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Brief for Respondent: Eighth Annual Pace National Environmental Law Moot Court Competition

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Civ. No. 95-214

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

BROWNFIELDS REDEVELOPMENT ASSOCIATES OF NEW UNION
Petitioner,

-against-

NEW UNION ROOFING AND ACID DRYWALL
Respondent,

-and-

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Petitioner,

-against-

NEW UNION ROOFING AND DRYWALL
Respondent.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION

BRIEF FOR RESPONDENT*

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* This brief has been reprinted in its original form. No revisions have been made by the editorial staff of the Pace Environmental Law Review.

QUESTIONS PRESENTED

I. Whether § 7002, the citizen suit provision of RCRA, permits BRANU to institute a private cause of action for restitution damages against NURD.

II. Whether NURD is liable to BRANU under RCRA § 7002 when no imminent and substantial endangerment to health or the environment existed at the time the action was filed.

III. Whether it is constitutional for Congress under the commerce clause to regulate NURD, a company that has always performed its business within one square mile of Cathertown, and except for a truck and a roofing product that once traveled interstate, uses local supplies.

IV. Whether NURD is liable to EPA and BRANU under CERCLA § 107 when it disposed of a mixture of prepared roof acid and fruit juices into a compost pit seven years prior to BRANU's ownership of the Moll's Garden site.

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OPINION AND JUDGMENT BELOW

The opinion of the District Court of New Union is unpublished and appears in the record on appeal reproduced in Appendix A.

JURISDICTION

Jurisdiction is waived pursuant to Rule IV(B)(3) of the official rules for the 1996 Eighth Annual National Environmental Law Moot Court Competition.

STATUTES AND REGULATIONS INVOLVED

The constitutional provisions and statutes relevant to the determination of the present case are listed in the Table of Authorities and are reproduced in Appendix B.

PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the District of New Union, rendered April 23, 1995. The Brownfields Redevelopment Associates of New Union ("BRANU") appeals from the District Court decision denying them restitution damages from New Union Roofing and Drywall ("NURD") under § 7002 of the Resource Conservation and Recovery Act ("RCRA"). The United States Environmental Protection Agency ("EPA") joins as amicus. Both BRANU and EPA appeal from the District Court's decision precluding them from recovering costs from NURD under § 107 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").

STATEMENT OF FACTS

New Union Roofing and Drywall ("NURD"), is a three-employee company recognized for its quality of craftsmanship and painstaking attention to detail. (R.2).[1] All of NURD's business is obtained through references from prior custom-

1. References denoted (R._) indicate the appropriate page of the decision of the United States District Court for the District of New Union reproduced in Appendix A.

ers. (R.2). NURD has always performed its roofing business within one square mile of the Moll's Garden neighborhood in Cathertown. (R.2). NURD operated its business from a one-room shed in Moll's Garden from 1981 until 1983. (R.3). The modest shed was located on a lot adjacent to the home of NURD's owner, Andrew Peterson. (R.3). In 1984, NURD moved to a site in Cathertown's industrial area. (R.3).

As part of the roofing process, NURD prepared batches of roof acid at the Moll's Garden site. (R.3). The prepared roof acid is commonly used to ease the process of removing old shingles. (R.3). One component of a prepared batch of roof acid, is roof acid powder, which is manufactured exclusively from natural ingredients, including several vegetable extracts. (R.3). In its powder form, roof acid is neither a listed hazardous waste, nor a characteristic hazardous waste under RCRA, a statute which EPA implements in New Union. (R.3). Roof acid becomes a RCRA listed hazardous waste only after water is added to the powder. (R.3). The parties agree that Peterson and NURD employees did not know that prepared roof acid was a RCRA listed hazardous waste. (R.3).

The roof acid powder and the truck NURD used to transport the product were manufactured out of state but subsequently purchased by NURD from local merchants. (R.5). The prices for these items and all other supplies were determined in a national market. (R.5). The other supplies used by NURD were not only purchased, but also manufactured in New Union. (R.5). In addition, the parties stipulate that while NURD did not partake in any other interstate commerce, NURD's actions do have indirect effects on interstate commerce to the same extent as any economic activity. (R.5-6).

NURD prepared 20 to 30 extra batches of roof acid during the three year period from 1981 through 1983. (R.3). It was NURD's practice to mix the excess prepared roof acid with leftover fruit juices from employee's lunches, leaves, grass clippings and food scraps. The resulting mixture was placed into a compost pit located behind the shed on the Moll's Garden property. (R.3). The parties stipulate that the resulting mixture did not qualify as a RCRA characteristic

hazardous waste. The parties further agree that NURD employees mixed the prepared roof acid with their fruit juice in good faith believing that it would add nutrients to the compost pit. (R.3). At no time was NURD in violation of any permit, zoning or applicable regulations. (R.4).

In 1990, after NURD relocated to the Cathertown industrial site, it sold the Moll's Garden property to plaintiff, Brownfields Redevelopment Associates of New Union ("BRANU"). (R.3). BRANU is a three-employee corporation whose purpose is to find former industrial type sites in Cathertown, buy them and perform any necessary environmental remedial action. (R.3). Once the land is redeveloped, BRANU sells the property for a profit. (R.3). BRANU has previously remediated two sites: a dry cleaner and a gas station. (R.3).

As BRANU prepared the Moll's Garden site for redevelopment, a neighbor telephoned the EPA regional office and described seeing NURD employees mixing prepared roof acid with fruit juices and disposing of it in the compost pit. (R.4). Peterson acknowledged that this had occurred, and both NURD and BRANU cooperated with EPA's sampling of soils and groundwater. (R.4). EPA spent $100,000 for such sampling and follow-up analysis. (R.4). Its report concluded that some soil was sufficiently contaminated to pose a harm, "should the site be used as a residential property or other land use in which soil contact by individuals is likely." (R.4). However, EPA stated that, "as the property is currently in the ownership of a land redevelopment company, federal action to remediate the soil is not necessary at this time." (R.4). Three years later, BRANU remediated the site at a cost of $200,000. (R.4).

After remediation, BRANU sought compensation for its response costs by commencing an action under RCRA § 7002 and CERCLA §107 in the United States District Court for the District of New Union. (R.4). EPA simultaneously instituted an action under CERCLA § 107, seeking recovery of its sampling and analysis costs from NURD. (R.4). The two cases have been consolidated, and EPA participates in the RCRA issues as an amicus. (R.4).

The District Court concluded that although Congress was within its power to enact RCRA § 7002, NURD was not liable under this section because § 7002 does not create a private cause of action for restitution. (R.6). Moreover, the court held that NURD was not liable to either BRANU or EPA under CERCLA § 107 because NURD did not dispose of a CERCLA hazardous substance. (R.8).

SUMMARY OF THE ARGUMENT

BRANU may not recover its cleanup costs under RCRA § 7002 because this section only grants citizens injunctive relief. The plain language of the statute and its legislative history evidence Congress' intent to limit the remedies available to citizens to injunctive relief. Since the statute explicitly provides for this form of remedy, it would be improper to imply any additional remedies. Therefore, BRANU may not recover restitution damages given that this remedy does not exist under § 7002.

BRANU is also barred from recovering under § 7002 since this section requires a finding of imminent and substantial endangerment to health and the environment. An imminent endangerment means a present or future threat to the environment. As BRANU remediated the site prior to filing this action, there is no imminent threat to the environment. Thus, BRANU cannot recover under RCRA § 7002.

Furthermore, NURD is not liable to BRANU because section 7002, as applied to NURD, is unconstitutional since it exceeds Congress' power to regulate under the commerce clause. Congress has failed to show how hazardous waste substantially affects interstate commerce. Even in the aggregate, small amounts of waste disposed of by companies like NURD do not substantially affect interstate commerce. As no substantial affect exists, § 7002 impermissibly allows Congress to interfere with the regulations of land use, an area of traditional state concern. Additionally, since § 7002, as applied to NURD, regulates a local business and is not an essential part of RCRA's larger regulatory scheme, Congress has exceeded its regulatory power.

Congress also may not regulate NURD because NURD is not a business that partakes of interstate commerce. NURD's only connection to interstate commerce is that its truck once traveled in interstate commerce, and some of its products, although locally manufactured and sold, have national markets. If Congress could regulate based on these tenuous connections to interstate commerce, its power under the commerce clause would have no limit. Furthermore, the roof acid powder was not a product subject to regulation by Congress after it reached the Moll's Garden site. Once a product shipped through interstate commerce reaches its "final destination," it loses its interstate quality. Therefore, § 7002 as applied to NURD is unconstitutional.

