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ARTICLES

KENTUCKY’S ENVIRONMENTAL SELF-AUDIT PRIVILEGE:
STATE PROTECTION OR INCREASED FEDERAL SCRUTINY?

by Clinton J. Elliott

I. INTRODUCTION

With the growing magnitude of environmental laws impacting large and small businesses alike, any competent business management plan must increase its focus on environmental issues to avoid the ever widening net of environmental liability. Indeed, businesses and anyone counseling them should know that numerous federal, state, and local environmental programs mandate complex monitoring, recordkeeping, and even public disclosure requirements, all of which carry substantial penalties

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3. Such liability often extends beyond the assessment of penalties, and may include costs associated with "supplemental environmental projects" or other expenditures. For example, pursuant to a recently announced settlement of a citizen suit under the Clean Water Act, a company agreed to not only pay a $1.6 million fine but also to expend $1.5 million to upgrade its waste water treatment system. See Penalties: Company To Upgrade Water Treatment, Pay Fine to Settle Chicago Citizen Suit, 10 Toxics L. Rep. (BNA) 703 (November 27, 1995). See also Atlantic States Legal Found., Inc. v. Whiting Roll-up Door Mfg., Corp., No. 90-CV-11095, 1994 U.S. Dist. LEXIS 6071 (W.D.N.Y. March 23, 1994). In the Whiting case, the plaintiff, acting as a private attorney general, brought a citizens' enforcement action under the Emergency Planning and Community Right to Know Act ("EPCRA"), 42 U.S.C. 11001-11005 (1994), alleging that the defendant business failed to timely submit hazardous chemical information to the proper state and federal authorities. Id. at *1. The parties ultimately settled the claims for penalties and injunctive relief. Nevertheless, the court awarded the plaintiff in excess of $32,000 as attorney’s fees because plaintiff was the “prevailing party” in enforcing defendant’s environmental paperkeeping requirements. Id. See also GM Fined, Ordered to Fix Polluting Cadillacs, THE COURIER-JOURNAL, December 1, 1995, at 1 (General Motors Corporation reportedly agreed to pay nearly $45 million in fines and other costs, which included almost $4 million “in compensatory spending on programs to help control air pollution.”).

4. By way of limited example only, federal environmental programs include the regula-
for non-compliance. Moreover, the “greening” of corporate America itself, if to be successful, must rely in large part on self-imposed corporate awareness and internal compliance auditing to compliment environmental protection performed by government regulators and public watchdogs. The Environmental Protection Agency (EPA) has even recently

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5. Civil liability under many environmental laws is strict, and joint and several, and applied without regard to fault, knowledge, or intent. Under most major state and federal programs, the government, or private parties acting in their stead, may seek penalties of $25,000 per day per violation. See, e.g., 42 U.S.C. § 6928(g) (1994) (civil penalties of $25,000 per day as well as injunctive relief available under RCRA); id. § 7413(d) (administrative penalty assessments up to $25,000 per day under the Clean Air Act); KY. REV. STAT. ANN. § 224.99-010 (Michie/Bobbs-Merrill 1995) (civil penalties up to $25,000 per day for violations of state hazardous waste management laws). In addition, under most environmental laws, an agency can pursue civil and criminal actions for the same violations. See 12 U.C.L.A. J. Envtl. L. & Pol'y 61 (1993). Enforcement by an agency can also proceed at the local, state, and/or federal level, and enforcement by a state does not necessarily foreclose enforcement by a federal agency, and vice versa. See, e.g., R. Christopher Locke & James H. Colopy, Strategies in Parallel Environmental Proceedings, 6 ENVTL. LIAB., ENFORCEMENT & PENALTIES REP. 23 (1995). Moreover, in addition to prosecution under specific environmental laws, an agency can seek enforcement under a variety of general statutes, such as those providing for criminal penalties for making false statements to the government, as well as racketeering statutes. See, e.g., 18 U.S.C. § 1001 (1994); id. §§ 1963-1964.

6. See John H. Cushman, Jr., EPA Forced to Curtail Pollution Inspections; Cost-conscious Congress Eyes Deeper Funding Cuts, THE COURIER-JOURNAL, November 25, 1995, at 1 ("Senior officials say that the reduction in inspections, which began when stop gap spending bills reduced the agency’s budget last month, is likely to intensify in coming months if Congress
stated that the goals of protecting public health and safeguarding the environment can be achieved only with such cooperation from the regulated community. To this end, the EPA and states alike recognize the continuing need for incentives to encourage businesses to voluntarily conduct environmental self-audits. While such audits should be proactive in nature, however, the very undertaking of an audit raises concerns that the voluntary audit may unnecessarily expose the company to liability both from the government and private plaintiffs, or in fact may unnecessarily uncover something that otherwise may be buried forever.

imposes deeper reductions in the agency’s enforcement activities.”). See also EPA Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004 (1986) (“It is EPA policy to encourage the use of environmental auditing by regulated entities to help achieve and maintain compliance with environmental laws and regulations, as well as to help identify and correct unregulated environmental hazards.”).

7. EPA Voluntary Environmental Self-Policing and Self-Disclosure Interim Policy Statement, 60 Fed. Reg. 16,875 (1995) [hereinafter Interim Policy]. Internal environmental compliance audits, as used in this article, and as opposed to the perhaps more recognized “Phase 1” audits performed as part of due diligence in commercial transactions, serve to help a business assess, achieve, and maintain operational compliance with environmental laws. As such, they have the potential to assess and confirm historical noncompliance where it exists. See, e.g., ASTM Standard PS-11-95 (on file with author). See also EPA Restatement of Policies Related to Environmental Auditing, 59 Fed. Reg. 38,455, 38,456 (1994) (“Auditing serves as a quality assurance check to help improve the effectiveness of basic environmental management by verifying that management practices are in place, functioning and adequate.”). Nevertheless, the EPA does not foreclose other opportunities for “policing” assistance. For example, the Clean Air Act allows the EPA to pay a “bounty” award up to $10,000 to any person who furnishes information or services which lead to a civil penalty or criminal conviction for violations under that Act. 42 U.S.C. § 7413(f) (1994).

8. In its final policy statement on auditing, the EPA “identifies the major incentives that EPA will provide to encourage self-policing, self-disclosure, and prompt self-correction.” EPA Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. 66,706, 66,707 (1995) [hereinafter Final Policy]. In addition to the “incentives” expressed in the Final Policy, the EPA is apparently seeking to establish criteria for auditing which will lead to reduced inspections, public recognition of companies with state of the art compliance programs, and certification of voluntary compliance programs. Id.

9. A recent case involving Coors Brewing Company serves as an example. Coors conducted a $1 million voluntary environmental audit on its facility’s air emissions, and after disclosing its findings to the state, findings which included apparent violations of emission standards, the Colorado Department of Health issued a $1.05 million fine against Coors. See Impact Statements: Draft, Final Impact Statements Made Available by EPA for Review, 24 Env’t Rep. (BNA) 570 (July 30, 1993).

Whether conducted by company personnel or outside consultants, environmental audits can serve public and business purposes by helping companies proactively advance regulatory compliance. Yet the principle disincentive to voluntary compliance audits has been the potential for disclosure of audit reports in enforcement contexts, especially for smaller businesses which may not be able promptly to fix what is found.

In response, a number of states have adopted environmental self-audit statutes in an attempt to encourage industry to assess, achieve, and maintain operational compliance with environmental laws. In some states, the newly created statutory "privilege" protects internal audits from disclosure,\(^\text{11}\) while in other states the statute provides "immunity" from prosecution for conditions discovered by the audit. At the same time, however, the EPA has threatened both to: 1) retract delegated authority for some state-run programs; and 2) increase federal enforcement in any state offering businesses a self-audit privilege or immunity from penalties.\(^\text{13}\)


12. In addition to enacting a statutory self-audit privilege, Colorado enacted a statute creating a presumption against the imposition of administrative, civil or criminal penalties in response to voluntary disclosures arising out of a voluntary self-evaluation. COLO. REV. STAT. § 25-1-114.5 (1995). This statutory presumption apparently is in response to the highly publicized case of Coors Brewing Company, a case which serves as a real life example of why some businesses fear the voluntary audit. Impact Statements, supra note 9.

13. In its Interim Policy, the EPA states that it "will scrutinize enforcement more closely in states with audit privilege and/or penalty immunity laws and may find it necessary to increase federal enforcement where environmental self-evaluation privileges or penalty immunities prevent a state from obtaining the following:

1. information needed to establish criminal liability;
2. facts needed to establish the nature and extent of a violation;
3. appropriate penalties for imminent and substantial endangerment or serious harm to human health or the environment, or from economic benefit;
4. appropriate sanctions or penalties for criminal conduct and repeat violations;
5. prompt correction of violations and expeditious remediation of those that involve imminent and substantial endangerment to human health or the environment."

Interim Policy, 60 Fed. Reg. at 16,878. In its Final Policy, the EPA states that it "reserves its right to bring independent actions against regulated entities . . . ." Final Policy, 60 Fed.
Against this backdrop, Kentucky has joined the minority ranks of those states who have enacted a statutory privilege to protect businesses engaged in self-auditing. This article examines the increased use of environmental auditing by businesses generally and discusses traditional evidentiary privileges and penalty mitigation considerations associated with information generated through voluntary self-auditing. This article then considers Kentucky's self-audit privilege and the resulting contradictions businesses now face due to the privilege's perceived safeguards and the EPA's expectations of full disclosure.

II. ENVIRONMENTAL SELF-AUDITING: PUBLIC BENEFITS AND PUBLIC CONCERNS

In contrast to past sentiments behind Earth Day and the "greening" of corporate America, or perhaps as an outgrowth of those sentiments, issues associated with economic development and regulatory constraints on business are hot topics of debate in classrooms, boardrooms, state capitols, and even our nation's capitol. Some argue that environmental regulations have so constrained industry that regulatory "takeings" without compensation run unchecked, and that otherwise responsible businesses

14. See, e.g., ALBERT GORE, EARTH IN THE BALANCE: ECOLOGY AND THE HUMAN SPIRIT 36-37 (1992) ("The most dangerous threat to our global environment may not be the strategic threats themselves but rather our perception of them, for most people do not yet accept the fact that the crisis is extremely grave . . . . Those who argue that we should do nothing until we have completed a lot more research are trying to shift the burden of proof even as the crisis deepens.").

15. See, e.g., ROGER BUCCHOLZ ET AL., MANAGING ENVIRONMENTAL ISSUES 71-79 (1992) ("Some environmentalists believe that the total elimination of risk is possible and desirable, but economists and policy analysts argue that the benefits of risk elimination need to be balanced against the costs.").


17. See, e.g., Loveladies Harbor, Inc. v. United States, 27 F.3d 1545 (Fed. Cir. 1994),
are subjected to "an increasingly heavy toll" in terms of regulatory constraints and compliance costs.\textsuperscript{18} Others, of course, argue that industry itself has historically operated unchecked and has delayed paying the price for environmental protection long enough.\textsuperscript{19}

\textbf{A. Voluntary Compliance Auditing}

Between these two positions may lay a practical, result-oriented approach whereby regulators with limited resources can oversee environmental programs and investigate environmental violations, supplemented with, but not supplanted by, self-regulation by the regulated community. This approach necessarily requires some degree of trust among the regulators and the regulated community,\textsuperscript{20} with the cornerstone of such an approach being an increased understanding and application of applicable laws by the regulated community through the voluntary internal compliance audit.\textsuperscript{21} In this context, the voluntary audit typically involves a

\textsuperscript{18} See Steven M. Wheeler & Edward Z. Fox, Avoiding Environmental Liabilities: A Primer For Business, 23 ARIZ. ST. L.J. 483 (1991) ("Environmental regulation is exacting an increasingly heavy toll on American business. Remediation obligations, business interruption, transaction costs, and litigation all drain corporate resources.").

\textsuperscript{19} See GORE, supra note 14, at 37 ("A choice to 'do nothing' in response to the mounting evidence is actually a choice to continue and even accelerate the reckless environmental destruction that is creating the catastrophe at hand.").

\textsuperscript{20} This, of course, is no small task, given the regulatory climate of environmental enforcement. See HOWARD, supra note 16, at 11 ("We seem to have achieved the worst of both worlds: a system of regulation that goes too far while it also does too little . . . . This paradox is explained by the absence of the one indispensable ingredient of any successful human endeavor: use of judgment. In the decades since World War II, we have constructed a system of regulatory law that basically outlaws common sense. Modern law, in an effort to be 'self-executing,' has shut out our humanity."). But see Enforcement: DOJ Environmental Enforcement Chief Schiffer Endorses Voluntary Audits, Decries Budget Cuts, 19 Chem. Reg. Rep. (BNA) 601 (Sept. 8, 1993) ("The Department of Justice's top environmental enforcement official stressed Sept. 1 a cooperative approach to working with industry through use of voluntary audits . . . .").

\textsuperscript{21} The voluntary environmental compliance audit, as used in this context, should not be confused with the environmental site assessment, commonly referred to as a Phase I environ-
thorough examination of a business' operations, which includes an inventory of chemicals used, stored, or generated; a review of emissions into the environment; an analysis of waste treatment, storage, and disposal practices; and a review of permit requirements and status; all in conjunction with a review of, or education as to, applicable environmental regulations.\(^\text{22}\)

What many businesses new to this self-auditing process discover, however, is that the morass of the environmental regulatory world is virtually overwhelming.\(^\text{23}\) Every year since 1972, the federal government has promulgated environmental statutes or regulations at an average of 600 pages per year.\(^\text{24}\) In turn, the promulgation of such statutes and regulations leads to literally thousands of pages of notices, proposed rulemaking, guidance, and final rulemaking published in the Federal Register with regard to environmental compliance.\(^\text{25}\) These environmental laws have evolved from rather broad programs to protect the environment generally,\(^\text{26}\) to more detailed programs impacting specific types and sizes

mental audit. Such Phase I audits typically are performed in conjunction with commercial property transactions, or property refinancing, and are not necessarily indicative of an internal self-audit, although they may be part of such a self-audit. The American Society for Testing and Materials has established a widely recognized standard for Phase I environmental audits. "As such, this practice is intended to permit a user to satisfy one of the requirements to qualify for the innocent landowner defense to CERCLA liability: that is, the practice that constitutes 'all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice' as defined in 42 U.S.C. 9601(35)(B)." \(^\text{See ASTM Standard E 1527-93 (on file with author).}\)

\(^{22}\) Such a review should be tailored to the particular business and to the audit's objectives and generally will assist in assessing compliance requirements and status as well as help a business identify, prioritize, and budget future compliance costs. However, the audit may have many benefits and, for example, may provide a baseline of environmental conditions useful as evidence in subsequent litigation. \(^{\text{See, e.g., S. Ikuta & P. Gelles, Property Problems May Ensnare Remote Prior Owners, ENVTL. COMPLIANCE & LITIG. STRATEGY 3-4 (1994). See also J. Cooney et al., Criminal Enforcement of Environmental Laws: Part III—From Investigation to Sentencing and Beyond, 25 Envtl. L. Rep. (Envtl. L. Inst.) 10,600 (1995) (The "first and best line of defense" against an environmental investigation should be a routine audit program.).}\)

\(^{23}\) \(^{\text{See, e.g., supra note 4. See also Rollins Envtl. Serv., Inc. v. EPA, 937 F.2d 649 (D.C. Cir. 1991) (taking into account regulatory confusion in assessing penalties).}\)

\(^{24}\) \(^{\text{See Safeguarding the Environment: Increasing EPA Regulations, 6 ST. LOUIS COM. 15 (1993); HOWARD, supra note 16, at 26 ("The EPA alone has over 10,000 pages of regulations.").}\)

\(^{25}\) \(^{\text{See HOWARD, supra note 16, at 25 ("The Federal Register, a daily report of new and proposed regulations, increased from 15,000 pages in the final year of John F. Kennedy's presidency to over 70,000 pages in the last year of George Bush's.").}\)

\(^{26}\) For example, the original version of what has evolved into the Clean Air Act was passed in 1955. \(^{\text{Pub. L. No. 84-159, 69 Stat. 322 (1955) (current version at 42 U.S.C. ch. 85 (1994)). The 1955 Act provided for research on air pollution affects and authorized the Surgeon General to investigate air pollution problems. In 1963, the first "Clean Air Act" with}}
of businesses and their day-to-day operations.\textsuperscript{27} For these reasons, companies and those counseling them must stay abreast of current environmental laws, and periodically review a facility's compliance status in relation to evolving environmental laws.\textsuperscript{28}

B. Incentives to Audit

The significance of environmental laws impacting business today is reflected in the increased enforcement of those environmental laws and the increased compliance costs of doing business.\textsuperscript{29} Thus, in addition to measuring compliance consistent with good business practices,\textsuperscript{30} internal
auditing may assist a company to manage its unique environmental risks in an attempt to minimize any compliance, cleanup, or litigation costs, as well as penalties associated with environmental issues. In this respect, environmental auditing can be preventative in nature and may assist a company to either avoid environmental problems altogether, or at least avoid the exacerbation of existing problems.\footnote{31}

In fact, one of the most motivating forces behind environmental auditing may well be the increased focus on criminal prosecutions for environmental violations.\footnote{32} Since 1983, the Department of Justice (DOJ) has assessed in excess of $296 million in criminal penalties and imposed approximately 561 years of imprisonment for environmental violations.\footnote{33} In 1993, the DOJ recorded 186 environmental criminal indictments (as opposed to forty in 1983), resulting in 168 guilty pleas and/or convictions.\footnote{34} Moreover, the targets of this criminal prosecution are more and more the individual corporate officers or business managers, as opposed to the corporation itself,\footnote{35} and in some cases criminal prosecution of such individuals may be based on the acts of a low level employee.\footnote{36}

Compounding the fear of criminal prosecution as a motivating factor is the standard of conduct necessary to convict. While traditional criminal law requires a showing of specific criminal intent, or "mens rea," some environmental laws allow convictions for mere negligence, regardless of

pressures to bear on companies doing business both locally and internationally. See, e.g., ISO \textit{14000 Standards}, \textit{NAT'gL. J.}, Nov. 6, 1995, at C1 ("Although these standards are intended to be voluntary, ISO 14000 sponsors believe they will be embraced by a sufficient number of U.S., European and Japanese firms that they are likely to become mandatory for most firms engaged in international trade, including may domestic suppliers to multinational firms.").

31. A company's poor attitude toward environmental compliance may be a factor in a conviction under environmental laws. On the other hand, "[w]hen regulated entities take reasonable precautions to avoid noncompliance, expeditiously correct underlying environmental problems discovered through audit or other means, and implement measures to prevent their recurrence, EPA may exercise its discretion to consider such actions as honest and genuine efforts to assure compliance." 51 Fed. Reg. 25,004, 25,007 (1986).

32. "This plethora of rules virtually guarantees that no company or individual can always be completely in compliance. And, worst of all, if the violation of an environmental statute or regulation has occurred, there is no absolute defense for criminal liability." Kole et. al., \textit{supra} note 29, at 37.

33. See DOJ Memorandum from P. Hutchins to R. Saracham, Environmental Criminal Statistics FY 83 Through FY 94 (April 7, 1995) (on file with author).

34. \textit{Id.}

35. Of the 1,481 indictments recorded in the past ten years for environmental criminal conduct, 1,068 have involved individuals. \textit{Id.}

an individual's actual knowledge. Moreover, even environmental laws imposing criminal sanctions for "knowing" conduct have been interpreted to impose criminal liability without an actual showing of specific criminal intent. In such cases, an individual's knowledge of what was done, and the fact that it was done voluntarily, may be sufficient for conviction absent knowledge of a legal requirement. In addition, the "responsible corporate doctrine" can be used to target upper management, such as

37. For example, under the Clean Water Act, any person who "negligently" violates certain provisions of the Act "shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both." 33 U.S.C. § 1319(c)(1) (1994). In addition, any person who "negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage" shall be subject to the same criminal punishment. Id. Similarly, the Clean Air Act provides criminal penalties for negligent conduct: "any person who negligently releases into the ambient air any hazardous air pollutant . . . and who at the time negligently places another person in imminent danger of death or serious bodily injury shall, upon conviction, be punished by a fine under Title 18, or by imprisonment for not more than 1 year, or both." 42 U.S.C. § 7413(c)(4) (1994).

38. A recent case resulting in the criminal conviction of a company's vice president illustrates the liberal "knowledge" requirement under certain environmental laws. In United States v. Hopkins, 53 F.3d 533 (2d Cir. 1995), petition for cert. filed, (Oct. 16, 1995), the Second Circuit Court of Appeals upheld the conviction, which included a sentence of 21 months imprisonment, based upon the following jury instructions at trial with regard to "knowledge":

Knowledge may be established by direct or circumstantial evidence. One may not willfully or intentionally remain ignorant of a fact, material or important to his conduct to escape the consequences of criminal law.

It is not necessary for the government to prove that the defendant intended to violate the law or that the defendant had any specific knowledge of the particular statutory, regulatory or permit requirements imposed under the Clean Water Act. Id. at 536. In upholding the jury instruction, the court explained that "in construing knowledge elements that appear in so-called 'public welfare' statutes—i.e., statutes that regulate the use of dangerous or injurious goods or materials—the Supreme Court has inferred that Congress did not intend to require proof that the defendant knew his actions were unlawful." Id. at 537 (citing United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558, 565 (1971) and United States v. Freed, 401 U.S. 601, 607-08 (1971)). See also United States v. Weitzenhoff, 35 F.3d 1275 (9th Cir. 1994), cert. denied, 115 S. Ct. 939 (1995). In Weitzenhoff, the Ninth Circuit Court of Appeals explained that the criminal provisions of the Clean Water Act set out "public welfare" offenses that are "clearly designed to protect the public at large from the potentially dire consequences of water pollution." Id. at 1286 (citing S. REP. NO. 99-50, 99th Cong., 1st Sess. 29 (1985)). The Weitzenhoff court thus upheld a jury instruction providing that the government was required only to prove that the defendant knew he was discharging pollutants. The government was "not required to prove that the defendant knew that his act[s] or omissions were unlawful." Id. at 1283. See also United States v. Laughlin, 10 F.3d 961, 967 (2d Cir. 1993), cert. denied, 114 S. Ct. 1649 (1994) (The government must prove only that the defendant was "aware of his acts," not that the defendant was aware of the specific regulatory requirements.); United States v. Hayes Int'l Corp., 786 F.2d 1499 (11th Cir. 1986) (Circumstantial evidence may supply the requisite proof.),
corporate officers and CEOs, to attribute "knowledge" based on the relative position in the company of those individuals.39

Thus recognizing the onerous nature of environmental liabilities, federal and state agencies responsible for enforcing environmental laws have at least adopted various policies to alleviate the seemingly draconian punishment of business.40 For example, in the civil context, the EPA recently announced its "Policy" toward self-auditing. This Policy eliminates "gravity" or punitive penalties, and in some cases any penalty altogether, where a business voluntarily conducts environmental due diligence and voluntarily discloses and corrects any violations an audit reveals.41 Such


40. For example, the regulated community and regulators alike have long struggled with lender liability under state and federal superfund laws. While CERCLA expressly provides an exemption from liability for security interest holders, 42 U.S.C. § 9601(20)(A) (1994), the language of this exemption leaves lenders and other interested parties uncertain as to when the exemption applies. See, e.g., United States v. Fleet Factors Corp., 901 F.2d 1550, 1557 (11th Cir. 1990), and cert. denied, 498 U.S. 1046 (1991). In response, the EPA promulgated a "lender liability rule" as guidance for lenders and other entities that acquire property involuntarily. 57 Fed. Reg. 18,344 (1992). This rule, however, was subsequently vacated by the Circuit Court of Appeals for the District of Columbia in Kelley v. EPA, 15 F.3d 1100 (D.C. Cir. 1994), reh'g denied, 25 F.3d 1088 (D.C. Cir. 1994), cert. denied, 115 S. Ct. 900 (1995). As a result, the EPA and the DOJ recently issued a joint policy statement stating that "as an enforcement policy, EPA and DOJ intend to apply as guidance the provisions of the 'Lender Liability Rule' promulgated in 1992, thereby endorsing the interpretations and rationales announced in the Rule." See EPA/DOJ Memorandum from S. Herman & L. Schaffer, Policy on CERCLA Enforcement Against Lenders and Government Entities That Acquire Property Involuntarily (October 6, 1995) (on file with author). See also KY. REV. STAT. ANN. § 224.01-400(26) (Michie/Bobbs-Merrill 1995).

In addition, the EPA also recently announced an enforcement policy pertaining to owners of property containing contaminated aquifers. 60 Fed. Reg. 34,786, 34,789 (1995).

[Where hazardous substances have come to be located on or in a property solely as the result of subsurface migration in an aquifer from a source or sources outside the property, EPA will not take enforcement actions . . . against the owner of such property to require the performance of response actions or the payment of response costs. Id. at 34,790. See also Interim Revised EPA Supplemental Environmental Projects Policy Issued, 60 Fed. Reg. 24,856 (1995) (setting forth the types of supplemental environmental projects that may be included in a settlement with the EPA to mitigate the assessment of civil penalties).

41. See Final Policy, 60 Fed. Reg., at 66,710-12. Under this Final Policy, voluntary auditing as well as voluntary disclosure and correction of violations performed pursuant to the conditions of the Final Policy may eliminate the gravity component of any penalty assessed for
penalty mitigation, however, not only requires voluntary environmental auditing or due diligence, but also requires voluntary disclosure, sub-
sequent prompt correction of any violation, and full cooperation with the EPA. Under this paradox, only after cooperating with the EPA will the EPA determine whether to exercise its discretion in mitigating any violations discovered through self-auditing.

At the height of this discretion, the EPA retains the right to demand disclosure of environmental reports where warranted. Indeed, while the Policy recognizes the need to provide incentives for businesses to volun-

environmental violations revealed if certain conditions are met. "Voluntary" in the context of the audit as well as the resulting disclosure means not through a legally mandated requirement. Under this Final Policy, however, the EPA retains the discretion to recover any economic benefit gained by the business as a result of noncompliance, i.e., any costs saved through delay in capital expenditures for environmental improvements. Moreover, the EPA retains discretion to assess even the gravity component of any penalty in cases involving criminal conduct or "imminent and substantial endangerment." Under the Final Policy, this disclosure of the violation in all but "complex" cases must be in writing and provided to the EPA within ten (10) days of discovery, unless a shorter period is provided by law. See id. at 66,711.

Correction of any violation shall be within 60 days of discovering the violation or "as expeditiously as practicable." Although beyond the scope of this article, the "voluntary" nature of any corrective action merits note. First, costs for voluntary corrective action may not be covered under the standard comprehensive general liability insurance policy. Second, even if a person initiates voluntary disclosure and corrective action relating to a violation, absent a diligent prosecution by the government, some environmental laws may nevertheless permit a citizens suit against the auditing business. See Gwaltney v. Chesapeake Bay Foundation, Inc., 484 U.S. 49 (1987).

Such cooperation requires that the regulated entity provide "such information as is necessary and requested by EPA to determine applicability of this policy." Final Policy, 60 Fed. Reg. at 66,711.

While some in industry commend the EPA’s policy toward auditing, including the EPA’s recognized discretion not to recommend criminal prosecution in certain cases, the failure of the policy to create any reliable rights, and its overall vagueness, fosters doubt as to its usefulness. See Jean H. McCready, EPA’s New Audit Policy May Be Small Comfort to Business, 11 ENVT. COMPLIANCE & LITIG. 1, 3 (1995).

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(1) Systematic discovery;
(2) Voluntary discovery;
(3) Prompt disclosure;
(4) Discovery and disclosure independent of government/third party;
(5) Correction and remediation;
(6) Prevent recurrence;
(7) No repeat violations;
(8) Other violations excluded; and
(9) Cooperation.
tarily conduct audits, the EPA remains publicly critical of self-audit privileges.46 Nevertheless, the EPA’s Policy does suggest that audit reports will be sought only where there is independent evidence that an environmental violation has occurred, and the Policy recommends that environmental audit reports should not be routinely requested in order to trigger civil or criminal liability.47

In the criminal context, discretion is also an important factor for prosecution, and the DOJ has stated that an important discretionary factor in environmental cases will be “the existence and scope of any regularized, intensive, and comprehensive environmental compliance program.”48 Thus, an environmental self-auditing program, conducted in good faith and not simply in response to a perceived violation or upcoming inspection, may be a significant and mitigating factor either in the discretion to prosecute or in the ultimate sentence or fine imposed.49 As with EPA discretion, however, the DOJ also requires voluntary disclosure of audit results as the price for leniency.

For all of these reasons, an environmental audit program can be an important business management tool for every company. Having said that, a perceived deterrent to a regular practice of environmental auditing has been the subsequent public availability of auditing reports even where a company does not adhere to the EPA and DOJ policy of voluntary disclosure.50 For example, most federal and state environmental statutes

46. “Privilege runs counter to efforts to open up environmental decision making and encourage public participation in matters that affect people’s homes, workplaces and communities.” Interim Policy, 60 Fed. Reg. at 16,878. See also Final Policy, 60 Fed. Reg. at 66,712 (“EPA remains firmly opposed to statutory environmental audit privileges . . . .”).
47. Final Policy, 60 Fed. Reg. at 66,711.
49. Id. (“Where the law and evidence would otherwise be sufficient for prosecution, the attorney for the Department should consider the factors contained herein, to the extent they are applicable, along with any other relevant factors, in determining whether and how to prosecute.”). The DOJ identifies several examples of voluntary conduct meriting consideration, including “the ideal case in terms of criteria satisfaction and consequent prosecution leniency.” Id. Even under the ideal case, however, the DOJ will only concede that “Company A would stand a good chance of being favorably considered for prosecutorial leniency.” Id.
50. According to a recent survey, “among those companies that do not perform audits, 20% fear that audit information could somehow be used against the company.” See Don’t Penalize Us for Audits, Says U.S. Companies, 6 Bus. & Env’t 1 (1995). In fact, some privilege supporters fear that government will unfairly exploit information in reports and as a result a seemingly innocent violation, one which is properly corrected but disclosed to the government, will result in a substantial civil or criminal prosecution.

Versions of the privilege offering immunity to companies that voluntarily disclosure envi-
authorize regulatory inspections, including the inspection and copying of company documents pertaining to environmental issues. Such documents, including audit documents in some cases, when copied and retained by the government typically become public documents subject to a public records request or review. As such, these public files may provide a wealth of information for environmental organizations and public interest groups acting as private attorneys general. Such documents

Bennet L. Heart, The Environmental Audit Privilege: A Step in the Wrong Direction, 10 Toxics L. Rep. (BNA) 307 (Aug. 21, 1995). Mr. Heart points out, however, that "most of the country's large companies already perform environmental audits without the benefit of an environmental audit privilege." Id. at 306. In addition, Mr. Heart argues that those who do not perform voluntary audits, approximately 25% of the 1,800 manufacturing companies surveyed, are motivated by factors other than the fear of disclosure, i.e., limited resources or lack of information. Id.

51. Many environmental programs provide for broad inspection powers. See, e.g., 42 U.S.C. § 6927(a)(1) (1994) (RCRA provides for the inspection of "any establishment or other place where hazardous wastes are or have been generated, stored, treated, disposed of, or transported from."); 42 U.S.C. § 9604(e)(3) (1994) (Under CERCLA, an inspector may enter "any vessel, facility, establishment, or other place or property where any hazardous substance or pollutant or contaminant may be or has been generated, stored, treated, disposed of, or transported from."); 29 U.S.C. § 657(a)(1) (1994) (OSHA allows for the inspection of "any factory, plant, establishment, construction site, or other area, workplace, or environment where work is performed by an employee of an employer."). Such inspection authority generally allows the inspecting agency to "have access to and copy any records, inspect any monitoring equipment or method required" or pertinent under the environmental program at issue. Clean Air Act, 42 U.S.C. § 7414(a)(2)(B) (1995). Kentucky regulations set out the state's inspection policy, which includes provision for the opportunity to access and copy documents. See 401 KY. ADMIN. REGS. 40:020 (1995). See also 42 U.S.C. § 6927(a) (1994) (allowing the inspector under RCRA to have access to and to copy all records relating to regulated waste); 42 U.S.C. § 9604(e)(2) (1994) (requiring the business owner or operator to furnish information or documents relating to the subject matter of the inspection). Cf. United States v. Biswell, 406 U.S. 311 (1972) (warrantless search acceptable under pervasively regulated industry exception).

52. See KY. REV. STAT. ANN. § 224.10-210 (Michie/Bobbs-Merrill 1995); id. § 224.10-212 ("Any record or other information furnished to or obtained by the cabinet shall be open to reasonable public inspection, except that . . . which constitutes trade secret or confidential business information and is designated as such by the cabinet . . . .").

53. See, e.g., Friends of the Earth v. Eastman Kodak, 656 F. Supp. 513 (W.D.N.Y. 1987), aff'd, 834 F.2d 295 (2d Cir. 1987) (Plaintiff's case was built upon the self-reporting documents prepared by the defendant and filed with the government pursuant to the Clean Water Act and permit conditions.). Additionally, ISO 14000 contemplates the creation of a substantial paper trail, which may include broad policy statements and operational documents discussing a company's environmental "aspects" and impacts. See ISO/DIS 14001 § 4 (on file with author).
may also represent "roadmaps" for parallel criminal investigations by government.  

III. PROTECTION FOR THE ENVIRONMENTAL SELF-AUDIT REPORT

In some respects, an environmental audit can be like asking that "one question" law school instructs the cautious attorney never to ask on cross-examination—the one to which you do not know the answer. The audit often answers the unknown question, sometimes with detrimental surprises, and thus may beg consideration under privileges from disclosure. Historically, Kentucky law recognized eight specific privileges, each of which arise from the distinct relationship between specific parties to the protected communication. Of these, typically only the attorney-client privilege can be asserted to protect an internal environmental audit report, although under certain circumstances even this privilege may not apply. Similarly, unless prepared "in anticipation of litigation," the

54. Discovery in civil cases is generally more liberal than that allowed in criminal cases. "The government can get around this, however, by bringing a civil action before bringing a criminal action; through broad based discovery in the civil case, the government can wander through a company's files looking for evidence of other violations." Kole & Lefeber, supra note 28. See also Locke et al., supra note 5, at 27.

55. Kentucky Rules of Evidence codify the fundamental practice that litigants generally are entitled to all relevant, nonprivileged evidence in possession or control of the opponent. KY. R. EVID. 501. "Except as otherwise provided by constitution or statute or by these or other rules promulgated by the Supreme Court of Kentucky, no person has a privilege to . . . refuse to disclose any matter; refuse to produce any object or writing; or prevent another from . . . disclosing any matter or producing any object or writing." Id. See also ROBERT G. LAWSON, THE KENTUCKY EVIDENCE LAW HANDBOOK, § 5.05, at 227 (3d ed. 1993).

56. See, e.g., KY. R. EVID. 503 (Attorney-client privilege); KY. R. EVID. 504 (Spousal privilege); KY. R. EVID. 505 (Religious privilege); KY. R. EVID. 506 (Counselor-client privilege); KY. R. EVID. 507 (Physician-patient privilege); KY. R. EVID. 508 (Informant privilege); KY. REV. STAT. ANN. § 421.100 (Michie/Bobbs-Merrill 1995) ("Source of Information" privilege); KY. REV. STAT. ANN. § 439.510 (Michie/Bobbs-Merrill 1995) (Parole-probation information privilege).

57. The attorney-client privilege is absolute and cannot be defeated through disclosure either compelled erroneously or made without opportunity to claim the privilege. See Cummings v. Commonwealth, 298 S.W. 943 (Ky. 1927); KY. R. EVID. 510. However, the privilege covers only confidential communications relating to legal advice, and if the client intends that the communication be shared with a third party, or if the communication is not in furtherance of legal advice, the privilege does not apply. See Hughes v. Meade, 453 S.W.2d 538 (Ky. 1970); Belcher v. Somerville, 413 S.W.2d 620 (Ky. 1967). See also United States v. Nixon, 418 U.S. 683 (1974) (Privileges "are not lightly created or expansively construed for they are in derogation of the search for the truth."). Id. at 710. Moreover, the privilege will not protect facts which are otherwise discoverable. See, e.g., Transit Auth. of River City v. Vinson, 703 S.W.2d 482, 486 (Ky. Ct. App. 1985).

58. See, e.g., In re Grand Jury Matter, 147 F.R.D. 82 (E.D. Pa. 1992). In this case, the
work product doctrine may not provide protection for the audit report.\textsuperscript{59} On the other hand, the judicially created privilege of self-critical analysis, on its face, seems entirely applicable to protection of an environmental self-audit report.\textsuperscript{60} This privilege, however, remains largely undefined,\textsuperscript{61} and several courts have specifically rejected such a privilege in the environmental audit context.\textsuperscript{62} In fact, courts generally recognize

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\textsuperscript{59} See KY. R. Civ. P. 26.02(3) (protecting documents prepared “in anticipation of litigation” by a party’s representative, including an attorney or consultant). The work product doctrine protection generally is deemed broader in scope than the attorney-client privilege, covering more than privileged communications, and extends to photographs, documents and other data generated by those working for the attorney. In State v. Ybarra, 777 P.2d 686 (Ariz. 1989), the court ruled that the work product doctrine protected an environmental audit report at issue. The attorney representing the defendant, after learning that criminal indictments may be forthcoming based on hazardous waste activities, engaged an environmental consultant to perform soil sampling to provide information to address the potential charges. \textit{Id.} at 688. Subsequently, the state issued a grand jury subpoena and obtained the environmental consultant’s report. \textit{Id.} Defense counsel thereafter moved for a new determination of probable cause, arguing that the environmental report was protected by the work product doctrine. \textit{Id.} The court, in determining that the environmental report represented non-discoverable work product, explained that “we must recognize, however, that with modern litigation becoming more complex, trial lawyers must often consult experts to adequately prepare their cases.” \textit{Id.} at 690. In that regard, as the court explained, environmental law presents the perfect example where techniques relating to soil sampling analysis are skills not usually learned in law school. \textit{Id.} Therefore, experts retained to investigate and prepare reports on technical aspects of specific litigation are part of counsel’s “investigative staff”, and their subsequent reports constitute protected work product. \textit{Id.} at 690-91. However, the court cautioned that the work product doctrine is not absolute, and if, for example, the defendants decide to use the expert environmental consultant as a witness, the report is then discoverable. \textit{Id.} at 691. Moreover, if otherwise protected information is unavailable to one party, it may be discoverable where that party can show a “substantial need” and that party is not able to obtain the same without “undue hardship.” \textit{Id.} at 692. Nevertheless, in \textit{Ybarra} the court explained that the state could have taken its own samples and could have hired its own expert, therefore the report was protected under the work product doctrine. \textit{Id.}

\textsuperscript{60} The judicially created self-evaluation or self-critical analysis privilege was first recognized in Bredice v. Doctor’s Hosp., Inc., 50 F.R.D. 249 (D.D.C. 1970), aff’d, 479 F.2d 920 (D.C. Cir. 1973). This privilege recognizes the overwhelming public interest in protecting from disclosure certain information which, if disclosed, would deter an otherwise candid and voluntary self-examination. \textit{Id.} at 251. \textit{See also Note, The Privilege of Self-Critical Analysis, 96 HARY. L. REV. 1083 (1983).}

\textsuperscript{61} Federal Trade Commission v. TRW, Inc., 628 F.2d 207, 210 (D.C. Cir. 1980) (“At most [this privilege] remains largely undefined and has not generally been recognized.”). In fact, the Kentucky Supreme Court expressly refused to judicially adopt the privilege. University of Ky. v. Courier-Journal & Louisville Times Co., 830 S.W.2d 373, 378 (Ky. 1992).

\textsuperscript{62} Although the EPA has encouraged courts to broaden the use of the self-critical analysis
that environmental laws are remedial in nature and should therefore be construed liberally to invoke an overriding public policy in favor of unimpeded enforcement, a public policy deemed contrary to a self-critical analysis privilege.63

IV. KENTUCKY’S SELF-AUDIT PRIVILEGE

For all the above reasons, a privilege protecting environmental self-audit reports from routine disclosure would seemingly encourage further self-auditing, and thus further promote self-regulation and overall compliance. On that basis, and expressly as an incentive to Kentucky businesses, the General Assembly has enacted a self-audit privilege to protect from disclosure certain environmental audit reports prepared by businesses.64 This “incentive,” however, must be embraced with caution, recognizing that the privilege is not absolute, but rather comes with a number of conditions and exceptions.

63. See United States v. Ekotek, Inc., No. 2:95 CV 0154K, 1995 U.S. Dist. LEXIS 14467 (D. Utah Sept. 11, 1995); United States v. Dexter Corp., 132 F.R.D. 8, 10 (D.C. Conn. 1990). See also Ohio ex rel. Celebrezze v. CECOS Int’l, Inc., 583 N.E.2d 1118 (Ohio Ct. App. 1990) (rejecting the application of the privilege to a hazardous waste compliance audit but recognized perhaps a limited application); Scroggins v. Uniden Corp. of Am., 506 N.E.2d 83 (Ind. Ct. App. 1987) (rejecting the self-critical analysis privilege). Nevertheless, at least one federal court has recognized the privilege and its application to an environmental audit report. The court recognized the self-critical analysis privilege where the following elements were present:

(1) a strong public interest in protecting the free flow of the type of information at issue;
(2) the information is of a type whose flow would be curtailed if otherwise discoverable;
(3) the information must have been prepared with the expectation of confidentiality; and
(4) the information must have in fact been kept confidential.


64. Ky. REV. STAT. ANN. § 224.01-040 (Michie/Bobbs-Merrill 1995) expressly provides as follows:

In order to encourage owners and operators of facilities and persons conducting other activities regulated under this chapter, or its federal, regional, or local counterparts or extensions, both to conduct voluntary internal environmental audits of their compliance programs and management systems and to assess and improve compliance with statutory and regulatory requirements, an environmental audit privilege is created to protect the confidentiality of communications relating to voluntary internal environmental audits.

Id. § 224.01-040(2).
A. Scope of the Privilege

Section 224.01-040 provides that an "environmental audit report" (hereinafter "EAR") shall be privileged and, therefore, not admissible as evidence in any civil, criminal or administrative proceeding. The statute defines the EAR to mean a set of documents, "each labeled 'environmental audit report: privileged document,' and prepared as a result of an environmental audit." Therefore, first and foremost, the document to be protected must be properly labeled. Second, it must arise from an "environmental audit."

Under Kentucky's self-audit privilege, an "environmental audit" means a voluntary, internal, and comprehensive evaluation of one or more facilities, or an activity at one or more facilities "regulated under this chapter" pertaining to environmental protection, or federal, regional or local counterparts, or of a management system related to that facility or activity, and that is designed to identify and prevent noncompliance.

65. Id. § 224.01-040(3). While the statute contemplates the protection of "communications relating to voluntary internal environmental audits," it expressly provides a privilege over only the environmental audit report itself. Id. § 224.01-040(2)-(3).

66. Id. § 224.01-040(1)(b). In this respect, Kentucky's privilege appears somewhat limited in scope. For example, while the Kentucky privilege protects only the report itself, note that Colorado's privilege, through its definition of "environmental audit report," seemingly extends to "any report, finding, communication, or opinion or any draft of a report, finding, communication, or opinion related to and prepared as a result of a voluntary self-evaluation that is done in good faith." COLO. REV. STAT. § 13-25-126.5(2)(b) (1995) (emphasis added). In addition, note that Illinois' privilege provides that a business owner or operator who performs or directs the performance of an audit, as well as a company officer or employee involved in the audit and any consultant hired to perform the audit, "may not be examined as to the environmental audit or any environmental audit report." ILL. REV. STAT. ch. 415, para. 5/52.2(c) (1995). Businesses in Kentucky, and those representing them, should therefore be aware that the privilege does not provide blanket protection to communications relating to an audit, but only a limited scope of protection. Practitioners should thus otherwise ensure the applicability of the attorney-client privilege or work product doctrine where appropriate.

67. The statute does not clearly articulate the scope of an "environmental" evaluation protected under the privilege, other than to provide that the audit shall pertain to a facility "regulated under this chapter," which refers to the chapter pertaining to "environmental protection," or federal, regional or local counterparts. See KY. REV. STAT. ANN. § 224.01-040(2) (Michie/Bobbs-Merrill 1995). Often, however, an "environmental" audit will include an evaluation of related health and safety issues that the unwary business may assume are protected, but which may not be protected under this privilege. For example, certain regulations pertaining to asbestos, labeling of hazardous chemicals, and permissible exposure limits for air contaminants are actually found in Kentucky's occupational safety and health standards and not in the "Environmental Protection" chapter of the statutes. See, e.g., id. § 338.010; 803 KY. ADMIN. REGS. 2:300 (1995).

68. This reference to "management system" seemingly extends the privilege protection to those activities contemplated under ISO 14000. But see infra note 77.
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and to improve compliance with regulatory or statutory requirements.69 This environmental audit may be conducted by an owner or operator of the business, by employees of the owner or operator, or by an independent contractor.70 When completed, the EAR must have three components: (1) an audit report prepared by an auditor, which may include conclusions and recommendations; (2) memoranda and documents analyzing the audit report and discussing implementation issues; and (3) an audit implementation plan that addresses correcting noncompliance, improving current compliance, and preventing future noncompliance.71 The EAR may include field notes, records of observations, drawings, photographs, maps, or graphs, "provided the supporting information is collected or developed for the primary purpose and in the course of an environmental audit."72 Because such information can be part of the EAR, it should be part of the EAR to maximize the permissible scope of the privilege. Note, however, that the self-audit privilege does not extend to reports or other information otherwise required to be developed, maintained, or reported pursuant to federal, state, or local law, and the statute shall not otherwise waive, limit, or abrogate any reporting requirement or permit conditions.73 Thus, for example, while the discovery of some "violations" may not in and of itself require reporting, otherwise reportable revelations find no new protection under the statute.74

69. KY. REV. STAT. ANN. § 224.01-040(1)(a) (Michie/Bobbs-Merrill 1995). As the statute thus indicates, an environmental audit evidencing "noncompliance" must lead to achieving compliance or the privilege will not apply. See id. § 224.01-040(4)(d).

70. Id. § 224.01-040(1)(a).

71. Id. § 224.01-040(1)(b).

72. Id.

73. Id. § 224.01-040(6). The practical application of this provision of the statute will further limit its scope, and further serves to illustrate that the statute is not necessarily the "hide all" polluter protection shield that some opponents of the privilege could be heard to assert. For example, all of the recordkeeping and reporting requirements promulgated under the community right-to-know laws are otherwise still applicable, and those compliance obligations cannot be avoided through this privilege. See 42 U.S.C. § 11001-11005 (1994). By way of further example, inspection or auditing requirements, such as the newly promulgated requirement that a building owner exercise due diligence to inform occupants of asbestos, including the requirement that identification of asbestos be made by an industrial hygienist, seemingly cannot be hidden away in this privilege. See 29 C.F.R. § 1910.1001 (1994).

74. Moreover, any information obtained by observation, sampling or monitoring by a regulatory agency, or information obtained from a source "independent of the environmental report," shall not be privileged. KY. REV. STAT. ANN. § 224.01-040(6)(b)-(c) (Michie/Bobbs-Merrill 1995). This latter provision specifying information independent of the EAR seems to support the argument that only those individuals recognized in the statute, i.e., the owner, operator or person conducting activity relating to the audit, can waive the privilege, and not, for example, a disgruntled employee. See infra, note 76 and accompanying text.
B. Waiver of the Privilege

As indicated, Kentucky's self-audit privilege is limited in scope, and the statute expressly provides that the privilege may be waived. In this regard, the self-audit privilege may be either expressly or implicitly waived by the owner or operator of the business generating the report, or even by persons "conducting an activity that prepared or caused to be prepared the environmental audit report." 75 Under this provision, a litigation adversary may argue that even a consultant under certain circumstances has the capacity to waive the privilege on behalf of the client, 76 although this issue most certainly will require litigation to confirm the scope of an implicit waiver. 77

In any event, the issue of waiver raises another notable practical concern. Many environmental reports are generated or relied upon in the context of the sale or refinancing of a business. Such transactional due diligence that the buyer or lender usually performs involves a thorough review of the business' environmental compliance status, and any failure by the business to provide full disclosure may jeopardize the transaction. In this scenario, however, releasing a previously conducted voluntary self-audit report to a prospective buyer or lender arguably may waive any privilege provided under the statute. 78 Unfortunately, this concern over

75. KY. REV. STAT. ANN. § 224.01-040(4)(a) (Michie/Bobbs-Merrill 1995). In this regard, if a report is voluntarily disclosed to the EPA or DOJ, a company may be hard pressed to argue that the information provided to the government does not constitute a waiver of any privilege over that information. See In re Martin Marietta, 856 F.2d 619 (4th Cir. 1988), cert. denied, 490 U.S. 1011 (1989). But see FED. R. EVID. 408; FED. R. CRIM. P. 11(e)(6)(D). In addition, if the owner or operator otherwise seeks to introduce into evidence any part of the environmental audit report, that shall constitute a waiver of the privilege "for the entire report." KY. REV. STAT. ANN. § 224.01-040(4)(b) (Michie/Bobbs-Merrill 1995). Note, however, that the inclusion of this language in subsection (4)(b) but not in the general waiver provision of (4)(a) supports the argument that, except when introducing a portion of the EAR as evidence, a waiver may be partial in scope. See Westinghouse v. Republic of the Philippines, 951 F.2d 1414, 1426 n.12 (3d Cir. 1991) ("When a party discloses a portion of otherwise privileged materials while withholding the rest, the privilege is waived only as to those communications actually disclosed, unless a partial waiver would be unfair to the party's adversary.").

76. If such an interpretation is upheld, this would further emphasize the limited scope of the self-audit privilege in relation to, for example, the attorney-client privilege. See 95 Op. Ky. Att'y Gen. 18 (1995) ("A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication . . . .").

77. While ISO 14000 envisions certification of a company's environmental management system by an external auditor, the auditor apparently will have no independent reporting obligations, and a company apparently will be able to independently contract with the auditor to create a confidential client-consultant relationship.

