedial action; 4) the health agency has the ability to administer federal funds; 5) the health agency has the ability to coordinate other necessary local and state agencies; and whether 6) the health agency has the ability to comply with the federal regulations.\textsuperscript{87}

\textsuperscript{83} To qualify for an enforcement cooperative agreement, a local health agency must show that it has the statutory "authority, jurisdiction, and the necessary administrative capabilities to take an enforcement action to compel PRP cleanup of the site, or recovery of the cleanup costs." 55 Fed. Reg. 22994, 23010 (1990) (to be codified at 40 C.F.R. § 35.6145). A local health agency may use its ability to promulgate its own regulations in order to satisfy any requirement the state or federal EPA may have. (See supra note 50).

\textsuperscript{84} 55 Fed. Reg. 22994, 23012 (1990) (to be codified at 40 C.F.R. § 35.6115(a)). Such agreements may take the form of a three-party contract stating the role of each party or a two-party contract between the State and the USEPA with a "pass through" provision to a political subdivision. Political Subdivision, at 4.


\textsuperscript{87} Political Subdivision at 5.
While many health agencies may need to modify their organizations in order to meet these requirements, many of the concerns should be addressed by the agencies' capacity to carry out their mandate to protect public health and their authority to investigate and abate situations which threaten the public health.

III. INFORMATION GATHERING: THE NEEDED LINK BETWEEN THE RIGHT TO ENFORCE AND THE ABILITY TO ENFORCE

Information regarding the releases of hazardous substances in a community and the nature and quantity of contaminants present in a given location is vital in evaluating pollution problems. The various environmental laws offer many mechanisms through which the enforcing entity can obtain information regarding the activities of the polluting company.

These laws contain numerous reporting requirements under which entities must identify such things as: 1) releases of hazardous substances into the environment; 2) the existence of areas in which hazardous substances are or have come to be placed, including the quantity and identity of the hazardous substance; 3) any activity involving the generation, transportation, treatment, storage or disposal of hazardous waste; 4) pro-

88. CERCLA, § 103(a), 42 U.S.C. § 9603(a) (1982). Owners and operators of facilities must report releases of hazardous substances over reportable quantities to the National Response Center.
89. CERCLA § 103(c) provides:
any person who owns or operates or who at the time of disposal owned or operated, or who accepted hazardous substances for transport and selected, a facility at which hazardous substances are or have been stored, treated, or disposed of shall, ... notify the Administrator of the Environmental Protection Agency of the existence of such facility, specifying the amount and type of any hazardous substance to be found there, and any known, suspected, or likely releases of such substances from such facility....
90. RCRA § 3010(a) mandates that within 90 days of its listing as a hazardous waste:
[A]ny person generating or transporting such substance or owning or operating a facility for treatment, storage, or disposal of such substance shall file with the Administrator (or with states with authorized hazardous waste permit programs under § 6926 of this title) a notification stating the location and general description of such activity and the identified or listed hazardous wastes handled by such person.
jected public exposure to releases of hazardous waste from a proposed landfill of surface impoundment.\textsuperscript{91}

Additionally, these environmental laws often give the USEPA and the state the authority to enter and investigate the regulated entities.\textsuperscript{92} This authority can be beneficial to local governmental agencies, such as health agencies, which are working in conjunction with the other levels of government. In fact, CERCLA specifically provides: “Any duly designated officer, employee, or representative of a state or political subdivision under a contract or cooperative agreement under subsection \([104(d)(1)]\) is also authorized to [take action under CERCLA's information gathering provisions.]”\textsuperscript{93}

\textsuperscript{91} RCRA, \$ 3019a(a) provides that:

\[E\]ach application for a final determination regarding a permit ... for a landfill or surface impoundment shall be accompanied by information reasonably ascertainable by the owner or operator of the potential for the public to be exposed to hazardous wastes or hazardous constituents through releases related to the unit. At a minimum, such information must address:

(1) reasonably foreseeable potential releases from both normal operations and accidents at the unit, including releases associated with transportation to or from the unit;

(2) the potential pathways of human exposure to hazardous wastes or constituents resulting from releases described under paragraph (1); and

(3) the potential magnitude and nature of the human exposure resulting from such releases.

\[E\] 42 U.S.C. \$ 6939a(a) (1988).

\textsuperscript{92} RCRA \$ 3007 provides that any designated officer, employee, or representative of the USEPA or of a state having an authorized hazardous waste program is authorized “(1) to enter at reasonable times any establishment or other place where hazardous wastes are or have been generated, stored, treated, disposed of or transported from; (2) to inspect and obtain samples from any person of any such waste and samples of any containers or labeling for such wastes” for the purposes of “developing or assisting in the development of any regulation or enforcing the provisions of this Chapter. . . .” 42 U.S.C. \$ 6927(a) (1988). Any such representative also has access to all records relating to such wastes. See also CERCLA \$ 104(e), 42 U.S.C. \$ 9604(e) (1988).

\textsuperscript{93} 42 U.S.C. \$ 9604(e)(1) (1988). Specifically, such representatives are authorized to take action under CERCLA \$\$ 104(e)(2), (3), and (4)(A) which provide, respectively, that any such representative:

(2) [M]ay require any person who has or may have information to any of the following to furnish, . . . upon reasonable notice, information or documents relating to such matter.

(A) The identification, nature, and quantity of materials which have been or are generated, treated, stored, . . . disposed of . . . or transported to . . . a facility.

(B) The nature or extent of a release or threatened release of a hazardous substance or pollutant or contaminant at or from a vessel or facility.

(3) [E]nter at reasonable times any of the following:

(A) Any . . . place or property where any hazardous substance or pollutant for
Even more comprehensive reporting requirements for releases of hazardous substances into the environment exist with the passage of the Emergency Planning and Community Right-to-Know law. Under this law, companies must provide to local authorities: 1) reports of releases of extremely hazardous substances over a given quantity, including the identity of the substance, the time, duration, and quantity of the release and the chronic and acute health effects of the hazardous constituent; 2) material safety data sheets or lists of hazardous chemicals used at the company over threshold amounts, including the quantities and location of such hazardous chemicals both individually and by category of health and physical hazards; and, 3) annually, the total release, permitted or unpermitted, of all listed toxic chemicals, over threshold amounts, from a facility into each environmental medium.

While these reporting requirements contain confidentiality provisions which enable companies to withhold from the public the contaminant may be or has been generated, stored, treated, disposed of or transported from.

(B) Any place or property from which or to which a hazardous substance has been or may have been released.

(C) Any place or property where such release is or may be threatened.

(D) Any place or property where entry is needed to determine the need for response or the appropriate response or to effectuate a response action under this subchapter.

(4A) Inspect and obtain samples from any place or property referred to in the above paragraph or from any location of any suspected hazardous substance or pollutant or contaminant....


The authority to enter onto such property, however "may be exercised only if there is a reasonable basis to believe there may be a release or threat of release of a hazardous substance or pollutant or contaminant." 42 U.S.C. § 9604(e)(1) (1988).


97. EPCRA § 313(g)(1)(C) provides:

[O]wners or operators of facilities must provide, for each hazardous chemical, information regarding the use of such chemical at the facility; the maximum amounts of each chemical present at the facility at any given time; the waste treatment or disposal methods for each waste stream, including the treatment efficiency and, finally, the annual quantity of the chemical which enters each environmental medium.

specific name of the chemical released if it is a "trade secret,"98 local health agencies have the unique ability to obtain such information otherwise protected from disclosure under these provisions.99

IV. CONCLUSION

The provisions of law discussed herein provide an array of options for addressing pollution problems at the local level. Not only can these laws be directly used by local government, but more stringent requirements can be enforced as well. For example, existing nuisance provisions can be applied against polluting entities, or the broad reach of the imminent and substantial endangerment provisions and the fact finding authority of the federal and state governments can be copied at the local level through the promulgation of like regulations by either the local health agency or other local governmental entities. Given the supreme role of health in the creation of these environmental laws, local health agencies could and should strive for a "speaking role" in the environmental protection network so that health considerations will play a direct part in the actual implementation and enforcement of pollution laws.

PRIVATE COST RECOVERY UNDER CERCLA FOR HAZARDOUS SUBSTANCE CLEANUP: A LAST RESORT

A. Christian Worrell, III and Joseph B. Jaap*

I. INTRODUCTION

The Comprehensive Environmental Response Compensation and Liability Act1 ("CERCLA"), enacted in 1980, provides a comprehensive mechanism for responding to releases of hazardous substances.2 Congress authorized the President to order those responsible for such releases to clean them up or, alternatively, to undertake such cleanup and recover costs from those responsible. This authority has been delegated to the United States Environmental Protection Agency ("EPA").

CERCLA also provides a means by which a purchaser who has acquired a facility where hazardous substances have been disposed to recover its costs from the predecessor in possession or title who was responsible for such disposal. In such a case, the purchaser may not have performed a pre-acquisition inspection of the facility, or the inspection may have been inadequate. There may have been misrepresentations made by the seller regarding the condition of the facility or the seller's activities at the facility. In certain instances, the purchaser may have made an informed decision to proceed with the purchase of suspect property due to other business considerations. Irrespective of the specific facts, a CERCLA private cost recovery action can provide the means for a purchaser to recover its costs of cleaning up after a former owner's hazardous substance disposal activities.

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2. Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887, 890 (9th Cir. 1986).
Not all cases of private cost recovery involve purchasers of a contaminated facility. An owner may have had its facility contaminated by the activities of adjoining operations. In one case, an emergency response contractor who had been retained by a company that had experienced a release of a hazardous substance, used a CERCLA cost recovery action in an attempt to collect its fees when the owner of the facility refused to pay cleanup costs.\(^3\)

The basis for, and elements of, a CERCLA private cost recovery action are addressed below. Where possible, some suggestions and practical considerations are presented.

II. STATUTORY AUTHORITY FOR PRIVATE COST RECOVERY UNDER CERCLA

CERCLA assigns liability for the costs of responding to releases of hazardous substances, allowing a private party to recover those costs as set forth in 42 U.S.C. section 9607:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section . . .

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, . . . from which there is a release, or threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for . . .

(A) all costs of removal or remedial action incurred by the United States . . . not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; . . . .\(^4\)

The private cost recovery action stands in contrast to other private actions authorized under CERCLA: (i) to enforce CERCLA requirements where the government has failed to do so;\(^5\) (ii) to obtain contribution from other parties found to be liable under CERCLA;\(^6\) or (iii) to make a claim against the Superfund\(^7\) for cleanup costs.\(^8\)

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6. Id. § 9613(f) (1988).
PRIVATE COST RECOVERY

The liability established by section 9607(a) has been held to be strict, absent one of the three defenses enumerated in section 9607(b). Liability is also joint and several. Federal district courts are given exclusive original jurisdiction, and venue is proper in the "district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office." A private cost recovery action must be brought within three years after completion of the initial actions to remove the hazardous substances and within six years after commencing more comprehensive remedial actions to clean up contaminated areas of the facility, such as soil and groundwater.

III. ELEMENTS OF A PRIVATE COST RECOVERY ACTION

The provisions of section 9607(a) are both relatively simple and somewhat imprecise. Courts have repeatedly struggled with CERCLA's lack of clarity. However, a five part test for establishing a prima facie case for private cost recovery has been distilled from section 9607(a). First, the defendant must be a potentially responsible party ("PRP"). PRPs are categorized as follows: (i) the current owner or operator of the facility; (ii) the owner or operator of the facility at the time of the disposal; (iii) a person who owned hazardous substances and who arranged for their disposal or treatment at, or transportation to, the facility from which there was a release or threatened release of hazardous substances; or (iv) a person who accepted hazardous substances for transportation and selected the facility for disposal or treatment, and from which facility there was a release or threatened release of hazardous substances. The second element is establishing that a release or threatened release of a hazardous substance resulted from the disposal or treatment of that hazardous substance. Third, the release or threatened release must have

11. Id.
12. Id. at § 9613(g)(2) (1988).
15. Id.
caused the plaintiff to incur response costs.\footnote{42 U.S.C. § 9607(a)(4)(B) (1988).} Fourth, the costs must be shown to be necessary costs of response.\footnote{Id.} Finally, the response must have been consistent with the National Oil and Hazardous Substance Pollution Contingency Plan ("National Contingency Plan" or "NCP")\footnote{The National Oil and Hazardous Substance Pollution Contingency Plan, commonly referred to as the National Contingency Plan, has been promulgated by the U.S. Environmental Protection Agency at 40 C.F.R. Part 300 to provide guidance on the procedures to be followed in conducting cleanup activities that conform to CERCLA requirements.} in order to allow recovery.\footnote{42 U.S.C § 9607(a)(4)(B).}

A. Is the Defendant a PRP?

The threshold issue in a private cost recovery action is to determine whether the defendant is a PRP, that is, whether the defendant falls into one of the four categories enumerated above. The current owner or operator of the contaminated facility is the most likely plaintiff in a cost recovery action, but may be the defendant if the plaintiff is an adjoining property owner whose land has been contaminated. The most likely defendants in a typical cost recovery action are the owner and/or operator of the facility at the time the hazardous substances were disposed, that is, the plaintiff's predecessor in possession or title. The other two categories of PRPs are more likely to be encountered in actions brought by the EPA for the cleanup of sites listed on the National Priorities List; these are persons who arranged for the transportation of the hazardous substances (that is, waste generators) and those who selected the disposal facility and transported hazardous substances to that facility.

Courts have applied CERCLA liability for cleanup costs liberally in cases brought by the EPA. These cases illustrate the range of potential defendants who might be pursued successfully in private cost recovery actions.

Lessees of contaminated property have been held to be liable both as owners and operators for contamination they cause.\footnote{See, e.g., Caldwell v. Gurley Refining Co., 755 F.2d 645, 652 (8th Cir. 1985) (a lessee may be considered an owner); United States v. South Carolina Recycling and Disposal, Inc., 653 F. Supp. 984, 1003 (D.S.C. 1984) (a lessee may be considered an operator); BCW Assoc. v. Occidental Chem. Corp., No. 86-5947 (E.D. Pa. Sept. 29, 1988) (both lessee and owner held to be liable for contamination created by prior occupants).}
Lessors can face liability both as owners of contaminated facilities and for contamination created by their lessees.21

In certain circumstances, corporate officers may be personally liable for cleanup costs. An officer may be deemed to be an operator of a facility, and therefore personally liable, if he or she has knowledge and control of day-to-day operations of that facility.22 Shareholders may also be liable for their company's cleanup costs. Where shareholder liability is found, it is generally the shareholder's close involvement in day-to-day operations that permits a court to determine that the shareholder is an operator of the company.23 However, even shareholders of a corporation dissolved years earlier who obtained their shares by inheritance are at risk under a trust fund theory.24 Parent corporations have been subject to the same analysis as individual shareholders, that is, an examination of whether the parent exercises control over the day-to-day operations of the subsidiary.25 In certain circumstances, an asset purchaser may be liable for releases created by its seller.26

CERCLA provides that a lender is generally exempt from liability as an owner if the lender, "without participating in the management of a ... facility, holds indicia of ownership primarily


26. Traditional tests for successor liability have been applied: (i) the asset purchaser expressly or impliedly assumed the seller's liabilities; (ii) the transaction was fraudulent; (iii) there was a de facto merger, see Philadelphia Elec. Co. v. Hercules, Inc., 762 F.2d 303, 310 (3rd Cir. 1985), cert. denied, 474 U.S. 980 (1985); and (iv) the purchaser is a continuation of seller, see Philadelphia Elec., 762 F.2d at 310; but see Anspec Co. v. Johnson Controls Inc., 734 F. Supp. 793, 795-96, 30 Env't. Rep. Cas. (BNA) 1672, 1673-74 (E.D. Mich. 1989) (successor into which the former owner/PRP ultimately merged was held not liable for cleanup costs).
to protect his security interest in the ... facility." 27 However, if the lender takes part in day-to-day operations at a facility (for example, requires changes in manufacturing processes) or closely monitors and approves decisions by operating personnel, it may be liable as an operator. 28 If the lender forecloses and takes title to a contaminated site, it may be liable as an owner. 29 In a recent decision, the Eleventh Circuit held that a secured creditor could be liable if its involvement with the management of a facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose. 30

Trustees are generally not personally liable under CERCLA solely on the basis of holding title as a fiduciary. 31 However, a trustee may have other interests in the trust estate which potentially could lead to a liability for clean-up costs.

In a typical case, the private cost recovery plaintiff must establish that the defendant was the owner or operator of the facility at the time of disposal. This can be established by a variety of techniques. Analytical results from testing of contaminated groundwater, surface water, or soil found at the facility can be compared to materials known to be used by the defendant. Other possible sources can be ruled out using techniques which define migration pathways such as up gradient and down gradient groundwater and surface water monitoring, or by establishing

30. United States v. Fleet Factors, 901 F.2d 1550 (11th Cir. 1990), but see East Asiatic Co. v. Port of St. Helens (In re Bergsoe Metal Corp.), 910 F.2d 886, 872 (9th Cir. 1990).
31. But in United States v. Burns, No. C-88-94-L (D.N.H., Sept. 12, 1988) (LEXIS, Env't. library, Dist. file), the trustee of a trust which owned contaminated property was named as a defendant. His motion to dismiss was denied. However, the court did not rule on whether the trustee was personally liable over and above the amount of the trust estate. Additionally, the trustee of the inter vivos trust was also a beneficiary. Another case, In re APCO Oil Corp., No. 5718 (Del. Ch. December 14, 1989), addresses the issue of whether the trustee of a liquidating trust could face personal liability under CERCLA and the Federal Priority Act, 31 U.S.C. § 3713(b) (1988). The trustee had refused to distribute income of the trust after the trustee had been advised that a site formerly owned by the liquidated corporation might be a candidate for CERCLA cleanup and that the trust could be a PRP. The court held that the trustee would not face personal liability in that the government had not yet made a claim against the trust. Further, the court stated that distribution of trust income to the beneficiaries did not constitute payment of a debt under the Federal Priorities Act.
PRIVATE COST RECOVERY

background concentrations of soil constituents. Through discovery, the plaintiff can gain a thorough knowledge of the defendant's operations. Since it may be tactically advantageous to name individual officers and shareholders or parent corporations as defendants, a knowledge of their duties and responsibilities should be gained through interviews and other discovery.

Interviews with former employees and neighbors can further delineate the scope of activities. Searches of information filed with the government by the defendant, such as Community Right-to-Know\textsuperscript{32} filings and Occupational Safety and Health Administration ("OSHA") reports, can provide additional information. A review of EPA and other regulatory agency files, including inspection reports, enforcement actions, and permit applications, can also provide useful information. Finally, an environmental consultant can be used to interpret information gathered in discovery and analyze the history of the site through the use of historic aerial photographs, insurance maps, newspaper files and other historical sources. The consultant can be useful in helping to define data gaps to be filled in the course of discovery.

\textbf{B. Was There a Release or Threatened Release of a Hazardous Substance?}

In order to establish that there was a release or threatened release of a hazardous substance, the plaintiff must first determine if the contaminants found at the facility are hazardous substances. CERCLA defines a "hazardous substance" by reference to numerous other federal statutes.\textsuperscript{33} However, as expressly provided by CERCLA, the term "hazardous substance" does not include petroleum, crude oil or any fraction thereof which is not

\begin{footnotesize}

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otherwise specifically listed or designated as a hazardous substance. Further, the term "hazardous substance" does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas). This so-called "petroleum exclusion" severely limits the application of CERCLA in a variety of circumstances. Thus, even though petroleum products such as gasoline contain hazardous substances, for example, benzene, toluene, xylene and possibly lead, the petroleum exclusion has been held to bar use of CERCLA where there was a release of gasoline not otherwise mixed with hazardous substances.

If hazardous substances are found to be involved, then it must be established that a "disposal" occurred. "Disposal" is defined as

the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters including ground waters.

This definition has been applied liberally to a variety of practices. One example of disposal is when hazardous substances have been released inside a building, contaminating the concrete floor or settling as dust. The release of a single asbestos fiber from a waste pile has been held to constitute disposal. However, the sale and placement of asbestos building material within a structure has not been considered disposal. CERCLA expressly pro-

34. 42 U.S.C. § 9601(14).
35. Id.
hibits the EPA from responding (in most instances) to releases of materials which have been integrated into the structure of a building, and which result in exposure inside the building.\footnote{41}

Once it has been established that “disposal” has occurred, the plaintiff must establish that the disposed hazardous substance has caused a “release or threatened release.” A “release” is defined as any “spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment”\footnote{42} and includes “the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance, pollutant or contaminant.”\footnote{43}

What constitutes a “threatened release” is not so easily defined and has been the subject of repeated judicial interpretation. Corroding tanks, lack of expertise in handling hazardous wastes, and even the failure to license a facility have all been held to constitute a threatened release.\footnote{44} The presence of transformers containing polychlorinated biphenyls (“PCBs”) within a facility may constitute a threatened release.\footnote{45} Evidence of the presence of hazardous substances at a facility, combined with evidence of the unwillingness of any party to assert control over the substances, can amount to a threat of release.\footnote{46}

C. Has the Plaintiff Incurred the Costs of Response as a Result of the Release

The next element which must be established relates to the costs incurred by the plaintiff in responding to the hazardous substances. CERCLA divides the actions taken in response to a release of a hazardous substance into two broad categories. The first category of response actions is “removal.” Removal is the initial response to mitigate the immediate effects of the release by removing the hazardous substances to an authorized disposal location. The terms “remove” and “removal” are defined as the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event

\footnote{43}{43. Id.}
\footnote{44}{New York v. Shore Realty Corp., 759 F.2d 1032, 1045 (2d Cir. 1985).}
of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals. . . .

The second category of response actions, "remedial actions," consists primarily of longer term steps necessary to permanently correct the effects of the release and to reduce the impact on the environment. The terms "remedy" and "remedial action" are defined as

those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, on site treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. . . .

A broad range of activities may qualify as response actions, either as removal or remedial actions. In addition to activities such as investigation, removal and off-site disposal of contaminated materials, on-site treatment systems, etc., response costs may include medical monitoring, but not medical treatment. A
party may recover environmental monitoring, assessment, and evaluation costs even where a clean-up has not yet begun.\textsuperscript{50} However, most courts have refused to allow attorney's fees as response costs.\textsuperscript{51} Establishing that response costs were incurred should be a straightforward record keeping or accounting matter. The issue of causation is linked with the issues of necessity and consistency with the NCP, as explained below. However, as a general rule, the most prudent course is to keep cleanup costs to a minimum prior to a judgment on liability.