In addition, NURD is not liable to either EPA or BRANU under CERCLA § 107. Under CERCLA § 107, NURD would be liable if it disposed of a "hazardous substance" on the Moll's Garden site. This condition was not met. When NURD disposed of the prepared roof acid mixed with fruit juice, food scraps and grass clippings, it was not disposing of a CERCLA hazardous substance as defined in RCRA. When a listed waste, such as prepared roof acid, is mixed with other nonhazardous wastes, like fruit juices and food scraps, it no longer constitutes a listed hazardous waste. Moreover, NURD's mixture was not hazardous because the EPA's mixture rule was unenforceable from 1981 until 1983 when NURD disposed of its mixture. Consequently, NURD cannot be held liable because its conduct does not fall within the scope of CERCLA § 107.

ARGUMENT

I. THE CITIZEN SUIT PROVISION OF RCRA CANNOT BE INTERPRETED TO IMPLY A PRIVATE CAUSE OF ACTION FOR RESTITUTION DAMAGES SINCE IT ONLY PROVIDES FOR INJUNCTIVE RELIEF.

The plain language of RCRA § 7002 does not, explicitly or implicitly, provide a private cause of action for the recovery

of cleanup costs. The statute's legislative history also demonstrates that Congress did not intend to provide such a remedy. Rather, the remedies provided by the statute to private parties are limited to injunctive relief. *Walls v. Waste Resource Corp.*, 761 F.2d 311, 315 (6th Cir. 1985). In interpreting a statute, a court must first examine the plain language of the statute. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring). When a private cause of action for damages is at issue, a court's statutory analysis must specifically focus on the plain language of the enforcement and relief provisions. *Middlesex Cty. Sewerage Auth. v. National Sea Clammers*, 453 U.S. 1, 13 (1981). In addition, a court must examine the legislative history to determine whether Congress intended to include a private cause of action for a remedy in a particular statute. *California v. Sierra Club*, 451 U.S. 287, 298 (1981). If, however, a statute expressly provides a remedy, courts must be careful not to infer additional remedies from the plain language of the statute. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979). Neither the plain language nor the legislative history of RCRA § 7002 manifest an intent by Congress to provide a private cause of action for restitution damages. Furthermore, as injunctive relief is explicitly provided for, additional remedies should not be implied. Hence, in following the guidelines set out by the Supreme Court, no implied remedy for restitution damages exists under § 7002. Accordingly, BRANU cannot institute a private cause of action for restitution damages against NURD.

Analysis of the statute's plain meaning in this case demonstrates that the only available remedy afforded citizens under § 7002 is through injunctive relief. *See, e.g.*, *Furrer v. Brown*, 62 F.3d 1092, 1097 (8th Cir. 1995); *Portmouth Redev. & Housing Auth. v. BMI Apartments Assocs.*, 874 F. Supp. 380, 385 (E.D. Va. 1994); *Gache v. Town of Harrison N.Y.*, 813 F. Supp. 1037, 1045 (S.D.N.Y. 1993); *Fallowfield Dev. Corp. v. Strunk*, Nos. CIV. A. 89-8644, CIV. A. 90-4431, 1993 WL 157723, *14-15 (E.D. Pa. May 11, 1993); *Commerce Holding Co. v. Buckstone*, 749 F. Supp. 441, 445 (E.D.N.Y. 1990). Section 7002 does not include recovery for cleanup costs or

any other form of damages. Thus, the statute on its face does not give district courts explicit authority to reimburse plaintiffs for costs incurred in cleaning up contaminated sites. *Id.* at 1096. Instead, it "confers limited jurisdiction" to district courts to grant injunctive relief in the form of an order to the responsible party to take remedial action or to restrain prohibited conduct. *Walls*, 761 F.2d at 315.

The purpose of § 7002 is to encourage citizens to act as private attorneys general by complimenting federal enforcement of environmental regulations. *See Environmental Def. Fund v. Lamphier*, 714 F.2d 331, 337 (4th Cir. 1983). When citizens act as attorneys general, they are protecting the public welfare, and therefore should only be entitled to remedies benefitting the public. The statute affords such a remedy by permitting citizens to obtain injunctions to abate an "imminent and substantial endangerment" to health or the environment. 42 U.S.C. § 6972 (a)(1)(B) (1984). Allowing a private party to recover restitution damages would be inconsistent with the purpose of § 7002 because it would not benefit the general public, but the private litigant instead. Accordingly, BRANU is not entitled to restitution damages, given that RCRA § 7002 only allows for injunctive relief when a citizen sues as a private attorney general.

Furthermore, a court may not read other remedies into a statute that expressly provides for a particular remedy or remedies. *Transamerica*, 444 U.S. at 19. Congress explicitly articulated the remedies available under RCRA for noncompliance with its rules and regulations. Both private citizens and EPA may obtain temporary or permanent injunctions through a civil action in a federal district court. Also, the statute provides that EPA may suspend or revoke permits, impose civil penalties, and bring criminal actions. 42 U.S.C. § 6928(a)-(d) (1986). In addition to articulating enforceable remedies, Congress addressed monetary considerations by explicitly providing for the award of litigation costs to the prevailing parties. 42 U.S.C. § 6972(e). These explicit governmental actions indicate that it is unlikely that "Congress absentmindedly forgot to mention an intended private action" such as restitution damages. *Cannon v. University of Chi-*

cago, 441 U.S. 677, 742 (1979) (Powell, J., dissenting). Hence, as § 7002 only permits injunctive relief for private parties, BRANU is not entitled to a monetary award.

Permitting a private cause of action for restitution damages under RCRA § 7002 would be contrary to Congress' intent. In determining whether Congress intended to include a private cause of action in a statute, a court must consider whether the plaintiff is a member of the class for whose "especial" benefit the statute was enacted, and whether the legislative history explicitly or implicitly indicates an intent to create or deny a private remedy. *Cort v. Ash*, 422 U.S. 66, 78 (1975). In the instant case, both of these questions must be answered in the negative. Therefore, BRANU cannot recover cleanup costs because Congress did not give it a means to do so.

First, since the purpose of RCRA is to benefit the entire citizenship through the protection of the resources of the United States, it follows that Congress did not intend to create a special class of beneficiaries under § 7002. When a statute grants an individual the right to bring a private cause of action for the benefit of the public at large, courts are reluctant to imply a private cause of action which benefits only a private litigant. *Cannon*, 441 U.S. at 693 n.13. In RCRA's stated objectives, Congress declared "it to be the national policy of the United States that . . . the generation of hazardous waste is to be reduced or eliminated . . . so as to minimize the present and future threat to human health and the environment." 42 U.S.C. § 6902(b) (1984). Thus, the benefit of enacting RCRA "inures to all citizens of the United States." *Furrer*, 62 F.3d at 1095. Therefore, the class for which RCRA was enacted encompasses the entire population of the United States. Moreover, just because the statute confers upon each citizen the "right to bring suit in the federal courts to compel enforcement of RCRA's provisions," it does not establish an "especial benefit" for property owners who seek recovery of cleanup costs for soil contamination. *Id.* Thus, BRANU, as a private litigant, cannot prevail because the remedy provided in § 7002 was intended to benefit the entire population.

Second, the legislative history of § 7002 does not speak to the issue of a private cause of action for restitution damages. In light of this, it is not necessary to inquire as to whether implying a cause of action would further the purpose of the statute. *Touche Ross & Co. v. Redington*, 422 U.S. 560, 574-576 (1979) (acknowledging that this inquiry, first set out in *Cort v. Ash*, is not relevant if the legislative history does not address the issue of private remedies). The Supreme Court has recognized that courts must be careful not to imply additional remedies when a statute provides for a remedy. *Transamerica*, 444 U.S. at 19. RCRA already provides for the remedy of injunctive relief. The legislative history of RCRA specifically states that RCRA's citizen suit provision "confer[s] on citizens a limited right . . . to sue to abate an imminent and substantial endangerment." H.R. Rep. No. 198, 98th Cong., 2d Sess., pt. 1, at 53 (1983). Congress has characterized citizen suit provisions as abatement or injunctive measures. *Gwaltney v. Chesapeake Bay Found.*, 484 U.S. 49, 61 (1987). Hence, when a citizen sues "to abate" a condition violative of RCRA's regulations, an injunction is the only possible relief. *Furrer*, 62 F.3d at 1098. Accordingly, no cause of action for damages can be implied since an express remedy for injunctive relief exists. *Transamerica*, 444 U.S. at 19. Since there is no explicit or implicit intent by Congress to allow for a private cause of action to recover cleanup costs, BRANU cannot recover cleanup costs.