78. See Niagara Mohawk Power Corp. v. Stone & Webster Eng'g Corp., 125 F.R.D. 578 (N.D.N.Y. 1989) (The "project management book" was protected by the work product doctrine
waiver in turn may compromise the overall beneficial effect of the privilege if it results in a chilling effect on the heretofore relatively liberal flow of audit information among parties to a transaction.

C. Exceptions to the Privilege

In addition to waiver, the statute also identifies several exceptions to the privilege which, after "a private review consistent with the Kentucky Rules of Civil Procedure," may require the disclosure of an EAR in whole or in part. In a civil or administrative proceeding, three statutory exceptions to asserting the privilege exist. First, where a party attempts to assert the privilege for a fraudulent purpose, the privilege will not protect the EAR from disclosure. Second, where the EAR itself is not properly subject to the privilege, the privilege will not protect the EAR from disclosure. Third, even where the EAR is otherwise properly subject to the privilege, if the EAR itself shows evidence of noncompliance and "appropriate efforts to achieve compliance were not promptly

where it was prepared in anticipation of an administrative hearing; nevertheless, this protection was waived when the report was shared with other defendants.)

One method of dealing with such transactional issues is to disclose only a separate, sanitized summary of audit results. Where fuller disclosure to a lender is contemplated, the lender should contractually agree to respect the confidentiality before audit reports or results are made available. Although such a confidentiality agreement may not avoid waiver of the privilege, it could create a deterrent cause of action against the lender if it discloses either such materials or the fact they had been disclosed to it. Thus, the net affect may be the same as non-disclosure.

Levin et al., supra note 9. Cf. 1995 Ark. Act 350, at 8-1-304(b) (waiver extends only to that part of the report expressly waived).

79. KY. REV. STAT. ANN. § 224.01-040(4)(c) (Michie/Bobbs-Merrill 1995).

80. Id. § 224.01-040(4)(c)(1). Here, the party asserting the privilege has the burden of proof.

In this regard, opponents of self-audit privileges argue that the privilege will shield unscrupulous companies:

Unscrupulous companies can be expected to take extreme positions on what is covered by the privilege, but of equal if not greater concern is that companies of all sorts will attempt to protect important inculpatory information by asserting the privilege. Such privilege claims, particularly in the first few years of the law, will need to be litigated. Heart, supra note 50, at 308. Notwithstanding such sentiments, Kentucky's statute in and of itself does not appear to feed what ever motives may be behind those "unscrupulous companies," companies which in the past have perhaps looked to the attorney-client privilege and/or work product doctrine in some attempt to protect their secrets. Here, at least, the statute fairly specifically identifies the nature of the document protected and contemplates a challenge based on fraudulent purpose through an "in camera" review. Such statutorily mandated reviews may, contrary to suggestion, become routine and procedural, and perhaps in fact reduce the amount of litigation over baseless claims of privilege.

81. Id. § 224.01-040(4)(c)(2). Here, the party asserting the privilege has the burden of proof.
initiated and pursued with reasonable diligence,” the privilege will not protect the EAR from disclosure. As indicated, the scope of the EAR document itself is fairly defined, and the statute provides for an “in camera” review for a court to determine the appropriate application of the privilege and exceptions on a case-by-case basis.

In a criminal setting, each of the three exceptions discussed above exist, as well as two additional exceptions. First, where the EAR itself contains evidence “relevant to” an offense under certain enumerated environmental statutes, and the prosecutor has “a need for the information,” the privilege will not protect the EAR from disclosure. Again, here the statute contemplates that this issue will be resolved with a review of the EAR at issue “in camera.” Second, where a prosecutor “has probable cause to believe that an offense has been committed,” and this probable cause is based upon information obtained from a source independent of the EAR, the prosecutor may obtain the EAR pursuant to a search warrant, criminal subpoena, or discovery as otherwise allowed. In such a situation, after receiving the EAR, the prosecutor

82. Id. § 224.01-040(4)(c)(3). Again, the party asserting the privilege has the burden to prove the privilege applies in the first place. Note in this instance, as perhaps analogous guidance, that the EPA considers 60 days as “prompt.” Interim Policy, 60 Fed. Reg. at 16,877. On the other hand, a party asserting the privilege may find the phrase “appropriate efforts to achieve compliance . . . with reasonable diligence” open to more debate.

83. Id. § 224.01-040(4)(d).

84. Id. Unlike the work product doctrine, which requires a showing of “substantial need,” note here that Kentucky’s privilege statute allows disclosure upon a showing of “need” by the prosecutor. Cf. Ky. R. Civ. P. 26.02(3)(a). See also United States v. Nobles, 422 U.S. 225, 238 (1975) (“Although the work-product doctrine most frequently is asserted as a bar to discovery in civil litigation, its role in assuring the proper functioning of the criminal justice system is even more vital.”).

85. Ky. Rev. Stat. Ann. § 224.01-040(4)(d)(4) (Michie/Bobbs-Merrill 1995). The prosecutor has the burden of proving the conditions for disclosure under this provision. Id. § 224.01-040(4)(e). In this context, the report must contain evidence relevant to the commission of an offense under KRS §224.99-010, Subsection (3), (4), (6), (10), or (11). Id. § 224.01-040(4)(d)(4).

86. However, it is not clear under the statute how prosecutors might learn that they have a need for the information, and in fact that the EAR contains evidence relating to an offense thus warranting an “in camera” review, without some prior disclosure or waiver.

87. Ky. Rev. Stat. Ann. § 224.01-040(5) (Michie/Bobbs-Merrill 1995). Here, the statute requires a showing of “probable cause” before the prosecutor may seize an EAR based upon information from an independent source. This provision seems to incorporate notions of “reasonable grounds” before the EAR may come to the prosecutor under this provision. See Smallwood v. Commonwealth, 204 S.W.2d 945 (Ky. Ct. App. 1947). Thus, the information from the independent source presumably must be fairly specific and identify how and why reasonable grounds exist to suggest an offense has been committed. See Thompson v. Commonwealth, 472 S.W.2d 884 (Ky. 1971), overruled by Beemer v. Commonwealth, 665 S.W.2d 912 (Ky. 1984); Henson v. Commonwealth, 347 S.W.2d 546 (Ky. 1961).
shall immediately place the EAR “under seal and shall not review or disclose its contents” pending a final determination as to its evidentiary use.\(^8\) Thereafter, the owner or operator who prepared or caused to be prepared the EAR report, or the prosecutor, has twenty days to petition the appropriate court and request a private hearing to determine whether the EAR, or portions thereof, are privileged.\(^9\) Upon the filing of a petition, the court shall then allow the prosecutor to remove the seal and review the EAR to prepare for the private hearing, while placing appropriate limitations on distribution and review to protect against unnecessary disclosure.\(^9\) However, any information used in preparation for the private hearing shall not be used in any investigation or any proceeding against the defendant and shall otherwise be kept confidential until and unless the information is found to be subject to disclosure.\(^9\) After the hearing, the court may compel disclosure of only a portion of the EAR relevant to the issues in dispute.\(^9\)

\[D. \text{ No Federal Protection}\]

Perhaps most importantly, and regardless of the statute’s ultimate scope, one must keep in mind that Kentucky’s self-audit privilege is just that—Kentucky’s—and it ultimately may provide no protection in the broad, and sometimes parallel arena of federal-environmental regulation. Rather, to the contrary, the existence of the privilege implies that the EPA may follow through with its threat to increase enforcement activity in states that enact such a privilege, or to revert delegated authority from those states for certain state-run programs. Moreover, reliance on the privilege presumably contradicts all considerations of leniency under the current EPA and DOJ guidelines for discretion in enforcement. Thus, the privilege may actually serve to: (1) increase enforcement against Kentucky businesses; and (2) aggravate the penalties assessed against those businesses on the federal level.

\(^8\) KY. REV. STAT. ANN. § 224.01-040(5)(a) (Michie/Bobbs-Merrill 1995).

\(^9\) Id. § 224.01-040(5)(b). Although either party may request a hearing, the statute expressly provides that the privilege is waived if the “owner or operator” does not file a petition. Id.

\(^9\) Id. § 224.01-040(5)(c).

\(^9\) Id. Whether the prosecutor’s investigation may be compromised by “fruit of the poisonous tree,” after the prosecutor reviews a report that the court subsequently rules is privileged, may be subject to some debate. See Jones v. Commonwealth, 556 S.W.2d 918 (Ky. Ct. App. 1977).

\(^9\) KY. REV. STAT. ANN. § 224.01-040(5)(e) (Michie/Bobbs-Merrill 1995).
V. CONCLUSION

Businesses engaged in a self-critical analysis of operational compliance are to be commended, and the benefits both to the individual business and the public at-large are in some cases immeasurable, regardless of any associated privileges or immunities. Kentucky’s newly created self-audit privilege at least provides some comfort, and incentive, that a business performing a self-critical analysis of its environmental compliance can examine and educate itself with some sense of modesty. Under this privilege, businesses may practice and implement a broader scope of quality management knowing that the correction of certain problems, under appropriate circumstances, may proceed without watchdog scrutiny and punitive repercussions. However, Kentucky’s statute is one of “privilege” only, and it provides no express immunity from penalties resulting from the discovery of violations. In addition, businesses and those counseling them must also recognize that this new privilege is limited in scope, and comes with several qualifications and exceptions. Moreover, the scope of the privilege will most likely not be thoroughly defined prior to the inevitable litigation which should judicially mold its application. In the meantime, businesses may be well advised to continue to foster and rely upon the attorney-client privilege and work product doctrine protections where appropriate.93

Indeed, while Kentucky’s state privilege may encourage compliance by providing a limited privilege for voluntary self-audit reports, such audits may also generate information raising countervailing considerations under federal law, particularly in light of the EPA and DOJ positions pertaining to voluntary disclosures. Therefore, until Congress enacts a similar privilege,94 Kentucky’s statute may in practice provide little reliable protection in the expansive and multi-layered world of environmental regulations.

93. "Nothing in Kentucky's privilege statute shall limit, waive or abrogate the scope or nature of any statutory or common-law privilege, including the work product doctrine and attorney-client privilege." Id. § 224.01-040(7).

94. See, e.g., H.R. 1047, 104th Cong., 1st Sess. (1995) (proposing both a limited privilege from disclosure and immunity from prosecution for companies performing self-audits and correcting noncompliance); Enforcement: Companies, Industry Groups Urge Congress to Pass Environmental Audit Legislation, 19 Chem. Reg. Rep. (BNA) 320 (June 23, 1995) ("A coalition of 67 companies and industry groups are urging Congress to pass legislation that would prevent the disclosure of corporate environmental audits.").
AIR OPERATING PERMITS IN KENTUCKY: ACCOUNTING FOR FUGITIVE EMISSIONS AND PREPARING THE APPLICATION

by Henry L. Stephens, Jr.¹

I. INTRODUCTION

As is now well known to experienced and neophyte practitioners of environmental law alike, Title V of the 1990 amendments to the Clean Air Act established a state-implemented operating permit program with federal oversight.² The Environmental Protection Agency (EPA) promulgated final regulations implementing Title V on July 21, 1992.³ These implementing regulations dictate the requirements that state programs must satisfy prior to receiving the EPA's approval to implement an operating permits program. In order to receive approval, state programs must provide for the permitting of the following sources: (1) major sources; (2) sources subject to standards, limitations, or requirements under § 111 of the Clean Air Act (new sources performance standards); (3) sources subject to standards or requirements under § 112 of the Clean Air Act, except for sources subject solely to the requirements under § 112(r) of the Clean Air Act; (4) sources subject to the acid rain provisions contained in Title IV of the Act; and (5) sources and categories designated by the EPA administrator.⁴ The general focus of this article are the requirements for "major sources." However, the impact of the Clean Air Act's requirements to evaluate fugitive emissions is felt by all who may be required to file a Title V permit application. The EPA provides as follows:

Fugitive emissions. Fugitive emissions from a part 70 source shall be included in the permit application and the part 70 permit in the same manner as stack emissions, regardless of whether the source category in question is included in the list of sources contained in the definition of major source.⁵

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⁴ See Id. § 70(3).
⁵ Id. § 70(3)(d).
For this reason, the specific focus of this article is the impact of this seemingly simple requirement upon sources seeking permits under Title V in Kentucky.

II. BACKGROUND

Regulations implementing the Title V operating permits program for Kentucky became final on September 28, 1994.\(^6\) In examining the applicability of the permitting regulations to major sources, Kentucky Administrative Regulation (KAR) 50:035 defines the term “major source” for a variety of stationary sources based upon such source’s “potential to emit” air pollutants above tonnage thresholds identified in the regulation.\(^7\)

“Potential to emit” means the maximum capacity of a stationary source to emit an air pollutant given its physical and operational design. A physical or operational limitation on the capacity of a source to emit an air pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if limitation is federally enforceable.\(^8\)

As a consequence of this expansive definition, “potential to emit” envelops many sources whose actual emissions may be well below the stated emission thresholds necessary to be exceeded in order to be denominated major sources.\(^9\) Major source determinations will be made based upon the potential to emit irrespective of actual emissions, unless the source’s

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7. See Id. § 1(22)(a)-(c).
8. Id. § 1(26).
9. A newly proposed regulation will, if adopted, provide relief for sources whose potential emissions are at or above the major source thresholds but whose actual emissions are consistently less than half that amount. See 22 Ky. Admin. Reg. 817-21 (1995)(to be codified at 401 KY. ADMIN. REGS. 50:031). The proposed regulation takes the position that where sources’ actual emissions are consistently less than half of the major source threshold, such sources have an “inherent physical limitation on [their] potential to emit which will likely prevent [them] from ever becoming a ‘major source.”’ Id. at 820. If approved, this regulation will reduce the number of sources required to obtain a Title V permit in Kentucky from 470 to approximately 200. Id. Nevertheless, sources that may be able to take advantage of this proposed regulation must still calculate fugitive emissions of hazardous air pollutants and sources among the twenty-seven categories delineated in the proposed regulation. Id.(to be codified at 401 KY. ADMIN. REGS. 50:031 § 1(7)(a)). Sources must also calculate fugitive emissions of all regulated air pollutants. Id. Therefore, irrespective of whether the requirement to obtain a permit is based upon actual or potential emissions, fugitive emissions must be calculated for most sources. See Id.
potential to emit is limited through the use of “federally enforceable requirements” or inherent physical limitations. The recent opinion of the Court of Appeals of the District of Columbia in National Mining Ass’n v. EPA may ultimately require the EPA to narrow the scope of the term “potential to emit” by allowing mechanisms other than “federally enforceable” mechanisms to limit a source’s potential to emit. Such relief will have little impact, however, upon sources which emit fugitive emissions unless those emissions are subject to state or federally enforceable limitations, such as state operating permits or State Implementation Plans (SIPs). This article seeks to resolve to what extent, if any, fugitive emissions are (a) exempt from being calculated for purposes of determining if the source is a “major source” or (b) exempt from permitting requirements.

III. WHAT SOURCES HAVE AN OBLIGATION TO APPLY FOR AN OPERATING PERMIT PURSUANT TO KAR 50:035?

Kentucky’s operating permit regulations impose the obligation to apply for a permit upon, among others, existing major and minor sources. Major sources are required to file a complete application within twelve months after the day the EPA approves Kentucky’s operating permit program submittal or twelve months after the source is required to obtain a “federally enforceable permit” pursuant to 40 C.F.R. part 70, whichever date is earlier. In its Statement of Consideration, filed after the public hearing on the proposed amendments to KAR 50:035 held on July 26, 1994, the Kentucky Division for Air Quality (DAQ) explained that sources required to obtain a “federally enforceable permit” are:

1. Sources that are major for PSD in attainment areas;
2. Sources that are major for NSR [New Source Review] in nonattainment areas;

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10. The term “federally enforceable requirement” essentially includes standards included in a state implementation plan (SIP), terms or conditions of preconstruction permits issued under the nonattainment or prevention of significant deterioration provisions of Title I of the Clean Air Act, a new source performance standard, a standard promulgated under the hazardous air pollutant section of the Clean Air Act (§ 112), or requirements contained in federally approved operating permits. 401 KY. ADMIN. REGS. 50:035 § 1(18) (1995).
11. 59 F.3d 1351 (D.C. Cir. 1995).
12. The Kentucky Division for Air Quality (DAQ) expects to receive approval from the EPA for the state’s Title V air permitting regulations by December, 1995. Telephone interview with James W. Dills, Director of the Permits Review Branch of the Kentucky Division for Air Quality (Aug. 18, 1995). Accordingly, all major sources of air emissions in Kentucky will likely need to file Title V permit applications with DAQ by December, 1996. Id.
3. Sources that are major for Part 70;
4. Minor sources required by the U.S. EPA to obtain a Part 70 permit;
5. Synthetic minor sources; and
6. Conditional major sources.\textsuperscript{14}

Therefore, in order for a source to determine whether it has a duty to apply for a permit, the source must analyze whether it falls within any of the categories listed in the third section of KAR 50:035.\textsuperscript{15} This section of KAR 50:035 imposes the obligation to apply for a permit upon (1) existing major sources, and (2) existing minor sources required to obtain a "federally enforceable permit" pursuant to 40 C.F.R. part 70.\textsuperscript{16} Accordingly, existing sources must initially determine whether they are "major" or "minor" sources.\textsuperscript{17}

Kentucky regulations define "major source" as:

[A] stationary source, or a group of stationary sources, that are located on one (1) property or two (2) or more contiguous or adjacent properties under common control of the same person, or persons under common control, and that belong to a single major industrial grouping . . . which emits a regulated air pollutant and which is described in paragraphs (a),

\textsuperscript{14} KENTUCKY NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET, DIVISION FOR AIR QUALITY, STATEMENT OF CONSIDERATION RELATING TO 401 KAR 50:035, response to comment 5, at 13 (1994) [hereinafter Statement of Consideration].

\textsuperscript{15} See 401 KY. ADMIN. REGS. 50:035 § 3(1)(a)(1)-(2) (1995). As will be discussed in detail, only sources described in KAR 50:035 § 1(22)(a) or (b) will have to include calculations of fugitive emissions in determining whether such sources are "major." Once determined that a source is "major," or if a source is otherwise required to apply for a federally enforceable permit (because it is "major," conditional major, synthetic minor, or a "part 70 source" as defined in 40 C.F.R. § 70.3(a) (1994)), KAR 50:035 § 3(3)(d)(1)(c) provides that all fugitive emissions from such sources will have to be listed in the permit application. Since the focus of this article is to describe the way permit applicants are to consider fugitive emissions, very little discussion herein is directed at sources required to apply for a permit unless such sources are "part 70 sources," i.e., those delineated in KAR 50:035 § 3(1)(a)(1)-(2). Sources described in KAR 50:035 § 3(1)(a)(3)-(8) also have obligations to apply for permits, however, fugitive emissions from such sources do not have to be included in the permit application pursuant to KAR 50:035 § 3(3)(d)(1)(c) because such sources are not those described as "part 70 sources" in 40 C.F.R. § 70.3(a).

\textsuperscript{16} 401 KY. ADMIN. REGS. 50:035 § 3(1)(a)(1)-(2) (1995). The subcategory of "existing minor sources required to obtain a federally enforceable permit" likewise includes "part 70 sources" pursuant to 40 C.F.R. § 70.3(a)(5). The permitting of this subcategory must be required by states seeking the EPA approval to run Title V operating permit programs. As the EPA administrator has yet to designate any such minor sources to date, no consideration is given to such sources herein, except to note that KAR 50:035 § 3(3)(d)(1)(c) provides that fugitive emissions from such sources must be included in the permit application when the EPA calls for a permit application. Accord 40 C.F.R. § 70.3(d) (1994).

\textsuperscript{17} 401 KY. ADMIN. REGS. 50:035 § 1(23) (1995). A "minor source" is defined as "a stationary source that is required to obtain a permit pursuant to this administrative regulation and that is not a major source." Id.
AIR OPERATING PERMITS IN KENTUCKY

(b), or (c) of this subsection. Subsection (a) of this regulation, defining "major source," provides that a source is major when it has the potential to emit ten (10) tons per year or more of a hazardous air pollutant [HAP] listed in 401 KAR 57:061 . . . or twenty-five (25) tons per year or more of a combination of hazardous air pollutants listed in 401 KAR 57:061, or a lesser quantity established by the U.S. EPA and promulgated in an administrative regulation in 401 KAR Chapter 57. While KAR 50:035 section 1(22)(a) does not specifically provide that fugitive emissions of the HAPs listed in KAR 57:061 must be considered in determining major source status, an interpretative memorandum issued by the EPA's Office of Air Quality Planning and Standards makes clear that fugitive emissions, to the extent quantifiable, must be considered in determining major source status for all purposes under § 112 of the Clean Air Act (prescribing the standards for HAPs). The Wegman Memorandum provides:

The EPA continues to believe the Act requires that fugitive emissions, to the extent quantifiable, must be considered in determining major source status for all Section 112 purposes. This policy applies to a source of any of the Section 112(b) listed pollutants whether or not the source in question is in a category listed pursuant to Section 112(c) [source categories for which NESHAPs are to be proposed]. The EPA expects states to comply with this policy in their operating permits programs submittals.

Accordingly, the Wegman Memorandum dictates that DAQ will interpret KAR 50:035 section 1(22)(a) as requiring consideration of fugitive emissions in determining whether a source is "major" because it exceeds the HAP thresholds of ten tons per year for any particular HAP or twenty-five tons per year of any combination of HAPs. In addition to stationary sources emitting HAPs, KAR 50:035 section 1(22)(b) specifically lists twenty-seven categories of stationary sources of air pollutants which must consider fugitive emissions in determining

19. Id. § 1(22)(a) (emphasis added) (alteration in original).
20. See Memorandum from Lydia Wegman, Deputy Director, Office of Air Quality Planning and Standards, on the Consideration of Fugitive Emissions in Major Source Determinations to EPA regional offices (Mar 8, 1994) (on file with author) [hereinafter Wegman Memorandum].
21. Id. at 5 (emphasis added) (alteration in original).
whether they have the potential to emit 100 tons per year more of any air pollutant.\(^\text{23}\) While the first twenty-six of the twenty-seven categories listed in KAR 50:035 section 1(22)(b) correspond with the first twenty-six categories listed in § 169(I) of the Clean Air Act,\(^\text{24}\) the twenty-seventh category in KAR 50:035 section 1(22)(b) provides that sources subject to new or existing source standards or national emission standards for hazardous air pollutants (NESHAPs) must calculate fugitive emissions of all regulated air pollutants in determining major source status.\(^\text{25}\) Thus, in Kentucky, a source subject to a new source performance standard or NESHAP becomes a “major source”\(^\text{26}\) (and therefore is required to file a permit application under KAR 50:035) if it has the potential to emit 100 tons per year or more of any “regulated air pollutant.”\(^\text{27}\)

In summary, KAR 50:035 section 1(22)(a), as it will ultimately have to be interpreted pursuant to the Wegman Memorandum, will provide that a source is major if it has the “potential to emit” ten tons a year of any single HAP listed in KAR 57:061 or twenty-five tons per year or more of any combination of such pollutants. Fugitive emissions of such pollutants must be considered in calculating the ten and twenty-five ton per year thresholds. Additionally, KAR 50:035 section 1(22)(b) provides that the following sources must quantify fugitive emissions of all regulated air pollutants and will be deemed major if there is the potential to emit any such one pollutant at or above the 100 ton per year threshold: “1.

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23. A “major source” is defined as: [A] stationary source of air pollutants that directly emits or has the potential to emit, 100 tons per year or more of an air pollutant. The fugitive emissions of a stationary source shall be considered in determining if it is a major source only if it belongs to one (1) of the following categories . . . (listing 27 categories of stationary sources). 401 KY. ADMIN. REGS. 50:035 § 1(22)(b) (1995).


26. “Major source” is defined as those sources identified in subparagraphs (a) thru (c) of subsection 22 which emit a “regulated air pollutant.” 401 KY. ADMIN. REGS. 50:035 § 1(22) (1995). The term “regulated air pollutant” for “sources subject to 40 C.F.R. part 70” is defined as nitrogen oxides (NOX), volatile organic compounds (VOCs), pollutants for which a national ambient air quality standard has been promulgated (criteria pollutants), pollutants subject to an NSPS or NESHAP, or Class I or Class II substances promulgated pursuant to Title VI of the Clean Air Act, pertaining to Stratospheric Ozone Protection. 401 KY. ADMIN. REGS. 50:035 § 1(28)(a) (1995). Thus, for purposes of determining whether a source is “major” and thus subject to the requirement to apply for a permit under KAR 50:035 § 3(l)(a)(1), only those emissions of “regulated air pollutants” listed in KAR 50:035 § 1(28)(a) emitted by “sources subject to 40 C.F.R. part 70” have to be calculated. See Statement of Consideration, supra note 14, at 15. See also infra note 29.

Any of the 26 listed specific source categories; or 2. Any stationary source subject to an existing or new source performance standard promulgated pursuant to § 111 of the Clean Air Act; or any stationary source subject to a NESHAP listed in 401 KAR Chapter 57. Accordingly, major sources identified in KAR 50:035 section 1(22) but not listed in subparagraphs (a) (HAPs emitters) or (b) (twenty-six specific source categories or sources subject to a new source performance standard or NESHAP) do not have to include fugitive emissions in the course of determining tonnage thresholds for major source statute determinations.29

IV. TO WHAT EXTENT, IF ANY, ARE FUGITIVE EMISSIONS EXEMPT (A) FROM BEING CALCULATED FOR PURPOSES OF DETERMINING IF THE SOURCE IS A “MAJOR SOURCE” OR (B) FROM PERMITTING REQUIREMENTS?

A two-part analysis must be undertaken in order to determine whether fugitive emissions may be exempt from having to be quantified for purposes of determining (1) whether a source is “major” (and thus is required to file a permit application) and (2) assuming major source status, whether and to what extent the fugitive emissions must be accounted for in the permit application. First, one must determine whether there are certain activities that produce fugitive emissions or sources that produce fugitive emissions which may be excluded when determining whether the source is a “major source.” Second, apart from whether a source or emissions from a source may be excluded from the determination of whether the source is “major,” one must determine whether certain activities which produce fugitive emissions or fugitive emissions of particular pollutants be exempt from (1) having to be listed in the permit application or (2) permitting requirements, even if such activities and pollutants generated therefrom have to be quantified and/or listed in the permit application. Initially, an analysis of sources or activities that may produce fugitive emissions will be undertaken to determine (1) the extent to which those sources or activities producing fugitive emissions must have those

28. Id.
29. Sources that can thus ignore fugitive emissions for determining major source status are listed in KAR 50:035 § 1(22)(c) and includes sources in ozone, carbon monoxide, and particulate matter non-attainment areas with the potential to emit specific thresholds of VOCs or NOX, carbon monoxide (CO) or particulate matter (PM10). These sources are deemed “major” for new source review purposes in non-attainment areas which are required to obtain a “federally enforceable permit.” See supra note 10 and accompanying text. See also Statement of Consideration, supra note 14.
emissions quantified for purposes of determining major source status; (2) irrespective of major source status, if a source is required to file a permit application, whether fugitive emissions must be quantified because of requirements pertaining to the completion of the permit application; and (3) the effect of DAQ listing such quantifications in the permit.

A. Introductory Concepts

In addition to delineating permitting requirements for major sources, KAR 50:035 contains provisions for the exemption of sources, affected facilities and activities. A thorough examination of these exemption provisions must be undertaken as one of the first steps in the process of completing a permit application after a comprehensive inventory of the source's emissions is completed. Certain exemptions exclude activities or affected facilities producing fugitive emissions from being quantified at all, while others only exempt the source from permitting requirements even though its emissions will ultimately have to be tallied for determining the source's status as major or minor.

Central to understanding the entire Kentucky permitting scheme is the distinction that is drawn through the use of the term "subject to 40 C.F.R. part 70" throughout the Kentucky regulations. These terms are not defined in the Kentucky regulations themselves. Rather, they acquire meaning when one recognizes that KAR 50:035 is seeking permit applications from sources that are required, pursuant to Title V of the Clean Air Act, to submit permits (sources pursuant to 40 C.F.R. part 70) and also sources that are subject only to state origin permitting requirements. The distinction between requirements applicable to sources "subject to 40 C.F.R. part 70" and sources subject to state origin requirements takes on meaning when viewed in the context of the definition of the term "regulated air pollutant" contained in KAR 50:035 section 1(28). The definition of "regulated air pollutant" lists specific pollutants for sources "subject to 40 C.F.R. part 70." The reference to sources being categorized "pursuant to 40 CFR part 70" in KAR 50:035 is consistent with the Code of Federal Regulations which defines those sources subject to 40 C.F.R. part 70 as "part 70 sources."
The term "regulated air pollutant" for "sources subject to 40 C.F.R. part 70" means nitrogen oxides, volatile organic compounds, a pollutant for which a national ambient air quality standard has been promulgated pursuant to § 109 of the Clean Air Act (criteria pollutants), a pollutant subject to a new source performance standard or NESHAP, or a Class I and Class II substance subject to a standard promulgated pursuant to Title VI of the Clean Air Act providing for stratospheric ozone protection. 33

The KAR definition of the term "regulated air pollutant" thus corresponds precisely to the definition of that term in the Code of Federal Regulations. 34 In its Statement of Consideration, Kentucky confirmed that only those pollutants listed in KAR 50:035 section 1(28)(a) have to be considered for determining whether a source is "major" pursuant to Title V. 35

Additionally, an examination of the scope of the term "applicable requirement," as used throughout KAR 50:035, is central to understanding the way in which fugitive emissions are regulated. An "applicable requirement" is defined as a "federally enforceable requirement" or

source of hazardous air pollutants that is not a major source, not including motor vehicles or nonroad engines subject to regulation under subchapter II" (which sets emissions standards for moving sources), subject to a standard or other requirement under § 112 of the Act, except that a source is not required to obtain a permit solely because it is subject to regulations or requirements under § 112(r) of the Act (this applies to any source subject to NESHAP but not sources subject to accidental release reporting under § 112(r); (4) any affected source (subject to the Acid Rain provisions of Title IV of the Act); and (5) any source in a category designated by the Administrator pursuant to this section. Id. (alteration in original).

33. See supra note 26.


35. The Statement of Consideration provides as follows: Therefore, the definition in Section 1(28) has been amended to provide that the pollutants which are used for Title V major source determination are identical to the list in the definition for "regulated air pollutant" at 40 CFR 70.2, and pollutants that are not required to be regulated under the Clean Air Act (state criteria air pollutants delineated in 401 KAR 50:010 and state air toxic pollutants in 401 KAR 63:021 and 63:022) [sic]. Statement of Consideration, response to comment (20)(b), supra note 14, at 15.

36. "Federally enforceable requirement" is defined as follows:

(a) Standards or requirements in the State Implementation Plan (SIP) that implement the relevant requirements of the Act, including revisions to that plan promulgated at 40 CFR Part 52;

(b) Terms or conditions of preconstruction permits issued pursuant to administrative regulations approved or promulgated pursuant to 42 USC 7401 through 7515 (Title I of the Act);

(c) A standard or other requirement promulgated pursuant to 42 USC 7411 (Section 111 of the Act) or 42 USC 7429 (section 129 of the Act) governing solid waste incineration.

(d) A standard or other requirement promulgated pursuant to 42 USC 7412 (Sec-
state origin requirement\textsuperscript{37} or standard.\textsuperscript{38}

B. Permitting Exemptions for Affected Facilities and Activities

KAR 50:035 section 2(1)-(3) contains exemptions from the other permitting requirements mandated by KAR 50:035 for both entire sources and activities within sources which may otherwise be subject to permitting requirements.\textsuperscript{39} The exemptions contained in KAR 50:035 section 2(1)-(3) are best understood by recognizing that the exemptions contained in section 2(1) are exemptions for entire sources which have \emph{de minimis} potentials to emit.\textsuperscript{40} On the other hand, the exemptions contained in section 2(2) apply primarily to discreet activities that may or may not be part of a major stationary source.\textsuperscript{41} As the first sentence of section 2(2) provides, activities within the scope of that subparagraph are exempt from the requirement to obtain the permit although the source may still be subject to the requirements of any other applicable requirement.\textsuperscript{42}

\textsuperscript{37} "State origin requirement" is defined as "an applicable requirement that is not mandated by \textit{the Clean Air Act} or any of the Act’s applicable requirements, and that is not federally enforceable." 401 KY. ADMIN. REGS. 50:035 § 1(18) (1995).

\textsuperscript{38} Id. § 1(7).

\textsuperscript{39} See id. § 2(1)-(3).

\textsuperscript{40} Such sources must (1) have the potential to emit less than twenty-five tons per year, (2) not be subject to any requirement contained in 40 C.F.R. §§ 60-63, and (3) have potential emissions of less than two tons per year of any single HAP and less than five tons per year of any combination of HAPs. Id. § 2(1)(a)-(b).

\textsuperscript{41} For example, there is an exemption for certain asbestos demolition or renovation operations. Id. § 2(2)(a). An exemption also exists for an activity that emits only nonprocess fugitive emissions that are not part of a source otherwise subject to an applicable requirement (such as a truck stop). Id. § 2(2)(c).

\textsuperscript{42} Id. § 2(2). Therefore, since activities exempted in KAR 50:035 § 2(2) are exempt
Thus, for example, an asbestos demolition or renovation operation undertaken at a major stationary source would not be required to obtain a permit for that activity even though the source, of which that activity is a part, otherwise falls within the definition of "major source."

The exemptions contained in section 2(3) are vitally important to most major sources and provide a basis for exempting insignificant activities from permitting requirements. Rather than listing specific activities that are exempt under this section, the DAQ has delineated criteria which such activities must meet in order to be exempt. However, unlike sources which do not have to obtain a permit at all if exempt under section 2(1), or activities which do not have to be permitted in any manner under section 2(2), activities meeting the criteria identified in section 2(3) must be included in the permit application with the request that DAQ exempt such activities from permitting requirements. It may well be that the activity will be determined to be exempt from the permit itself because it is "insignificant."43 However, the determination of "insignificance" in KAR 50:035 section 2(3) is based upon a calculation of the activity's "potential to emit."44 Therefore, fugitive emissions of all "regulated air pollutants"45 will have to be quantified in order to determine whether the activity falls below the significance threshold.46

In order for an activity to fall below the "significance" threshold in KAR 50:035 section 2(3), the following criteria must be satisfied:

(1) The activity shall not be subject to an applicable requirement [a federally enforceable requirement or state origin requirement];47 and (2) the potential or actual emissions from the activity shall not cause the source to be subject to an applicable requirement to which the source would not otherwise be subject [for instance, if exempting the activity would cause emissions of a Kentucky air toxic emitted by that activity to fall below the significance level for that air toxic, then the activity cannot be exempt];48 and (3) the activity shall have a potential to emit of less than 5 tons per
year of any regulated air pollutant; and (4) the potential to emit of all activities exempted pursuant to this subsection shall be less than 2 tons per year of any HAPs and less than 5 tons per year of any combination of HAPs [or lesser amount as specified by the EPA]; and (5) the potential to emit of all activities exempted pursuant to this subsection shall be less than the significance level of any air toxic pollutant listed in 401 KAR 63:021-22 [Kentucky air toxics].

49. *Id.* § 2(3)(d). See also notes 26 and 45 for the definition of “regulated air pollutant,” excluding, for purposes of this particular criterion appearing at KAR 50:035 § 2(3)(d), any emissions of HAPs or Kentucky air toxics (since particular criteria speak to these emissions). *Id.*


51. *Id.* § 2(3)(f). All emissions of 1,1,1-TRICHLOROETHANE sought to be exempted shall be less than .48 lbs per hour. See 401 KY. ADMIN. REGS. 63:021 Appendix B (1994). In an Office of Air Quality Planning and Standards memorandum entitled “White Paper for Streamlining Development of Part 70 Permit Applications,” the EPA urges states to be flexible in requiring information on insignificant activities to be included in permit applications. Memorandum from Lydia Wegman, Deputy Director, Office of Air Quality Planning and Standards, to Regional Air Administrators (July 10, 1995) (on file with the author) [hereinafter White Paper]. The White Paper indicates that certain activities including emissions units and extremely small emissions are trivial and can be omitted from the application even if they are not included on a list of insignificant activities approved in the state’s part 70 program pursuant to § 70.5(c). *Id.* at 8. Accordingly, Attachment A to the White Paper lists specific examples of activities which EPA believes should normally qualify as trivial. The following types of activities and emissions units may be presumptively omitted from part 70 permit applications. Certain of these listed activities include qualifying statements intended to exclude many similar activities.

a. Combustion emissions from propulsion of mobile sources, except for vessel emissions from Outer Continental Shelf sources.

b. Air-conditioning units used for human comfort that do not have applicable requirements under Title VI of the Act.

c. Ventilating units used for human comfort that do not exhaust air pollutants into the ambient air from any manufacturing/industrial or commercial process.

d. Non-commercial food preparation.

e. Consumer use of office equipment and products, not including printers or businesses primarily involved in photographic reproduction.

f. Janitorial services and consumer use of janitorial products.

g. Internal combustion engines used for landscaping purposes.

h. Laundry activities, except for dry-cleaning and steam boilers.

i. Bathroom/toilet vent emissions.

j. Emergency (backup) electrical generators at residential locations.

k. Tobacco smoking rooms and areas.

l. Blacksmith forges.

m. Plant maintenance and upkeep activities (e.g., grounds keeping, general repairs, cleaning, painting, welding, plumbing, re-tarring roofs, installing insulation, and paving parking lots) provided these activities are not conducted as part of a manufacturing process, are not related to the source’s primary business activity, and not otherwise triggering a permit modification.
n. Repair or maintenance shop activities not related to the source's primary business activity, not including emissions from surface coating or degreasing (solvent metal cleaning) activities, and not otherwise triggering a permit modification. [Cleaning and painting activities qualify if they are not subject to VOC or HAP control requirements. Asphalt batch plant owners/operators must still get a permit if otherwise required.]

o. Portable electrical generators that can be moved by hand from one location to another. ["Moved by hand" means that it can be moved without the assistance of any motorized or non-motorized vehicle, conveyance, or device.]

p. Hand-held equipment for buffing, polishing, cutting, drilling, sawing, grinding, turning or machining wood, metal or plastic.

q. Brazing, soldering and welding equipment, and cutting torches related to manufacturing and construction activities that do not result in emission of HAP metals. [Brazing, soldering and welding equipment, and cutting torches related to manufacturing and construction activities that emit HAP metals are more appropriate for treatment as insignificant activities based on size or production level thresholds. Brazing, soldering, welding and cutting torches directly related to plant maintenance and upkeep and repair or maintenance shop activities that emit HAP metals are treated as trivial and listed separately in this appendix.]

r. Air compressors and pneumatically operated equipment, including hand tools.

s. Batteries and battery charging stations, except at battery manufacturing plants.

t. Storage tanks, vessels, and containers holding or storing liquid substances that will not emit any VOC or HAP. [Exemptions for storage tanks containing petroleum liquids or other volatile organic liquids should be based on size limits such as storage tank capacity and vapor pressure of liquids stored and are not appropriate for this list.]

u. Storage tanks, reservoirs, and pumping and handling equipment of any size containing soaps, vegetable oil, grease, animal fat, and nonvolatile aqueous salt solutions, provided appropriate lids and covers are utilized.

v. Equipment used to mix and package soaps, vegetable oils, grease, animal fat, and nonvolatile aqueous salt solutions, provided appropriate lids and covers are utilized.

w. Drop hammers or hydraulic presses for forging or metalworking.

x. Equipment used exclusively to slaughter animals, but not including other equipment at slaughterhouses, such as rendering cookers, boilers, heating plants, incinerators, and electrical power generating equipment.

y. Vents from continuous emissions monitors and other analyzers.

z. Natural gas pressure regulator vents, excluding venting at oil and gas production facilities.

aa. Hand-held applicator equipment for hot melt adhesives with no VOC in the adhesive formulation.

bb. Equipment used for surface coating, painting, dipping or spraying operations, except those that will emit VOC or HAP.

cc. CO2 lasers, used only on metals and other materials which do not emit HAP in the process.

dd. Consumer use of paper trimmers/binders.

ee. Electric or steam-heated drying ovens and autoclaves, but not the emissions from the articles or substances being processed in the ovens or autoclaves or the boilers delivering the steam.
Presumably, many routine maintenance activities such as painting and the use of gasoline powered lawn maintenance equipment may qualify for an exemption under KAR 50:035 section 2(3). However, one must

- Salt baths using nonvolatile salts that do not result in emissions of any regulated air pollutants.
- Laser trimmers using dust collection to prevent fugitive emissions.
- Bench-scale laboratory equipment used for physical or chemical analysis, but not lab fume hoods or vents. [Many lab fume hoods or vents might qualify for treatment as insignificant (depending on the applicable SIP) or be grouped together for purposes of description.]
- Routine calibration and maintenance of laboratory equipment or other analytical instruments.
- Equipment used for quality control/assurance or inspection purposes, including sampling equipment used to withdraw materials for analysis.
- Hydraulic and hydrostatic testing equipment.
- Environmental chambers not using hazardous air pollutant (HAP) gases.
- Shock chambers.
- Humidity chambers.
- Solar simulators.
- Fugitive emission related to movement of passenger vehicles, provided the emissions are not counted for applicability purposes and any required fugitive dust control plan or its equivalent is submitted.
- Process water filtration systems and demineralizes.
- Demineralized water tanks and demineralizer vents.
- Boiler water treatment operations, not including cooling towers.
- Oxygen scavenging (de-aeration) of water.
- Ozone generators.
- Fire suppression systems.
- Emergency road flares.
- Steam vents and safety relief valves.
- Steam leaks.
- Steam cleaning operations and steam sterilizers.

Id. Attachment A at 1-4 (alteration in original).

52. The White Paper makes reference to 40 C.F.R. § 70.5(c) which allows the administrator to approve, as part of a state program, a list of insignificant activities which need not be included in permit applications. White Paper, supra note 51, at 8. DAQ elected to avoid the time consuming and problematic task of delineating each insignificant activity which need not be described in the permit application. Rather, DAQ resorted to a delineation of criteria which such activities must meet in order to be excluded from the permit application. “For activities on the list, applicants may exclude from part 70 permit applications information that is not needed to determine (1) which applicable requirements apply, (2) whether the source is in compliance with applicable requirements, or (3) whether the source is major.” Id. Thus, it is possible that an insignificant activity may be able to avoid being listed in the permit application from one facility where, for instance, source emissions of HAPs exceed the major source threshold, but would have to be listed in the application from a facility whose HAP emissions are slightly below the major source threshold and where emissions from the insignificant activity might be enough to take the facility over the major source threshold.

While Attachment A to the White Paper lists examples of activities which EPA believes
remember that emissions from such activities (stack or fugitive, where applicable) will have to be calculated in reaching the major source determination for overall permitting activities. Further, by virtue of Kentucky regulations as currently drafted, emissions from facilities sought to be exempted must still be described and quantified in the permit application. Thus, KAR 50:035 section 2(3) appears to contain the broadest area of possible exclusion for activities that produce fugitive emissions of any of the category of exempt activities in KAR 50:035 section 2.

From the standpoint of completing the permit application, the functional difference among the exemptions contained in KAR 50:035 section 2(1)-(3) is that exemptions claimed in subsections (1) or (2) can simply be claimed with an explanation of entitlement to the exemption (which will presumably include a calculation of emissions sought to be exempt). On the other hand, an exemption claimed pursuant to subsection (3) may not simply be claimed, but rather must be requested, with it being left up to DAQ to determine whether to exempt the activity or not. However, procedurally, in order to be exempt from being listed in the permit, (and thereby from all permitting requirements), pursuant to subsection (3), both the activity producing the emissions and the potential to emit each regulated pollutant from such activities must be quantified and listed with the request that the activity be exempt. Once a source is determined to be major for 40 C.F.R. part 70 purposes, fugitive emissions shall be included in the permit application in the same manner as stack emissions even if the source category in question is not included in the list of sources in KAR 50:035 section 1(22). Therefore, without undertaking these calculations of fugitive and stack emissions, one cannot determine whether the potential to emit for particular activities falls below the emission should normally qualify as trivial in this sense, the White Paper leaves the ultimate decision of which activities to denominate as insignificant to the states, but provides that [p]ermitting authorities can also allow, on a case-by-case basis without the EPA's approval, exemptions similar to those activities identified in Attachment A. "Id. at 9.


54. This of course assumes that KAR 50:035 § 3(3)(b)(1) is not modified to become more streamlined in light of the July 10, 1995 White Paper. See supra note 53.

55. See supra notes 29-37 and accompanying text.

tonnage ceilings contained in KAR 50:035 section 2(3)(d)-(f),\textsuperscript{57} thus allowing the activity to qualify for the subsection (3) exemption.

\textbf{C. Steps Necessary to Determine Entitlement to Exemptions}

As a practical matter, the first step in the permit application process will be the calculation of all stack and fugitive emissions of all regulated air pollutants.\textsuperscript{58} These calculations will be necessary for several purposes in the course of completing the permit application.

First, if a source is listed in one of the specific source categories delineated in KAR 50:035 section 1(22)(b), then emissions, including fugitive emissions of all regulated air pollutants, must be tallied to determine whether any one such pollutant potentially exceeds the 100 ton potential to emit threshold for conferring major source status. If the 100 ton per year threshold is potentially exceeded and actual emissions exceed fifty tons per year, then the source is major. The source will then need to quantify the fugitive emissions of all regulated air pollutants for listing in the permit application\textsuperscript{59} in order to determine entitlement to exemptions under KAR 50:035 section 2.\textsuperscript{60} If the activity or affected facility falls within the delineated lists contained in KAR 50:035 section 2(2), then the activity and its emissions need not be listed in the permit application. On the other hand, if the activity is not specifically listed in KAR 50:035 section 2(2), it must meet the criteria of KAR 50:035 section 2(3) in order to be exempt from permitting requirements and being listed in the permit.\textsuperscript{61}

Second, even if a source is not a major source under KAR 50:035 section 1(22)(b), it will still need to tally its fugitive emissions of HAPs to determine whether it is major for purposes of KAR 50:035 section 1(22)(a).\textsuperscript{62} KAR 50:035 section 1(22)(a) makes the determination of major source status applicable to emission of HAPs only. In other words, emissions of pollutants other than HAPs do not need to be tallied for purposes of determining major source status.

\begin{itemize}
\item \textsuperscript{57} See supra notes 45-51 and accompanying text.
\item \textsuperscript{58} See supra notes 26 and 45. See also supra note 9. DAQ proposes to exempt sources from permitting requirements where actual emissions have been one-half or less of the major source threshold.
\item \textsuperscript{59} See 401 KY. ADMIN. REGS. 50:035 § 3(3)(d)(1)(c) (1995).
\item \textsuperscript{60} See supra text accompanying notes 40-57.
\item \textsuperscript{61} Therefore, fugitive emissions of regulated air pollutants from all sources must be quantified and emissions of each particular pollutant must be totaled in order to insure that the emission caps delineated in KAR 50:035 § 2(3) are not exceeded.
\item \textsuperscript{62} See supra text accompanying note 20.
\end{itemize}
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determined to be major because of its HAPs emissions, the same requirements of KAR 50:035 section 3(3)(d)(1)(c) apply and mandate that fugitive emissions of all regulated air pollutants identified in KAR 50:035 section 1(28)(a) and (b) must be included in the permit application.63

In summary, stack and fugitive emissions of state origin pollutants do not have to be calculated to determine whether a source is "major" and subject to the permitting requirements. Once a source is determined to be "major," and thus required to submit a permit application, those state regulated emissions must be included in the permit application unless the specific activity or affected facility producing such emissions is exempt under KAR 50:035 section 2(2). If the emissions are not exempt under KAR 50:035 section 2(2), then such emissions must still be listed in the permit application; however, a request for the exemption of the activity producing the emission can be made pursuant to KAR 50:035 section 2(3) because such activities are insignificant according to that section's criteria.64 Moreover, if an activity is exempt from permitting requirements under KAR 50:035 section 2(2), then it is presumable that emissions from such activities need not be quantified for determining whether the source for the activity conducted is "major."65

By quantifying source and fugitive emissions in this manner, a source will be able to determine its entitlement to those exemptions that are provided for ongoing activities.66 Even though emissions from small engines may be insignificant and therefore need not be included in the permit, they still could pose a problem from the vantage point of making a source major that otherwise would not be major.


64. See supra note 54.

65. See supra text accompanying notes 42-46. Although such sources may not be required to obtain a permit (with the resultant effect that emissions need not be included in the major source determination), such sources (like asbestos, NESHAPS, new source performance standards for residential wood heaters, etc.) may still be subject to applicable requirements.

66. Note that there is an exemption from the requirement to obtain a permit or permit revision for certain de minimis changes at facilities. 401 KY. ADMIN. REGS. 50:035 § 2(5) (1995). This exemption is of little utility for ongoing activities, however, as it is applicable only to construction projects where the potential to emit a criteria pollutant identified in KAR 50:010 (PM10, sulfur dioxide (SO2), VOCs, NOx, or CO) is equal to or less than two tons and the change is not otherwise subject to an "applicable requirement." 401 KY. ADMIN. REGS. 50:010 (1994). See supra notes 31-34 and accompanying text concerning the definition of the term "applicable requirement." Thus, this so-called "two ton construction exemption" is available only for construction, but not operation of effective facilities.
V. TO WHAT EXTENT ARE EMISSIONS FROM SMALL ENGINES (MOBILE AND STATIONARY) AND ROUTINE MAINTENANCE ACTIVITIES EXCLUDED FROM THE PURVIEW OF KAR 50:035?