\textit{D. Were the Costs Necessary?}

The plaintiff must also show that cleanup costs were necessary. There is surprisingly little judicial guidance on this issue. However, in deciding whether or not the release "caused" the incurrence of response costs, one court examined the size of the release and found that it was a "factual inquiry which should focus on whether the particular hazard justified any response actions."\textsuperscript{52} This court held that a plaintiff who has incurred costs meets the liability requirement as a matter of law if the release violates, or if a threatened release is likely to violate, any applicable state or federal standard.\textsuperscript{53}

\textit{E. Was the Response Consistent with the NCP?}

Probably the most difficult obstacle for the plaintiff to overcome is to establish that all of its response actions were performed in a manner consistent with the NCP.\textsuperscript{54} In a private cost recovery action, the burden of proof is upon the plaintiff to establish that all of its cleanup actions were consistent with the NCP.\textsuperscript{55} In contrast, when the EPA brings a cost recovery action,

\begin{itemize}
\item \textsuperscript{52} Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 670 (5th Cir. 1989).
\item \textsuperscript{53} \textit{Id. at} 671.
\item \textsuperscript{54} \textit{See, supra} note 18.
\end{itemize}
it appears to enjoy a rebuttable presumption that its efforts were consistent with the NCP, and the burden of proof rests with the defendant to establish that those actions were inconsistent with requirements of the NCP. 56

Courts have varied in how seriously they consider the consistency issue. Some decisions suggest that the court can be relatively easily satisfied that costs were consistent. 57 Other courts have required strict adherence to the NCP absent specific documentation as to why otherwise applicable provisions were not followed. 58 However, in reformulating the NCP, the EPA has attempted to level the playing field. 59

The NCP is intended to provide the organizational structure and procedures for responding to the discharge of oil and to releases of hazardous substances, pollutants and contaminants. 60 The EPA has promulgated the NCP as required by CERCLA and the Clean Water Act. 61 The NCP applies primarily to governmental responses, although in a private cost recovery action, its terms serve as a yardstick against which the plaintiff's cleanup actions will be measured. The plaintiff will not recover for costs expended which did not conform to the NCP requirements.

The terms of the NCP most relevant to a private party contemplating a cleanup action for which there is a potential for recovery of costs are found at 40 C.F.R. Part 300 Subpart H, Participation by Other Persons. This section incorporates other federal requirements which apply, such as OSHA health and safety standards applicable to response workers. 62

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60. See, supra note 18.
62. The requirements of 29 C.F.R. § 1910.120 must be met for response workers. 40 C.F.R. § 300.150 (1990).
requirements of the NCP require documentation to support all actions taken, including information on the source and circumstances of the release, the identity of the responsible parties, the actions taken, and an accounting of costs incurred.\textsuperscript{63}

To meet the requirements of the NCP, the private party must: (i) engage in a prompt response; (ii) be sensitive to local community concerns; (iii) consider the use of alternate available treatment technologies; (iv) encourage involvement and sharing of technology; \textsuperscript{64} (v) determine the need for permits applicable to on-site and off-site activities; \textsuperscript{65} (vi) report the release of reportable quantities to the National Response Center; \textsuperscript{66} (vii) perform a site evaluation of potential removal actions including a preliminary assessment and site inspections; \textsuperscript{67} (viii) perform removal actions as appropriate based on an assessment of the risk posed to human health and the environment; \textsuperscript{68} (ix) perform a remedial site investigation including a preliminary assessment, for example, review of existing information and possibly a remedial site inspection; \textsuperscript{69} (x) remedial design/remedial action operations and maintenance; \textsuperscript{70} (xi) provide opportunity for public comment, particularly on remedy selection; \textsuperscript{71} and (xii) perform a remedial investigation/feasibility study ("RI/FS") and remedy selection. \textsuperscript{72}

The RI/FS is the most complicated of the NCP requirements. The RI/FS must assess site conditions and evaluate alternatives to the extent necessary to select a remedy. It involves defining the project scope, collecting data, performing a risk assessment, performing treatability studies, and analyzing remedial alternatives. The RI collects data necessary to characterize the site for the purpose of developing and evaluating effective remedial alternatives. The FS develops and evaluates appropriate remedial alternatives based in large part on remedial action objectives.

\textsuperscript{63} 40 C.F.R. § 300.160 (1990).
\textsuperscript{64} Id. at §§ 300.400(C)(1),(4),(5),(7) (1990).
\textsuperscript{65} Id. at § 300.400(e) (1990).
\textsuperscript{66} Id. at § 300.405 (1990).
\textsuperscript{67} Id. at § 300.410 (1990).
\textsuperscript{68} An engineering evaluation and cost analysis may be required. The removal should be consistent with any anticipated long-term remedial action. 40 C.F.R. § 300.410 (1989).
\textsuperscript{69} 40 C.F.R. § 300.420 (1990).
\textsuperscript{70} Id. at § 300.435.
\textsuperscript{71} Id. at § 300.700(c)(6).
\textsuperscript{72} Id. at § 300.700(c)(5)(viii).
The five types of remedial alternatives listed in the old NCP have been replaced by more general qualifiers. The number and type of alternatives to be analyzed now are to be determined on a site-by-site basis after remedial action objectives have been established. General categories of alternatives now suggested in the NCP are source control actions, groundwater response actions, innovative treatment technologies, or no action.\textsuperscript{73}

Remedial action objectives must specify contaminants and media of concern, potential exposure pathways, and remediation goals. Remediation goals must establish acceptable exposure levels that are protective of human health and the environment considering both applicable or relevant and appropriate requirements ("ARARs")\textsuperscript{74} and exposure risk information; maximum contaminant level goals ("MCLGs"), if greater than zero, or if the MCLG is zero, maximum contaminant levels ("MCLs") under the Safe Drinking Water Act\textsuperscript{75}; water quality criteria; alternative concentration limits; etc.\textsuperscript{76}

The revised NCP provides nine criteria for detailed evaluation of remedial alternatives.\textsuperscript{77} These nine criteria are: (i) overall protection of human health and the environment; (ii) compliance with ARARs; (iii) long term effectiveness and permanence; (iv) reduction of toxicity, mobility, or volume through treatment; (v) short term effectiveness; (vi) implementability; (vii) cost; (viii) state acceptance; and (ix) community acceptance.\textsuperscript{78} These nine criteria should be applied in three phases in the actual selection of the remedy.\textsuperscript{79} First, the remedial alternatives must meet threshold criteria (i) and (ii) above before the alternatives can receive further consideration. Next, five primary balancing criteria are used to evaluate and compare those alternatives which meet the threshold criteria. These five primary balancing criteria are those identified as (iii), (iv), (v), (vi), and (vii) above. The final two criteria, (viii) and (ix) above, are modifying criteria against which the surviving alternatives are judged.

\textsuperscript{73} Id. at §§ 300.430(e)(3),(4),(5),(6).
\textsuperscript{74} Id. at § 300.400(g).
\textsuperscript{76} See, 40 C.F.R. § 300.430(e)(2)(i) (1990).
\textsuperscript{77} 40 C.F.R. § 300.430(9)(iii) (1990).
\textsuperscript{78} Id.
\textsuperscript{79} See Id. at § 300.430(f) (1990).
The EPA states that "a private party response action will be considered 'consistent with the NCP' if the action, when evaluated as a whole, is in substantial compliance with the above requirements and results in a CERCLA-quality cleanup." The EPA believes that strict compliance with all of the components listed above is not always necessary so long as "substantial compliance" is demonstrated. Prior approval by the EPA should not be required in order to demonstrate consistency with the NCP. Note, however, that the plaintiff in any action under CERCLA must provide a copy of the complaint to the EPA and the Attorney General.

Demonstrating consistency with the NCP requires the testimony of an expert intimately familiar with its requirements. It may be prudent to retain an expert independent of the environmental consultant/contractor that is directing or performing the cleanup. The impartiality of such an independent expert would not be subject to impeachment on the basis that he profited from the performance of unnecessary investigatory or cleanup work. The expert should have experience with sites undergoing EPA-directed cleanup as well as private cost recovery actions. It also may be possible, albeit difficult, to obtain favorable testimony from state or federal officials. Maintaining exhaustive records is imperative, e.g., using court reporters at public hearings, keeping a file of newspaper notices, and regularly reviewing and compiling the contractor's files and accounts. The agreement with the cleanup contractor should specify consistency with the NCP as a key criteria for determining performance.

Establishing consistency with the NCP is so critical that often the best course is to obtain a verdict on liability based on minimal incurrence of response costs and declaratory judgment with respect to future response costs. By deferring actual cleanup, the adverse effect of a finding of inconsistency is substantially reduced.

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III. DEFENSES TO A PRIVATE COST RECOVERY ACTION

Since the statute and judicial interpretations apply strict liability, defenses to CERCLA liability are limited. There are three enumerated defenses to CERCLA liability. To successfully avoid liability, a PRP must prove that the release or threat of release of a hazardous substance was caused solely by an act of God, an act of war, or the act of a third party. Although the third party defense may be the most popular defense to attempt, it may be difficult to invoke. The PRP must establish each of five elements: (i) the act (i.e., disposal or release of hazardous substances) was committed by a third person; (ii) the PRP took precautions to prevent foreseeable acts of such third persons; (iii) the third person is not an agent or employee of the PRP; (iv) the PRP exercised due care with respect to the hazardous substances; and (v) the PRP had no direct or indirect contractual relationship with the third person with respect to the act which created the release.

The Superfund Amendments and Reauthorization Act of 1986 ("SARA") created a "backdoor" way to avoid CERCLA liability under the third party defense. This is provided in its definition of "contractual relationship." It purportedly created an "innocent landowner" defense. SARA defines "contractual relationship" to include "land contracts, deeds or other instruments transferring title or possession" of real property. Thus, the purchase or lease of real property creates a contractual relationship with predecessors in title. It precludes use of the third party defense with respect to contamination they may have created unless the purchaser acquired the property after the disposal of hazardous substances occurred, and the purchaser can prove by a preponderance of evidence that it did not know and had no reason to know of such disposal.

To establish that it had "no reason to know of disposal," the purchaser must have undertaken "all appropriate inquiry into the previous ownership and uses of the property consistent with

88. Id.
good commercial or customary practice." SARA indicates that courts should consider: (i) the purchaser's specialized knowledge, if any; (ii) the relationship of the purchase price to the value of the land if uncontaminated; (iii) commonly known information about the property; (iv) the obviousness of the contamination; and (v) the ability to detect such contamination. SARA's definition of "contractual relationship" also includes an exception for those who take real property by inheritance or bequest; these persons are not considered to have a contractual relationship with predecessors in title. However, the new owner must also meet the other requirements of the third party defense by exercising due care with respect to any hazardous substances on the property. Subsequent releases may create liability. Thus, given the nature of private cost recovery actions, there would appear to be few opportunities for a defendant's use of the innocent purchaser defense.

IV. RELATED CAUSES OF ACTION

In addition to a private cost recovery action under CERCLA, a purchaser of contaminated property should consider the following causes of action to be included in its complaint by invoking ancillary and pendant jurisdiction: (i) trespass; (ii) nuisance; (iii) strict liability for previously maintaining an ultrahazardous activity on the property; (iv) negligence in handling hazardous substances; (v) breach of any applicable representations and warranties in the purchase agreement since an "as-is" sale will not preclude a CERCLA private cost recovery action; (vi) unjust enrichment; and (vii) in cases involving stock purchases, violation of security laws such as state blue sky laws and federal securities regulations.

V. CONCLUSION

Private cost recovery action can provide a means by which one who has incurred costs in responding to releases of hazardous

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89. Id.
90. Id. at § 9601(35)(B) (as amended).
92. See Restatement (Second) of Torts § 262, Comments b & e (1965).
substances can recover from those responsible. Given the broad reach and strict application of CERCLA liability, these actions, along with contribution actions, permit the courts to more fairly and equitably assign responsibility to those parties who actually created the problems. However, the cost recovery action is not a statutory form of toxic tort and in order to take advantage of this remedy, the plaintiff must be prepared to adhere to a comprehensive regulatory framework intended to apply to federally mandated cleanups.
GROUNDWATERS PROTECTION: "NOR ANY DROP TO DRINK" 1

David Van Epps*

I. INTRODUCTION

"The 'bottom line' for most efforts in environmental protection remains whether our water is safe to drink." 2 While this statement is narrow, it is tangible evidence of the awakening to what we might call "ecology concerns." If environmental controls are simply an article of faith, that is, it is a "bad" thing to contaminate, as in the case of equipment and performance standards without a clearly perceived relationship to environmental quality, it is extremely difficult to sustain an impetus to impose those controls in the face of the millions of dollars of capital and operating costs, and opportunity losses which result from such internalizing of the economic impacts from preventing and controlling contamination. In the past two decades there has been enormous progress at identifying and quantifying the interactions of contaminants with the total environment. Not surprisingly, initial concern has focused on applying this information to evaluating direct impacts on human health. In the legislative arena, this growing awareness and concern has manifested itself in major proposals to address air contaminants, looking, as it were, for air "safe to breathe."

Even so, regulation of groundwaters and activities contaminating underground waters have lagged behind other areas of environmental regulation. However, with the continuing emphasis on, and development of, information concerning risks associated with ground and groundwater contamination, arising from the

1. Coleridge, Rhyme of the Ancient Mariner.

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response program created pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), we should expect interest to develop in creating authorities for direct regulation and protection of groundwater supplies. There are other programs which should increasingly move sentiment in the direction of a regulatory program. First, the additional treatment requirements which have been imposed on "public" water suppliers through the Safety of Public Water Systems subchapter of the Public Health Service Act, formerly known as the Safe Drinking Water Act ("SDWA"), should result, as these costs are increasingly felt, in municipal lobbying for such regulations. Presumably, they will try to stave off the higher costs of treating contaminated groundwaters and to protect clean supplies. The second program, which can also be expected to create pressures for regulation and objective, direct standards, is the assessment of damages in conjunction with injury to natural resources as authorized by CERCLA.

II. CONTEXT

Until relatively recently, primary concern about underground waters has focused on their "supply." Of course, not all under-
ground water supplies are suitable for human consumption due to the natural presence of inorganic compounds such as sulphur compounds or salts. Groundwaters, however, are generally assumed to be relatively pure.

Groundwaters are a major source of waters used for potable and irrigation purposes. In 1980, the use of groundwaters throughout the United States amounted to 89 billion gallons per day. Groundwaters are used in every state. They provide approximately one-fourth of all water used in the United States. Fifty percent of the total U.S. population, and 97 percent of all rural residents, are served by groundwaters for domestic uses. Thirty-five percent of all municipal water supplies are groundwaters. Forty percent of agricultural irrigation waters and 26 percent of waters used for industrial purposes, excluding electric power plants, are from groundwaters.

Groundwaters provide drinking water for almost half of all Ohioans. About 75 percent of Ohio's 1,600 community water systems rely on groundwaters for their supply. Industry in the state uses approximately 350 million gallons of groundwater every day for manufacturing and cooling water. Agricultural uses for irrigation constitute another approximately 10 million gallons per day.

1. Absence of A Frame-Work For Direct Regulation of Pollution of Groundwaters

Ohio and Kentucky have no specific, direct statutory or administrative groundwater regulation or protection authorities. In-

See also, Environmental Defense Fund v. Costle, 439 F. Supp. 980 (E.D.N.Y. 1977) (concerning effects on groundwater use and "Section 208" planning; and New Jersey Builders Ass'n v. Department of Environmental Protection, 169 N.J. Super. 76, 404 A.2d 320 (1979), cert. denied, 81 N.J. 402, 408 A.2d 796 (1979) (in which a moratorium on building in the New Jersey "pine barrens" was imposed in order to protect the underlying aquifer).


deed, this is the case in many states, although there has been federal funding of state programs to develop and implement state groundwater protection strategies. Ohio and Kentucky pollution control statutes define regulated waters as including underground waters. In addition, Ohio and Kentucky groundwaters are each considered resources of the state or commonwealth.

The regulation and protection of groundwaters can take a variety of forms which differ primarily in the directness of their approach. One method is to set standards for any effect on groundwaters either in the form of numerical groundwater standards or as narrative prohibitions. A second means is to regulate activities which cause contamination of both ground and groundwaters by prohibiting or limiting such contamination through a permit-type program with standards and self reporting. The third method, more indirect than the first two regulatory approaches, involves setting requirements for cleaning up contaminated ground and groundwaters. Notwithstanding that there is relatively little direct regulation of either groundwater pollution or of activities which can lead to contamination, in the past decade there has been an enormous amount of activity regarding cleanup of ground and groundwater contamination. For the most part, this work has proceeded under either the Solid Waste Disposal Act or CERCLA.

In the most recent revisions to the National Contingency Plan, the U.S. Environmental Protection Agency ("EPA") stated that:

The remedy selection process promulgated today is founded on CERCLA’s overarching mandate to protect human health and the environment. This approach emphasizes solutions that can insure reliable protection over time.

12. GAO, supra note 8, at 3.
13. Id. at 161.
The approach EPA promulgates today sets a course for the Superfund program between the two ends of the spectrum reflected in these comments. EPA is establishing as its goals remedial actions that protect human health and the environment, that maintain protection over time, and that minimize untreated waste.

This goal reflects CERCLA's preference for achieving protection through the use of treatment technologies that destroy or reduce the inherent hazards posed by wastes and result in remedies that are highly reliable over time. The purpose of treatment in the Superfund program is to significantly reduce the toxicity and/or mobility of the contaminants posing a significant threat ... wherever practicable to reduce the need for long-term management of hazardous wastes. EPA will seek to reduce hazards (i.e., toxicity and/or mobility) to levels that insure that contaminated material remaining on-site can be reliably controlled over time through engineering and/or institutional controls.17

In addition to response actions by EPA and the states under CERCLA,18 there have been a considerable number of groundwater contamination cases litigated by private parties without formal standards for groundwater quality.19

18. It is worth remembering that in both the Hazard Ranking Process, 55 Fed. Reg. 35,502 (1990), and the NCP provisions addressing cleanup, ground and groundwater contamination is the key.
2. Growing Concern Regarding Groundwaters

It may be that the vast quantities of groundwaters of potable quality have reduced, somewhat, the concern for either quantity or quality of groundwaters. In any case, Ohio has recognized the present and future importance of this resource.

Groundwater is highly vulnerable to pollution in many areas of Ohio and, once contaminated, it is difficult and expensive to restore. Until recently, Ohioans took clean, abundant groundwater for granted. In part, because federal, state, and local governments and the private sector now conduct more groundwater quality tests, toxic chemicals and other pollutants are being discovered with increasing frequency.

Groundwater contamination is not inevitable. Through careful management, stronger protection measures, improved cooperation between state agencies and local governments and increased public awareness, groundwater depletion and contamination can be minimized.

Groundwater's unique vulnerability to contamination, and our dependance on it, make it essential that Ohio take action now [October, 1986] to protect and manage this resource...  

Actually, descriptions of the national view are not greatly different.

Our groundwater resources have long received little attention. For one thing, it was thought that the natural filtering capacity of soils simply removed dangerous contaminants. Also, because most contamination is hidden underground, and because most contaminants require a long time to reach wells, public awareness of the problem is limited. In fact, until recently, the ground was actually thought to be the best way to get rid of wastes. The preferred methods of disposing of hazardous wastes, for instance, have been to place them in landfills or inject them underground...

... In most cases, however, groundwater protection efforts have been partial at best. The regulatory programs put in place often have failed to exercise much of the statutory authority available. Because many of the laws were written at different times and for different purposes, they often add up to a program of groundwater

20. Ohio, supra note 10, at iv.
3. Sources of Contamination

Contamination of groundwaters can be viewed as essentially a land use problem. What happens on the land surface, within surface waters, and in the land itself through mining, extraction, or other activities, has a direct impact on the quality of the lands and of the groundwaters. Work in a variety of existing environmental programs has resulted in recognition of major sources of groundwater contamination. These are said to be described as: Waste disposal activities such as on-site sewage disposal, underground injection wells, surface impoundments, land application of wastes, landfills, hazardous waste treatment and disposal, and disposal of radioactive materials; materials handling and storage such as above and in-ground storage tanks, materials stockpiles, and materials transport and transfer operations; and, surface and underground mining, drilling and extraction, and agricultural activities such as contamination in surface waters, urban storm water run-off, use of de-icing salts, deposition of atmospheric contaminants, and other activities associated with urban and rural living.22

This list of sources of ground and groundwater contamination is essentially a standard list of subjects which has received attention in the past decade as relating to problems of groundwater contamination. An illustrative response to such a perception is the addition of the Underground Storage Tank Regulatory Program to the Solid Waste Disposal Act in 1984 and 1986.23 In addition to this list, however, are contamination of ground and groundwaters arising from improper releases of chemicals, transportation and stationary facilities, emergency incidents, and groundwater production itself. Wells producing large volumes create a depression in the surface of the groundwater table, referred to as the "cone of influence." These changes in the water regime resulting from pumping can create or facilitate movement

22. Id. at 47. See also, Ohio, supra note 10, at v, and GAO, supra note 8, at 11.
of contaminants through the geological features. This then may cause the spread of contamination to additional ground and groundwaters.

III. PROTECTION OF GROUNDWATER IN OHIO AND KENTUCKY

Groundwater protection programs can make use of any or all of several types of groundwater quality standards. One type is ambient standards - that is, a limit on the permissible concentration of contaminants in the aquifer water. The second is source standards - a limit on the permissible amount or concentration of contaminants that are allowed to percolate into the ground from a particular type source of potential groundwater contamination. The third is use standards - limits on the permissible concentration of contaminants for particular water uses. Most standards are numerical, specifying allowable concentrations in terms of so many milligrams per liter or parts per million, but they can also be narrative - for example, adequate to support aquatic wildlife. The latter entirely avoids the necessity for quantitative specificity in favor of a case-by-case review of water quality impairment.\(^\text{24}\)

Of these three regulatory types, only the last is firmly in place, in the form of the Safe Drinking Water Act state analogues.\(^\text{25}\) As to source standards, these exist to a degree in regulatory programs related to mining, underground storage tanks, and hazardous waste treatment storage and disposal facilities. There is, however, a fourth "regulatory" approach, the response program authorized by CERCLA and by state authorities.