In addition, the legislative history of the enforcement provision in RCRA § 7002 illustrates that no private cause of action for restitution damages exists. The enforcement provision of the statute allows the District Court "to order . . . such other actions as may be necessary" to enforce the regulations promulgated by the RCRA. 42 U.S.C. 6972(a)(2). While the legislative history of § 7002 does not specifically address this phrase, Congress qualified the reach of this provision when discussing § 7003. John E. Sullivan, *Implied Private Causes of Action and the Recoverability of Damages Under the RCRA Citizen Suit Provision*, 25 Envtl. L. Rep. 10408 (August 1995); *see also* 42 U.S.C. § 6973(a) (1984). The history of § 7003 indicates that the enforcement provision refers to authority

granted to federal courts to order the responsible party to take whatever action is necessary to correct the violation. *Id.* These actions include "short- and long-term injunctive relief, ranging from the construction of dikes to the adoption of certain treatment technologies, upgrading of disposal facilities, and removal and incineration." *United States v. Price*, 688 F.2d 204, 213 (3rd Cir. 1982) (citing H.R. Committee Print No. 96-IFC 31, 96th Congress, 1st Sess., at 32 (1979)). Notably, there is no reference to recovery for cleanup costs or any other forms of damages in the legislative history of either § 7002 or § 7003. Since courts are not authorized to ignore legislative judgment, and since a review of RCRA's legislative history demonstrates that Congress did not contemplate an implied private cause of action for restitution damages, no such action exists. *See Middlesex County Sewage Auth.*, 453 U.S. at 18.

The above analysis is consistent with a recent Eighth Circuit decision that contains facts mirroring those in the instant case. In *Furrer v. Brown*, 62 F.3d 1092, 1093 (8th Cir. 1995), landowners who were ordered to remediate their property sought to recover their cleanup costs from prior owners. The court used the guidelines established by the Supreme Court in *Cort v. Ash* to determine whether Congress intended to authorize a monetary remedy to private citizens in § 7002. *Furrer*, 62 F.3d at 1094. The court concluded that the language of § 7002 demonstrates that it was not enacted for the special benefit of those in the Furrer's situation. *Id.* at 1095. In fact, the court pointed out that RCRA and § 7002 are specifically directed against owners of property where contamination presents an imminent and substantial endangerment. *Id.* at 1095. The Furrer's fell within this class of landowners. *Id.* at 1095.

Further, after analyzing the statute's plain language, the court in *Furrer* stated that § 7002 specifically authorizes federal courts to grant injunctive relief and does not "contemplate the payment of money to a party who already has cleaned up a contaminated site." *Id.* at 1096-97. In finding this express remedy, the court concluded that Congress has "clearly provided" for restitution damages in other federal en-

vironmental laws and "deliberately did not do so in this instance." *Id.* at 1096. The court denied the Furrer's claim for recovery of cleanup costs, concluding that the statute specifically authorized injunctive relief. Since the Furrer's were unable to establish any Congressional intent to create a private cause of action for the recovery of cleanup costs, there was no justification to infer such a remedy under § 7002. *Id.* at 1102.

Additionally, in *Furrer*, the Eighth Circuit persuasively criticized *KFC W. Inc. v. Mehring*, 49 F.3d 518 (9th Cir. 1995), a recent Ninth Circuit decision authorizing recovery of cleanup costs under § 7002. The Ninth Circuit misconstrued two Eighth Circuit cases which addressed whether EPA can recover response costs. *Id.* at 1100. First, the Ninth Circuit incorrectly relied on *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726, 738 (8th Cir. 1986), because, in that case, the Eighth Circuit never reached the issue of recovery of response costs available to the government under § 7003.

Second, the Ninth Circuit relied on *United States v. Aceto Agricultural Chem. Corp.*, 872 F.2d 1373 (8th Cir. 1989), and concluded that since citizens suits are almost identical to EPA suits, citizen suits should permit cleanup costs. The court, however, applied reasoning pertinent to EPA suits to justify its findings with regard to citizen suits. This reasoning is flawed. Private litigants, unlike the government, cannot pursue a cause of action under the EPA suit provision for post-abatement recovery costs. *Id.* at 1383. Furthermore, the Supreme Court, in *Cannon v. University of Chicago*, 441 U.S. 677, 693, n. 13 (1979), explained that an implied cause of action in favor of the United States may be allowed in cases "where the statute creates a duty in favor of the public at large." This proposition does not suggest that a private party has the same privilege.

Moreover, the Ninth Circuit's opinion incorrectly interpreted Congress' legislative intent when enacting § 7002. The Court cited to H.R. Rep. No. 198, and indicated in dicta that "the legislative history cuts both ways because . . . language [stating that citizens have a limited right to sue to abate] supports the [defendant's] contention that Congress intended to allow citizens to sue only for injunctions when it

added the endangerment provision." *KFC W.*, 49 F.3d at 522. However, the language in the legislative history indicates that a citizen's right to sue is based on the standards of liability found under § 7003 and that citizens are not entitled to the same remedies available to EPA under § 7003. *Furrer*, 62 F.3d at 1101. The Ninth Circuit obviously ignored legislative intent in reaching its conclusion when interpreting § 7002. In light of § 7002's plain language and its legislative history, it is difficult to justify the Ninth Circuit's decision to allow for restitution of cleanup costs in a citizens suit.

BRANU, in its attempt to recover cleanup costs for property formerly owned by NURD, clearly misinterpreted the meaning and intent of RCRA § 7002. RCRA § 7002 does not explicitly provide for restitution of cleanup costs, and there is no implicit intention in the legislative history indicating that such recovery was considered by Congress. In asserting an implied private cause of action in § 7002, BRANU disregards well-established canons of statutory construction as well as long-standing Supreme Court decisions which give guidance to the proper interpretation of statutes. RCRA does not provide BRANU with the remedy it desires. The only remedy BRANU could possibly be granted is injunctive relief. However, this is impossible since BRANU remediated the Moll's Garden site prior to bringing this action. Since RCRA § 7002 only offers injunctive relief to restrain someone from acting or to force someone to act, issuing an injunction against NURD at this time would be absurd.

Finally, allowing BRANU to recover its cleanup costs under RCRA § 7002 would not fulfill the intended purpose of the statute, which is to encourage private citizens to act as attorney generals for the overall community's good. BRANU's sole purpose for suing NURD is to recover the costs it incurred when it cleaned up the Moll's Garden site for its own development and profit making purposes. When these factors are examined, it is clear that the District Court correctly held that BRANU cannot recover its cleanup costs from NURD under RCRA.

II. BRANU HAS NO CAUSE OF ACTION UNDER RCRA § 7002 BECAUSE NO "IMMINENT AND SUBSTANTIAL ENDANGERMENT" TO HEALTH OR THE ENVIRONMENT EXISTS.

BRANU is barred from recovering under § 7002 because it remediated the Moll's Garden site prior to filing this action and eliminated any possible dangers to the environment. To succeed in a RCRA claim, a plaintiff must establish that the condition at the site in question "present[s] an imminent and substantial endangerment to the health or the environment." 42 U.S.C. § 6972(a)(1)(B). Courts interpreting this phrase have held that the statute can only be used to bring an action for events "which took place in the past but which continue to present a threat." *United States v. Price*, 688 F.2d 204, 213 (3rd Cir. 1982). If a court allows a citizen suit to be brought after the site has been remediated, the court would be ignoring the express purpose of RCRA to eliminate any risk to health or the environment. *Coalition for Health Concerns v. LWD, Inc.*, 834 F.Supp. 953, 957 (W.D. Ky. 1993). Thus, allowing BRANU to institute a suit against NURD after it has remediated the contaminated site would subvert the intent and meaning of "imminent and substantial endangerment" as used in RCRA § 7002.

The legislative history of RCRA indicates that Congress relied on the definition of imminence found in § 7003 when it amended § 7002. *See Middlesex Cty. Bd. of Chosen Freeholders v. State of N.J., Dept. of Envtl. Protection*, 645 F. Supp. 715, 721 (D.N.J. 1986). Section 7003 defines "imminence" as applying "to the nature of the threat rather than identification of the time when the endangerment initially arose." *United States v. Waste Industries, Inc.*, 734 F.2d 159, 166 (4th Cir. 1984)(quoting H.R. Rep No. 31, 96th Cong., 1st Sess. 32 (Comm. Print 1979) (Eckhardt Report). The nature of the threat refers to the capacity of the harm to be inflicted on the environment in the present or in the future, even though the action causing the harm occurred sometime in the past. Further, imminence does not require that actual harm exist; in-

stead, a risk of threatened harm only needs to be present. *Dague v. City of Burlington*, 935 F.2d 1343, 1356 (2d Cir. 1991). Therefore, actions under § 7002 can only be instituted if the contamination causing the harm remains present, even if the action which caused the harm has ceased. The action which caused the endangerment at the Moll's Garden site occurred in the past, but the contamination was remediated prior to the commencement of the present suit. Therefore, BRANU cannot sustain its claim under § 7002.

Furthermore, the purpose of RCRA is to promote the protection of health and the environment through the abatement of practices harmful to the general well being of citizens. *Id.* at 1356; *see also* 42 U.S.C. § 6902. Citizen suit provisions are often characterized as "abatement" provisions by Congress. *Gwaltney*, 484 U.S. at 61. Abatement is defined as "a reduction, a decrease, or diminution . . . suspension or cessation." Black's Law Dictionary Sixth Edition (1990). Allowing recovery after a harm has been eliminated would contravene Congress' characterization of citizen suit provisions as abatement provisions. Thus, courts hold that a complaint brought under RCRA's citizen suit provision requesting an abatement must allege that the harm is continuing in nature, *McClellan Ecological Seepage v. Weinberger*, 707 F. Supp. 1182, 1187 (E.D. Ca. 1988); *Gwaltney*, 484 U.S. at 59, and the plaintiff must actually prove that harm exists. *Murray v. Bath Iron Works Corp.*, 867 F. Supp. 33, 41 (D. Me. 1994). In this case, BRANU does not have a cause of action under RCRA § 7002 because at the time it filed this action, it had already remediated the site. Therefore, it could neither allege that the harm was continuing in nature nor prove that the harm existed.

In addition, case law supports the position that NURD is not liable to BRANU since the site did not pose any danger when BRANU filed suit. The Second Circuit in *Dague v. City of Burlington*, 935 F.2d at 1356, recognized that since an "imminent and substantial endangerment to health or the environment" existed when the suit was filed, the plaintiff was not precluded from obtaining injunctive relief. *Dague* reiterates that the Congressional purpose behind RCRA § 7002 is

to abate existing situations which pose "imminent and substantial endangerment." *Id.* Similarly, in *Gache v. Town of Harrison*, 813 F. Supp. 1037, 1043 (S.D.N.Y. 1993), the District Court, in determining whether the contamination of a landfill continued to pose a present threat, stated that "Congress intended to allow citizen suits under § 7002 of RCRA for past violations where the effects of the violation remain remediable." As a result, the court concluded that "the disposal of wastes can constitute a continuing violation as long as no proper disposal procedures are put into effect or as long as the waste has not been cleaned up." *Id.* at 1042.

In the present case, BRANU cannot establish the existence of a threatened or potential harm as required by § 7002. BRANU cleaned up the contamination, thereby abating the "imminent and substantial endangerment" to health and the environment. Consequently, there is no violation of RCRA § 7002. Allowing BRANU to recover after the contamination has been removed from the property would be contrary to the purpose and intent of the Act, which is to protect the health of the general public. Therefore, this Court should affirm the District Court's decision that NURD is not liable to BRANU under RCRA § 7002.

III. SECTION 7002 OF RCRA IS UNCONSTITUTIONAL AS APPLIED TO NURD BECAUSE THE ACT WHEN APPLIED EXCEEDS CONGRESS' POWER TO REGULATE UNDER THE COMMERCE CLAUSE.

RCRA as applied to NURD is unconstitutional because it is not within the scope of Congress' regulatory power. The Constitution grants Congress the power to "regulate Commerce with foreign Nations, and among the several states, and among the Indian Tribes." U.S. Const., Art. I, § 8, cl. 3. This enables Congress to regulate any activities that have a substantial impact on interstate commerce, the channels through which interstate commerce flow, and the instrumentalities of interstate commerce or people or things in inter-

state commerce. *United States v. Lopez*, __ U.S.__, 115 S.Ct. 1624, 1629 (1995). Congress may also regulate purely intrastate activities if, in the aggregate, the intrastate activity substantially affects interstate commerce. *Id.* at 1631. In addition, if the regulation of the intrastate activity is essential to a regulatory scheme enacted by Congress, Congress has the power to intervene. *Id.* Thus, Congress' power to regulate under the commerce clause, is not unlimited. *Id.* at 1628. The scope of the commerce clause

> must be considered in the light of our dual system of government and may not be extended so as to embrace effects on interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937). NURD and others similarly situated do not substantially affect interstate commerce in the aggregate. Also, their regulation is not an essential part of the regulatory scheme set out in RCRA. Therefore, RCRA §7002 is unconstitutional as applied to NURD.

A. *NURD's disposal of a small quantity of waste, coupled with that of other intrastate businesses, does not have a substantial affect on interstate commerce.*

Congress may regulate intrastate activity if that activity, in the aggregate, substantially affects interstate commerce. *Jones & Laughlin*, 310 U.S. at 37. However, Congress cannot use trivial effects on interstate commerce to regulate private activities. *Maryland v. Wirtz*, 392 U.S. 183, 196, n. 27 (1968). In evaluating whether an intrastate activity substantially affects interstate commerce, courts will consider whether Congress is intruding in areas of traditional state concern. *See Lopez*, __U.S.__, 115 S.Ct. at 1632. The courts may hold a specific act of Congressional regulation invalid if Congress regulates a local activity, thereby giving Congress a general police power traditionally reserved to the states. *Id.* at 1634.

Section 7002 of RCRA as applied to NURD regulates an intrastate activity that in the aggregate does not substantially affect interstate commerce and is an area of traditional state concern. Therefore, §7002 as applied to NURD is unconstitutional.

NURD's disposal of the prepared roof acid and fruit juice mixture on the Moll's Garden site does not substantially affect interstate commerce. This is supported by the Supreme Court's reasoning in *United States v. Lopez*, __ U.S. __, 115 S.Ct. 1624 (1995). In *Lopez*, the Court held that in order for Congress to regulate an intrastate activity that activity must do more than just affect interstate commerce. *Id.* at 1930. It must substantially affect interstate commerce. *Id.* In applying this standard, the Court struck down as unconstitutional § 922(q) of the Gun-Free School Zone Act of 1990, which made it a federal crime to knowingly possess a firearm within 1000 feet of a school zone. *Id.* at 1626. The Court determined that, in the aggregate, possession of a gun in a school zone was not an economic activity that substantially affected interstate commerce. *Id.* at 1631.

In addition, there were no findings by Congress demonstrating that possession of a gun in a school zone substantially affected interstate commerce. *Id.* The Court refused to acknowledge the existence of a substantial relationship, fearful of granting Congress an unlimited power to regulate under the commerce clause. *Id.* at 1632. Moreover, the Court was particularly unwilling to allow this expansion of the commerce clause given that § 922(q) sought to regulate criminal activity, an area of traditional state concern. *Id.* at 1634. This would inevitably destroy the constitutional balance between what is truly local and what is truly national. *Id.*

The instant case is similar to *Lopez*. The Congressional findings contained in RCRA do not indicate how solid and hazardous wastes substantially affect interstate commerce. John P. Dwyer, *The Commerce Clause and the Limits of Congressional Authority to Regulate the Environment*, 25 Envtl. L. Rep. 10408 (August, 1995). The findings indicate that there has been an increase in the amount of solid wastes for urban areas due to an increase and improvement in manufac-

turing, packaging, and marketing of consumer products. 42 U.S.C. § 6901(a)(1),(2) (1992). According to Congress, the disposal of solid waste has become a problem that is national in scope and requires Federal action. 42 U.S.C. § 6901(a)(4). For instance, Congress has found that hazardous waste can present a danger to human heath and the environment. 42 U.S.C. § 6901(b)(2). Despite these findings, nowhere in this section does Congress state how intrastate waste has a substantial effect on interstate commerce.

Furthermore, like the defendant's conduct in *Lopez*, NURD's actions do not substantially affect interstate commerce. First, the potential harm that was created when NURD disposed of the prepared roof acid mixture was contained at the Moll's Garden site. EPA concluded that the mixture was only a threat should an individual come in direct contact with the soil. Thus, the harm that could have resulted from the waste would not have had any affect on interstate commerce because it was contained on the land. Furthermore, the waste disposed of by NURD, in combination with other intrastate businesses, does not, in the aggregate, substantially affect interstate commerce. In *Lopez*, __ U.S. __, 115 S.Ct. 1624, 1632 (1995), the government argued that gun possession would substantially affect interstate commerce because people would be unwilling to travel to areas within the country that they perceived were unsafe. The Court declined to consider this a substantial effect. In light of *Lopez*, the effects in the instant case are not a substantial.

Although in the aggregate NURD's disposal of the mixture of prepared roof acid and fruit juice, combined with waste disposed of by other similarly situated businesses, affects land value, this effect does not substantially impact interstate commerce. If Congress could permissibly regulate any activity because it affected land value, Congress' power under the commerce clause would have no limit. In *Lopez*, the Court declined to expand Congress' power to such an extent, because to do so would permit Congress to interfere in an area of regulation reserved for the states under the Constitution. *Id.* at 1634. Similarly, NURD's impact on land value, in the aggregate, does not substantially affect inter-

state commerce, given that RCRA § 7002 regulates land use, an area of state concern. *See Lewis v. BT Investment*, 447 U.S. 27, 36 (1980) (holding that the states retain authority under their general police powers to regulate matters of legitimate states concern). To hold otherwise would upset the constitutional balance between what is local and what is national. *See Gibbons v. Ogden*, 9 Wheat 1, 194-95 (1824). Therefore, since RCRA § 7002 as applied significantly changes the balance of federal-state power, and since Congress failed to make any findings concerning the nexus between hazardous waste and interstate commerce, this Court should find RCRA as applied to NURD unconstitutional.

Additionally, the instant case is distinguishable from *Hodel v. Virginia Surface Mining and Reclamation Assn., Inc.*, 452 U.S. 264 (1981), where, in response to a constitutional challenge to the Surface Mining Control and Reclamation Act ["SMCRA"], the Supreme Court found that Congress rationally concluded that surface mining had an effect on interstate commerce. In reaching its decision, the Court specifically looked at the Congressional findings in SMCRA, as well as the extensive legislative history concerning surface mining and its effects on interstate commerce. *Id.* at 277-80. The association of coal producers who challenged SMCRA argued that, since the Act regulated land use, a local activity, the Court should not defer to Congress' finding. *Id.* at 281-82. The Court rejected this argument concluding that "Congress may regulate the conditions under which goods shipped in interstate commerce are produced where the 'local' activity of producing these goods itself affects interstate commerce." *Id.* at 281.

Although Congress has concluded that surface mining as regulated under SMCRA has an impact on interstate commerce, it has made no such findings concerning the impact of solid and hazardous waste. Also, SMCRA involves the regulation of coal mining, an industry that by its nature sends goods into interstate commerce. Unlike the coal mines in *Hodel*, NURD has no direct ties to interstate commerce and does not ship any goods out of state. While SMCRA was facially challenged, RCRA § 7002 is unconstitutional only as applied

to NURD. This distinction is relevant considering the Court's reasoning in *Hodel* that "courts have uniformly found the power conferred by the Commerce Clause is broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have had effects in more than one state." *Id.* at 282. This reasoning cannot be applied in the instant case because the substance that NURD disposed of did not have the potential to affect any other state. Therefore, unlike the statute in *Hodel*, RCRA as applied to NURD is unconstitutional.

B. *Section 7002, as applied to NURD, is not an essential element of RCRA's regulatory scheme.*

RCRA's regulatory scheme will not be undercut if NURD's intrastate activity goes unregulated. Congressional regulation of purely local activity, although not normally within the scope of the commerce clause, is constitutional if the regulation of the local activity is an essential part of a larger regulatory scheme. *Maryland v. Wirtz*, 392 U.S. 183, 197 (1968). An essential part of a larger regulatory scheme is one which, if absent, would undercut the effect of the regulatory scheme. *See Lopez*, __U.S.__, 115 S. Ct. at 1631. Section 7002 as applied to NURD is not an essential part of RCRA. Congress' motive in enacting RCRA was primarily to decrease adverse effects caused by hazardous waste on human health and the environment. *See* 42 U.S.C. § 6902(a). RCRA, as a whole, achieves this goal. If § 7002 is limited in its application to businesses or persons engaged in or affecting interstate commerce, the purpose of RCRA would not be undercut.

A Congressional goal is only achievable to the extent that it is within the scope of the commerce clause. If, however, Congress is permitted to regulate a local activity only because it furthers a Congressional goal, Congress' power under the commerce clause will have no limit. In this case, the application of § 7002 to NURD may further Congress' goal of protecting health and the environment. RCRA's purpose, however, would not be undercut if it is solely applied to businesses engaged in or affecting interstate commerce, thereby excluding NURD. A harmful substance disposed of intrastate will not

substantially affect health and the environment. Excluding this small amount of waste from RCRA's scope would not undercut Congress' intentions because most hazardous waste would still be regulated under RCRA. Accordingly, § 7002 as applied to NURD's activity is not an essential part of RCRA.

C. *NURD's activity has only a tenuous connection to interstate commerce.*

Congress cannot regulate the mixture of prepared roof acid fruit juice simply because the roof acid powder once passed across state lines. Although Congress may regulate items that move in interstate commerce, *Lopez*, __U.S.__, 115 S.Ct. at 1629, Congress may not reach a product once the product arrives at its final destination. *See Walling v. Jacksonville Paper Co.*, 317 U.S. 564 (1943) (acknowledging that the test of whether an item is still in interstate commerce for the purposes of federal regulation is whether the item moving in interstate commerce had reached its "final destination" or whether it was merely at an interim stop in the process of getting the item to its final destination); *Higgins v. Carr Bros. Co.*, 317 U.S. 572 (1943) (holding that a business' employees were not subject to the Fair Labor Standards Act because the products that the business received ceased to be with the channels of interstate commerce as they had reached their final destination). When the roof acid was delivered to NURD, it had reached its "final destination." The acid was subsequently used only intrastate. Thus, there is no doubt that the roof acid, once received by NURD, lost its quality as an interstate item and was no longer subject to regulation by Congress.

Moreover, the roof acid did not become an item that can be regulated by RCRA until after reaching its final destination in New Union. The roof acid powder did not constitute a hazardous waste under RCRA until it was mixed with water at the Moll's Garden site. Prior to this alteration, the substance was not even an item that Congress chose to regulate under RCRA. Therefore, the prepared roof acid cannot be regulated by Congress under the commerce clause.

Congress also cannot regulate NURD's mixture based on an assumption that NURD is a business that partakes in interstate commerce. The only connection that NURD has to interstate commerce is that its truck was shipped in interstate commerce, and some supplies it uses have national markets. However, these indirect ties to interstate commerce do not bring NURD within Congress' regulatory sphere under the commerce clause. If Congress is permitted to regulate items that once passed state lines or possess a national market base, there would be no end to Congress' power under the commerce clause. Therefore, the truck and supplies owned by NURD do not give Congress the power to regulate the hazardous waste produced by NURD. Furthermore, Congress cannot regulate NURD simply because its employees can use their salaries to buy interstate products. This connection to interstate commerce is also tenuous. As a result, § 7002 as applied to NURD is unconstitutional.

IV. THE DISTRICT COURT CORRECTLY DETERMINED THAT NURD CANNOT BE LIABLE UNDER CERCLA § 107 SINCE IT DID NOT DISPOSE OF A "HAZARDOUS SUBSTANCE."

When NURD employees placed a mixture of prepared roof acid, fruit juice, leaves, grass clippings and food scraps into a compost pit on its Moll's Gardens cite, they were not disposing of a "hazardous substance" under CERCLA. CERCLA § 107(a) holds liable "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C. § 9607(a) (1992). The plain language of the statute dictates that in order for a past owner to be held liable, a hazardous substance must have been disposed of on the site during the period of ownership of the past owner. *Id.* Consequently, NURD is not liable for response costs to either EPA or BRANU under CERCLA § 107 because the mixture NURD disposed of during 1981 through 1983 was not a CERCLA hazardous substance.

A "hazardous substance" under CERCLA § 101(14) is defined as one which has been identified as hazardous in other environmental statutes. 42 U.S.C. § 9601(14) (1992). The parties agree that the only statute through which the mixture might be hazardous is RCRA.[2] Pursuant to RCRA, EPA promulgated rules governing the management of "hazardous waste." 42 U.S.C. § 6921 (1984); 40 C.F.R. 261 (1993). The definition of hazardous waste includes characteristic hazardous wastes and listed wastes. 40 C.F.R. § 261.3. If a waste fails certain EPA-approved regulatory tests, it is labeled a characteristic hazardous waste. 40 C.F.R. § 261, subpart C. A waste is a listed hazardous waste if it appears on one of the three regulatory lists implemented by EPA. 40 C.F.R. § 261, subpart D. The parties agree that the only provision through which the mixture might be a hazardous substance is through its listing as a RCRA hazardous waste.

In 1980, prepared roof acid was listed as a hazardous waste under RCRA. NURD did not, however, dispose of prepared roof acid. Rather, it disposed of a mixture of prepared roof acid and fruit juice left over from lunch, which was prepared in good faith to add nutrients to a compost pit. When, as in the instant case, a listed hazardous waste is mixed with other solid wastes, it no longer constitutes a listed waste. *United States v. Bethlehem Steel Corp.*, 38 F.3d 862 (7th Cir. 1994). "[W]ithout a separate rule specifying that such mixtures are hazardous, the language of the listing itself fails to reach such mixtures." *Id.* Accordingly, NURD is not liable because, at the time it disposed of the mixture of prepared roof acid and fruit juices, it was not disposing of a listed hazardous waste.

The only avenue by which NURD's mixture could be designated as a hazardous waste is through the EPA's "mixture rule." The mixture rule provides that a waste shall be managed as hazardous if it is a combination of a solid waste and any listed hazardous waste. 40 C.F.R. § 261.3(a)(2)(iv). How-

2. CERCLA § 101(14) also designates as a "hazardous substance" any substance EPA has designated for special consideration under the Clean Air Act, Clean Water Act or Toxic Substances Control Act.

ever, the mixture rule, although initially issued in 1980, did not have any legal effect until its repromulgation in 1992. This delay is attributed to the D.C. Circuit's 1991 decision in *Shell Oil Co. v. Environmental Protection Agency*, 950 F.2d 741 (D.C. Cir. 1991), to "vacate" and "set aside" the mixture rule. In *Shell Oil*, the court found that EPA violated the Administrative Procedure Act ("APA") when it failed to provide notice and an opportunity for public comment before issuing the rule in 1980. Consequently, the mixture rule was invalidated on procedural grounds and remanded to EPA. *Id.* at 752. As a result of *Shell Oil*, the mixture rule has been treated by courts as if it had not been issued until 1992. *United States v. Goodner Bros. Aircraft, Inc.*, 966 F.2d 380 (8th Cir. 1992); *United States v. Recticel Foam Corp.*, 858 F. Supp. 726 (E.D. Tenn. 1993); *In re Hardin County, OH*, No. RCRA-V-W-89-R-29, RCRA (3008) Appeal No. 93-1, 1994 RCRA LEXIS 36 (ALJ, April, 12, 1994); *In re Amoco Oil Co.*, RCRA No. III-225, 1993 WL 426068 (ALJ, Sept. 15, 1993).

The language of *Shell Oil* is consistent with the interpretation that the mixture rule was not applicable until 1992. The *Shell Oil* court stated that the mixture rule was "vacated" and "set aside." 950 F.2d at 752. "To 'vacate,' as the parties should well know, means 'to annul; to cancel or rescind; to declare, to make or to render void; to defeat; to deprive of force; to make of no authority or validity; to set aside.'" *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983) (citations omitted). Thus, it is apparent that the court intended that the mixture rule be unenforceable from its initial issuance in 1980 until its repromulgation in 1992.

Furthermore, a retroactive application of the decision in *Shell Oil* is consistent with the Supreme Court's ruling in *James B. Beam Distilling Co. v Georgia*, 501 U.S. 529 (1991). The Supreme Court eliminated a modified prospective approach and concluded that full retroactivity is the normal rule in civil cases. *Id.* Thus, courts have only two options: either abide by the normal rule that a decision rendered in a civil case should be applied retroactively, or, in certain instances, apply the decision purely prospectively. When a new

rule is applied to the litigants in the case in which the rule was announced, full retroactive effect must be given to the new rule. *Id.* at 535. A purely prospective decision occurs when a new rule is neither applied to the parties in the law-making decision nor to the conduct of others or events that came before. *Id.* at 536. The court in *Shell Oil* applied its decision to vacate the mixture rule to the parties. 950 F.2d at 952. In light of the Supreme Court's ruling in *Beam Distilling*, the D.C. Circuit's decision in *Shell Oil* to vacate the mixture rule should be applied retroactively. *See Goodner*, 966 F.2d at 386. Hence, the mixture rule was unenforceable from 1980 until 1992.

The court in *Shell Oil* denied the government's clarification motion, thereby reinforcing the conclusion that the mixture rule was vacated retroactively. The government specifically requested that the court "clarify" its holding to reflect that the mixture rule was only void prospectively. *Shell Oil Co. v. Environmental Protection Agency*, No. 80-1532 (D.C. Cir., March 5, 1992)(Order Denying Motion for Clarification). Hence, the court had the perfect occasion to carve out an exception to the general rule of retroactivity, yet it refrained from doing so.

Additionally, the Eighth Circuit in *Goodner Bros.* rejected EPA's argument that the *Shell Oil* decision should not apply retroactively. The court held that a rule has no "force or effect of law and therefore is void ab initio" when APA notice and comments requirements are not met. 966 F.2d at 384. Moreover, the Supreme Court has held that, generally, regulations not promulgated in accordance with the procedural minimum found in the APA cannot be afforded the "force and effect of law." *Chrysler Corp. v. Brown*, 441 U.S. 281, 313 (1979). Hence, the mixture rule did not exist until it was correctly promulgated in 1992. Consequently, NURD is not liable to either EPA or BRANU under the mixture rule because NURD disposed of the mixture during the period from 1981 until 1983 — the very time the mixture rule had no legal effect.

Not only was the mixture rule unenforceable when NURD disposed of the mixture of prepared roof acid and fruit

juice, but also when EPA conducted its response action in 1990. Thus, applying the repromulgated mixture rule retroactively would enable EPA to recover costs which NURD was not liable for at both the time of disposal and at the time of EPA's expenditures. The Supreme Court has not permitted this outcome.

Furthermore, the Supreme Court has held that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Since EPA's mixture rule does not contain any language requiring a retroactive effect, a retroactive application of the rule to impose liability on NURD would be inappropriate. The agency has even conceded that the mixture rule's effect can only be prospective, and thus cannot apply to actions brought before its enactment. *In the Matter of Hardin Cty., OH c/o Hardin County Comm'rs*, No. RCRA-V-W-89-R-29, 1992 RCRA LEXIS 301, at 14 (ALJ, July 10, 1992). Therefore, to permit EPA to apply the repromulgated mixture rule retroactively would "make a mockery . . . of the APA, [since] agencies would be free to violate the rule making requirements of the APA with impunity if, upon invalidation of the rule, they were free to 'reissue' that rule on a retroactive basis." 488 U.S. at 225 (Scalia, concurring).

The invalidation of the mixture rule from 1980 until 1992 will not completely shelter from liability past and present owners or operators who disposed of hazardous wastes. *See Rebuttal: The Mixture Rule and the Environmental Code*, 25 Envtl. L. Rep. 10244 (1995). Although the combination of a listed waste with other solid wastes before 1992 is neither a listed waste, nor subject to the mixture rule, it may still be classified as a characteristic hazardous waste for RCRA liability purposes. Accordingly, a retroactive application of *Shell Oil* will not preclude from regulation mixtures that exhibit any EPA-identified hazardous waste characteristics. In addition, EPA has even recognized that "millions of tons" of non-characteristic waste mixtures can be managed outside the hazardous waste system because they pose a relatively low risk. 57 Fed. Reg. 21450, 21451. Hence, invalidating the

mixture rule for a brief period will neither harm the environment, nor completely eliminate liability.

NURD, however, is not liable for adding the mixture of prepared roof acid and fruit juice to the compost pit because it did not dispose of a characteristic hazardous waste. When EPA analyzed the soil at the Moll's Gardens site, it found that the contents of the compost pit did not exhibit any of EPA-identified hazardous waste characteristics. For these additional reasons, NURD is not liable under CERCLA § 107 since it did not dispose of a RCRA hazardous waste.

Unmistakably, NURD cannot be liable because the mixture rule had no legal effect during the period from 1981 through 1983 when NURD disposed of the mixture. Since the mixture rule did not exist when NURD disposed of the prepared roof acid and fruit juice, it was not disposing of a RCRA hazardous waste. As a result, NURD's conduct does not fit within the scope of CERCLA § 107 because liability is only imposed upon past owners if, at the time of disposal, the mixture was a RCRA hazardous waste.

CONCLUSION

For the foregoing reasons, Petitioner, New Union Roofing and Drywall respectfully requests that this Court uphold the District Court's decision barring EPA and BRANU from recovering under both RCRA § 7002 and CERCLA § 107.