In light of the requirement contained in the Wegman Memorandum that fugitive emissions of HAPs must be considered for determining major source status, situations can arise where a source may be thrown into the major source category if stack emissions, which alone might be insufficient to confirm major source status, are amalgamated with fugitive emissions from such sources. As an example, consider a source whose emissions inventory from stacks as stationary sources yield potential HAP emissions of 24.8 tons per year. Further, consider that the source has a semi-enclosed maintenance shop where small engines, such as those propelling garden tractors, forklifts, lawn mowers, and string trimmers, are repaired. The shop, one may estimate, has the potential of producing 0.1 tons per year. Additionally, consider that other routine maintenance activities, such as painting and lawn maintenance, have the potential to add another 0.2 tons per year to the “potential to emit” calculation. Under this scenario, the source with 24.8 potential tons per year of HAP emissions would not be a major source. However, when fugitive sources are added thereto, the shop becomes a major source by virtue of the inclusion of the fugitive sources. Further, for purposes of determining whether a source is “major,” fugitive emissions from “insignificant activities” must be included in arriving at the major source determination, notwithstanding the fact that such “insignificant activities” may be excluded from descriptive requirements in the permit application or applicable requirements with respect to emissions delineated in the permit application. Therefore, it is of critical importance to determine the extent to which minor sources, such as garden tractors, forklifts, lawn mowers and string trimmers, and minor activities, such as routine painting and maintenance, include emissions from such sources when determining major source status. Separate and apart from the major source determination issue is whether emissions from minor sources or activities have to be listed in the permit application, thereby subjecting such sources or activities to permitting requirements. This section will first analyze the extent to which emissions from small engines must be evaluated in determining major source status. The section will then analyze the extent to which emissions from maintenance activities, such as painting, must be

67. See Wegman Memorandum, supra note 20, at 8-9.
68. See supra note 51.
evaluated in determining major source status.

A. Emissions from Engines

The question presented concerns whether emissions from engines must be calculated in determining whether a source is “major.” Assuming that a small engine may emit one or more HAPs, initially one must determine whether those emissions are “fugitive emissions” or “stack emissions.” While it can be argued that such emissions are “stack emissions,” Kentucky DAQ would likely categorize such emissions as “fugitive emissions.” The definition of “fugitive emissions” in the Kentucky regulations is consistent with the federal definition. Further, Kentucky DAQ notes that this definition is not intended to impose new requirements on fugitive emissions. However, one must note that to the extent that emissions could reasonably pass through a stack, vent or other opening, they are not fugitive emissions which have to be calculated for determining whether a source is major or which must be listed in the permit application pursuant to the requirement that fugitive emissions of all sources be listed. Rather, such emissions are stack emissions and must be included in the permit application if such emissions consist of “regulated air pollutants.” In other words, unless an “applicable requirement” applies to those emissions which could reasonably pass through a stack, vent or other opening, KAR 50:035 imposes no substantive additional requirements. Kentucky DAQ has indicated that emissions from small engines which are designed to be moved about (because such engines propel equipment which moves or accompanies equipment which moves, such as string trimmers) would be deemed fugitive emissions. Unless the activity producing the fugitive emissions is excluded from all permitting requirements under KAR 50:035 section 2, emissions from such sources must be included in the calculation of whether the source is “major.”

One must remember that KAR 50:035 section 1(22) defines “major

69. “Fugitive emissions” are defined as “those emissions which could not reasonably pass through a stack, chimney, vent or other functionally equivalent opening.” 401 KY. ADMIN. REGS. 50:035 § 1(20) (1995).
70. See 40 C.F.R. § 70.2(12) (1994).
73. See supra notes 36-37 and accompanying text.
74. Telephone interview with James W. Dills, Director of the Permits Review Branch of the Kentucky Division for Air Quality (Oct. 12, 1994).
source” as a “stationary source.” Therefore, the obligation to apply for a permit under KAR 50:035 section 3(1)(a)(1)-(2) befalls “stationary sources” which meet the definition of major source. As previously discussed, if a “stationary source” is a “major source,” then fugitive emissions of HAPs (in the case of a source subject to KAR 50:035 section 1(22)(a)[sources with the potential to emit ten or twenty-five tons per year of a single HAP or combination of HAPs]) and fugitive emissions of “regulated air pollutants” identified in KAR 50:035 section 1(28)(a) (in the case of any of the twenty-seven sources listed in KAR 50:035 section 1(22)(b)) will have to be calculated in determining major source status. As the source-wide exemption identified in KAR 50:035 section 2(1) is so restrictive that it is not applicable to most manufacturing facilities, the exemptions in KAR 50:035 section 2(2)75 or section 2(3) are the only realistic routes to exempt an activity or affected facility. If the activity or affected facility meets the narrow scope of the KAR 50:035 section 2(2) exemption from the requirement to obtain a permit, then presumably fugitive and stack emissions from such activities can be ignored in determining whether the source in which that activity or affected facility is a part is a major source. If, however, the activity can only claim an exemption under KAR 50:035 section 2(3), then (1) fugitive emissions therefrom must be calculated in determining major source status and (2) the activity must still be listed in the permit application with a request that it be exempted from the permit itself, pursuant to the criteria delineated in KAR 50:035 section 2(3). By the same token, if a source is not a stationary source, then its emissions arguably should be excluded from determining major source status and any permit conditions. With respect to such small engines as those propelling forklifts, riding lawn mowers and tractors, in light of the KAR 50:035 section 2(2)(e) exemption for vehicles used for transporting passengers or freight, emissions from these small vehicles should be excluded from permitting requirements and from having to be calculated in reaching the major source determination.76 However, the KAR 50:035 section 2(2)(e) exemption is not applicable to emissions from hand lawn mowers, string trimmers, chain saws, and other gasoline engines affixed to small moveable equipment. This is because such equipment is not used for transporting passengers or freight. Such equipment will be exempt from all requirements of KAR

75. A source-wide exemption exists only for minor sources that have de minimis potentials to emit pollutants. 40 KY. ADMIN. REGS. 50:035 § 2(1) (1995).

76. Further, these sources are likely to be excluded from the definition of “stationary source.” See infra notes 79-83 and accompanying text.
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50:035 (major source determinations, emissions calculations and listing in permit applications) if such equipment does not constitute a “stationary source.”

B. Do Fugitive Emissions from Hand Lawn Mowers, String Trimmers, Chain Saws, etc., Have to be Calculated in Reaching the Major Source Determination?

Central to resolving this question is the recognition that KAR 50:035 section 1(22) defines “major source” as a “stationary source.” The term “stationary source” means “a building, structure, facility or installation that emits or may emit a regulated air pollutant.” The term “affected facility,” as used within the definition of stationary source, is defined as “an apparatus, building, operation, road, or other entity or series of entities which emits or which may emit an air contaminant in the outdoor atmosphere.”

The Kentucky definitions are consistent with federal definitions. The term “stationary source,” as defined in the Clean Air Act, means “any building, structure, facility, or installation which emits or may emit any air pollutant.” The EPA has defined the term “installation” for purposes of major new sources and modifications in non-attainment areas to mean “an identifiable piece of process equipment.” Thus, by definition, small moveable engines that are not an identifiable piece of process equipment are not installations and are excluded from the EPA’s definition of “stationary source.”

The term “stationary source,” as used in the general provisions of the Clean Air Act, means “generally any source of an air pollutant except those emissions resulting directly from an internal combustion engine for transportation purposes or from a nonroad engine or nonroad vehicle as defined in [§ 216 of this Act].” However, Kentucky regulations could arguably include emissions from small engines, such as string trimmers, within the Kentucky definition of “stationary source” since such entities fall within the definition of “affected facility” which is contained in the definition of “stationary source.” Nevertheless, the federal definition

78. Id. 50:010 § 1(1) (1994) (emphasis added).
82. See supra notes 76-79 and accompanying text. Since a string trimmer and a lawn mower may be defined as an “entity or series of entities that may emit an air contaminant into
of the term "stationary source" specifically excludes direct emissions from an "internal combustion engines [used] for transportation purposes or from a nonroad engine or nonroad vehicle." 83 A "nonroad engine" is an internal combustion engine (including the fuel system) that is not used in a motor vehicle or a vehicle used solely for competition, or that is not subject to standards promulgated under Section 7411 [i.e. new source performance standards for stationary sources] or Section 7521 [prescribing emission standards for new motor vehicles or new motor vehicle engines]... 84

Further, the term "nonroad vehicle" is defined in the Clean Air Act to mean "a vehicle that is powered by a nonroad engine and that is not a motor vehicle or a vehicle used solely for competition." 85 Thus, "nonroad engines" and "nonroad vehicles" can arguably be excluded from the definition of "stationary source" and of "major source" contained in KAR 50:035 section 1(22). 86

the outdoor atmosphere," such entities are "affected facilities" and thus arguably "stationary sources." However, Kentucky DAQ expressly states that it is not bearing tension to examine mobile sources in the course of determining major source status for purposes of mandating permit submissions pursuant to KAR 50:035. Telephone interview with James W. Dills, supra note 74.

84. Id. § 7550(10).
85. Id. § 7550(11).
86. In a recent rule-making, pursuant to § 213 of the Clean Air Act, the EPA sought to clarify the definition of "nonroad engine." The definition of "nonroad engine," now contained in 40 C.F.R. § 89.2 provides as follows:

(1) Except as discussed paragraph (2) of this definition, a nonroad engine is any internal combustion engine:

(I) in or on a piece of equipment that is self-propelled or serves a dual purpose by both propelling itself and performing another function (such as garden tractors, off-highway mobile cranes and bulldozers); or

(II) in or on a piece of equipment that is intended to be propelled while performing its function (such as lawn mowers and string trimmers); or

(III) that, by itself or in or on a piece of equipment, is portable or transportable, meaning designed to be and capable of being carried or moved from one location to another. Indicia of transportability include, but are not limited to, wheels, skids, carrying handles, dolly, trailer or platform.

(2) An internal combustion engine is not a nonroad engine if:

(I) the engine is used to propel a motor vehicle or a vehicle used solely for competition or is subject to standards promulgated under § 202 of the Act; or

(II) the engine is regulated by a federal New Source Performance Standard promulgated under section 111 of the Act; or

(III) the engine otherwise included in the definition of paragraph (1)(II) of this definition remains or will remain at a location for more than 12 consecutive months or a shorter period of time for an engine located at a seasonal source. A location is any single site at a building, structure, facility or installation. Any engine (or engines) that
In a 1994 rule-making, pursuant to § 213 of the Clean Air Act, the EPA sought to clarify the definition of “non-road engine.” Thus, “an engine would be considered non-road if it moves between different sites within a stationary source.” However, the federal non-road engine rule-making provides that portable and transportable engines remaining in a particular location for over twelve months (e.g. portable generator engines at fixed locations) are not within the definition of non-road engines and are therefore considered to be included within the definition of “stationary source.” This provision is designed to insure that engines which operate as integral parts of stationary sources are themselves considered stationary. Moreover, emissions from such fixed sources may not be fugitive emissions since they could reasonably be routed to a vent, stack or other opening. If such emissions are not in fact fugitive, but rather stack emissions, emissions of regulated air pollutants from such sources are clearly subject to inclusion in determining major source status for all purposes delineated in KAR 50:035 section 1(22) including subsection 22(c), which defines “major source” for purposes of new source review in non-attainment areas.

Denominating small moveable engines, such as those mounted on forklifts, and those contained on equipment, such as string trimmers, as “nonroad engines” provides a separate basis for excluding emissions from those sources from the definition of “major source” contained in KAR 50:035 section 1(18). This is because such sources are not “stationary sources.” It must be emphasized that the EPA interprets the nonroad

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replaces an engine at a location and that is intended to perform the same or similar function as the engine replaced will be included in calculating the consecutive time period. An engine located at a seasonal source is an engine that remains at a seasonal source during the full annual operating period of the seasonal source. A seasonal source is a stationary source that remains in a single location on a permanent basis (i.e., at least two years) and that operates at a single location approximately three months (or more) each year. This paragraph does not apply to an engine after the engine is removed from the location. An engine would be considered nonroad if it moves to different sites within a stationary source.

See, 59 Fed. Reg. 31,312 (June 17, 1994). The federal nonroad engine rule-making makes clear that portable and transportable engines remaining in a particular location for over 12 months (for example portable generator engines at fixed locations) are not within the definition of nonroad engines and are therefore within the definition of “stationary source.” Id. at 31,311. This provision is designed to ensure that engines that operate as integral parts of these stationary sources are considered stationary. Id.

88. Id. at 31,312.
89. Id. at 31,311.
90. See supra note 69.
engine exclusion from the Clean Air Act's definition of "stationary source" to apply to those internal combustion engines which are manufactured after July 18, 1994, the effective date of its regulations on nonroad engines. As such, states are free to regulate the use of nonroad engines or mandate modest retrofit requirements for nonroad engines. While Kentucky DAQ has indicated that it does not intend to regulate mobile sources under KAR 50:035, the likelihood that Kentucky will seek to regulate nonroad engines in the manner contemplated by the EPA in its June 17, 1994 rule-making is slight. Certainly, it can be argued that the EPA intends to exclude nonroad engines from the definition of "stationary source" unless a state regulates such engines. In the absence of such state regulation, the state should not seek to include emissions from such sources in determining whether they are "major sources" (and thus "stationary sources" for purposes of Title V permitting). Moreover, Kentucky DAQ has consistently construed its definitions to mirror the federal definitions, has amended certain definitions to achieve conformity with federal definitions and has indicated that it does not intend to permit mobile sources as a part of the Title V permitting process. Thus, it can be argued that Kentucky's definition of "stationary source" should not be construed to reach sources which the EPA's definition of stationary source would not reach, such as small moveable engines. In sum-

93. See supra note 74. Since this statement was made with specific reference to whether forklift emissions were included in the major source HAPs definition, it is presumed that the comment applies to "nonroad engines" as well as other forms of mobile sources.
94. However, Kentucky Revised Statute (KRS) § 13A.120 is arguably not a bar to the state regulation of existing nonroad engines, assuming Kentucky chooses to regulate. The Kentucky Supreme Court has held that KRS § 13A.120 prohibits Kentucky regulations from being more stringent than federal regulations when the Kentucky regulations are required by federal law. Franklin v. Natural Resources and Envtl. Protection Cabinet, 799 S.W.2d 1, 3 (Ky. 1990). The EPA's rule-making concerning nonroad engines does not require states to regulate existing nonroad engines, but merely permits states to impose such restrictions. See 59 Fed. Reg. 31,306, 31,312-13 (1994).
96. Telephone interview with James W. Dills, supra note 74.
97. See supra note 76 and accompanying text.
98. The Supreme Court of Kentucky arguably prohibits the regulations in 401 KAR 50:035 from being more stringent than the federal regulations contained in 40 C.F.R. part 70. See Franklin v. Natural Resources and Envtl. Cabinet, 799 S.W.2d 1, 3 (Ky. 1990). As the definition of "stationary source" contained in 40 C.F.R. § 70.2 defines that term to include any "building, structure, facility, or installation that emits or may emit any regulated air pollutant or any pollutant listed under § 112(b) of the Act," it can be argued that Kentucky's use of the term "affected facility" in KAR 50:035 § 1(36) to define "stationary source," to the extent that it would apply to a source that the federal regulations in 40 C.F.R. part 70 would not regu-
mary, Kentucky DAQ does not have the authority to denominate mobile engines as stationary sources where the federal definition of "stationary source" would exclude such mobile engines.\textsuperscript{99} If the federal law and regulations labeled small engines as "stationary internal combustion engines," then they would be considered "stationary sources."\textsuperscript{100} Thus, they would be required to include emissions of regulated air pollutants in the major source determination and have emissions from such sources (both fugitive and stack) subject to permitting requirements. Unless the federal law and regulations label small engines, such as string trimmers, as "stationary internal combustion engines," Kentucky regulations should be interpreted to exclude moveable engines and their emissions from all provisions of KAR 50:035.\textsuperscript{101} This is because such sources are not major or minor sources required to obtain a permit pursuant to the provisions of KAR 50:035 section 3(1)(a).

C. To What Extent May Fugitive Emissions From Routine Maintenance Activities be Excluded From Major Source Calculations and Source Listings in Permit Applications?

While routine maintenance activities are not covered by the exemption from the requirement to obtain a permit embodied in KAR 50:035 section 2(2), such activities should be exempt from permitting requirements pursuant to KAR 50:035 section 2(3), assuming such activities meet the criteria delineated therein. As previously discussed, fugitive emissions from such activities otherwise exempt from permitting requirements will have to be included in determining whether the source is a "major source" and their emissions will have to be listed in the permit application.\textsuperscript{102} Specifically, the routine maintenance activity must not be subject to an applicable requirement, nor must the potential or actual emissions from the activity cause the source to be subject to an applicable requirement, to which the source would not otherwise be subject. Further, the activity must have a potential to emit less than five tons per year of the following pollutants:

1. NOX
2. VOCs
3. Criteria pollutants

\textsuperscript{99} See supra note 98 and accompanying text.
\textsuperscript{100} See supra note 86.
\textsuperscript{101} See supra note 94 and accompanying text.
\textsuperscript{102} See supra notes 45-52 and accompanying text.
4. Pollutants subject to new source performance standards or NESHAPs
5. Class I or Class II substances subject to a standard promulgated pursuant to 42 U.S.C. §§ 7671-7671q relating to stratospheric ozone protection
6. Hydrogen sulfide
7. Gaseous fluorides
8. Total fluorides

Additionally, the potential to emit from all activities sought to be exempted under KAR 50:035 section 2(3) must be less than two tons of any HAP and less than five tons of any combination of HAPs (or lesser amount if specified by EPA). The potential to emit all activities exempted must be less than the significance level of any air toxic listed in KAR 63:021-22.

D. Assuming Fugitive Emissions Have Been Calculated for Purposes of Determining Major Source Status, What Additional Permitting Requirements May be Imposed Upon Such Fugitive Emissions?

KAR 50:035 section 4(1)(a) provides that emission limitations and standards, including operational requirements and limitations, are to be included as standard permit requirements to insure compliance with applicable requirements at the time of permit issuance. Accordingly, an emission limitation or standard should not be included as a standard permit requirement where it is not necessary to insure compliance with applicable requirements at the time of permit issuance. While KAR 50:035 section 4(1)(a)(6) provides that “fugitive emissions from a source subject to 40 C.F.R. part 70 shall be included in the permit in the same manner as stack emissions,” stack emissions should be subject to no additional permit limitations, except to the extent necessary to insure compliance with such applicable requirements. Since fugitive emissions are to be treated in the same manner as stack emissions, unless permit conditions are necessary to insure compliance with applicable requirements relating to such fugitive emissions, fugitive emissions should be subject to no additional permit limitations. Even if the quantity of a fugitive emission is greater than that allowed for such emission to be excluded, permit conditions beyond those necessary to insure compliance with applicable requirements should not be applied to such fugitive emissions.

E. What Permitting Consequences Ensue From (A) Having Activities or Emissions Determined to be Entitled to an Exemption Under KAR 50:035 §§ 2(2) or 2(3), or (B) Having Activities or Emissions Listed in the Permit With a Regulatory Determination That No Applicable Requirements Pertain to Such Activities or Emissions?

Emissions resulting from the very limited list of activities that may qualify for an exemption under KAR 50:035 section 2(2) may be excluded from the calculation necessary to determine major source status pursuant to KAR 50:035 section 1(22)(a)-(b), notwithstanding that such activities are still subject to applicable requirements. Activities which are exempt from the requirement to obtain a permit as a result of being entitled to the KAR 50:035 section 2(2) exemption need not be listed in the permit application. However, unlike the exemption contained in KAR 50:035 section 2(2), emissions from activities sought to be exempted pursuant to KAR 50:035 section 2(3) must be listed in the permit application with the request that the activity be exempt from permitting requirements. If determined to be eligible for the KAR 50:035 section 2(3) exemption, such activity should be exempt from all permitting requirements by definition. Therefore, permit limitations upon such emissions or activities are unnecessary since Kentucky regulations provide for permit limitations only where necessary to insure compliance with applicable requirements. Thus, emissions determined to be entitled to the section 2(3) exemption should also be exempt from permitting requirements such as those contained in KAR 50:035 section 4(1)(c)(3)(b) (requiring the proper reporting of deviations from permit requirements and a statement of the corrected actions or preventive measures taken). In the case of fugitive emissions that do not qualify for an exemption under either KAR 50:035 section 2(2) or 2(3), permitting requirements such as those contained in KAR 50:035 section 4(1)(c)(3)(b) should not be imposed unless such

104. Id. § 2(3)(a).
105. Id. § 2(3)(b).
106. “[E]mission limitations and standards, including operational requirements and limitations,” are to be included as standard permit requirements to ensure compliance with applicable requirements at the time of permit issuance. Accordingly, an emission standard or limitation should not be included as a standard permit requirement where it is not necessary to ensure compliance with applicable requirements at the time of permit issuance. Id. § 4(1)(a). However, those “fugitive emissions from sources subject to 40 C.F.R. part 70 shall be included in the permit in the same manner as stack emissions.” Id. § 4(1)(a)(6). This provision effectively ensures that neither stack nor fugitive emissions should be subject to permit limitations unless such limitations are necessary to ensure compliance with an applicable requirement.
emissions are subject to an applicable requirement. 107

Assuming that a source has been determined to be a major source, the permit application must provide emissions related information concerning all pollutants by which the source is major and all emissions of regulated air pollutants. 108 Fugitive emissions from all activities conducted at sources subject to 40 C.F.R. part 70 must be included in the permit application in the same manner as stack emissions. 109 As a practical matter, emissions from all activities (other than those exempt pursuant to KAR 50:035 section 2(2)) must be calculated to determine whether the exemptions contained in KAR 50:035 section 2(3) may be applicable.

Once emissions from sources are listed in the permit application, such emissions may be (1) subject to an applicable requirement, (2) exempt under KAR 50:035 section 2(3), or (3) included in the permit without having any substantive emission limitations or procedural requirements imposed upon emissions. An example of this latter category of emissions would be where the quantity of fugitive emissions from a source exceeds the emission caps delineated in KAR 50:035 section 2(3), thus rendering such emissions ineligible for its exemption.

With respect to those fugitive emissions which, although not subject to an applicable requirement, may quantitatively exceed the threshold for the KAR 50:035 section 2(3) exemption, arguably, the permit shield contemplated by KAR 50:035 section 4(6) is nevertheless applicable. KAR 50:035 section 4(6)(a) provides that the conditions of the permit will be deemed in compliance with all requirements if:

1. The applicable requirements are included and are specifically identified in the permit; or 2. The cabinet, in acting on the permit application or revision, determines in writing that other requirements specifically identified are not applicable to the source, and the permit includes the determination or a concise summary thereof. 110

Therefore, permit applicants should specifically request that the Environmental Protection Cabinet determine in writing that there are not requirements applicable to (a) activities for which exemptions are sought pursuant to KAR 50:035 section 2(3), and (b) emissions, the quantity of which precludes exemption under KAR 50:035 section 2(3), but which are not otherwise subject to an applicable requirement. Pursuant to KAR 50:035 section 4(6)(b), a permit that does not expressly state that a per-

108. See Id. § 3(1)(d)(1). See also supra notes 26 and 45.
mit shield exists should be presumed to be without a shield. Therefore, in addition to requesting that activities or emissions for which there are no applicable requirements be specifically determined to be excluded from permit conditions, the permit applicant should affirmatively request a permit shield.

Specifically listing activities for which exemptions are sought and activities which are not subject to an applicable requirement in the permit application may have a beneficial outcome with respect to the requirement to report releases in a quantity equal to or greater than a Reportable Quantity (RQ) pursuant to § 103(a) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA),\(^\text{111}\) § 304 of the Superfund Amendments and Reauthorization Act (SARA) Title III,\(^\text{112}\) or Kentucky Revised Statutes.\(^\text{113}\) The notification requirements under these statutes apply to any release of a hazardous substance other than "a federally permitted release."\(^\text{114}\) In a July 19, 1988 proposed rule purporting to clarify the scope of the federally permitted release exemption,\(^\text{115}\) the EPA indicated that among other approaches, it was considering an approach whereby air releases would be deemed permitted to the extent that constituent hazardous substances had been identified, reviewed and made part of the public record during permit issuance, or state implementation plan or regulation development processes for the pollutant of which the hazardous substance is a part.\(^\text{116}\) The exemption would not extend to releases of constituent hazardous substances of a permitted or regulated pollutant category that are not identified expressly on the record with respect to the applicable permit or control program.\(^\text{117}\) The EPA presumed that once the constituent hazardous substance had been identified and reviewed appropriately, the limitation on the category of emissions of hazardous substances, if any, would provide the "permit or control regulation" necessary for application of the federally permitted release exemption.\(^\text{118}\) Accordingly, a permit applicant should consider requesting that the agency include all emis-


\(^{113}\) KY. REV. STAT. ANN. § 224.21-400 (Michie/Bobbs-Merrill 1995). This statute is Kentucky's release reporting and remediation statute and is often referred to as Kentucky's version of "superfund."


\(^{116}\) See id. at 27,270.

\(^{117}\) See id. at 27,273.

\(^{118}\) Id. at 27,273-74.
sions not determined to be subject to applicable requirements as well as all emissions determined to be exempt pursuant to KAR 50:035 section 2 in the draft permit available for public review and comment in the event that the EPA chooses the approach of allowing the federally permitted release exemption to apply to emissions of hazardous substances “identified and reviewed and made a part of the public record.” In the final promulgation of its regulations delineating the scope of the exemption for federally permitted releases, the EPA may determine that emissions of hazardous constituents that have been identified in the draft permit are to be excluded from the release reporting requirements of CERCLA, SARA and therefore, KRS section 224.01-400.119

VI. CONCLUSION

In light of the requirement that fugitive emissions of all regulated air pollutants from sources subject to 40 C.F.R. part 70 be included in the permit application, permit applicants should undertake a comprehensive emissions inventory of all regulated pollutants from all sources except those identified in KAR 50:035 section 2(2), nonroad engines and nonroad vehicles. In the case of nonroad engines and nonroad vehicles, an adequate legal basis exists for concluding that such small sources are not “stationary sources.”120 Once a comprehensive emissions inventory is undertaken, emissions of “regulated air pollutants” identified in KAR 50:035 section 1(28)(a) can be segregated from those identified in KAR 50:035 section 1(28)(b) for purposes of determining major source status. Assuming major source status is conferred, an examination of the quantities of emissions of regulated air pollutants identified in both KAR 50:035 section 1(28)(a) (criteria pollutants and those subject to new source performance standards, NESHAPs and stratospheric ozone production) can be segregated from those identified in KAR 50:035 section 1(28)(b) (state origin pollutants including odors and Kentucky air toxics)


120. Small engines that are not mobile may not be “nonroad engines or nonroad vehicles” and may thus be “stationary sources” under the Clean Air Act with the resultant effect that emissions from such sources must be included in the major source determination and the permit application. See supra note 89 and accompanying text.
for purposes of determining major source status.\textsuperscript{121} Assuming major source status is conferred, an examination of the quantities of emissions of regulated air pollutants identified in both KAR 50:035 section 1(28)(a) and (b) must be undertaken to determine the applicability of exemptions contained in KAR 50:035 section 2(3).

Accordingly, while the EPA has recently proposed rules to streamline and clarify portions of the operating permits program that states will be required to mirror,\textsuperscript{122} the process of identifying, calculating, and determining requirements for fugitive emissions remains unchanged in such proposed regulations. As a consequence, prospective permittees must remain mindful of the impact of fugitive emissions on major source determinations and permit application procedures.

\textsuperscript{121} See \textit{supra} notes 32-40 and accompanying text.
A Supreme Court decision on June 29, 1995 continues on-going judicial discussions and debates in two areas of the law, statutory interpretation and the Endangered Species Act (Act).2 Plaintiffs, Sweet Home Chapter of Communities for a Great Oregon and other organizations, were parties who alleged they were dependent on the forest product industry.3 They brought action against the Secretary of the Interior (Secretary) and the Director of the Fish and Wildlife Service challenging a regulation established and promulgated by the Secretary under the Endangered Species Act.4

The Endangered Species Act makes it unlawful for any person to “take” endangered or threatened species,5 and defines “take” to mean to “harass,” “harm,” “pursue,” “wound” or “kill.”6 Through an implementing regulation, the Interior Department defined the statutory term “harm” to mean “an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.”7

Plaintiffs in the action were small landowners, logging companies and families dependent on forest product industries.8 Their complaint alleged that application of the “harm” regulation to the red-cockaded woodpecker, an endangered species, and the northern spotted owl, a threatened

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1. Professor Grosse is the distinguished former dean and current professor emeritus at the Salmon P. Chase College of Law, Northern Kentucky University. He is the author of NATURAL RESOURCES LAW, a two volume treatise, and also teaches a natural resources law course at the College.


3. Id. at 2410.

4. Id. The Endangered Species Act provides that the Secretary of the Interior has jurisdiction over the Act and that the Fish and Wildlife Service administers the Act.


6. Id. § 1532(19).

7. 50 C.F.R. § 17.3 (1994).

8. Sweet Home, 115 S. Ct. at 2410.
species, had caused a significant economic injury. Plaintiffs challenged the regulation on its face claiming that Congress did not intend the word “take” to include habitat modification, then further argued that because the regulation was established and promulgated by the Secretary, it was invalid because the Secretary exceeded his authority under the Act.

When the forest dependant plaintiffs took their cause to the judicial system, the United States District Court for the District of Columbia found the regulations valid. The loggers, recognizing the adverse impact this decision would have on their financial well being, appealed. Plaintiffs arguments were initially rejected by the District of Columbia Court of Appeals which affirmed the judgment of the district court. Undaunted, the loggers filed a petition for rehearing and the court of appeals reversed the district court decision.

The court of appeals' second decision created a conflict with a 1988 ninth circuit decision that upheld the Secretary's definition of "harm." Faced with dissension among the circuits, the Supreme Court granted certiorari and eventually upheld the Secretary’s definition of harm in a 6-3 decision.

Beyond the obvious benefit of *Sweet Home*, the further protection of endangered and threatened species, the case presents important economic, political and statutory interpretation considerations. Perhaps the most crucial aspect of the case is the court's attempt at statutory interpretation.

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9. *Id.* “The woodpecker was listed as an endangered species in 1970 pursuant to the statutory predecessor of the Endangered Species Act.” *Id.* at 2410 n.4. The spotted owl was listed as a threatened species pursuant to the Endangered Species Act. 55 Fed. Reg. 26,114 (1990).

10. *Sweet Home*, 115 S. Ct. at 2410. The action was in the form of a declaratory injunction against the Secretary of the Interior and the Director of the Fish and Wildlife Service. *Id.*


14. Palila v. Hawaii Dep’t of Land and Natural Resources, 852 F.2d 1106 (9th Cir. 1988).


16. Economics and political considerations in the case occupy a minor place in the overall discussion. What importance these two considerations have on the main consideration, statutory interpretation, must depend on implication because neither the majority nor the minority devote substantial time to the considerations.
Statutory interpretation is a process through which judges do more than apply statutes or regulations—they decipher the meaning. This process becomes necessary because “[i]n all fields of experience, not only that of rules, there is a limit, inherent in the nature of language, to the guidance which general language can provide.”

Approaches to statutory interpretation pre-date the development of the modern legal era and in some cases pre-date American independence. In all cases concerning statutory interpretation, the primary and essential task of the court is to attempt to determine legislative purpose or intent.

In *Sweet Home*, the Supreme Court divided 6-3 when attempting to determine legislative purpose or intent. In discussing whether or not the legislature intended the word “harm,” as included as an example within the meaning of the word “take,” applied to habitat modification, the divided court used several approaches to determine the legislative intent: (1) the *Ejusdem Generis* Rule; (2) legislative history; (3) reasonable interpretation rule; and (4) a variation on the *Ejusdem Generis* Rule cited by Justice Scalia as *noscitur a sociis*.

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18. See, e.g., Heydon’s Case, 76 Eng. Rep. 637 (Exchequer 1584) (announcing “The Social Purpose Approval”); River Wear Commissioners v. Adamson, 2 App. Cas. 742 (H.L. 1877) (Lord Blackburn suggesting the Qualified Plain Meaning Approach: The Golden Rule); Holy Trinity Church v. U.S., 143 U.S. 457 (1892) (advancing an approach that states “a thing may be within the letter of the statute and yet not within the statute because not within its spirit nor within the intention of its makers”).
19. This assumes that the court has already determined that the statutory language is not so uncertain in application to the facts of the case or so vague as to be incomprehensible. A particularly difficult problem is raised when the literal meaning of a statute leads to absurd or mischievous results. In this situation the court must choose between interpreting the plain meaning as stated and leading to absurd results or declaring the statute vague. See Vacher & Sons, Ltd. v. London Society of Compositors, 28 T.L.R. 366 (C.A. 1912) (Atkinson, L.J., concurring) (applying approach called “The Literal Plain Meaning Approach”).
20. Justices Stevens, O’Connor, Kennedy, Souter, Ginsberg, and Breyer constituted the majority and Chief Justice Rehnquist, Justices Thomas and Scalia made up the minority. Justice O’Connor wrote a concurring opinion and Justice Scalia wrote the dissenting opinion.
21. The statutory interpretation approach entitled *ejusdem generis* states that “general terms appearing in a statute in connection with specific terms are to be given meaning and effect only to the extent that the general terms suggest items similar to those designated by specific terms.” Dean v. McFarland, 500 P.2d 1244, 1248 (Wash. 1972).

The approach suggested by Justice Scalia, *noscitur a sociis*, has been stated to mean “a word is known by the company it keeps.” *Sweet Home*, 115 S. Ct. at 2411 (citing Neal v. Clark, 95 U.S. 704, 708-09 (1878)). The word must be read in context and therefore the meaning is gathered from the surrounding words. Utility Elec. Supply, Inc. v. ABB Power T&D Co., 36 F.3d 737, 740 (8th Cir. 1994) (citing Jarecki v. G.D. Searle & Co., 81 S. Ct. 1579 (1961)).
Both the majority and the minority used the same approaches to study interpretation to reach opposite conclusions of law. The majority refers to the placement of the word “harm” in the statute and concludes that the surrounding words lend independent meaning to the subject word so as to validate the meaning ascribed to it by the Secretary’s regulation. On the other hand, the minority court views the placement of the subject term and its surrounding terms as indicative of an intention on the part of the legislature to ascribe the same categorical meaning to the term as the surrounding terms.

The difficulty evidenced by the split in the justices in deciding this statutory interpretation case has a long history which has plagued the judiciary from the beginning. Justice Felix Frankfurter once said that “the troublesome phase of construction is the determination of the extent to which extraneous documentation and external circumstances may be allowed to infiltrate the text on the theory that they were part of it, written in ink discernible to the judicial eye.”

It is not so much that the justices disagree on extraneous documentation (although different kinds of documentation in the same category are used), but rather that they differ on the interpretations assigned to different documents and the impact that such interpretations have on statutory intent.

The majority and minority views also draw different inferences from an examination of the legislative history of the Act. Both the majority and minority opinions discuss the legislative track of the Act through Congress including committee and floor statements and reach opposite con-
clusions as to the legislative intent of the meaning of the term "harm" as applied to habitat modification. 26 Even the plain meaning approach used by both the majority and minority justices results in different conclusions when references are made to Webster's International Dictionary. 27

While the court in Sweet Home devotes most of its argument to the issue of statutory interpretation there are other arguments or at least statements by the Justices which raise economic and political issues.

Political ramifications are raised by Justice Scalia's assertion that those who manage the Act, i.e., implement its provisions according to statutory authority, have exceeded their authority by promulgating regulations not permitted by the statute. This attack does not question congressional authority but rather addresses two questions: (1) the relationship between Congress and the administrative system; and (2) the impact that the Act, with all of its administrative trappings, has on society. 28

Justice Scalia raised, almost by indirection, the issue of economic impact of the regulation. In the opening paragraph of his dissenting opinion, Justice Scalia stated, "The Court's holding that the hunting and killing prohibition incidently preserves habitat on private lands imposes unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted in national zoological use." 29

The majority referred to the plaintiffs by representative classifications, but it can certainly be argued that the reference to such plaintiffs was merely for the purpose of identification. No further reference was made to the plaintiffs' economic status in the remainder of the opinion. 30 It is

26. Both the majority and the minority cite amendments to the Endangered Species Act in support of their construction of statutory intent.

27. Justice Stevens writing for the majority uses Webster's Third New International Dictionary (1966) to provide an ordinary definition of the word "harm." Sweet Home, 115 S. Ct. at 2412. Justice Scalia writing for the minority uses Webster's New International Dictionary of the English Language (2d ed. 1949) to provide an ordinary definition of the word "take." Id. at 2421 (Scalia, J., dissenting).

28. The argument by Justice Scalia does not range far enough to trigger any substantial response from the majority position. The only response to this potential political challenge comes in the form of a common rule applicable in administrative law considerations, deference to agency interpretation. Id. at 2416 (citing Stephen G. Breyer, Judicial Review of Questions of Law and Policy, 38 ADMIN. L. REV. 363 (1986)).

29. Id. at 2421 (Scalia, J., dissenting).

30. The majority clears the way for a possible economic argument by assuming that respondents did not have a desire to harm either the red-cockaded woodpecker or the spotted owl. Id. at 2412. The significance of this assumption is that it puts aside any economic argument on the facial challenge to the Act and states that any such claims could be considered in the permitting process provided under the Act.
unclear whether Justice Scalia, writing for the minority, referred to the plaintiffs' economic labels merely for the incidental purpose of identification or to raise by implication the suggestion that economic considerations enter into the process by which critical habitat is designated, and that the Court should weigh in the economic harm caused plaintiffs in the decision concerning the application of the term "harm" to habitat modification. 31

*Sweet Home* presents an interesting example of the statutory interpretation process. Regardless of the approach or approaches used it frequently happens that a court will be divided over the meaning of terms of a statute or the application of the statute as a whole. In the final analysis, it is the duty of the court, unanimous or divided, to "make sense under and within the law." 32

31. Department of Interior regulations which implement the Endangered Species Act require that economics and other impacts be considered in designating critical habitat. 50 C.F.R. 424.12 (1994). The listing of endangered and threatened species on the other hand, does not require, or even permit, economic consideration. 16 U.S.C. § 1533 (1994).

32. Karl Llewellyn phrased the matter as follows: "[I]n regard to statutes, because of (1) the power of the legislature both to choose policy and select measures; and (2) the necessity that the legislature shall, in so doing, use language-language fixed in particular words; and (3) the continuing duty of the courts to make sense under and within the law." Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules and Canons about How Statutes are to be Construed*, 3 VAND. L. REV. 395, 399 (1950).
"TAKEN" BY SUBJECTIVITY

by Charles S. Griffith, III

I. INTRODUCTION

The courts in the United States are increasingly being asked to interpret statutory compilations which address subject matter that is highly technical and specialized. These statutes contain words and phrases that are unique to their respective fields of applicability. To adequately decipher these somewhat cryptic statutes, the courts rely upon documentation of the statute's legislative background. This "legislative history is a judicial tool, one judges use to resolve difficult problems of judicial interpretation."1

The Supreme Court in the principal case faced the formidable task of interpreting the Endangered Species Act which was enacted to protect the nation's wildlife from the depletion of needed habitat and human predation.2 The Supreme Court agreed to resolve the interpretive difficulties experienced between citizens who depend upon the forest products industries and the Secretary of the Interior who was concerned with the industries' deleterious effects upon the habitat of the northern spotted owl and the red-cockaded woodpecker.

II. LEGISLATIVE BACKGROUND

A. Endangered Species Act

"Congress enacted the Endangered Species Act in 1973 in response to increasing concern about the extent to which 'various species of fish, wildlife, and plants' had been rendered extinct 'as a consequence of economic growth and development untempered by adequate concern and conservation.'"3 The purpose of the ESA is to provide a method whereby the delicately balanced ecosystems upon which endangered species

survive are protected from being destroyed.4

According to the ESA, the Secretary of the Interior shall, by regulation, determine which species is endangered based upon destruction of its habitat.5 Once a species is determined to be endangered, it is preserved by § 9(a)(1) of the ESA, which prohibits any person subject to the jurisdiction of the United States from “taking” any such species within the United States or its territorial seas.6 The ESA defines the term “take” to mean “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”7

B. Secretary of the Interior’s 1975 Promulgation

The Secretary of the Interior, through the Director of the Fish and Wildlife Service, promulgated a regulation in 1975 defining the term “harm” to denote an act which “actually injures or kills wildlife, including acts which annoy it to such an extent as to significantly disrupt essential behavioral patterns, which include, but are not limited to, breeding, feeding or sheltering,” including “significant environmental modification or degradation which has such effects.”8 The preamble to the 1975 regulation expressed that it was formulated to further protect the habitats of endangered species, in compliance with congressional intent, as stated in the “[p]urposes” section of the ESA.9

C. Secretary of the Interior’s 1981 Revision

In 1981, the Secretary modified the “harm” regulation to indicate that a “taking” does not result from a “habitat modification alone without any attendant death or injury of the protected wildlife.”10 The Secretary’s modified definition of “harm” declared it to be “an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.”11

5. See id. § 1533(a)(1)(A).
7. Id. § 1532(19).
11. 50 C.F.R. § 17.3 (1994).
D. Congressional Amendment of the Act in 1982

In 1982, Congress authorized the Secretary to sanction any taking otherwise prohibited by § 1538(a)(1)(B) "if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."12 This amendment "requires the applicant to prepare a 'conservation plan' that specifies how he intends to 'minimize and mitigate' the 'impact' of his activity on endangered and threatened species."13

III. FACTS AND PROCEDURE BELOW

The Plaintiffs, Sweet Home Chapter of Communities for A Great Oregon and a number of other organizations, are landowners, logging companies, and families dependent upon the forest products industries in the Pacific Northwest and in the Southeast.14 Plaintiffs contend that they are adversely affected by the Secretary's "harm" regulation as made applicable to the northern spotted owl and the red-cockaded woodpecker, which are listed as endangered species.15 To avoid "harm"-type takings of endangered species, the Fish and Wildlife Service has placed restrictions upon timber harvesting.16

Plaintiffs "claim that these restrictions have forced them to lay off employees, limited their income from trust lands, reduced the timber supply, and placed some of the plaintiffs in the position of being unable to support their families."17 Plaintiffs sued in district court to challenge the Secretary's definition of "harm" at 50 C.F.R. § 17.3 as contrary to the Endangered Species Act of 1973.18 They argued that the language in the Senate's original version of the ESA defined "take" to include destruction of habitat of fish or wildlife, but the language was deleted prior to enactment.19 They also contended that the Senate added the term "harm" to the definition of "take" in a floor amendment without debate, and thus, the court should not interpret the term so expansively as to include habitat modification.20

The United States District Court for the District of Columbia rejected

14. Id. at 2410.
15. Brief of the Petitioners at 11, Sweet Home (No. 94-859).
16. Brief of the Respondents at 5, Sweet Home (No. 94-859).
17. Id.
18. Id.
20. Id. at 2411.
Plaintiffs’ arguments, holding “that Congress intended an expansive interpretation of the word ‘take,’ an interpretation that encompasses habitat modification.”

The district court stated that, even if the ESA were “silent or ambiguous” regarding the Secretary’s authority to define “harm,” it would have upheld the regulation as a reasonable interpretation of the statute. Thus, the court entered summary judgment for the Secretary of the Interior and dismissed Plaintiffs’ complaint.

The United States Court of Appeals for the District of Columbia Circuit affirmed the lower court’s ruling but was divided on the scope of the Act’s prohibition of the “taking” of endangered species. On petition for rehearing, the court of appeals reversed its decision holding that “the Service’s definition of ‘harm’ was neither clearly authorized by Congress nor a ‘reasonable interpretation’ of the statute.”

The court stated that “[t]he potential breadth of the word ‘harm’ is indisputable,” but “[t]he immediate context of the word, however, argues strongly against any such broad reading. With the single exception of the word ‘harm,’ the words of the definition contemplate the perpetrator’s direct application of force against the animal taken.” The court used the maxim noscitur a sociis, that a word is known by the company it keeps. “While not an inescapable rule, [it] is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress.”

The District of Columbia Circuit Court of Appeals’ ruling was in direct conflict with a Ninth Circuit decision which upheld the Secretary’s definition of “harm.” Consequently, the Supreme Court of the United States granted certiorari to resolve the conflict.

24. Babbitt I, 1 F.3d at 1.
26. Id.
27. Id. at 1465.
28. Id.
30. Palila v. Hawaii Dep’t of Land & Natural Resources, 852 F.2d 1106 (9th Cir. 1988).
31. Sweet Home, 115 S. Ct. at 2412.
32. Id.
IV. THE COURT'S REASONING IN SWEET HOME

A. Majority Opinion

Justice Stevens delivered the opinion for the Court, which held that after "consideration of the text and structure of the Act, its legislative history, and the significance of the 1982 amendment . . . the Court of Appeals' judgment should be reversed." Justice Stevens stated three reasons for concluding that the Secretary's interpretation was reasonable. First, "an ordinary understanding of the word 'harm' supports it." Second, "the broad purpose of the ESA supports the Secretary's decision to extend protection against activities that cause the precise harms Congress enacted the statute to avoid." Third, "the fact that Congress in 1982 authorized the Secretary to issue permits for takings that section 9(a)(1)(B) would otherwise prohibit . . . strongly suggests that Congress understood section 9(a)(1)(B) to prohibit indirect as well as deliberate takings."

1. An ordinary understanding of the word "harm" supports the Secretary's interpretation.

The Court referred to the dictionary definition of the verb form of "harm," which stated "to cause hurt or damage . . . " The majority determined that the term "harm," in the context of the ESA, included ecosystem modification that results in actual injury to the endangered species. Plaintiffs asserted that the scope of "harm" should be limited to "direct applications of force against protected species," but the Court reasoned that the definition of "harm" did "not include the word 'directly' or suggest . . . that only direct or willful action that leads to injury constitutes 'harm.'" The majority concluded that if the definition of "harm" did not include indirect as well as direct injuries, then the word would merely duplicate the distinct words used to define "take." The majority was reluctant
“to treat statutory terms as surplusage,”42 and deduced that the Secretary’s interpretation of “harm” was reasonable.43

2. “[T]he broad purpose of the ESA supports the Secretary’s decision to extend protection against activities that cause the precise harms Congress enacted the statute to avoid.”44

Justice Stevens observed that the ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation,”45 and its purpose is “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.”46 He noted that Plaintiffs advanced a compelling argument “that activities that cause minimal or unforeseeable harm will not violate the Act as construed in the ‘harm’ regulation.”47 However, Plaintiffs presented a facial challenge to the regulation, which would require the Court to invalidate “the Secretary’s understanding of ‘harm’ in every circumstance, even when an actor knows that an activity, such as draining a pond, would actually result in the extinction of a listed species by destroying its habitat.”48 As a result, the majority deduced that based upon Congress’ clear intent to provide broad protection for endangered wildlife, the Secretary’s definition of “harm” was reasonable.49

3. “Congress understood § 9(a)(1)(B) to prohibit indirect as well as deliberate takings.”50

The majority inferred that Congress’ 1982 Amendment to the ESA, which empowered the Secretary “to issue permits for takings that section 9(a)(1)(B) would otherwise prohibit . . . strongly suggest[ed] that Congress understood section 9(a)(1)(B) to prohibit indirect as well as deliberate takings.”51 The majority reasoned that this demonstrated that Congress had considered “foreseeable rather than merely accidental effects on

42. Id.
43. Id.
44. Id.
45. Id. (quoting Tennessee Valley Auth. v. Hill, 437 U.S. 153, 180 (1978)).
46. Id. (quoting 16 U.S.C. § 1531(b) (1988)).
47. Id. at 2414.
48. Id.
49. Id.
50. Id.
51. Id.
listed species.” Thus, the majority declared that Congress’ amendment requiring permits to modify the habitat of endangered species supported “the Secretary’s conclusion that activities not intended to harm an endangered species, such as habitat modification, may constitute unlawful takings under the ESA unless the Secretary permits them.”

To further support its conclusion, the majority analyzed the legislative history behind the ESA. Justice Stevens wrote that both the Senate and House Reports stressed that the term “take” was to be interpreted in the broadest possible manner which encompassed harassment, whether intentional or not. The Justice also commented on the House Report’s definition of “take” which would allow the Secretary to regulate the activities of bird watchers where those activities might interfere with the process of procreation. He concluded by stating that the above instances demonstrated Congress’ intent and “support[ed] the Secretary’s interpretation that the term ‘take’ in § [sic] 9 reached far more than the deliberate actions of hunters and trappers.”