As of February 1988, 26 of 57 "states" had adopted numeric standards for groundwaters, and an additional 15 states had enacted narrative standards.\(^\text{26}\) The Government Accounting Office ("GAO") in its report states that, of the 1,019 numeric standards in 26 states, 260 distinct contaminants were regulated.\(^\text{27}\) Some states regulated as few as 14 contaminants and some as many as 190.\(^\text{28}\) The regulated contaminants included physical and radiological characteristics of groundwaters, various inorganic com-

\(^{24}\) Conservation Foundation, supra note 9, at 177 (emphasis added).
\(^{25}\) GAO Report, supra note 8.
\(^{26}\) Id.
\(^{27}\) Id.
\(^{28}\) Id.
pounds, biological substances, and, most prominently, organic compounds, including a large number of volatile organic compounds and pesticides. The GAO reports extensive use being made of EPA drinking water standards as standards for groundwaters generally.29

The GAO noted that narrative standards, while differing, "usually . . . [specify] some standard of quality or [prohibit] some type of contamination . . . ."30 Most of the states using narrative standards framed them to protect human health and other such groundwater uses. A substantial number also intended their standards to protect the environment. Some state standards make general reference to EPA's drinking water or surface water standards or to existing or background levels of contaminants in ambient groundwaters.31

1. Prohibitions

Ohio and Kentucky, like many states, have statutory and administrative authorities to regulate the contamination of state waters, the use of waters for drinking water, and to regulate some types of land uses which can pollute ground and groundwaters. Neither state has ambient groundwater standards nor a direct regulatory program, such as exist for surface waters. Instead, contamination of waters is prohibited generally. For example:

No person shall cause pollution or place or cause to be placed any sewage, industrial waste, or other wastes in a location where they cause pollution of any waters of the state, and any such action is hereby declared to be a public nuisance, except in such cases where the director of Environmental Protection has issued a valid and unexpired permit, or renewal thereof . . . , or an application for renewal is pending.32

29. Id.
30. Id.
31. Id.

No person shall, directly or indirectly, throw, drain, run or otherwise discharge into any of the waters of the Commonwealth, or cause, permit or suffer to be thrown, drained, run or otherwise discharged into such waters any pollutant, or any substance that shall cause or contribute to the pollution of the waters of the Commonwealth in contravention of the standards adopted by the cabinet or in contravention of any of the rules, regulations, permits, or orders of the cabinet or in contravention of any of the provisions of this chapter.
While the regulatory program is directed to the quality of and discharges of contaminants to surface waters, "waters of the state" are defined to mean:

[All streams, lakes, ponds, marshes, water courses, water ways, wells, springs, irrigation systems, drainage systems, and all other bodies or accumulations of water, surface and underground, natural or artificial, regardless of the depth of the strata in which underground water is located, which are situated wholly or partly within, or border upon, this state, or are within its jurisdiction, except those private waters which do not combine or affect a junction with natural surface or underground waters.]

Ohio and Kentucky have not promulgated general regulatory programs to protect ground waters nor to provide a direct permit program for activities which could originate releases to the ground and groundwaters, other than for a few specific types of facilities. Instead, the existing ambient water quality standards "establish minimum water quality requirements for all surface waters of the state." Ohio, in considering these questions, has stated that:

Effective groundwater protection and management requires a consistent, coordinated enforcement program which insures the right of citizens to participate.

In some instances, the existing legal structure impedes comprehensive enforcement to protect groundwater. Numerous federal environmental protection statutes drive many of the State's existing groundwater programs. Although none of these laws has groundwater protection as its primary goal, the State is legally obligated to enforce them and receive substantial financial assistance to do so. Enforcement priorities, decisions, and resources are directed toward meeting the individual goals of these laws, not toward a comprehensive groundwater enforcement policy.

Other commentators have argued that generally:

33. **Ohio Rev. Code Ann.** § 6111.01(H) (Baldwin 1989) (emphasis added). **Accord**, Ky. Rev. Stat. Ann. § 224.005(26) (Baldwin 1989), defining "water" or "waters of the Commonwealth" as including "any and all rivers, streams, creeks, lakes, ponds, impounding reservoirs, springs, wells, marshes and all other bodies of surface or underground water, natural or artificial, situated wholly or partly within or bordering upon the Commonwealth or within its jurisdiction"; **see also**, Ky. Rev. Stat. Ann. § 151.100(5) (Baldwin 1989), defining "groundwater" and "subterranean water."


35. Ohio, *supra* note 10, at 32.
The standard approaches adopted to induce [direct] compliance include adverse publicity, civil penalties, criminal penalties, and injunctions. Some laws allow administrative penalties, but most require the implementing agency to work through the judicial system - a slower and more costly process. Criminal penalties tend to be imposed only under certain statutes and under particularly egregious circumstances.36

The absence of ground water standards and a direct permit and regulating program for activities affecting the quality of ground waters, leave questions about what is legally permissible in substantial doubt. As a result, ground water quality is a subject that has been left to private litigation and to enforcement activities in which, somehow, the attention of the agency is drawn to ground water issues. Thus, the technical and legal standards of conduct, or for ground and groundwater quality, are not decided and predictable in advance. They are left to the "market place" or to litigation and administrative negotiations.

One commentary, however, has argued for a more definite approach:

To be effective, any groundwater protection efforts must be backed by an adequate enforcement program. Such a program consists of three basic elements. The first is clear legal and technical definitions of what constitutes compliance and non-compliance. The second is the capability to accurately determine whether the facilities or systems being controlled are satisfying this definition. And the third is the provision of adequate incentives to induce non-complying facilities or systems to continuously satisfy the definition of compliance.37

2. Notification of Release

In addition to there being no direct permit or regulatory programs for groundwaters in Ohio and Kentucky in any way similar to those which regulate surface waters, there are no

36. Conservation Fund, supra note 9, at 197. While a popular prejudice exists to this effect, administrative penalties are not necessarily speedier. An administrative penalty may be equipped, either at common law or through the enabling legislation, with presumptions of regularity and increased burdens for anyone seeking to review or attack the penalty imposition. It cannot, however, be completely divorced from the judicial process. Recourse to the judicial system may be required to enforce and collect the penalty or other administrative sanction.

37. Id. at 196.
specific requirements for notification of contamination of groundwaters. The Clean Water Act ("CWA") program for regulating any discharges of pollutants to surface waters provides for review of facilities, explicit standards for their operations and discharges, and self-monitoring of compliance with these standards. The program also provides for notification and reporting of data concerning those operations and discharges. In addition, the CWA provides for immediate notification of any spill or unpermitted release of hazardous materials.

As a result, notification and reporting of releases of materials to groundwaters, other than in the handful of cases in which specific facilities are regulated in Ohio or Kentucky, as in connection with underground storage tanks or hazardous materials treatment, storage or disposal facilities, are subject to the requirements of the CERCLA. Under CERCLA, a "release" is defined, with a few exceptions, as meaning:

\[ \text{any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant).} \]

CERCLA requires that:

Any person in charge of ... an on-shore facility shall, as soon as he [or she] has knowledge of any release (other than a federally permitted release) of a hazardous substance from such ... facility in quantities equal to or greater than those determined pursuant to § 9602 of this title [§ 102], immediately notify the National Response Center ... of such release. The National Response Center shall convey the notification expeditiously to all appropriate government agencies including the governor of any affected state.

Since facility is defined to include, among others, "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located ...", the

40. Id.
43. Id. at § 9603(a).
reporting authority arguably extends to properties contaminated by others, scenes of accidents, and sites of other inadvertent contamination. Section 103 reporting requirements arguably extend to existing conditions of ground and groundwater contamination, that is, a "continuous release." Where a release is "continuous" and "stable in quantity and rate," an annual written notification may be given in lieu of the daily notifications which would normally be required once the existence of the release has been reported. Further notification is required "at such time as there is any statistically significant increase in the quantity of any hazardous substance or constituent thereof released, above that previously reported or occurring."46

The Title III reporting requirements were engrafted on CERCLA by the Superfund Amendments and Reauthorization Act of 1986 ("SARA").47 CERCLA § 304 requires releases of certain compounds, legislatively defined as "extremely hazardous substances,"48 to be reported directly to local emergency response agencies and states in addition to reporting to the National Response Center pursuant to § 103(a).49

These two CERCLA notice provisions constitute the basic requirements for notification of contaminated ground or groundwater and of contaminating incidents. There are a conflicting myriad of other state and federal reporting requirements specifically directed to types of facilities or circumstances.

3. Standards For Groundwaters

Since there are no specific substantive standards for the quality of groundwaters, there are thus no direct measures against which releases and contamination can be judged. The National Contingency Plan, giving only the most general guidance in connection with site cleanups, is essentially the sole source for establishing groundwater "standards." As a result, there continues to be "negotiation" of standards.

By far, the area of broadest and most intense activity regarding issues of ground and groundwater contamination has been, for

46. Id.
49. Id.
the past decade, the response action program pursuant to CERCLA. To the extent that it can be said that there are any substantive standards for the quality of ground and groundwaters, they have been co-opted from other programs in case-by-case determinations made in the Superfund program. Specifically, as a result of SARA, § 121 added explicit authority to establish "clean-up standards." In the guidance offered by Congress here, as with the National Contingency Plan, the actual "regulatory" language is extraordinarily broad. It only establishes a goal in the process of site investigation and determination of response actions, and the site-by-site designation of the effective standards. These have come to be called the "ARAR's." This section, among other things, legitimized the EPA's turning to standards and guidelines designed for other purposes to be used in setting clean-up standards for ground and groundwaters. While the section discusses this issue in some detail, the bottom line is contained in the provision that response actions "shall require, at the completion of the remedial action, a level or standard of control for such hazardous substances or pollutant or contaminant which at least attains such legally applicable or relevant and appropriate standard, requirement, criteria, or limitation." Of course, what actually constitutes a legally applicable standard or some other standard which is, though not legally applicable, relevant and appropriate, is still up in the air. Compounding the confusion still further, the concept of an ARAR has hardened into a "Superfund practice" term of art such that EPA feels compelled to say that it may use standards and criteria which are not legally applicable nor relevant and appropriate standards.

One commentor felt the remediation goals should be based only on ARARs and that EPA has no authority to require compliance with anything but ARARs, although the commenter acknowledges that other information may be necessary when ARARs are not available. EPA disagrees that it has no authority to comply with anything but ARARs. ARARs do not exist for all exposure media (e.g., certain types of contaminated soil) or for all chemicals, and therefore, EPA must use other information to set remediation goals that will insure protection of human health and the environ-

51. ARAR is an acronym for "applicable or relevant and appropriate requirements."
ment as required by statute. EPA intends that this will focus on the EPA-developed toxicity information (cancer potency factors and the reference doses for noncarcinogenic effects). If neither ARARs or EPA-derived toxicology information are available, other information will be used, as necessary, to determine what levels are necessary to protect human health and the environment (e.g., state guidelines on what is protective for a certain chemical).

Essentially, this discussion goes on to consider types of information which will be utilized, and to state the reaction of EPA to situations in which it does not believe that ARAR's are properly protective of human health and the environment. EPA has recently published "Headquarter's Guidance" directed to its regional and branch personnel. The EPA believes that allowing so-called "Responsible Parties" to conduct the risk assessment portion of the site evaluation has failed to adequately address health and environmental risks. Consequently, the EPA is directed to conduct its own risk analyses.

IV. SUMMARY AND CONCLUSION

Ohio and Kentucky, like other regulating entities, have been, and are, seeking to establish regulatory or other administrative programs which will be protective of groundwater resources, and public health and environmental quality values. At present, however, these issues have not been the subject of any broad, considered program rulemaking or even any extensive litigation at the state and commonwealth level. To a large degree, issues relating to contamination of ground and groundwaters have been addressed in the CERCLA response action and natural resources damages programs. It is probably fair to say that as attention is focused on questions of exposures to chemicals through such initiatives as the Clean Air Act Amendments of 1990, and as public water suppliers are subjected to enforcement actions, citizen lawsuits, and, perhaps most importantly, as costs of water treatment are increased, we should see a growing public sentiment for the establishment of groundwater quality standards and, perhaps, even a broad regulatory program.

IS A RULE BY ANY OTHER NAME STILL A RULE?:
CASE ANSWERS UNDER THE CLEAN AIR ACT

Robert L. Brubaker and Judith L. French-Berry*

I. INTRODUCTION

The current federal Clean Air Act is 190 pages long; implementing regulations cover more than 3000 pages. Despite the volume and detail of these statutory and regulatory provisions, they represent only the tip of the iceberg of the full set of "regulatory requirements" imposed under the authority of the Clean Air Act. The United States Environmental Protection Agency ("EPA") is increasingly resorting to the informal adoption of "policies," "guidance," and "interpretations," in lieu of rulemaking, to establish and revise "regulatory requirements" under the Clean Air Act.

This article reviews Clean Air Act case law addressing various informal EPA actions alleged to be procedurally unlawful, because they constitute "legislative rules" (or their functional equivalent), but were not adopted in the form of rules and did not come into being as the product of administrative rulemaking.

II. PROCEDURES FOR THE ADOPTION OR AMENDMENT OF A LEGISLATIVE RULE

Section 551 of the federal Administrative Procedure Act ("APA") defines a "rule" as an agency statement of general or

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The authors gratefully acknowledge the assistance of their colleagues Michael K. Glenn and Daniel J. Prater.


particular applicability and future effect. A rule may be legislative (or "substantive"), interpretive, or procedural. An agency may adopt legislative rules only by formal hearing on the record or by less rigorous notice and comment rulemaking. An agency must follow the formal hearing procedures set out in 5 U.S.C. §§ 556-557 if the governing statute expressly requires rulemaking "on the record" after opportunity for hearing. Otherwise, an agency may elect to use "notice and comment" procedures found in 5 U.S.C. § 553. Most EPA rulemaking is notice and comment rulemaking, involving publication in the Federal Register of a notice of proposed rulemaking, public comment, and a final rule publication.

The APA excludes from notice and comment rulemaking "interpretive" rules (agency statements of what it believes the statute means), general statements of agency "policy" (not having the force and effect of law), and rules of agency organization, practice, or procedure. An agency also may waive notice and comment rulemaking procedures for good cause where it finds and supports a determination that such procedures are "impracticable, unnecessary, or contrary to the public interest."

III. CLEAN AIR ACT IMPLEMENTATION

Several recent EPA approaches to implementing the Clean Air Act provide specific case examples of EPA's increasing tendency to employ informal alternatives to conventional notice and comment rulemaking procedures. Judicial responses to EPA's procedural creativity in adopting these new approaches have thus far been mixed. Judicial determination of what constitutes a "legislative rule," especially when EPA contends that its action is not final, not binding, or not tantamount to a legislative rule, has proven difficult. It may be that administrative law concepts and definitions which served reasonably well during the past 50 years are inadequate to deal with today's pervasive system of

5. 5 U.S.C. § 553(c).
6. Section 307(d) of the Clean Air Act mandates special rulemaking procedures for certain EPA regulations. 42 U.S.C. § 7607(d). The section 307(d) procedures are similar to the APA informal rulemaking procedures, but are somewhat more detailed and rigorous.
environmental and health regulation often involving the uncertain and unstable frontiers of science and technology.

A. International Air Pollution Findings: "Rulemaking" By Press Release

The Clean Air Act requires states to adopt State Implementation Plans ("SIPs") to attain and maintain compliance with the National Ambient Air Quality Standards ("NAAQS"). A state must from time to time revise its SIP if EPA finds the SIP to be "substantially inadequate" to achieve the NAAQS or other requirements of the Act.

Section 115(a) of the Clean Air Act, dealing with international air pollution, provides:

Whenever the [EPA] Administrator, upon receipt of reports, surveys or studies from any duly constituted international agency has reason to believe that any air pollutant or pollutants emitted in the United States cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare in a foreign country ... the Administrator shall give formal notification thereof to the Governor of the State in which such emissions originate.

Section 115(b) provides that the "formal notification" issued under subsection (a) is deemed to be a finding of "substantial inadequacy" under section 110(a)(2)(H)(ii), and requires each notified state to revise as much of its SIP as is "inadequate to prevent or eliminate" the endangerment. Subsections (a) and (b) apply only if legal "reciprocity" exists, that is, the endangered foreign country is one "which the Administrator determines has given the United States essentially the same rights with respect to the prevention or control of air pollution occurring in that country as is given that country by this section."

On January 13, 1981, in the final week of the Carter Administration, out-going EPA Administrator Douglas M. Costle sent a letter to then-Secretary of State Edmund S. Muskie, in which Costle indicated his belief, based on certain reports, that "acid

11. 42 U.S.C. § 7415(a) (emphasis added).
deposition is endangering public welfare in the U.S. and Canada and that U.S. and Canadian sources contribute to the problem not only in the country where they are located but also in the neighboring country."\textsuperscript{14} In this letter, Costle also determined that newly-enacted Canadian legislation authorized Canada to provide the United States with essentially the same international air pollution abatement rights as the United States affords Canada under section 115 of the U.S. Clean Air Act. He recognized, however, that effective legal reciprocity "could be changed should the U.S. conclude that future Canadian actions interpreting or implementing their legislation were not giving essentially the same rights to the U.S."\textsuperscript{15} Costle sent a similar letter to Senator George Mitchell of Maine\textsuperscript{16} and announced his purported section 115 findings to the public in a press release. No advance notice of Costle's "findings" was given, no public comment was solicited, and neither Costle's letters nor his "findings" were ever published in the \textit{Federal Register}.

Costle's successors at EPA, under the Reagan Administration, did not regard the Costle section 115 letters and press release as final or official government action that compelled SIP revisions under section 115. As a result, several northeastern states, environmental groups, a United States Congressman, and several American citizens who owned property in eastern Canada sued EPA in the United States District Court for the District of Columbia.\textsuperscript{17} They sought a mandatory injunction requiring EPA to identify the states in which air pollution responsible for acid deposition endangering Canada originates, and to require those identified states to revise their SIPs pursuant to section 115.

The district court ruled in favor of the plaintiffs, and ordered EPA to reassess Costle's "reciprocity" finding, and, if that finding remained accurate,\textsuperscript{18} further ordered EPA to issue SIP revision

\textsuperscript{15} Letter, supra note 14, 613 F. Supp. at 1488.
\textsuperscript{17} New York v. Thomas, 613 F. Supp. at 1488.
\textsuperscript{18} On October 22, 1985, then-current EPA Administrator Lee M. Thomas found that international air pollution reciprocity between the United States and Canada continued to exist.
notices to the appropriate states within 180 days thereafter. EPA appealed the district court's decision to the United States Court of Appeals for the D.C. Circuit.19

In Thomas v. New York,20 the D.C. Circuit reversed. The court found that "[o]n its face, § 7415 [section 115 of the Act] requires an EPA Administrator who has reason to believe in the existence of an international air pollution problem to issue SIP revision notices to 'the Governor' of 'the State' responsible for it."21 The diffuse nature of the acid deposition problem, however, made identification of the responsible state(s) difficult. Moreover, the court noted that if section 115 had "been executed [by EPA] as Congress probably anticipated ... [Costle's] [n]otice of the 'endangerment' and 'reciprocity' findings would have been issued at the same time as the proposed SIP revision notices, comment would have been taken on both, and both would have been published in final form in the Federal Register."22 Since outgoing EPA Administrator Costle had issued his January 1981 findings without simultaneously identifying the responsible states, the court faced the question of whether Costle's findings could require a succeeding EPA Administrator to take the (second) step of issuing the formal SIP revision notices contemplated by section 115.

The D.C. Circuit cited section 551(4) of the APA which defines a "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." Applying that definition, the court determined that "an agency statement that bound subsequent EPA Administrators to issue SIP revision notices would be a statement of 'future effect designed to implement ... law or policy' and thus a rule."23 Since the 1981 Costle findings were not interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice, the court concluded that notice and comment rulemaking would be required.

19. Apellants in the case also included: the Commonwealth of Kentucky; the States of Ohio and West Virginia; the National Coal Association; and numerous electric utility companies. See Thomas v. New York, 802 F.2d 1443, 1444 (D.C. Cir. 1986), cert. denied, 482 U.S. 919 (1987).
21. Id. at 1446 (emphasis original).
22. Id.
23. Id. at 1446-47 (footnote omitted) (emphasis added).
in order to bind a new EPA Administrator to issue section 115 SIP revision notices. 24

Thus, the D.C. Circuit found that Costle's informal "findings" constituted a "legislative rule," but one that was unlawful and void ab initio because it was not adopted in accordance with applicable administrative rulemaking procedures.

B. SIP Calls: "Rulemaking" By Letter

As noted above, EPA has the authority under section 110 of the Clean Air Act to find that a state implementation plan is "substantially inadequate" to achieve the National Ambient Air Quality Standards. Such a finding, along with notification to the state of EPA's finding and the need for a SIP revision, triggers an extensive regulatory process. 25

On December 22, 1988, EPA Region V Administrator Valdas Adamkus sent a letter to Ohio Governor Richard Celeste notifying Celeste that the Ohio State Implementation Plan was "substantially inadequate to achieve the National Ambient Air Quality Standards ("NAAQS") for sulfur dioxide (SO_2) in Hamilton County [Ohio]." 26 The Adamkus letter called upon the State to "cure the inadequacies in the SIP by revising it," required Ohio to "submit a commitment and schedule for the development of the SIP" within sixty days, and required Ohio to submit a final SIP revision for EPA approval within eighteen months. 27 EPA published a notice of its Ohio SIP deficiency finding and call for a SIP revision in the Federal Register. 28

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24. The court determined that the fact that it was still uncertain which states were responsible for emissions affecting Canada, and therefore which states might receive SIP revision notices, could be relevant to the issue of ripeness, but that this uncertainty did not make the Costle findings mere general statements of policy or procedural rules. The court stated that if "Costle's findings left the EPA no alternative but to issue SIP notices ultimately causing the termination or restriction of the operations of many utilities and manufacturers—if they forced the EPA to take direct and substantial regulatory actions—they could not be promulgated without notice-and-comment procedures." Id. at 1447 (emphasis in original).