Respectfully submitted,
Counsel for Respondent,
New Union Roofing and Drywall

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

BROWNFIELDS REDEVELOPMENT ASSOCIATES OF NEW UNION (BRANU)	)	
v.	)	
	)	Civ. No. 95-214
NEW UNION ROOFING AND DRYWALL (NURD)	)	
and	)	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY	)	
v.	)	
NEW UNION ROOFING AND DRYWALL	)	

Brownfields Redevelopment Associates of New Union (BRANU) and the United States Environmental Protection Agency (EPA) have appealed the decision of the United States District Court for the District of New Union that they cannot recover cleanup costs from New Union Roofing and Drywall (NURD) under section 7002 of the Resource Conservation and Recovery Act (RCRA) and section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

Each party is instructed to brief the following questions:

(1) Is NURD liable to BRANU under RCRA 7002 for NURD's disposal of the chemical known as "roof acid"? BRANU answers in the affirmative; NURD and, as amicus, EPA answer in the negative.

(2) Is NURD liable to EPA and BRANU under CERCLA 107 for NURD'S disposal of roof acid? BRANU and EPA answer in the affirmative; NURD answers in the negative.

Parties are limited in their briefs to the above issues, but are not limited to the arguments for their positions raised in the district court below.

For purposes of briefing and argument, legal authorities may be cited that date until September 15, 1995, and more recent legal authorities may not be cited or referred to.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW UNION

BROWNFIELDS REDEVELOPMENT ASSOCIATES OF NEW UNION (BRANU)	)	
v.	)	
	)	Civ. No. 93-22,046
NEW UNION ROOFING AND DRYWALL (NURD)	)	
and	)	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY	)	
v.	)	
NEW UNION ROOFING AND DRYWALL	)	

Decision entered April 23,1995

I. Introduction and Background Facts

New Union Roofing and Drywall (NURD) is a 3-employee business in Cathertown, New Union. NURD specializes in careful craftsmanship and painstaking attention to detail in its work: though its prices are high, NURD always meets its deadlines and takes pride in the fact that it can list every one of its former customers as a reference for its work. NURD's owner, Andrew Peterson, is known throughout the community as a gentleman of old-fashioned values with a refreshing desire not to sacrifice his personal care in his work. NURD, pronounced "nerd", has taken advantage of its off-beat acronym in the company slogan on its letterhead: "Remember high school. NURDs always get the job done right." NURD has never advertised, and instead gets all of its business from its prior customers serving as references. NURD has always

performed all of its business in the same small (1 square mile) "Moll's Gardens" neighborhood in Cathertown.

NURD was incorporated as a New Union for-profit corporation in 1981 and acquired a vacant lot adjoining the owner's family home in the Moll's Gardens residential neighborhood. On the lot, NURD constructed, and operated out of, a modest one-room shed, barely big enough to store its equipment, mix its roofing compounds in drums, and provide a desk for the owner. From 1981 to 1983, NURD operated its roofing business from this shed, until moving in 1984 to a site in Cathertown's industrial area.

The Brownfields Redevelopment Associates of New Union (BRANU, commonly pronounced "brand new") is a 3 employee for-profit business incorporated in New Union in 1984. Owned by Elizabeth Kates, known for her philosophy of "think globally and act locally", BRANU's purpose is to find former industrial-type sites in Cathertown, buy them, perform any necessary environmental remedial action to make them attractive for new development, and then sell them at a profit. The firm's letterhead includes its motto: "We recycle land to make it BRAND NEW!" This is a time consuming process for each site, and since it was incorporated in 1984, BRANU has purchased 3 sites: a former dry cleaner, which it remediated and resold as a photo supply shop; a former gas station, which is still owned by BRANU and which BRANU hopes to resell; and the former NURD site. All of the sites are in the Moll's Gardens neighborhood.

The parties agree on the facts that give rise to dispute, summarized as follows. During NURD's operations at its Moll's Gardens site from 1981 to 1983, NURD prepared batches of "roof acid", a chemical applied to an existing roof to ease the process of removing old shingles prior to a new roof being installed. Roof acid is manufactured exclusively from natural ingredients, including several vegetable extracts, and is purchased by roofers in powder form and then prepared for application by adding water to the powder. As mixed with water, roof acid is listed a hazardous waste under the Resource Conservation and Recovery Act (RCRA), which the United States Environmental Protection Agency (EPA) im-

plements in New Union (the State of New Union has not been authorized by EPA to implement RCRA). Roof acid was listed as a RCRA hazardous waste on December 31, 1980. On 20 to 30 occasions from 1981 to 1983, NURD prepared more roof acid than it needed for a particular job, and in these instances it was NURD's practice to mix the excess roof acid with the leftover fruit juice prepared for the employees' lunches for the day and put the resulting mixture into the compost pit, a hole dug at the back of NURD's site in Moll's Gardens. The parties agree that Peterson and NURD employees did not know that roof acid was a RCRA listed waste, and mixed the roof acid with their fruit juice in good faith, believing (mistakenly) that, because roof acid is prepared from vegetable extracts and other natural ingredients, it would add nutrients to the compost and would thus enhance the soil rather than pose harm. In addition to the mixture of roof acid and soft drinks, NURD employees also tossed into the compost pit other composting materials, such as autumn leaves, grass clippings, and food scraps from employees' lunches. The parties have stipulated that no other materials were disposed of in the compost pit; that the compost pit is the only source of contamination on the former NURD site; that at all times NURD used roof acid in quantities small enough to fall below the thresholds necessary applicable regulations were violated by NURD at any time during its operations at the Moll's Gardens site. Moreover, the parties stipulate, the roof acid used was of technical grade; and while discarded roof acid was listed hazardous waste under RCRA, neither the roof acid alone nor the mixture which resulted when mixed with soft drinks qualified as characteristic hazardous waste under RCRA.

The parties have also stipulated that at the time of BRANU's purchase of the Moll's Gardens site from NURD in 1990, BRANU did not know and had no reason to know that any hazardous substance was disposed of in, or at, the site; that the transfer deed and other documents between NURD and BRANU are silent as to liability in this instance; and that no applicable New Union state law is relevant.

In 1989, as BRANU began clearing the shed from the property and applying for a Cathertown building permit to build on the site, a neighbor telephoned the EPA regional office and described seeing NURD employees mixing roof acid and fruit juices and disposing of them in the compost pit. Andrew Peterson readily acknowledged that this had been NURD's practice, and both NURD and BRANU fully cooperated with EPA's sampling of soils and groundwater. EPA spent $100,000 for such sampling and follow-up laboratory analysis of the samples taken, all in 1990, with a report that concluded:

> A key location on the site has soil that is sufficiently contaminated with roof acid to constitute a danger should the site be used as residential property is currently in the ownership of a land redevelopment company, federal action to remediate the soil is not necessary at this time.

BRANU remediated the site spending $200,000, all in 1993. (The site is now remediated and a family lives in the residence BRANU constructed on the site.) Later in 1993 BRANU commenced this action under RCRA (properly fulfilling the notice requirements of RCRA 7002 (b))2)(A) and other applicable notice requirements) and the Comprehensive Environmental Response, Compensation, and liability Act (CERCLA) (also properly fulfilling CERCLA's notice requirements). BRANU sought compensation for its response costs, and at approximately the same time *(and within the statute of limitations) EPA commenced this action under CERCLA, seeking recovery of its $100,000 in sampling and analysis costs. With the consent of the parties, the two cases have been consolidated, and EPA participates in the RCRA issues as an amicus.

II. *NURD Liability to BRANU Under RCRA 7002*

BRANU asserts that NURD is liable to BRANU under RCRA for restitution of BRANU's $200,000 site remediation costs under RCRA 7002. NURD asserts that RCRA 7002 does not provide that relief includes restitution, and also that

RCRA 7002 cannot constitutionally be applied to grand any relief on these facts. EPA, as amicus, agrees with NURD that RCRA 7002 does not provide for restitution on these facts, but for different reasons.

RCRA 7002(a)(1)(B) provides in pertinent part that "any person may commence a civil action on his won behalf. . . against any person. . . including any past or present generator,. . . or past or present owner or operator of a . . . disposal facility, who has contributed or who is contributing to the past or present. . . disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." The parties agree that NURD fits the specified criteria and that, until BRANU remediated the site in 1993, the site presented an imminent and substantial endangerment.

What the parties do not agree on is what relief is called for. BRANU, pointing to RCRA 7002's authorization for the district court to "order such person to take such other action as may be necessary", says that this provides to the court its full equitable powers, and asks for restitution, citing to *KFC Western, Inc. v. Meghrig* (49 F.3d 518, 25 Envtl. L. Rep. 20638 (9th Cir. 1995) as precedent. *See generally* J. Martin Robertson, *Restitution Under RCRA sec. 7002(a)(1)(B): The Courts Finally Grant What Congress Authorized*, 25 Envtl. L. Rep. 10491 (Sept. 1995).

NURD counters that BRANU and *KFC WESTERN* read more into RCRA 7002 than is there, and that under applicable Supreme Court precedent finding implied private causes of action is disfavored. *See generally*, John E. Sullivan, *Implied Private Causes of Action and the Recoverability of Damages Under the RCRA Citizen Suit Provision*,25 Envtl. L. Rep. 10408 (Aug. 1995). Moreover, NURD says, the facts in this case are so local in nature that interstate commerce is not implicated and so to apply RCRA 7002 to these facts is to exceed Congress' authority to regulate under the Commerce Clause, citing to *United States v. Lopez*, 115 S.Ct. 1624 (1995). The parties agree that neither BRANU nor NURD *directly* partake of any interstate commerce, except that the roof acid used by NURD was manufactured in Virginia and

transported though interstate commerce to a hardware store in Cathertown, where NURD purchased it. Likewise, NURD's truck was manufactured in Michigan, and transported through interstate commerce to a dealership in Cathertown, where NURD bought it. All other supplies were manufactured and purchased in New Union. The parties agree that for all supplies used by NURd, including those make in New Union and the roof acid and truck form other states, the markets are national with prices set competitively from many manufacturers. Moreover, the parties agree that both BRANU and NURD have *indirect* effects on interstate commerce to the same extent as any economic activity of their size though, for example, payments to employees which then enable employees to purchase goods and services form out of state, and purchases form suppliers that, though the purchases were manufactured in New Union, provide profits to both the suppliers and the manufacturers which enable them to pay their own employees, who in turn purchase goods and services in interstate commerce. Simply put, BRANU suggests that this type of direct and indirect effect on interstate commerce is sufficient under *Lopez* for RCRA to apply here, and NURD, pointing to the weapons which were at issue in *Lopez*, says it is not.

EPA, like BRANU, asserts that the *Lopez* criteria are met, but concludes that RCRA 7002 nonetheless does not authorize a private cause of action. EPA acknowledges that RCA 7002 is quite similar to RCRA 7003, which provides relief when sought by the federal government. Nonetheless, EPA maintains, though the words are similar, they are not identical, and moreover under applicable Supreme Court case law though a high burden must be met to find a *private* cause of action from the text of a statute, the burden is lower in finding a *government* cause of action. Consequently, EPA says, RCRA 7003 authorizes restitution when sought by EPA, but RCRA 7002 does not authorize restitution when sough by a private party.

This court is unwilling to engage in judicial activism, and concludes that Congress was within its Commerce Clause authority in enacting RCRA 7002, particularly in light of the

congressional finding in RCRA 1002(a)(4) that "problems of waste disposal" "have become a matter national in scope." However, in enacting RCRA 7002, this court does not believe that a private cause of action for restitution was created, and so this court holds that NURD is not liable to BRANU under RCRA 7002.

III. NURD Liability to BRANU and EPA under CERCLA 107

In the alternative to restitution under RCRA 7002, BRANU asks for cost recovery from NURD under CERCLA 107. EPA asks likewise.

The parties agree that the only CERCLA 107 issue is whether what NURD disposed of is a "hazardous substance" for CERCLA liability purposes. CERCLA 101(14) defines "hazardous substance" by cross-referencing to other provisions; the only provision through which roof acid might be a hazardous substance is though its listing as a hazardous waste under RCRA.

BRANU's and EPA's initial reasoning is straightforward: roof acid is a listed RCRA hazardous waste, which makes it a hazardous substance under section 101(14), which makes NURD liable for its disposal under section 107.

But NURD points out that NURD did not dispose of roof acid, but actually disposed of a mixture of roof acid and fruit juice left over from lunch, which was prepared in good faith to add nutrients to a compost pit. The mixture of roof acid and fruit juice was not a listed waste, and is only hazardous through EPA's "mixture rule," which states that "a solid waste . . . is a hazardous waste if . . . [i]t is a mixture of solid waste and one or more hazardous wastes listed." (40 CFR 261.3).

NURD concedes that if the mixture rule applies, then its disposal was of a hazardous waste. However, NURD points out that the D.C. Circuit vacated the mixture rule in *Shell Oil Co. v. Environmental Protection Agency*, 950 F.2d 741, 22 Envtl. L. Rep. 20305 (D.C. Cir. 1991, as amended 1992). Although EPA reissued the rule in 1992 (57 Fed. Reg. 7628),

and stated that the rule was in effect from its initial issuance in 1980 until the D.C. Circuit vacated it in 1991 (57 Fed. Reg. at 7630), it is not clear that the rule was indeed in effect during the time of NURD's actions in 1981 through 1983. The language of the D.C. Circuit opinion does not indicate that the court envisioned a "discontinuity" in the regulation of hazardous waste. Likewise, the 8th Circuit has interpreted the D.C. Circuit's opinion as declaring the mixture rule void ab initio (*United States v. Goodner Aircraft, Inc.*, 966 F.2d 380, 22 Envtl. L. Rep. 21201 (1992)).

On whether the mixture rule applied during the 1980-1991 period, all three parties cite to James E. Satterfield, *EPA's Mixture Rule: Why the Fuss?* 24 Envtl. L. Rep. 10712 (Dec. 1994); Van Carson, Philip Schillawski, and Mark Shere, *Rebuttal: The Mixture Rule and the Environmental Code*, 25 Envtl. L. Rep. 10244 (May 1995); and James E. Satterfield, *EPA's Continuing Jurisdiction Regulation: A Response to "The Mixture Rule and the Environmental Code"*, 25 Envtl. L. Rep. 10262 (May 1995).

NURD asserts that the roof acid - fruit juice mixture was not a hazardous waste, and hence not a CERCLA hazardous substance, in 1981 through 1983, and so NURD is not liable under CERCLA 107(a)(2). In addition, NURD raises a defense specific to its liability to EPA: NURD points out that if the mixture rule was invalid, its waste was not hazardous in 1990 when EPA conducted its response action. Thus, NURD says, although it acknowledges that the mixture rule has since been properly reissued, applying it retroactively enables EPA to recover from NURD for costs which NURD was not liable for at both the time of disposal and at the time of EPA's expenditures.

Both EPA and BRANU assert that the mixture rule was invalid from its initial issuance in 1980, without interpretation. But they assert differently in the alternative. If the mixture rule was not valid at the time of NURD's disposal, BRANU asserts, it is sufficient that it was valid at the time of BRANU's response action in 1993. EPA asserts that it was not necessary for the mixture rule to be valid when EPA con-

ducted its work in 1990, that it is sufficient for the rule to be applicable when EPA filed its action.

The court believes that NURD is most persuasive here. The D.C. Circuit was clear that it was *vacating* the mixture rule, not merely making it invalid from the date of decision forward. If the EPA didn't accept the D.C. Circuit's decision, its responsibility was to take the matter to the Supreme Court. It is estopped and precluded now, in this court, to assert otherwise. Thus, the mixture was not a hazardous waste at the time of its disposal, nor, for EPA, at the time of its cleanup. The court holds NURD is not liable under CERCLA 107.

Orders consistent with this decision are issued herewith.

/s/
R.N. Remus
United States District Judge

APPENDIX B

UNITED STATES CONSTITUTION, ARTICLE I, SECTION 8, CLAUSE 3

Section 8. [1] The Congress shall have Power . . .

[3] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

42 U.S.C. § 6972 (1984)

Citizen Suits

(a) In general

Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf—

(1)(A)

. . .

(B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment; or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia. The district court shall have jurisdiction, without regard to the amount in contro-

versy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under section 6928(a) and (g) of this title.

. . .

(e) Costs

The court, in issuing any final order in any action brought pursuant to this section or section 6976 of this title, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party, whenever the court determines such an award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

42 U.S.C. § 9601 (1992)

Definitions

For the purpose of this subchapter—

. . .

(14) The term "hazardous substance" means (A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act (but not including any waste the regulation of which under the Solid Waste Disposal Act has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317 (a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the

Clean Air Act, and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15, . . .

42 U.S.C. § 9607 (1992)

Liability

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

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

. . .

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

. . .

(4) . . . from which there is a release, or threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

. . .

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

. . .

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

40 C.F.R. § 261.3 (1993)

Definition of hazardous waste

(a) A solid waste, as defined in § 261.2, is a hazardous waste if:

. . .

(2) It meets any of the following criteria:

. . .

(iv) It is a mixture of solid waste and one or more hazardous wastes that is listed in subpart D of this part

and has not been excluded from paragraph (a)(2) of this section under §§ 260.20 and 260.22 of this chapter; . . .