The majority also examined two endangered species bills which were introduced in the Senate. Neither of these bills included the term “harm” in its definition of “take,” but Senator Tunney introduced a floor amendment which added the term “harm” to the definition, commenting that this would “help to achieve the purposes of the bill.” The Court also viewed the definition of “take” as it originally appeared in Senate Bill 1983, which included the destruction or modification of an endangered species habitat. The Court was not influenced by the absence of the habitat provision from the final version of the enactment, because the “legislative materials contain[ed] no indication why the habitat protection provision was deleted.” The 1982 Amendment, which gave the Secretary authority to issue permits for “incidental” takings, was further clarified by the House Report which stated, “By use of the word ‘incidental’ the Committee intends to cover situations in which it is known that a taking will occur if the other activity is engaged in but such taking is

52. Id.
53. Id.
54. Id. at 2416.
55. Id.
56. Id.
57. Id.
59. Sweet Home, 115 S. Ct. at 2416-17 (quoting 119 CONG. REC. 25,638 (1973)).
60. Id. at 2417.
61. Id.
incidental to, and not the purpose of, the activity." 62 The majority concluded that "Congress had habitat modification directly in mind: both the Senate Report and the House Conference Report identified as the model for the permit process . . . a case in California where a development project threatened incidental harm to a species of endangered butterfly by modification of its habitat." 63

Justice Stevens concluded that Congress, in 1982, focused directly on the aspect of the "harm" regulation at issue in this litigation. 64 "Congress' implementation of a permit program is consistent with the Secretary's interpretation of the term 'harm,'" 65 and the Secretary reasonably construed Congress' intent by including "significant habitat modification or degradation that actually kills or injures wildlife" in the definition of "harm." 66

B. Dissenting Opinion

Justice Scalia, with whom Chief Justice Rehnquist and Justice Thomas joined, authored the dissent: 67 "The Court maintains that the legislative history of the 1973 Act supports the Secretary's definition . . . . Even if legislative history were a legitimate and reliable tool of interpretation . . . here it shows quite the opposite of what the Court says." 68 He further criticized how the majority's discussion of legislative history centered around two points: first, an amendment that added the term "harm" to the definition of "take," with the comment that it would help to accomplish the objective of the bill; and second, the Committee's elimination of the definition of "take" which included destruction or modification of the endangered species habitat. 69 "The Court inflates the first and belittles the second, even though the second is on its face far more pertinent." 70

Justice Scalia further questioned the validity of the majority's use of legislative history, "since we have direct evidence of what those who brought the legislation to the floor thought it meant—evidence as solid as

63. Id. at 2418 (citing S. REP. NO. 418, 97th Cong., 2d Sess. 10 (1982); H.R. CONF. REP. NO. 835, 97th Cong., 2d Sess. 30 (1982)).
64. Id.
65. Id.
66. Id.
67. Id. at 2421.
68. Id. at 2426-27 (Scalia, J., dissenting).
69. Id. at 2427.
70. Id.
any ever to be found in legislative history, but which the Court banishes to a footnote."71 The Justice was referring to the fact that both the Senate and House floor managers of the bill discussed the aspects of the bill, stating that the Act would authorize the Secretary to purchase land to prevent the negligent destruction of the endangered species' habitat,72 and the bill also would deter the taking of endangered species for pleasure or profit.73

The Justice pronounced that these references destroyed "the Court's legislative-history case, since they display the clear understanding (1) that habitat modification is separate from 'taking,' and (2) that habitat destruction on private lands is to be remedied by public acquisition, and not by making particular unlucky landowners incur 'excessive cost to themselves.'"74 Thus, he concluded that the majority's holding was neither supported by the plain meaning of the statute's text, nor evidence of its legislative history.75

V. ANALYSIS

The federal judiciary has made increasing use of legislative history since the 1940s.76 The manner in which the courts interpret statutes in the federal system is extremely important to our nation's jurisprudence.77 "Courts are often ill equipped to master the complexities of these sometimes labyrinthine statutes that govern highly technical matters beyond the expertise of a generalist judiciary."78 In conjunction with this tremendous increase in federal legislation, Congress has entrusted administrative agencies with the responsibility of interpreting, implementing, and administering the nation's statutory laws.79 If the objective of statutory interpretation "is the ascertainment of meaning, nothing that is logically relevant should be excluded,"80 including the chronicles which preserve the statute's legislative conception and development.

71. Id.
72. Id. (quoting 119 CONG. REC. 25,669 (1973)).
73. Id. (quoting 119 CONG. REC. 30,162 (1973)).
74. Id. at 2427-28.
75. Id. at 2431.
78. Id. at 372.
79. Id.
A. Statutory Interpretation

Two schools of thought exist regarding the use of legislative history in statutory interpretation. First, the “American rule” advocates “the use of legislative historical materials in the interpretative process.” This school believes that words have distinct meanings when used in different statutory frameworks, and to consult Webster’s Dictionary during times of stupefaction ignores the intricacies of the statute being interpreted. Justice Frankfurter once warned, “[t]he notion that because the words of a statute are plain, its meaning is also plain, is merely a pernicious oversimplification.”

The most commonly used legislative materials for calculating Congress’ intent are Committee Reports, Conference Committee Reports, statements made by sponsors or managers of legislation, and statements made by floor managers. A more precarious practice is relying upon ad lib comments by marginal participants, hearings, post-enactment statements by legislators of the statute’s meaning, and successful and unsuccessful attempts to amend a bill as an accurate indicator of Congress’ intent. The latter are more dangerous “because it is often unclear whether the amendment is designed to change or to clarify the substance of the original bill.” As Judge Wald once stated, “[t]he legislative materials at our disposal do not, and probably never will, accurately and comprehensively record what actually took place during the convoluted process of enactment.” However, “[l]anguage never seems plain enough in its meaning to forestall the hunt for enlightenment in the legislative context.”

The second discipline of statutory interpretation, which is based upon the English canon, is designated the plain meaning approach. This technique proscribes the use of any legislative materials in the determination of the statute’s meaning. “Where the language is plain and admits

81. Starr, supra note 77, at 373.
84. Wald, supra note 82, at 201.
85. Id. at 201-2.
86. Id.
87. Id. at 216.
88. Id.
89. Starr, supra note 77, at 374.
90. Id.
of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion."

Advocates of the plain meaning approach criticize the use of legislative history because of its highly subjective nature. One such advocate, the late Judge Harold Leventhal, analogized the use of legislative history to "looking over a crowd and picking out your friends." The substantial use of legislative history by American courts prompted the Canadian judiciary to ridicule that "whenever the legislative history is ambiguous it is permissible to refer to the statute."

The strongest current proponent of plain meaning interpretation is Supreme Court Justice Antonin Scalia. Justice Scalia's plain meaning approach has prevailed on occasion in Supreme Court decisions and is conspicuous in his dissenting opinion in Sweet Home. The plain meaning method is very rigorous and espouses the view that the statute, and not the Committee Report, is the authoritative expression of the law. However, the application of legislative history to statutory interpretation can be equally rigorous when correctly employed.

Supreme Court Justice Steven Breyer, a defender of the use of legislative history in interpreting statutes, believes that "[t]he 'problem' of legislative history is its 'abuse,' not its 'use.'" He cites five situations where the use of legislative history can aid a court in comprehending the context and purpose of a statute:

(1) avoiding an absurd result; (2) preventing the law from turning on a drafting error; (3) understanding the meaning of specialized terms; (4) understanding the "reasonable purpose" a provision might serve; and (5) choosing among several possible "reasonable purposes" for language in a politically controversial law. The first three are not very controversial. The last two are controversial.

First, in situations involving problematic language, the judge should investigate the history of the statute "to see whether the language is, in
fact, as absurd as it appears, or whether it may serve a reasonable purpose that did not occur to the parties or to the court.” Justice Scalia, the strongest proponent of plain meaning, conceded that this was an appropriate use of legislative history in *Green v. Bock Laundry Machine Co.*

The second use of legislative history is to elucidate drafting errors. A statute’s language might seem obvious and may not produce an absurd result, “[y]et, legislative history nonetheless might clearly show that the result is wrong because of a drafting error that courts should correct.”

Third, “[e]ven the strongest critics of the use of legislative history concede that a court should take full account of any special meaning that a statutory word may have.” In *Pierce v. Underwood,* Justice Scalia, writing for the majority, used a 1938 case to explain the “technical meaning of a word in the Administrative Procedure Act, which did not become law until 1946.” Justice Scalia knew that the 1938 case defined the technical term because the 1946 House and Senate Reports unambiguously illustrated that it was their intent “to enact into law recommendations contained in the Report of the Attorney General’s Committee on Administrative Procedure. That report cites the Consolidated Edison definition . . . .” This is a common function of legislative history, and “Justice Scalia’s reliance on such materials in *Pierce,* widely accepted like most, represents a fairly noncontrovertial use of legislative history.”

The fourth use of legislative history is to determine the purpose a statutory word “serves within the broader context of a statutory scheme in order to decide properly whether a particular circumstance falls within the scope of that word or phrase.” To prohibit the courts from refer-

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99. *Id.* at 849.
100. *Id.* (citing *Green v. Bock Laundry Machine Co.*, 490 U.S. 504 (1989)).
101. *Id.* at 850.
102. *Id.* (citing United States v. Falvey, 676 F.2d 871 (1st Cir. 1982)).
103. *Id.* at 851.
105. Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938).
108. *Id.* (citing Administrative Procedure in Government Agencies-Report of the Committee on Administrative Procedure, Appointed by the Attorney General, at the Request of the President, to Investigate the Need for Procedural Reform in Various Administrative Tribunals and to Suggest Improvements Therein S. Doc. No. 10, 77th Cong., 1st Sess. 89 (1941)).
109. *Id.* at 853.
110. *Id.* See Evans v. Commissioner, Maine Dep’t of Human Serv., 933 F.2d 1 (1st Cir.
ring to legislative history would effectively sever an important line of communication that runs from "those affected by a law’s implementation, through courts and legislators, to those involved in the law’s creation."111 Prohibiting the use of legislative history will result in inconsistent consequences which defeat "the reasonable expectations of the many individuals and groups involved in the legislative process."112 Provided that a goal of our "legal system is to maintain rules of law consistent with the reasonable expectations of those who live within it, this result is undesirable."113

The fifth and most controversial use of legislative history is choosing among reasonable interpretations of a politically controversial statute.114 This usually involves a statute that was enacted with language that is equivocal or tacit regarding a portentous issue that faces a court.115 "Judicial use of legislative history to determine meaning in this context seems to cause critics the greatest concern, for it is the kind of situation in which courts risk elevating the testimony to the level of a statute."116 However, "in certain contexts reference to legislative history can promote interpretations that more closely correspond to the expectations of those who helped create the law (and whom the law will likely affect). To that extent, its use seems likely to promote fair and workable results."117

Justice Breyer has authored a number of opinions interpreting statutory language,118 and in those opinions he used an organized analysis which was both strengthened and substantiated by the use of legislative history.119 In his opinions, Justice Breyer used a structured three-step approach. First, he studied the word’s definition and any meaning garnered from its context within the statute.120 Second, he analyzed the purpose and background of the statute.121 Third, he concluded by presenting distinct and intelligible legislative history which supported his position.122

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111. Breyer, supra note 1, at 856.
112. Id.
113. Id.
114. Id.
116. Breyer, supra note 1, at 856.
117. Id. at 861.
119. Id. at 839.
120. Id.
121. Id.
122. Id.
Justice Breyer methodically analyzed the statute in question and delineated a conclusion that was strengthened by the legislative history. In *Babbitt v. Sweet Home*, Justice Breyer joined Justice Stevens in the majority opinion, which followed Justice Breyer's three-step approach. However, the Court failed miserably in its use of legislative history to support its position. The difficulty the Court experienced while determining the statutory purpose of “harm” in the broader context of the Endangered Species Act corresponds to Justice Breyer's fourth circumstance for permitting the use of legislative history. Yet, the majority's reference to legislative history was closer to “looking over a crowd and picking out your friends,” than to the promotion of interpretations that more closely correspond to the expectations of those who helped create the law.

In *Griffin v. Oceanic Contractors, Inc.*, Justice Stevens indicated “that consistent and uniform rules for statutory construction and use of legislative materials are not being followed today.” This appears to be true. “[L]egislative history is a judicial tool, one judges use to resolve difficult problems of judicial interpretation. It can be justified, at least in part, by its ability to help judges interpret statutes, in a manner that makes sense and that will produce a workable set of laws.” However, the use of legislative history as a “judicial tool” does not guard against the human disability of subjectivity.

In *Sweet Home*, the legislative history stated that the original definition of “take” included the “destruction, modification, or curtailment of [a ‘listed species’] habitat or range,” but it was deleted prior to enactment. The majority did not find this legislative fact to be “especially significant,” and proceeded to merge “habitat modification” into the definition of “take.” Nor was the majority affected by the statements

129. Wald, *supra* note 82, at 214 (quoting *Griffin*, 458 U.S. at 590 (Stevens, J., dissenting)).
of "Senator Tunney and Representative Sullivan, each [of whom] described the Act as dealing separately with (1) the problem of predation by man, and (2) the distinct problem of habitat destruction."\textsuperscript{133} The majority completely ignored the legislative history describing the separation of "taking" and "habitat modification."\textsuperscript{134}

The Court's selection of legislative testimony suggesting one outcome over articulate legislative evidence recommending the contrary certainly does not elevate this process to a science. The Court must employ an objective analysis which is capable of producing justifiable results. The opinion in \textit{Sweet Home} is subject to Justice Scalia's criticism of subjectively selecting favorable morsels from the buffet of legislative history, which have little to do with the ESA as written.\textsuperscript{135}

The ESA, as written, has legitimacy and can expect compliance only because it represents, through elected representatives, the consensus and consent of the governed, and as parties to this "social contract" they owe obedience to its directive. Justice Scalia's censure is valid to the extent that the materials used in \textit{Sweet Home} were not reflective of that consensus and were permitted to weigh against materials that did inform of the consensus. But the "social contract" of legislation can, like any other contract, be illuminated as to the consent and consensus of the parties by analyzing materials outside the four corners where the statute is tacit and ambiguous.

Scalia's criticism can be answered, and light on ambiguous and tacit terms can be shed, if legislative history is treated in a manner parallel to parol evidence,\textsuperscript{136} such that only the materials manifesting the legitimacy of the legislative command are used. There is no need to sit in the darkness of the statute's ambiguous and tacit meaning where light can be shed by utilizing select legislative materials which yield the key to the conundrum.

Materials that can aid in discovering consensus generally are committee reports, conference committee reports, statements of floor managers, statements made by the sponsors of the legislation, and committee and subcommittee markups.\textsuperscript{137} These aid discovery because they are gener-

\textsuperscript{133} Brief of the Respondents at 32, \textit{Sweet Home} (94-859); \textit{see} 119 \textit{Cong. Rec.} 25,669 (1973); \textit{id.} 30,162.

\textsuperscript{134} \textit{Sweet Home}, 115 S. Ct. at 2417.

\textsuperscript{135} \textit{id.} at 2428-29 (Scalia, J., dissenting).

\textsuperscript{136} \textit{Restatement (Second) of Contracts} § 213 (1981) (stating if the agreement is ambiguous on its face, or becomes ambiguous in performance, parol evidence is admissible to clarify the parties intent).

\textsuperscript{137} Wald, \textit{supra} note 82, at 201-2.
ated closest to the collective opinion of the legislature and document the considerations, reflections, opinions, and concerns of the creators. Materials which are not generally worthy of consideration are hearings, ad lib comments by marginal participants, post-enactment statements by legislators of the statute's meaning, successful or unsuccessful attempts to amend the bill, and floor debates. These are generally unreliable because they are further removed from the consensus of the legislature and are frequently tainted by partisan anxiety and special interests. These are not absolute categories but are scalar, one end of the scale representing helpfulness of the materials in determining consensus and the opposite representing irrelevancy.

Helpfulness can be determined by compliance with the following criteria: first, the legislative materials consulted must conclusively exhibit and specify the purpose and significance of the statute, phrase, or word being interpreted; and second, if two sources of legislative materials meet the first criterion but render dissimilar outcomes, then the legislative history is inconclusive and does not confirm consensus. Consequently, it may not be relied upon to sustain the interpretation of the statute, phrase or word being considered.

This analysis requires explicit language, uses limited sources, and would proscribe the traditional approach of placing inference upon inference until the desired result is achieved. If the Court had possessed this "objective test" when it decided Sweet Home, its use of legislative history would have been defensible. The majority cited three sources of legislative materials which were helpful in the determination of consensus. The first source was the Committee Reports which did not specifically discuss the meaning of "harm," but indicated that "take" should be defined in the broadest possible terms to include every conceivable manner in which a person can take wildlife. The second source was the statements made by both the Senate and House floor managers of the bill which demonstrated that "habitat modification" and "taking" were viewed as different problems, addressed by different provisions of the act. The third source was the Committee Report which authorized the 1982 Amendment that granted the Secretary the authority to issue permits for incidental takings, which stated, "By use of the word 'incidental' the Committee intends to cover situations in which it is known that a taking...

138. Id.
140. See 119 CONG. REC. 25,669 (1973); id. 30,162.
will occur if the other activity is engaged in but such taking is incidental to, and not the purpose of, the activity."141

The first source did not define the term "harm," but instead stated that the term "take" should be interpreted broadly.142 This does not conclusively exhibit and specify that the purpose and understanding of the term "harm" as used in the definition of "take" includes habitat modification. On the other hand, the statements made by the floor managers indicating that they considered "habitat modification" and "taking" to be two separate issues143 do conclusively exhibit that the authors collectively believed that the term "take" and the phrase "habitat modification" were distinct and dissimilar. The final source which authorized the Secretary to issue permits for incidental takings and defined incidental to include "situations in which it is known that a taking will occur if the other activity is engaged in but such taking is incidental to, and not the purpose of, the activity,"144 does not conclusively exhibit and confirm that the term "harm" as used in the definition of "take" means habitat modification.

The first and third sources of legislative materials, which established absolutely no nexus between "harm" and "habitat modification," do not confirm consensus and should not have been relied upon by the majority to support its interpretation of the ESA. However, the statements made by the floor managers do conclusively exhibit that the authors believed that the term "take" and the phrase "habitat modification" were distinct and dissimilar. Accordingly, the only legislative materials reflecting consensus and legitimacy were ignored by the majority and irrevocably produce the complete antithesis of its opinion.

VI. CONCLUSION

Proponents of the plain meaning approach shout from the mountain tops that the statute is the only law and deference shall be paid to the statute as created by Congress!145 They are also professing to be omniscient, requiring absolutely no "extrastatutory materials in the interpreta-

143. See 119 CONG. REC. 25,669 (1973); id. 30,162.
145. Breyer, supra note 1, at 863.
tion" of ambiguous and complex statutes that greatly affect individual citizens and the population as a whole. However, they miss the point. "No one claims that legislative history is a statute, or even that, in any strong sense, it is 'law.' Rather, legislative history is helpful in trying to understand the meaning of the words that do make up the statute or the 'law.'" 147

A statute, as written, has legitimacy and can expect compliance only because it represents, through elected representatives, the consensus and consent of the governed. The quest for consensus mandates substantially more than a judiciary of isolated critical thinkers with a dictionary and an ambiguous statute. However, statutory interpretation also requires more structure and predictability than the current practice of arbitrarily selecting a favorite passage from a statute's legislative past. Statutory interpretation requires an "objective test," one capable of assailing the human temptation to slide into policy preferences. "One judge's excess very well may be another's moderation." 148 To avoid that element of subjectivity, our "judgment[s] should be informed by objective factors to the maximum possible extent." 149 This elusive precept could have rescued a community—a community which now owns a "national" forest.

146. Starr, supra note 77, at 373.
147. Breyer, supra note 1, at 863.
149. Id. (quoting Rummel v. Estelle, 445 U.S. 263, 274 (1980)).
THE SUPREME COURT PLACES THE ENDANGERED SPECIES ACT IN “HARM’S” WAY

by Patrick J. Beirne

“The future of the Endangered Species Act (ESA) lately has come under intense scrutiny both within and outside the federal government. Probably the most intractable aspect of the debate is that perennial lightning rod: the property rights issue. As currently written, the ESA has at least the potential to curtail private property use in various ways-whatever its actual impact as implemented may be.”

I. INTRODUCTION

As early as 1922, Justice Holmes warned of the dangers of letting regulatory power get so expansive as to do away with private property rights: “We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.” In 1992, Justice Scalia wrote: “[T]he government’s power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits.” Scalia further reasoned that the powers of the state to regulate private property must not be left “unbridled” for “the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed].” It is with these words in mind that the author will analyze the ESA, recent Supreme Court decisions, and the future of environmental regulations with regard to the Fifth Amendment to the Constitution.

“To no one’s surprise, the hundreds of species protected by the ESA are sometimes found on private property. When they are, the ESA may pit private economic activity against national concern for aesthetic, ecological, scientific, and recreational values.” This article will examine the recent decision in Babbitt v. Sweet Home Chapter of Communities for a

4. Id. at 2893 (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).
5. Meltz, supra note 1, at 370.
Great Oregon, including its history, basis for decision, and most importantly, its effects on private property owners. Comparison will be made with Justice Scalia’s warnings in his 1992 majority opinion in Lucas v. South Carolina Coastal Council concerning the possible overreaching of environmental statutes. By regulating federal and private activities, the ESA functions as a land use regulation. While the extent of land use regulations varies from a simple zoning designation to a complete deprivation of all use of the land, the ESA certainly has the potential to raise Fifth Amendment takings issues.

Analysis of Fifth Amendment implications of Sweet Home first requires a review of the Endangered Species Act of 1973, its pertinent provisions, and how it operates. Second, application of the act to the clear detriment of rights of property owners will be illustrated through analysis of Sweet Home. Third, warnings from the dissent of Sweet Home and the decision in Lucas will be included to show the fundamental problems brought about through the result reached in the Sweet Home majority opinion. Finally, without correction of the judicial legislation in Sweet Home, private property owners will be forced to bear the financial burden of protecting endangered and threatened species on their own.

II. THE ENDANGERED SPECIES ACT OF 1973

A. THE DETERMINATION OF WHETHER A SPECIES IS "ENDANGERED"

"[T]he Endangered Species Act of 1973 represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." The ESA was enacted to provide "[a] means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." The Supreme Court has noted that both the language of the ESA and its legislative history express the clear desire "to halt and reverse the trend toward species extinction, whatever the cost." 

Section 4 of the ESA provides that the secretary is to determine which species are endangered or threatened within the meaning of the Act

9. Tennessee Valley Auth., 437 U.S. at 184. In Tennessee Valley Auth., the Court stopped construction on a federally funded Tellico Dam because it was likely to seriously threaten the continued existence of the snail darter. Id. at 172-73.
10. "The term 'endangered species' means any species which is in danger of extinction throughout all or a significant portion of its range . . . ,” 16 U.S.C. § 1532(6) (1994), while
and is to maintain a list of species so designated. In determining whether or not to include a species on the list, the Secretary is required to consider "the present or threatened destruction, modification, or curtailment of its habitat or range, as well as "overutilization," "disease or predation," "inadequacy of regulatory mechanisms," or any other factors "affecting its continued existence." All decisions regarding a species' addition to or removal from one of the lists shall be based on data obtained from the most reliable scientific or commercial data available.

B. THE SECTION 9 PROHIBITION ON "TAKING"

Section 9 of the ESA makes it "[u]nlawful for any person subject to the jurisdiction of the United States to take any such [endangered or threatened] species within the United States or the territorial sea of the United States." "Person" includes private property owners (individuals or corporations) as well as the government. In addition to expressly forbidding any landowner to "take" a species, § 1538 forbids a landowner to "import," "export," "possess," "sell," "deliver," "carry," "transport," "ship," "offer for sale," "receive," or attempt to do any of the foregoing. "Take," as set forth in the ESA is further defined to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." No guidance as to whether "take" is to imply any particular conduct, such as directed or intentional acts, is in the Act anywhere. The only insight as to the intended statutory meaning of "take" is through the use of the synonymous concepts stated above, which surround "take" in the prohibition laundry list of § 3. Under § 4 of the ESA, the Secretary of the Interior is responsible for adopting regulations in furtherance of the provisions of the ESA.

a threatened species is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." Id. § 1532(20).

11. Id. § 1533.
12. Id. § 1533(a)(1).
13. Id. § 1533(b)(1)(A).
14. Id. § 1538(a)(1)(B) (emphasis added).
15. Id. § 1532(13).
16. Id. § 1538(a)(1).
17. Id. § 1532(19).
18. Id. § 1538(a)(1).
19. Id. § 1533(d).
C. ADDITIONAL PROVISIONS OF THE ESA

In order to protect and preserve needed habitat for threatened and endangered species, the ESA authorizes the Secretary to acquire land from private property owners to aid in the preservation of endangered or threatened species.20 "[T]o carry out such a program, the appropriate Secretary . . . is authorized to acquire by purchase, donation, or otherwise, lands, waters, or interest therein, and such authority shall be in addition to any other land acquisition authority vested in him."21 The funds made available for such pursuits shall come from the Land and Water Conservation Fund Act of 1965.22

With respect to restrictions on land use activities, the ESA clearly differentiates between the Act’s scope on federally owned lands as opposed to privately owned lands. The ESA, through provisions contained exclusively in § 7, applies a much greater check for federal activities occurring on federally owned lands than private activities on privately owned lands.23 Section 7 requires "[t]hat any action authorized, funded, or carried out by such agency (hereinafter an . . . ‘agency action’) is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined . . . to be critical, unless such agency has been granted an exemption."24 Section 7, which is more strict on governmental activities than § 9 on private activities, therefore expressly prohibits the adverse “modification of habitat”25 of endangered or threatened species. No such prohibition on private property owners can be found in print under § 9.26

20. Id. § 1534(a).
21. Id. § 1534(a)(2).
22. Id. § 1534(b).
23. Id. § 1536.
24. Id. § 1536(a)(2).
25. Id.
26. For a discussion of the legal significance of the omission in § 9 after the inclusion in
D. THE 1982 AMENDMENTS TO THE ESA

In 1982, Congress amended the ESA to include a provision by which the Secretary is empowered to grant permits for incidental "takings" of endangered or threatened species.27 To obtain an incidental take permit, an applicant must apply to the Secretary.28 Such application shall show "the impact which will likely result from such taking; [and] what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps."29 It is also clear that the applicant will need to provide the Secretary with a list of "what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized."30

E. PROMULGATION OF THE FWS REGULATION

In an effort to make the legislation concrete, and under the authority granted it by the ESA, the Fish and Wildlife Services (FWS) promulgated a regulation defining "harm" to mean "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering."31 This regulation was adopted in 1975 and subsequently amended in 1981 to reflect an intent to include only acts which actually "kill or injure wildlife."32 Since the regulation's promulgation and first Supreme Court test in Tennessee Valley Authority v. Hill (TVA),33 Congress arguably acquiesced in the definition by amending the Act in 1982 without changing § 9's "take" prohibition or relevant sections.34

§ 7, see Babbitt v. Sweet Home Chapter of Communities for A Great Oregon, 115 S. Ct. 2407, 2425 (1995) (Scalia, J., dissenting). "[C]ongress's explicit prohibition of habitat modification in the one section would bar the inference of an implicit prohibition of habitat modification in the other section." Id.

28. Id. § 1539(a)(2)(A).
29. Id. § 1539(a)(2)(A)(i), (ii).
30. Id. § 1539(a)(2)(A)(iii).
31. 50 C.F.R. § 17.3 para. 10 (1994) (emphasis added).
III. THE ESA APPLIED: BABBITT v. SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON

Babbitt v. Sweet Home Chapter of Communities for a Great Oregon was brought as a declaratory action by private landowners seeking to have the Secretary’s regulation prohibiting “habitat modification” on private lands declared invalid on its face. For the most part, the plaintiffs were interested in harvesting or working their privately owned lands. However, due to the regulations of the Secretary, the plaintiffs essentially had to halt their activities and leave their lands in the natural state to protect a habitat either used by endangered species or, in some instances, one which might only someday be suitable to a currently endangered or threatened species.

A. FACTS AND PROCEDURE BELOW

The plaintiffs consisted of “small landowners, logging companies, and families dependent on the forest products industries in the Pacific Northwest and in the Southeast, and organizations that represent their interests.” They contended that the regulations promulgated by the Secretary reduced the lumber supply, limited their income from trust lands, forced them to lay off employees, and even left some of them incapable of supporting their families. As a result the plaintiffs brought a declaratory action against the Director of the FWS “to challenge the statutory validity of the Secretary’s regulation defining ‘harm,’ particularly the inclusion of habitat modification and degradation in the definition.”

Plaintiffs argued that:

By regulation, the U.S. Fish and Wildlife Service had defined “harm” in a way that focused exclusively on the ultimate effect that any action had on a wildlife species; by its terms, it extended the ESA to ordinary land...
use activities ("habitat modifications"), like those engaged in by Respondents [plaintiffs] here, neither directed at wildlife nor directly injuring wildlife. 41

In this manner, the plaintiffs argued that the Fish and Wildlife Service impermissibly expanded the meaning of the term "harm" under the ESA. 42

The plaintiffs argued that § 9 of the ESA applied only to activities which were directed at wildlife. 43 However, they argued that regulation by the Secretary did away with this statutory requirement of "directed action" and thus "sweeps within the 'take' prohibition a host of activities" not included by Congress in the ESA. 44 Plaintiffs made three arguments in favor of their contention that Congress did not intend "take" to include habitat modification.

First, they correctly noted that language in the Senate's original version of the ESA would have defined "take" to include "destruction, modification, or curtailment of [the] habitat or range" of fish or wildlife, [FN6] but the Senate deleted that language from the bill before enacting it. Second, respondents argued that Congress intended the Act's express authorization for the Federal Government to buy private land in order to prevent habitat degradation in § 5 to be the exclusive check against habitat modification on private property. Third, because the Senate added the term "harm" to the definition of "take" in a floor amendment without debate, respondents argued that the court should not interpret the term so expansively as to include habitat modification. 45

On defendant's motion for summary judgment, the United States District Court for the District of Columbia rejected all three of plaintiffs' arguments. 46 The district court held that the "Secretary's definition of harm at § 17.3 is entirely consistent with the ESA's definition of take." 47 "Congress made clear that it was defining 'take' extremely broadly, 'to include every conceivable way in which a person can "take" or attempt to "take."' 48 In so holding, the district court followed the pre-

42. Id.
43. Id. at 2 (emphasis added).
44. Id. at 3.
45. Sweet Home, 115 S. Ct. at 2410-11.
47. Id. at 284.
48. Id. (citing S. REP. NO. 307, 93d Cong., 1st Sess. 7 (1973)).
cedent of TVA, and Palila v. Hawaii Department of Land & Natural Resources.

In Palila, the court required the removal of goats and sheep from public land because they were destroying the mamane-naio woodlands, an area which was absolutely essential for the survival of the palila, an endangered species of bird. Similarly, the United States Supreme Court in TVA addressed § 7 of the Act as it halted construction on the federally funded Tellico dam. In fact, in Tennessee Valley Authority, the Court noted that "the legislative history undergirding § 7 reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species." Thus, as early as 1978, the Court recognized that Congress, in enacting the ESA, intentionally included "habitat modification" in § 7, but did not anywhere include such restrictions in § 9.

B. THE APPEALS

The district court opinion was initially affirmed by a 2-1 appellate decision. However, the United States Court of Appeals for the District of Columbia Circuit subsequently reversed its initial decision and held "invalid the Fish & Wildlife Service regulation defining 'harm' to embrace habitat modifications." The court reasoned that the meaning of the term "take" must be construed by reference to those around it, and thus applied the maxim "noscitur a sociis." By looking at all other terms used to define "take" under § 2 of the Act, the court found that all involve a substantially direct application of force, which the Service's

50. 852 F.2d 1106 (9th Cir. 1988).
51. Id. (emphasis added).
53. Id. at 184 (emphasis added).
56. Id. at 1465-66. The court found that "[t]he structure and history of the Act confirm this [narrow] reading." Id. at 1466.
57. As defined by BLACK'S LAW DICTIONARY 1060 (6th ed. 1990): "It is known from its associates. The meaning of a word is or may be known from the accompanying words. Under the doctrine of noscitur a sociis, the meaning of questionable or doubtful words or phrases in a statute may be ascertained by reference to the meaning of other words or phrases associated with it."
concept of forbidden habitat modification altogether lacks. The reason for the appellate court’s change in heart is attributable to its division, originally, on the issue of the expansiveness of the word “harm” within the meaning of “take.”

C. THE REASONING OF THE MAJORITY IN SWEET HOME

The United States Supreme Court issued a 6-3 decision in Sweet Home on June 29, 1995. At issue in was whether the Secretary of the Interior had exceeded his authority in defining the term “take” under the ESA. The Court was required to determine whether the term “take,” within its context in the statute, could include the “possibility to harm” an endangered species, such as the regulation promulgated by the FWS.

The Court proceeded under the fundamental assumptions that the plaintiffs had no intent to harm either the red-cockaded woodpecker or the spotted owl, and that the only restrictions keeping them from engaging in what would otherwise be “entirely proper activity” was the FWS regulation. In its decision, the Court found three reasons for concluding that the Secretary’s interpretation was reasonable: “First, an ordinary understanding of the word ‘harm’ supports it.” “Second, the broad purpose of the ESA supports the Secretary’s decision to extend protection against activities that cause the precise harms Congress enacted the statute to avoid.” The third reason was “the fact that Congress in 1982 authorized the Secretary to issue permits for takings that § 9(a)(1)(B) would otherwise prohibit.” The Court found that an overwhelming amount of weight with regard to the general intent of the statutory construction was in favor of allowing the Secretary’s regulation interpreting the statute to stand.

The Court found it clear that, under Webster’s definition, “harm” could easily cover “indirect as well as direct injuries.” This finding

58. Babbitt II, 17 F.3d 1463, 1465.
59. Id.
61. Id.
62. Id. at 2412 (emphasis added).
63. Id. at 2412.
64. Id. at 2413.
65. Id. at 2414.
66. Id. at 2416, 2418.
67. Id. at 2412-13.
was based at least in part on TVA, where the Court had found that the ESA was the “most comprehensive legislation for the preservation of endangered species ever enacted,” and that the “plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.” Only if the Court upheld the Secretary’s regulation, the majority believed, could the overall intent of the statute be achieved.

The Supreme Court rejected the D.C. Circuit’s application of noscitur a sociis to restrict the definition of “harm” for three reasons. First, the Court asserted that other words in the definitional list “do not require direct applications of force.” Second, the Court rejected any requirement of “intention” or “purpose” in the definition of “take” as inconsistent with § 9’s proscription of “knowing” action. Third, and most troubling, the Court misused the canon of noscitur a sociis to amplify the meaning of “harm” in the definition of “take” rather than focusing the scope of the general word “harm” through the lens of the specific words in the list as the canon in fact prescribes. The Court claimed that the D.C. Circuit’s application of the canon to narrow the meaning of “harm” equated its meaning to that of the other words present in the list “thereby denying it independent meaning.”

With regard to statutory structure, the Court found unpersuasive the argument that the statutory structure provided for governmental regulation of private lands through the Land Acquisition provisions of § 5 of the ESA. Section 5 of the ESA is the provision which provides for government acquisition of private lands for the preservation of species habitat. However, the Court did note that “purchasing habitat lands may well cost the Government less in many circumstances than in pursuing civil or criminal penalties.”

69. Id. at 184 (emphasis added).
71. Id.
72. Id.
73. Id.
75. Id. at 2415.
77. Sweet Home, 115 S. Ct. at 2415.
In its analysis, the Supreme Court recognized the well established test under *Chevron*, but found it inapplicable: "We need not decide whether the statutory definition of 'take' compels the Secretary's interpretation of 'harm,' because our conclusions that Congress did not unambiguously manifest its intent to adopt respondents' view and that the Secretary's interpretation is reasonable." Thus, the Court never even considered the "reasonableness" element of the *Chevron* "two-step." Further, the Court found that "[t]he latitude the ESA gives the Secretary in enforcing the statute, together with the degree of regulatory expertise necessary to its enforcement, establishes that we owe some degree of deference to the Secretary's reasonable interpretation." The Court overturned the court of appeals' decision and held that "take" did not necessarily require a directed action.

**D. Scalia's Dissent**

In the dissent, Justice Scalia did not hesitate to criticize the majority opinion because its "holding that the hunting and killing prohibition incidentally preserves habitat on private lands imposes unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use." Justice Scalia sharply dissented from the majority because of three fundamental premises found within the regulation itself and the reasoning used by the majority to uphold it. First, the regulation prohibited acts which were no more than the "cause-in-fact" of death or injury to wildlife. Second, the regulation required less than an act, as an omission to protect wildlife may suffice for a "taking" under the regulation. Third, and most important of all to Scalia, the regulation "encompasses injury inflicted, not only upon individual animals, but upon populations of the protected species." "None of these three features of the regulation can be found in the statutory provisions supposed to authorize it." Scalia pointed out

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78. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Chevron* set forth a two-step test to determine the validity of regulations adopted under the guise of legislative authority: (1) Is the legislative intent ambiguous? and, if so, (2) Is the agency's regulation reasonable within the confines of the legislative authority?


81. *Id.* at 2421 (Rehnquist, C.J. & Thomas, J. concurring with Scalia, J. in dissent).

82. *Id.*

83. *Id.* at 2421-22.

84. *Id.* at 2422.
that the regulation covered actions which did not "kill" or "injure" any animals, but rather only impaired the species' breeding habits. Such protection, it may be argued, is not even afforded citizens. In his estimation, the regulatory use of "take" is inconsistent with the common law and constitutional notions of "take." 86

Scalia proceeded through an exhaustive analysis on "take" and its definition in the ESA concentrating on four major points. First, while the majority was correct that the term "take" was expanded by the Act, its only expansion of the age old concept of "take" was to include not only completed takings but also the process of taking. The majority further expanded this meaning of the term "take" by focusing excessively on the word's definition in the act rather than the word itself. 87 Second, the application of the Court's definition made "nonsense" of the very word which the definition was attempting to define. "Harm," an aid to understanding "take," was defined in such a way by the Court as to completely disregard the necessary elements of "take" itself. 88 Third, "harm" is not the only term used in defining "take." As such, the maxim noscitur a sociis was applicable to limit the term "harm" to the similar meaning it shares with the other nine words, an interpretation which requires some direct force. 89 Fourth, the penalty provisions under the ESA lend further support for a more limited definition of "harm" than the majority assigned to it. By forgoing a "direct" requirement under the Act, the Court made every farmer subject to strict liability in the carrying out of everyday activities. 90

85. Id.
86. Id.
87. Scalia observed that "[t]he tempting fallacy—which the Court commits with abandon... is to assume that once defined, 'take' loses any significance, and it is only the definition that matters." Id. at 2423. By doing this, "[t]he Court treats the statute as though Congress had directly enacted the § 1532(19) definition as a serf-executing prohibition, and had not enacted § 1538(a)(1)(B) at all." Id.
88. Scalia admonished that the Court's interpretation requires the Court "to accept that a farmer who tills his field and causes erosion that makes silt run in a nearby river which depletes oxygen and thereby 'impairs [the] breeding' of protected fish, has 'taken' or 'attempted to take' the fish." Id. at 2423.
89. Scalia pointed to a memorandum of April 17, 1981, reprinted in 46 Fed. Reg. 29490, 29491, written by the Solicitor of the Fish and Wildlife Service. In the Solicitor's legal opinion on § 1532(19), "the term 'harm' should be interpreted to include only those actions that are directed against, and likely to injure or kill, individual wildlife." Id. at 2423-24.
90. "A large number of routine private activities—farming, for example, ranching, roadbuilding, construction and logging—are subjected to strict-liability penalties when they fortuitously injure protected wildlife, no matter how remote the chain of causation and no matter how difficult to foresee (or to disprove) the 'injury' may be." Id. at 2424.
Scalia did not follow what he perceived as a simplistic approach by the majority in an effort to carry out the "primary objective" of the ESA. "I thought we had renounced the vice of simplistically... assum[ing] that whatever furthers the statute's primary objective must be the law." In Scalia's opinion, "the whole text" of the Act must be read to determine the purpose of Congress. The legislative history of the Act thus supports the clear reading of the ESA which Scalia attributed it. Although Scalia did not believe that legislative history is "a legitimate and reliable tool of interpretation," he addressed the legislative history anyway. In support of his argument Scalia cited to the excerpts of the discussions which took place in 1973 at the introduction of the bill:

[T]he principal threat to animals stems from destruction of their habitat... [The bill] will meet this problem by providing funds for acquisition of critical habitat... It will also enable the Department of Agriculture to cooperate with willing landowners who desire to assist in the protection of endangered species, but who are understandably unwilling to do so at excessive cost to themselves. Another hazard to endangered species arises from those who would capture or kill them for pleasure or profit. There is no way that Congress can make it less pleasurable for a person to take an animal, but we can certainly make it less profitable for them to do so.

Scalia's final contention regarding the regulatory definition of "take" was that a subsequent legislative amendment to the act cannot be construed as legislative approval of the agency created definition of "take." This is so because the subsequent amendments were not a reenactment of the section in dispute.

**E. ANALYSIS OF SWEET HOME**

Congress enacted the ESA to protect endangered and threatened species from extinction. In *TVA*, the Court said that it is clear that while a direct predation on animals is indeed threatening to endangered species, a loss or degradation of habitat is generally recognized as the greatest
threat to the maintenance of endangered or threatened species. The ESA protects against both the depletion of needed habitat and human predation. Sweet Home allows an agency to promulgate a regulation requiring the maintenance of private land in a natural state. This regulation is in the interest of preservation of endangered or threatened species, having found that this is a highly valued goal worthy of achievement. Through a look at the statutory structure it becomes painfully clear that Congress intended habitat modifications to apply only to federal lands.

1. Statutory Structure

The habitat of listed species is considered in only two sections: the § 7 prohibitions applicable to federal land and in the land acquisition provision of § 5. Section 7 of the Act provides more strict controls for what may happen to lands than does § 9, but is limited in application to federal lands. Section 5 of the Act provides authority for government purchases of private land so as to preserve needed habitat. A reasonable implication is that only lands already owned or to be acquired by the government are subject to the habitat modification restrictions.

In § 9, at issue in Sweet Home, no provision or even any mention is made of adverse modifications to the habitat. By the construction maxim of inclusio unius est exclusio alterius, where the legislature includes certain specific language in one section of the legislation but not another, the latter section must be read as if that specific language were intentionally excluded. Furthermore, the court has a "[d]uty to refrain from reading a phrase into the statute when Congress has left it out." This maxim would prohibit the court from reading into § 9 a prohibition against the private modification of the habitat because such a reading would contradict the ability of Congress to write what it means.

2. Noscitur a Sociis

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99. Id.
101. Id. § 1534.
106. For further development and support of this argument see Sweet Home, 115 S. Ct. 2407, 2424 (1995) (Scalia, J., dissenting).
The D.C. Circuit’s decision was predicated in large part on an application of the maxim *noscitur a sociis* to the enumeration of terms to be used in helping to define “take.” The Supreme Court rejected the D.C. Circuit’s application of *noscitur a sociis* to restrict the definition of “harm” for three reasons. First, the Court asserted that other words in the definitional list “do not require direct applications of force.” Justice Scalia correctly noted that to “harass” and to “pursue” are the steps initiating a taking, signifying that the attempt to take, as well as the completed act, is within the prohibition. Yet, Scalia noted that the majority’s concern with “force” was beside the point since the meaning common to all the listed words is “affirmative conduct intentionally directed against a particular animal or animals.”

Second, with Justice Scalia’s criticism apparently in mind, the Court rejected any requirement of “intention” or “purpose” in the definition of “take” as inconsistent with § 9’s proscription of “knowing” action. Justice Scalia described a situation where a hunter shoots a protected species, mistaking it for an unprotected species. Such conduct would not be “knowing,” since there is a mistake of fact, but would nonetheless be “purposeful” and would therefore be a violation of § 9(a)(1)(B). Such conduct would not “knowingly violate” but, rather, “otherwise violate” § 9(a)(1)(B) and would be punishable under the lesser penalties of § 11(a)(1), rather than the more severe penalties imposed for “knowing” violations. This distinction in the § 11 penalty provisions evinces congressional awareness that knowing conduct requires a heavier penalty for deterrence than does purposeful but unwitting conduct.

Third, and most troubling, the Court misused the canon of *noscitur a sociis* to amplify the meaning of “harm” in the definition of “take”
rather than focus the scope of the general word "harm" through the lens of the specific words in the list as the canon in fact prescribes. The Court claimed that the D.C. Circuit's application of the canon to narrow the meaning of "harm" equated its meaning to that of the other words present in the list "thereby denying it independent meaning. The canon, to the contrary, counsels that a word "gathers meaning from the words around it."117

In choosing this particular description of the canon from Jarecki, the Court subtly but erroneously canonized its own assumption that the "whatever the cost"118 dicta from TVA should govern the application of the Act regardless of the express words of the Act or the well settled teachings of statutory interpretation adopted by the Court. The Sweet Home court sought to conjure that "a word gathers scope from the words around it" from Chief Justice Warren's phrase in Jarecki, that "a word gathers meaning from the words around it."119 Yet, if the meanings of the words around "harm" are more restrictive, as here, the canon would have to be inverted to dilate120 rather than focus "harm's" scope.

Just as a word gathers meaning121 from the words around it, so Chief Justice Warren's phrase gathers meaning from the sentences around it in Jarecki. Chief Justice Warren would be of one accord with Justice Scalia that noscitur a sociis serves to sharpen ambiguous Congressional intent rather than dilate it. The entire passage from Jarecki provides:

We look first to the face of the statute. "Discovery" is a word usable in many contexts and with various shades of meaning. Here, however, it does not stand alone, but gathers meaning from the words around it. These words strongly suggest that a precise and narrow application was intended in [§] 456. The three words in conjunction, "exploration," "discovery" and "prospecting," all describe income-producing activity in the oil and gas and mining industries, but it is difficult to conceive of any other industry to which they all apply. Certainly the development and manufacture of drugs and cameras are not such industries. The maxim noscitur a sociis [sic], that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of

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120. Sweet Home, 115 S. Ct. at 2424 (Scalia, J., dissenting).
121. But not scope.
Congress. The application of the maxim here leads to the conclusion that "discovery" in [§] 456 means only the discovery of mineral resources. 122

Chief Justice Warren’s application of noscitur a sociis is foursquare with well-established doctrines limiting the general words in a series by the specific words:

If the legislative intent or meaning of a statute is not clear, the meaning of doubtful words may be determined by reference to their relationship with other associated words and phrases. Thus, when two or more words are grouped together, and ordinarily have a similar meaning, but are not equally comprehensive, the general word will be limited and qualified by the special word. 123

The case Chief Justice Warren chose to cite in Jarecki exemplifies such a limitation of a comprehensive word. 124 In Neal v. Clark, Justice Harlan invoked the complementary principle of ejusdem generis to explain why the more general word so defined in fact has independent meaning and is not surplusage at all:

[In the construction of statutes, likewise, the rule noscitur a sociis is very frequently applied; the meaning of a word, and, consequently, the intention of the legislature, being ascertained by reference to the context, and by considering whether the word in question and the surrounding words are, in fact, ejusdem generis, and referable to the same subject-matter.

Applying these rules to this case, we remark, that, in the section of the law of 1867 which sets forth the classes of debts which are exempted from the operation of a discharge in bankruptcy, debts created by 'fraud' are associated directly with debts created by 'embezzlement.' Such association justifies, if it does not imperatively require, the conclusion that the 'fraud' referred to in that section means positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, as does embezzlement; and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality. 125

Sutherland explains how Justice Harlan's principle of ejusdem generis gives independent meaning to both the general and specific words. Where specific words are listed following general ones, the doctrine restricts application of the general term to things that are similar to those enumerated. Ejusdem generis has been called a common drafting technique

123. 2A NORMAN J. SINGER, SUTHERLAND STAT. CONST. § 47.16 (5th ed. 1992).
125. Id. (citations omitted).
designed to save the legislature from spelling out in advance every contingency in which the statute could apply. . . .

The rule 'accomplishes the purpose of giving effect to both the particular and the general words by treating the particular words as indicating the class, and the general words as extending the provisions of the statute to everything embraced in that class, though not specifically named by particular words.' 126

Justice Harlan, in fact, relied in Neal upon an 1844 case that evinced this rationale precisely:

If the act [exempting from discharge in bankruptcy] embrace such a debt, it will be difficult to limit its application. It must include all debts arising from agencies; and indeed all cases where the law implies an obligation from the trust reposed in the debtor. Such a construction would have left but few debts on which the law could operate. In almost all the commercial transactions of the country, confidence is reposed in the punctuality and integrity of the debtor, and a violation of these is, in a commercial sense, a disregard of a trust. But this is not the relation spoken of in the first section of the act.

The cases enumerated, "the defalcation of a public officer," "executor," "administrator," "guardian," or "trustee," are not cases of implied but special trusts, and the 'other fiduciary capacity' mentioned, must mean the same class of trusts. The act speaks of technical trusts, and not those which the law implies from the contract. A factor is not, therefore, within the act. 127

Or, as Sutherland summarizes:

The doctrine of ejusdem generis calls for more than merely an abstract exercise in semantics and formal logic. It rests on practical insights about everyday language usage. When people list a number of particulars and add a general reference like "and so forth" they mean to include by use of the general reference not everything else, but only others of like kind. 128

The Sweet Home majority need not have parsed the Nineteenth Century foundations of statutory interpretation, as Chief Justice Warren had taken care to do, to discover that general words enumerated with specific words serve to describe a particular class, "not everything else." 129 It

126. 2A SINGER, supra note 123, § 47.17 (emphasis added) (citing Nat'l Bank of Commerce v. Estate of Ripley, 61 S.W. 587, 588 (Mo. 1901)).
128. 2A SINGER, supra note 123, § 47.18.
129. Id.
need only have consulted Justice Blackmun’s thorough treatment of *noscitur a sociis* in *National Muffler Dealers Association v. United States (NMDA).* 130

In *NMDA,* an association of Midas Muffler franchisees sought tax-exempt status as a "business league" under § 501(c)(6) of the Internal Revenue Code which provided an exemption for "business leagues, chambers of commerce, real-estate boards, or boards of trade, or professional football leagues." 131 As "business leagues" is a term so general as to render an interpretive regulation appropriate, 132 the Internal Revenue Service defined "business league" by Treas. Reg. § 1.501(c)(6)-1, which provided:

A business league is an association of persons having some common business interest, the purpose of which is to promote such common interest and not to engage in a regular business of a kind ordinarily carried on for profit. It is an organization of the same general class as a chamber of commerce or board of trade. Thus, its activities should be directed to the improvement of business considerations of one or more lines of business as distinguished from the performance of particular services for individual persons . . . . 133

The Internal Revenue Service denied the NMDA’s exemption as a "business league" since its "purpose was too narrow to satisfy the line-of-business test." 134 The NMDA, composed solely of Midas dealers, sought advantages for the group both from Midas and vis-a-vis other muffler dealers. 135 The Court adopted the Seventh Circuit’s application of *noscitur a sociis* to the statute, to find that the specific terms 136 following the general term “business league” carried the sense of industry-wide or locality-wide organizations, with a purpose to benefit the entire industry or locale rather than one set of competitors within the industry. 137

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134. Nat’l Mufflers Dealers Ass’n, 440 U.S. at 476.
135. Id. at 473-76.
136. Chambers of commerce, real estate boards, boards of trade, or professional football leagues.
137. Those who have failed to meet the “line of business” test, in the view of the Commissioner, include groups composed of businesses that market a single brand of automobile, or have licenses to a single patented product, or bottle one type of soft drink. The Commissioner has reasoned that these groups are not designed to better conditions in an entire industrial
The Court rejected the NMDA’s contention that the interpretation of “business leagues” be expanded beyond the “line of business” test adopted by the I.R.S. on the basis of special conditions faced by franchisees: “These arguments are not unlike those that persuaded the Senate to add the business-league exemption to the 1913 Bill. Perhaps Congress would find this forceful today. The Association, however, needed more than a plausible policy argument to prevail here.”