27. Id.

28. EPA stated that the notice was "informational only" and invited no comments. 54 Fed. Reg. 6287, 6288 (1989).
In *Greater Cincinnati Chamber of Commerce v. EPA*, petitioners subject to regulation by the Ohio SIP sought review of EPA’s informal “SIP call” letter, and moved the court to stay implementation of any SIP revision action pending appeal. Petitioners argued that EPA’s letter was both procedurally and substantively defective. They asserted that the EPA Regional Administrator erred procedurally in making a “finding” of substantial inadequacy to achieve the national standards without conducting notice and comment rulemaking. Petitioners relied principally on the D.C. Circuit’s 1986 decision in *Thomas v. New York* that EPA’s similar form of “findings” of endangerment and reciprocity under section 115 were not exempt from notice and comment rulemaking. Petitioners argued further that EPA’s substantial inadequacy finding ignored the substantive requirements of section 110(a)(2)(H)(ii) of the Clean Air Act.

EPA moved to dismiss the case, arguing that the Adamkus “SIP call” letter was not a “final action” subject to judicial review under section 307(b)(1) of the Clean Air Act. The court granted EPA’s motion, holding that the case was not “ripe” for judicial review.

The Sixth Circuit first found that the language of section 307(b)(1) of the Act demonstrates Congress’ intent to limit section 110 reviewable “final action” to EPA action “approving or promulgating” a SIP. Thus, only EPA’s approval or promulgation of a revised SIP for Hamilton County constitutes final agency action under section 307. EPA’s request or “call” for Ohio to revise...
its SIP does not constitute final agency action. In effect, judicial review of EPA's notice of deficiency and call for a SIP revision was premature. As the Sixth Circuit noted, EPA's letter "in no way alters the obligations of the parties in either a practical or legal sense. It is impossible to anticipate which of the many available alternative strategies the State and the EPA will pursue." Accordingly, the court dismissed the case without reaching the merits of the question of whether a finding of "substantial inadequacy" under section 110(a)(2)(H), the same kind of finding that was before the D.C. Circuit in Thomas v. New York, constituted a "legislative rule."

C. Existing Plant "Modifications": "Rulemaking" By Applicability Determinations

In 1970, Congress required EPA to promulgate New Source Performance Standards ("NSPS") to regulate air pollution emissions from significant new sources. NSPS apply not only to new sources, but also to "modifications" of existing sources that create new or increased pollution.

In 1977, Congress added a program for the Prevention of Significant Deterioration ("PSD") of air quality in areas where existing air quality is already appreciably better than the National Ambient Air Quality Standards. The PSD program requires a permit prior to the commencement of construction of a major new stationary source and prior to any major "modification" of an existing major source in such areas. The PSD program incorporates the NSPS statutory definition of what constitutes a "modification," a legal term of art under the statute.

From this statutory framework, EPA promulgated its own "modification" regulations for both the NSPS and PSD programs. The NSPS regulations define a "modification" as: "[A]ny physical or operational change to an existing facility which results in an increase in the emission rate to the atmosphere of any pollutant to which a standard applies shall be considered a modification.

37. Id.
38. Id. at 1383.
within the meaning of section 111 of the Act." Thus, to determine whether a physical change constitutes a modification for purposes of NSPS, EPA must determine whether the change increases the facility's hourly rate of emission.

The PSD "modification" regulations use the term "major modification" and, in contrast to the NSPS modification regulations, are concerned with annual emission tonnage, rather than hourly emission rate increases. If a non-excluded physical or operational change to an existing major stationary source will result in a "significant net emissions increase" in a relevant attainment pollutant, a PSD permit is required prior to commencement of construction of the change.

Closely related to the NSPS "modification" rule is EPA's "reconstruction" rule, which applies to the replacement of an existing facility "at the end of its useful life." The "reconstruction" rule provides that replacement of depreciable components

41. 40 C.F.R. § 60.14(a). The NSPS "modification" regulations exclude, among other things:

(1) Maintenance, repair, and replacement which the Administrator determines to be routine for a source category . . . .
(2) An increase in production rate of an existing facility, if that increase can be accomplished without a capital expenditure on that facility.
(3) An increase in the hours of operation.
(4) Use of an alternative fuel or raw material if, prior to the date any NSPS becomes applicable to that source type, the existing facility was designed to accommodate that alternative use.

42. 40 C.F.R. § 60.14(a) (1989).
43. 40 C.F.R. § 52.21(b)(3) (1989).
44. Similar to the NSPS "modification" rule, the PSD "major modification" rule specifically excludes, among other things:

(a) Routine maintenance, repair, and replacement; . . . .
(e) Use of an alternative fuel or raw material which:

(1) The source was capable of accommodating before January 6, 1975 [that is not prohibited by a federally-enforceable PSD permit condition]; . . .
(f) An increase in the hours of operation or in the production rate [that is not prohibited by a federally-enforceable PSD permit condition].

45. A "significant net emissions increase" is a complicated concept, generally defined as an increase in actual annual emissions of a pollutant. If increased emissions, measured in tons per year, are not offset by certain contemporaneous decreases in emissions at the same source, and the "net" increase exceeds pollutant-by-pollutant "significance" thresholds in EPA's PSD regulations, the project will be a "major modification." See 40 C.F.R. § 52.21(b) (1989).
costing more than fifty percent of the cost of a comparable entirely new facility makes the reconstructed facility subject to NSPS.\textsuperscript{47} There is no similar reconstruction rule in the PSD program.\textsuperscript{48}

These statutes and regulations were the focal point of a dispute between EPA and the Wisconsin Electric Power Company (WEPCO), relating to proposed changes to WEPCO's Port Washington electric power plant located on Lake Michigan north of Milwaukee, Wisconsin.\textsuperscript{49} The dispute presented the issue of whether EPA was “interpreting” its regulations or revising them without conducting additional rulemaking, and whether EPA was using an individual applicability determination to create new legally binding requirements of general applicability.

WEPCO's Port Washington generating station consists of five coal-fired steam electric generating units.\textsuperscript{50} In a 1983 study assessing the condition of the Port Washington station, WEPCO found that the combustion air preheaters on units one through four suffered from age-related deterioration, and that rear steam drums in units two through five were cracking.\textsuperscript{51} With ample reserve capacity at the time, in 1985, WEPCO shut down unit five as a safety precaution and reduced the maximum operating capacity of units two and three.\textsuperscript{52} The maximum operating capacities of units one and four also fell due to the reduced efficiency of the deteriorated air heaters.

As a result of the 1983 study, in 1987 WEPCO submitted a proposed repair program for approval by the Wisconsin Public Service Commission, as required under state law.\textsuperscript{53} WEPCO's proposed refurbishment project consisted of repairs and “like-

\textsuperscript{47} “Reconstruction” triggers NSPS applicability even if there is no increase in emission rates (and indeed, even if there is a decrease in emission rates). There is an exemption in the “reconstruction” rule if it can be shown that compliance with the NSPS would be technically and economically infeasible at the existing facility in question. 40 C.F.R. § 60.15(b)(2).

\textsuperscript{48} EPA considered adopting a “reconstruction” rule for the PSD program, similar to the NSPS “reconstruction” rule, but decided not to because “the general PSD objective of safeguarding existing air quality from significant degradation will not be undermined by deleting the requirement for review of reconstructions.” 45 Fed. Reg. 52703 (1980).

\textsuperscript{49} Wisconsin Elec. Power Co. v. Reilly, 893 F.2d 901 (7th Cir. 1990).

\textsuperscript{50} Id. at 905.

\textsuperscript{51} Id.

\textsuperscript{52} Id. at 905-06.

\textsuperscript{53} Id. at 906 (Citing Wis. Stat. § 196.49 (1987)).
kind" replacement of the air heaters for units one through four, the rear steam drums for units two through five, and common plant support facilities, in order to restore all five of the units to their original design capacity.\footnote{WEPCO had referred to the restoration or repair and replacement program as a "life extension" project which was necessary to allow all the Port Washington units to operate beyond their previously planned retirement dates of 1992 (units one and two) and 1999 (units three, four, and five). The new projected retirement date for all units was 2010. Id. at 906. The cost of WEPCO's repair project, however, would be only about fifteen percent of the cost of a comparable new facility, nowhere near the fifty percent threshold established in EPA's NSPS "reconstruction" rule. Id.}

The Wisconsin Public Service Commission consulted with the Wisconsin Department of Natural Resources ("Wisconsin DNR") on whether any environmental preconstruction permits were needed for the Port Washington station restoration project to be approved.\footnote{Memorandum from Don R. Clay, EPA Acting Assistant Administrator for Air and Radiation, to David A. Kee, Director of Air and Radiation Division, Region V (Sept. 9, 1988); Letter from Lee M. Thomas, EPA Administrator, to John W. Boston, WEPCO Vice President (Oct. 14, 1988); and Letter from Don R. Clay, EPA Acting Assistant Administrator for Air and Radiation, to John W. Boston, WEPCO Vice President (Feb. 15, 1989).}

The Wisconsin DNR determined that Clean Air Act "new source" and existing source "modification" review and permitting requirements did not apply to the project, but nevertheless referred the matter to EPA Region V for review. EPA decided that the Port Washington project was a "modification" subject to federal NSPS and a "major modification" subject to federal PSD permitting requirements.\footnote{EPA decided that, unlike the PSD program, there was no pre-change "representative emissions" concept under the NSPS program, and the use of a "shortly before" emission rate baseline was therefore justified. Letter from Thomas to Boston at 5.}

With respect to NSPS, EPA determined that the maximum hourly emissions just prior to ("shortly before") the project were less than maximum "potential" hourly emissions would be after the restoration project was completed.\footnote{Id.}

This EPA comparison method produced a calculated hourly emission rate increase. Even if the units possibly could have been operated for a short period of time at their full design capacity, without any renovation, EPA said it would ignore that fact unless operation at full design capacity "could be achieved on an economically sustainable basis" with the deteriorated equipment.\footnote{Id.} EPA also concluded that the...
Port Washington project did not qualify as an NSPS-exempt "routine" repair and replacement project.\textsuperscript{59}

With respect to PSD applicability, in contrast to the "shortly before" emissions rate baseline EPA had used for NSPS purposes, EPA found that the actual emissions at Port Washington during the 1985-1988 period of equipment deterioration were not representative of "normal" source operations. Instead, EPA looked at the annual average emissions during the two-year period of 1983-84 as the most recent representative emissions during "normal" source operations to determine PSD applicability.\textsuperscript{60} EPA then compared the actual representative annual emissions before the project to the maximum "potential" emissions after the project, that is, the emissions that would result if the station was operated at or near maximum capacity, 24 hours a day, 365 days a year.\textsuperscript{61}

WEPCO appealed EPA's NSPS and PSD applicability determinations to the Seventh Circuit. In Wisconsin Electric Power Co. v. Reilly,\textsuperscript{62} the Seventh Circuit agreed with EPA's interpretation of NSPS "modification" applicability to the Port Washington project, but disagreed with EPA's interpretation that the project was a "major modification" subject to PSD jurisdiction.

\textsuperscript{59} EPA gave no indication, however, of the weight to be given to any one of the multiple "routineness" determination factors announced for the first time in the WEPCO case. EPA's September 9, 1988, memorandum states that "[i]n determining whether proposed work at an existing facility is 'routine,' EPA makes a case-by-case determination by weighing the nature, extent, purpose, frequency, and cost of the work, as well as other relevant factors, to arrive at a common-sense finding." Memorandum from Clay to Kee at 3. In other words, it is impossible to know what changes will be considered "routine" without an EPA inquisition.

\textsuperscript{60} Id. at 5. Although 40 C.F.R. § 52.21(b)(2)(ii) provides that, in general, a source's actual emission is the average rate, in tons per year, at which the source "actually emitted" for the preceding two-year period, it also provides that the Administrator "shall allow the use of a different time period" determined to be "more representative of normal source operation."

\textsuperscript{61} "Actual emissions" is defined to mean generally pollutants actually emitted. Where an emissions unit "has not begun normal operations," however, it means that unit's "potential to emit." 40 C.F.R. § 52.21(b)(2)(iv). EPA's WEPCO decision, however, applies the "potential to emit" definition (40 C.F.R. § 52.21(b)(4)) to all sources "not currently subject to a PSD permit containing operational limitations," apparently under the reasoning that all planned changes to major stationary sources fit within the category of "an emissions unit which has not begun normal operations." This circular reasoning assumes that all changes to an existing unit make it a "new" unit (one to which 40 C.F.R. § 52.21(b)(2)(iv) applies), rather than illuminating which changes make it a "new" unit and which changes do not.

\textsuperscript{62} 893 F.2d 901 (7th Cir. 1990).
With respect to both NSPS and PSD applicability, the court deferred to EPA’s determinations that the Port Washington repair project was a “physical change” and that it was not an NSPS-exempt “routine” repair, maintenance, or replacement project. The court also accepted EPA’s comparison of the maximum hourly emission rate “shortly before” the project to the maximum hourly emission rate after the plant was repaired to find an emissions “increase” for NSPS purposes.63

However, the Seventh Circuit vacated EPA’s determination of PSD applicability. The court found EPA’s method of comparing pre-change actual emissions to post-change maximum “potential” emissions to be “circular.”64 In the context of physical or operational changes to any existing emission source, using the “potential” emissions concept in the equation assumes that which it seeks to prove, rather than differentiating those changes that will result in an “actual” net emissions increase from those changes that will not.65

The court noted that EPA was not permanently precluded from ever subjecting replaced units to the potential to emit concept under its regulations. Rather, the court stated, “The EPA may, if it wishes, undertake notice and comment procedures to apply the potential to emit concept to like-kind replacement. . . . But existing regulations do not seem to us to support such an application.”66

The WEPCO case is an example of using an informal determination of PSD and NSPS applicability to serve a broader agenda of revising or expanding EPA’s pre-established rules67

63. Id. at 913-15.
64. Id. at 917.
65. See Id. The court observed that in order to demonstrate that the Port Washington like-kind replacement project constitutes a modification, the EPA applies the potential to emit concept (to show an increase in emissions). In order to apply the potential to emit concept to like-kind replacement, the EPA assumes that the plant is a ‘modified’ unit. Id.
66. Id. at 918 (citation omitted).
67. See Memorandum from Gregory B. Foote, Attorney, EPA Air and Radiation Division, to William G. Rosenberg, EPA Assistant Administrator for Air and Radiation, at 3 (Nov. 24, 1989), noting that the First Circuit’s decision in Puerto Rican Cement Co. v. EPA, 889 F.2d 292 (1st Cir. 1989):

is a ringing endorsement of an important facet of EPA’s recent activist posture on PSD issues. It can be read as a green light for the Agency to proceed to rigorously apply new source requirements to a broad range of physical or oper-ational changes at existing facilities where the changes provide an economic incentive that might result in increased emissions. (Emphasis in original).
through "interpretation." The Seventh Circuit quite perceptively spotted EPA's rulemaking circumvention in holding that the "actual-to-potential" emission comparison test for PSD applicability was impermissible unless and until EPA first conducted notice and comment rulemaking to amend its rules. It is somewhat anomalous, however, that the Seventh Circuit failed to reach the same conclusion with respect to: (1) EPA's introduction of the new "shortly-before" baseline emission rate test for NSPS applicability purposes; (2) EPA's implicit repeal of the PSD exclusion for increased hours of operation and production rates; or (3) EPA's substantial departure from the "reconstruction" rule that was expressly created to deal with replacements "at the end of the useful life" of a facility.

D. "Top Down" BACT: "Rulemaking" By Internal Memorandum

As previously discussed, the 1977 amendments to the Clean Air Act established new requirements to prevent significant deterioration of air quality in regions of the country where ambient air quality is already better than the established national ambient standards (so-called "attainment" or "clean air" areas).68 PSD requirements apply to the construction of new "major emitting facilities"69 and to "major modifications" of existing major emitting facilities.70 Before any such new or modified source construction may commence, a federal PSD permit must be obtained and it must include, among other things, emission limitations based upon the application of "best available control technology" ("BACT").71 As defined in the statute:

The term "best available control technology" means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, includ-

68. 42 U.S.C. §§ 7470-79.
70. 40 C.F.R. § 52.23(b)(2), (i) (1989).
ing fuel cleaning or treatment or innovative fuel combustion techniques for control of each such pollutant.\footnote{72}

On January 4, 1979, soon after the PSD program was enacted, the EPA Assistant Administrator for Air and Radiation transmitted to EPA's regional offices a December 1978 document entitled Guidance for Determining Best Available Control Technology (BACT) ("1978 BACT Guidance").\footnote{73} The 1978 BACT Guidance document provided general, non-binding guidelines for EPA, state, and local permitting agencies to use in making "case-by-case" BACT determinations, pursuant to the statutory definition of BACT. EPA indicated in the 1978 BACT Guidance that the Act places the responsibility for determining BACT with the states;\footnote{74} that the statutory case-by-case approach provides a mechanism for identifying the best technology that meets the statutory criteria in each individual situation;\footnote{75} and that a critical decision in the BACT analysis is the relative weight assigned to energy, environmental, and economic impacts and other costs in each individual case setting.\footnote{76} The 1978 BACT Guidance further indicated that Congress implied that the decision on the weight to be assigned to these statutory "balancing" factors was to be made by the states, thus allowing flexibility in emission control requirements depending on local considerations and local preferences.\footnote{77} "State judgment," together with federal NSPS and National Emission Standards for Hazardous Air Pollutants ("NESHAP"), was stated to be the "foundation" for BACT determinations. Accordingly, the 1978 BACT Guidance document advised that it was not appropriate to assign any nationally-applicable weighting factors for BACT decisionmaking.\footnote{78}

The 1978 BACT Guidance document further provided that a PSD permit applicant should present to the permitting agency,

\footnote{72}{42 U.S.C. § 7479(3) (emphasis added). "In no event shall application of 'best available control technology' result in emissions of any pollutants which will exceed the emissions allowed [by any applicable NSPS or any applicable national emission standards for hazardous air pollutants]." 42 U.S.C. § 7479(3).}
\footnote{73}{Memorandum from David G. Hawkins, EPA Assistant Administrator for Air, Noise, and Radiation, to EPA Regional Administrators (Jan. 4, 1979).}
\footnote{74}{Id. at 3.}
\footnote{75}{Id.}
\footnote{76}{Id. at 4.}
\footnote{77}{Id.}
\footnote{78}{Id.}
and defend, the technology which the applicant selected and proposed as BACT, and that the control system proposed should be at least as stringent as the more stringent of the allowable emission levels of an applicable SIP or the federal NSPS and NESHAP requirements.\textsuperscript{79} The applicant should also present, according to the 1978 BACT Guidance, other available alternative control systems for each pollutant more stringent than the system proposed as BACT, alternatives already in use or proposed for the source, or for similar applications.\textsuperscript{80} EPA's 1978 Guidance further stated that the applicant must defend the system proposed as BACT by showing that any more stringent alternative systems would cause unreasonable adverse energy, environmental, or economic impacts.\textsuperscript{81} Importantly, the applicant was to present its rationale for rejecting any more stringent alternatives in the form of an "incremental" analysis of the impacts of each such alternative system relative to the proposed BACT control system.\textsuperscript{82}

In October 1980, the EPA Office of Air and Radiation issued a second guidance document entitled Prevention of Significant Deterioration Workshop Manual ("1980 PSD Workshop Manual") to familiarize permitting agencies and permit applicants with EPA's August 7, 1980, PSD regulations\textsuperscript{83} and to suggest methods for meeting those requirements.\textsuperscript{84} The 1980 PSD Workshop Manual incorporated the same "base case" or "incremental" BACT analysis set forth in the 1978 EPA Guidance.

In January 1986, however, the Radian Corporation ("Radian"), under contract to EPA, prepared a report entitled Suggested Approaches for Determining Best Available Control Technology (BACT) and Lowest Achievable Emission Rate (LAER) ("1986 Radian Report"). The 1986 Radian Report contrasted the BACT determination approach presented in EPA's 1978 BACT Guidance and 1980 PSD Workshop Manual (referring to it as a "bottom-up" approach) with a newly-suggested "top-down" approach.\textsuperscript{85}

\textsuperscript{79.} Id. at 4-5.
\textsuperscript{80.} Id. at 5.
\textsuperscript{81.} Id. at 6.
\textsuperscript{82.} Id.
\textsuperscript{83.} 40 C.F.R. § 52.21 (1989).
\textsuperscript{85.} 1986 Radian Report at 3-2.
described by Radian, the first step under the alternative "top-down" approach would be to determine the most stringent available control system for a similar or identical source type. If it could be proven (by the permit applicant) that this most stringent technology was technically or economically "infeasible" for the source in question, then the next less stringent control system would be considered. The "top-down" analysis thus would continue downward, according to Radian's suggestion, until the BACT level being examined could not be eliminated by "infeasibility" considerations. Among other things, the 1986 Radian Report stated that, although control costs and cost-effectiveness would not enter into "top-down" BACT decisionmaking as often as in the "bottom-up" approach, in certain instances control costs might become a determining factor. The Radian Report further showed that the "top-down" approach could result in more restrictive BACT levels than the "bottom-up" approach of EPA's 1978-1980 guidance.

On December 1, 1987, then-Assistant Administrator for Air and Radiation, J. Craig Potter, issued an internal memorandum to EPA Regional Administrators entitled Improving New Source Review ("NSR") Implementation (the "Potter Memo"). Among other things, the Potter Memo authorized the development of specific guidance on the use of the new "top-down" approach for determining BACT, on a national scale and for all new and modified sources. The Potter Memo indicated, in language virtually identical to Radian's suggestion, that the first step was to determine, for each emission source, "the most stringent control available" for a similar or identical source or source category. According to the Potter Memo, if the applicant could show that this "top" level of control was technically or economically "infeasible," then the next less stringent level of control would be

86. Id. at 3-10.
87. Id. at 3-13. A very significant new feature of the "top-down" BACT approach is EPA's insistence on the use of "total cost-effectiveness" (rather than "incremental" cost-effectiveness) for determining the economic reasonableness of a control alternative. Because it uses an assumed "no control" baseline, the total cost-effectiveness analysis results in more stringent control systems appearing to be less costly than EPA's benchmark figure for economic reasonableness.
88. Id. at 3-10 to 3-14.
89. Memorandum from J. Craig Potter, EPA Assistant Administrator for Air and Radiation, to EPA Regional Administrators, at 3-4 (Dec. 1, 1987).
90. Id. at 3.
determined and similarly evaluated. This "top-down" analysis, as described in the Potter Memo, would continue until the BACT level under consideration could not be eliminated by any "substantial or unique" technical, environmental, or economic objections. The "top-down" approach, according to the Potter Memo, "shifts ... to the applicant" the burden of proving why the proposed source is unable to apply the "top" technology.