As the I.R.S.’s line-of-business test bore a “fair relationship to the language of the statute,” the Court upheld the interpretation citing Jarecki’s language that noscitur a sociis is “[w]isely applied . . . in order to avoid the giving of unintended breadth to the Acts of Congress.”

Had the Sweet Home Court followed Jarecki and NMDA, “harass” and “harm,” as general words, would clearly refer to a class delimited by the specific terms of the statute indicating “affirmative conduct intentionally directed against a particular animal or animals.” While Congress might find the plausible policy of habitat modification forceful today, defining “harm” narrowly would have wisely avoided giving unintended breadth to the Act.

3. Legislative History

The legislative history of the ESA is riddled with tension. As Scalia pointed out, the legislative history is not as supportive of the proposition that the ESA is to be able to restrict private property owner’s rights. The majority looked at the broad and somewhat misdirected general purposes of the statute rather than specific floor debates, hearings, or congressional input. A look at this type of legislative history reveals that while the intent and purpose of the statute may have been to stop species extinction by whatever means possible, and at any cost, several legislators specifically noted that the Act would provide for the acquisition of land so that some habitat could be established and maintained to carry out these broad purposes. The statement of law emerging from Congress is, like any legislation, laden with qualifications and limitations which are subtrac-
tions from the "broad purposes" of the legislation. Further, the record reveals that the interaction with private property owners was characterized as productive negotiations with willing property owners that are supportive of the ESA and eager to help in this effort of species preservation.

The discussion will yield, through a look at *Lucas v. South Carolina Coastal Council*, what the potentially disastrous consequences of the *Sweet Home* decision are.

IV. REGULATORY TAKINGS

The decision in *Sweet Home* is important not only for its undoubtedly noble efforts to save the environment in which we live and the creatures and species within it, but also because it has created a potentially volatile constitutional dispute.\(^{143}\) The very expansiveness of the government's power under *Sweet Home* raises the question of its limits under the Fifth Amendment. A strong case may be made that the regulation in *Sweet Home* strips all economically viable use of land from the property owners and constitutes a taking of property without just compensation. This issue, however, may have been settled already, in 1992, by the Supreme Court's decision in *Lucas v. South Carolina Coastal Council*.\(^{144}\) Not surprisingly, the author of the opinion was none other than Justice Antonin Scalia.

In *Lucas*, the Petitioner purchased two lots on a barrier island in South Carolina with intentions of erecting one single family house on each lot.\(^{145}\) At the time Lucas purchased these lots, all of the surrounding lots were already developed with similar structures, and no zoning restrictions were in place on his land preventing similar development.\(^{146}\) In 1988, two years after Lucas purchased his lots, the Beachfront Management Act was adopted to protect against the erosion of the barrier islands, a vital resource for the protection of the integrity of the shoreline.\(^{147}\) As a result, Lucas' plans for building two residential houses on his lots collapsed. Essentially, the only thing Lucas was allowed to do on his lots was erect certain nonhabitable improvements such as wooden

\(^{143}\) U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").


\(^{145}\) Id.

\(^{146}\) Id.

\(^{147}\) Id.
access ramps or decks. Lucas did not challenge the validity of the legislation enacted, but instead argued that it constituted a taking of his property without just compensation.

A. PROCEDURE BELOW

Lucas filed his case in the South Carolina Court of Common Pleas. The court of common pleas held in Lucas' favor. The court found that the prohibition "deprived Lucas of any reasonable economic use of the lots, . . . eliminated the unrestricted right of use, and rendered them valueless by respondent's enforcement of the coastal-zone construction ban." Thus, the court ordered that full compensation be paid for the taking of Lucas' land.

The Supreme Court of South Carolina reversed. The court noted that "the United States Supreme Court has never articulated a 'set formula' to determine where regulation ends and taking begins." Rather, the court believed that the Supreme Court has decided takings cases on a case by case basis. The Supreme Court of South Carolina chose to follow Mugler v. Kansas, which held that compensation was not due if the legislation was aimed at preventing a "serious public harm," and was thus a valid exercise by the government for which no compensation was due.

Two justices on the South Carolina Supreme Court dissented from this position because they did not believe that the purpose of the Beachfront Management Act was to prevent a nuisance, as defined at common law. Instead, they believed that the Beachfront Management Act did not have as "its primary purpose the prevention of a nuisance," because the "activities and effects the Act seeks to prohibit do not rise to

149. Lucas, 112 S. Ct. at 2890.
150. Id.
151. Id. No decisions are reported prior to the decision of the Supreme Court of South Carolina in Lucas v. South Carolina Coastal Council, 404 S.E.2d 895 (S.C. 1991), rev'd, 112 S. Ct. 2886 (1992).
152. Lucas, 112 S. Ct. at 2890.
154. Id.
156. Lucas, 404 S.E.2d at 901-02.
157. Harwell & Chandler, JJ.
158. Lucas, 404 S.E.2d at 906.
such a level as to be fairly considered 'noxious.'" 159

The majority reasoned that because Lucas did not challenge the validity of the enacted legislation or their findings that construction would cause serious public harm, Lucas implicitly conceded its additional finding that such construction would constitute a nuisance and was thus barred under the nuisance exception set forth in Mugler. 160

B. MAJORITY OPINION BY THE SUPREME COURT

In 1992 the Supreme Court, in a 6-2 decision with one abstaining statement, 161 decided whether the South Carolina Beachfront Management Act, 162 through its application to David H. Lucas' property, constituted a taking without just compensation. 163 Justice Scalia, writing for the majority, held that, unless "the State could show that its regulations prohibiting Lucas' desired use merely prohibited what was already recognized and prohibited at common law as a nuisance, the State would have to compensate for the taking of Lucas' property through excessive regulation. 164"

"While property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 165 No set formula exists for determining when a regulation constitutes a taking, 166 yet two categories of regulations render state action a compensable taking without a case specific inquiry. 167 "The first encompasses regulations that compel the property owner to suffer a physical 'invasion' of his property." 168 "[N]o matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation [in all such cases]." 169

159. Id. at 906-07 (Harwell & Chandler, JJ. dissenting).
160. Id. at 900.
164. Id. at 2901.
166. See Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978). The Court must look at each case on an individual basis to determine if a compensable taking has occurred.
168. Id. at 2893.
169. Id.
"The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land."

The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, or denies an owner economically viable use of his land. The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest. . . . [T]he question necessarily requires a weighing of private and public interests.

On one side of this balancing test is a desire to achieve the maximum social benefit from our land and the resources it provides. This is often done through government acquisition, either for the public use or to prevent certain private uses, some of which may be harmful or noxious.

On the other side of the balance, affirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, by requiring land to be left substantially in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.

The court assigned a heightened risk to the situation where the regulation seeks to maintain the land in its "natural state," because this is essentially a negative regulation which the court compared to an appropriation as defined by the "many statutes on the books." Thus, there exist good reasons for the Court's belief that "[w]hen the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."

Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.

170. Id. (citations omitted).
172. Lucas, 112 S. Ct. at 2894.
173. Id. at 2894-95.
174. Id. at 2895.
175. Id.
176. Id. at 2899.
While all property is held with the understanding that at some time the legislature may restrict its use, in the case of land it may not reasonably be argued that "all economically valuable use" is one of those possible foreseen limitations which could be applied. In so holding, the Court explicitly stated that just as physical invasions unconditionally constitute a need for compensation, "similar treatment must be accorded confiscatory regulations, i.e., regulations that prohibit all economically beneficial use of land." The only way in which such a severely limiting regulation may be enforced without providing compensation is when the limitation is already present in the owner's title to the land. Thus, the legislation may do no more than that which the common law of property already imposes on the landowner.

The Supreme Court ultimately reversed the judgment and remanded it to address the question of whether any common law property right would prevent Lucas from his proposed use of the land. The majority opinion pointed out that it is highly unlikely that use of the land for what it and surrounding land have historically been used for is prohibited at common law, but before issuing a final disposition on this case, that issue would have to be finally resolved.

C. EFFECT OF LUCAS

The Court in Lucas held in check the power of government to regulate private land use without having to pay just compensation for such regulation. If the regulation is of such a nature that it prevents all economically viable use of the land, then this fits into one of the two exceptional situations where no factual inquiry is even necessary. The government must

177. Id. at 2899-900.
178. Id. at 2900.
179. Id.
180. Id. In characterizing these statements and principles, the majority referenced the situation where the owner of a lakebed who is denied a permit to engage in a landfilling operation, will not be able to claim that he has suffered a taking without compensation due to the fact that the effect of his action would be to cause water runoff onto neighboring parcels which is impermissible at common law.
181. Id. at 2902.
182. Id. at 2901. On remand, the South Carolina Supreme Court further held that no common law barrier existed to prevent Lucas from his contemplated construction, and after he had a final agency action on his request for an exception under the 1990 Amendment, the trial court would have to determine the amount of damages owed to Lucas, depending on a temporary or a permanent takings theory. Lucas v. South Carolina Coastal Council, 424 S.E.2d 484, 486 (S.C. 1991).
compensate for this impairment of land.

Under Lucas, the guise of preventing serious public harm in the enabling statute does not serve the necessary purpose for staying the need for accommodation. To prevent abuse by the legislature, such alleged justifications will not be valid merely because they are written in the acts. The legislature will have the burden of showing that the restriction is one that would have been proscribed at common law anyway. This is a stringent requirement. If such land use is forbidden at common law, what then is the purpose of the legislation?

As Justice Scalia noted in Lucas, “[r]egulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, by requiring land to be left substantially in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.”183 By so doing, the Court properly ascribed a very heavy burden on the government to justify regulating private land without paying just compensation. This accords with the notion that a public benefit, although certainly desirable, must be paid for by the public, i.e., through taxes. Lucas warned that regulations which attempt to alter private property owner’s rights, must not substantially withdraw those rights of the owner.

V. SWEET HOME’S EFFECT IN LIGHT OF LUCAS

The Sweet Home Court had two options in construing “harm” as defining “take.” The narrower interpretation adopted by the D.C. Circuit was solidly grounded in the Court’s precedents and principles of statutory construction and was, by any measure, well within the intent of Congress. Had the Congress viewed this interpretation as too narrow, it could have responded by amending the ESA to include “habitat modification” in the definition of “take,” just as Congress had added “real estate boards” and “professional football leagues” to its tax exemption for “business leagues.”184 The road in fact taken, however, invites a different response from Congress, one which endangers the Endangered Species Act.185 It would be tragic for the Act’s purported expansion to threaten the Act’s extinction.

The word “harm” is indeed the most expansive of the ten used in § 3

183. Lucas, 112 S. Ct. at 2894-95 (citations omitted).
to define "take," yet the Court focused extravagant attention on the one word in an effort to give effect to a desired policy. The Court's exposition on how broadly the term "harm" can be interpreted does no more than to prove Justice Scalia's point that a term must be construed within the bounds set by the company it keeps. Furthermore, there is little if any reason to support the proposition that "harm," as it can be broadly interpreted, was the intention of the legislature. Congress gave little thought to "harm" in its definitional context and absolutely no consideration outside of that context.

Nonetheless, under the sweeping authority recognized in Sweet Home, the Secretary of the Interior may prohibit a habitat modification on private land which could potentially lead to the impairment of a species' reproductive abilities. Thus, the property owner may very well be required to leave his land in a natural condition, or even an unnatural condition, as some species thrive in wasteland. All of this would be for the alleged benefit of listed species, but often at the cost of depriving the owner of the land any and all economic benefit of that land.

Sweet Home advances the proposition that the environment is very much a coveted asset.


187. Sweet Home, 115 S. Ct. at 2424. Scalia points out that to give every word individual meaning in adding to the overall intent of the statute could require one to read "'trap' in the definition its rare meaning of 'to clothe' (whence 'trappings') since otherwise it adds nothing to the word 'capture.'" Id.

188. "There is no specific legislative history on 'harm.' The term was added as part of a package of 24 undebated 'technical' floor amendments." Brief for Respondents at 15, Sweet Home, 115 S. Ct. 2407, (No. 94-859), 1995 WL 130541, p. 17 (1995).

189. Id.


191. In an effort to preserve some manmade wetlands "a truck mechanic [was] fined $202,000 and sentenced to three years in jail for removing old tires from his property because water that collected around his junk pile made it a 'wetland.'" Mary Bernhard, Citizens Would Be Freed From Costly Requirements, MILWAUKEE J., Mar. 10, 1995, at A11. Enforcement of the ESA in a similar situation was so feckless as to make the maintenance of a dump seem a preferred alternative. Expansion of a Kern County, California landfill prompted the EPA to relocate the thirty kangaroo rats infesting the dump at a cost of $30,000 to a manmade den. The new den flooded after the first rains, however, and drowned the newly arrived rats. Brent Walth, Myth, Fact Collide in Kern County, PORTLAND OREGONIAN, June 14, 1995, at A01. It would not stretch the imagination that the habitat modification doctrine would require the dump henceforth to be maintained in its pristine rat-friendly condition, other efforts to accommodate the landowner having proved fatal to the rats.

192. "If I have a rare metal on my property, its value goes up. But if a rare bird occupies the land, its value disappears." Ike C. Slug, The Endangered Landowner Act, WASH. TIMES,
Environmental regulations, just like planning and zoning, have the function of protecting the larger interests of the community—air, water, open space—and inevitably there are some winners and losers. The ESA is not a land use law. It is a law which says we are going to protect public property—wild and endangered species—but it acknowledges that in many cases the only efficacious way to protect an endangered species is to protect habitat.\textsuperscript{194}

Among those losers can be found Margaret Rector, who had her retirement property deemed "potential habitat for the golden-cheeked warbler."\textsuperscript{195} As a result of the government's efforts, the value of Ms. Rector's "nest egg" plummeted from greater than $800,000 to less than $30,000.

"Environmentalism started as a very noble cause, but it began demonizing ordinary property owners. People are waking up to see that it's not about the environment. It's about control of every speck of land and every species."\textsuperscript{196} Quite often, the only way around the severe penalties of the act for a mere "harm" by a property owner has been to apply for incidental "take" permits. However, even this system has required, on average, a donation of property three times that taken, with this ratio commonly being higher.\textsuperscript{197}

The social costs are not limited to the losses of these landowners. Other landowners, in fear of coming under EPA scrutiny under the ESA, routinely "sterilize" the land, i.e., disc "clean of vegetation" agricultural land that would ordinarily and more prudently lie fallow for natural replenishment, lest endangered species find the fallow land habitable and move in: "[T]he stakes are just too high—losing precious land—to risk reporting any endangered species found on their property."\textsuperscript{198} Sterilizing exacerbates erosion which creates great dust storms that can and do

\textsuperscript{193} See also David Parrish, \textit{Environmental Dilemma Central Valley Farmers United in Fight Over Endangered Species Laws That Impact Water Availability, Land Rights}, L.A. DAILY NEWS, Mar. 19, 1995, at N1 (quoting Ron Remple, Fish and Game Supervisor: "Wildlife belongs to the people, not to individual landowners[].")


\textsuperscript{195} Adler, supra note 190 (emphasis added).


\textsuperscript{197} Parrish, supra note 193.

\textsuperscript{198} Id.
cause loss of human life.\textsuperscript{199} Such costly conduct to evade the threat of adverse ESA enforcement leads to habitat modification with a vengeance. Evasive habitat modification benefits neither landowners, nor consumers, nor the species, but it is compelled to minimize the landowner's potential losses under the ESA.

The ESA, with its focus on habitat, undeniably limits the freedom of some landowners: Freedom to raze a forest, to bulldoze habitat, or to dry up streams which contain an endangered species. The questions then become: "How far? What are the restrictions like? When are you entitled to compensation?"

To the extent that the ESA regulates private property such that it is unreasonable or takes away all economically viable use, \textit{Lucas} has made clear that the government will be required to compensate for such action. "Regulatory action taken for a valid public purpose can have consequences that legally inconvenience people and, from time to time, do diminish someone's rights."\textsuperscript{201} With statements like this, and the ominous consequences arising from seemingly uncontrollable events, it is not hard to understand why property rights advocates are necessarily pitted against the expansive application of the ESA.\textsuperscript{202}

Under \textit{Sweet Home} the power of governmental agencies is very broad; but under the \textit{Lucas} check, regulatory restrictions will be limited to treating the environment as a public good. It is clear under \textit{Sweet Home} that the EPA will now have the power to implement regulations which tightly curtail the use of private property by owners. Such regulations by agencies clothed with this apparent legislative ability must, under \textit{Lucas}, be compensated, "whatever the cost."\textsuperscript{203}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{199} Id.
\item \textsuperscript{200} Id.
\item \textsuperscript{201} Babbitt, supra note 194, at 359. Quite possibly an understatement, given the realities that certain persons are individually being asked to finance this costly endeavor by donating their lands to the cause!
\item \textsuperscript{202} Grossi, supra note 196.
\item Many landowners, farmers, loggers and other industries as well as some cities feel the cost for the current environmental conscience is too high. And they believe branches of the green movement have become susceptible to political undermining. . . . Environmental opponents have seized the opportunity, forming their own movement — "Wise Use." . . . Wise Use organizations, such as the Fairness to Land Owners Committee in Maryland, became heavily involved in the election process last year. Many used tactics forged by environmentalists 20 years ago to help candidates who promote their agenda.
\item \textsuperscript{203} Tennessee Valley Auth. v. Hill, 437 U.S. 153, 184 (1978). The Hill Court distilled this dicta from the ESA in the face of daunting obstacles. There was neither language in § 1536 (a)(1)(B) nor in the legislative history as to costs at all:
\begin{quote}
While there is no discussion in the legislative history of precisely this problem, the
\end{quote}
\end{enumerate}
\end{footnotesize}
The overreaching scope of the statute under *Sweet Home*, combined with the potential cost to the public of takings to prevent habitat modification, may well invite Congressional restriction of this new regulatory power. Looming in wait are ambitious and often young, conservative, lawmakers threatening to roll back environmental legislation over twenty years. Included in this group is George P. Radanovich, a California Republican, who believes that "Environmental wackos" with the Fish and Wildlife Service have gone too far and are out of control. Radanovich said, "I'm after their [FWS'] budget. I want all of it if I can get it." 204 Such sentiments are not uncommon in either the federal or state legislatures. "If they feel like they smell blood at the federal level, and roll over the (federal) Endangered Species Act there, I don't know what that means to the state Endangered Species Act .... It's a bad dream sometimes. Fish and Wildlife does things to make things worse." 205 One pro-environment California assemblyman warned: "I fear a wholesale gutting of the [state] act[.]")206

While many Republicans busied themselves planning their attacks on the ESA, even House Speaker Newt Gingrich feared excessive retaliation to the precedent of *Sweet Home*. He warned that "[t]here are enormous interests that we have as human beings in maintaining biological diversity." 207 Still, it is clear that "the 1994 election swept leaders to the fore with dramatically different outlooks than . . . [Congressman Gerry]".

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The totality of congressional action makes it abundantly clear that the result we reach today is wholly in accord with both the words of the statute and the intent of Congress. The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. . . . The pointed omission of the type of qualifying language previously included in endangered species legislation reveals a conscious decision by Congress to give endangered species priority over the "primary" missions of federal agencies.

Id. at 184-85. It should be of no surprise that pro-environment groups favor the resolution of environmental policy issues in courts rather than in Congress:

"It's a polluter's bill of rights," said Louis Blumberg, assistant regional director of the Wilderness Society in San Francisco. "The courts are the proper place to decide many of these issues. We believe [the new legislation] will cost Americans billions [to compensate landowners]." Environmental activists say the new legislation is nothing more than an end run around years of their court victories. . . .

Grossi, *supra* note 196.

205. Id. (quoting John McCaull, state legislative director for the National Audubon Society).
206. Id.
These young conservative "leaders" believe that this promulgation of the ESA is part of a "socialist agenda," and thus are determined to destroy the Act.\footnote{Studds.}{\textsuperscript{208}}

Given the Court's awareness of the fiscal implications of regulatory "takings," as enunciated in \textit{Lucas}, it should have been apparent that an expansive interpretation of the term "harm" in the ESA very well might endanger the Endangered Species Act itself. "If the government wants this land for endangered species, why doesn't the government buy it?\textsuperscript{209} This question requires a legislative answer as to what the law should be rather than a judicial answer of "what the law is."\textsuperscript{210} By answering what the law is by interpreting rather than inventing the statute's language, the Court might have left for the legislature the balancing of societal interests as described by Speaker Gingrich: "On the one front, you have legitimate property rights and legitimate economic interests. On the other front, you have a need for a level of biodiversity and a level of concern for the biological system that is also paramount. The question is how can we work together[.\textsuperscript{211}} Instead, by eagerly proclaiming what the law should be, the Court, as a policy participant, has incited anti-environment forces who may put the ESA in "harm's" way.

\footnote{Rep. Helen Chenoweth, Republican of Idaho, [is] a first-termer who was so upset at efforts to restore rivers where salmon spawn that she held "endangered salmon bake" fund-raisers for her campaign. "They seethe with hate," Studds said, referring to some of the new Republican members who are attacking environmental laws. "It's so alien to me and the folks I represent. It's like they're from another planet."}{\textsuperscript{210}}

\footnote{Aaron Epstein, \textit{Friends, Foes of Law Tell Horror Stories to Court}, L.A. \textsc{Daily News}, Apr. 16, 1995, at U2 (quoting Taung Ming-Lin, a Taiwanese immigrant whose plans to cultivate his 732-acre farm were interrupted by government measures to protect endangered species on his property). To answer the question is to acknowledge a taking for public purpose, which under the Fifth Amendment requires just compensation.}{\textsuperscript{211}}

\footnote{Marbury \textit{v. Madison}, 5 U.S. 137, 177 (1803). (Marshall, C.J.: "It is emphatically the province and duty of the Judicial Department to say what the law is.").}{\textsuperscript{211}}

\footnote{Allen, \textit{supra} note 207.}{\textsuperscript{211}}
On June 6, 1995, the United States Supreme Court authored the final chapter of what is arguably the most controversial environmental case ever decided and paved the way for what promises to be the legislative demise of the Endangered Species Act (ESA). In a decision delivered by Justice Stephens, *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon* extended to private persons the ESA’s prohibition against “significant habitat modification” of endangered and threatened species’ ecosystems. Previously, the prohibitive language had been construed to apply only to federal agencies.

*Sweet Home* resulted in the protection of the Pacific Northwest and Southeast habitats of the northern spotted owl and the red-cockaded woodpecker. The decision also severely restricted timber harvesting in these regions. The restrictions on timber harvesting adversely affected private landowners, small logging companies, and forest dependent fami-
lies located in the area. The results included lay-offs at logging operations, reduced timber supplies, limitations on income from trust lands, and an inability of local workers to support their families.

While *Sweet Home* has been received by environmental groups as a positive step toward a continuing effort to protect the habitats of animals listed as endangered or threatened species, it has received much criticism from conservative policy makers who feel the burden placed on citizens and companies in the Pacific Northwest and Southeast timber countries far outweighs any benefit which might be derived from preserving the spotted owl and the red-cockaded woodpecker.

**A DEFINING MOMENT FOR THE ENDANGERED SPECIES ACT**

In 1973, Congress enacted the ESA to provide a vehicle for conserving endangered and threatened species and for the protection of their habitats. Section 4 of the ESA gives the Secretary of the Interior (Secretary) the authority to recognize and list fish, wildlife, or plants as either "threatened" or "endangered" species. To ensure that federal agencies and federally authorized actions do not jeopardize a threatened or endangered species, § 7(a)(2) was included in the ESA. This provision prohibits a federal agency from taking any action which would result in adverse habitat modification of an endangered species.

Section 9 of the ESA, which is a focal point in *Sweet Home*, considers actions by federal as well as nonfederal parties which might have an adverse effect on endangered species. Central to this case is the latitude given to the meaning of the "take" provision. Section 9 makes it illegal for "any person" to "take" an endangered species. The scope of "take" includes the following actions: "[T]o harass, harm, pursue, hunt,

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11. *Id.*
13. *Id.*
16. *Id.* § 1536(a)(2).
17. *Id.*
18. *Id.* § 1538(a)(1)(B).
19. *Id.*
20. *Id.*
shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."21 Although the "taking" bar is applicable only to endangered species, the ESA has given the Secretary the authority to extend this protection to threatened species.22 Pursuant to this grant, the Secretary extended the "take" prohibitions to all threatened wildlife species.23

Within the definition of "take" appears the prohibition against any action which might "harm" an endangered species.24 The ESA does not provide a specific definition for "harm." However, in 1991 the Secretary issued a regulation defining "harm" as:

Harm in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.25

It was this definition that brought the plight of Sweet Home Chapter of Communities for a Great Oregon to the federal courts.

THE SPOTTED OWL MEETS THE AMERICAN JUDICIAL SYSTEM

Plaintiffs, Sweet Home Chapter of Communities for a Great Oregon and other organizations, are a consortium of special interest groups, families, landowners, and logging companies in the Pacific Northwest and Southeast which are dependent upon the forest product industries.26 Plaintiffs filed suit to challenge the statutory validity of the Secretary's regulation which defined "harm."27 Specifically, the group sought to

21. Id. § 1532(19).
22. Id. § 1533(d). "Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 1538(a)(1) of this title, in the case of fish or wildlife, or section 1538(a)(2) of this title, in the case of plants, with respect to endangered species; except that with respect to the taking of resident species of fish or wildlife, such regulations shall apply in any State which has entered into a cooperative agreement pursuant to section 1535(c) of this title only to the extent that such regulations have also been adopted by such State." Id.
23. 50 C.F.R. § 17.31(a) (1994). "Except as provided in subpart A of this part, or in a permit issued under this subpart, all of the provisions in § 17.21 [which restates the prohibitions outlined in 16 U.S.C. § 1538(a)(1)] shall apply to threatened wildlife, except § 17.21(c)(5)." Id.
25. 50 C.F.R. § 17.3 (1994).
27. Id.
challenge the definition's inclusion of habitat modification and degradation. In its complaint, plaintiffs alleged that the application of the “harm” regulation to the habitats of the northern spotted owl and the red-cockaded woodpecker resulted in their significant economic injury.

Plaintiffs initiated an action for declaratory judgment against the Secretary and the Director of Fish and Wildlife Services in the United States District Court for the District of Columbia. Plaintiffs advanced three arguments to support its theory that Congress did not intend the ESA’s “take” provision to include habitat modification.

Plaintiffs first argued that the Senate’s original version of the ESA defined “take” to include habitat modification or destruction. However, this language was deleted from the bill before it was enacted. Because of this removal, Plaintiffs insisted that Congress did not intend “take” to include habitat modification. The district court, however, rejected this argument, finding that Senate wanted “take” to have a broad definition. The court also refused to speculate upon legislative intent during the adoption of the ESA.

Plaintiffs’ second argument was premised on the theory that Congress desired to handle habitat modification problems through federal land acquisition rather than through the take provision. Plaintiffs argued that § 4 of the ESA authorizes the Secretary to use land acquisitions for the completion of conservation programs for endangered or threatened species. The court, however, quickly dismissed this argument, finding that although Congress intended land acquisition to be a useful method of preventing habitat modification, it was not intended to be the only program available for protection. The court also examined House and Senate Reports which indicated that the Congress intended to give the Secretary that authority necessary to protect habitats, regardless of their

28. Id.
29. Id.
31. Id. at 282-85.
32. Id. at 283.
33. Id.
34. Id.
35. Id.
36. Id.
37. Id.
38. Id. (citing 16 U.S.C. § 1534 (1988)).
39. Id. (The court also noted express language in the ESA contrary to the Chapter’s theory: “To carry out such a program [of species conservation], the appropriate Secretary shall utilize the land acquisition and other authority . . . .” See 16 U.S.C. § 1534(a)(1) (1988)).
In its final argument, Plaintiffs suggested that because the Senate failed to debate the inclusion of "harm" to the "take" definition before it was included in a floor amendment, it was improper for the court to give the term a broad definition which included habitat modification. The court, however, quickly quashed this argument by noting that Congress intended "take" to include "every conceivable way in which a person can take or attempt to take." Furthermore, prior judicial interpretations of the "take" definition upheld the inclusion of "harm." It was also recognized that Congress was aware of these decisions when the ESA was reauthorized and amended in 1982.

In rejecting each of Plaintiffs' arguments, the district court found that the structure of the ESA supports a broad interpretation of "take." The ESA includes "considerable overlaps" among its provisions, and such overlap is synchronized to further support the ESA's vigorous protection of endangered and threatened species. As such, it is proper for both land acquisitions and take prohibitions to provide solutions for the prevention of habitat modification.

When the conflict between the endangered birds and private land owners reached the Court of Appeals for the District of Columbia, a divided court affirmed the district court's decision. A rehearing was later granted, however, and the court of appeals reversed.

At the appellate level, the focus was turned once again to the breadth
given to the definition of “take.” In the majority opinion which found in favor of the private land owners, Circuit Judge Sentelle concluded that with the exception of the word “harm,” the words of the “take” definition suggested direct application of force against an endangered or threatened species.\textsuperscript{50} In reaching this decision, Sentelle consulted a Ninth Circuit decision which interpreted the Marine Mammal Protection Act’s definition of “take” to require direct and sustained intrusion.\textsuperscript{51} He also placed reliance on the maxim \textit{noscitur a sociis} which limits a word’s definition.\textsuperscript{52}

In sharp reaction to the majority opinion, Chief Judge Mikva, who had announced the court’s original conclusion, dissented from what he termed an “unfortunate decision.”\textsuperscript{53} Blasting the majority’s “misguided legal analysis,”\textsuperscript{54} Mikva argued that his colleagues had mistakenly ignored \textit{Chevron U.S.A. Inc. v. Natural Resources Defense Council},\textsuperscript{55} which provides the court’s standard of review of an administrative agency’s statutes.\textsuperscript{56}

Under the two-pronged \textit{Chevron} test, Mikva noted, the court should have considered whether the intent of Congress was clear.\textsuperscript{57} If the intent was not clear, rather than providing its own construction of the statute, the court should have looked at the agency’s answer to the question and whether it was founded on an acceptable construction of the statute.\textsuperscript{58}

Applying \textit{Chevron}, Mikva found that inclusion of habitat modification in the definition of “harm” was appropriate because expansive words such as “wound” and “pursue” were included in the definition to clearly establish that a broader range of activity was intended.\textsuperscript{59} Mikva also found the majority’s reliance upon \textit{noscitur a sociis} to be unfounded due to the presence of ambiguous terms in the “harm” definition, as well as

\textsuperscript{50} \textit{Id.} at 1465. The court explained its interpretation by providing the basic model “A hit B.” \textit{Id.}

\textsuperscript{51} \textit{Id.} (citing United States v. Hayashi, 5 F.3d 1278, 1282 (9th Cir. 1993)).

\textsuperscript{52} \textit{Id.} (“The maxim \textit{noscitur a sociis}, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress.” Jarecki v. G.D. Searle & Co., 367 U.S. 303 (1961)).

\textsuperscript{53} \textit{Id.} at 1473.

\textsuperscript{54} \textit{Id.}

\textsuperscript{55} 467 U.S. 837 (1984).

\textsuperscript{56} \textit{Id.} at 1473 (Mikva, C.J., dissenting).

\textsuperscript{57} \textit{Id.}

\textsuperscript{58} \textit{Id.} (citing \textit{Chevron U.S.A. Inc. v. Natural Resources Defense Council}, 467 U.S. 837, 842-43 (1984)).

\textsuperscript{59} \textit{Id.} at 1475.
the overwhelming legislative history supporting the Secretary’s explanation.60

Because the court of appeals’ ultimate decision resulted in a split among the circuits regarding the proper definition of harm,61 the United States Supreme Court granted certiorari to resolve the conflict.62

ENDANGERED BIRDS ARE FLYING HIGH, LOGGERS ARE OUT OF LUCK

By the time Sweet Home reached the Supreme Court in 1994, Americans had been ambushed by the publicity surrounding the fate of the spotted owl, its not so famous friend the red-cockaded woodpecker, and the thousands of workers and landowners who depended upon the birds’ forest habitat for their livelihood. In a decision authored by Justice Stevens, a majority of the Supreme Court found the Secretary’s interpretation of “harm” to be reasonable, thus reversing the court of appeals.63

The Court began its analysis in an elementary fashion, consulting a popular dictionary which defined harm as “to cause hurt or damage to: injure.”64 This definition, when considered in the context of the ESA, encompasses habitat modification which results in injury or death to an endangered or threatened species.65 The definition also refutes Plaintiffs’ argument that “harm” requires a direct application because it fails to include the word “directly” or imply the necessity of a direct or willful action.66 Stevens went on to find that unless “harm” encompassed indirect and direct injuries to endangered species, the word had no use other than to duplicate other words used to describe “take.”67 Because the judiciary is reluctant to treat statutory terms as “surplusage,” Stevens continued, the reasonableness of the Secretary’s interpretation will be upheld.68

Focus then turned to the ESA’s broad purpose of protecting endangered and threatened species. This purpose, Stevens reasoned, supports

60. Id.
61. See Palila II, 852 F.2d at 1106. Palila II upheld the Secretary’s definition of “harm.”
63. Sweet Home, 115 S. Ct. at 2412.
64. Id. (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1034 (1966)).
65. Id. at 2412-13.
66. Id. at 2413.
67. Id.
68. Id.
the Secretary's protection of private lands from habitat modification.69 Recalling a previous decision to halt construction of the Tellico Dam because of its adverse impact on the habitat of the snail darter, the majority reiterated that the intent of Congress in enacting the ESA was to end species extinction and reverse the process at whatever price.70

Also rejected was Plaintiffs' request to invalidate the definition of "harm" because it would include minimal or unforeseeable harmful acts.71 Such acts, the Court reasoned, fall within the ESA's broad purpose of protection.72 Plaintiffs further argued that an incidental taking permit, which the Secretary had authority to grant, could be used to avoid liability, protect the private land owners, and maintain adherence to the ESA.73 This attack, however, was struck down because the permit process requires a conservation plan detailing efforts to minimize the adverse impact.74 Such a plan, it was reasoned, suggests that Congress intended permits to be given to foreseeable incidental harms rather than those harms which were accidental or direct and deliberate.75 To allow permits to be given for direct and deliberate actions would defeat the purpose of the permit exception.76 Furthermore, the inclusion of a permit exception supports the argument that habitat modification may constitute an unlawful taking even though the actor had no intent to harm an endangered species.77

Stevens next considered the overlapping of issues among the provisions of the ESA and found the occurrences to be unexceptional.78 Following the lower court's decision, it was determined that any overlap within the ESA is simply a reflection of the broad purpose of the Act.79 In similar fashion, the reasonableness of the Secretary's interpretation of "harm" was swiftly handled with a pledge of deference to the administrative officer.80

In a final blow to the private land owner, the Court determined that

69. Id. at 2413.
70. Id. (citing Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978)).
71. Id. at 2414.
72. Id.
73. Id. (The Secretary may permit "any taking otherwise prohibited by section 1538(a)(1)(B) of this title if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. § 1539(a)(1)(B) (1988)).
74. Id. (citing 16 U.S.C. § 1539 (a)(2)(A) (1988)).
75. Id.
76. Id.
77. Id.
78. Id. at 2415.
79. Id. at 2416.
80. Id.
the Secretary's definition of harm received considerable support from the ESA's legislative history. Following a somewhat exhaustive review of the Committee Reports which accompanied the ESA, Stevens concluded that the regulatory definition promulgated by the Secretary was consistent with the intent of Congress during the 1973 enactment and 1982 amendment of the ESA.

In a typically right-wing approach, Justice Scalia, along with the Chief Justice and Justice Thomas, dissented on the basis that the preservation of habitats on private lands results in the financial ruin of owners who involuntary find their lands the targets of "national zoological use." Scalia focused upon three elements of the "harm" definition which he appraises as not in accord with the "take" provision. The definition, he argued, interprets the provision as a prohibition of habitat modification if death or injury results. This assumption, furthermore, is false because it makes illegal any significant habitat modification which impairs behavioral patterns, regardless of the foreseeability of the result or intent of the actor. Scalia also deduced that such a conclusion is improper because no deference is given to the "chain of causality between modification and injury."

The minority also raised an objection to the Secretary's position that an omission, as well as an "act," will suffice as a violation of the regulation. This inclusion, they later argued, has no statutory authorization. In a final insult, the regulation is attacked for encompassing injury inflicted not only on individual animals, but upon entire populations of species via the impairment of behavioral patterns which include breeding. Such an all-embracing regulation appears especially acidic to a minority which cannot rationalize impairment of breeding as an injury to actual "living" creatures.

Scalia next directed his attention to the reliance upon the ESA's "broad
purpose” as support for the Secretary’s definition of “harm.” Such reasoning was quickly denounced as simplistic and condemned for its lack of analytical discussion. Similarly, the majority’s reliance upon legislative history was damned for showing what Scalia found to be “quite the opposite of what the Court says.”

The Court’s reliance upon the 1982 amendment, which included the incidental permit exception, also fell victim to Scalia’s pen. The minority debated that only if habitat modification was the only lawful act which might result in an incidental or nonpurposeful taking could there be a valid inference that the permit revealed a congressional understanding that prohibitive acts include indirect and deliberate takings. An invalidity existed, however, because the provision applied to several otherwise lawful takings, including fishing and shrimp harvesting. Scalia also attacked the Court’s admonition of Plaintiffs’ facial challenge of the regulation. The offered analysis of the facial challenge, he concluded, was deficient because it attacked a regulation which was invalid in all applications and failed to include any actor who would otherwise have been liable if the statute were properly applied.

In a final appraisal of the ESA, the dissent recognized the act as an item of legislation designed to protect endangered and threatened species from the public at large. To make private landowners accountable for the preservation of an endangered species habitat is a radical departure from the original intent of the Act.

A VICTORY ON THE JUDICIARY BATTLEFIELD, A SLAUGHTER IN THE LEGISLATIVE WAR ZONE

Although Sweet Home was a tremendous victory for environmental advocates, the after-shocks may result in the desecration of the ESA. Even before the decision was handed down, the predicament of the private land owners and loggers in the Pacific Northwest became a battle cry for Republicans anxious to regain control of the White House.

94. Id. at 2426.
95. Id.
96. Id.
97. Id. at 2428.
98. Id.
99. Id.
100. Id. at 2429.
101. Id.
102. Id. at 2431.
103. Id.
Initially, members of Congress attacked the Court’s decision as an invitation to either rewrite or abolish the ESA. *Sweet Home*’s largest, and most outspoken, enemies in Congress include former Senator Robert Packwood, a Republican from Oregon, and Senator Slade Gorton, a Republican from Washington. Packwood, attempting to garner support in the twilight of his term in office, attacked the decision and called for its revamping in order to prove to constituents that people and industry are more important to the government than plants, bugs, and birds. Gorton, on the other hand, took matters to the Senate floor before the Court’s opinion was released and proposed an “Endangered Species Act Reform Act” which would significantly impair the strength of the ESA and consider people as well as animals.

It is easy to understand why opponents of *Sweet Home* and the ESA are taking drastic measures to enable landowners to regain control of their land. Since the spotted-owl litigation began in the 1980s, the Pacific Northwest timber industry has suffered devastating economic losses due to the government’s restrictions on timber harvesting in critical habitat areas. In 1990, before the government mandated strongholds were placed on loggers, the timber industry annually produced over 7.8 billion board feet of lumber per year. In 1994, however, increasing litigation and pressure on the White House from environmental groups caused the total number of board feet production to drop to 421 million.

The financial losses to towns and workers is obvious. Since 1989, more than 242 mills in the Pacific Northwest have closed, and over thirty thousand workers in Washington, Oregon, Idaho, Montana, and California have found themselves without jobs in what had once been a steady, reliable industry. There is, however, some discrepancy as to the true reason for the loss of jobs in the timber industry. Although Republicans would like to blame the loss of all timber jobs on an executive branch which is soft on “green” issues, technological improvements in the milling industry have also played an important role in the disappearance of many positions. Fueled by a need for efficiency and a competitive

104. Tom Uhlenbrock, Supreme Court Ruling Supports Endangered Species, ST. LOUIS POST DISPATCH, June 30, 1995, at 06A.
107. Id.
108. Id.
edge in a shrinking market, the adoption of technological advancements in the mills accounted for at least twenty-four percent of the job losses in the timber industry during 1994.\textsuperscript{110}

The turmoil created by \textit{Sweet Home} may have been avoided if attempts by the Clinton administration to preserve the Pacific Northwest timber industry had succeeded. Following a 1993 forest preservation summit in Portland, Oregon, President Clinton initiated Option 9 which allowed for the harvesting of some timber in the protected spotted-owl forests.\textsuperscript{111} Option 9, the President proposed, would allow for the production of 1.1 billion board feet per year from the privately owned critical habitat forests, as well as economic adjustment funds for the retraining of workers and businesses severely injured by the previous prohibitions.\textsuperscript{112} Unfortunately, Option 9, like many idealistic programs, failed to provide funds or timber to the mills and workers.\textsuperscript{113} This failure proved to be great ammunition as the Republicans loaded their guns and began to blast at the ESA.

How Republicans in Congress plan to override the favorable environmental ruling in \textit{Sweet Home} is no great mystery. One possibility is to rewrite the ESA and give the federal government less power to step in when private land owners take action which might violate habitat modification laws.\textsuperscript{114} A second alternative is to allow the ESA to continue to exist as it does today, but cut funding to the Department of the Interior and make enforcement of the laws economically impossible.\textsuperscript{115}

Rewriting the ESA is not as impossible a task as it might first appear. The recent right shift in Congress and the national trend toward the Republican Party makes the passage of a bill which totally obliterates the current protections afforded by the ESA a strong possibility. Senator Gorton, who has made many unsuccessful past attempts to "reform" the ESA, has gained considerable support from the Republican dominated Senate.\textsuperscript{116} Gorton, who questions the importance of a species if it interferes with industrial or economic progress, strikes against the ESA as the culprit behind the downfall of Pacific Northwest families who once relied on the timber industry for strong communities, financial stability, and

\begin{itemize}
\item \textsuperscript{110} Id.
\item \textsuperscript{111} Siegel, \textit{supra} note 106, at A17.
\item \textsuperscript{112} Id.
\item \textsuperscript{113} Id.
\item \textsuperscript{114} Currents, \textit{Taking Aim at the Environment}, \textit{Newsday}, July 30, 1995, at A37.
\item \textsuperscript{115} Id.
\end{itemize}
educational opportunities for their children. Striking at the heart of constituents’ biggest fears, unemployment and the maladies which follow, Gorton lashes out at a federal law which he feels was created in haste and fails to consider the economic ramifications of application. Rather than focusing upon the ESA’s broad purpose of protecting endangered and threatened species at whatever the cost, Gorton’s proposal considers the biological significance of the species, the species’ critical habitat, the number of jobs lost if full protection is provided, the impact on the local economy, as well as social and community values.

Although Gorton claims that his proposal is a flexible alternative to the now hard-line ESA protection policy, it is blatantly obvious that such a “reform” would do nothing more than abolish any protections for endangered or threatened species. Senator Gorton claims that the ESA is about choices, a choice between a productive society and a possibly not so important species. Gorton would like for the public to believe that his proposal will give Americans the opportunity to make intelligent decisions about species protection based upon the needs of society. What he is offering, however, is a plan that will support species extinction if a threatened plant or animal does not have some ultra-attractive trait which will ultimately provide some type of concrete benefit to society.

Even more likely than a reform of the ESA is the slashing of funds from the Department of Interior’s budget. Although the ESA currently receives only sixty nine million dollars in funding, an amount that equals the cost of funding for two miles of urban highway, a proposal to cut this amount to fifty five million dollars has received a positive reaction from a majority eager to quash the ESA’s authority. If this cut is approved by Congress, little to no reform of the ESA will be necessary because adequate funds for the implementation of ESA provisions will not be available. Thus, Republicans intent on destroying the ESA will be able to achieve their goals without disturbing what was once considered a landmark piece of legislation.

117. Id. at S6340.
118. Id.
119. Id.
120. Sweet Home, 115 S. Ct. at 2413.
122. Id.
123. Id. at S6339.
125. Id.
The political reality of *Sweet Home* is a battle won, but a war lost, for environmental advocates. Rather than providing President Clinton with a strong base for strict enforcement of environmental policies, it has supplied Republicans with a tough, emotion laced argument that the President and the judiciary system are more interested in protecting animals than providing jobs for taxpayers. In games like the upcoming presidential race, such an argument could spur an aggressive Republican challenge and persuade citizens to return to a party that places economic fortitude over environmental concern.

It is not necessary, however, to wait until 1996 to measure *Sweet Home*'s impact on the executive office. Less than a month after the decision was announced, President Clinton was forced to acknowledge the political war being waged. Under extreme pressure to regain the support of voters in the Pacific Northwest who had rallied behind the President during the 1992 election, Clinton signed into law The Emergency Salvage Timber Sale Program (ESTSP).\(^{126}\)

Supporters of the ESTSP argue that the program is advantageous because it will reduce fuel buildup and prevent forest fires in dead and dying forests, thus protecting businesses and communities located in or near these areas.\(^{127}\) To achieve this politically positive target, the program advocates and legitimizes the logging of ESA protected critical habitat land.\(^{128}\) Any timber sales resulting from the action, the program insures, will be protected from pro-environment legal challenges.\(^ {129}\) Thus, private land owners who wish to harvest the salvage timber on their lands will be able to do so without fearing legal ramifications for violating *Sweet Home* and the ESA.\(^ {130}\)

The political focus of the ESTSP is a strike against executive and judiciary protection of the environment. Because the program provides at least a short-term revitalization of the Pacific Northwest timber industry and places money in the pockets of displaced workers who also happen to vote, President Clinton was forced to abandon his strict environmental policy and adopt a provision that lashes out against the ecosystems his administration has zealously sought to protect. While ESTSP advocates may argue that the program is a typical concession in the legislative process, it cannot be ignored that the program’s intent creates a direct

\(^{127}\) Siegel, *supra* note 106, at A17.
\(^{128}\) *Id.*
\(^{129}\) *Id.*
\(^{130}\) *Id.*
affront to the *Sweet Home* mandates and places the President in an compromising situation.

**A SAD FAREWELL TO BUGS, PLANTS, AND BIRDS**

We are a nation of citizens who value jobs, economic stability, and freedom from government intrusion. We are also a citizenry which cherishes its majestic wild and natural scenery and animals. *Sweet Home* provides the American public an opportunity to protect endangered and threatened species by setting strict but necessary guidelines for the protection of critical habitats on federal as well as privately owned property. While the economic ramifications of *Sweet Home* mean a loss of jobs and some autonomy for private land owners, it promises future generations an abundant environment plentifully endowed with the animals and plants which make nature so spectacular.

Allowing the political needs of a few powerful individuals to result in the overthrow of one of the most critical pieces of law existing in the United States could mean environmental catastrophe for the country. Yes, people and jobs do count, they are the lifeline of our society, and their value should never be discounted. However, when our economic and fiscal needs call for the extinction of an animal or plant, we must take stock of the action. Humans have a unique status on the Earth as the dominant species. To ensure that our fellow species continue to flourish, it is our duty to protect their habitats. *Sweet Home* places boundaries on human intrusion into the habitats of less powerful species. We are a resilient and creative people who can respect and protect these boundaries and also find opportunities for those who are adversely affected.
STUDENT ARTICLE

THE CLEAN WATER ACT ENFORCEMENT PROVISION: WHAT CONSTITUTES DILIGENT ENFORCEMENT UNDER COMPARABLE STATE LAW

by Julia A. Glazer

I. INTRODUCTION

What constitutes diligent comparable state enforcement under 33 U.S.C. § 1319(g)(6) of the Clean Water Act (CWA or Act) so as to preclude a private citizen from bringing a citizen suit under the CWA citizen suit provision? The absence of guidance from the United States Supreme Court and Congress concerning this provision has produced conflicting opinions within the federal circuit courts. The courts in the First, Eighth and Tenth Circuits have given the CWA’s enforcement provision a broader interpretation. These decisions indicate that a citizen’s role may be supplemental, but may not be intrusive. On the other hand, the Third, Sixth and Ninth Circuits have refused to adopt this broad approach. Instead, these circuits follow a narrower view and focus, primarily, on the meaning of the statutory provision.

Part II of this article traces the roots of the Clean Water Act, while part III will address the origins of the citizen suit provision. Part IV will consider the enforcement aspect of the CWA and the limitations this provision places upon those wishing to bring a citizen suit action, while examining the major decisions from the various circuits. Part V will explore the implications of these decisions.

II. BACKGROUND OF THE CLEAN WATER ACT

As it is popularly known today, the Clean Water Act had its origins in the Federal Water Pollution Control Act passed by Congress in 1948. The purpose of the 1948 Act was to give the states the power to enforce control of water pollution within their boundaries in conjunction with

2. Id. § 1365.
technical and research support from federal governmental agencies.\textsuperscript{4} This enforcement provision also provided for negotiations and conferences between polluters and government, in addition to judicial review of abatement conference recommendations.\textsuperscript{5} A court could order abatement only if it found that compliance was feasible.\textsuperscript{6} The federal government was also authorized to provide the states with loan assistance to help provide financing for building treatment facilities.\textsuperscript{7}

In 1956, the Act underwent an initial round of scrutiny under the watchful eye of Congress and the first amendments were added.\textsuperscript{8} The amendments included tightened measures for controlling pollution of interstate waterways, increased technical and research assistance to the states, and authorization of federal grants to assist the states in formulating pollution control plans and for aiding localities in building treatment facilities.\textsuperscript{9}

Nearly a decade later, the Act became the target of the congressional pen, and in 1965, a second set of amendments were created.\textsuperscript{10} A key provision of the 1965 Amendments included a requirement that each state develop water quality standards for all navigable interstate waterways within a particular state's boundaries.\textsuperscript{11} In 1966, a congressional amendment to the Act provided broader and more extensive federal support to assist the states in their efforts to control water pollution.\textsuperscript{12} Amendments enacted in 1970 added new sections on liability for the clean up of discharges of oil and hazardous substances, sewage releases from vessels, pollution in the Great Lakes, and drainage of acid from mining.\textsuperscript{13} The amendments also provided regulation of federal activities impacting water quality and water pollution control training.\textsuperscript{14}

Congress made additional changes to the Act by enacting the Federal Water Pollution Control Amendments of 1972.\textsuperscript{15} A key aspect of these amendments of 1972 was the implementation of a citizen suit provision modeled after a similar provision found in the Clean Air Amendments
Act of 1970. The citizen suit provision gave private citizens the right to bring an action in court against an alleged violator of the Act. This right of action was limited to situations where neither the EPA nor the State were taking civil or criminal action on their own against the alleged violator.

These amendments also created the National Commission on Water Quality whose mission was to study the progress being made in implementing and achieving water pollution effluent limitation goals. One of the major alterations brought about by the Commission's studies was the change of the enforcement mechanism from water quality standards to effluent limits. The reasoning behind this change was to have a better defined link between water pollution and the enforcement mechanism. The study found that effluent limits would provide a more suitable link than water quality standards.

The Commission's evaluation significantly influenced the amendment provisions found within the Clean Water Act of 1977, including the continued utilization of studies to evaluate and ensure the achievement of the Act's goals. Additionally, the 1977 Amendments authorized the establishment and implementation of the permitting program.

The right of private citizens to bring suit against violators received a setback in the Water Quality Act of 1987. The act included § 309 which barred citizens from bringing suit under the CWA in instances where a state began prosecuting an alleged violator before the citizen filed suit. This provision, which has been the source of much litigation throughout the circuits, is the topic of this article.

III. § 1365—THE CLEAN WATER ACT CITIZEN SUIT PROVISION

Realizing that enforcement was lacking under prior law arising from the Federal Water Pollution Control Act, Congress enacted a citizen suit provision within the 1972 Federal Water Pollution Control Act Amend-

16. Id.
17. Id.
18. Id.
21. Id.
22. Id.
23. Rogers, supra note 23.
25. Id. § 1319 (1994).
26. Id.
ments.27 This provision enabled a private citizen to bring an action against any violator of the Act as long as the administrator or state had not commenced and was not diligently prosecuting the action.28 However, even if the administrator or state was bringing an action, a private citizen could intervene as a matter of right.29 The Act also allowed a citizen to bring suit against the Act administrator if the administrator failed to perform a non-discretionary duty outlined within the chapter.30 Additionally, the Act's enforcement provision provided for both criminal and civil penalties to be assessed against the violator.31

One of the key cases brought before the United States Supreme Court under the Clean Water Act citizen suit provision was Gwaltney of Smithfield v. Chesapeake Bay Foundation.32 The main issue addressed by the Court in Gwaltney was whether the Clean Water Act citizen suit provision provided relief for violations that occurred entirely in the past.33 Interpreting the Act's "alleged to be in violation" language34 to apply only to violations which were ongoing continuous or ongoing intermittent violations at the time the lawsuit was brought, the Court held that past acts were not covered by the Act.35

The issue surrounding Gwaltney arose when two citizens groups filed a claim under the CWA citizen suit provision against Gwaltney, a Virginia meat processing/packing company.36 The suit stemmed from the company's repeated violation of its National Discharge Elimination System (NPDES) permit between 1981 and 1984.37 The permit was violated when Gwaltney surpassed the effluent limitations imposed on five out of the seven pollutants included in the permit.38 According to the Discharge Monitoring Report kept by Gwaltney, its violations included: (1) eighty-seven violations of the TKN39 limitations; (2) thirty-four violations of

28. Id.
30. Id. § 1365(a)(2).
31. See id. § 1319.
33. Id. at 52.
35. Gwaltney, 484 U.S. at 53.
36. Id. at 54.
38. Gwaltney, 484 U.S. at 53.
39. TKN refers to "total Kjeldahl nitrogen." Id.
the chlorine limitation; and (3) thirty-one violations of the fecal coliform limitation.\textsuperscript{40}

In rationalizing its interpretation that the citizen suit provision only applies to ongoing violations, the Court looked to the language of the statute and the legislative history of the provision.\textsuperscript{41} The Court indicated that Congress utilized present tense language throughout the provision section\textsuperscript{42} and also pointed out that the purpose of the provision's notice requirement\textsuperscript{43} was to offer the alleged violator the opportunity to comply with the Act, thus rendering the citizen suit unnecessary.\textsuperscript{44} If a citizen suit was allowed to target wholly past violations, the majority reasoned, the notice requirement in these instances would become totally gratuitous.\textsuperscript{45}

Additionally, it was suggested that the purpose of the citizen suit provision was to allow a citizen to take enforcement action only when the government failed to do so.\textsuperscript{46} Thus, the citizen suit provision was intended not to replace but rather to supplement governmental action.\textsuperscript{47}

IV. § 1319—ENFORCEMENT UNDER THE CLEAN WATER ACT: WHAT CONSTITUTES DILIGENT STATE ENFORCEMENT SO AS TO PREEMPT A CITIZEN SUIT BEING BROUGHT UNDER § 1319(G)(6) OF THE CLEAN WATER ACT?\textsuperscript{48}

In addition to the limiting language of the CWA citizen suit provision as interpreted by the Supreme Court in \textit{Gwaltney},\textsuperscript{49} the Act's enforcement provision places another limitation as to when a citizen suit may be brought. Under this provision, a citizen suit cannot be brought if a "[s]tate has commenced and is diligently prosecuting an action under a State law comparable to this subsection . . . ."\textsuperscript{50}

The decisive issue then becomes a matter of what constitutes diligent state enforcement. A discussion follows of the federal circuit courts that have interpreted this provision.

\begin{itemize}
\item \textsuperscript{40} \textit{Id.}
\item \textsuperscript{41} \textit{Id.} at 56-63.
\item \textsuperscript{42} \textit{Id.} at 59.
\item \textsuperscript{43} The Act's notice provision required a citizen to provide sixty days notice of intent to file suit against an alleged violator. \textit{33 U.S.C. § 1365(b)(1)(A) (1994)}.
\item \textsuperscript{44} \textit{Gwaltney}, 484 U.S. at 60.
\item \textsuperscript{45} \textit{Id.}
\item \textsuperscript{46} \textit{Id.}
\item \textsuperscript{47} \textit{Id.}
\item \textsuperscript{48} \textit{33 U.S.C. § 1319(g)(6) (1994)}.
\item \textsuperscript{49} \textit{Gwaltney}, 484 U.S. at 49.
\item \textsuperscript{50} \textit{33 U.S.C. § 1319(g)(6)(A)(ii) (1994)}.\end{itemize}
A. First Circuit: North & South Rivers Watershed Ass'n, Inc. v. Scituate

The question addressed in this case was whether the Massachusetts Department of Environmental Protection (DEP) administrative order, issued against the Town of Scituate for violating the State of Massachusetts Clean Water Act, was sufficient to constitute diligent state enforcement under § 309(g)(6)(a) of the CWA so as to bar the North and South Rivers Watershed Association (NSRWA) from bringing a similar action under the Act's citizen suit provision. The district court, finding that the NSRWA was barred under § 309(g)(6)(a) from bringing the citizens suit, granted summary judgment for Scituate.

In *Scituate*, the DEP issued the order against the defendant for discharging pollutants from a sewage treatment facility into a coastal estuary without a federal discharge permit. The order prohibited Scituate from making any new connections to its sewer system, required Scituate to begin development of a new wastewater treatment facility, and required it to upgrade its existing treatment facility.

At the time the order was issued, the state decided not to assess penalties against Scituate, but reserved the right to do so at a later date. The DEP received its authority from the Massachusetts Clean Waters Act which closely paralleled the federal Clean Water Act. The NSRWA brought its action under the citizen suit provision of the federal CWA.

In affirming the decision of the district court, the appellate level utilized the argument advanced by the United States Supreme Court in *Gwaltney*. It reasoned that a citizen suit under the federal CWA is meant to supplement but not replace governmental action and, thus, when "governmental action under either the Federal Act or comparable State Clean Water Acts begins and is diligently prosecuted, the need for a citizen to bring suit vanishes."

NSRWA argued that a citizen suit was appropriate where the governmental action did not specifically demand a financial penalty. The

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51. 949 F.2d 552 (1st Cir. 1992).
52. Id. at 553.
53. Id. at 555.
54. Id. at 555.
55. Id.
56. Id. at 554.
57. Id.
58. Id. at 555.
59. Id.
60. Id. (Emphasis added).
61. Id.
appellate court rejected this argument and stated that if a citizen suit was allowed to go forth in this instance, the role delegated to the government would be undermined by "changing the nature of the citizen's role" from supplemental to intrusive, thus creating a potentially duplicative action. Additionally, the court indicated that the state's failure to seek penalties against Scituate did not mean that the governmental enforcement provision under the Massachusetts Clean Water Act was not comparable to the federal CWA's governmental enforcement provision.

NSRWA also argued that even if the bar on citizen suits extended to civil penalties, it did not extend to actions for injunctive and declaratory relief. The court rejected this argument on the basis that § 505 of the CWA does not distinguish separately the civil penalty remedies from other types of available civil remedies.

B. Second Circuit: New York Coastal Fishermen's Ass'n v. New York City Dep't of Sanitation

*New York Coastal* involved a landfill in Bronx County, New York, which was operated by the New York City Department of Sanitation (DOS) from 1963 to 1979. After ceasing operation, the landfill was never properly capped. As a consequence of this, leachate seeped out of the landfill site resulting in complaints from individuals living around this area. The New York State Department of Environmental Conservation (DEC) entered into an Order on Consent with DOS in 1985 which required DOS to submit both a temporary and a permanent leachate management plan to the state.

DOS's initial temporary management plan was rejected by DEC. The second plan, which was accepted by DEC, called for collecting the leachate and discharging it into Eastchester Bay feeding Long Island Sound. In April 1990, DOS and DEC entered into a second Order on Consent which required DOS to complete an additional remedial plan for

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62. *Id.* at 556.
63. *Id.*
64. *Id.* at 557.
65. *Id.* at 558.
67. *Id.* at 163.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
the landfill by 1995.\textsuperscript{73}

The New York Coastal Fishermen's Association (NYCFA) filed a CWA citizen suit against DOS on July 17, 1990 seeking civil penalties, declaratory and injunctive relief.\textsuperscript{74} It was the NYCFA's contention that DOS's dumping of the leachate into the bay without a permit was a violation of the CWA.\textsuperscript{75} DOS argued that the CWA enforcement provision barred NYCFA from bringing a citizen suit under the CWA, as the 1985 and 1990 DEC Orders on Consent constituted diligent prosecution under comparable state law.\textsuperscript{76}

The NYCFA, however, argued that a citizen suit brought under the CWA should only be barred if the state also seeks penalties against the alleged violator;\textsuperscript{77} otherwise, the state's action does not rise to the level of diligent prosecution under comparable State law as required by the CWA enforcement provision.\textsuperscript{78} Utilizing the same rationale as the First Circuit Court of Appeals in \textit{Scituate},\textsuperscript{79} the district court held that it was not necessary for the DEC to impose penalties on DOS in order to bar a CWA citizen suit action.\textsuperscript{80} Furthermore, the court noted that DEC reserved the right in both the 1985 and the 1990 orders to impose penalties against DOS at a later date if warranted, and thus, the DEC orders did constitute action under comparable state law.\textsuperscript{81}

NYCFA also posed a second argument contending that the DEC action did not constitute action under comparable state law because neither the 1985 nor the 1990 DEC Order addressed pollution control of a navigable water.\textsuperscript{82} Both orders arose from the concern with leachate seeping into the surface water and the groundwater.\textsuperscript{83} NYCFA argued that the state's action was not comparable because the CWA did not provide the state with information concerning the pollution of navigable waters in 1985.\textsuperscript{84} The court rejected this argument on the basis that the DEC's 1985 order specifically addressed concerns with leachate entering the surface water.

\begin{thebibliography}{8}
\bibitem{73} \textit{Id.}
\bibitem{74} \textit{Id.}
\bibitem{75} \textit{Id.}
\bibitem{76} \textit{Id.}
\bibitem{77} \textit{Id.} at 165.
\bibitem{79} \textit{North & South Rivers Watershed Ass'n, Inc. v. Scituate}, 949 F.2d 552 (1st Cir. 1992).
\bibitem{80} \textit{New York Coastal}, 772 F. Supp. at 165.
\bibitem{81} \textit{Id.}
\bibitem{82} \textit{Id.} at 166.
\bibitem{83} \textit{Id.}
\bibitem{84} \textit{Id.}
\end{thebibliography}
CLEAN WATER ACT ENFORCEMENT

and the groundwater.85 The court reasoned that surface waters were arguably covered by the Act, despite the fact that the Act did not govern groundwater.86 The court also appeared to accept DOS's arguments that the 1990 order made no mention of the CWA or surface water and that the 1985 order was specifically incorporated into the 1990 order.87

However, the district court held that the state's efforts to stop DOS's discharge of leachate into Eastchester Bay had not been diligent.88 The court based its ruling on the fact that the 1985 DEC order requiring DOS to come up with both a temporary and a permanent plan to eliminate leachate had not been complied with in a timely manner.89 In support, the court cited to the fact that it took DOS three years just to develop a temporary plan and that the permanent plan was never implemented as required by the 1985 order.90 Furthermore, the 1990 order allowed DOS even more time to construct a permanent plan.91 The court found it unacceptable that the state would approve and continue to allow DOS to discharge leachate into the Eastchester Bay for seven years.92 As a result of this inaction on the state's part, the court allowed NYCFA's citizen suit.93

C. Third Circuit: Public Interest Research Group, Inc. v. GAF Corp.94

Public Interest involved two citizen groups which filed suit under the CWA citizen suit provision against the defendant, GAF Corporation.95 The Public Interest Research Group of New Jersey (PIRG) alleged that GAF violated its permitted state effluent discharge limits on a number of occasions between August 1985 and March 1989.96 The New Jersey Department of Environmental Protection (DEP) issued a notice of violation to GAF before PIRG issued its notice of intent to file suit.97 Pursu-
ant to the notice of violation, DEP entered into an Administrative Consent Order with GAF.\(^98\) This order required GAF to upgrade its waste treatment facilities by July 8, 1990.\(^99\) Additionally, the DEP levied penalties against GAF for the past violations as well as for anticipated future violations that were likely to occur during the upgrade period.\(^100\) All of DEP's actions against GAF were sanctioned under the authority of the New Jersey Water Pollution Control Act.\(^101\)

PIRG argued that the state DEP order was not comparable to an action brought under the CWA because the CWA's enforcement provision required an opportunity for public notice and comment prior to issuance of an order.\(^102\) The New Jersey Clean Water Act on the other hand had no such public notice provision.\(^103\)

The district court allowed PIRG to proceed with its CWA citizen suit against GAF.\(^104\) The court agreed that the lack of a public notice and comment provision in the New Jersey Clean Water Act was enough to make DEP's action against GAF incomparable to an administrative action under § 309 of the CWA.\(^105\)

**D. Sixth Circuit: Natural Resources Defense Council, Inc. v. Vygen Corp.**\(^106\)

The viability of CWA citizen suits reached the Sixth Circuit when two environmental groups filed a claim against the owner of Vygen Corporation for violating its state effluent discharge permit on numerous occasions between January 1989 and March 1992.\(^107\) In 1989, the Ohio Department of Environmental Protection (OEPA) commenced an administrative enforcement action against Vygen.\(^108\) On February 9, 1990, OEPA issued a Director's Final Findings and Orders (DFFO) against Vygen for noncompliance with its permit effluent limitations.\(^109\) The DFFO outlined a compliance schedule which required final compliance within thir-
ty-six months.110

A second DFFO was issued in November of 1991 when Vygen continued to violate the previous order.111 The 1991 order revised Vygen’s compliance schedule and also levied civil penalties against the company.112 In September of 1991, prior to OEPA’s issuance of the second DFFO, two public interest groups, National Resource Defense Council (NRDC) and the Ohio Public Interest Research Group (OPIRG), sent Vygen a notice of intent to sue for alleged violations of the CWA.113 On January 3, 1992, the two groups filed a CWA citizen suit against the company.114

Vygen argued that NRDC and OPIRG were barred from bringing the citizen suit because the OEPA was diligently prosecuting Vygen’s violations as required by the CWA enforcement provision.115 Utilizing the same rationale as the court in Public Interest,116 the Ohio district court found that the OEPA’s action did not constitute a state action comparable to the federal CWA because the Ohio Act had no public notice or comment provisions.117 Under Ohio law, use of notice, comment and hearings is within the discretion of the OEPA.118 In order to be considered comparable state action as provided under the CWA enforcement provision, such public participation would have to be mandated by the state act.119 Since public participation was not mandated by Ohio law, the district court held that the plaintiffs could proceed with their CWA citizen suit.120

The court also distinguished its decision from Scituate.121 In Scituate, the First Circuit held that the interests of affected citizens were protected where the state statute provided that orders were public records.122 A provision of this nature would make the state provision comparable to the

110. Id.
111. Id.
112. Id.
113. Id.
114. Id.
115. Id.
118. Id.
119. Id.
120. Id.
122. Vygen, 803 F.2d at 101 (citing Scituate, 949 F.2d at 556).
CWA and barred a citizen suit. The district court in Vygen disagreed with this approach and took a more narrow view of the issue. The court stated that "public notice is fundamental to protecting citizen participation in agency decisions. If the public does not know about agency actions, it cannot avail itself of any right to participate in any action that may be taken pursuant to that statute.

E. Eighth Circuit: Arkansas Wildlife Fed'n v. ICI Americas, Inc.

The Eighth Circuit followed the First Circuit's reasoning in Scituate to decide Arkansas Wildlife. In Arkansas Wildlife, Arkansas Wildlife Federation (AWF) appealed a district court decision which barred AWF from bringing a CWA citizen suit. The district court barred AWF's suit because the Arkansas Department of Pollution Control and Ecology (ADPCE) previously commenced an action and was diligently prosecuting ICI for exceeding their permitted effluent discharge limits during a period from late 1988 through early 1991.

In response to the violations, ADPCE entered into a Consent Administrative Order (CAO) with ICI which required ICI to meet a number of specifications within thirty days. The CAO also required ICI to pay civil penalties. The original CAO was amended in order to reflect ICI's request for an extension to meet compliance. On July 2, 1991, prior to the filing of the amended CAO, AWF filed a CWA citizen suit against ICI.

The AWF argued that ADPCE's action did not constitute a state action comparable to the federal CWA because no notice or hearing opportunities were provided to the public prior to issuance of the CAO. ICI argued that the AWF was barred from bringing the citizen suit since ADPCE's issuance of the CAO constituted diligent prosecution under a

123. Id.
124. Id. at 102.
125. Id.
128. Arkansas Wildlife, 29 F.3d at 377.
129. Id.
130. Id. at 378.
131. Id.
132. Id.
133. Id.
134. Id. at 379.
state law comparable to the federal CWA.135 Both the district court and the Eighth Circuit Court of Appeals agreed with ICI.136 Both benches took a broad view of the term "comparable" as used in the CWA enforcement provision137 by interpreting it to mean that states had some latitude in deciding the mechanics of how to enforce "comparable" state acts.138 The AWF also argued that the Arkansas Water and Air Pollution Act was not comparable to the federal CWA because the Arkansas Act did not provide the public notice and comment projections of the federal CWA.139 The court embraced the same reasoning used in Scituate140 by adopting the more liberal "sufficiently similar" standard announced by the First Circuit.141 In adopting this reasoning, the Eighth Circuit held:

[The] comparability requirement may be satisfied so long as the state law contains comparable penalty provisions which the state is authorized to enforce, has the same overall enforcement goals as the federal CWA, provides interested citizens a meaningful opportunity to participate at significant stages of the decision-making process, and adequately safeguards their legitimate substantive interests.142

F. Ninth Circuit: Citizens For a Better Environment-California v. Union Oil Co.143

On the west coast, two identical cases were combined and brought by Citizens For a Better Environment-California (CFBEC) against Union Oil Company (UNOCAL) and Exxon.144 Both cases concerned the discharge of wastewater containing selenium, a toxic element, into the San Francisco Bay by the defendant oil refineries.145 The court addressed the effect of a state administrative order on a citizen suit filed under the federal CWA.146

135. Id.
136. Id. at 380.
138. Arkansas Wildlife, 29 F.3d at 380.
139. Id. at 381.
141. Arkansas Wildlife, 29 F.2d at 381.
142. Id. (citing Scituate, 949 F.2d at 557).
143. 861 F. Supp. 889 (N.D. Cal. 1994).
144. Id. at 894.
145. Id. at 893.
146. Id. at 894.
On November 8, 1993, the defendants, along with four other oil refineries, entered into a Cease and Desist Order (CDO) with the California State Water Resources Control Board (Board). The main provisions of the CDO outlined tasks and a timetable for compliance with the effluent discharge permits. Two public hearings on the CDO were held in November and December. Based on the comments received from the public and the EPA at these hearings, the CDO was modified. The final CDO was issued by the Board on January 19, 1994. Pursuant to the CWA, the CFBEC filed a citizen suit on March 2, 1994.

UNOCAL and Exxon argued that CFBEC’s citizen suit was barred by the federal CWA enforcement provision because the state CDO constituted “a final order” under a “comparable” state law. In deciding whether the CDO constituted a “comparable” state law, the court looked to the CDO and the powers vested in the board by the authority of the California Water Code. UNOCAL argued that since it, along with Exxon and Shell Oil, agreed to make payment to the state as part of the CDO, the board’s action must be considered a civil penalty action under section 13385 of the California Water Code.

The court, however, rejected this argument indicating that the action taken by the board was specifically and intentionally termed a Cease and Desist Order which fell under a different section of the California Water Code and that the board’s deliberate action in regard to the CDO did not constitute an imposition of civil penalties. The court also noted that the cash payment agreed to by the defendants was never classified by the Board as a penalty. As a result, in order to determine whether the state action was comparable to the federal CWA, the court looked to the specific state statutory provision utilized by the board, rather than the state statutory enforcement scheme as a whole. Using this rationale, the court held that the board’s action in issuing the CDO did not constitute a comparable state action so as to bar the CFBEC from bringing a
citizen suit under the CWA.\textsuperscript{159}

The district court rejected the First Circuit’s reasoning in \textit{Scituate}\textsuperscript{160} by criticizing the broad approach of looking at a statutory scheme in its attempt to interpret the meaning of “comparable state law.”\textsuperscript{161}

\textit{G. Tenth Circuit: Sierra Club v. Colorado Refining Co.}\textsuperscript{162}

Colorado Refining Company (CRC) was cited by the Water Quality Control Division (WQCD) of the Colorado Department of Health (CDH) for exceeding its permitted discharge effluent limits.\textsuperscript{163} As a result, on May 5, 1993, the WQCD issued to CRC a Notice of Violation and Cease and Desist Order (NOV).\textsuperscript{164} Prior to this action, in March of 1989, CRC along with another refiner, Conoco, entered into an Administrative Order on Consent (AOC), in order to stop the flow of contaminants from the groundwater into Sand Creek.\textsuperscript{165} On August 12, 1993, based on these same facts, the Sierra Club filed a citizen suit under the CWA against CRC.\textsuperscript{166}

CRC argued for the dismissal of the Sierra Club citizen suit because the WQCD, via the 1989 AOC, already commenced and was diligently prosecuting an action under a comparable state law as defined by the CWA enforcement provision.\textsuperscript{167} The Sierra Club, however, argued that the 1989 AOC did not commence an action, but rather merely comprised a long-term plan for the study and cleanup of CRC’s facility.\textsuperscript{168}

Citing \textit{Gwaltney},\textsuperscript{169} the district court indicated that a citizen suit under the CWA is only proper “if the Federal, State and local agencies fail to exercise their enforcement responsibility.”\textsuperscript{170} The court indicated that deference should be given to the plan devised by the WQCD and that to allow the Sierra Club to proceed with its citizen suit would actually result in a duplicative effort between the Sierra Club and the State.\textsuperscript{171}

\begin{flushleft}
\textsuperscript{159} Id.
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\textsuperscript{160} North & South Rivers Watershed Ass’n, Inc. v. Scituate, 949 F.2d 552 (1st Cir. 1992).
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\textsuperscript{161} Union Oil, 861 F. Supp. at 906.
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\textsuperscript{162} 852 F. Supp. 1476 (D. Colo. 1994).
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\textsuperscript{163} Id. at 1478.
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\textsuperscript{164} Id.
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\textsuperscript{165} Id. at 1479.
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\textsuperscript{166} Id. at 1480.
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\textsuperscript{167} Id. at 1481.
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\textsuperscript{168} Id. at 1482.
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\textsuperscript{169} Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49 (1987).
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\textsuperscript{170} Sierra Club, 852 F. Supp. at 1483.
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\textsuperscript{171} Id.
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In addressing the issue of when the state actually commenced action, the court held that action was commenced by the state on March 19, 1993 when CDH sent a Notice of Significant Noncompliance to CRC, thus barring the Sierra Club's citizen suit.\textsuperscript{172} The court interpreted the meaning of the word "action" as used in 33 U.S.C. § 1319 of the CWA, and indicated that it was not just limited to a lawsuit but rather should be broadly defined to include administrative actions such as the Notice of Significant Noncompliance.\textsuperscript{173}

V. CONCLUSION

As demonstrated by recent cases, the circuits are not in total agreement as to how the federal Clean Water Act provision of diligent enforcement under comparable state law should be interpreted.\textsuperscript{174} The First, Eighth, and Tenth Circuits appear to give the provision a much broader preclusive effect against citizen suits. These circuits tend to be more focused on the overall regulatory scheme, while the Third, Sixth, and Ninth Circuits tend to read the provision as providing a much narrower preclusive effect. These three circuits are seemingly more focused on the precise meaning of the individual statutory provision.

In denying certiorari to the Arkansas Wildlife Federation in its citizen suit against ICI Americas Inc.,\textsuperscript{175} the United States Supreme Court's action can be interpreted as an implicit endorsement of the much broader preclusive view of citizen suits adopted by the Eighth Circuit. This approach appears to be consistent with Congress' original intent in enacting the citizen suit provision whereby the citizen suit was to be used strictly as a secondary supplemental means of enforcing the CWA, while the EPA and the individual states maintained the primary authority and responsibility of enforcing the Act.\textsuperscript{176}

One thing is certain, given the divisiveness between the circuits, until either the Supreme Court or Congress comes forward with a clear directive on how "diligent enforcement under comparable state law" is to be interpreted under the CWA, litigation in this area is destined to grow.

It is necessary for the Supreme Court or Congress to resolve the un-

\begin{itemize}
\item \textsuperscript{172} Id. at 1485.
\item \textsuperscript{173} Id.
\item \textsuperscript{174} 33 U.S.C. § 1319(g)(6)(A) (1994).
\item \textsuperscript{175} Arkansas Wildlife Fed'n v. ICI Americas, Inc., 29 F.3d 376 (8th Cir. 1994), cert. denied, 115 S. Ct. 1094 (1995).
\end{itemize}
certainty surrounding this provision. Resolution of this issue is crucial in order to obtain uniformity in the federal courts as well as to protect the citizens that the Clean Water Act was meant to protect when it was first enacted by Congress.
NOTE

UNITED STATES v. CDMG REALTY CO.: REJECTING CERCLA'S PREVIOUS OWNER LIABILITY FOR PASSIVE AND ACTIVE DISPOSAL ON MOTION FOR SUMMARY JUDGMENT

by Robin C. Irwin

"The debate which followed the enactment of CERCLA has been loud, often rancorous, and is still in full cry." 1

I. INTRODUCTION

The National Priorities List (NPL) was established pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund). 2 The NPL provides a record of land sites contaminated with hazardous substances that the Environmental Protection Agency (EPA) intends to address by conducting remedial action. Cleanup costs for CERCLA sites have been estimated at approximately $500 billion and could range as high as $750 billion. 3 In 1993, it was estimated that between 130,000 and 380,000 sites were potential candidates for government-initiated cleanup action under CERCLA. 4 For sites that were on the 1993 NPL, construction was not expected until the year 2003. 5 The EPA estimated that it expected to add sites to the NPL at the rate of seventy-five to one hundred per year. 6 CERCLA authorizes federal and state governments, as well as private citizens, to bring suit to recover cleanup costs of these abandoned hazardous waste sites from "respon-

6. Id.
The drafters of CERCLA expected these suits to quickly fix the problem of abandoned sites by aiming for the contaminators' pocketbooks. As anticipated by some members of Congress, problems arose when courts began to tackle the issues of identifying "responsible" parties and determining what activities by those parties sparked CERCLA liability.

Initially, it was relatively easy "to hold individuals liable who pushed drums off the tailgate, or who directly and objectively ordered such actions." However, courts were soon faced with the issue of whether to impose cleanup cost liability on past owners of contaminated sites who had done little or nothing to exasperate the environmental damage initiated by others. In *United States v. CDMG Realty Co.*, the District Court for the District of New Jersey addressed this question when it considered whether Dowel Associates (Dowel), a previous owner of an abandoned landfill, could be liable for cleanup costs based upon the fact that hazardous substances, released by the original owner, continued to migrate into uncontaminated soils and groundwater during Dowel's term of ownership. The district court also considered whether Dowel's soil borings into the contaminated site were sufficient under the definition of disposal to touch off CERCLA liability.

This note will briefly review the history of CERCLA and its application to previous owners of property at the time of disposal of hazardous substances. It will examine the various judicial interpretations of the term "disposal" which may be applied to previous owners of contaminated land. It will then explore the ramifications of Judge Politan's decision to reject liability for the passive migration of hazardous waste. Finally, this note will analyze Judge Politan's decision to grant summary judgment to Dowel on the issue of active disposal.

II. LEGISLATIVE BACKGROUND AND INTERPRETATION OF "DISPOSAL"

A. CERCLA

In 1980, Congress enacted CERCLA to respond to the dangers created by disposal of hazardous substances in now abandoned waste disposal facilities. CERCLA was created to complete the authority of the Re-
source Conservation and Recovery Act (RCRA) which authorizes the regulation of ongoing hazardous waste handling and disposal. In 1986, CERCLA was substantially amended by the Superfund Amendments and Reauthorization Act (SARA). Congress created within SARA what is known as the innocent landowner defense. This defense is available to a current owner or operator who can show that it did not know or have reason to know at the time of purchase that any hazardous substance had been disposed of at the facility. To establish a lack of knowledge, the owner must show that it undertook “all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice.” Despite the amendments, CERCLA’s chief function has remained “the cleanup of inactive hazardous waste sites and the distribution of cleanup costs among the parties who generated and handled hazardous substances at these sites.”

CERCLA gives the EPA a federal cause of action based upon strict liability to recover cleanup costs from potentially responsible parties (PRPs). In order to invoke its recovery authority, the EPA must show that (1) a release of hazardous substances has occurred; (2) the release occurred at a facility; (3) the government incurred response costs; and (4) the defendant is a potentially responsible party.
A "release" is defined by CERCLA as:

[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).] 19

The requirement that the release occur at a "facility" encompasses just about every source of environmental pollution with some exceptions. A waste disposal facility is defined as "any site or area where a hazardous substance has . . . come to be located." 20 Buildings, structures, installations, equipment, pipes, pipelines, and wells are all things that constitute facilities. Specifically excluded from the definition of a facility are consumer products in consumer use and vessels. 21 The term "vessel" stands for any craft used as a means of transportation on water. 22 Under the third requirement mentioned above, the terms "respond" and "response" are defined as: "remove, removal, remedy, and remedial action; all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto." 23

There are four classes of PRPs answerable for cleanup costs covered by both governmental and private parties. 24 The four types of PRPs are: (1) the current owner and operator of a hazardous waste facility; 25 (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; 26 (3) any person who arranged for disposal, treatment or transport of hazardous substances of any facility owned or operated by another party; 27 and (4) any person who transported hazardous substances to a disposal or treatment facility. 28 Defendants of contribution actions must also fall into one of these categories before an action for cleanup costs may be successfully initiated. 29 This note focuses primarily on the in-

1991) (citing Amoco Oil Co. v. Borden, Inc. 889 F.2d 664, 668 (5th Cir. 1989)).
20. Id. § 9601(9).
21. Id.
22. Id. § 9601(28).
23. Id. § 9601(25).
24. Id. § 9607(a)(1)-(4).
25. Id. § 9607(a)(1).
26. Id. § 9607(a)(2).
27. Id. § 9607(a)(3).
28. Id. § 9607(a)(4).
29. SARA provides for contribution actions among PRPs. See Id. § 9613(f)(1). Contribu-
terpretation of 42 U.S.C. § 9607 (a)(2)\textsuperscript{30} which counts as PRPs those persons who owned or operated hazardous waste facilities at the time hazardous substances were disposed.\textsuperscript{31}

B. Varying Constructions of “Disposal”

Section 9601(29) of CERCLA states that “‘disposal’... shall have the meaning provided in section 1004 of the Solid Waste Disposal Act [42 U.S.C. § 6903].”\textsuperscript{32} This RCRA section provides:

The term “disposal” means 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.\textsuperscript{33}

Two questions come to mind when attempting to apply this definition in CERCLA cases: Does disposal require an affirmative act on the part of the past owner or operator, and is the past owner or operator presently liable for the migration of hazardous substances which occurred during the period of ownership? A plethora of conflicting judicial opinions show that these questions are not easily answered. However, the judicial attempt to decipher the will of Congress reveals several valid arguments supporting either side. While some courts have decided that “disposal” requires a past owner to have affirmatively performed an act resulting in disposal,\textsuperscript{34} other courts have determined that a disposal requires no active human intervention.\textsuperscript{35} This section summarizes the development of

\textsuperscript{30} “This section works in conjunction with § 9607(a)(4)(A)-(D) to impose liability for costs in rendering releases of hazardous substances at the time of disposal. Congress has defined ‘disposal’ as one type of ‘release’ under CERCLA. However, not every release constitutes a disposal.” United States v. Petersen Sand & Gravel, Inc., 806 F. Supp. 1346, 1351 (N.D. Ill. 1992). But cf. Patrick D. Traylor, Liability of Past Owners: Does CERCLA Incorporate a Causation-Based Standard?, 35 S. Tex. L. Rev. 535, 554 (1994) (proposing that “disposal” and “release” are separate triggers to liability).

\textsuperscript{31} See infra section IV. A & B. The secondary focus of this note is the determination of previous owner disposal activities which are sufficient to preclude a motion for summary judgment. See infra section IV. C.


\textsuperscript{33} Id. at § 6903(3).


\textsuperscript{35} Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837 (4th Cir. 1992), cert.
cases and commentary concerning the definition of disposal.

1. Arguments Supporting Liability for Passive Disposal

a. The "Lack of Congressional Intent" Argument

One of the earliest cases dealing with disposal is United States v. Price. In Price, the EPA sought an injunction forcing the defendant to fund a study which would monitor the extent of problems caused by contamination in their landfill, to devise a solution to the contamination problem, and to provide an alternate water supply to nearby homeowners. The injunction was denied. However, Judge Brotman concluded that disposal "need not result from affirmative action by the defendants but may be the result of passive inaction." In support of this conclusion, Judge Brotman posited that language indicating Congress' intent for causation to precede liability was absent from the section. Judge Brotman then noted that "it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law." Finally, Judge Brotman determined that the section of the Code from which CERCLA borrows the definition of what was intended to be broadly applied. Thus, the district court held in Price that the definition of "disposal" includes inaction or negligent inaction on the part of the past owner.

b. The "Range of Meanings" Argument

Other judges have decided that, by inferring from other words in the definitional list, a passive construction of disposal was intended by Congress. In United States v. Waste Indus., Inc., the EPA brought an action under RCRA seeking injunctive relief to correct water pollution

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37. Id.
38. Id.
39. Id. at 1071.
40. Id. at 1073-74.
41. Id. at 1069.
42. Id. at 1071.
43. Id.
44. 734 F.2d 159 (4th Cir. 1984).
caused by toxic waste in a landfill located in North Carolina. The district court dismissed the case. On appeal, the Fourth Circuit reversed the dismissal. In his opinion, Circuit Judge Sprouse reasoned that Congress intended “disposal” to have a range of meanings by including leaking, which is more of an occurrence rather than conduct, as one of the components in the RCRA definition.

c. The “Causation” Argument

One commentator, Patrick D. Traylor, has sought to explain why past owners and operators of facilities at the time of disposal are liable for response costs for passive migration of hazardous waste by pointing to 42 U.S.C. § 9607(a)(4)’s phrase “release or threatened release” as applied to subparagraphs (1) through (3). Mr. Traylor cites New York v. Shore Realty Corp., for its disclosure that:

The phrase “from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance” is incorporated in and seems to flow as if it were a part only of a subparagraph (4), but it is quite apparent that it also modifies subparagraphs (1)-(3) inclusive. When the Senate’s compromise bill was printed in the Congressional Record at the start of the debate... the predecessor of... followed the printing format of the Senate version as reported... in each case subparagraph (4) ended with the words “selected by such person,” and the commencing clause “from which there is a release” was printed as a new line, supporting the reading we give it above. The latter clause evidently slipped into subparagraph (4), as sometimes happens in the waning days of a session, when the entire Senate compromise was reprinted prior to the final vote... The change thus appears to have been simply a printer’s error.

In Shore Realty, the Court of Appeals for the Second Circuit affirmed an order finding an owner of contaminated property liable under CERCLA for clean up expenditures funded by the State of New York. In the opinion, Judge Oakes explained that “section 9607(a)(2)’s scope is more limited than that of section 9607(a)(1).” Without clear congressional command otherwise, the court would not construe CERCLA “in

45. Id.
46. Id. at 164.
48. 759 F.2d 1032 (2d Cir. 1985).
49. Traylor, supra note 47, at 554 n.116 (citing Shore Realty, 759 F.2d at 1043 n.16).
50. Shore Realty, 759 F.2d at 1043.
any way that makes some of its provisions surplusage."51

Mr. Traylor adds that disposal and release can be viewed as different triggers to liability and that "Congress' decision to make past owner liability contingent on the existence of a disposal during ownership demonstrates that past owner liability cannot be predicated upon release alone."52 This argument is buttressed by the proposition in Shore Realty that "[i]nterpreting [42 U.S.C. § 6907(a)(1)] as including a causation requirement makes superfluous the affirmative defenses provided in [§ 6907(b)], each of which carves out from liability an exception based on causation."53

d. The "Inclusion of the Word 'Leaking'" Argument

Judges adhering to the passive construction of disposal have also depended on the inclusion of the word "leaking" in the CERCLA definition of "disposal." For example, in Pantry, Inc. v. Stop-N-Go Foods, Inc.,54 District Judge Tinder wrote:

"Leaking" does not commonly imply an intentional act. Rusted barrels, [and] radiators . . . may "leak" without anyone's aid or knowledge; moreover, an unseen or unintended gravity-aided release from these containers would most naturally be called a "leak." Were one purposefully to refer solely to a controlled or intentional release of some substance, one would almost never use the term "leak" to capture that meaning. . . . Therefore, the word "leaking," by itself, plainly includes and likely connotes an unintentional or inadvertent release.55

In Pantry, a purchaser of some convenience stores sued the seller for breach of environmental warranties in the purchase agreement. The district court held that the seller's inaction fell within the scope of "disposal" under a state statute definition which was virtually identical to the RCRA definition.56

2. Arguments Supporting the Finding of an Active Element in Disposal

a. The "Ejusdem Generis" Argument

51. Id.
52. Traylor, supra note 47, at 560.
53. Shore Realty, 759 F.2d at 1044.
55. Id. at 1177.
56. Id. at 1177-78.
Courts have utilized the canon of statutory construction known as *ejusdem generis* to conclude that disposal calls for human activity. *Ejusdem generis* stands for the proposition that when general words follow the enumeration of particular classes of things, the general words are most properly construed as applying to the same class of things as those enumerated.\(^{57}\) In *United States v. Waste Industries*,\(^{58}\) District Judge Britt explained:

General terms, i.e. leak and spill, must be read as containing the elements common to the specific terms, i.e. deposit, inject, dump, and place. That common element is an act carried out by a person. Leak and spill evince the legislative purpose not to require that the act have [sic] been intentional. Even under the statutory definition, disposal requires someone’s active conduct, whether intentional or accidental, in the movement of hazardous waste.\(^{59}\)

\(b\). The “Noscitur A Sociis” Argument

At least one court has relied upon the principle of *noscitur a sociis* to infer the meaning of the term “leaking” in the context of the other words in disposal’s definitional list. In *Ecodyne Corp. v. Shah*,\(^{60}\) the Ecodyne Corporation had treated wood used in the construction of water tower tanks with a hazardous chemical preservative. After discovering that the preservative had leaked onto the ground, Ecodyne sold the property to Shah.\(^{61}\) During Shah’s ownership the conditions on the property worsened. Shah sold the property before Ecodyne was commanded to clean up the site.\(^{62}\) Ecodyne sued Shah to recover the costs of cleaning up the hazardous waste and asserted that previous owners who had allowed hazardous waste to continue its downward migration should be liable under CERCLA.\(^{63}\)

The court used the maxim *noscitur a sociis* as a tool in its statutory interpretation to show that Congress, by grouping the term “leaking” with the terms “discharge,” “deposit,” “injection,” “dumping,” and “placing,” intended “leaking” to have an active human element. The

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59. *Id.* at 1306.
60. 718 F. Supp. 1454 (N.D. Cal. 1989).
61. *Id.* at 1455.
62. *Id.* at 1456.
63. *Id.* at 1456-57.
court observed

that these three nouns (discharge, deposit, and injection) and four gerunds (dumping, spilling, leaking, and placing), when read together, all have in common the idea that someone do something with hazardous substances. Taking the clearest example, the Court notes that “placing,” read in the context of the statute, means a person introducing—putting—formerly controlled or contained hazardous substances into the environment.64

In support of the court’s observation, commentator Robert Bronston has asserted that the maxim noscitur a sociis would be violated by interpreting the word “leaking” as widely divergent from its surrounding language.65

c. The “Comparison With ‘Release’” Argument

It may also be argued that a clear definition of “disposal” can be extracted from the anatomy of the statute by closely examining other sections of CERCLA and SARA where “disposal” appears.66 One section that quite obviously contemplates activity in disposal is the CERCLA definition of “release.”67 The term “disposal” is included within the definition of “release” along with other words in the definitional list, like “escaping” and “leaching.” The terms “escaping” and “leaching” do not require any active conduct by PRPs. Therefore, one may argue that a release, which is clearly a broader concept than disposal, can occur even if PRPs have remained inactive. If disposal contained a passive element under CERCLA, then one may also argue that no intelligible difference would exist between the terms “disposal” and “release.”

The District Court of the Northern District of Illinois considered this argument in United States v. Petersen Sand & Gravel, Inc.68 In Petersen Sand, the United States sued the defendant corporation, a previous owner, for allowing parts of an area of land once used for mining to be used for disposing hazardous waste.69 The United States contended that “disposal” under § 9607(a)(2) included passive leaching or leaking that

64. Id. at 1457.
67. See supra text accompanying note 19.
69. Id. at 1348.
occurred after 1970, when the defendant corporation was formed. The court was not persuaded by the government’s argument. Because the term “release” could be interpreted to be broader in scope than the term “disposal,” the court concluded that disposal requires activity on the part of PRPs.

III. UNITED STATES V. CDMG REALTY CO.

A. The Facts

In 1980, Dowel entered into a contract to purchase a ten-acre plot of land which was once part of the Sharkey Farm’s Landfill located in Parsippany-Troy Hills Township, New Jersey. The purchase contract was contingent upon Dowel’s obtainment of a building permit within six to nine months. In 1981, Dowel purchased the vacant plot. Prior to purchasing the land, Dowel commissioned a preliminary soils and foundation investigation in connection with a proposed building site which involved at least eight ground borings.

Between 1979 and 1982, the EPA conducted a variety of inspections and assessments of the landfill. The site was investigated for contamination of the groundwater, the soil, the sediment, the leachate, and the surface water by solid waste and hazardous industrial substances such as organic and inorganic chemical compounds including chlorobenzene, toluene, ethyl-benzene, methyl chloride, xylene, nickel, and lead. The EPA placed the site on the National Priorities List of Superfund sites in December of 1982. In 1984, the EPA identified Dowel as a potentially responsible party and invited Dowel to advise the EPA of its willingness to undertake remediation activities. After disclosing the fact that the

70. Id. at 1349.
71. Id. at 1351. The Petersen court also depends upon the “innocent landowner” argument to conclude that disposal requires some activity. See infra text accompanying notes 132-34.
73. Id.
75. Id.
76. HMAT’s Supplemental Memorandum at 2, CDMG (No. 89-4246).
78. HMAT’s Supplemental Memorandum at 2, CDMG (No. 89-4246).
79. Id. at 5.
ten-acre plot was part of the Sharkey Landfill, Dowel sold it to HMAT Associates, Inc. (HMAT) in 1987.80

In 1989, the EPA and the New Jersey Department of Environmental Protection filed complaints against PRPs in an effort to seek a reimbursement for money spent to clean up the landfill and a declaration of liability for future cleanup costs.81 HMAT was named as a PRP because it was the current owner of the plot.82

B. Cross-Motions for Summary Judgment

HMAT filed a federal third-party suit, among other state law claims, seeking contribution from Dowel as a former owner of the Sharkey Landfill plot under 42 U.S.C. § 9607(a)(2).83 From May 9, 1994 to October 24, 1994, the United States District Court for the District of New Jersey entertained cross-motions for summary judgment by Dowel and HMAT concerning Dowel’s potential liability as a previous owner under CERCLA.84 In its motion, HMAT contended that Dowel’s failure to take any action to prevent the migration of contaminants underground constituted disposal under CERCLA.85 HMAT also alleged that Dowel’s drilling activities were sufficient for active disposal liability because the subsurface drilling discharged preexisting contaminants into the groundwater beneath the landfill.86 On the other hand, Dowel contended that it could not be liable under CERCLA because it was not an owner or operator of the property at the time of disposal of hazardous substances.87

I. First Issue: Could Dowel be Liable for Passive Disposal?

District Judge Politan acknowledged that the scope of the definition of “disposal” is in conflict between the circuits88 and that the Third Circuit had not squarely addressed the interpretation of disposal in the context of

81. Brief in Support of Motion for Summary Judgment by Dowel Associates at 1-2, CDMG (No. 89-4246).
82. Id.
83. CDMG, 875 F. Supp. at 1080. The state law claims are not discussed in this note.
84. Id. at 1079 n.1.
85. HMAT's Supplemental Memorandum at 9-12, CDMG (No. 89-4246).
86. Id. at 13-15.
87. Dowel's Brief at 3-6, CDMG (No. 89-4246).
88. CDMG, 875 F. Supp. at 1081.
CERCLA. Judge Politan made an initial examination of the New Jersey District Court case of United States v. Price which addressed the disposal issue in the context of RCRA. The judge then engaged in an independent review of cases addressing disposal as applied in the context of CERCLA. In his opinion, Judge Politan expressed a preference for the Third Circuit’s reasoning in Witco Corp. v. Beekhaus. Judge Politan believed that Witco cast doubt upon the issue of whether the scope of disposal under CERCLA was as broad as it is under RCRA. Because 42 U.S.C. § 9607(a)(2) recognizes a temporal dimension to disposal, Judge Politan reasoned that an active component to disposal was suggested.

Judge Politan also examined the manner in which CERCLA disposal is defined in other jurisdictions. The court relied upon United States v. Peterson Sand & Gravel, Inc. as a well reasoned and accurate construction of Congress’ intent. The court in CDMG adopted the Petersen holding that disposal does not encompass a passive element. Judge Politan went on to determine that the Second Circuit’s construction of Congressional intent prior to the amendments allowing for the innocent landowner defense was of questionable value. Dowel, by its mere ownership of the landfill at the time when contamination may have been leaching, leaking, or moving through soil or groundwater, was not liable for passive disposal.

2. Second Issue: Did Dowel’s Subsurface Drilling Constitute Active Disposal?

Judge Politan questioned whether an issue of fact existed as to Dowel’s alleged active disposal of hazardous substances. In its motion for summary judgment, HMAT contended that Dowel’s subsurface drilling

89. Id.
90. See supra notes 36-43 and accompanying text.
91. CDMG, 875 F. Supp. at 1081-84.
92. 38 F.3d 682 (3d Cir. 1994).
93. CDMG, 875 F. Supp. at 1081.
94. Id. at 1081-82.
95. Id. at 1082-84.
96. Id. at 1084. See text accompanying notes 68-71 for a summary of the decision in Petersen Sand.
97. Id.
98. Id. at 1083 n.10 (citing New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985)).
99. Id. at 1084.
100. Id. at 1084-86,
discharged preexisting contaminants into the groundwater beneath the landfill. Judge Politan decided that active disposal equaled the movement, dispersal, or release of substances, extending beyond the initial introduction of hazardous materials. The judge then reviewed specific examples of conduct that other courts have found to meet the threshold requirements for active disposal.

One of the first cases dealing with some specific requirements for an owner's active disposal is *Tanglewood East Homeowners v. Charles-Thomas, Inc.* In *Tanglewood*, the defendants had built a housing subdivision on contaminated property. In the course of grading the site, the defendants spread contaminated soil over the whole property. Judge Politan explained that "there may be other disposals when hazardous materials are moved, dispersed, or released during landfill excavations and fillings." Since *Tanglewood*, other courts have determined that upsetting contaminants during the excavation of a landfill satisfies the requirements for disposal under CERCLA.