The internal EPA Potter Memo thus directed EPA regional offices to apply the "top-down" approach to all BACT determinations. It further directed EPA regional offices to comment and object when a state or local permitting agency proposed a level of control that appeared to be inconsistent with the "top-down" approach. If a final state or local BACT determination fails to reflect adequate consideration of factors that would have been relevant using a "top-down" analysis, according to the Potter Memo, EPA would consider the PSD permit to be "deficient" and subject to EPA enforcement action.

The Potter Memo and various subsequent EPA efforts to impose the "top-down" approach on all state permitting agencies and PSD permit applicants which have not met the rulemaking requirements of the APA have been challenged in federal courts in Washington, D.C. and elsewhere. At present, it is unresolved whether EPA has the authority to change its 1978-1980 BACT

91. Id. at 3-4.
92. Id. at 4.
93. Id.
94. Id. Later, on July 15, 1988, the EPA Office of Air Quality Planning and Standards and the EPA Headquarters Office of Enforcement and Compliance Monitoring jointly issued a memorandum entitled Procedures for EPA to Address Deficient New Source Permits Under the Clean Air Act [hereinafter "1988 Deficient Permits Guidance"], providing that a BACT determination not using the "top-down" process would be sufficient reason for EPA to find a permit "deficient" and to take enforcement action. Among other things, the 1988 Deficient Permits Guidance provided that EPA could issue an order under section 167 of the Act demanding that the permittee not commence construction or that the permittee cease construction, that EPA could issue a notice of violation under section 113 of the Act seeking civil penalties of up to $25,000 per day, and that EPA could take court action if the permittee did not comply with an EPA order. Knowing violations of applicable, federally-enforceable SIP requirements or EPA orders are punishable under section 113(c) of the Act by fines of up to $25,000 per day or imprisonment up to one year or both.
95. On March 15, 1990, EPA "issued" its final draft guidance on "top-down" BACT determinations. This most recent and complete articulation of EPA's "top-down" approach also has been challenged in federal court.
guidance and implement "top-down" BACT informally, that is, without administrative rulemaking procedures.

E. Zimmer Paper Products: "Rulemaking" By Creative Enforcement

Indiana's SIP includes limitations on the release of volatile organic compounds ("VOCs") by the paper coating industry. Operators of paper coating lines comply with VOC emission limitations through one or more compliance techniques. 96

After EPA approved the Indiana SIP, EPA Headquarters distributed to the chiefs of the Air Programs Branches in the ten EPA regional offices what the government characterized as an "internal memorandum," authored by Richard Rhoads, Director of EPA's Control Programs Development Division ("Rhoads Memo"). The Rhoads Memo stated that difficulties had arisen in securing compliance with emission limitations in the paper coating industry when "add-on" controls (incinerators) were used. To eliminate these add-on control compliance difficulties, the Rhoads Memo provided that units of emissions in mass VOC per volume of coating "cannot be used." 97 Rather, emission limitations "must be based on mass of VOC per volume of solids consumed." 98 In addition, the Memo stated that the emission levels achieved through incineration must be equivalent to those attainable under the alternative approach of using a higher solids (lower solvent) coating. 99

Zimmer Paper Products operates a facility in Indianapolis which coats, prints, and cuts paper for food packaging overwrap and pressure sensitive labels. 100 Based on a March 5, 1987, inspection of the facility, EPA found that Zimmer was not in compliance with EPA's interpretation of the Indiana SIP, and filed an action seeking injunctive relief and civil penalties against Zimmer for excessive emissions of VOCs. 101 EPA also informed Zimmer that, in order to comply with the Indiana SIP, its emis-

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98. Id.
99. Id.
100. Id.
101. Id. at 3-4.
sions would be measured according to the procedures outlined in the Rhoads Memo.\textsuperscript{102}

Zimmer counterclaimed, alleging that EPA and Indiana authorities were applying the Rhoads Memo as if it were a binding "legislative rule." Zimmer argued that since the Rhoads Memo had not been duly promulgated as a rule, the emission requirements of the memo could not be applied to affect the company adversely.\textsuperscript{103}

EPA argued, on the other hand, that the Rhoads Memo was merely an agency "policy statement" or "interpretive rule" which clarified how to determine whether add-on controls such as incinerators comply with Indiana's VOC emission limitations. Thus, EPA argued, the Rhoads Memo was intended to clear up confusion over the appropriate means of determining compliance with emission limitations. It was not intended as a substantive change in the VOC limitations.\textsuperscript{104} As such, according to EPA, the Rhoads Memo was not a legislative rule.

On cross-motions for summary declaratory judgment, the court held in favor of Zimmer.\textsuperscript{105} The court found that, through the Rhoads Memo, EPA was attempting to impose new and more stringent duties on the paper coating industry in two ways. First, the memo effectively changed the applicable regulatory provision by requiring that emissions be measured in units of "volume of [coating] solids consumed" rather than in pounds of VOC per gallon of coating solution.\textsuperscript{106} Second, the Rhoads Memo required that, if add-on equipment is used to achieve compliance under the Indiana rule, the emission levels achieved must be equivalent to those using a higher solids (low solvent) coating.\textsuperscript{107} Thus, the memo changed the existing regulation, which allowed compliance through a variety of techniques, to a new "regulation" which required compliance by only one technique, that is, the use of low solvent coatings.

The court noted, in particular, the mandatory language of the Rhoads Memo and EPA's attempts to impose the memo upon

\textsuperscript{102} Id. at 4.
\textsuperscript{103} Id.
\textsuperscript{104} Id.
\textsuperscript{105} Id. at 19.
\textsuperscript{106} Id. at 9 (emphasis in original).
\textsuperscript{107} Id. at 9.
Zimmer as a currently binding rule. The court found that "EPA [had] set out the new emissions standards in mandatory language much more suggestive of 'the rigor of a rule, not the pliancy of a policy.'"\textsuperscript{108}

On these grounds, the court concluded that the Rhoads Memo was in fact a "legislative rule." The court held, therefore, that Zimmer could not be adversely affected by EPA's informally-adopted "rule," because the rule had not been promulgated lawfully pursuant to notice and comment rulemaking. Thus, the court granted Zimmer's motion for summary declaratory judgment.\textsuperscript{109}

IV. CONCLUSION

These cases demonstrate various forms of EPA's recent tendencies toward rulemaking avoidance, but do little to explain or justify EPA's actions. Reasons for rulemaking avoidance do exist, whether legally justified or not.

First, EPA has strong internal and external incentives to avoid rulemaking. The rulemaking process is cumbersome, expensive, and time-consuming.\textsuperscript{110} Throughout the rulemaking process and after rules have been promulgated, EPA faces the potential of organized opposition from industry, environmental groups, and others. In addition to these forces from outside the government, EPA's proposed regulatory actions are subject to the scrutiny of other entities within the government, including the regulatory review staff of the Office of Management and Budget ("OMB").\textsuperscript{111}

\begin{enumerate}
\item[108.] Id. at 11 (citing McLouth Steel Products Corp. v. Thomas, 838 F.2d 1317, 1320-21 (D.C. Cir. 1988)).
\item[109.] Id. (citing 5 U.S.C. § 552(a)(3)).
\item[110.] For example, the cost to the Agency for revising standards of performance for fossil fuel-fired steam generators under Title 40 of the Code of Federal Regulations, part 60, subpart Db, was approximately $500,000 over a period of three to five years. Telephone interview with Fred Porter, EPA Office of Air Quality Planning and Standards (June 11, 1990). This rulemaking would have cost substantially more had the Agency not utilized information from a similar rulemaking for industrial boilers, which cost $2 million over a seven-year period. Id. According to Mr. Porter, development of "more complex, more rigorous" rules such as the NSPS for utility boilers, may cost as much as $5-6 million and require two to six years for completion. Id.
\item[111.] Other governmental executive branch oversight bodies include: the Cabinet, along with its various councils and working groups; White House Staff; the Office of the Vice President; and other components of the Executive Office of the President, including the Council of Economic Advisors, the Council on Environmental Quality, the Office of Policy Development, the National Security Council, National Critical Materials Council, the
The scrutiny of OMB has been particularly threatening to EPA in recent Administrations.\textsuperscript{112} A second key factor in EPA's rule-making avoidance tendencies may be that, after the Supreme Court's decision in \textit{Chevron U.S.A. v. Natural Resources Defense Council},\textsuperscript{113} reviewing courts have been increasingly willing to grant considerable deference to an agency's interpretations of its governing law and regulations. As one commentator has noted, courts may feel compelled, based on a broad reading of \textit{Chevron}, to accept agency interpretations without consideration of whether Congress has delegated to the agency the authority to issue such interpretations in \textit{informal} (non-rulemaking) formats.\textsuperscript{114} This


112. OMB review can take many forms. In May, 1986, the House Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce conducted hearings concerning the policies of OMB governing disclosure of communications with outside parties and agency officials on regulatory review matters. One subcommittee member stated:

\begin{quote}
There's no question that OMB's Office of Information and Regulatory Affairs routinely reviews and attempts to influence the substance of proposed agency rules. Sometimes this is done by pressuring an agency to shift direction and sometimes it is done by holding rules hostage for long periods of time. Some who have watched this spectacle over the years think OMB should change its name to the 'Office of Meddling and Backlog.'
\end{quote}


\begin{quote}
Such a reading of \textit{Chevron} is possible because its language suggests that, if the reviewing court cannot find specific congressional intent on the precise point at issue, but rather finds the statute to be silent or ambiguous on that point, it should presume that Congress delegated to the agency the interpretive authority to fill the gap, and must therefore accept any reasonable agency interpretation. It is then but a short step, perhaps unconsciously taken, to assume that this implied delegation requires acceptance of the interpretation \textit{without regard for the format in which it is expressed}.
\end{quote}

\textit{Id.} (footnote omitted) (emphasis added).

Professor Anthony concludes, however, that "[w]here the format is an \textit{informal} one, it ordinarily does not carry the force of law, and a reviewing court is not bound by the agency interpretation, though it should give special consideration to the agency opinion." \textit{Id.}
“Chevron-type” deference by reviewing courts, however, invites more autocratic federal agencies and fosters more rulemaking avoidance.

Rulemaking procedures designed to ensure fairness and rationality have been an important check on governmental power for half a century. As agencies like EPA operate increasingly in the realm of more heat than light, the process used for making regulatory decisions in the face of scientific uncertainty becomes even more important. Procedural safeguards applicable to legislative rulemaking, though they may be imperfect and may reduce the efficiency with which government would prefer to operate, are the best known antidote to errant, unwise, unauthorized, or unfair lawmaking by administrative agencies. When agencies like EPA manifest an aversion to the rulemaking process, the judiciary is the branch of government best suited to ensure that fair and proper procedures are observed. In cases involving procedural shortcuts or deprivations on the part of an agency, the courts need to rise to the difficult challenge of determining what constitutes a legislative rule, or the functional equivalent of one. The courts also should be circumspect in extending deference to an agency’s self-serving characterization of actions which are alleged to be the functional equivalent of legislative rules.
I. INTRODUCTION

"How clean is clean?" is a question about which there is a great deal of debate in the area of environmental remediation. In order to answer it, one must confront scientific uncertainty, value conflict, and legal complexity. This article explores the relation between state and federal law, and the application of state and federal law in Kentucky concerning setting standards for cleaning up environmental contamination.

The issue of background versus risk-based cleanup levels has for a number of years shaped the debate about cleanup levels in Kentucky as well as around the country. It is first of all important to realize what the question of "how clean is clean" is not. It is not a question whose answer defines how every hazardous waste or hazardous substance site will be addressed. Instead, it is the question of at what point a site exits the system of regulation, that is, at what point do regulatory agencies declare a site clean, and thereby sanction unlimited land uses and public
access. This question is distinct from the issues of how contaminated sites or permanent disposal sites are managed, through institutional controls to limit access such as fences, guards, signs, deed restrictions, and containment measures, such as capping, to limit migration of residual contaminants to ground and surface waters. Hazardous substance sites have traditionally been remediated in one of two ways. The first is in place (in situ) treatment or disposal with a cap (or cover) placed over the site, and long term continued monitoring and maintenance. The second is “clean closure” involving removal of wastes and waste residues for treatment and/or disposal elsewhere, with groundwater monitoring for the purpose of demonstrating that no migration from the disposal area has occurred. Under clean closure, no further management of the site occurs.

Framed in this way, the issue is not simply a technical determination. Instead, the level of contamination (above naturally occurring background) at which the responsible regulatory agency ceases to be concerned with the welfare of those exposed becomes a question of public policy and value judgment. Once regulatory

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2. This issue is broader than the issue of releases from liability, such as those offered to certain potentially responsible parties by EPA under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”). See CERCLA, 42 U.S.C. § 9622 (1988); 52 Fed. Reg. 24,333, 24,337 (1987) (request for public comment, June 30, 1987); 54 Fed. Reg. 34,235 (1989) (public notice, Aug. 18, 1989). Such releases, if offered by the state agency, would in any case be of dubious effect, especially if residual contamination was determined at a later date to pose a threat to human health or the environment, given the absence of clear statutory authority and the public policy ramifications of allowing the public welfare to be endangered based on governmental actions later determined to be unsound. Compare Michigan v. Thomas, 805 F.2d 176 (6th Cir. 1986) (agencies should not be estopped from using increased technical expertise).

3. For hazardous waste sites, EPA proposed a rule allowing another alternative, called “hybrid closure,” on March 19, 1987. 52 Fed. Reg. 8,712 (1987) (proposed Mar. 19, 1987). That rule was never promulgated in final form, but would have allowed for establishment of alternative closure standards involving the removal of the majority of waste and waste residues, with continued management and monitoring of areas with residual contamination, less than the full closure and post-closure standards applicable to hazardous waste landfills. Id. at 8,713.

4. Soil cleanup standards are usually thought of in connection with the clean closure option, but they are also often applied to areas outside the capped area of a disposal site because of the potential for exposure to humans and wildlife, and for runoff into surface waters. See, e.g., Comments Submitted by The Commonwealth of Kentucky Natural Resources and Environmental Protection Cabinet, Division of Waste Management on B.F. Goodrich/Airco Consent Decree (lodged Jan. 5, 1989) at 7 (filed in B.F. Goodrich, supra, note 1) [hereinafter Comments on B.F. Goodrich Consent Decree] (on file with the Salmon P. Chase College of Law library).
jurisdiction over a site ceases, and the site is declared "clean," any land use is possible, from day-care centers to playgrounds to housing, golf courses and park land. The question of what risk level to allow people to be involuntarily, and even unknowingly, exposed to is a value-laden, and therefore political question. The companion question, of what level of certainty should be required about the risks of exposure before we rely on it, is also a value-laden political issue.

The presence of the broad based and growing grassroots environmental movement concerned with issues relating to exposure to toxics demonstrates the increasing public concern with these issues. Regardless of whether one agrees that these citizens represent a majority of the public, citizens of a democracy that respects individuals' rights must be gravely concerned when so many citizens are being subjected unknowingly or against their will, but with the full approval of the government, to conditions that even the most ardent defender of risk assessment/risk management would admit constitutes some degree of risk.

II. THE FEDERAL FRAMEWORK AND THE SPACE LEFT THE STATES

In the area of environmental law, Congress has generally taken the approach of setting minimum standards, and requiring that

5. See, e.g., 52 Fed. Reg. 8,704 (1987). The site of a hazardous waste unit closed by removal "may be transferred and developed freely without giving notice of its prior use." Id. at 8,707.
6. "Unknowingly," because once a site is declared "clean," there is a high probability that subsequent users (including owners, tenants, passersby, bystanders, and employees) will be exposed to whatever residual contamination remains, without any warning. "Involuntary," because without knowledge voluntariness is impossible, and because for some post-cleanup land-uses, like housing, individuals may be financially unable to avoid exposure even if they do learn about residual contamination after occupying the property. To avoid these results, the deed notice provisions in existing laws must be construed as inclusively as possible and enforced aggressively. See KY. REV. STAT. ANN. § 224.876(16) (Baldwin 1990). Even then, it is highly unlikely that these provisions will afford non-owners knowledge of the residual contamination.
7. For a good discussion of the moral and ethical implications of exposing unknowing individuals to conditions believed "safe," but with some degree of uncertainty, in the context of biological warfare testing, see generally L. COLE, CLOUDS OF SECRECY: THE ARMY'S GERM WARFARE TESTS OVER POPULATED AREAS (1988).
8. Such groups as the Citizen's Clearinghouse for Hazardous Wastes (Arlington, Va.), National Toxics Campaign (Boston, Mass.), People Against Hazardous Landfills (Valparaiso, Ind.), and innumerable local groups that have organized against toxics demonstrate the rising level of public concern with exposure to toxics. See generally B. COMMONER, MAKING PEACE WITH THE PLANET 178 (1990).
9. See generally COLE, supra note 7.
no state set less stringent environmental standards.10 States are, however, generally permitted to establish more stringent standards.11 This article will discuss the interaction of state and federal law in determining cleanup standards at sites subject to the hazardous waste laws, the hazardous substance laws, and the solid waste laws. In addition, it will touch on the impact of the Toxic Substances Control Act12 ("TSCA") and the Federal Water Pollution Control Act13 ("FWPCA") on site remediation.

Since at least 1984, the United States Environmental Protection Agency ("EPA") has been implementing a policy of risk management with respect to the regulation of toxic chemicals in the environment.14 Beginning with the incorporation of risk analysis under the TSCA, where balancing of benefits in terms of avoided risks against cost of control was authorized by statute,15 continuing with the use of risk assessment to evaluate the protective ness of remedial action alternatives under Superfund,16 and most recently with attempts to propose incorporating risk assessment into corrective action and closure determinations under RCRA,17 EPA has moved toward incorporating risk-based cleanup standards into its programs.

The Commonwealth of Kentucky, like several other states, has been reluctant to adopt EPA's approach to risk management, and has maintained an antidegradation, or "clean to background" approach to remediating soils at hazardous substance sites. The Natural Resources and Environmental Protection Cabinet has cited several reasons why risk assessment is not the preferred approach, including potential future liability, expense of risk assessment, and concerns about the "usability of risk assessment

11. Id.
14. See EPA, RISK ASSESSMENT AND MANAGEMENT: FRAMEWORK FOR DECISION MAKING, December 1984 (on file with the Salmon P. Chase College of Law library).
15. Id. at 24.
data to protect other, [more] sensitive species than Homo sapiens."18 While there is much discussion and debate about the characteristics and implications of the use of risk assessment in setting cleanup standards, little discussion has been addressed to the distributive effects of the tool. For example, site-specific risk assessments, which are often used by EPA and industry in justifying cleanup standards, can yield very different results, that depend upon the location of the site. For example, the guiding principle may be that a certain amount of toxics will be allowed to remain in the soil if no more than one out of one million potential receptors (exposed humans) will contract cancer from the site. The cleanup standard is quite different if there are a thousand people living within a quarter mile of the site than if there is only one person. The result of applying site-specific risk assessment is that rural sites will generally be left more contaminated than urban sites. In Kentucky, a largely rural state, the public may demand that a different set of values be used for establishing cleanup standards.

The fundamental mandate of the Kentucky Natural Resources and Environmental Protection Cabinet ("Cabinet") in dealing with matters relating to waste management is the protection of human health and the environment.19 Proponents of risk assessment in setting cleanup standards argue that this mandate is fulfilled when, pursuant to a risk assessment, an "insignificant" amount of contamination, and risk to public health, remains. Opponents of risk assessment argue that the notion of leaving some contamination, and exposing the public to some risk, is inconsistent with the protection of public health. Moreover, given the methods of risk assessment commonly in use today, protection of the environment is not necessarily assured when a risk-based approach is used. Generally, human carcinogenicity is the measure of risk evaluated through risk assessment, and sometimes other human effects, but the data for evaluating environmental effects through risk assessment are generally not available.

III. CLEANUP STANDARDS UNDER KENTUCKY LAW

A. Sources of Cleanup Authority

A site that has non-naturally occurring chemical substances in the soil as a result of disposal (as opposed to the normal appli-

18. WILLIAMS, supra note 1, at 21.
cation of fertilizer or pesticide) may be regulated in several ways. The first question is whether the waste disposal unit is a hazardous waste site, that is, whether the compound disposed of is a hazardous waste, and whether the waste continued to be managed after the jurisdictional date of the Resource Conservation and Recovery Act\textsuperscript{20} ("RCRA"), which is November 19, 1980.\textsuperscript{21}

To determine whether a waste is a hazardous waste, the first line of inquiry is whether the substance is a listed hazardous waste.\textsuperscript{22} If not, it must be determined whether the substance is hazardous by characteristic.\textsuperscript{23} If the waste is a hazardous waste disposed of after the effective date of RCRA, then cleanup of the site is governed by the Kentucky regulations regarding hazardous waste facilities.\textsuperscript{24}

The next question is whether the site is a hazardous waste facility,\textsuperscript{25} even if the disposal unit is not a hazardous waste facility.


\textsuperscript{22} The listings are found in 401 Ky. Admin. Regs. § 31:040 (Baldwin 1990), and in Identification and Listing of Hazardous Waste, 40 C.F.R. §§ 261.31-33 (1989).

\textsuperscript{23} The characteristics which, if exhibited by a waste, render it hazardous under the regulations are ignitability, corrosivity, reactivity, and Extraction Procedure Toxicity ("EPT"). 401 Ky. Admin. Regs. § 31:030 (Baldwin 1990); Identification and Listing of Hazardous Waste, 40 C.F.R. §§ 261.20-24 (1989). Liquids with a flash point of less than 140° are ignitable; materials with a pH greater than 12.5 or less than 2 are corrosive; materials that are explosive or produce toxic gases when in contact with water are reactive; and, materials that leach specified heavy metals or organic compounds above certain rates are considered E.P. Toxic. Note that EPA has recently published a final rule on Toxicity Characteristic Leaching Procedure which will replace E.P. Toxicity as the criteria for defining those wastes which are hazardous by characteristic of toxicity, and which will bring many wastes under regulation as hazardous for the first time. See 55 Fed. Reg. 11,798 (1990).

\textsuperscript{24} 401 Ky. Admin. Regs. Chapters 34 and 35 (Baldwin 1990). See also 40 C.F.R. §§ 264-65 (1989). If a site is a RCRA permitted hazardous waste treatment, storage, or disposal facility, or an illegal RCRA treatment, storage, or disposal facility, it will generally be cleaned up under RCRA. The exceptions to this (where a site may be cleaned up under CERCLA) are described in EPA guidances on when sites subject to RCRA may be cleaned up under CERCLA. 53 Fed. Reg. 30,002 (1988) (Policy Statement for Comment, Aug. 9, 1988) (setting forth criteria for determining whether a site subject to corrective action is a hazardous waste site under RCRA based on inability to pay for RCRA corrective action); 53 Fed. Reg. 30,005 (1988) (Policy Statement, Aug. 9, 1988). If the disposal unit received hazardous wastes after November 18, 1980, or was managed or closed after that date, it must be cleaned up under the standards for "regulated units." If the unit was closed prior to that date, or received only wastes not regulated as hazardous wastes, then it is subject to RCRA corrective action requirements as a solid waste management unit.

\textsuperscript{25} There are several ways that hazardous waste generators can become hazardous
disposal unit. If the site is a hazardous waste facility, it is subject to corrective action by order or permit condition, even for units on site that do not contain hazardous waste.26 If the site escapes regulation as a hazardous waste facility, one must check to see if any of the substances at the site are regulated as hazardous constituents, hazardous substances or pollutants.27

If there are hazardous constituents present, and the Cabinet determines that the constituents are likely to migrate to groundwater, it has authority to require corrective action regardless of the time the waste was disposed.28 If a substance is not regulated as a hazardous substance or hazardous constituent, but is a pollutant, Kentucky has the authority to require it be cleaned up to a point where its infiltration to groundwater and discharge of contaminated groundwater to surface water, or runoff to surface water, does not threaten to exceed the water quality

waste facilities. The most obvious is by intentionally placing hazardous waste on the ground in such a way that constituents may enter the land or water. See 401 Ky. ADMIN. REGS. 30:010 (1990) (definition of “disposal”). Such facilities are hazardous waste disposal facilities. It should also be noted that sites of inadvertent spills are considered disposal sites if not cleaned up “immediately” to background levels. See 401 Ky. ADMIN. REGS. 38:0101(c) (1990) (exemption from permitting for immediate response to spills). In addition, while generators, as opposed to owners or operators of treatment, storage or disposal facilities, are normally exempt from permitting, their exemption disappears if they fail to comply with the generator pretransport requirements. 401 Ky. ADMIN. REGS. 32:030 (1990). Thus, if a generator is not in compliance with the requirements to mark drums with hazardous waste labels, or fails to maintain a contingency plan as required, for example, the permitting exemption can be lost and the site can become a facility. Similarly, if the generator exceeds the allowed time for storage under the exemption or accepts hazardous wastes from another site for storage for any amount of time, or engages in treatment without a permit, facility requirements may apply. All facilities are required to maintain financial assurance for closure, liability insurance, and to perform corrective action at solid waste management units where a release of hazardous constituents has occurred. Thus generator compliance is extremely important for generators that do not want to have facility standards applied to them.


27. The hazardous constituent list is found at 401 Ky. ADMIN. REGS. 31:170 (1990), or Identification and Listing of Hazardous Waste, 40 C.F.R. § 261 App. VIII (1989). The federal hazardous substance list appears at 40 C.F.R. § 302.4 (1989). Pollutants for which there are surface water standards are listed at 401 Ky. ADMIN. REGS. 5:031 (1990). Although Kentucky had not yet promulgated a hazardous substance list as this article went to press, the state has maintained that all hazardous constituents, as well as other substances, such as the federally listed substances that meet the definition of a hazardous substance under Ky. REV. STAT. ANN. § 224.877 (Baldwin 1989) are required to perform remediation under Ky. REV. STAT. ANN. § 224.877.

standards for potentially affected surface waters. Finally, if a substance is not regulated as any of the above it is still a solid waste, and unless it is found in a properly permitted waste disposal site, is subject to remediation as an illegal waste disposal site.

B. The Kentucky Hazardous Waste Program

The EPA has authorized the Commonwealth of Kentucky to administer a state hazardous waste program under the RCRA. However, Kentucky has not yet been authorized to administer the requirements imposed under the substantial revisions to RCRA as represented by the Hazardous and Solid Waste Amendments of 1984 ("HSWA"). This means that although Kentucky administers and enforces what is called the base program, EPA still plays a direct role in the administration of those requirements imposed under HSWA. Thus, for example, final (Part B) hazardous waste facility permits are dual permits issued jointly by the Kentucky Natural Resources and Environmental Protection Cabinet and the EPA, with the state having primary responsibility for the RCRA requirements and EPA having primary responsibility for the HSWA requirements. Under the hazardous waste laws, as mentioned above, two types of closure of land disposal units are allowed, clean closure and closure with waste in place.

1. Clean Closure of RCRA Regulated Units

In setting cleanup standards for regulated land disposal units, EPA initially distinguished between listed and characteristic

32. The regulations provide for a number of different types of hazardous waste units. Cleanup standards generally come into play for surface impoundments and waste piles, which can both be treated as storage units and closed by removal (also called "clean closure") or closed with waste in place as a hazardous waste landfill. If closed with waste in place, they must comply with the full closure and post-closure requirements for hazardous waste landfills, including financial assurance and liability insurance for the 30 year post-closure monitoring and maintenance period and the placement of a hazardous waste cap designed to minimize infiltration. See generally 401 Ky. Admin. Regs. Chapters 34-35 (1990) and 40 C.F.R. §§ 264-65 (1989) for standards applicable to hazardous waste surface impoundments, waste piles, and landfills.
wastes. In order to clean close a unit in which listed hazardous wastes had been disposed or stored, a facility was required to remove all hazardous constituents to naturally occurring background levels. For characteristic wastes, removal of only that soil which was so contaminated that it actually exhibited the characteristic of the waste was all that was required. EPA amended that requirement on March 19, 1987. On that date it promulgated an amendment to the clean closure regulations. In the preamble to the new regulations, it provided an interpretation of the “remove or decontaminate” standard. EPA stated that

33. See 45 Fed. Reg. 33,203, 33,205 (1990). The original regulation for clean closure of interim status surface impoundments and waste piles required that all hazardous wastes and hazardous residues be removed. Since the regulation defining when a hazardous waste ceases to become a waste differed for listed and characteristic hazardous wastes, different requirements applied to clean closure. The regulations provide that residues derived from the treatment, storage, or disposal of a listed hazardous waste continue to be hazardous wastes until a delist petition is granted, whereas wastes derived from a characteristic waste are only hazardous if they exhibit the characteristic. Identification and Listing of Hazardous Waste, 40 C.F.R. § 261.3(c)-(d) (1989). This meant for soil contaminated with a listed waste, as long as detectable levels of hazardous constituents (above natural background) were present, the soil was a hazardous waste required to be removed for clean closure. But for soil contaminated with a characteristic waste, if the waste was sufficiently diluted so that the resultant contaminated soil did not exhibit the characteristic, it could remain in place even under the clean closure option (assuming no groundwater contamination was detected during compliance monitoring). See also 52 Fed. Reg. 8,704-05 (1987) (to be codified at 40 C.F.R. § 265.228).

34. Id.

35. The regulation provides that the owner or operator must “remove or decontaminate all waste residues, contaminated containment system components (liners, etc.), contaminated subsoils...” 40 C.F.R. § 265.228(a)(1); 401 Ky. ADMIN. REGS. 35:200(6) (1990) (discussing surface impoundments); 401 Ky. ADMIN. REGS. 35:210(7) (1990) (applying the same requirements to waste piles). In the preamble to the amended regulation, EPA explained that this would generally mean that a facility would be required to have cleaned to background, unless the site could be shown to have levels of hazardous constituents protective of human health and the environment. 52 Fed. Reg. 8,704 (1987) (codified at 40 C.F.R. § 265.228 (1990)). The demonstration of protectiveness must be made under the most conservative assumptions according to the preamble:

For the purpose of making a closure by removal demonstration, the potential point of exposure to hazardous waste constituents is assumed to be directly at or within the unit boundary for all routes of exposure (surface-water contact, ground-water ingestion, inhalation, and direct contact). Potential exposure at or within the unit boundary must be assumed because no further oversight or monitoring of the unit is required if the unit is closed by removal. (Recall that the land overlying a unit that closes by removal may be transferred and developed freely without giving notice of its prior use). Therefore, no attenuation of the hazardous waste constituents leaching from the waste residues can be presumed to occur before the constituents reach exposure points.

the standard would generally require background, or an alternative demonstration, provided that “the Agency must be certain that no hazardous constituents remain that could harm human health or the environment [now or in the future].” Because of the uncertainty associated with risk assessment, and the large number of chemicals for which inadequate data is available to make such a determination with certainty, it appears that this standard will require background cleanup levels in many, if not most, cases.

2. Kentucky’s Interpretation of the Remove or Decontaminate Standard

The Kentucky Natural Resources and Environmental Protection Cabinet has continued to interpret the “remove or decontaminate” standard to require cleanup to background of contaminated soils at hazardous waste land disposal units. The language in the state regulation\(^{37}\) is identical to the federal, but Kentucky’s interpretation is in accord with the “plain meaning” of the regulatory language. Where the language refers to all waste and waste residues, Kentucky’s interpretation is that it means all, not all except what some analysis reveals as insignificant. Kentucky’s regulation is not “more stringent,” but rather is an identical regulation. The state interprets the standard differently from EPA, and does not follow the non-binding, advisory preamble.\(^{38}\) Hence the state continues to require cleanup to back-

\(^{36}\) Id. at 8,708.


\(^{38}\) The point that Kentucky’s regulation is not more stringent than the federal is not merely academic. Many industry advocates argue that Kentucky may not promulgate regulations under the hazardous waste program that are more stringent than the federal, citing KY. REV. STAT. ANN. § 13A.120. That statute provides:

An administrative body may adopt administrative regulations to implement a statute only when the act of the general assembly creating or amending the statute specifically authorizes the adoption of such regulations or such regulations are required by federal law, in which case such regulations shall be no more stringent than the federal law or regulations. . . .

KY. REV. STAT. ANN. § 13A.120 (Baldwin 1990).

However, it is apparent from a cursory examination of the statutory language that it does not apply to the Kentucky Hazardous Waste Regulations since those regulations are authorized by state statute. KY. REV. STAT. ANN. §§ 224.033, 224.866 (Baldwin 1989). In addition, those regulations are not required by federal law since states are not required to adopt state programs for the management of hazardous waste; they are permitted to leave the task of administering hazardous waste laws and regulations to the federal government.
ground for clean closure at hazardous waste disposal sites.

3. Cleanup of Solid Waste Management Units at Hazardous Waste Facilities

In 1984, Congress enacted the Hazardous and Solid Waste Amendments ("HSWA"). Among them was RCRA § 3008(h), which provided EPA with the authority to require corrective action for releases or threatened releases of hazardous constituents at facilities for the treatment, storage, or disposal of hazardous wastes. Thus EPA was no longer constrained by the arbitrary definition of regulated units. If a chemical listed as a hazardous constituent was leaching into groundwater or migrating through the soil, EPA could address it through corrective action, provided the facility was one engaging in a regulated activity after the jurisdictional date of RCRA. The Kentucky legislature went even further, giving the state agency the authority to require corrective action at any landfill, surface impoundment or class of surface impoundments from which it determined hazardous constituents were likely to migrate to groundwater. EPA has incorporated corrective action at solid waste management units ("SWMUs") into corrective action orders for interim status facilities and into Part B permits for permitted hazardous waste facilities.

Recently EPA published the long-awaited proposed regulations for corrective action at solid waste management units. These regulations explicitly incorporate risk-based decision making into the selection of correction action measures. EPA has chosen a risk range of $10^{-4}$ to $10^{-6}$ for cleanup standards for carcinogens. In addition, it has published a list of concentrations meeting the proposed criteria for target action levels (levels below which no further investigation or cleanup is necessary) and proposed a list of concentration ranges for cleanup levels for carcinogens in air, water, and soil.

40. Id.
42. See, e.g., 55 Fed. Reg. 30,798, 30,801 (1990) (describing implementation of HSWA corrective action program to date).
In addition to the problems discussed earlier for risk-based cleanup levels, setting such de minimis levels below which no cleanup will be required removes the incentive for prevention of releases up to that level of contamination.

IV. CERCLA

If a site is not regulated under RCRA, it may be addressed under CERCLA. CERCLA, or more popularly “Superfund,” is primarily aimed at addressing abandoned sites where there have been releases or threatened releases of a hazardous substance. Rather than imposing a prospective regulatory program on the entire universe of facilities, CERCLA focuses almost exclusively on cleanup of sites which already present a problem. EPA is authorized to conduct two basic types of cleanups under CERCLA: remedial actions and removal actions. Remedial actions achieve a permanent remedy. Removal actions address the more immediate problems associated with the site.

In addition to providing a federal cause of action for cost recovery and enabling EPA to undertake removal and remedial actions, CERCLA also provides that any private party may recover response costs for actions taken consistent with the requirements of the statute in response to releases of hazardous substances. This provision is also available to the state for use at non-NPL sites.

CERCLA cleanups involve a broad range of contaminants as the statute grants EPA authority to deal with problems which fall between the cracks in other regulatory programs. The definition of hazardous substance includes any substance regulated under sections 307(a) and 311(b)(2) of the Clean Water Act, section 3001 of the Resources Conservation and Recovery Act, section 7 of the Toxic Substances Control Act, or section 102 of CERCLA itself.

A. Cleanup Standards Under CERCLA-ARARs

Section 121 of CERCLA, as amended by SARA, requires all remedial actions to achieve cleanup standards set by applicable or relevant and appropriate requirements ("ARARs").\textsuperscript{51} This includes state as well as federal requirements.\textsuperscript{52} Therefore, although the statute excludes sites where remedial actions are conducted from the requirements of state permitting,\textsuperscript{53} the substantive standards that would be imposed through the permitting process are incorporated into the remedy through the ARAR concept.

According to EPA guidance, ARARs are applicable, if, but for the site's status as a Superfund site, they would be legally applicable.\textsuperscript{54} For example, RCRA or authorized state equivalent hazardous waste requirements would be applicable if hazardous wastes were disposed of at the site after the jurisdictional date of RCRA. The guidance suggests that ARARs are relevant and appropriate if they are designed to address circumstances that are sufficiently similar so as to render the requirement well suited for application to the site.\textsuperscript{55} This rule is easily applied in the case of a site where wastes were disposed which would have

\textsuperscript{51} 42 U.S.C. 9621(d)(2)(A) (1988). The statute provides:
With respect to any hazardous substance, pollutant or contaminant that will remain onsite, if—
(i) any standard, requirement, criteria, or limitation under any Federal environmental law ...; or
(ii) any promulgated standard, requirement, criteria, or limitation under a State environmental or facility siting law that is more stringent than any Federal standard, requirement, criteria, or limitation ..., is legally applicable to the hazardous substance or pollutant or contaminant concerned or is relevant and appropriate under the circumstances of the release or threatened release of such hazardous substance or pollutant or contaminant, the remedial action selected under section 9604 of this title or secured under section 9606 of this title shall require, at the completion of the remedial action, a level or standard of control for such hazardous substance or pollutant or contaminant which at least attains such legally applicable or relevant and appropriate standard, requirement, criteria, or limitation. Such remedial action shall require a level or standard of control which at least attains Maximum Contaminant Level Goals established under the Safe Drinking Water Act ... and water quality criteria established under section 304 or 303 of the Clean Water Act ..., where such goals or criteria are relevant and appropriate under the circumstances of the release or threatened release.

\textsuperscript{52} Id.
\textsuperscript{55} Id. at 32,497.
been hazardous wastes but for the fact that the disposal occurred prior to the jurisdictional date of RCRA. Substantive cleanup requirements, such as a hazardous waste landfill cap for an in situ containment remedy, are relevant and appropriate in such a case. Slightly more controversial is the case where a hazardous constituent for which a maximum contaminant level ("MCL") in groundwater has been defined for RCRA facilities is present in groundwater at a site, but where no showing has been made that hazardous wastes are present at the site. The statute also provides that EPA may waive ARARs in selecting a remedy if one of six criteria are met: (1) the action selected is only part of a total remedial action that will attain the ARAR; (2) compliance with the ARAR will result in greater risk to human health and the environment than noncompliance; (3) compliance with the ARAR is "technically impracticable from an engineering perspective;" (4) the remedial action will achieve an equivalent level of protection of human health and the environment; (5) with respect to a state ARAR, the state has inconsistently applied the ARAR; and, (6) for Superfund financed cleanups, meeting the ARAR will not provide a balance between the need for protection of public health and the environment at the site under consideration and conserving the remaining funds to protect health and the environment from releases at other sites.

56. EPA's ARAR guidance identifies three types of ARARs: chemical specific; action specific; and, location specific. 52 Fed. Reg. 32,496 (1987). Chemical specific ARARs are generally numeric standards that apply to specific contaminants, for example, Maximum Contaminant Levels ("MCLs") or Maximum Contaminant Level Goals ("MCLGs") established under the Safe Drinking Water Act for specific substances, and Ambient Water Quality Standards (state) or Criteria (federal). Action specific ARARs are requirements triggered by certain activities. For example, leaving hazardous waste on the ground at the close of a remedial action would trigger the hazardous waste landfill closure requirements under the RCRA regulations and their state equivalent. Location specific ARARs are triggered by the location of the remedial action. Earthquake protection measures for landfills located in zones of seismic activity, or restrictions on siting landfills in the floodplain, or in areas of karst terrain, are examples of potential location specific ARARs.

57. Indeed, EPA contended that was the situation at the B.F. Goodrich/Airco Superfund site at Calvert City, Kentucky. The Commonwealth of Kentucky contended that wastes identical to hazardous wastes had been disposed at the landfill on the B.F. Goodrich portion of the site. EPA contested this contention, and took the position that RCRA closure ARARs did not apply to the landfill, although RCRA hazardous constituents were present at the site. Motion to Enter and Response to Comments, United States v. B.F. Goodrich, United States District Court, Western District of Kentucky (No. 89-0005-P(CS)).

Kentucky has consistently maintained that section 224.877 of the Kentucky Revised Statutes was an ARAR requiring cleanup to background levels of hazardous substances at uncapped areas or at sites to be clean closed.60 In the 1990 session, the legislature passed House Bill 893, which amended KRS section 224.877.60 The application of the recently amended statute as an ARAR has yet to be determined. In any event, the language of CERCLA does not allow for sites to be declared clean if contamination remains. Section 121 of CERCLA, as amended, requires a review of the site every five years if the remedy “results in any hazardous substances, pollutants, or contaminants remaining at the site.”61 Thus, the danger of sites being declared “clean” even if residual contamination remains is somewhat less problematic under CERCLA.62

B. Hazardous Substance Cleanups Under State Law

Until 1990, Kentucky had a statute requiring persons possessing or controlling hazardous substances which were being discharged, or those who caused the discharge, to “restore the environment to the extent practicable....”63 This requirement was consistently interpreted to require the cleanup of hazardous substances to naturally occurring background concentrations, ex-
cept where technically infeasible from an engineering perspective, or where a site became a permitted disposal unit subject to requirements of capping, monitoring and maintenance.

As a result of the 1990 amendment of section 224.877 of the Kentucky Revised Statutes, a new section provides an alternative rule, but the requirement to "restore the environment to the extent practicable" remains. Prior to the amendment, the statute merely provided the option of "restoration," but the statute now provides for the option of "remediation." Presently, there are few chemicals for which adequate information is available to perform such an analysis and establish a protective number other than zero. However, this section authorizes other, permanent, management, containment or treatment remedies in situations where the site-specific circumstances so warrant. Moreover, the


Upon a cabinet determination that an application satisfies the requirements of this subsection, remedial action may be conducted in response to a release of a hazardous substance, pollutant or contaminant. The remedial action shall protect human health, safety, and the environment considering the following factors as appropriate:

(a) The characteristics of the substance, pollutant, or contaminant, including its toxicity, persistence, environmental fate and transport dynamics, bioaccumulation, biomagnification, and potential for synergistic interaction and with specific reference to the environment into which the substance, pollutant, or contaminant has been released;

(b) The hydrogeologic characteristics of the facility and the surrounding area;

(c) The proximity, quality, and current and future uses of surface water and groundwater;

(d) The potential effects of residual contamination of potentially impacted surface water and groundwater;

(e) The chronic and acute health effects and environmental consequences to terrestrial and aquatic life of exposure to the hazardous substance, pollutant, or contaminant through direct and indirect pathways;

(f) An exposure assessment; and

(g) All other available information.


66. Specifically:

The cabinet shall be the lead agency for hazardous substance, pollutant, or contaminant emergency spill response and, after consultation with other affected federal, state and local agencies and private organizations, shall establish a contingency plan for undertaking emergency actions in response to the release of a hazardous substance, pollutant, or contaminant. The contingency plan shall:

(c) Provide for remediation or restoration of the lands or waters affected consistent with this Act; 

bill adds a new section requiring the Cabinet to maintain an inventory of sites where no further action is required, and to designate those sites where hazardous substances remain, for review every five years.67

C. The PCB Spill Cleanup Policy

EPA has, on occasion, demonstrated a preference for using the PCB Spill Cleanup Policy,68 established under the Toxic Substances Control Act,69 for establishing cleanup standards for PCBs, or polychlorinated biphenyls, at hazardous waste or hazardous substance sites. This is so despite the limitations stated in the PCB Spill Cleanup Policy, that it does not apply to "old spills" where residual contamination is an issue.70

D. Clean Water Act Considerations

Standards imposed under the Clean Water Act, and its state counterparts, also impact soil cleanup standards. No violation of Clean Water Act requirements may result from a cleanup under CERCLA section 121, where the standards are incorporated as ARARs.71 Such standards are required to be met as a matter of state law at other sites.72 This means that the state agency may

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67. The statute now provides that:
The cabinet shall prepare and annually update an inventory of all sites in the Commonwealth at which there is or has been an environmental emergency or a release of a hazardous substance, pollutant or contaminant. In preparing the inventory the cabinet shall determine, based on information available to the cabinet, the impact of each site on public health and the environment and identify the relative priority for restoration or remedial action. Upon determining that no further restoration or remedial action is necessary, the cabinet shall so designate the site on the inventory. A separate designation of sites where a remedial action involving on-site containment or treatment has been performed and other sites where restoration of the environment has not been achieved shall be maintained. A review of the environmental conditions ... shall be conducted by the cabinet every five (5) years to determine whether additional action is necessary to protect human health or the environment.

KY. REV. STAT. ANN. § 224.877(9) (Baldwin 1990).
68. PCB Spill Cleanup Policy, 40 C.F.R. § 761.120 (1989).
70. 40 C.F.R. § 761.120(a).
72. See 401 KY. ADMIN. REGS. 5:031 (1990) for water quality standards for surface waters. Kentucky's statutory general prohibition against pollution provides that:

No person shall, directly or indirectly ... discharge into any of the waters of the
calculate a cleanup standard for soil at sites contaminated with pollutants, based on the migration through percolation of rainwater to groundwater, and discharge of groundwater to surface water, as well as based on runoff of contaminated rainwater to surface water. The Clean Water Act also explicitly allows for state water quality standards to be more stringent than the federal water quality criteria.73

E. Other State Authority for the Cleanup of Contaminated Sites

The Kentucky Natural Resources and Environmental Protection Cabinet has broad authority to impose corrective action at those landfills or surface impoundments from which the Cabinet determines that hazardous constituents are likely to migrate to groundwater.74 The Cabinet has several mechanisms for the imposition of corrective action under this statute. It can issue orders, promulgate regulations, impose permit conditions, or seek corrective action as necessary remedial measures in an enforce-

Commonwealth, or cause, permit or suffer to be ... discharged into such waters any pollutant, or any substance that shall cause or contribute to the pollution of the waters of the Commonwealth in contravention of the standards adopted by the cabinet. . . .

KY. REV. STAT. ANN. § 224.060 (Baldwin 1990).


74. See KY. REV. STAT. ANN. § 224.867(1)(i) (Baldwin 1990) (giving Cabinet authority to “[i]mpose such requirements as may be necessary to protect human health and the environment at any existing landfills, surface impoundments or class of surface impoundments from which the cabinet determines hazardous constituents are likely to migrate into groundwater . . .”). Although the title given by the compiler of statutes to this section is “Specific authority of cabinet over management of hazardous wastes” (emphasis added), the title is neither controlling, nor useful as an aid to statutory construction. See generally KY. REV. STAT. ANN. § 7.136 (Baldwin 1990) (indicating that the Legislative Research Commission, the compiler of Kentucky statutes, may change the wording of headnotes in publishing the Kentucky Revised Statutes). In fact, the Act of which section 224.867 of the Kentucky Revised Statutes is a part is entitled “An Act relating to waste management.” 1986 Ky. Acts 237.

Section 224.867(1)(i) clearly references hazardous constituents, which are those compounds listed in 401 KY. ADMIN. REGS. 31:170 (1990). According to its plain meaning, this section would give the cabinet the authority to require corrective action at any solid waste landfill or surface impoundment from which hazardous constituents are likely to migrate to groundwater. Thus construed, the effect of the statute is to mitigate some of the most anomalous results of the hazardous waste regulation system, which otherwise treats differently the identical threat of contamination from the identical hazardous constituents, depending on whether the source of the hazardous constituents is a regulated hazardous waste or not.
ment action. The statute gives the Cabinet's technical experts and policy makers broad latitude in determining "such requirements as may be necessary to protect human health and the environment."

Finally, even if a substance is not listed as a hazardous constituent, the disposal or transportation of that substance may lead to enforcement action, unless the site is a permitted solid waste disposal site that conforms to the environmental performance standards. Environmental performance standards are found in the Kentucky Administrative Regulations, and state that when a permitted landfill is in violation of these standards, it is considered an "open dump" by the Cabinet. Open dumps are prohibited, as is the use of landfills not permitted by the Cabinet. The Cabinet is authorized to require "appropriate response actions to close and reclaim" such sites. In addition, the Cabinet has wide latitude in determining cleanup measures at contaminated sites.

75. Although there is an argument that if the legislature had intended order authority to be available to the Cabinet under this subsection, it would have used the "require or order" language of Ky. Rev. Stat. Ann. § 224.867(1)(f) (Baldwin 1990), the language "impose such requirements as may be necessary" (Ky. Rev. Stat. Ann. § 224.867(1)(i) (Baldwin 1990)) is not so restrictive as to imply that the Cabinet may only impose those requirements by regulation. In fact, the language "at any existing landfills, surface impoundments, or class of surface impoundments" (Ky. Rev. Stat. Ann. § 224.867(1)(i) (Baldwin 1990)) implies that the Cabinet would act by regulation on the last, but would make a site-specific judgment on the first two in the series, and therefore it would have to act by order, permit condition, or enforcement action.

79. Id.
83. Id. The application of these statutes to contaminated sites may seem inappropriate at first glance. The migration of contaminants carried through soil by rainfall, however, is arguably a continuing discharge or release. "Waste disposal site or facility" means any place where waste is managed, processed or disposed of..." Ky. Rev. Stat. Ann. § 224.005(20) (Baldwin 1989). The definitions of both "solid waste" and "hazardous waste" include "discarded material," which would encompass chemical contaminants in most instances. Ky. Rev. Stat. Ann. §§ 224.005(24) (Baldwin 1990). Consequently, the migration of contaminants would be considered a continual disposal and would therefore constitute a violation of the prohibition of unpermitted solid waste disposal sites, and allow for the imposition of appropriate response measures at such sites.
F. Kentucky Litigation Over State/Federal Relationship in Setting Cleanup Standards

Since 1987, the Kentucky Natural Resources and Environmental Protection Cabinet has found itself at odds with the EPA over cleanup standards on several occasions. In United States v. B.F. Goodrich, the Cabinet has been granted intervention in the consent decree action filed by the EPA under CERCLA. In that action, Kentucky contended that EPA ignored applicable or relevant and appropriate state standards ("ARARs"), in particular KRS § 224.867, and hazardous waste closure standards. As of the date this article went to print, that lawsuit was unresolved.

VI. CONCLUSION

Kentucky is currently at a critical juncture for determining how its state laws will be applied in the future to set cleanup standards. An emphasis on protecting human health and the environment by continuing to require cleanup to background is at the risk of requiring some entities to spend more than might arguably be necessary on environmental remediation. This emphasis must be weighed against erring on the side of saving companies money, with the attendant risk of exposing current and future generations of Kentucky residents to toxic chemicals.

85. See Memorandum of Law in Support of the Motion to Intervene by Kentucky Natural Resources and Environmental Protection Cabinet, and attachments. Kentucky also contended, inter alia, that the consent decree did not provide the state participation required by CERCLA, 42 U.S.C. 9621(f) (1988).
86. It should be noted that Kentucky is one of several states challenging EPA's rulemaking on the National Oil and Hazardous Substances Contingency Plan which is the set of regulations providing for the implementation of CERCLA. The challenge relates to the provisions on state ARARs and state participation.
PENDENT PARTY JURISDICTION'S FLIGHT INTO OBLIVION: FINLEY v. UNITED STATES

Michael Folk

I. INTRODUCTION

The United States Supreme Court decided Finley v. United States on May 22, 1989.1 In a 5-4 decision, the Court held that the use of pendent party jurisdiction to bring parties to related claims into the action as defendants is prohibited by language of the Federal Tort Claims Act.2 Justice Scalia's opinion was joined by Chief Justice Rehnquist and Justices White, O'Connor, and Kennedy.3 The FTCA provides a method of recovering damages suffered because of the tortious conduct of the United States or its agents.4 The Act specifies that any suit seeking recovery under the provisions of the Act must be brought in a federal court.5

There were two dissenting opinions in the case. Justice Blackmun's dissent stated that when Congress legislates that a specific type of case is to be heard only in federal courts, the only proper forum in which the entire case as a whole may be heard is a federal court.6 In his view, the only sensible result would be to impose pendent party jurisdiction and hear the entire matter as a single case.7

Justice Stevens' dissent, which was joined by Justices Brennan and Marshall, expressed several other points of opposition.8 The first was that the Court's holding was a violation of the doctrine of stare decisis.9 Second, Stevens would have held that a federal court generally has the power to hear pendent claims where the

2. 28 U.S.C. § 1346(b) (1988) [hereinafter FTCA].
5. Id.
7. Id.
8. Id. (Stevens, J., dissenting).
9. Id.
action before the court comprised a single case. This dissent also expressed the view that since Congress had not specifically prohibited pendent party jurisdiction under the Federal Tort Claims Act, the majority's narrow statutory interpretation is an unwarranted violation of the principle of judicial economy.

This paper presents an analysis of the Finley decision and the future of pendent jurisdiction. Although the Court's issue was expressly limited to pendent party jurisdiction in the context of the FTCA, the logic and analysis of the court is applicable to several different but related areas of jurisdictional questions. This paper will explore the possible impact of Finley and will attempt to illustrate for the scholar and practitioner the potential future applications of this decision to the areas of ancillary and pendent claim jurisdiction.

II. BACKGROUND

The concepts of ancillary and pendent jurisdiction are the only areas of subject matter jurisdiction that are court created. All of the other subject matter jurisdictional powers of the federal courts are constitutionally based and have been created by legislation. The primary motivating factor behind this family of jurisdictional power is judicial economy. When causes of actions involve multiple claims the entire dispute is allowed to be heard in the federal court even though some of the claims lack an independent jurisdictional basis. This avoids multiple actions involving the same parties or the same factual occurrences in both the state and federal venues.

Besides judicial economy, this doctrine also prevents the questionable result of having different courts reach conflicting decisions on essentially identical fact scenarios. These jurisdictional rules prevent what could amount to a significant measure of

10. Id.
11. Id. at 2021.
12. Id. at 2009.
forum shopping. Finally, and of particular interest to the practitioner and the public at large, the expenses associated with bringing a case to trial are significantly reduced when duplicative trials are avoided.

It is helpful to remember the differences between the various types of ancillary and pendent jurisdictions. Many courts are guilty of misusing the terms and substituting one for the other. One way to distinguish between the two branches is to ask the question: Who is asserting the federally insufficient claim? When a plaintiff has asserted multiple claims and one of them is a state law based claim without independent federal jurisdictional grounds, the proper term is pendent jurisdiction. On the other hand, where the claim is asserted by one other than the original claimant, such as a third party claim, a counterclaim, or a claim of intervention, the correct term is ancillary jurisdiction.

Ancillary jurisdiction is the power of the federal courts to hear otherwise jurisdictionally insufficient claims which are closely related to claims properly before the court. Once the federal court has jurisdiction over a matter, the court may, at its discretion, allow other parties who have an interest in the original claim to become part of the action. The concept of jurisdiction supports the application of the Federal Rules of Civil Procedure 13, 426 and 24(a) where the diversity or amount in controversy requirements of normal federal jurisdiction are lacking. To add further to the lexical confusion, it has become proper to refer to

21. Id.
22. Id.
23. Id.
27. See, e.g., Smith Petroleum Serv. v. Monsanto Chem. Co., 420 F.2d 1103 (5th Cir. 1970); Lenz v. Wagner, 240 F.2d 666 (5th Cir. 1957).
Pendent claims or pendent parties as being ancillary to the claim or party which is jurisdictionally sufficient to be before the court. For purposes of clarity, this author will attempt to restrict the use of the term "ancillary" and utilize the more historically and descriptively accurate term "pendent."

Pendent claim jurisdiction is invoked when a plaintiff has a jurisdictionally sufficient claim which arises under federal law and an additional jurisdictionally insufficient claim concerning the same situation arising under state law. The power of the federal court to hear the related but jurisdictionally inadequate state claim is a matter of the court's discretion.

Before granting a request for pendent claim jurisdiction, the court requires that the plaintiff's claims be such that one would ordinarily try them all in one judicial proceeding. The current United Mine Workers v. Gibbs test, used by the courts to determine the cohesiveness of the claims is whether the claims derive from a common nucleus of operative fact. If the court believes that a common nucleus of operative fact exists and also decides that judicial economy would best be served by hearing the claims in a single proceeding, the court will allow the jurisdictionally insufficient state claim to be heard under the concept of pendent jurisdiction. If both tests are not met, the state claim will be remanded to the state courts for further action.

Pendent party jurisdiction involves the situation where a plaintiff asserts a claim against one party where the matter and the parties are properly before the court and attempts to add other parties who by themselves would not properly be before the federal court. Finley is the classic pendent party scenario. Finley involved an action against the United States which could only be brought in a federal court. The plaintiff also alleged claims against the city and the power company which were based on state law and these parties did not meet the requirements of

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30. Id. at 725.
31. Id.
32. Id.
33. Id.
34. Finley, 109 S. Ct. at 2006.
35. Id. at 2005.
diversity. The only way in which the issue could be settled in a single proceeding would be to declare the city and the power company pendent to the United States.

The power of the federal courts is limited by Article III, section 2 of the United States Constitution. Prior interpretation of this section in Gibbs held that the Constitution grants power to hear the enumerated claims and issues and also grants jurisdiction over entire cases. Provided a claim and party before the federal court are jurisdictionally sufficient under Article III, the entire matter should be viewed as a single constitutional case, and other jurisdictionally insufficient claims and parties may be joined. This promotes judicial efficiency by allowing the entire matter to be heard and ruled upon in a single hearing rather than splitting the action into a multitude of separate hearings.

The district courts have recently attempted to expand the related concepts of pendent and ancillary jurisdiction but the Supreme Court has been seeking a more limited application.

In Zahn v. International Paper Co., which was decided sixteen years prior to Finley, the Court reversed a decision which would have allowed a plaintiff to maintain an action against a co-defendant where the diversity requirements have not been met. The Supreme Court also announced that there must be a statutory basis for the pendent jurisdiction in Aldinger v. Howard. Finley appears to represent a refinement of the Court's attitude toward extra- legislative definitions of jurisdictional power.

36. Id.
37. Id.
39. Id.
44. Id.
45. Id. at 302.
III. FINLEY v. UNITED STATES

A. FACTS

During the night of November 11, 1983, plaintiff's husband was piloting a twin engine plane.\(^47\) On board were two of their children.\(^48\) During the instrument landing approach to an airport in San Diego, California, the airplane struck electric power distribution lines located near the runway.\(^49\) The small plane crashed and all persons aboard were killed.\(^50\) Mrs. Finley originally brought an action in tort in state court naming the San Diego Gas and Electric Company and the city of San Diego as defendants.\(^51\) She claimed the San Diego Gas and Electric Company had positioned the power distribution lines in a negligent manner and failed to properly illuminate them.\(^52\) She further alleged that the city of San Diego had negligently maintained the runway lights which caused them to be inoperative at the time of the crash.\(^53\)

Subsequently, Mrs. Finley learned that the Federal Aviation Administration ("FAA") was the party responsible for maintaining the runway lights.\(^54\) She then filed suit against the United States in the United States District Court for the Southern District of California.\(^55\) She alleged negligence in the FAA's performance of air traffic control procedures and in the operation and maintenance of the runway lights.\(^56\) Federal court jurisdiction was based on the FTCA.\(^57\)

Almost a year after filing her claim against the United States, Mrs. Finley moved to allow an amended complaint to add the defendants from the original state tort action.\(^58\) All of the original state tort claims lacked a sufficient and independent basis for

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\(^{47}\) Finley, 109 S. Ct. at 2005.
\(^{48}\) Id.
\(^{49}\) Appellant's Brief for Petition for Writ of Certiorari at Joint Appendix at A-6, Finley v. United States (S.D. Cal 1987) (No. 87-1973).
\(^{50}\) Finley, 109 S. Ct. at 2005.
\(^{51}\) Id.
\(^{52}\) Id.
\(^{53}\) Id.
\(^{54}\) Id.
\(^{55}\) Id.
\(^{56}\) Id.
\(^{58}\) Finley, 109 S. Ct. at 2005.
federal court jurisdiction. The district court granted the motion to amend and allowed the additional parties to be added under a theory of pendent jurisdiction. The district court found that it was "clear that judicial economy and efficiency favored trying the actions together, and conclud[ed] that they arose from a common nucleus of operative facts."

An interlocutory appeal was certified by the district court to the Court of Appeals for the Ninth Circuit. The appellate court reversed the lower court's decision based on the Ninth Circuit's prior opinion in Ayala v. United States, rejecting pendent party jurisdiction under the FTCA.

The Supreme Court granted certiorari to review the decision of the court of appeals. Finley thus became the Supreme Court's vehicle for resolving a difference of opinion among the circuits on the question of whether the FTCA permits the use of pendent party jurisdiction to bring parties to related claims into the action as defendants.

B. HOLDING

The Supreme Court narrowly defined the issue in Finley as whether the FTCA allows pendent party jurisdiction where the additional defendants do not have an independent jurisdictional basis. However, the holding of the case is presented in broad sweeping language that appears to include not only pendent party jurisdiction and the FTCA, but also pendent claim and ancillary jurisdictional concepts.

The Court held that "parties to related claims cannot necessarily be sued" in federal courts and that a "grant of jurisdiction over claims involving particular parties does not itself confer jurisdiction over additional claims by or against different par-
ties." Justice Scalia appears to utilize the specifics of *Finley* to announce a new policy of the Court that packs the historically unrelated concepts of ancillary and pendent jurisdictional power into a single entity. The decision casts out the liberalized concepts of pendent and ancillary power and promotes a new policy of providing a "background of clear interpretive rules" for Congress so it may "know the effect of the language it adopts." 70

**IV. ANALYSIS OF THE MAJORITY OPINION**

After a discussion of the facts of the case, the Court noted that federal courts are limited in their jurisdiction and that these jurisdictional limits are concrete barriers to any expansion of the powers of the courts. 71 When the court examines a matter concerning federal question jurisdiction it is bound to find a grant of power in Article III of the Constitution and some act of Congress. 72 Past interpretation of the language of Article III has allowed the court to expand the general rule in limited situations. 73

Pendent jurisdiction allows a related but jurisdictionally insufficient matter to be joined with a claim which is jurisdictionally valid in the federal court. 74 Such matters are allowed to be heard when both claims "derive from a common nucleus of operative fact and are such that a plaintiff would ordinarily be expected to try them in one judicial proceeding." 75 The opinion assumes without deciding that the constitutional requirements of pendent claim and pendent party jurisdiction are similar but pendent party jurisdiction requires full congressional authorization. 76 The Court provided a clue to its ultimate decision when it said that during the examination of jurisdictional questions, it will not give the statutes a broad interpretation. 77

The Court examined its past decisions involving the issues of pendent jurisdiction. 78 It used these cases to define the differences

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69. Id.
70. Id.
71. Id. at 2005-06.
72. Id.
73. Id.
74. Id.
between pendent claim and pendent party assertions of jurisdictional power.\textsuperscript{79} Pendent claim jurisdiction is the addition of a jurisdictionally insufficient claim between parties who are currently before the court in a matter which is jurisdictionally sufficient to be heard in the federal system.\textsuperscript{80} A typical example would be where a plaintiff has brought a defendant into federal court on a question of federal law and wishes to also append a closely related matter of state law.\textsuperscript{81} At its discretion,\textsuperscript{82} the court may append the jurisdictionally insufficient state claim to the jurisdictionally sufficient federal claim and hear the single constitutional case.\textsuperscript{83}

In the situation of pendent party jurisdiction, a plaintiff who is in federal court with a jurisdictionally sufficient claim against one party attempts to append a related but jurisdictionally insufficient claim against a new party.\textsuperscript{84} The Court has historically frowned on this type of case.\textsuperscript{85} \textit{Finley} is a classic example of the pendent party jurisdictional concept.\textsuperscript{86} Absent the jurisdictionally sufficient claim against the United States, the state claims against the non-diverse utility and city could not be heard in the federal court.\textsuperscript{87} Since there is no independent basis for jurisdiction, a federal court would be intruding into the state court's domain and would violate the constitutional precepts of the bifurcated federalistic system.\textsuperscript{88}

Justice Scalia discounted Mrs. Finley's argument that changes in the text of the FTCA could be interpreted to grant jurisdiction over pendent parties.\textsuperscript{89} A minor change had been made to the act using the terminology of the Federal Rules of Civil Procedure

\textsuperscript{79} Id.
\textsuperscript{80} Id.
\textsuperscript{81} J. GLANNON, CIVIL PROCEDURE 159 (1987).
\textsuperscript{84} Owen Equip. & Erection Co. v. Kroger, 437 U.S. 385 (1978).
\textsuperscript{86} \textit{Finley}, 109 S. Ct. at 2006.
\textsuperscript{87} Id.
\textsuperscript{88} Id. at 2007.
\textsuperscript{89} Id. at 2009.
which were based on the concept of civil actions rather than claims.\textsuperscript{90} The Court narrowly interpreted the FTCA to mean that it confers jurisdiction over the United States and no one else.\textsuperscript{91}

V. ANALYSIS OF THE MINORITY OPINIONS

Justice Blackmun's dissent agrees with the majority opinion that the text of the Federal Tort Claims Act is not an affirmative grant of pendent party jurisdiction.\textsuperscript{92} However, he disagrees with the majority regarding the interpretive requirements of prior decisions.\textsuperscript{93} Rather than requiring an actual statement of jurisdiction, Justice Blackmun suggests that jurisdiction should be allowed unless the statute expressly prohibits the exercise of such power.\textsuperscript{94} This view, that pendent party jurisdiction is the norm unless it has been expressly prohibited by statute,\textsuperscript{95} is in direct conflict with the majority opinion which requires that the legislation expressly allows pendent party jurisdiction.\textsuperscript{96}

The focal point of Justice Stevens' dissent, which was joined by Justices Brennan and Marshall,\textsuperscript{97} is the Court's decision in United Mine Workers v. Gibbs.\textsuperscript{98} Justice Stevens maintained that the Finley majority was not faithful to the precedent established by Gibbs.\textsuperscript{99} Article III of the Constitution grants the power to hear cases involving the United States to the federal courts.\textsuperscript{100} The FTCA further specifies that the federal courts are the proper place to hear claims against the United States.\textsuperscript{101} Given such directives, it was Justice Stevens' view that the district court has both the Constitutional and statutory power to hear a case like Finley.\textsuperscript{102}

Justice Stevens determined that Rule 20(a) of the Federal Rules of Civil Procedure authorizes the joining of additional defendants

\textsuperscript{90} Id. at 2010.
\textsuperscript{91} Id. at 2008.
\textsuperscript{92} Id. at 2010 (Blackmun, J., dissenting).
\textsuperscript{93} Id.
\textsuperscript{94} Id. at 2011.
\textsuperscript{95} Id.
\textsuperscript{96} Id. at 2006.
\textsuperscript{97} Id. at 2011 (Stevens, J., dissenting).
\textsuperscript{98} 383 U.S. 715 (1966).
\textsuperscript{99} Finley, 109 S. Ct. at 2011 (Stevens, J., dissenting).
\textsuperscript{100} U.S. CONST. art. III, \S 2.
\textsuperscript{101} FTCA, 28 U.S.C. \S 1346(b) (1988).
\textsuperscript{102} Finley, 109 S. Ct. at 2012-13 (Stevens, J., dissenting).
when the claim arises out of the same transaction or occurrence.\textsuperscript{103} Prior to the enactment of the Federal Rules of Civil Procedure, the federal courts routinely decided state law based claims for parties without an independent basis for federal jurisdiction.\textsuperscript{104} The enactment of the Federal Rules of Civil Procedure broadened the definition of cases which the federal courts could hear,\textsuperscript{105} yet the majority has now decided to ignore these precedents and unnecessarily restrict the domain of the federal courts.\textsuperscript{106}

The Court's holding in \textit{Gibbs} is interpreted by Justice Stevens to mean that the federal court had the power to hear an entire case provided there was a common nucleus of operative facts and the claim was such that it would ordinarily be tried in a single judicial proceeding.\textsuperscript{107} Although \textit{Gibbs} involved the question of pendent claim jurisdiction,\textsuperscript{108} the logical analysis of that issue is, and has historically been, identical to the analysis of cases involving pendent party jurisdictional questions.\textsuperscript{109}

The Stevens dissent cites the opinions of Judge Henry Friendly as an example of the proper form of analysis.\textsuperscript{110} Judge Friendly indicated that the proper test for allowing the federal courts to reach a party lacking an independent jurisdictional basis was the \textit{Gibbs} test.\textsuperscript{111} Later, he again based an opinion on the question of pendent party jurisdiction on the \textit{Gibbs} test and found that jurisdiction was proper provided the \textit{Gibbs} test had been met.\textsuperscript{112} After the Supreme Court decision in \textit{Aldinger v. Howard},\textsuperscript{113} which held that pendent party jurisdiction should not be exercised if Congress had by statute negated its existence,\textsuperscript{114} Judge Friendly again had an opportunity to write an opinion on the issue of pendent party jurisdiction.\textsuperscript{115} He found that the result of the

\begin{footnotesize}
103. Id. at 2013.
104. Id.
105. Id. at 2014.
106. Id. at 2010.
107. Id. at 2014-15.
110. Id.
111. Leather’s Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800 (2d Cir. 1971).
114. Id. at 18-19.
\end{footnotesize}
Aldinger case was limited to the issue of pendent party jurisdiction with respect to a claim brought under 42 U.S.C. section 1983. In dicta, the Aldinger Court explicitly stated that different "statutory grants and other alignment of parties might call for a different result." As an example of when pendent party jurisdiction would be allowed, the Court described a situation of claims and parties identical to the facts of Finley.

It is Justice Stevens' view that the majority confuses the implicit rejection of pendent party jurisdiction in Aldinger with the absence of an affirmative grant of power in the FTCA. A more correct understanding of Aldinger indicates that the courts may fill in the gaps of legislation unless the statute explicitly or implicitly forbids such actions. If the majority view had been applied to Gibbs, Hurn, and Moore as well as many other cases, a different result would have been reached in each of them. The Aldinger court assumed the existence of pendent jurisdiction and asked if the statute in question forbids it. The Court used similar analytical techniques to decide the issues in Zahn and Kroger. In both cases the Court held that statutory jurisdictional requirements could not be circumvented by the exercise of pendent jurisdiction. The dissent holds the view which is supported by Gibbs and Aldinger, that unless the statute denies pendent jurisdictional power, the Federal Rules of Civil Procedure must come into force. A faithful understanding of the rules can only yield the result that pendent jurisdiction should be allowed in cases where the statute has not made it

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116. Id. at 76-77.
118. Id.
119. Finley, 109 S. Ct. at 2018 (Stevens, J., dissenting).
120. Id. at 2019.
124. Finley, 109 S. Ct. at 2019 (Stevens, J., dissenting).
130. Finley, 109 S. Ct. at 2021 (Stevens, J., dissenting).
clear that pendent jurisdiction was not the desire of Congress.

In conclusion, Justice Stevens makes note of the statements by Justices Cardozo and Frankfurter regarding the FTCA.\textsuperscript{131} Once a state has consented to be sued, there cannot be a sensible reason for an entity of that government to put further obstacles in the path of a prospective plaintiff.\textsuperscript{132} The FTCA does not itself indicate that pendent jurisdiction should be denied.\textsuperscript{133} Given that, it is sensible to allow a plaintiff to seek complete relief in a single action before the federal court.\textsuperscript{134} If the United States, as a defendant, required the presence of joint tortfeasors in an action to completely protect its interests, there is no reason that a plaintiff should not be granted the same rights.\textsuperscript{135} Prior precedent, the Federal Rules of Civil Procedure, and the combined wisdom of Judge Friendly and Justices Cardozo and Frankfurter indicate that the lower court was correct.\textsuperscript{136}

VI. IMPACT OF THE FINLEY DECISION

Justice Scalia indicated a need to provide a "background of clear interpretive rules."\textsuperscript{137} Unfortunately, the opinion in Finley has provided just the opposite. The implication from the broad sweeping language of the opinion is that the federal courts have been acting without statutory authority for years.\textsuperscript{138} Many of the lower courts have illustrated this confusion in post-Finley opinions.\textsuperscript{139} Although the Court did not expressly overturn its holding in Gibbs, it has certainly modified that ruling.

\begin{enumerate}
\item Id. at 2023.
\item Id.
\item FTCA, 28 U.S.C. § 1346(b) (1988).
\item Musher Found. v. Alba Trading Co., 127 F.2d 9, 11 (2d Cir. 1942) (Clark, J., dissenting) ("if the roast must be reserved exclusively for the federal bench, it is anomalous to send the gravy across the street to the state court house").
\item Finley, 109 S. Ct. at 2023 (Stevens, J., dissenting).
\item Id. at 2010.
\end{enumerate}
Although they arose from separate lines of cases, until *Finley*, the paths of ancillary and pendent jurisdiction have been merging.\(^{140}\) Some commentators have even gone so far as to combine the two terms into a single theory of jurisdiction that has been labeled "supplemental,"\(^{141}\) "incidental,"\(^{142}\) or "extended."\(^{143}\) The *Finley* decision has once again forced the concepts to travel separate paths, with pendent party jurisdiction becoming the path not taken.

While the issue of *Finley* was written in very narrow terms,\(^{144}\) by the time the reader reaches the holding of the case, the broad sweeping language can be interpreted to encompass such areas of interest as ancillary jurisdiction, pendent claim jurisdiction and even modern class actions. This only adds to the confusion regarding exactly what impact *Finley* will have on future cases.

Even though the opinion distinguishes prior holdings as cases involving ancillary rather than pendent jurisdictional questions,\(^{145}\) the Court's analysis fails to differentiate between the two.\(^{146}\) *Gibbs* is seen as not applying to the facts of *Finley* because it is an aberration that departs from the jurisdictional requirement of being based on statutory authority.\(^{147}\) The Court went to great lengths to explain that the language of the FTCA which allows civil actions "against the United States" means against the United States and no one else.\(^{148}\)

One would have to believe that this construction could equally be used to prevent the addition of defendant parties under a theory of ancillary jurisdiction. If a defendant cannot be added to a civil action by a plaintiff because the statute only allows actions against the United States and no one else, would this not also preclude the addition of co-defendants by an invocation of ancillary jurisdiction? An ancillary claim is, by definition, raised

\(^{141}\) J. Glannon, Civil Procedure 162 (1987).
\(^{144}\) *Finley*, 109 S. Ct. at 2005.
\(^{145}\) Id. at 2006.
\(^{146}\) Id.
\(^{147}\) Id.
\(^{148}\) Id.
by a defendant.\textsuperscript{149} The primary justification for allowing these types of jurisdictionally insufficient claims has been fairness.\textsuperscript{150} However, the Court specifically states that the conveniences of the parties and judicial economy are not enough.\textsuperscript{151}

Prior to the \textit{Finley} decision, the \textit{Kroger} test had become the accepted method of determining a pendent claim jurisdictional question.\textsuperscript{152} Justice Scalia ignored the language of the \textit{Kroger} opinion which has been used by the courts to require an examination of the statutes in question. \textit{Kroger} directed the courts to look for language which negated the pendent claim jurisdiction.\textsuperscript{153} \textit{Finley} noted that the \textit{Gibbs} line of cases which involve pendent claim jurisdiction were a departure from the rules which require statutory authority for the jurisdictional claim and indicates it has no intention of impairing or limiting that departure.\textsuperscript{154} What the Court has in effect done is liberalize the test for pendent claim jurisdiction. The Court announced in \textit{Finley} that the additional requirement of a lack of statutory negation from \textit{Kroger} is no longer required.\textsuperscript{155} The only concern regarding pendent claim jurisdiction appears to be the remaining elements of the \textit{Gibbs} test.\textsuperscript{156}

This loosening of jurisdictional requirements for cases involving pendent claim jurisdiction may not be a cause of celebration among those who desire expanded jurisdictional power within the federal courts.\textsuperscript{157} The language of \textit{Finley} requires the presence of a statute which grants the authority to bring jurisdictionally insufficient claims and parties before the court.\textsuperscript{158} It is certainly possible that within a short period of time, the Court will be forced to address the issue of pendent claim jurisdiction. If the language of the \textit{Finley} opinion is as far reaching as it appears, the Court's only choice will be to overturn \textit{Gibbs} and require a statutory grant of jurisdiction in cases involving pendent claims.

\textsuperscript{149} G. SHREVE & P. RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE 129 (1989).
\textsuperscript{150} Freeman v. Howe, 65 U.S. (24 How.) 450 (1860).
\textsuperscript{151} \textit{Finley}, 109 S. Ct. at 2010.
\textsuperscript{153} \textit{Id.}
\textsuperscript{154} \textit{Finley}, 109 S. Ct. at 2010.
\textsuperscript{155} \textit{Id.}
\textsuperscript{156} \textit{Id.}
\textsuperscript{157} \textit{Id.}
\textsuperscript{158} \textit{Id.}
Modern class action rules may also be affected by *Finley*. The currently accepted law is that in class actions, only the named plaintiffs must meet the diversity of citizenship requirements.\(^{159}\) The federal court would then reach the non-diverse parties to the action under the rubric of ancillary jurisdiction.\(^{160}\) This rule from *Ben-Hur* was somewhat restricted when the *Zahn* Court added the requirement that all class members must meet the amount in controversy requirement in order to join an action.\(^{161}\)

The statement in *Finley* that the “grant of jurisdiction over claims involving particular parties does not itself confer jurisdiction over additional claims by or against different parties”\(^{162}\) rings the death knell for potential parties of class actions who are not diverse from the named defendants. It is apparent that each potential class member must individually meet the jurisdictional requirements of the federal courts. A potential multitude of plaintiffs will lose their opportunity to have their claims heard in order to satisfy the *Finley* concepts of federalism and jurisdictional power.

There can be no doubt that any attempt by a plaintiff to add parties as defendants in civil actions involving the FTCA is doomed to failure.\(^{163}\) Even though the opinion is based on the concepts set forth in *Aldinger*, and even though *Aldinger* listed FTCA situations such as the *Finley* case as an area of pendent party jurisdiction which should be allowed,\(^{164}\) Justice Scalia has ignored the practices of past decisions and has set forth a broad holding which encompasses all pendent party jurisdictional claims.

The liberal joinder of parties which the Federal Rules of Civil Procedure have encouraged may also become a victim of the *Finley* decision. Justice Scalia’s rebuttal to Justice Stevens’ dissent specifically says there is a “central distinction ... between new parties and parties already before the court.”\(^{165}\) The addition of new parties is exactly what is allowed and encouraged pursuant

\(^{159}\) In re Agent Orange, 818 F.2d 145, 162 (2d Cir. 1987).
\(^{162}\) *Finley*, 109 S. Ct. at 2010.
\(^{163}\) *Id.* See also Konradi v. United States, 919 F.2d 1207 (7th Cir. 1990) (denying pendent party jurisdiction in an FTCA case).
\(^{164}\) *Aldinger* v. Howard, 427 U.S. 1, 12 (1976).
\(^{165}\) *Finley*, 109 S. Ct. at 2008 n.2.
to Rule 14(a) of the Federal Rules of Civil Procedure.\textsuperscript{166} Since the requirements of jurisdiction for pendent party jurisdiction and impleader are similar, and since the goal of each is to bring additional parties before the court, and since Finley appears to tell us that such an attempt will not be allowed, the viability of impleader must be questioned. Justice Stevens points this out to the Court when he says that there is "no reason why the joinder of pendent defendants over whom there is no other basis of federal jurisdiction should differ from the joinder of \ldots other pendent parties."\textsuperscript{167} While the majority is busily presiding over the deathbed of pendent party jurisdiction, Justice Stevens' dissent correctly points out that "the counter claim cases \ldots defined the scope of the jurisdiction granting statute in precisely the same way the Rules did in Gibbs."\textsuperscript{168}

Although the term pendent party jurisdiction is of modern origin, the Court acknowledged a form of the doctrine early in its history. The Court described the need for pendent party jurisdiction and had no trouble allowing claims against otherwise jurisdictionally insufficient parties to be appended to jurisdictionally sufficient claims already before the court.\textsuperscript{169} The first actual use of the term pendent jurisdiction was in \textit{Hum}\textsuperscript{170} and it seemed to be firmly entrenched as a doctrine by the time of the \textit{Gibbs} decision.\textsuperscript{171}

An early example of the use of ancillary jurisdiction occurred in the case of \textit{Freeman v. Howe}.\textsuperscript{172} The Court noted that the claim was not part of the original suit but was rather "ancillary and dependent, supplementary merely to the original suit, out of which it had arisen, and is maintained without reference to the citizenship or residence of the parties."\textsuperscript{173}

The origins of ancillary jurisdiction and pendent party jurisdiction have their roots in differing lines of case law. It appeared

\textsuperscript{166} \textit{Fed R. Civ. P.} 14(a).
\textsuperscript{167} \textit{Finley}, 109 S. Ct. at 2020 (Stevens, J., dissenting).
\textsuperscript{168} \textit{Id.} at n.30.
\textsuperscript{170} \textit{Hurn v. Oursler}, 289 U.S. 238 (1933).
\textsuperscript{172} \textit{Freeman v. Howe}, 65 U.S. (24 How.) 450 (1860).
\textsuperscript{173} \textit{Id.} at 460.
as if the Court was, more and more, looking at these jurisdictional powers as both being part of the same doctrine of federal court jurisdictional power. When the Court faced its decision in Kroger, it said that questions of ancillary and pendent jurisdiction are correctly "two species of the same generic problem." A few years later the Court refused to state precisely that pendent and ancillary jurisdictional powers had been merged into a single concept of jurisdictional doctrine; however, its tacit approval of such a merger is exemplified by the comment that "there is little profit in attempting to decide ... whether there are any 'principled' differences between pendent and ancillary jurisdiction." The merger of the two doctrines whose only major difference was their historical origins seemed complete until Finley. The Court reconciled the Hurn test which used the language "cause of action" with the Federal Rules of Civil Procedure in Gibbs. Gibbs also provided the Court an opportunity to solidify the merging of ancillary and pendent jurisdiction, which it did. In Finley, Justice Scalia clearly announced that any merging of ancillary jurisdiction and pendent jurisdiction which had occurred in the past was overruled. The majority opinion made note of the "central distinction ... between new parties and parties already before the court." 

Fairness has been a major consideration of the Court in prior decisions. One of the principle arguments for allowing a party to invoke ancillary jurisdiction is that they have been brought into court other than of their own accord. The Court decided that it would only be fair to allow such a party to use the power of ancillary jurisdiction in order to fairly and efficiently seek relief from claims made against them.

The issue of fairness was also mentioned in Finley when the majority stated there was a distinction between new parties and parties already before the court. Yet, the Court weighed its previously declared principles of fairness and efficiency against federalistic concerns and found them lacking.

177. Id.
178. Finley, 109 S. Ct. at 2006 n.2.
180. Finley, 109 S. Ct. at 2006 n.2.
181. Id. at 2008.
An overly strict adherence to the doctrine of federalism "means the efficiency and convenience of a consolidated action will sometimes have to be foregone." The Court has adapted the previous rule of Aldinger which asked whether an act of Congress negated pendent party jurisdiction. The new test will require Congress to explicitly provide for pendent party jurisdiction in areas it deems appropriate. The Court has needlessly given up its ability to interpret legislative intent and has weakened the checks and balances that exist between the branches of government in an effort to strengthen the position of the states in regard to the Federal government.

VII. CONCLUSION

Finley v. United States was an attempt by a plaintiff to bring jurisdictionally insufficient defendants into the federal court through the mechanism of pendent party jurisdiction. The Supreme Court ruled that pendent party jurisdiction was improper because the FTCA did not grant the federal courts the required additional jurisdictional power. Rather than decide the case and announce a narrowly tailored result, the opinion was written in generalized terms which raised more questions than it answered.

The Court's analysis appears to cast doubts on the viability of pendent jurisdiction, ancillary jurisdiction and even some modern forms of the class action. The lower courts have already exhibited conflicting views of the Finley opinion which suggests the

182. Id. at 2010.
183. Id. See generally Tentative Recommendations of the Federal Courts Study Committee at 69 (December 22, 1989); Report of the Federal Courts Study Committee at 47 (April 2, 1990) (both criticizing Finley but noting that the remedy lies with Congress).
185. Id. at 2006.
186. Id. at 2008-09.
187. See, e.g., Nolan v. Boeing Co., 919 F.2d 1058 (5th Cir. 1990) (language of the statute is indistinguishable from language that Finley suggests is broad enough to create pendent party jurisdiction); Stallworth v. Cleveland, 893 F.2d 830 (6th Cir. 1990); Buckley v. Fitzsimmons, 919 F.2d 1230 (7th Cir. 1990); Heritage Bank & Trust Co. v. Abdner, 906 F.2d 292 (7th Cir. 1990); Lather v. Beadle County, 879 F.2d 365 (8th Cir. 1989) (pendent party jurisdiction is precluded unless an independent jurisdictional basis for the pendent party exists); Staffer v. Bouchard Transp. Co., 878 F.2d 638, 643 n.5 (2nd Cir. 1989) ("pendent-party jurisdiction is no longer a valid concept"); Teledyne, Inc. v. Kone Corp., 892 F.2d 1404, 1408 (9th Cir. 1989) (upholding pendent party jurisdiction); Carter v. Kixon,
Supreme Court will be faced with the task of refining its stance in the near future.

AUTHOR’S ADDENDA REGARDING STATUTORY CHANGES

Subsequent to the preparation of the preceding article for publication, Congress enacted the Federal Courts Study Committee Implementation Act of 1990. This appears to be a response to the Finley decision and grants formal recognition to the concept of supplemental jurisdiction. With the enactment of


189. Section 310 reads:

SEC. 310. SUPPLEMENTAL JURISDICTION.
(a) GRANT OF JURISDICTION. - Chapter 85 of title 28, United States Code is amended by adding at the end thereof the following new section:

§ 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal Statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20 or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if:

(1) the claim raises a novel or complex issue of State Law,
section 1367, Congress has suspended the attempt by the judiciary to distinguish between ancillary and pendent jurisdiction. The attempt by commentators to merge the two paths into a single concept of supplemental jurisdiction has met with success.\textsuperscript{190} Section 1367 also represents a total resurrection of the Gibbs "common nucleus of operative facts" analysis from the ashes of \textit{Finley}.\textsuperscript{191}

As a consequence of this legislation, "district courts having original jurisdiction over a civil action shall also have supplemental jurisdiction over any claim so related to the action that it forms part of the same case or controversy under Article III of the United States Constitution."\textsuperscript{192} Even though the new section clarifies jurisdictional matters for the federal courts, it is important to note that supplemental jurisdiction does not apply to actions filed subsequent to the \textit{Finley} decision and prior to the December 1, 1990 date of enactment.

Supplemental jurisdiction does not extend to diversity cases where such jurisdiction would be inconsistent with the requirements of diversity.\textsuperscript{193} In addition, a court may decline to exercise

\begin{itemize}
\item \textbf{(2)} the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
\item \textbf{(3)} the district court has dismissed all claims over which it has original jurisdiction, or
\item \textbf{(4)} in exceptional circumstances, there are other compelling reasons for declining jurisdiction.
\item \textbf{(d)} The period of limitations for any claim asserted under subsection (a), and any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.
\item \textbf{(e)} As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.
\end{itemize}

(b) \textbf{TECHNICAL AND CONFORMING AMENDMENT.} - The table of sections for chapter 85 of title 28, United States Code, is amended by adding at the end thereof the following new item:

"1367. Supplemental jurisdiction."

(c) \textbf{EFFECTIVE DATE.} - The amendments made by this section shall apply to civil actions commenced on or after the date of the enactment of this Act.

\textsuperscript{192} Memorandum from L. Ralph Mecham, Director, Administrative Office of the United States Courts, to United States District Court Judges and United States Magistrate Judges (Jan. 16, 1991) (discussing the recent changes in federal law relating to federal court jurisdiction, venue, removal, and statutory limitations).
supplemental jurisdiction for reasons listed in the statute.\footnote{194} Even though the legislation has attempted to correct some of the apparent problems which existed after the Court's decision in \textit{Finley}, this area of the law remains an unexplored and potentially treacherous trap for the unwary.

\footnote{194. 28 U.S.C.S. § 1367(c) (1991).}