After he compared Dowel's alleged activities with the examples meeting threshold requirements for the denial of summary judgment in other cases, Judge Politan concluded that HMAT had not pointed to any concrete evidence that Dowel's borings disturbed any contaminants or caused them to become mixed in clean soil. The judge speculated that even if Dowel had done what HMAT alleged, such conduct would still be insufficient to confer CERCLA liability. After comparing the facts of *CDMG* with the situations in the *Tanglewood* line of cases, Judge Politan opined that any subsurface drilling by Dowel would fall short of conduct accepted as enough of a disturbance to constitute disposal.

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101. HMAT's Supplemental Memorandum at 14, *CDMG* (No. 89-4246).
103. *Id.*
104. 849 F.2d 1568 (5th Cir. 1988).
105. *Id.* at 1571.
106. *Id.* at 1573.
109. *Id.*
110. *Id.*
their worst possible portrayal, the . . . borings 'cannot' match these scenarios.” According to Judge Politan, “to encompass [these borings] within the term 'disposal' [under] CERCLA . . . would be an unjustified expansion of the Tanglewood proposition that only 'significant disturbance of already contaminated soil constitutes disposal.'” For these reasons, Judge Politan decided that HMAT failed to establish a prima facie case of CERCLA disposal liability against Dowel. 

IV. ANALYSIS

At least one court has espoused that CERCLA is now viewed nearly universally as a failure. Judge Sweet, in United States v. A&N Cleaners & Launderers, Inc., pointed to the fact that “after fourteen years and over eighteen billion dollars spent on the CERCLA program, only 12% of the sites on the NPL have been cleaned up.” Part of CERCLA’s “universal failure” may be attributed to the difficulties courts often discover when they attempt to apply CERCLA to cases involving previous owners of contaminated property.

Before applying a statute, a court must first evaluate the statutory language. When the language is plain, the courts must enforce the statute according to its terms. While some courts have attempted to determine whether the CERCLA term “disposal” provides a plain meaning, other courts have sought consolation for their views from different sections of CERCLA, an assortment of legislative history, use of the term in other statutes, and varying canons of statutory interpretation. Judge Politan's decision in CDMG reflects an interpretation that is gaining credibility in federal courts around the nation. This section analyzes Judge Politan's construction of disposal and explores the ramifications of his decision to reject passive disposal. The section then analyzes Judge Politan's decision to award Dowel summary judgment on the issue of active disposal liability.

111. Id.
112. Id. at 1085.
113. Id. at 1085-86.
115. Id. (citing 140 CONG. REC. S3965, S3965 (daily ed. March 25, 1994) (statement of Sen. Smith)).
118. See supra part II. B.
A. Judge Politan's Construction of Disposal

Judge Politan refused to base his opinion solely on the *noscitur a sociis* or the *ejusdem generis* canons of statutory construction. Instead, he searched for internal consistency within the CERCLA text and the SARA amendments by comparing the definitions of disposal and release within the context of the innocent landowner defense. While Dowel did not depend on the innocent landowner defense, a discussion of the defense is "aimed only at establishing that its construction leads inevitably to the conclusion that CERCLA's definition of 'disposal' involves an active component." Judge Politan was persuaded by the reasoning of *United States v. Petersen Sand & Gravel, Inc.*, which is perhaps the most significant case construing an active element in disposal. In *Petersen Sand*, the government contended that the defendant, a former owner of contaminated property, was liable as an owner at the time of disposal under 42 U.S.C. § 9607(a)(2). Even though no proof was presented showing that the defendant engaged in waste disposal activity during its ownership, the government asserted that passive disposal was enough for liability under the statute.

In *Petersen Sand*, Judge Conlon compared RCRA's definition of "disposal" to the definition of "release" under CERCLA. Judge Conlon determined that "release" encompasses "disposal." The judge explained that Congress has preconditioned the CERCLA response scheme on the occurrence of a release. However, a more specific determination of owner or operator liability is centered on disposal. Because of the existence of the innocent landowner defense, the *Petersen Sand* court determined that a release may not equal liability all of the time. On the other hand, a disposal which occurs under the owner or operator's watch will always touch off CERCLA liability.

Because of the existence of the innocent landowner defense, Judge Conlon, in *Petersen Sand*, constructed an active element in CERCLA's
definition of disposal. According to Judge Conlon, the innocent landowner defense sheds light on the meaning of "disposal" in three ways. First, the court reasoned that giving disposal a passive content would eviscerate the plain purpose of the innocent landowner defense. Second, because SARA refers to a time period after disposal but during release or threatened release, the relative scope of "release" and "disposal" was made "unequivocally clear." Last, the court reasoned that disposal requires an affirmative human act because the innocent landowner defense "likens a 'disposal' to a placement." For these reasons, the Petersen Sand court held that the strict liability aspect of CERCLA had been diluted by the innocent landowner defense and that the Congressional intent of CERCLA was not offended by exculpating former owners unaccountable for disposal.

Commentator Robert Bronston has developed the reasoning of Petersen Sand, explaining that:

[If disposal incorporates passive migration, virtually no one could qualify for this [innocent landowner] defense because the passive migration could well occur or continue to occur during the innocent purchaser's ownership . . . [O]nly purchasers fortunate enough to purchase land where the buried waste was contained in concrete—and thus incapable of migration—could assert the defense if courts adopted the passive definition of disposal.

If Judge Politan agrees with Judge Conlon's reasoning, then Judge Politan must agree that Congress viewed disposal as an act with defined beginning and ending points. Thus, Judge Politan refused to construe disposal to incorporate passive migration of contaminants because it would eliminate any period of time after the disposal. If the passive migration also had a distinct ending point, then the argument raised by Robert Bronston in support of Judge Conlon's reasoning must logically fail. However, the very nature of hazardous waste movement tends to render an identification of a distinct ending point for passive migration virtually impossible.

Judge Politan viewed the cases finding previous owner liability for

130. Id. at 1352.
131. Id.
132. Id.
133. Id.
134. Bronston, supra note 65.
135. See Id. at 628 n.85.
136. See Id.
passive migration of waste as unpersuasive in his opinion. He rejected the case of Nurad, Inc. v. William E. Hooper & Sons Co. for its proposition that disposal requires no activity on the part of a past owner or operator who has sold contaminated property to a current owner or operator. In Nurad, defendant Kenneth Mumaw had purchased a portion of contaminated property from defendant Nicoll. Nicoll had purchased the property from William E. Hooper & Sons Co. Located on the property were several underground storage tanks which had previously leaked hazardous substances. Defendant Mumaw took title to the property, subdivided the site into parcels, and then transferred the parcels to plaintiff Nurad, Inc. and other parties. Nurad, Inc. later filed a private cost recovery action naming Mumaw as a responsible party and alleging that Mumaw was liable for the passive migration of hazardous substances at the site during his brief ownership.

In the trial court, Judge Nickerson, in Nurad, disagreed with the plaintiff's interpretation of disposal under 42 U.S.C. § 9607(a)(2). Judge Nickerson reasoned that CERCLA liability was expressly limited by Congress to include former owners “at the time of disposal,” a phrase which must refer to an action or have no meaning at all. This reasoning was rejected by the Fourth Circuit Court of Appeals. The Fourth Circuit explained that if “a current owner, such as Nurad, who never used the storage tanks could bear a substantial share of the clean up costs,” then it would not be consistent for a similarly situated former owner to escape liability. In CDMG, Judge Politan countered the Fourth Circuit’s logic by showing that the value of strict liability principles expressed prior to the SARA amendment is questionable in the present context of the law. Regardless of the principles expressed in Nurad, Judge Politan insisted that the “strict liability facet of CERCLA

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139. Id. at 840.
140. Id.
141. Id.
142. Id.
143. Id. at 841.
145. Id.
146. Id. at 847.
147. Id. at 845.
has been diluted” by the innocent landowner defense.149

B. Ramifications of Judge Politan’s Decision to Reject Passive Disposal Liability

Judge Politan’s decision to reject liability for the passive migration of hazardous substances was correct because any other decision would render the innocent landowner defense as surplusage. If disposal included passive non-action, then the innocent landowner defense would be moot in all but only the rarest of circumstances.150 Judge Politan’s decision was based upon the maxim that all words and provisions of statutes are intended to have meaning and are to be given effect, and words of a statute are not to be construed as surplusage.151

On the other hand, one could argue that Judge Politan’s decision to reject passive disposal frustrates the original strict liability purpose of CERCLA by incorporating a fault based standard for liability. Courts interpreting CERCLA have consistently held that CERCLA liability is strict, retroactive, and joint and several.152 However, CERCLA’s strict liability facet is defined by language confining liability to parties falling into one of the four classes of PRPs. Judge Politan’s conclusion does not require proof of the previous owner’s negligence, violation of statute, or other “fault” based activity. Therefore, by construing an active element to disposal, Judge Politan did not necessarily impose a fault based standard which would otherwise frustrate CERCLA’s strict liability facet. Judge Politan merely confined the scope of disposal to the active human conduct of placing hazardous substances in or on the environment with or without fault. This conclusion is supported by the reasoning that Congress could have specifically included language in the statute which extended the liability net to include passive polluters.153

Another of CERCLA’s stated goals is to encourage the private cleanup

149. Id. at 1083.
150. See supra note 134 and accompanying text.
153. See Snediker Dev. Ltd. Partnership v. Evans, 773 F. Supp. 984, 989 (E.D. Mich. 1991) (reasoning that the drafters of CERCLA would have explicitly written that all owners in the chain of title are liable, if the framers had so intended). But cf. Moskal, 498 U.S. at 109 (explaining that the Supreme Court has never required that every permissible application of a statute be expressly referred to in its legislative history).
of polluted sites. One may argue that Judge Politan's decision will encourage landowners to sell their contaminated property without disclosing the defects to prospective buyers. Judge Conlon, in Petersen Sand, stated that "an owner could avoid liability simply by standing idle while an environmental hazard festers on his property." Such action may violate CERCLA's important private cleanup policy. Nevertheless, Judge Conlon went on to explain that this problem could be resolved by CERCLA § 9601(35)(C) which provides:

Nothing in this paragraph or in section 9607(b)(3) of this title shall diminish the liability of any previous owner or operator of such facility who would otherwise be liable under this chapter. Notwithstanding this paragraph, if the defendant obtained actual knowledge of the release or threatened release of a hazardous substance at such facility when the defendant owned the real property and then subsequently transferred ownership of the property to another person without disclosing such knowledge, such defendant shall be treated as liable under section 9607(a)(1) of this title and no defense under section 9607(b)(3) of this title shall be available to such defendant.

Judge Conlon, in Petersen Sand, disavowed any danger that intermediate landowners would refuse to disclose fully the fact of contamination to escape liability, but his decision may lead to just that. Judge Politan's decision, which was based upon the analysis in Petersen Sand, also offers a seductive but deceptive security. According to the Petersen Sand court, § 9601(35)(C) insures against a previous owner's failure to disclose the fact of contamination because he knows that he can be prosecuted for doing so. However, the Petersen Sand court's interpretation of § 9601(35)(C) cannot ultimately be reconciled with § 9607(a).

The language of section [9601(35)(C)] suggests that it was intended to apply only to those potentially liable parties who try to use the innocent landowner defense, or more precisely, those parties who are PRPs under [9607(a)]. If, however, passive disposal does not give rise to section [9607(a)(2)] liability, as Petersen holds, then past passive owners need not invoke the innocent landowner defense at all, as CERCLA does not reach them. Passive owners who know their sites are contaminated would thus be free to sell their property without disclosing the fact that it contains hazardous substances.
While the rejection of passive disposal liability may conflict with CERCLA's underlying policy that encourages private instigation of clean-up activities, it certainly does not conflict with the policy which attempts to focus liability on "those industries and consumers who profit from products and services associated with the hazardous substances which impose risks in society." 158

This policy has been interpreted to limit liability under CERCLA to those parties "responsible for, or benefiting from, the activities leading to" a contamination problem. Industries or other persons who actively dispose of hazardous waste benefit or profit from that activity. Current landowners who clean up their contaminated property, either voluntarily or at the request of the government, benefit from owning clean land. But a landowner who purchases property on which hazardous substances have been dumped or buried by a previous owner, and who later sells the property, does not benefit or profit from the placing of chemicals in the land or from the cleanup. Thus, holding that party responsible for "disposing" of chemicals that move passively beneath the soil would seem to conflict with a CERCLA policy. 159

In light of the seemingly conflicting policies of CERCLA, Judge Politan's decision to limit the scope of "disposal" to active human conduct remains the correct interpretation of the statute. However, rejecting liability in factual situations like Mumaw, where the defendant held title for a few hours and might not have known about the contamination at the time of purchase, is different from absolving previous passive owners who had full knowledge of contamination but refused to disclose at the time of the sale. For this reason, commentator Catherine Stempein suggests that CERCLA disposal should be broadly interpreted to include knowledge of leaching plus non-action. 160

Still, a court's obligation is to take statutory language as Congress wrote it. If there is ambiguity, then the court may examine the legislative history and statutory purposes before rendering a decision. 161 In the present case, CERCLA does not purport to explain whether knowledge of a previous release is an element of disposal liability for previous owners and operators. Ergo, there is no ambiguity, and knowledge of a release is

159. Id.
irrelevant for the purposes of active disposal. In light of CERCLA’s quick cleanup policy, this lack of statutory guidance indicates that considered action is needed by either Congress or the various state legislators. Because the existing Congress seems reluctant to expand the liability net to include sellers of contaminated land who refuse to disclose, state legislators who have not done so must be encouraged to examine their own policies regarding this issue.

Solutions to this apparent loophole may be found in other contexts. In one well-reasoned opinion, Third Circuit Judge Cowen explained that “[i]n enacting CERCLA Congress has not explicitly preempted all state law on environmental subject matter, nor has Congress enacted such a comprehensive scheme of regulation as to provide no room for supplementation by the States.” A state law which imposes liability upon a previous landowner who refused to fully disclose the fact of contamination to a buyer by voiding the contract would not stand as an obstacle to the purposes of Congress in enacting CERCLA. Additionally, a previous landowner could comply with both state and federal law on this particular issue. At least one state, New Jersey, has enacted full disclosure laws. In states that do not have full disclosure laws, prospective purchasers must remember that the rule of caveat emptor may not always be circumvented by actions for private nuisance or other common law causes of action. Therefore, prospective purchasers may find it in their best interest to protect themselves by providing for contingencies in the purchase agreement. In addition, the buyer can always ask for representations and warranties from the vendor.

Holding previous owners liable for the passive migration of waste during their tenure of ownership may contravene CERCLA’s purpose of requiring those who benefit from polluted land to be responsible for cleanup. In CDMG, Judge Politan’s decision preserved that purpose as well as the diluted strict liability facet of CERCLA. Nevertheless, his

162. Witco Corp. v. Beekhaus, 38 F.3d 682, 687 (3d Cir. 1994).
163. N.J. STAT. ANN. § 13:1E-116 (West 1991) provides:
   a. No person shall contract to sell any land which has been utilized as a sanitary land-fill facility at any time prior to the effective date of this supplementary act unless the contract of sale for the land shall state the fact and the period of time that the land was so utilized . . . .
   b. Any contract made in violation of this section is voidable.
decision exposed the consequences of ignoring another important goal of CERCLA. Despite the reasoning of Petersen Sand, intermediate landowners who are fully aware of previous contamination will not be motivated to instigate cleanup activities by CERCLA alone. For the protection of real estate buyers and the public, state legislators should be encouraged to pass full disclosure laws affecting vendors of land contaminated with hazardous substances. In CDMG, both Dowel and HMAT were fully aware of the problems surrounding the landfill. Thus, there was never an issue concerning full disclosure to HMAT by Dowel of the existence of hazardous waste. Since New Jersey already requires full disclosure, Judge Politan was never truly presented with the impact his decision might have on previous owners who failed to disclose the fact of contamination in order to escape liability. For these reasons, Judge Politan's decision to reject passive disposal liability will likely be affirmed on appeal.

C. Judge Politan's Decision to Grant Summary Judgment on the Issue of Active Disposal

Judge Politan made a cursory examination of the extent to which Dowel's drilling constituted active disposal before granting Dowel's motion for summary judgment. The evidence of Dowel's commissioned soil borings was not considered sufficient to stave off a grant of summary judgment. Affidavits by HMAT's soil expert were viewed as merely speculative. According to Judge Politan, HMAT had not pointed to any concrete evidence that the borings caused any contaminants to become mixed with clean soil. Judge Politan then decided that even if the borings had occurred as HMAT contended, such activity could not match the scenarios of other cases where summary judgment was precluded.

The Federal Rules of Civil Procedure state that "[a] party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof." Summary judgment was once met with a heated resistance in the federal courts. However, it has definitely become accept-

166. Id. at 1085.
167. Id.
168. Id.
169. FED. R. CIV. P. 56(b).
170. See generally Robert M. Bratton, Summary Judgment Practice in the 1990s: A New
ed practice in recent times. One scholar explains that a trilogy of 1986 Supreme Court cases deciding issues on summary judgment has sent a message to district court judges that "summary judgment motions should not be approached timidly." 171 The United States Supreme Court has also reasoned that:

[Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action. ... Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the rule, prior to trial, that the claims and defenses have no factual basis. 172]

Under the Federal Rules, the moving party bears the initial burden of identifying evidence which demonstrates the absence of a genuine issue of material fact. 173 Once that burden has been met, the non-moving party must set forth "specific facts showing that there is a genuine issue for trial" 174 or the factual record will be taken as presented by the moving party and judgment will be entered as a matter of law. 175 The non-movant must "do more than simply show that there is some metaphysical doubt as to the material facts." 176

In ruling on a motion for summary judgment, the judge is bound to resolve all evidentiary disputes and draw all inferences in the non-movant's favor. Construing the evidence in such a fashion, the judge determines whether the evidence is sufficient to sustain a verdict for the opponent, rendered by a reasonable jury acting under appropriate instructions, including those defining the applicable standard of proof. In the absence of sufficient evi-

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Despite the well-intentioned efforts of the drafters and members of the legal community who had arduously labored and participated in formulating [the summary judgment rule], Rule 56 suffered heavily from neglect, misuse, restriction, confusion and inconsistency during the first forty-eight years of its existence. One has only to wade through volumes of articles and cases decided under Rule 56 ... to verify this truth.

Id. at 449-50.

173. Id. at 323.
174. Id. at 324.
176. Id. at 586.
However, the issue remains: How much evidence is sufficient to preclude a motion for summary judgment? The Supreme Court in *Anderson v. Liberty Lobby, Inc.* provides clues to the answer.

[A] motion for summary judgment [under Rule 56] necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on its merits . . . . [T]he judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.179

A determination of whether a plaintiff’s particularized facts are sufficiently strong to pass the “scintilla of evidence” burden is at least partially discretionary on the part of the trial judge. Even so, trial court judges frequently struggle with this standard.

One of the dilemmas summary judgment poses is whether the trial court’s decision is solely a matter of law or whether it also includes findings of fact. The civil rules appear to clearly address this issue. The statutory language dictates that trial courts must decide summary judgment motions “as a matter of law.” Notwithstanding this mandate, trial courts must make at least a preliminary finding of facts to determine whether the evidence is insufficient to raise a genuine issue. In short, the statement that summary judgment is a finding as a matter of law is yet another legal fiction. In practice, summary judgment reflects a judge’s determination that the facts, as she perceives them, are insufficient for a party to win his case at trial.180

The argument that judges will be tempted to reach decisions of summary judgment on an *ad hoc* basis is valid.181 In *CDMG*, Judge Politan suggested that his decision to grant summary judgment in favor of Dowel was based upon the fact that Dowel’s soil borings were not a significant disturbance. This type of reasoning opens the door for future judges to do away with previous owner issues based upon their personal fancies. If the case is appealed, then the Third Circuit should be aware of the

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179. *Id.* at 252.
181. *See* Arnstein v. Porter, 154 F.2d 464, 479 (2d Cir. 1946) (Clark, J. dissenting)
Tanglewood holding that disposal is not limited to the initial introduction of hazardous material onto property. Before rendering a decision, the Third Circuit should consider that "Congress intended to impose liability on those parties who caused or contributed to a release or threatened release of hazardous waste." The Third Circuit should ultimately reverse Judge Politan’s summary judgment because disposal, which is a kind of release, is broadly defined as “[a] discharge . . . into or on any land . . . so that such . . . waste . . . may enter the environment.” CERCLA’s plain statutory language fails to impose any quantitative requirement on the term “disposal.” Therefore, evidence that a previous owner introduced a quantity of hazardous waste, however small, into the environment should be sufficient for a preclusion of summary judgment.

Judge Politan’s decision shifts the focus of the court away from a preliminary determination of a genuine issue of whether an act of disposal has occurred. Instead, judges following CDMG will feel compelled to wade deeply into the record and draw arbitrary lines based upon personal and inconsistent determinations of a sufficient quantity of discharge needed to preclude summary judgment. Judge Politan’s portrait of summary judgment contravenes the United States Supreme Court’s view that the substantive law will identify which facts are material for summary judgment and subverts Congress’ goal that parties responsible for contaminating property be held accountable for the cost of cleaning it up. Unless Judge Politan’s decision to grant summary judgment in favor of Dowel on the issue of active disposal is reversed on appeal, summary judgment decisions concerning CERCLA disposal or release will inevitably remain ad hoc.

V. CONCLUSION

Ralph Waldo Emerson once wrote that “[a] foolish consistency is the hobgoblin of little minds.” In United States v. CDMG, Judge Politan attempted to capture a statutory “hobgoblin” through his construction of

184. Id. at 1342.
185. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (reasoning that “[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment”).
186. RALPH WALDO EMERSON, SELF-RELIANCE, 45, 58 (1883).
CERCLA disposal as applied to past owners of contaminated property. Of course, one cannot be certain how other jurisdictions will attempt to solve this noteworthy puzzle. To this day, the various courts have failed to find a method by which to chime their views. Instead, the several jurisdictions seem to jostle each other for position in a kind of judicial steeplechase for a "correct" interpretation. It seems strange that each Circuit has a stronger sense of its own voice and commitments than anything Congress put forward with assurance when CERCLA was enacted. Judge Politan's decision to reject passive disposal was technically correct under the applicable facts. However, the existence of the numerous judicial interpretations that attempt to validate liability for the passive migration of hazardous waste should caution environmental practitioners.

The Supreme Court still has not ruled on the issue. Perhaps now is the time. Either Congress or the Supreme Court must ensure a clearer definition of the term "disposal" under CERCLA. Hopefully the disposal issue, in light of the quick cleanup policy, can be examined with specificity if Congress decides to reauthorize and amend CERCLA.187 Future reforms must include provisions ensuring a clearer comparison of the terms "disposal" and "release." Another important consideration for future reformers is the determination of the kind of activity that will trigger environmental cleanup responsibilities. Should conduct by a previous owner be the trigger to liability at all? If not, then within what context should the legal system be required to find previous owner liability? If holding a previous owner responsible for passive migration of hazardous waste is appropriate, then what about the status of a potential offender who, like Mumaw in Nurad, never set foot upon the property and only held title long enough to effect the property's sale? Finally, how much discretionary power may be used by a court when it sifts through the evidence offered by a party in an effort to preclude a grant of summary judgment? Without more guidance from Congress or the Supreme Court, future trial and appellate judges are likely to resolve these issues according to their personal choice of logic. Therefore, environmental lawyers should seek to discover the personal inclinations of federal judges regarding CERCLA policies before advising any clients who risk becoming PRPs. Regardless of whether Congress or the Supreme Court decides to

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clarify these issues, State legislatures must attempt to mend the liability net by passing and enforcing full disclosure laws that cover current owners of uncontaminated property who could otherwise escape CERCLA liability.
SPECIAL FEATURE

INTRODUCTION TO THE BEST BRIEFS FROM THE 1995 CHASE NATIONAL ENVIRONMENTAL LAW MOOT COURT COMPETITION

In March, 1995, the Salmon P. Chase College of Law Moot Court Board and the Ohio Valley Environmental and Natural Resources Law Institute hosted the annual Chase National Environmental Law Competition. One of only two nationally recognized environmental law competitions, Chase hosted the following sixteen schools represented by competitors: Brigham Young University-J. Rueben Clark Law School, Chicago-Kent College of Law, George Washington School of Law, Georgia State University, Lewis and Clark-Northwestern School of Law, Ohio Northern University, Pace University, Seattle University, the University of Akron, the University of Cincinnati, the University of Dayton, the University of Kentucky, the University of Toledo, Washington College of Law-American University, Wayne State University, and Widener University.

The final round was argued before a prestigious bench including Justice Donald Wintersheimer, Kentucky Supreme Court; Judge Patricia Summe, Kenton County Circuit Court; Judge Gregory Bartlett, Kenton County Circuit Court and Adjunct Professor at Chase; Judge Martin Sheehan, Kenton County District Court; Dean David Short, Chase College of Law; Henry L. Stephens, Director of Ohio Valley Environmental and Natural Resources Law Institute and Associate Professor at Chase; and David Van Epps, Environmental law practitioner and Adjunct Professor at Chase.

Each team submitted an appellate brief and presented oral arguments on an action involving the need for preparation of an environmental impact statement for an international trade agreement. The two main issues were: (1) Whether an environmental public citizen group had standing to challenge the Office of the Trade Representative’s failure to prepare an environmental impact statement for a Trade Agreement with Australia and New Zealand; and (2) Whether the Office of the Trade Representative took a “final agency action” by preparing and finalizing the Trade Agreement, thereby enabling the court to exercise jurisdiction over the matter.

The fictitious case originated from negotiations of a new free trade agreement between the United States (represented by the Office of the
Trade Representative), Australia, and New Zealand. The plaintiff, Protector of the Earth, challenged the action because of the alleged detrimental effects it would have on the environment. Protector of the Earth sought a declaration that the Office of the Trade Representative was required to prepare an environmental impact statement, pursuant to the National Environmental Policy Act. The Office of the Trade Representative sought dismissal of the action due to plaintiff's lack of standing and failure to state a cause of action.

Widener University, represented by Danielle Kilgore, Rhonda Kauf and Jim DeCinti, won Best Overall Team. The University of Dayton, represented by Cameron Sergent and Walter Krygowski, won second place for Best Overall Team the award for the Best Petitioner's Brief. Brigham Young University, represented by Robert Funk and Jared Leung, won the award for the Best Respondent's Brief. Best Oralist was awarded to Walter Krygowski, University of Dayton, and Rhonda Kauf, Widener University, won Second Best Oralist.

The Salmon P. Chase Moot Court Board was organized in 1971 by professors Frederick Schneider and Frederic Gray. Professor Kamilla Mazanec currently serves as the faculty advisor. The student-run board was lead by Chief Justice Ann Toni Kereiakes during the 1994-1995 school year. The 1995 Chase National Environmental Law Competition was chaired by Lisa M. Kottak.
No. NKU- 1995

In The
SUPREME COURT OF THE
UNITED STATES

March Term, 1995

OFFICE OF THE UNITED STATES
TRADE REPRESENTATIVE,
Petitioners
v.
PROTECTOR OF THE EARTH,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eighteenth Circuit

BRIEF FOR THE PETITIONER

Walter J. Krygowski &
Cameron A. Sergent
Counsel for Petitioner
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QUESTIONS PRESENTED

I. Whether Respondent has failed to identify a final agency action on behalf of the Office of the United States Trade Representative ("OTR") sufficient to invoke review under the Administrative Procedure Act ("APA") when the OTR only preliminarily negotiated an international trade agreement which still lacks the necessary presidential approval, submission to Congress and congressional approval and implementation.

II. Whether Respondent has failed to establish the constitutional Article III and APA standing requirements to bring suit against the OTR when it cannot show either derivative or informational harms resulting from the negotiation of the Trade Agreement with Australia and New Zealand ("TAAN"), and Congress did not intend to make the negotiation of such trade agreements reviewable under the National Environmental Policy Act ("NEPA").

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Administrative Procedure Act
Respondent, Protector of the Earth, brought this action against Petitioner, Office of the United States Trade Representative ("OTR"), under the National Environmental Policy Act ("NEPA") and the Administrative Procedure Act ("APA") in the U.S. District Court for the Northern District of Bedford. (R. 1). Respondent asked that court for declaratory and injunctive relief seeking a declaration that the OTR is required to prepare an Environmental Impact Statement ("EIS") for the Trade Agreement with Australia and New Zealand ("TAAN"), an international free trade agreement. Id. The court granted the OTR's motion to dismiss for lack of standing and for failure to state a claim upon which relief can be granted, finding that Respondent was without standing to bring suit. Id. In response, Respondent appealed to the U.S. Court of Appeals for the Eighteenth Circuit, which reversed the decision of the district court, finding that Respondent had standing to bring suit under the APA and requiring the OTR to issue an EIS regarding TAAN. (R. 6). Appealing the decision of the Eighteenth Circuit Court, the OTR urges this Court to reverse the decision below and find that Respondent cannot identify a final agency action sufficient to invoke APA review of its actions, and that Respondent lacks the standing necessary under the U.S. Constitution and the APA to bring this suit.

In 1991, the United States began negotiations with Australia and New Zealand to enter into TAAN. (R. 2). Under the direct control of both the President and Congress, the OTR conducted negotiations on behalf of the United States. Id. The OTR's negotiation efforts produced TAAN, which creates a free trade zone that encompasses the United States, Australia, and New Zealand by eliminating all tariffs and non-tariff barriers to trade.
on thousands of items in commerce. *Id.* On May 18, 1994, the trade representatives of the three nations signed TAAN. *Id.* The President must submit TAAN to Congress along with implementing legislation and an explanation of its changes to the current law, and Congress must approve the agreement before it can take effect. *Id.* The President has not yet submitted TAAN to Congress. *Id.*

Respondent is an environmental group with international membership which attempts to educate the public on environmental issues and lobbies for laws that protect public health and the environment. *Id.* Respondent seeks an injunction requiring the OTR to prepare an EIS detailing the possible effects that Respondent alleges TAAN may have on the environment and on public health. *Id.*

**SUMMARY OF ARGUMENT**

The OTR's negotiation of TAAN does not constitute final agency action within the meaning given that phrase by section 704 of the APA or as the Supreme Court has defined such action. Instead, the final action concerning TAAN will be that of the President, as he must submit TAAN to Congress for approval before the agreement can take effect. TAAN can have no effect on Respondent or its members unless and until it is implemented, pending this presidential action of submission, and this Court has determined that presidential action is not reviewable under the APA. Further, Congress can amend its trade agreement approval procedures and change TAAN itself before approving it. Respondent, thus, cannot identify any final agency action for review by this Court under the APA. Therefore, Respondent has not advanced a cause of action for review by this Court under the APA. Therefore, Respondent has not advanced a cause of action for which relief can be granted, and this Court must reverse the decision of the court of appeals and remand with the proper instructions to grant the OTR's motion to dismiss for failure to state a claim upon which relief can be granted.

Further, Respondent cannot meet the minimal standing requirements of Article III of the U.S. Constitution, nor can it meet the additional standing requirements of the APA. Although Respondent seeks both derivative and informational organization standing, the injuries it alleges are neither sufficiently actual nor concrete to establish a geographic nexus. Additionally, Respondent fails to establish both a causal relationship between the OTR's negotiation of TAAN and its alleged injuries, and the redressability of these injuries. Respondent also cannot identify an agency
action sufficient to fulfill the APA standing requirements. Finally, Respondent cannot show that the injuries it complains of fall within the zone of interest that Congress intended NEPA to protect. Thus, Respondent does not fulfill the Article III or APA standing criteria and may not bring suit in this Court. Again, this Court must reverse the decision of the court of appeals and remand with the proper instructions to grant the OTR's motion to dismiss.

ARGUMENT

I. THE OTR'S NEGOTIATION OF TAAN IS NOT "FINAL AGENCY ACTION" WITHIN THE MEANING OF THE APA AS THIS COURT HAS DEFINED THE TERM; THUS, RESPONDENT HAS FAILED TO INVOKE APA REVIEW, AND THIS COURT MUST REVERSE THE COURT OF APPEALS' DECISION AND REMAND WITH THE PROPER INSTRUCTIONS TO GRANT THE OTR'S MOTION TO DISMISS RESPONDENT'S SUIT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.


The OTR's action which Respondent avers constitutes final agency action in the present case is its negotiation of TAAN. (R. 2). Further, Respondent wishes the OTR to prepare an EIS for alleged environmental impacts of TAAN's implementation. (R. 1). Because the final action prior to implementation of TAAN must be that of the President's submission of TAAN to Congress, and because an agency's failure to prepare an EIS is not a "final agency action" within the meaning of that phrase under the APA, Respondent has failed to show a final agency action by the OTR sufficient to sustain its claim against the OTR. See Franklin, 112 S. Ct. at 2773; Foundation on Economic Trends v. Lyng, 943 F.2d 79, 85 (D.C. Cir. 1991). Since Respondent has failed to show a set of
facts which would support its claim under the APA, this Court must reverse the court of appeals' decision and remand with the proper instructions to grant the OTR's motion to dismiss Respondent's suit for failure to state a claim upon which relief can be granted.

A. THE OTR'S NEGOTIATION OF TAAN IS NOT FINAL AGENCY ACTION UNDER THE APA BECAUSE THE PRESIDENT MUST SUBMIT TAAN TO CONGRESS FOR APPROVAL BEFORE ITS IMPLEMENTATION; THUS, THE FINAL ACTION TAKEN ON TAAN MUST BE THAT OF THE PRESIDENT.

The Supreme Court has denoted the "core question" in determining whether an agency action is final as "whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." Franklin, 112 S. Ct. at 2773. This Court also has declared that this "final agency action" requirement cannot be satisfied where Congress provides that only the President may take final action on a matter. Dalton v. Specter, 114 S. Ct. 1719, 1724-25 (1994). In Franklin, which involved the Commerce Secretary's congressional district reapportionment report to the President, this Court found that although the Secretary had completed her decisionmaking process in her submission of the report to the President, the action that would ultimately affect the parties directly was the President's review and submittal of the Secretary's report to Congress. Franklin, 112 S. Ct. at 2773. Because the Secretary's report was not the action that would have a direct effect on the parties, the plaintiffs in that case were not able to show a final agency action sufficient to invoke APA review, and the Court granted the Secretary's motion for summary judgment. Id. at 2778.

The U.S. Court of Appeals for the District of Columbia Circuit has applied that logic to the OTR's negotiation of NAFTA, an international trade agreement strikingly similar to TAAN. Public Citizen v. United States Trade Representative, 5 F.3d 549 (D.C. Cir. 1993). The environmental groups in Public Citizen, like Respondent, brought suit against the OTR under NEPA and the APA, seeking to force the OTR to issue an EIS prior to the President's submission of NAFTA to Congress. Id. at 550. In a series of suits brought by these environmental groups challenging the OTR's work on the North American Free Trade Agreement, ("NAFTA"), the District of Columbia Circuit Court "has unequivocally foreclosed judicial review under the APA of NEPA claims arising from trade agreements concluded pursuant to the Trade Acts." Public Citizen
v. Kantor, 864 F. Supp. 208, 211 (D.D.C. 1994). Furthermore, that
court has declared that an agency’s failure to prepare an EIS “is not
sufficient to trigger APA review in the absence of identifiable substantive
agency action putting the parties at risk.” Public Citizen, 5 F.3d at 552.

As an international agreement to be concluded pursuant to the Trade
Act, TAAN, like NAFTA, does not constitute agency action by the OTR
that is reviewable under the APA. (R. 2). Like the OTR’s work on
NAFTA at the time of that suit, the OTR’s negotiation of TAAN was
comeplete when Respondent brought suit. Id. The OTR’s work on
NAFTA, however, was not the final action that would trigger that
agreement’s direct effect on parties such as Public Citizen. Instead, the
court found that the final action regarding NAFTA would be the involve-
ment of the President at the final stage of the trade agreement process
which the Trade Act mandates, a process that provides for the President’s
submission to Congress of the “final legal text of the agreement, a draft
of the implementing legislation, and supporting information.” Id. (citing

Like NAFTA and the congressional reapportionment report at issue in
Franklin, TAAN is and will remain a “moving target” that the President
may alter unless and until he submits it to Congress. Franklin, 112 S. Ct.
at 2774; Public Citizen, 5 F.3d at 552. As was the case with NAFTA,
the President retains complete discretion to change or renegotiate portions
of TAAN before submitting it to Congress or to decline to submit the
agreement to Congress at all. Public Citizen, 5 F.3d at 552. In the cases
of both NAFTA and TAAN, the OTR’s role in conducting international
trade negotiations is closely bound with that of the President. Kantor, 864
F. Supp. at 211. The Trade Act’s requirement that the President initiate
trade negotiations and submit trade agreements and their implementing
legislation to Congress indicates that “Congress deemed the President’s
involvement essential to the integrity of international trade negotiations.”
Public Citizen, 5 F.3d at 552; see 19 U.S.C. §§ 2191(a), 2902(a) (1988

Should the President change TAAN before its submission, much of
the OTR’s work on TAAN may not survive the agreement’s final form.
Additionally, should the President decide not to seek implementation of
TAAN and thus fail to submit it for congressional approval, the OTR’s
negotiation of the agreement could have no effect on Respondent or on
anyone. Furthermore, even should the President submit TAAN in its
current form to Congress, the agreement would not be the result of final
agency action, since the last action taken on behalf of TAAN still would
be presidential action. Kantor, 864 F. Supp. at 212. Thus, regardless of
his choice of action, responsibility for the final disposition of TAAN remains with the President, and only his action can lead to TAAN’s implementation and any subsequent effects on Respondent. Because Respondent cannot show that the OTR’s work on TAAN will have a direct effect on it, Respondent cannot identify a final agency action with which to secure APA review. This Court, thus, must reverse the court of appeals’ decision and remand with the proper instructions to grant the OTR’s motion to dismiss for failure to state a claim upon which relief can be granted.

B. PRESIDENTIAL ACTION IS NOT REVIEWABLE UNDER THE APA AS FINAL AGENCY ACTION; THUS, RESPONDENT HAS FAILED TO FINAL APA REVIEW.

The APA defines “agency” as “each authority of the Government of the United States, whether or not it is within or subject to review by another agency,” and it excepts several governmental bodies from its review, including Congress, the courts, the state governments and the military. 5 U.S.C. § 551 (1)(A)-(H) (1988 & Supp. V 1993). The statute does not exclude explicitly from its coverage the actions of the President, but this Court has given weight to the APA’s failure to explicitly include his actions within its scope. Franklin, 112 S. Ct. at 2775. Moreover, this Court has deferred to the importance of the separation of powers and the “unique constitutional position of the President” in finding that “textual silence is not enough to subject the President to provisions of the APA.” Id. Without express statutory mention of the President within such a statute, this Court then requires an express statement by Congress that it intended the President’s acts to be reviewable under a statute before such review can occur. Id. (citing Nixon v. Fitzgerald, 457 U.S. 731, 748 (1982)).

Since the APA does not make an explicit mention of the reviewability of the President’s actions, this Court has not allowed such a review and cannot in the present case. Thus, because the OTR did not engage in final agency action within the APA’s definition of that term, and the President’s actions, final or not, are not reviewable under the APA, Respondent has failed to identify final agency action sufficient to trigger APA review of TAAN. Accordingly, this Court must reverse the decision of the court of appeals and remand with the proper instructions to grant the OTR’s motion to dismiss Respondent’s claim for failure to state a
claim upon which relief can be granted.

C. CONGRESS CAN AMEND ITS FAST TRACK APPROVAL PROCESS, TO WHICH TAAN WILL BE SUBJECTED IF SUBMITTED; THUS, CONGRESS MAY ALTER TAAN BEFORE ITS IMPLEMENTATION, FURTHER REMOVING TAAN FROM THE CONTROL OF THE OTR.

Congress has indicated, through the fast track procedures it has adopted under the Trade Act to approve and implement trade agreements, the importance of the President’s role in negotiating and finalizing agreements such as TAAN. Congress has enacted these self-governing rules to facilitate the approval and implementation of trade agreements as the President has entered into them; it has prohibited itself from altering such agreements in deference to presidential authority and in order to simplify and hasten their enactment. Under its fast track procedures, Congress has sixty days to approve or reject a trade agreement once the President has submitted it, Congress may engage in only limited debate on the agreement, and Congress cannot alter such an agreement once the President has submitted it with its implementing legislation. 19 U.S.C. § 2191(a)-(e) (1988).

These procedures are not statutory requirements, but have been adopted as an exercise of Congress’ rule-making power. Public Citizen v. Office of the United States Trade Representative, 822 F. Supp. 21, 23 n.2 (D.D.C. 1993)(citing 19 U.S.C. § 2191(a)(1) (1988). As such, these rules are binding only so long as Congress wishes to continue self-imposing them; Congress may amend them at any time to allow itself to alter trade agreements. Should it choose to so amend these fast track procedures, Congress could allow itself to change TAAN. Thus, not only is TAAN subject to change before its implementation at the hands of the President, it is subject to Congress’ alterations as well. Because either Congress or the President may change TAAN before the agreement has an effect on anyone, Respondent cannot show that the OTR has engaged in an action that will affect it directly. Respondent, therefore, has failed to identify a final agency action sufficient to invoke APA review. Accordingly, this Court must reverse the court of appeals’ decision and remand with the proper instructions to grant the OTR’s motion to dismiss Respondent’s claim for failure to state a claim upon which relief may be granted.

II. RESPONDENT CANNOT ESTABLISH THE CONSTITUTIONAL OR APAREQUIREMENTS NECESSARY TO MAINTAIN STANDING
TO SUE THE OTR; THUS, THIS COURT MUST REVERSE THE COURT OF APPEALS' DECISION AND REMAND WITH THE PROPER INSTRUCTIONS TO GRANT THE OTR'S MOTION TO DISMISS RESPONDENT'S CLAIM.

Respondent cannot establish standing pursuant to Article III of the U.S. Constitution and the additional requirements set forth in section 702 of the APA. This Court, in Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982), interpreted the Article III language of "cases" or "controversies" to limit standing to those plaintiffs who could satisfy a three-part test. Id at 472-73 (1982); see U.S. CONST. art. III, § 2, cl. 1. At an irreducible minimum, a plaintiff must establish "that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant [("injury-in-fact") ... and that the injury fairly can be traced to the challenged action [(causation)] and is likely to be redressed by a favorable decision [(redressability)]." Id. (quoting Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979) and Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38, 41 (1976)).

In the typical NEPA case, environmental plaintiffs must establish organizational standing to obtain judicial review of administrative actions. This Court has held that an organization may stake a claim either derivatively through its members ("derivative standing") or through an injury directly to the organization's interest ("informational standing"). See generally National Wildlife Fed'n, 497 U.S. 871. Although NEPA does not allow a private right of action, an organization may seek judicial review of an administrative action under the general review provision of section 702 of the APA. See id. at 882; see also 5 U.S.C. § 702 (1988 & Supp. V 1993). Section 702 states in pertinent part, "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702 (1988 & Supp. V 1993).

The District of Columbia Circuit Court has interpreted the first clause of section 702 of the APA to mandate the constitutional Article III requirements of injury in fact, causation and redressibility. See National Wildlife Fed'n v. Burford, 835 F.2d 305, 311 (D.C. Cir. 1987), rev'd on other grounds, Lujan v. National Wildlife Fed'n, 497 U.S. 871 (1990). This Court has interpreted the final clauses of section 702 as mandating two additional standing requirements. First, the plaintiff must "identify
some 'agency action' that affects him in a specified fashion;" secondly, the plaintiff must "show that he has 'suffer[ed] legal wrong' because of the challenged agency action, or is 'adversely affected or aggrieved' by that action 'within the meaning of a relevant statute."' National Wildlife Fed'n, 497 U.S. at 882-83. As to the latter, a plaintiff must demonstrate that "his aggrievement, or the adverse effect upon him falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." Id. at 883. Since Respondent cannot meet the constitutional Article III and statutory APA standing requirements, this Court must reverse the court of appeals' decision and remand with the proper instructions to grant the OTR's motion to dismiss.

A. **Respondent cannot establish the injury in fact requirement of Article III and APA standing; thus, Respondent lacks standing to pursue its claim against the OTR.**

Respondent cannot establish an injury in fact to attain standing for judicial review of the OTR's actions. Generally, courts have held that to establish an injury in fact, the injury must be distinct and palpable and not hypothetical or based purely on conjecture. See Warth v. Seldin, 422 U.S. 490, 501 (1975); City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983). In the NEPA context, an organization seeking to establish the injury in fact component of both Article III and APA standing requirements for derivative standing typically alleges that the "environmental, recreational, or aesthetic interests of its members would suffer if some particular agency activity . . . were undertaken and that if the agency prepared an impact statement . . . before implementing its plans, it might change its mind and thereby avert the damage to those interests." Lyng, 943 F.2d at 83. In essence, the alleged derivative organizational injury must arise directly from a proposed agency action rather than the agency's failure to prepare an EIS. See United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973) ("[a] plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action." Id. at 688). An organization seeking derivative standing must identify an actual injury to its members.

In contrast, an organization seeking informational standing typically alleges that there will be "damage to the organization's interest in disseminating the environmental [data] an impact statement could be expect-
ed to contain." Lyng, 943 F.2d at 84. Consistently, courts have held that to meet the Article III and APA requirement of injury in fact, an organization must proffer more than the procedural injury of the agency's failure to comply with NEPA's EIS requirement. Id.; see also Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2142 (1992); National Wildlife Fed'n, 497 U.S. at 891, 898-99. To meet the injury in fact requirement, the organization must point to a "concrete" injury. Defenders of Wildlife, 112 S. Ct. at 2142.

The test for actual or concrete injury to achieve either derivative or informational standing is the requirement that the organization must establish a "geographic nexus." See City of Los Angeles v. National Highway Traffic Safety Admin., 912 F.2d 478, 492-93 (D.C. Cir. 1989). To establish a geographic nexus, an organization must demonstrate that the area affected by the agency action and not an "area roughly 'in the vicinity' of it" is used by the organization's membership. See Defenders of Wildlife, 112 S. Ct. at 2139-40 (1992). Although in some circumstances a court may find a geographic nexus in order to redress a widely shared harm "that will personally affect [an organization's] members," this Court should adopt the stringent rule that the geographic nexus alleged by an organization must be more than a potential environmental harm that may result from a proposed agency action. See e.g., City of Los Angeles, 912 F.2d at 494. But see Foundation on Economic Trends v. Watkins, 794 F. Supp. 395 (D.D.C. 1992) (finding that the plaintiff failed to establish a nexus between the government activity and alleged global warming); Greenpeace, U.S.A. v. Stone, 748 F. Supp. 749 (D. Haw. 1990) (suggesting a stringent geographic nexus requirement because National Wildlife Fed'n "appears to heighten the requirements for establishing actual injury for purposes of standing under NEPA" Id. at 756).

Specifically, an organization must demonstrate that its members' use of "particular lands" is "actually" affected by the agency action. See generally National Wildlife Fed'n, 497 U.S. 871. National Wildlife Fed'n appears to require that a plaintiff alleging environmental impacts covering a broader area than that used by the plaintiff organization's members be denied standing. See e.g., Greenpeace, U.S.A., 748 F. Supp. 749; Watkins, 794 F. Supp. 395. This Court's failure to employ this stringent geographic nexus standard will result in the adjudication of generalized grievances rather than specific cases. In this era of back-logged dockets and scarce judicial resources, this Court must impose the strict geograph-
In the case at bar, Respondent alleges both derivative and informational standing for its NEPA claim against the OTR. (R. 2, 3). Attempting to meet the injury in fact requirement of Article III and the APA, Respondent avers that TAAN by its terms and the OTR’s failure to prepare an EIS pursuant to NEPA will result in environmental changes to certain geographical areas. (R. 3). Respondent, however, does not demonstrate a geographic nexus sufficient to establish a concrete or actual injury. Respondent alleges that the pacific coast states will be harmed by environmental damage to their ports, bays, inlets, and surrounding territorial areas due to increased shipping. *Id.* In addition, Respondent alleges that TAAN will cause pressures for increased domestic production which in turn will create incentives for oil and gas exploration. *Id.* Finally, Respondent avers that domestic companies will move operations to other countries agreeing to the terms of TAAN in an attempt to avoid the stringent U.S. environmental regulations and laws. *Id.* These allegations of environmental impact stem from Respondent’s complaint that the OTR failed to prepare an EIS in accordance with NEPA.

Respondent, however, conjectures about the future harms that may result to the environment of its members due to the implementation of TAAN. Moreover, Respondent avers generalized widespread grievances and has not proffered evidence that the alleged injuries will actually impact the specific areas where members of their organization live. (R. 3). Respondent has only asserted that its membership uses and enjoys lands in the vicinity of the alleged environmental impact of TAAN. *Id.* Thus, Respondent cannot establish the injury in fact requirement necessary to attain standing under both Article III and the APA. Therefore, this Court must reverse the court of appeals’ decision and remand with the proper instructions to grant the OTR’s motion to dismiss because Respondent cannot prove a set of facts in support of its claim which entitle it to relief.

**B. Respondent cannot establish the causation requirement of Article III and APA standing; thus, Respondent lacks standing to pursue its claim against the OTR.**

Respondent also cannot prove the causation element necessary to attain standing pursuant to the mandates of both Article III and the APA. To establish causation, Respondent must demonstrate that the averred conduct will likely lead to the alleged injury. *City of Los Angeles*, 912 F.2d at 483. Respondent need not proffer evidence of a “cause-and-effect

In the case at bar, Respondent cannot link the OTR’s failure to produce an EIS on certain areas near the Pacific Rim to environmental harm to those areas. (R. 2, 3). NEPA requires all federal agencies to perform an EIS “in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment . . . .” 42 U.S.C. § 4332(2)(C) (1988). In this case, the OTR’s negotiation of TAAN will have no effect on Respondent’s membership unless and until the President submits TAAN to Congress for approval. Respondent can establish no causal link because the negotiation of TAAN is not a final agency action as defined by the APA. In the absence of a final agency action, Respondent has failed to demonstrate how the OTR’s negotiation of TAAN and failure to prepare an EIS creates a substantial likelihood that Respondent and its membership will be injured in the manner alleged. Thus, the OTR requests that this Court reverse the decision of the court of appeals and remand with the proper instructions to grant the OTR’s motion to dismiss Respondent’s claim.

C. **Respondent cannot establish the redressibility requirement of Article III and APA standing; thus, Respondent lacks standing to pursue its claim against the OTR.**

Finally, Respondent cannot fulfill the redressability element necessary to attain standing. To meet this element, Respondent must demonstrate that its requested relief will likely provide a remedy for its alleged injuries. *Valley Forge Christian College*, 454 U.S. at 472. The redressability requirement allows the court to ensure that the case is decided “in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.” *Id.* at 472. In essence, the goal of redressability is to promote the judicial resolution of solvable issues rather than the rendering of advisory opinions by the courts. *Id.*

In the present case, Respondent seeks an injunction requiring the OTR to perform an EIS. (R. 2). Respondent argues that the purpose of NEPA’s EIS requirement is to inform decision makers about the environmental consequences of TAAN before those consequences reach a crisis stage. *Id.* The final decision regarding whether to implement TAAN is
that of the President. The final action that will lead to the alleged environmental impact is the implementation of TAAN, which is in the hands of both Congress and the President. Hence, the injunction sought by Respondent will neither lead to the reduction of nor avert the alleged environmental consequences of TAAN. The OTR’s preparation of an EIS would not lead necessarily to a presidential or congressional decision not to implement TAAN. Therefore, this Court should reverse the court of appeals’ decision and remand with the proper instructions to grant the OTR’s motion to dismiss.

D. RESPONDENT CANNOT IDENTIFY AN AGENCY ACTION BY THE OTR SUFFICIENT TO ESTABLISH THE APA STANDING REQUIREMENTS; THUS, RESPONDENT LACKS STANDING TO PURSUE ITS CLAIM AGAINST THE OTR.

Respondent cannot establish the additional requirement of section 702 of the APA mandating the identification of an “agency action” that affects it in a “specified fashion.” The APA defines “agency action” as “the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.” 5 U.S.C. § 551(13) (1988 & Supp. V 1993). Since NEPA does not specifically provide its own judicial review provision, Respondent must fulfill the APA mandate that the agency action be a “final agency action.” See generally National Wildlife Fed’n, 497 U.S. 871. This Court has held that regulation is not “‘ripe’ for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and . . . [until the claimant identifies] some concrete action applying the regulation to the claimant’s situation in a fashion that harms or threatens to harm [it].” National Wildlife Fed’n, 497 U.S. at 891. This Court has declared that a plaintiff cannot seek judicial review and standing under the APA until a final agency action occurs. See generally id. Moreover, courts have articulated that the mere failure of an agency to produce an EIS does not constitute a final agency action within the meaning of section 702 of the APA. See Lyng, 943 F.2d at 85; National Wildlife Fed’n, 497 U.S. 871; Public Citizen v. Office of the United States Trade Representative, 970 F.2d 916, 918-19 (D.C. Cir. 1992). In other words, there must be “an identifiable action or event.” Lyng, 943 F.2d at 85. The language of NEPA, coupled with the holding in National Wildlife Fed’n, demand that the identifiable action or event must be a “major” federal action requiring the EIS preparation. Id. Further, plaintiffs who allege violations of NEPA by an agency and claim solely an “‘informational injury’ must show the particular agency action—in addition to the agency’s refusal to
prepare an impact statement—that allegedly triggered the violation and thereby caused the injury.” *Lyng*, 943 F.2d at 87.

In the present case, the OTR's failure to prepare an EIS is not itself an agency action sufficient to invoke APA review. Although NEPA requires an agency to prepare an EIS on “every recommendation . . . affecting the quality of the human environment,” Respondent has failed to proffer the specific proposal or major federal action that triggered the OTR's obligation to prepare an EIS. 42 U.S.C. § 4332(2)(C) (1988); *see also Lyng*, 943 F.2d at 918-19. Respondent avers that the final agency action at issue is the OTR's negotiation of TAAN. (R. 2). Respondent clearly overlooks this Court's finding that there must be something “more” than general day-to-day operations of the agency to trigger an obligation to prepare an EIS. *See generally National Wildlife Fed'n*, 497 U.S. at 899. Since it is the OTR's duty to conduct trade negotiations on behalf of the United States, the OTR's negotiation of TAAN amounts to nothing more than its day-to-day operations.

In a case that closely parallels the facts to those at bar, the District of Columbia Circuit soundly concluded that the final agency action regarding an international trade agreement is the submission of the agreement to Congress by the President. *Public Citizen*, 5 F.3d at 553. In *Public Citizen*, the D.C. Circuit appropriately pointed out, based on Supreme Court precedent, that the OTR's release of NAFTA to the President and the subsequent presidential submission to Congress did not constitute an agency action reviewable under the APA. *Id.* at 553. The OTR's actions in negotiating TAAN with Australia and New Zealand, therefore, do not constitute a final agency action reviewable under the APA. (R. 2); *see also Public Citizen*, 5 F.3d at 553. In essence, Respondent attempts to claim an informational injury in the OTR's failure to produce an EIS without averring a particular agency action that triggered a NEPA violation and caused Respondent or its membership harm. Thus, Respondent has failed to set forth a claim upon which relief can be granted because it can prove no set of facts in support of its claim. Therefore, this Court must reverse the court of appeals' decision and remand with the proper instructions to grant the OTR's motion to dismiss.

**E. Respondent Cannot Show That It Is Adversely Affected or Aggrieved Within the Zone of Interests That NEPA Seeks to Protect; Thus, Respondent Lacks Standing to Pursue Its Claim Against the OTR.**
Finally, Respondent can prove no set of facts sufficient to overcome the OTR's motion to dismiss because it cannot establish the APA requirement that it is "adversely affected" or "aggrieved" within the meaning of NEPA. In *National Wildlife Fed'n*, this Court stated that the relevant test is to determine whether the injury the plaintiff complains of is within the "zone of interests" of the statute "whose violation forms the legal basis for his complaint." *National Wildlife Fed'n*, 479 U.S. 388, 399 (1987). The zone of interest test is a guide to decide whether a plaintiff's interests fall within Congress' intent to make an agency action reviewable. *Clarke v. Securities Indus. Assoc.*, 479 U.S. 388, 399 (1987). The zone of interest test "denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.*

The thrust of NEPA is to inform "governmental agencies and the public about the environmental consequences of its proposed activities, not to inform them about all possible consequences of an agency's actions." *Competitive Enter. Inst. v. National Highway Traffic Safety Admin.*, 901 F.2d 107, 123-24 (D.C. Cir. 1990). Moreover, the congressional intent behind NEPA is to mandate agencies to recognize "worldwide . . . environmental problems" and the "quality of the human environment" before proposing or recommending major federal actions. See 42 U.S.C. § 4332(2)(C), (F) (1988). In the NEPA context, therefore, a plaintiff is "aggrieved [or adversely affected] by the agency's failure to prepare an EIS, when he can show that failure 'creat[es] a risk that serious environmental risks will be overlooked.'" *City of Los Angeles*, 912 F.2d at 492.

In this case, Respondent is not adversely affected or aggrieved within the meaning of NEPA. Although the OTR agrees that the thrust of NEPA is to evaluate environmental harms by agency actions, Respondent fails to establish an agency action that creates an obligation to issue an EIS. Although TAAN has been negotiated by the OTR and signed by the President, TAAN may never be implemented. It is the President who has the option to alter the terms of TAAN and submit TAAN to Congress. Thus, the final action to implement TAAN is left to the President.

TAAN creates a free trade zone encompassing Australia and New Zealand by eliminating all tariffs and non-tariff barriers to trade on items in commerce. (R. 2). Assuming, arguendo, that TAAN is implemented without significant alteration by the President or Congress, Respondent avers that the pacific coast rim states will suffer environmental damage. (R. 3). Further, Respondent alleges that TAAN may create pressure to
increase domestic production methods and establish incentives for oil and gas exploration and global pollution effects, as companies may move operations to foreign countries to avoid U.S. environmental regulations. *Id.* Respondent's alleged injuries are too far removed from the implementation of TAAN. This Court cannot guess as to possible environmental impacts as Respondent requests it to do.

If TAAN is implemented without change, it does not necessarily follow that Respondent's alleged environmental harms will occur. The immediate impact of the President's implementation of TAAN may be increased trade among the three countries bound by the agreement. This possible increase in trade will not necessarily lead to environmental harm to ports, bays, inlets and surrounding lands. *Id.* Even if such environmental harms do occur, they are too attenuated from the implementation of TAAN; moreover, other environmental regulations may be enacted to prevent these harms.

Additionally, Respondent cannot blame its other alleged environmental injuries on the possible implementation of TAAN. For example, increases in domestic production methods will potentially increase the U.S. economy and provide the means to become a part of the expanding global market. Further, Respondent maintains that TAAN will create incentives for oil and gas exploration and encourage use of non-renewable natural resources. *Id.* Implementation of TAAN does not necessarily lead to Respondent's conclusion. The harm that Respondent connects to such events may never occur since significant increases in trade among the countries are not guaranteed by the implementation of TAAN. Respondent cannot meet the zone of interest test because Respondent's allegations are only marginally related to the purpose of NEPA; hence, this Court cannot assume that Congress intended to permit this suit. Thus, Respondent has failed to demonstrate that it is aggrieved or adversely affected within the meaning of NEPA. Since Respondent cannot establish that it is aggrieved or adversely affected within the meaning of NEPA, its claim falls outside the statute's zone of interest. Respondent cannot meet the injury in fact requirement of standing and cannot establish standing. *City of Los Angeles*, 912 F.2d at 495. Therefore, Respondent can prove no set of facts in support of its claim entitling it to relief, and this Court must reverse the court of appeals' decision and remand with the proper instructions to grant the OTR's motion to dismiss.
CONCLUSION

For the reasons set forth above, the Petitioner respectfully requests that the judgment of the United States Court of Appeals for the Eighteenth Circuit be reversed and remanded with the proper instructions to grant the Petitioner's motion to dismiss.
IN THE SUPREME COURT OF THE UNITED STATES

MARCH TERM 1995
Docket No. 95-101

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE,
Petitioner,

—against—

PROTECTOR OF THE EARTH,
Respondent,

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTEENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

I. Whether an environmental group has standing to demand that the Office of the United States Trade Representative prepare an Environmental Impact Statement under the National Environmental Policy Act.

II. Whether the submission of a treaty to the President, in turn to be submitted to Congress unchanged under the Fast Track Procedure, constitutes a final agency action sufficient for review under the Administrative Procedure Act.

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ARGUMENT:

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STATEMENT OF THE CASE

The United States, Australia, and New Zealand began negotiations on the Trade Agreement with Australia and New Zealand ("TAAN") in 1991. (R. 2). On May 18, 1994, the trade representatives of the three countries signed TAAN in Christchurch, New Zealand. Id. TAAN creates a free trade zone among the three countries, eliminating tariff and other trade barriers and allowing thousands of items to be traded freely. Id. Although TAAN has not been submitted to Congress, it is scheduled to go into effect on January 1, 1996, if approved by the Congress through the "fast track" approval process. Id.

Petitioner, Office of the United States Trade Representative ("OTR"), represented the United States in the negotiations of TAAN. (R. 1). OTR is a federal agency with statutory power to negotiate trade agreements on behalf of the United States, reporting directly to the President and the Congress. (R. 2). Protector of the Earth ("POE") is the Respondent.
POE is an international organization, with members from Australia, New Zealand, and all 50 states in the United States. It advocates for the protection of public health and the environment through public education and lobbying for laws. Id. POE alleges that the public, including the decision-makers of TAAN, lack information about the potential environmental and health consequences of TAAN. Id. TAAN will affect numerous federal and state laws concerning environmental and public health matters. (R. 3, 6). In addition, TAAN will cause environmental changes to certain geographical areas, especially in the “west coast port states” because of the increase in trade resulting from this trade agreement. (R. 3, 6-7). Further, water and air quality in Hawaii, Alaska, California, Oregon and Washington will deteriorate because of TAAN. Id. Finally, POE alleges that TAAN will adversely affect domestic agricultural and meat industries as well as energy sources. (R. 3).

Therefore, POE initiated an action in the United States District Court for the Northern District of Bedford against OTR for an injunction requesting OTR to perform an Environmental Impact Statement (“EIS”) in compliance with the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4331 (1995). (R. 1-2). POE asserts that the EIS will inform decision-makers of the potential environmental harms TAAN will cause to the Western United States, and thereby influence them to “seek to avert and minimize environmental harms before they reach the crisis stage.” (R. 2).

SUMMARY OF THE ARGUMENT

I. STANDING

In order to have standing to challenge an agency action, a party must show (1) it has been adversely affected by an agency’s action, (2) that the harm is fairly traceable to that agency, and (3) that the harm is redressable. An environmental organization may have standing if it asserts an injury to one or more of its members. Since this action concerns a motion to dismiss, the general allegations made by Respondent that its members live within the vast areas that may be adversely affected by the TAAN are sufficient to satisfy the first prong of the standing test.

The OTR is expressly charged with primary responsibility of negotiating international trade agreements such as TAAN. This particular trade agreement is alleged to result in numerous possible environmental harms.
Therefore, these harms can be sufficiently traced to OTR. An EIS, by showing the extent of the expected harms and putting these before Congress, will redress the harm, especially in light of the fact that a significant part of the harm alleged here is informational in nature. Hence, Respondent POE does have standing to seek an injunction for an EIS.

II. FINAL ACTION

The Administrative Procedure Act ("APA") requires that an agency's action be final in order to be contested under the previously defined three-prong standing test. The district court interpreted the term "final action" to mean that the agency's action must be the final action in the chain of events. However, this contradicts both the plain meaning of the APA and this Court's holding. Instead, "final action" means just what it purports to mean: that it is the agency's final action.

The TAAN is a final proposal of OTR, an agency, to the President. As such, it is a "final agency action" that will trigger the APA's provision for judicial review. This is the only interpretation of "final action" that will allow review of the OTR's participation and proposals in international trade negotiations.

The holding of the appellate court must be affirmed.

ARGUMENT

I. RESPONDENT DOES HAVE STANDING TO DEMAND THAT THE OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE PREPARE AN ENVIRONMENTAL IMPACT STATEMENT UNDER THE NATIONAL ENVIRONMENTAL PROTECTION ACT.

"Standing is one of 'the most amorphous (concepts) in the entire domain of public laws.' It is not an absolute. It is a variable, closely related to the nature of the controversy and the relief sought." Taylor v. Cohen, 405 F.2d 277, 282 (4th Cir. 1968) (alteration in the original) (footnote omitted) (quoting Flast v. Cohen, 392 U.S. 83, 98 (1968)). In reviewing the lower court's decision regarding standing, this Court applies a de novo standard of review of issues of law. United States v. Fernandez, 18 F.3d 874, 876 (10th Cir. 1994) (citing United States v. Walker, 933 F.2d 812, 815 (10th Cir. 1991)).

As this Court has tried to deal with the question of standing, it has held that standing would be granted to those with a direct stake in the
outcome. *Baker v. Carr*, 369 U.S. 186, 204 (1962). But that language is rather broad. How large must the stake be? If the stake is especially large, can it be less direct? What is the scope of the stake—potential, actual, economic?

In an attempt to resolve this ambiguity, courts have formulated basic requirements for standing, based upon the United States Constitution. Therefore, in order to establish standing to sue, as Article III § 2 has been interpreted, a party must, “at an irreducible minimum,” show (1) “that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct” (personal injury), (2) that “the injury ‘fairly can be traced to the challenged action’” (causation), and (3) that the injury “is likely to be redressed by a favorable decision” (effective relief). *Animal Legal Defense Fund v. Quigg*, 932 F.2d 920, 925 (Fed. Cir. 1991) (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982)) (emphasis added). However, when the controversy involves federal administrative action, “the trend is toward enlargement of the class of people who may protest administrative action.” *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970) [hereinafter *Data Processing*]. This trend is apparent in the APA, which governs standing relative to administrative decisions. 5 U.S.C. § 702 (1994). The APA enlarges the definition of injury to include a “person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute. . . .” *Id.* (emphasis added). The injury described in the first prong of the standing test is therefore expanded by the APA so that even a mere threat of being “adversely affected” by the action of an agency will be sufficient to bestow standing. *Id.*

Thus, in order to obtain standing in demanding an EIS in the instant case, Respondent must show: (1) that it has been or may be adversely affected by agency action within the meaning of NEPA, (2) that the harm can be fairly traced to the OTR’s action, and (3) that the harm is likely to be prevented by the completion of the EIS. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

A. *Respondent has asserted a palpable threatened injury by showing it will be adversely affected by TAAN in the absence of an Environmental Impact Statement.*

The landmark case for the question of standing in challenging an environmental administrative action is *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990) [hereinafter *National Wildlife*]. In it, this Court held that "the party seeking review under § 702 [of the APA] must show that he has 'suffered legal wrong' because of the challenged agency action, or is 'adversely affected or aggrieved' by that action 'within the meaning of a relevant statute.'" *Id.* at 883 (second alteration in original) (emphasis added). This is the standard that this Court has chosen for determining standing. The meaning of "adversely affected" was explained in *Data Processing*:

The question of standing . . . concerns . . . the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. . . . That interest, at times, may reflect 'aesthetic, conservational, and recreational' as well as economic values. *Data Processing*, 397 U.S. at 153-54 (citation omitted). See also *National Wildlife*, 497 U.S. at 883.

1. *Derivative suit through an organization's members versus informational injury.*

There are two ways for an organization to show standing to sue under NEPA. *Public Citizen v. Office of United States Trade Representative*, 782 F. Supp. 139, 142 (D.D.C. 1992) [hereinafter *Public Citizen I*]. The first is derivatively through the members of the organization. "The usual allegation is that the members' environmental, recreational or aesthetic interests would suffer if a particular agency action were taken, and that
preparation of an EIS might cause the agency to change its plans and avert the harm.” *Id.* POE has alleged that it has members living in all fifty states. (R. 2). It has alleged specific environmental harm to the states of Hawaii, California, Oregon, Washington, and Alaska as a result of TAAN. (R. 7). When the alleged harm is so widespread as to include several entire states, it is improbable that citizens of these states would not be affected. If POE members live within the affected areas, they would have standing to demand that an EIS be prepared. See *Supporters to Oppose Pollution, Inc. v. Heritage Group*, 973 F.2d 1320, 1322 (7th Cir. 1992) (“StOP represents persons living close to the [affected area], which has at least the potential to injure them, so the Constitution permits it to litigate.”). Thus, POE has standing through the derivative organizational standing rule.

The second way for an organization to establish standing to sue under NEPA is “through an injury directly to the organization’s interest—an interest in obtaining information from the government for the purposes of public education and advocacy.” *Public Citizen I*, 782 F. Supp. at 142. There is little doubt that the instant action can be classified as an informational injury—it is based on a failure to perform an EIS as required by NEPA. However, there is doubt whether this alone is sufficient to establish standing. “The [D.C. Circuit] reasoned that assertion of informational injury alone was no different than assertion of a ‘mere interest’ in a problem, shared by any member of the public, which the Supreme Court has held inadequate for standing purposes.” *Id.* at 143 (quoting *Foundation on Economic Trends v. Lyng*, 943 F.2d 79, 84-85 (D.C. Cir. 1991)). For this reason, and because there are sufficient allegations to support a derivative action through POE’s members, the balance of this discussion will involve standing through derivative action.

2. To withstand a motion to dismiss, general allegations will be construed to embrace specific facts necessary to state a claim.

It must be kept in mind that in the case at bar, the Respondent need only withstand a Rule 12(b) motion to dismiss, which “presumes that general allegations embrace those specific facts that are necessary to support the claim.” *Lujan v. National Wildlife Fed’n*, 497 U.S. 871, 889 (1990) (*citing Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). In other words, if the non-moving party asserts general allegations in opposing a motion to dismiss, these allegations are assumed to include
specific facts which are necessary to them. Furthermore, these allegations are construed to be true. "For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). In this way, the allegations are construed in the light most favorable to the non-moving party. This is in contrast to a defense of a 56(c) motion for summary judgment, in which the non-movant must assert specific facts to support its allegations. Fed. R. Civ. P. 56(c).

*National Wildlife* most clearly illustrates the burden on the non-moving party in opposing a motion to dismiss, as compared with the burden in opposing a motion for summary judgment. At issue were actions by the Bureau of Land Management (BLM) in reclassifying some previously withdrawn lands, opening them up to mining activities, which the respondents claimed would destroy their natural beauty. *National Wildlife*, 497 U.S. at 879. In response to a motion to dismiss, the appellate court looked to affidavits submitted by two of the respondent's members, who alleged merely that they used land "in the vicinity" of land which was reclassified by the BLM. *Id.* at 880. The appellate court "found sufficient to survive the motion the general allegation in the amended complaint that respondent's members used environmental resources that would be damaged by petitioners' actions." *Id.* This Court subsequently found that these allegations were not sufficient to withstand a motion for summary judgment.

Of course, in the case at bar, a motion to dismiss is at issue, not a motion for summary judgment. But it would be helpful to look at this Court's comments on affidavits in summary judgment proceedings, and how they compare with the allegations in the instant case. The first affidavit in *National Wildlife* alleged that the affiant used federal lands in the vicinity of the South Pass-Green Mountain area of Wyoming. . . . [The BLM's] decision . . . opened up to mining approximately 4500 acres within a two million acre area, the balance of which, with the exception of 2000 acres, has always been open to mineral leasing and mining. . . . There is no showing that [the affiant's] recreational use and enjoyment extends to the particular 4500 acres covered by the decision. . . .

*Id.* at 886-87. The other affidavit was "similarly flawed." *Id.* at 887. These allegations were clearly not specific enough to withstand a motion for summary judgment. And yet, this incredibly vague allegation was sufficient to withstand a motion to dismiss, the same action at issue in the instant case. This is so because the burden to withstand a summary judg-
ment is "a world apart from 'assuming' that general averments embrace the 'specific facts' needed to sustain the complaint," Id. at 888, the standard this Court gives for opposing a motion to dismiss, Id. at 889, and which is the same standard used by the trial court in National Wildlife. Id. at 880.

Two other cases of note discuss allegations in a motion to dismiss. This Court compared allegations in SCRAP, 412 U.S. 669, to those in Sierra Club v. Morton, 405 U.S. 727 (1972). Referring to the allegations put forth in SCRAP, this Court said:

[T]hey point specifically to the allegations that their members used the forests, streams, mountains, and other resources in the Washington metropolitan area for camping, hiking, fishing, and sightseeing, and that this use was disturbed by the adverse environmental impact caused by the nonuse of recyclable goods brought about by a rate increase on those commodities. The District Court found these allegations sufficient to withstand a motion to dismiss. We agree.

SCRAP, 412 U.S. at 685. Though still vague, these allegations are more specific than those in National Wildlife, and were deemed sufficient to withstand a motion to dismiss. Perhaps what this Court said later in the case clarifies the standard:

In [Sierra Club] the asserted harm 'will be felt directly only by those who use Mineral King and Sequoia National Park, and for whom the aesthetic and recreational values of the area will be lessened by the highway and ski resort,' yet '(t)he Sierra Club failed to allege that it or its members would be affected in any of their activities or pastimes by the . . . development.'

Id. at 687 (second alteration in original) (citation omitted). In SCRAP, this Court allowed standing, because the plaintiffs alleged threatened harm to lands they used. Only in Sierra Club was the motion to dismiss not granted; however, the plaintiffs in that case did not allege that they used the lands that would be adversely affected by the agency action. But in both SCRAP and National Wildlife, the affiants did allege that they used the lands in question. And in both cases, the courts deemed that sufficient to withstand a motion to dismiss.

3. **Respondent has alleged facts sufficient to withstand a motion to dismiss.**

Thus, in order to withstand the motion to dismiss, Respondent needs
to allege that it or its members use the land affected by the agency's action, and that their use of the land is adversely affected, even if the land is used primarily for their aesthetic pleasure.

The analysis now turns to the harm alleged in the instant case. To assert an injury under NEPA, Respondent need only show that it was adversely affected by OTR's action in negotiating TAAN, the Data Processing "zone of interests" test. Data Processing, 397 U.S. at 153. But this need not be an actual, immediately quantifiable injury. A threatened injury is sufficient because "that the injury be 'threatened' rather than 'actual' does not defeat the claim. Nor need the risk of injury be certain, as opposed to contingent. In particular, that the potential injury would be the result of a chain of events need not doom the standing claim." Idaho Conservation League v. Mumma, 956 F.2d 1508, 1515 (9th Cir. 1992) (citations omitted). Neither does the injury need to be economic. To again quote Data Processing, "That interest [of the aggrieved party], at times, may reflect 'aesthetic, conservational, and recreational' as well as economic values." Data Processing, 397 U.S. at 154 (1970) (quoting Scenic Hudson Preservation Conference v. FCC, 354 F.2d 608, 616 (2d Cir. 1965)). In short, the minimum that Respondent needs to show in order to satisfy this "zone of interests" test is that it or its members' aesthetic, conservational, or recreational interests may be adversely affected by TAAN. "This test is not meant to be especially demanding." Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 399 (1987).

The land affected by TAAN here is much more widespread than in either SCRAP or National Wildlife. Respondent has alleged that:

TAAN, by its terms, will result in changes to federal and state law and policy in a variety of health and environmental matters and that these changes will have an environmental impact on them. Furthermore, [Respondent] argues that TAAN will result in environmental changes to certain geographical areas in the United States, especially the west coast port states handling the increased shipping of goods due to the reduction in trade barriers. [Respondent] explicitly points out water and air quality harm to occur in Hawaii, Alaska, California, Oregon and Washington, primarily in environmental damage to ports, bays and inlets and surrounding lands, the territorial sea, contiguous zone, and exclusive economic zone. (R. 3). Respondent points to specific harm that will occur to the entire west coast of the United States. Perhaps it would be different if the instant case dealt with a restricted area, which did not encompass the residences of the aggrieved parties. Rather, specific environmental harm is alleged to an entire region of the United States—harms that will affect all
of the residents of the affected states. It is improbable that there are areas of those states that could be singled out and be said to not be potentially affected by TAAN. The environmental harms in the case at bar are extremely widespread, encompassing entire states. "If such an injury is alleged by a litigant 'having a sufficient geographical nexus to the site of the challenged project that he may be expected to suffer whatever environmental consequences the project may have,' then that litigant will have satisfied the injury requirement for NEPA standing." City of Los Angeles v. National Highway Traffic Safety Admin., 912 F.2d 478, 492-93 (D.C. Cir. 1990) (citation omitted) (quoting City of Davis v. Coleman, 521 F.2d 661, 671 (9th Cir. 1975)). It does not require a stretch of logic to assert that residents of an affected state in the instant case would have a "sufficient geographical nexus" to the affected area, which covers the entire west coast. If it is sufficient to assert general allegations in order to withstand a motion to dismiss, it should be sufficient to assert the general allegation that POE members residing in the affected area will be harmed.

B. The alleged environmental harm can be traced to action by OTR.

The second prong of the standing test requires the aggrieved party to be able to trace the harm to an agency's action. There is a dispute in the instant case regarding the final action of TAAN, whether it is attributed to OTR, or whether it is the President's. This will be discussed in succeeding sections. For the purposes of the standing test, it is sufficient to examine the involvement of OTR in TAAN negotiations, and determine if the threatened environmental harm can be attributed to the agency's actions in these negotiations.

This prong (traceability) and the third prong (redressability) both focus on causation. City of Los Angeles v. National Highway Traffic Safety Admin., 912 F.2d 478, 483 (D.C. Cir. 1990). But "[t]o the extent that there is a difference, it is that the former examines the causal connection between the assertedly unlawful conduct and the alleged injury, whereas the latter examines the causal connection between the alleged injury and the judicial relief requested." Allen v. Wright, 468 U.S. 737, 753 n.19 (1984). So the question that needs to be answered is whether the harms that POE has alleged will occur because of OTR's involvement in the TAAN negotiations.
1. *The alleged environmental harms can be traced to TAAN.*

POE has alleged specific harms that will occur as a direct result of TAAN. In addition to the environmental impact already discussed, POE has alleged specific provisions of TAAN that will have an adverse effect on the environment:

POE also claims that TAAN's reduction of trade barriers will cause a reduction in prices for domestic agricultural and meat products, thus creating pressure to intensify domestic production methods which will have a detrimental effect on the environment. In addition, plaintiff alleges TAAN's energy incentives for oil and gas exploration will encourage the use of nonrenewable energy sources. And finally, POE claims that TAAN may have pollution have [sic] effects in that domestic companies will move their operations to Australia or New Zealand to avoid the more stringent U.S. environmental laws. (R. 3). Since the instant case involves a motion to dismiss, these allegations are to be taken at face value. “For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.” *Animal Legal Defense Fund v. Quigg*, 932 F.2d 920, 925 (Fed. Cir. 1991) (quoting *Warth*, 422 U.S. at 501). Respondent's allegations are enough to trace the harms to TAAN.

2. *The OTR had primary responsibility in negotiating TAAN.*

The Trade Act of 1974 establishes the duties of the OTR:

(1) The United States Trade Representative shall—

(A) have primary responsibility for developing, and for coordinating the implementation of, United States international trade policy. . . .

(C) have lead responsibility for the conduct of, and shall be the chief representative of the United States for, international trade negotiations. . . .

(E) act as the principal spokesman of the President on international trade;

(F) report directly to the President and the Congress regarding, and be responsible to the President and the Congress for the administration of, trade agreements programs. . . .

19 U.S.C. § 2171 (1994). In negotiating TAAN, OTR did fulfill its statutory duties as chief negotiator. (R. 2). Thus, it is established that the TAAN is directly responsible for the alleged harms, and that OTR did
have chief responsibility in negotiating TAAN. These premises are sufficient to show that the environmental harm alleged by POE is traceable to the actions of OTR.

C. *The harm is likely to be prevented by completion of an EIS.*

The Council on Environmental Quality (CEQ) has been given responsibility to review federal agency actions to determine how they contribute to the President’s environmental quality policies. 42 U.S.C. § 4344 (1994). As part of this duty the CEQ requires federal agencies to prepare Environmental Impact Statements for their actions:

The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government. It shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers [sic] and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. 40 C.F.R. § 1502.1 (1995). It may first appear that there are two separate types of injuries asserted here, an informational injury, and actual threatened environmental harm. But, as the Ninth Circuit has observed, “In reality, both injuries are but two sides of a single coin: It is the alleged procedural failure in the EIS (the actual, present harm) that ‘create[s] a risk that environmental impact will be overlooked’ (in the future).” Idaho Conservation League v. Mumma, 956 F.2d 1508, 1514 (9th Cir. 1992) (alteration in original) (quoting Oregon Envtl. Council v. Kunzman, 817 F.2d 484, 491 (9th Cir. 1987)). POE is asking that the decision-makers involved in TAAN perform an EIS “in the hope that their decisions will seek to avert and minimize environmental harms before they reach the crisis stage.” (R. 2). If Congress has an EIS that spells out probable consequences when deciding whether to ratify TAAN, they will be better able to determine if the treaty is consistent with national environmental policy, which is to “attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences. . . .” 42 U.S.C. § 4331(b)(3) (1994). And it is irrelevant that the completion of an EIS may not change TAAN at all because “[t]he asserted injury is that environmental consequences might be overlooked and reasonable alternatives ignored as a result of deficiencies in the final EIS. . . .” Mumma,
The ultimate injury sought to be prevented is environmental harm that is contrary to national environmental policy. The performance of an EIS would certainly redress this injury.

It is clear that Respondent, Protector of the Earth, through its individual members residing in the areas that may be threatened by the provisions of TAAN, has standing to demand that OTR complete an environmental impact statement, which is required by United States Statute for all agency actions. 42 U.S.C. § 4333 (1994); 40 C.F.R. § 1500.3 (1995).

II. THE SUBMISSION OF TAAN TO THE PRESIDENT, IN TURN TO BE SUBMITTED TO CONGRESS WITHOUT ANY CHANGES UNDER THE FAST TRACK PROCEDURE, CONSTITUTES A FINAL AGENCY ACTION SUFFICIENT FOR REVIEW UNDER THE APA.

The question of standing to oppose an agency's actions does not end with an examination of the opposing party's eligibility to bring an action. The action and the agency itself must also be investigated. The APA says that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704 (1994). Since the NEPA does not expressly provide for judicial review, OTR's action in the case at bar must be found to be final agency action.

A. The OTR is an agency.

Ascertaining whether a final agency action has occurred, thereby warranting judicial review under APA, is a two-step inquiry. First, it must be established that OTR is an agency. The OTR is a federal entity established within the executive branch. 19 U.S.C. § 2171(a) (1994). It is the United States' chief negotiator for trade matters. Id. § (c)(1)(C). The OTR "report[s] directly to the President and the Congress regarding, and [is] responsible to the President and the Congress for the administration of, trade agreements programs . . . . Id. § (c)(1)(F). Although OTR is accountable to the President with respect to trade matters, it "has a separate statutory basis for its authority and has many separate responsibilities aside from assisting and advising the President." Public Citizen v. United States Trade Representative, 822 F. Supp. 21, 25 n.4 (D.D.C. 1993), rev'd, 5 F.3d 549 (1993). In addition, OTR is identified as an agency under both the Freedom of Information Act and the Privacy Act. See 15

B. The TAAN is a proposal for legislation.


On May 18, 1994, after three years of negotiations, the trade representatives of Australia, New Zealand, and the United States met in Christchurch, New Zealand and signed the TAAN. (R. 2). The TAAN has not yet been transmitted to Congress. (R. 2). However, once the TAAN is submitted to Congress for ratification under the fast-track procedures, the agreement in its transmitted form is unalterable and subject only to a vote of approval or rejection. Congress will have ninety legislative days to vote on the agreement. Public Citizen v. United States Trade Representative, 5 F.3d 549, 550 (D.C. Cir. 1993), cert. denied, 114 S.Ct. 685 (1994). The TAAN, having been signed and finalized as between the three countries, and awaiting only approval by the Congress before becoming a binding treaty, is unambiguously a “proposal for legislation” that falls under the auspices of the NEPA. The fact that “[t]he President is not obligated to submit any agreement to Congress” does not, at this point in the inquiry, call into question whether or not the TAAN constitutes a “proposal for legislation.” Id. at 551.
C. The signing of TAAN by OTR, and not the submission of TAAN by the President to Congress, constitutes final agency action.

Once it has been established that TAAN is a proposal for legislation, and that OTR is an agency, the examination must turn to the proposal, to determine if it falls under the definition of "final action" in order to warrant judicial review. The APA allows review only of "final agency action." 5 U.S.C. § 704 (1994). But does this mean that the action of the agency must be final, or does it mean that the agency's action must be the final action in the life of the proposal?


The Court of Appeals for the District of Columbia Circuit heard two rounds of appeals on a case strikingly similar to the case at bar. Public Citizen v. Office of the United States Trade Representative, 970 F.2d 916 (D.C. Cir. 1992) [hereinafter Public Citizen II], and Public Citizen v. United States Trade Representative, 5 F.3d 549 (D.C. Cir. 1993) [hereinafter Public Citizen IV], both involve demands for an EIS to show the impact on the environment that NAFTA, a trade agreement very much like TAAN, would have. The former of these opinions was in response to an EIS demand prior to completion of NAFTA negotiations, and the latter was after the completed treaty was given to the President to be submitted to Congress under the fast-track procedure. In both of these opinions, standing was denied. The district court in the case at bar, drawing its reasoning from Public Citizen IV, said, "If and when the agreement is submitted to Congress, it will be the result of action by the President, action clearly not reviewable under the APA." (R. 4). However, the decisions of the D.C. Circuit are not clear, and are in conflict with this Court's holding in Franklin v. Massachusetts, 112 S. Ct. 2767 (1992).

In Public Citizen II, the court ruled that there was no final agency action for purposes of review under the APA, because negotiations on NAFTA had not yet been completed. "[P]laintiffs must point to a specific proposal for legislation or other action 'at least arguably triggering the agency's obligation to prepare an impact statement.'" Public Citizen II, 970 F.2d at 918-19 (emphasis added) (quoting Foundation on Economic Trends v. Lyng, 943 F.2d 79, 85 (D.C. Cir. 1991)). And so OTR's obligation to prepare an EIS would be triggered by a "specific proposal for legislation." Id. The court goes on to state, "it is unclear whether either round [referring to both NAFTA and Uruguay Round GATT negotiations] will ever produce a final agreement for the President to submit
to Congress.” *Id.* at 919 (emphasis added). Clearly, the D.C. Circuit anticipated the final NAFTA trade agreement to be completed by the negotiators, and then afterwards be given to the President to submit to Congress. The final agreement occurs before it is ever in the President’s hands. This interpretation is strengthened by another statement later in the case: “[T]he time for judicial intervention is ‘when the report or recommendation on the proposal is made, and someone protests either the absence or the adequacy of the final impact statement.’” *Id.* (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 406 n.15 (1976)). This interpretation is reinforced by the court’s holding that “a final rule represents an agency’s formal resolution of an issue that it has defined to its own satisfaction. . . .” *Id.* at 920.

In short, the D.C. Circuit held in Public Citizen’s first attempt to obtain an injunction for the OTR to prepare an EIS: (1) that OTR’s obligation would be triggered by a specific proposal for legislation; (2) that a final agreement would be produced by OTR and others participating in the negotiations before it is placed in the President’s hands; (3) that judicial intervention comes when a report or recommendation is made by the agency; and (4) that OTR’s formal resolution (of the negotiations in the present case) is its final rule, or final action. These holdings are consistent with the first of the possible “final rule” interpretations, in which the focus is on the action of the agency being final. But when the issue came back before it upon completion of the NAFTA negotiations, the D.C. Circuit contradicted itself.

In *Public Citizen v. United States Trade Representative*, 5 F.3d 549 (D.C. Cir. 1993)\(^1\), that same court held that there is no final action until the President submits NAFTA to Congress. “If and when the agreement is submitted to Congress, it will be the result of action by the President, action clearly not reviewable under the APA.” *Id.* at 551-52. The court then went on to determine that:

[T]he requirement that the President, and not OTR, initiate trade negotiations and submit trade agreements and their implementing legislation to Congress indicates that Congress deemed the President’s involvement essential to the integrity of international trade negotiations. . . . [U]nder the reasoning and language of *Franklin v. Massachusetts*, the “final agency action” challenged in this case is the submission of NAFTA to

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1. or, *Public Citizen IV*
Congress by the President.

Id. at 552-53.

Again, the question of what is "final action" is at the core of the issue. The first time Public Citizen came before the D.C. Circuit, that court interpreted "final action" to mean that the agency's action must be final in order for a suit to be brought against it under the APA. But the second time Public Citizen came before it, just a year later, it interpreted "final action" to mean that the agency's action must be the final action in the life of the ruling or proposal. The D.C. Circuit, whose holding was relied on by the district court below in granting the dismissal in the instant case, cannot be relied on to resolve the question of what is meant by the term, "final action." That must be resolved by the decisions of this Court.

2. This Court's decision in Franklin v. Massachusetts suggests that the agency's action must be final for a suit to be brought disputing it.

The district court below relied on this Court's decision in Franklin v. Massachusetts, 112 S. Ct. 2767 (1992), in addition to Public Citizen IV, in determining that OTR's action was not final when it submitted TAAN to the President. It ruled:

To determine whether an agency action is final, "the core question is whether the agency has completed its decision making process, and whether the result of that process is one that will directly affect the parties." Franklin v. Massachusetts, — U.S. —, 112 S. Ct. 2767, 2773, 120 L.Ed.2d 636 (1992). This logic applies to TAAN. Although the OTR has completed negotiations on TAAN, the agreement will have no effect on POE's members unless and until the President submits it to Congress.

(R. 4). As in Public Citizen IV, this analysis is presented under the assumption that final action means the final action taken in the life of the agency's proposal or ruling. However, an analysis of the language of Franklin will reveal that this is not the correct interpretation.

In order for the House of Representatives to be periodically reapportioned, the Census Bureau, under direction of the Secretary of Commerce, counts the population, and then sends a report of the results to the President. Franklin, 112 S. Ct. at 2773. This report is the decennial census. As a result of the 1990 decennial census, Massachusetts lost a seat in the House of Representatives when it was decided to allocate "922,819 overseas military personnel to the State designated in their personnel files as their 'home of record'. . . . " Id. at 2770. This caused
a shift of one seat in the house from Massachusetts to Washington. Id. at 2769. Therefore, Massachusetts challenged the method used to count these military personnel. Id.

Prior to the 1990 census, it became apparent that there was support in Congress for the overseas federal employees to be included in the state population counts. As a consequence of this growing support, the Secretary of Commerce agreed to include them in the count. Id. at 2771-72. When the report of the 1990 census was completed, the Secretary submitted it to the President, who transmitted to Congress a statement showing the results. Id. at 2774. “Only after the President reports to Congress do the States have an entitlement to a particular number of Representatives.” Id. at 2773.

The Franklin Court concluded that no decision-making process was completed because the census figure supplied by the Secretary of Commerce to the President was actually a “moving target,” and that the President reserved the right to either amend the census information before transmitting it to Congress, or request that the census be reformed. Id. at 2774-75. As a result, this Court held that APA review was unavailable because the final action under the reapportionment statute rested with the President, and the President is not an agency. Id. at 2773; see Armstrong v. Bush, 924 F.2d 282, 289 (D.C. Cir. 1991) (holding that the President is not an “agency” within the meaning of the APA).

There are some important distinctions this Court made that set Franklin apart from other agency actions:

The Secretary’s report to the President is an unusual candidate for “agency action” within the meaning of the APA, because it is not promulgated to the public in the Federal Register, no official administrative record is generated, and its effect on reapportionment is felt only after the President makes the necessary calculations and reports the result to the Congress. Franklin, 112 S. Ct. at 2773 (emphasis added). The court went on to find that, “the action that creates an entitlement to a particular number of Representatives and has a direct effect on the reapportionment is the President’s statement to Congress, not the Secretary’s report to the President.” Id. And finally, “[b]ecause the Secretary’s report to the President carries no direct consequences for the reapportionment, it serves more like a tentative recommendation than a final and binding determination.” Id. at 2774. The action of the Secretary here is merely a resource the President and Congress use to calculate the reapportionment of the House
of Representatives. It is not, in itself, an agency action with direct consequences on the interested parties. See id. at 2773.

The district court in the instant case relied on Public Citizen IV's interpretation of the Franklin decision when it granted the defendant’s motion to dismiss. (R. 4). Specifically, the district court held that “[a]lthough the OTR has completed negotiations on [the] TAAN, the agreement will have no effect on POE’s members unless and until the President submits it to Congress.” (R. 4). The President, in turn, is not obligated to submit any agreement to Congress, and until he does there is no final action. (R. 4). If and when the President submits the agreement to Congress, the district court reasoned, it will be the result of action by the President, action clearly not reviewable under the APA. (R. 4).

This line of reasoning is, first, procrustean, and, second, a misconstruing of the plain meaning Congress purposed for the words “final agency action.” 5 U.S.C. § 704 (1994). Under accepted rules of statutory construction, words in a statute should be interpreted according to their general meaning if unambiguous or if they are subject to one meaning. Francis J. McCaffrey, Statutory Construction 131 (1953). In § 704, “final” immediately precedes “agency.” 5 U.S.C. § 704 (1994). Osten-sibly, Congress selected this textual arrangement in order to emphasize that it was final “agency action” that would trigger APA review. The Public Citizen IV court chose instead to adopt an awkward interpretation of § 704: agency action which is the final action. If Congress had truly intended such a meaning, then it could easily have said “final presidential action,” or more simply, “final action.”

3. The TAAN is a final agency action that will directly affect POE.

It is clear that the Secretary’s report in Franklin is a different type of action than that performed by OTR. The Census is more of a tool than a rule or proposal. It has “no direct consequences for the reapportionment.” Franklin v. Massachusetts, 112 S. Ct. 2767, 2773 (1992). But TAAN is a final proposal for legislation that will be submitted directly to Congress to be ratified with no changes. (R. 8). The President is not going to make any calculations, or take OTR’s findings under advisement so he can prepare a report for Congress. He submits TAAN itself for ratification. (R. 2). The Office of the United States Trade Representative has “lead responsibility for the conduct of . . . international trade negoti-
grams. . . . " Id. § (c)(1)(F). If the actions of OTR regarding TAAN are not subject to suit by parties affected by its action, because TAAN is not a final agency action, then there is no chance for judicial review of any of its statutory duties while conducting international trade negotiations, because OTR must report to the President. But this cannot be the case, because "[a] person . . . adversely affected or aggrieved by agency action within the meaning of a relevant statute [here, NEPA], is entitled to judicial review thereof." 5 U.S.C. § 702 (1994). Congress intended agency action to be reviewable; for this to be possible, the only correct interpretation of "final action" is as the final action of an agency. The final action of OTR in TAAN is its submission to the President. This is the "final agency action" required by the APA. Thus, standing should be granted.

CONCLUSION

For the foregoing reasons, Respondent Protector of the Earth respectfully requests that the holding of the appellate court below be affirmed.

STATUTORY APPENDIX

40 C.F.R. § 1500.3 (1995)
MANDATE.

Parts 1500 through 1508 of this title provide regulations applicable to and binding on all Federal agencies for implementing the procedural provisions of the National Environmental Policy Act of 1969, as amended (Pub. L. 91-190, 42 U.S.C. 4321 et seq.)(NEPA or the Act) except where compliance would be inconsistent with other statutory requirements. These regulations are issued pursuant to NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.) section 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977). These regulations, unlike the predecessor guidelines, are not confined to sec. 102(2)(C)(environmental impact statements). The regulations apply to the whole of section 102(2). The provisions of the Act and of these regulations must be read together as a whole in order to comply
with the spirit and letter of the law. It is the Council’s intention that judicial review of agency compliance with these regulations not occur before an agency has filed the final environmental impact statement, or has made a final finding of no significant impact (when such a finding will result in action affecting the environment), or takes action that will result in irreparable injury. Furthermore, it is the Council’s intention that any trivial violation of these regulations not give rise to any independent cause of action.


PURPOSE.

The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government. It shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data. Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses. An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.

40 C.F.R. § 1508.12 (1995)

FEDERAL AGENCY.

Federal agency means all agencies of the Federal Government. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office. It also includes for purposes of these regulations States and units of general local government and Indian tribes assuming NEPA responsibilities under section 104(h) of the Housing and Community Development Act of 1974.
LEGISLATION.

Legislation includes a bill or legislative proposal to Congress developed by or with the significant cooperation and support of a Federal agency, but does not include requests for appropriations. The test for significant cooperation is whether the proposal is in fact predominantly that of the agency rather than another source. Drafting does not by itself constitute significant cooperation. Proposals for legislation include requests for ratification of treaties. Only the agency which has primary responsibility for the subject matter involved will prepare a legislative environmental impact statement.

RIGHT OF REVIEW

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.
Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are [sic] subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

(C) DUTIES OF UNITED STATES TRADE REPRESENTATIVE AND DEPUTY UNITED STATES TRADE REPRESENTATIVES

(1) The United States Trade Representative shall—
   (A) have primary responsibility for developing, and for coordinating the implementation of, United States international trade policy, including commodity matters, and, to the extent they are related to international trade policy, direct investment matters;
   (B) serve as the principal advisor to the President on international trade policy and shall advise the President on the impact of other policies of the United States Government on international trade;
   (C) have lead responsibility for the conduct of, and shall be the chief representative of the United States for, international trade negotiations, including all negotiations on any matter considered under the auspices of the World Trade Organizations, commodity and direct investment negotiations, in which the United States participates;
   (D) issue and coordinate policy guidance to departments and agencies on basic issues of policy and interpretation arising in the exercise of international trade functions, including any matter considered under the auspices of the World Trade Organization, [sic] to the extent necessary to assure the coordination of international trade policy and consistent with any other law;
   (E) act as the principal spokesman of the President on international trade;
   (F) report directly to the President and the Congress regarding, and be responsible to the President and the Congress for the administration of, trade agreements programs;
   (G) advise the President and Congress with respect to nontariff
barriers to international trade, international commodity agreements, and other matters which are related to the trade agreements programs;

(H) be responsible for making reports to Congress with respect to matters referred to in subparagraphs (C) and (F);

(I) be chairman of the interagency trade organization established under section 1872(a) of this title, and shall consult with and be advised by such organization in the performance of his functions; and

(J) in addition to those functions that are delegated to the United States Trade Representative as of August 23, 1988, be responsible for such other functions as the President may direct.

(footnote omitted)


CONGRESSIONAL DECLARATION OF PURPOSE

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.


CONGRESSIONAL DECLARATION OF NATIONAL ENVIRONMENTAL POLICY

(b) Continuing responsibility of Federal Government to use all practicable means to improve and coordinate Federal plans, functions, programs, and resources

In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may . . .

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and
unintended consequences;

COOPERATION OF AGENCIES; REPORTS; AVAILABILITY OF INFORMATION; RECOMMENDATIONS; INTERNATIONAL AND NATIONAL COORDINATION OF EFFORTS

The Congress authorizes and directs that, to the fullest extent possible: . . . (2) all agencies of the Federal Government shall—

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,
(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
(iii) alternatives to the proposed action,
(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

CONFORMITY OF ADMINISTRATIVE PROCEDURES TO NATIONAL ENVIRONMENTAL POLICY

All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this chapter and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this chapter.

DUTIES AND FUNCTION OF COUNCIL ON ENVIRONMENTAL QUALITY

It shall be the duty and function of the Council—

(1) to assist and advise the President in the preparation of the Environmental Quality Report required by section 4341 of this title;

(2) to gather timely and authoritative information concerning the conditions and trends in the quality of the environment both current and prospective, to analyze and interpret such information for the purpose of determining whether such conditions and trends are interfering, or are likely to interfere, with the achievement of the policy set forth in subchapter I of this chapter, and to compile and submit to the President studies relating to such conditions and trends;

(3) to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in subchapter I of this chapter for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto;