Pace Environmental Law Review

Volume 13
Issue 2 *Spring 1996*
Symposium Edition

Article 33

April 1996

Brief for Appellant and Amicus United States Environment Protection Agency: Eighth Annual Pace National Environmental Law Moot Court Competition

Haylee Albert
University of Florida College of Law

Jaime Austrich
University of Florida College of Law

David Pearce
University of Florida College of Law

UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

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

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

BRIEF FOR APPELLANT AND AMICUS UNITED STATES ENVIRONMENTAL PROTECTION AGENCY*

Attorneys for Appellant and Amicus,
United States
Environmental Protection Agency
Haylee Albert
Jaime Austrich
David Pearce

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

Environmental Law Society
University of Florida
College of Law
Bruton-Geer Hall
Gainesville, Florida 32611
(904) 846-1198

This brief is in a type size of ten (10) characters per inch.

QUESTIONS PRESENTED

I. WHETHER CONGRESS MAY REGULATE NEW UNION ROOFING AND DRYWALL'S DISPOSAL OF A HAZARDOUS SUBSTANCE UNDER THE AUTHORITY OF THE COMMERCE CLAUSE, WHEN NEW UNION ROOFING AND DRYWALL HAS ALWAYS PERFORMED ITS BUSINESS LOCALLY.

II. WHETHER BROWNFIELDS REDEVELOPMENT ASSOCIATES OF NEW UNION MAY SEEK SITE REMEDIATION COSTS UNDER SECTION 7002 OF RCRA, WHEN RCRA DOES NOT EXPRESSLY CREATE A PRIVATE CAUSE OF ACTION FOR RESTITUTION.

III. WHETHER THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND BROWNFIELDS REDEVELOPMENT ASSOCIATES OF NEW UNION CAN SEEK COST RECOVERY FROM NEW UNION ROOFING AND DRYWALL UNDER CERCLA 107, WHEN THE HAZARDOUS SUBSTANCE DISPOSED OF WAS ACTUALLY A MIXTURE, AND THE MIXTURE RULE WAS VACATED BY THE DISTRICT OF COLUMBIA CIRCUIT COURT.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

UNITED STATES COURTS OF APPEAL CASES

UNITED STATES DISTRICT COURT CASES

OPINION BELOW

The unreported opinion of the United States District Court for the District of New Union is set out in the transcript of the record.

JURISDICTION

Jurisdiction need not be asserted as compliance with Supreme Court Rule 24.1 (e) is waived under B (3) of the Official Rules for the 1996 Eighth Annual National Environmental Law Moot Court Competition.

STATUTES AND REGULATIONS INVOLVED

Statutes and regulations relevant to the determination of the present case are listed in the Table of Authorities.

PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the District of New Union, decided April 23, 1995. Brownfields Redevelopment Associates of New Union appeals the decision of the District Court with respect to the liability of New Union Roofing and Drywall for site remediation costs under Section 7002 of the Resource Conservation and Recovery Act (RCRA). 42 U.S.C. § 6972 (1976). The United States Environmental Protection Agency participates as amicus on this issue. Brownfields Redevelopment Associates of New Union and United States Environmental Protection Agency also appeal the lower court judgment regarding the liability of New Union Roofing and Drywall for cost recovery under Section 107 of the Comprehensive Environmental

Response, Compensation and Liability Act (CERCLA). 42 U.S.C. § 9607 (1980). The standard of review for all questions raised in this appeal is *de novo.*

STATEMENT OF THE CASE

New Union Roofing and Drywall (NURD) is a roofing business in Cathertown, New Union. (R. 2).[1] It was owned by Andrew Peterson and then incorporated in 1981. From 1981 to 1983 NURD operated its roofing business in the Moll's Garden residential neighborhood. In 1984, NURD moved to a site in Cathertown's industrial area. (R. 3). During NURD's operations at its Moll's Gardens site, NURD prepared batches of "roof acid," a chemical applied to remove old roof shingles. (R. 3). NURD purchased the roof acid in a powder form, and then mixed it with water. (R. 3). As mixed with water, roof acid is a listed hazardous waste under RCRA, which the Environmental Protection Agency (EPA) implements in New Union. (R. 3). Roof acid was listed as a RCRA hazardous waste on December 31, 1980.

The roof acid used by NURD was manufactured in Virginia and transported through interstate commerce to a hardware store in Cathertown. (R. 5). Similarly, NURD's truck was manufactured in Michigan and transported through interstate commerce to a dealership in Cathertown. (R. 5). On 20 to 30 occasions from 1981 to 1983, NURD disposed of excess roof acid in a compost pit behind its building after mixing it with leftover fruit juice. (R. 3). Other materials, such as leaves, grass clippings, and food scraps, were tossed into the compost pit as well. (R. 3). The compost pit is the only source of contamination on NURD's property. (R. 4).

In 1990 the Brownfields Redevelopment Associates of New Union (BRANU) purchased the site from NURD. (R. 3). BRANU, owned by Elizabeth Kates, purchased industrial sites in Cathertown. (R. 3). The company would perform any necessary environmental remediation, and then resell the sites at a profit. (R. 3). Since BRANU was incorporated in

1. Cites to (R._) refer to pages of the decision of the United States District Court for the District of New Union.

1984, it has purchased three sites: a former dry cleaner, which was remediated and resold as a photo supply shop; a former gas station, currently up for sale; and the former NURD site. (R. 3). The former NURD site is now used for residential purposes. (R. 3). The parties have stipulated that at the time BRANU purchased NURD's site BRANU did not know, nor did it have reason to know, that NURD had disposed of any hazardous substance in the site. (R. 4).

After the hazardous waste disposal was discovered and reported, EPA performed soil and groundwater tests. (R. 4). EPA spent $100,000 for its sampling and laboratory analysis. In 1990 the EPA concluded that "[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 or other land use in which soil contact by individuals is likely." (R. 4). Because EPA knew that BRANU owned the site and that BRANU was a land redevelopment company, EPA decided that federal action to remediate the soil was not necessary at that time. (R. 4).

BRANU seeks to recover its remediation expenses from NURD pursuant to CERCLA and RCRA § 7002. (R. 4). EPA commenced this action under CERCLA to recover its $100,000 in sampling and analysis costs. (R. 4). The lower court concluded that NURD was not liable to BRANU under RCRA § 7002 because RCRA did not provide for a private cause of action. (R. 6). However, the court concluded that RCRA was validly enacted by Congress under the Commerce Clause. (R. 6). Furthermore, neither BRANU nor the EPA could recover under CERCLA because the roof acid was not a listed hazardous waste when mixed with the fruit juice. (R. 8).

SUMMARY OF THE ARGUMENT

Congress had authority under the Commerce Clause to enact RCRA § 7002 because hazardous waste disposal substantially affects interstate commerce. Because the nexus between commercial activity and waste disposal is well documented in congressional findings and legislative history,

Congress may rationally conclude that waste disposal affects interstate commerce. Furthermore, NURD's hazardous waste disposal sufficiently affected commerce to justify requiring NURD's compliance with RCRA. NURD's hazardous waste may adversely affect the environment in neighboring states. In addition, NURD purchased goods and services from out of state suppliers, and contaminated a site which could be resold to out of state individuals seeking to relocate to New Union.

BRANU cannot seek remedial costs from NURD because RCRA § 7002 does not authorize a private cause of action for restitution. Courts may not imply a private cause of action unless it is clear that Congress intended to create such a right. No such implication is justified in the instant case because Congress specified in detail all remedies it intended to provide. Furthermore, the citizens' suits provision of RCRA only provides for claims by parties acting as private attorneys general, not for those pursuing a private remedy. Thus, it would be improper for this court to imply additional remedies.

The EPA can collect its response action costs from NURD because the roof acid mixture was a hazardous waste under CERCLA § 107. EPA promulgated a mixture rule defining hazardous waste to include "a mixture of solid waste and one or more hazardous wastes listed." 40 C.F.R. 261.3 (1992). By this definition, the roof acid disposed of by NURD, even when mixed with the fruit juice, is a hazardous substance. The mixture rule was in effect at the time of the disposal, and thus is applicable to the instant case. The vacatur of the rule does not mean that the rule was void ab initio. In the alternative, the EPA has the authority to apply its reissued mixture rule retroactively.

ARGUMENT

I. CONGRESS HAS AUTHORITY UNDER THE COMMERCE CLAUSE TO REQUIRE NURD COMPLIANCE WITH RCRA § 7002.

Applying RCRA § 7002 to NURD does not exceed Congressional authority to regulate under the Commerce Clause. The United States Constitution provides Congress with the authority to regulate commerce among the several states. U.S. Const. art. I, §8, cl. 3. The power of Congress over interstate commerce extends to intrastate activities which so affect interstate commerce as to make regulation appropriate. *United States v. Darby*, 312 U.S. 100, 118 (1941). Because the nexus between commercial activity and the generation of solid waste is well documented, Congress may rationally conclude that waste disposal affects interstate commerce. *United States v. Rogers*, 685 F.Supp. 201, 202 (D. Minn. 1987). Congressional findings have established hazardous waste disposal as a matter of national concern necessitating federal action. Resource Conservation and Recovery Act of 1976, § 1002(a), 42 U.S.C. § 6901(a) (1976). Furthermore, NURD's hazardous waste disposal sufficiently affected interstate commerce to justify requiring NURD to comply with RCRA.

A. *Congress had authority under the Commerce Clause to enact RCRA § 7002 because waste disposal affects commerce and is a national concern.*

Congress may regulate the disposal of hazardous waste pursuant to its commerce clause powers because waste disposal, and hazardous waste in particular, is "a matter national in scope." RCRA §1002(a)(4). Even before the enactment of RCRA, Congress demonstrated a growing federal interest in the disposal of solid and hazardous wastes by adopting the Solid Waste Disposal Act of 1965, the Resource Recovery Act of 1970, superseded by RCRA, the Toxic Substances Control Act, and the Safe Drinking Water Act of 1974.

Extensive congressional findings and legislative history set forth the interstate affects of hazardous waste disposal

and the need for federal regulation. In determining the constitutionality of congressional action under the Commerce Clause, the courts may consider legislative findings and committee reports. *United States v. Lopez*, 115 S.Ct. 1624, 1631 (1995). The legislative history found that "although the disposal of discarded materials has traditionally been considered a local problem, it is in fact one of broader scope." H.R. Rep. No. 1491, 94th Cong., 2d Sess., pt. 1, at 9 (1976). Congressional findings further state that "the problems of waste disposal. . .have become a matter national in scope and in concern and necessitate Federal action through financial and technical assistance and leadership. . ." 42 U.S.C. §6901(a)(4).

A court must defer to a congressional finding that a regulated activity affects interstate commerce if there is any rational basis for such a finding. *Hodel v. Virginia Surface Mining*, 452 U.S. 264, 276 (1981); *Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241, 258 (1964). The Committee of Interstate and Foreign Commerce found that, without a regulatory framework, hazardous wastes would continue to be disposed of in a manner resulting in "substantial and sometimes irreversible pollution of the environment." H.R. Rep. No. 1491 at 3. The Committee expressed concern over the effects of hazardous waste disposal on human health and the environment, noting that much of the hazardous waste disposed of is in interstate commerce. *Id.* It found that this legislation is necessary for other environmental laws to be effective, since existing methods of waste disposal often result in air pollution, water pollution, subsurface leachate and surface run-off. *Id.* at 4.

The legislature also found a need for a more wide-ranging dissemination of information. Technical and institutional barriers faced by municipalities are often insurmountable without federal assistance. *Id.* at 10. Moreover, the aggregation of so many independent units of local governments creates institutional and legal barriers to effectively deal with waste disposal problems. This aggregation complicates financial arrangements, particularly involving financing for facilities or equipment. Additionally, most local governments

have no experts on recovery technology or conservation systems. *Id.*

In *United States v. Solvents Recovery Service of New England*, 496 F.Supp. 1127 (D.Conn. 1980), the court stated that these congressional findings "eliminate any doubt that by 1976 Congress had deemed the disposal of hazardous wastes an important federal concern, which was related to other types of pollution regulated by federal law, and which required uniform federal standards." *Id.* at 1138. Similarly, a district court found that, "RCRA easily passes constitutional muster as an exercise of congressional power under the Commerce Clause." *United States v. Rogers*, 685 F.Supp. 201, 202 (D. Minn. 1987). *See also United States v. ILCO*, 48 B.R. 1016, 1021 (D. Ala. 1985) ("Clearly RCRA and CERCLA are rooted in the Commerce Clause.") Thus the legislative history and congressional findings establish a sufficiently strong federal interest in preventing pollution caused by hazardous wastes to justify federal legislation.

The complex regulatory program established by RCRA can survive a commerce clause challenge without showing that every facet of the program is independently and directly related to a valid congressional goal. *See Hodel v. Indiana*, 452 U.S. 314, 328 (1981). "It is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this test." *Id.* Section 7002 is an integral part of RCRA's regulatory program. It authorizes citizen suits in instances where disposal of hazardous waste has created an imminent or substantial danger. Such suits are important to RCRA's regulatory framework because they encourage abatement and remediation of hazardous waste sites.

B. *NURD's activities have a sufficient nexus to interstate commerce to require compliance with RCRA § 7002.*

NURD's activities sufficiently affect interstate commerce to justify requiring compliance with RCRA § 7002. Congress may regulate an intrastate activity that has a substantial effect on interstate commerce, irrespective of whether such ef-

fect is direct or indirect. *Wickard v. Filburn*, 317 U.S. 111, 125 (1942). The indirect effects of NURD's and BRANU's activities on interstate commerce are sufficient to allow NURD's activities to be regulated under the Commerce Clause. Furthermore, even if NURD's actual effect on interstate commerce is slight, the court must not only consider NURD's actions, but also the aggregate effect on interstate commerce of all those similarly situated to NURD.

1. Congress may regulate an intrastate activity that has an indirect effect on interstate commerce.

The characterization of an activity as "local" or intrastate does not resolve the question of whether Congress may regulate it under the Commerce Clause. The Commerce Clause extends to intrastate activities which so affect interstate commerce that congressional regulation is appropriate as a means of attaining a legitimate end, and effectively regulating interstate commerce. *Hodel v. Virginia Surface Mining*, 452 U.S. 264 (1981). Congress may regulate an intrastate activity that has a substantial effect on interstate commerce, "irrespective of whether such effect is what might. . .have been defined as 'direct' or 'indirect.'" *Wickard* 317 U.S. at 128. "There is no question of Congress's power under the Commerce Clause to include otherwise ostensibly local activities within the reach of federal economic regulation, when such activities sufficiently implicate interstate commerce." *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1975).

In *United States v. Earth Sciences*, 599 F.2d 368 (10th Cir. 1979), the court held that pollution of a stream sufficiently affected commerce to be covered by the Clean Water Act. The stream was located entirely in one county, was not navigable, and was not used to transport goods or materials. Respondents argued that the stream did not provide a significant link in the chain of commerce. However, the court held that "the stipulation of facts indicates at least some interstate impact from this stream, and that is all that is necessary under the Act." *Id.* at 374. The fact that the stream supported trout and beaver, and that its water was used for

agricultural irrigation, provided a sufficient link to interstate commerce.

The parties have stipulated that both BRANU and NURD have indirect effects on commerce. (R.5). First, NURD and BRANU purchase goods and services from out-of-state suppliers. Second, the property polluted by NURD, and remediated by BRANU, may be purchased by an out-of-state individual. Lastly, NURD's pollution may have adverse environmental consequences on wildlife or groundwater which may move outside the state. Thus, the fact that NURD operated locally is not dispositive. "Activities conducted within State lines do not by this fact alone escape the sweep of the Commerce Clause." *United States v. Rock Royal Co-operative Inc.*, 307 U.S. 533, 569 (1939).

a. NURD and BRANU purchased goods through interstate commerce.

NURD's and BRANU's activities affect interstate commerce because they affect the demand and supply of goods passing through interstate commerce. *See United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942) (upholding Congress's power to regulate the marketing of milk produced and sold intrastate but in competition with milk marketed interstate). NURD purchased roof acid manufactured in Virginia and transported through interstate commerce to a store in Cathertown. (R.5). Furthermore, NURD's truck was manufactured in Michigan, and transported through interstate commerce to a dealership in Cathertown. (R.5). All supplies used by NURD have national markets, with prices set competitively from many manufacturers. Moreover, payments to BRANU's and NURD's employees enable those employees to purchase goods from out of state. Purchases from suppliers provide profits to both the suppliers and the manufacturers which enable them to pay their own employees who, in turn purchase goods in interstate commerce.

Courts have found such affects on interstate commerce sufficient to allow regulation under the Commerce Clause. *See Daniel v. Paul*, 395 U.S. 298 (1969). In *Daniel* the Supreme Court held that a snack bar in a private club was a

covered "public accommodation" under the Civil Rights Act. *Id.* at 302. The snack bar served food to interstate travelers and purchased food which had moved in interstate commerce. The Court noted that certain ingredients going into the bread and soft drinks were produced and processed in other states. Likewise NURD's roof acid, the hazardous waste which polluted the site, was purchased out of state. (R.5).

b. the site may be purchased by a person from out of state.

BRANU remediates contaminated land for resale to purchasers who may not be residents of New Union. NURD's site has in fact been purchased for residential purposes. (R.4).[2] The Supreme Court has noted that the population "has become increasingly mobile, with millions of people. . .traveling from state to state." *Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241, 252 (1964). NURD's contamination of a site potentially marketable to out of state residents limits their ability to relocate in Cathertown. NURD's activities "sufficiently contaminated [the site] with roof acid to constitute a danger should the site be used as residential property." (R.4). Costs to remediate the site may have substantially increased the selling price of the land.

Activities which interfere with the allocation of housing resources may be regulated by Congress under the Commerce Clause. *See Morgan v. HUD*, 985 F.2d 1451, 1455 (10th Cir. 1993). In *Morgan* an appellate court struck down a discriminatory housing statute. The court reasoned that housing discrimination interferes with the efficient allocation of housing resources, and could thus hinder interstate relocation. Congress therefore could reasonably seek to remove such impediments by relying on its commerce power. *See also Seniors Civil Liberties Union Ass'n v. Kemp*, 965 F.2d 1030 (11th Cir. 1992) (the housing market affects interstate commerce). "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *United*

2. The facts do not state whether the purchasers of the site were residents of Cathertown or from out of state.

States v. Woman's Sportswear Mfg Ass'n, 336 U.S. 460, 464 (1949). Thus, NURD's activities affect interstate commerce because the contaminated a site may reasonably affect the housing market.

c. NURD's hazardous waste disposal may adversely affect the environment in neighboring states.

Congress may regulate NURD's activities under the Commerce Clause because hazardous waste disposal has adverse environmental affects in neighboring states. Pollution, especially hazardous wastes, invades natural ecosystems and groundwater systems which do not respect state boundaries. Harm to one ecosystem may have substantial consequences to other ecosystems as a result of the dynamic nature of living organisms. Poisons pass through the food chain in animals traveling among several states. RCRA's legislative history recognized this fact by citing an incident where children sustained serious alkyl mercury poisoning after eating contaminated pork. H.R. Rep. No. 1491 at 23. This example illustrates the protracted effects of hazardous wastes.

Further, hazardous waste disposal affecting one state's water supply may contaminate the water supply of neighboring states. Groundwater travels underground, often below several states. The transboundary nature of groundwater pollution necessitates national pollution prevention measures. The law must respect the complexities and interrelationships of the natural world. The federal government must be able to regulate threats to the environment on a national scale in order to properly protect and manage the nation's natural resources as a whole. Even small amounts of hazardous waste disposed of locally, such as NURD's disposal of roof acid, may contaminate groundwater or enter the food chain, poisoning plants and animals in other regions.

Case law has upheld federal regulation in such instances. *Earth Science*, 599 F.2d at 374, found that effects on trout and beaver, and on stream flow, had a sufficient effect on interstate commerce to apply to Clean Water Act to a stream located entirely in one county. Similarly, the court in

Hoffman Homes, Inc. v. Administrator, EPA, 999 F.2d 256 (7th Cir. 1993), found that a body of water affects interstate commerce if its degradation or destruction would have an effect upon migratory birds. NURD's disposal of roof acid threatens wildlife living in or around the contaminated area. These effects sufficiently relate to interstate commerce to permit federal regulation thereof.

2. If all those similarly situated to NURD disposed of their hazardous waste in a like manner, the aggregate effects of the pollution would significantly affect interstate commerce.

Assuming *arguendo* that NURD's singular disposal of roof acid does not significantly effect interstate commerce, the aggregate effect of hazardous waste disposal from all those similarly situated to NURD would significantly effect commerce. Congress may regulate acts which are nationally significant in their aggregate effect. The triviality of an individual act's impact is irrelevant so long as the class of such acts may reasonably have substantial national consequences. *See Wickard v. Filburn*, 317 U.S. 111 (1942). The Supreme Court established this principle in *Wickard* by holding that Congress could control a farmer's production of wheat for home consumption. *Id.* at 127. The Court reasoned that the cumulative effects of home consumption of wheat by many farmers may alter the supply and demand relationship of the interstate market. "That the appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial." *Id.*

In *National Labor Relations Board v. Fainblatt*, 306 U.S. 601 (1939), the Court expressly stated that the operation of the Commerce Clause does not depend on any particular volume of commerce affected. The company at issue was a small clothing manufacturer, employing from 60 to 200 employees. The Court held that the small volume of commerce affected was without significance. "Commerce may be affected in the same manner and to the same extent in proportion to its vol-

ume, whether it be great or small." Id. at 607. *See also Perez v. U.S.*, 402 U.S. 146, 154 (1971) ("where the class of activities is regulated and that class is within the reach of federal power, the courts have no right to excise, as trivial, individual instances of the class."); *Maryland v. Wirtz*, 392 U.S. 183, 192 (1968) ("The contention that in commerce clause cases the courts have the power to excise, as trivial, individual instances falling within a rationally defined class of activities, has been entirely put to rest.").

Thus, under the Commerce Clause, Congress can reach any individual activity, no matter how insignificant if, when combined with other similar activities, it exerts a "substantial economic effect on interstate commerce." *Wickard*, 317 U.S. at 100. Congressional findings established that waste disposal is a national problem, significantly threatening the nation's health and environment. NURD's disposal of hazardous waste contaminated the soil, which may affect wildlife, groundwater, and public health. If all those similarly situated to NURD disposed of their hazardous waste in a like manner, serious public health and environmental consequences would result.

C. This case is distinguishable from Lopez because it involves an economic activity and because there are legislative findings establishing the effects on interstate commerce.

Applying RCRA § 7002 to these facts does not exceed Congress's authority to regulate under the Commerce Clause in light of the Supreme Court's holding in *United States v. Lopez*, 115 S.Ct. 1624 (1995). In *Lopez*, the Supreme Court struck down a federal statute on the grounds that it violated the Commerce Clause. The Court found that the Gun Free School Zones Act of 1990 was unconstitutional because (1) it was a criminal statute that did not involve commerce or any sort of economic activity, (2) the statute contained no jurisdictional element to ensure, through case-by-case inquiry, that possession of a firearm had any concrete tie to interstate commerce, and (3) gun possession is traditionally a subject of

state control. The instant case is distinguishable on all three grounds.

1. NURD's and BRANU's activities are economic in nature.

In *Lopez*, the Supreme Court found that the Gun Act exceeded Congress's ability to regulate commerce because gun possession in a school zone does not involve an economic activity. *Lopez*, 115 S.Ct. at 1630. However, NURD's roofing and drywall business clearly involves economic activity. NURD is a profit oriented entity, engaging in commercial activity by selling its services and purchasing products from other suppliers. Likewise, BRANU is an economic enterprise which purchases land with the intention of reselling it at a profit.

In discussing the requirement that a regulation concern an economic activity, the *Lopez* Court cited *Wickard v. Filburn*. *Id.* at 1624. In *Wickard*, the Court upheld a penalty against a farmer for harvesting more wheat then he was allotted under the Agricultural Adjustment Act. *Wickard*, 317 U.S. at 127. This extra wheat was grown entirely for the farmer's personal consumption. The *Lopez* Court stated that such an activity was sufficiently economic in nature because "a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions." *Lopez*, 115 S.Ct. at 1624 (quoting Wickard, 317 U.S. at 128). Thus, even apparently tenuous economic activities, such as growing wheat for personal consumption, qualify as an economic activity under the *Lopez* reasoning.

2. Sufficient jurisdictional elements exist to regulate NURD under the Commerce Clause.

The *Lopez* court struck down the Gun Act because it contained no jurisdictional element which would ensure that the firearm possession in question affected interstate commerce. In discussing this aspect, the Court stated that "as part of our independent evaluation of constitutionality under the Commerce Clause we of course consider legislative findings, and

indeed even congressional committee findings." *Lopez*, 115 S.Ct. at 1631. The Court found that neither the Gun Act nor its legislative history contained express congressional findings regarding the effects upon interstate commerce of gun possession in a public school. *Id.* at 1632.

However in the instant case, lengthy congressional findings and 112 pages of legislative history explicitly outline the effects of waste disposal on interstate commerce. *See* discussion *supra* I.A. RCRA was a product of several years of hearings and markups before various subcommittees, including the Committee on Interstate and Foreign Commerce. The legislative history reveals a strong need for national legislation in the area of waste disposal because "waste itself is in interstate and intermunicipal commerce. . ." and "hazardous waste is more likely to be the subject of interstate transportation than is non-hazardous industrial or municipal waste." H.R. No. 1491 at 10. Congress outlined the national health concerns and environmental threats waste disposal poses, as well as the institutional barriers to effective regional or statewide planning for discarded materials management. *Id.* at 11.

3. Hazardous waste disposal is not an appropriate area for state control.

The *Lopez* Court struck down the gun possession statute because it intruded into an area of traditional state concern, namely criminal law. The *Lopez* Court identified education, family law, and criminal law as areas of traditional state regulation, but made no mention of environmental or land use law. In fact, the Supreme Court has previously recognized that there is a strong federal interest in controlling certain types of pollution and in protecting the environment. *See Illinois v. City of Milwaukee*, 406 U.S. 91, 107 (1972); *Hodel v. Virginia Surface Mining*, 452 U.S. 264 (1981).

In *Virginia Surface Mining* appellees contended that regulating surface mining exceeded Congress's authority under the Commerce Clause because land use regulation was an inherent police power of the state. The Court rejected this argument, finding that the mining activity affected commerce

and public welfare by destroying and diminishing the utility of land for commercial, industrial, agricultural, and forestry purposes. Inadequacies in existing state laws and the need for uniform minimum nationwide standards made federal regulation appropriate. *Id.* at 280. Furthermore, uniform standards were essential to ensure fair competition in interstate commerce among sellers of coal produced in different states.

In the instant case, Congress has determined that waste disposal has created a problem "national in scope," which poses a national threat to public health and the environment. Legislative history supports the finding that the states were unable to appropriately regulate waste disposal because of economic and institutional barriers. Furthermore, because waste itself is in interstate commerce, some states have enacted protectionist measures to prohibit the importation of foreign waste.

D. Section 7002's substantive standards come from federal common law which does not require a showing of interstate effects.

Interstate effects need not be alleged in order to apply RCRA § 7002 to NURD. The federal common law of nuisance governs an action brought under the imminent hazard provision of RCRA. *See U.S. v. Solvents Recovery Service of New England*, 496 F.Supp. 1127 (D. Conn. 1980). In *Solvents Recovery*, the United States instituted an action for injunctive relief to abate and remedy unlawful groundwater pollution. *Id.* at 498. Defendants argued that the action was deficient because it failed to allege that the seepage of chemicals into underground wells had interstate effects. The court found that § 7003 merely granted jurisdiction; it did not establish standards for determining the lawfulness of the conduct of those sued by the United States.[3] Those standards must be

3. Although *Solvents Recovery* involved § 7003 of RCRA, the holding should be equally applicable to § 7002 because of the close similarity in language. The differences between the statutes are not relevant to issues regarding the Commerce Clause.

found elsewhere in RCRA or in the regulations promulgated pursuant to RCRA, or in the federal common law of nuisance. *Id.* at 1134.

The Supreme Court gave life to this body of federal common law in *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972). The Court stated that "federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution." *Id.* at 107. *See also United States v. Valentine*, 856 F.Supp. 627 (1994) (Courts may formulate federal common law under RCRA § 7003 where necessary to protect uniquely federal interests or where Congress has given power to develop substantive law.). The basis for this federal cause of action was the strong federal interest in controlling certain types of pollution and protecting the environment. The substantive principles which govern an action for equitable relief under RCRA are found in the common law.

Citing *Milwaukee*, the court in *Solvents Recovery* concluded that there was an overriding federal interest in preserving interstate waters. "When a pollution controversy arises, it is immaterial whether there is a showing of extraterritorial pollution effects. The issue is whether the dispute is a matter of federal concern." *Solvents Recovery*, 496 F.Supp. at 1134. The court reasoned that "conditioning a § 7003 claim on the allegation of interstate effects would be fundamentally inconsistent with the character of the pollution which is the target of the legislation and incompatible with the nature and extent of the federal concern embodied in RCRA." *Id.* at 1138. Accordingly, the court held that plaintiff's complaint was not deficient for failure to plead any extraterritorial effects. Plaintiff stated a cause of action under the federal common law of nuisance, even though the pollution was confined within the town limits.

Thus, as long a NURD's waste disposal created a nuisance under federal common law, interstate affects need not be alleged. Such a nuisance claim is clearly made considering the EPA's findings in their site report. The report concluded that the soil around the site was sufficiently contaminated with roof acid to constitute a danger should the site be used

as residential property or for any other use in which soil contact by individuals is likely. (R. 4).

II. BRANU CANNOT SEEK SITE REMEDIATION COSTS FROM NURD BECAUSE RCRA § 7002 DOES NOT AUTHORIZE A PRIVATE CAUSE OF ACTION FOR RESTITUTION.

The federal district courts have no authority under RCRA to grant BRANU remediation costs. Section 7002 does not expressly create a private cause of action for restitution, and there is no support for implying a private cause of action for personal remedies thereunder.

A. Congress did not intend to create a private cause of action for restitution under RCRA § 7002.

BRANU cannot file a claim for restitution under RCRA § 7002 because Congress limited the jurisdiction of federal district courts in citizens' suits to injunctive relief. RCRA § 7002 does not expressly provide for restitution as a remedy, and there is no apparent support for the proposition that Congress intended to imply such a remedy.

1. The Supreme Court has firmly established that federal courts are not to imply federal private causes of action unless it is clear that Congress intended to bestow such a right.

In *Cort v. Ash*, 422 U.S. 66 (1975), the Supreme Court outlined a "preferred approach for determining whether a private right of action should be implied from a federal statute. . . ." *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 26 (1979) (White, J., dissenting). This approach involved the consideration of four factors: (1) is the plaintiff one of the class for whose especial benefit the statute was enacted, (2) is there any indication of legislative intent, explicit or implicit, either to create such a remedy or deny one, (3) is it consistent with the underlying purposes of the legislative scheme to imply such a remedy, and (4) is the cause of action one traditionally relegated to state law? The Supreme Court

has since explained that the ultimate issue is whether Congress intended to create a private right of action. *See California v. Sierra Club*, 451 U.S. 287, 293 (1981) ("The question is not simply who would benefit from the Act, but whether Congress intended to confer federal rights upon those beneficiaries.").

The Sixth Circuit applied this doctrine to RCRA § 7002 and refused to imply a private cause of action for restitution. *Walls v. Waste Resource Corp.*, 761 F.2d 311, 315-316 (6th Cir. 1985) (finding the types of relief available limited to injunctive remedies). The *Walls* court held that under the *Cort* line of cases it was correct to dismiss plaintiff's count for damages under RCRA § 7002 since the statute did not expressly permit a private action for damages. *Walls*, 761 F.2d at 316; *see also Environmental Defense Fund, Inc. v. Lamphier*, 714 F.2d 331, 337 (4th Cir. 1983) (finding that Congress did not confer a federal right in restitution to private parties under RCRA).

2. It would be improper for this court to imply additional judicial remedies because Congress specified those remedies it intended to avail to citizens under RCRA § 7002.

This court cannot find an implied private cause of action for restitution under RCRA § 7002 because Congress has specifically defined all remedies that are available to private citizens. This court would violate established rules of statutory interpretation if it were to assume that Congress intended to imply additional judicial remedies. *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 14 (1981).

In *Middlesex*, the Supreme Court considered whether Congress intended to create a private cause of action under the Federal Water Pollution Control Act (FWPCA) where one was not explicit. *Id.* at 10-11. The Court reaffirmed its holding in *California v. Sierra Club*, stating that the key to the inquiry is legislative intent. *Middlesex*, 453 U.S. at 14 (citing, among other authorities, *California v. Sierra Club*, 451 U.S. at 293).

In interpreting the intent of Congress, the *Middlesex* court considered all of the elaborate enforcement provisions in the FWPCA. The Court concluded that because Congress had chosen to provide the various causes of action in such detail, the Court could not assume that Congress intended to authorize by implication additional judicial remedies. *Middlesex*, 453 U.S. at 14. "It is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Id.* at 14-15 (citing *Transamerica*, 444 U.S. at 19).

In the instant case, Congress similarly provided for various specific remedies and set out elaborate provisions prescribing the manner and form in which authorized suits must be occur. *See* 42 U.S.C. §§ 6972 (a-g) (delineating every aspect of citizens' suits authorized under RCRA, from notice requirements to the types of relief authorized). In the absence of any indicia to the contrary, this court must conclude that Congress provided for precisely those remedies it desired to create. *Middlesex*, 453 U.S. at 15. Congress excluded restitution as an available private remedy when it specifically defined those remedies that a private party may seek under RCRA. Therefore, to hold that BRANU may seek restitution under RCRA would be contrary to congressional intent.

3. The citizens' suits provision of RCRA only provides for claims by parties acting as private attorneys general, not those pursuing a private remedy.

Section 7002 confers on citizens a "*limited right*. . .to sue to abate an imminent and substantial endangerment. . . ." Hazardous and Solid Waste Amendments of 1984, H.R. No. 198, 98th Cong., 2d Sess., pt. I, 53 (1983) (emphasis added), reprinted in 1984 U.S.C.C.A.N. 5576, 5612. Similar citizens' suits provisions are viewed by the Supreme Court as supplementary enforcement mechanisms to the Acts in which they appear, not as a means of seeking private remedies. *See Middlesex*, 453 U.S. at 14 ("These citizen-suit provisions authorize private persons to sue for injunctions to enforce [their respective] statutes."). The Fourth Circuit interpreted the

citizens' suits provision of RCRA to grant the same authority. The court held that Section 7002 authorizes only those suits by private parties where the party is acting as a private attorney general, rather than pursuing a private remedy. *Lamphier*, 714 F.2d at 337.

RCRA § 7002(a) specifically limits the jurisdiction of federal district courts to four remedies: (1) enforcement of RCRA requirements that have been violated; (2) restraining any past or present contributors; (3) ordering responsible persons to take such action as necessary; or (4) ordering the Administrator to perform any non-discretionary act or duty. 42 U.S.C. § 6972(a). These remedies allow private parties to advocate matters in the public interest consistent with "the primary goal of this provision, namely the prompt abatement of imminent and substantial endangerments." Hazardous and Solid Waste Amendments of 1984 at 5612. All of the above remedies are injunctive in nature and do not provide a private party any especial benefits.

In the instant case, BRANU is requesting personal recovery for site remediation costs, a remedy not considered under RCRA § 7002. Awarding BRANU substantive relief in the form of site remediation costs would be contrary to the purpose of RCRA's citizens' suits provision, which only allow private parties to sue in the public interest as private attorneys general. *Lamphier*, 714 F.2d at 337. In asking the court to award money damages for remedial costs, BRANU is "requesting relief that is beyond the powers of the district court to grant under the citizens-suit provision of RCRA." *Portsmouth Redevelopment and Housing Authority v. BMI Apartments Associates*, 847 F.Supp. 380, 385 (E.D. Va. 1994). The statute simply does not provide a private action for damages. Therefore, BRANU should not be allowed to use RCRA § 7002 to seek personal financial gain.

B. This court cannot follow the holding of the Ninth Circuit in KFC Western because it is contrary to both congressional intent and Supreme Court precedent.

The Ninth Circuit's recent decision in *KFC Western, Inc. v. Meghrig*, 49 F.3d 518 (9th Cir. 1995), is not binding in the instant case and should not be followed. The two-to-one majority in *KFC* did not follow the intent of Congress, nor did the court base its decision on controlling Supreme Court precedent.

In *KFC*, the plaintiff sought to recover remediation costs under RCRA § 7002. The district court granted the defendants' motion to dismiss, holding that Section 7002 authorized only injunctive or other equitable relief. *Id.* at 519-520. The Ninth Circuit reversed concluding that district courts are authorized to order that defendants take "such other action as may be necessary." *Id.* at 520 (citing 42 U.S.C. § 6972(a)(1)(2)). The majority relied on this statutory language erroneously to imply a private cause of action for restitution.

Interpreting this language to authorize restitution is contrary to the intent of the Legislature. Congress was referring to injunctive relief when it authorized district courts "*to order* such person to take such other action as may be necessary. . ." 42 U.S.C. § 6972(a)(2) (emphasis added). The legislative history indicates that the phrase was intended to authorize both short- and long-term injunctive relief needed to compel responsible parties to remediate imminent hazards. *United States v. Price*, 688 F.2d 204, 213 (3d Cir. 1982) (quoting The Eckhardt Report, H.R. Rep. No. 31, 96th Cong., 1st Sess. 32 (1979)) (referring to § 7003 from which the language was taken).

This language has also been precluded as a means of obtaining restitution even under equitable principles. In *Commerce Holding Company, Inc. v. Buckstone*, 749 F.Supp. 441 (E.D. N.Y. 1990), the plaintiffs contended that they were not seeking legal or compensatory damages under RCRA, "but only equitable relief in the form of reimbursement for costs

for remediation of the [s]ite." *Id.* at 445. The court held that even maintaining the claim as equitable under this RCRA language, the plaintiff would be the direct beneficiary of the substantive relief. "Thus, regardless of how the request is denominated, it does not comport with the statute's purpose of allowing private parties to bring suit if 'genuinely acting as private attorneys general rather than pursuing a private remedy.'" *Id.* (quoting Environmental Defense Fund, Inc. v. Lamphier, 714 F.2d 331, 337 (4th Cir. 1983).

III. CERCLA AUTHORIZES THE ENVIRONMENTAL PROTECTION AGENCY TO COLLECT RESPONSE ACTION COSTS FROM NEW UNION ROOFING AND DRYWALL.

NURD must reimburse the EPA for the costs incurred by the agency in its response action to NURD's illegal disposal of a mixture which constituted a hazardous substance. The District Court found NURD not liable, erroneously concluding that the mixture rule had been voided ab initio by the D.C. Circuit in *Shell Oil Co. v. Environmental Protection Agency*, 950 F.2d 741 (D.C. Cir. 1991). However, the mixture rule was still in effect when NURD disposed of the roof-acid mixture. Even if the mixture rule is not applicable, roof acid is still a listed hazardous waste under RCRA. Additionally, CERCLA § 107 grants EPA the authority to apply its reenacted mixture rule retroactively. Therefore, EPA can still seek its response action costs.

A. The Environmental Protection Agency can collect response action costs because the mixture rule was in effect when NURD disposed of the roof-acid mixture.

CERCLA § 101 provides that a hazardous substance includes those substances that are listed in RCRA. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 103, 42 U.S.C. § 9601(14)(C) (1980). RCRA provides the provisions through which roof acid can be

defined as a hazardous substance. In 1980, EPA promulgated a mixture rule broadening the definition of hazardous waste to include "a mixture of solid waste and one or more hazardous wastes listed." 40 C.F.R. 261.3 (1992). By this definition, the roof acid disposed of by NURD, even when mixed with the fruit juice, is a hazardous substance.

1. The *Shell Oil* decision to vacate the mixture rule does not mean the mixture rule is void ab initio.

EPA may recover response costs for NURD's disposal of the roof-acid mixture because the *Shell Oil* vacatur did not establish a new principle of law. "Vacate" does not necessarily equate with retroactivity, and the *Shell Oil* decision should be interpreted as intending prospective application. For this court to determine that the mixture rule was voided ab initio, it must conclude that the *Shell Oil* court established a new principle of law. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971).

The validity of the mixture rule was first questioned in *Shell Oil*. 950 F.2d at 741. EPA originally promulgated the mixture rule as a clarification of the definition of hazardous waste under RCRA. RCRA defined hazardous waste as a solid waste that might "pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed." 42 U.S.C. § 6903(5) (1976). Industry filed its first objection to the mixture rule on the day after the rule was first promulgated, and the twelve year court battle ended in a vacatur of the mixture rule. *Shell Oil*, 950 F.2d at 745.

The issue to be decided by the D.C. Circuit in *Shell Oil* was whether the EPA had violated the notice and comment requirements of the Administrative Procedure Act in promulgating the mixture rule. *Shell Oil*, 950 F.2d at 746. The court held that the agency did not provide adequate notice of the mixture rule. *Id.* at 752. The relationship between the proposed regulation and the final rule determines the adequacy of notice. *Id.* at 746.

The D.C. Circuit reasoned that the mixture rule was not an implicit or logical outgrowth of the proposed clarification of the hazardous waste definition. *Id.* at 752. Although the D.C. Circuit vacated the mixture rule, the court recognized the pitfalls of discontinuing the regulation of hazardous wastes. Specifically, the court remanded the mixture rule and recommended that the EPA repromulgate it, in whole or in part, under the "good cause" exception of the Administrative Procedure Act, 5 U.S.C. § 553(b)(3)(B) (1988). *Id.* at 756.

NURD cannot credibly maintain that the *Shell Oil* court's decision equated with a new principle of law because the court did not announce what effect, if any, the vacatur would have on similarly situated litigants. Likewise, NURD cannot assume that the vacatur of the mixture rule would be applied retroactively. The *Shell Oil* court did not announce a new rule of law by vacating the mixture rule because its order was not a "legal principle, of general application. . .expressed in the form of a maxim or logical proposition." Lori Caramanian, Comment, *Hazardous Waste Management After Shell Oil*, 11 Pace Envtl. L. Rev. 265, 286-87 (1993). The vacatur should be seen as merely an order remanding to the agency the mixture rule for curative actions in light of the notice and comment infractions.

2. The discontinuity in the regulation of hazardous wastes caused by the vacatur of the mixture rule does not mean that the rule was void ab initio.

The *Shell Oil* decision did not intend to void the mixture rule ab initio because a discontinuance in the regulation of hazardous wastes does not equate with retroactivity. Discontinuance means "ending; causing to cease; ceasing to use; giving up; or leaving off." BLACK'S LAW DICTIONARY 464 (6th ed. 1990). Equating retroactivity and void ab initio with discontinuance violates the plain meaning of discontinuance.

In 1992, the Eighth Circuit reversed a RCRA conviction of Albert S. Goodner, Jr. in light of the *Shell Oil* opinion. *United States v. Goodner Bros. Aircraft, Inc.*, 966 F.2d 380, 385 (8th Cir. 1992), *cert. denied*, 113 S.Ct. 967 (1993). Goodner owned and operated Goodner Brothers Aircraft, Inc.

Goodner, 966 F.2d at 382. The government prosecuted the company and Goodner for several RCRA and CERCLA violations because of the illegal disposal of spent paint solvents. *Id.*

The issue to be resolved by the Eighth Circuit was whether the vacatur of the mixture rule by the *Shell Oil* court demanded a reversal of all the defendants' RCRA and CERCLA convictions that were dependent upon the mixture rule. The Eighth Circuit found that an unlawfully promulgated regulation had no force and effect in law and was void ab initio. *Id.* at 384 (citing Chrysler Corp. v. Brown, 441 U.S. 281, 313 (1979)).

The court's reasoning relied on the D.C. Circuit's plain meaning interpretation of the word vacate. *Goodner*, 966 F.2d at 384. Vacate 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." *Id.* (citing Action on Smoking & Health v. C.A.B., 713 F.2d 795, 797 (D.C. Cir. 1983)). The Eighth Circuit assumed that this definition of vacate required the Court to declare the mixture rule void ab initio. *See also*, *United States v. Bethlehem Steel Corp.*, 38 F.3d 862, 871 (7th Cir. 1994); *In re Hardin County*, 1994 WL 157572, *6 (EPA) (April 12, 1994).

An analysis of the *Goodner Bros.*, *Bethlehem Steel*, and *In re Hardin County* decisions must start with ascertaining what the *Shell Oil* court intended when it vacated and remanded the mixture rule to the EPA. Admittedly, the D.C. Circuit wanted to penalize the EPA for its procedural violations of the Administrative Procedure Act. The court did have the option of leaving the mixture rule in place pending the agency's procedural remedies. *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991). The D.C. Circuit may have decided, however, that leaving the mixture rule in place would be seen as undermining the requirements of the APA. For that reason, the D.C. Circuit may have believed that setting aside the mixture rule was a more appropriate remedy than a simple remand for notice and comment proceedings. The court suggested that the rule be reenacted pending the EPA's proper procedural remedy. *Shell Oil*, 950 F.2d at 752.

Agencies may reenact rules, in whole or in part, on an interim basis under the "good cause" exemption of 5 U.S.C. § 553(b)(3)(B) pending full notice and opportunity for comment. *Id.* (citing Mid-Tex Elec. Co-op., Inc. v. FERC, 822 F.2d 1123, 1131-34 (D.C. Cir. 1987)).

The court did state, however, that it was concerned with the "dangers posed by a discontinuity in the regulation of hazardous wastes". *Shell Oil*, 950 F.2d at 752. Discontinuance envisions a time line of rule enforcement, an interruption in that enforcement, and then enforcement when the rule is reenacted. If the rule were void ab initio there would be nothing to discontinue. Thus, the definition of discontinuance does not equate with retroactivity or void ab initio. Thus the *Goodner Bros.*, *Bethlehem Steel*, and *In re Hardin County* decisions reached the result that the D.C. Circuit was attempting to avoid. It is clear from the *Shell Oil* court's reference to discontinuity that it did not intend to vacate the mixture rule ab initio.

As a matter of policy, the vacatur of the mixture rule should not be seen as void ab initio. Retroactive application of the vacatur would allow polluters to escape liability for their waste disposal despite the fact that they had notice of the mixture rule. Such a congressional intent cannot be logically implied. NURD cannot now claim that it lacked notice of the mixture rule ten years after it was promulgated. *See Cheek v. U.S.*, 498 U.S. 192, 199 (1990) ("Ignorance of the law is no excuse."). Equity demands that NURD and other despoilers of the environment pay for the response actions necessary to protect human health.

B. The Environmental Protection Agency may retroactively apply the reissued mixture rule to recover its response action costs.

CERCLA § 107 grants EPA the authority to promulgate rules that have a retroactive effect. The reenacted mixture rule may be applied retroactively to hold NURD liable for its illegal disposal of a hazardous substance. Statutory delegations of legislative power to promulgate regulations having a

retroactive effect must be conveyed by Congress in express terms. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). This "clear statement" principle has become the test for regulations having retroactive effect.

In 1981, the Secretary of the Department of Health and Human Services promulgated a regulation which limited reimbursements to health care providers for medicare expenses. *Bowen*, 488 U.S. at 206. The D.C. Circuit held that the agency had violated the notice and comment procedures of the Administrative Procedure Act when the rule was challenged by local hospitals. *Id.*

The issue was whether the Medicare Act forbid retroactive rulemaking by the Secretary to set the cost-limit rules. *Id.* at 208. The Supreme Court rejected the Secretary's arguments that the Medicare Act authorized retroactive rulemaking. *Id.* at 213. The Court found no legislative intent in the Medicare Act favoring retroactive rulemaking. *Id.* In fact, the legislative history in this case tended to reveal that Congress wanted to forbid retroactive cost-limit rules. *Id.* at 214.

In the instant case, CERCLA does not expressly provide for retroactivity, but it is unquestioned that Congress made a clear statement that CERCLA have retroactive effect. *United States v. Northeastern Pharmaceutical*, 810 F.2d 726, 733 (8th Cir. 1986). Thus, the instant case is distinguishable from the facts in *Bowen*, since Congressional intent under the Medicare Act tended to point towards disfavoring retroactivity. In the instant case congressional intent for CERCLA's retroactive application may be found in CERCLA's legislative history, in the statutory language of CERCLA, and in case precedent.

The legislative history in the instant case indicates that Congress intended that CERCLA be applied retroactively. "With regard to retroactive responsibility for the dumping of hazardous waste, this report would permit the Federal Government the option to sue the generator of hazardous waste under a theory of strict liability to recover the cost of clean up which had been paid for initially by Federal funds." Committee on Interstate and Foreign Commerce, 96th Cong., 2d Sess., Report on Hazardous Waste Disposal 69 (Comm. Print

1979). "Moreover, the effect of Section 604 is to impose liability retroactively on all inactive hazardous waste sites." Hazardous Waste and Toxic Waste Disposal, 1979: Hearings on S. 1341 Before the Subcomm. on Environmental Pollution and the Subcomm. on Resource Protection of the Senate Comm. on Environment and Public Works, 96th Congr., 2d Sess. 455 (1979). "Provisions of whatever hazardous wastes Superfund bill the Committee reports out should be made retroactive to cover spills . . . ." *Id.* at 790.

Many courts have decided that the statutory language and legislative history of CERCLA indicate that Congress wanted CERCLA to have retroactive effect. *Northeastern Pharmaceutical*, 810 F.2d at 733 (citing, among other authorities, *United States v. Conservation Chemical Co.*, 619 F.Supp. 162, 220 (W.D. Mo. 1985). CERCLA acts remedially and retroactively by authorizing the EPA to force responsible parties to clean up inactive or abandoned hazardous substance sites under CERCLA § 106. *Northeastern Pharmaceutical*, 810 F.2d at 733. The Eighth Circuit also found that CERCLA's retroactivity is confirmed by legislative history. *Id.* (citing H.R.Rep. No. 1016, 96th Cong., 2d Sess. (1980)). Thus, Congress conveyed in express terms that EPA promulgate rules having a retroactive affect. Therefore, the "clear statement" principle found in *Bowen* is met.

Additionally, the EPA may reasonably interpret the CERCLA provisions as authority to promulgate retroactive rules as part of its gap filling responsibilities. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842 (1984). Congress has spoken in clear terms that it expects the EPA to fill in the statutory gaps and act retroactively in enforcing the liability and response action provisions of CERCLA. As a matter of policy, the EPA should be able to promulgate rules that have retroactive effect under CERCLA. The retroactive rules are necessary to carry out the congressional mandate that polluters such as NURD pay for the response action costs resulting from their illegal disposal of hazardous substances.

C. The Environmental Protection Agency can collect response action costs from NURD without relying on the mixture rule.

The Environmental Protection Agency can collect response action costs because NURD illegally disposed of roof acid, which is a listed waste under RCRA. (R. 6). A listed hazardous waste does not cease to be subject to RCRA and CERCLA requirements simply by mixing it with other wastes. *United States v. Marine Shale Processors, Inc.*, No. CIV. A. 90-1240, at *1, *3-4, 1994 WL 419910 (W.D.La. Aug. 1, 1994).

The EPA designated roof acid as a listed hazardous waste on a generic, nationwide basis. As a listed hazardous waste, roof acid remains a hazardous waste until a petition to delist the roof acid has been approved by the EPA. 40 C.F.R. § 261.3(c)(1). This "continuing jurisdiction" principle has been the policy of the EPA for over a decade, and should not be disregarded. James Satterfield, *EPA's Mixture Rule: Why All the Fuss?*, 24 Envtl. L. Rep. 10712, 10713 (1994). The D.C. Circuit had previously acknowledged the validity of the continuing jurisdiction policy when it held that the "contained-in" policy remains as "one application of a general principle, consistently adhered to, that a hazardous waste does not lose its hazardous character simply because it changes form or is combined with other substances." *Chemical Waste Management, Inc. v. Environmental Protection Agency*, 869 F.2d 1526, 1539 (D.C. Cir. 1989).

As a matter of policy, the Environmental Protection Agency should be allowed to collect its response action costs from NURD because the mixture rule was merely a clarification of the regulation of hazardous wastes under the continuing jurisdiction principle of 40 C.F.R. § 261.3(c)(1). NURD cannot escape liability for its disposal of roof acid, a listed waste under RCRA and a hazardous substance under CERCLA.

CONCLUSION

For the foregoing reasons, the Environmental Protection Agency respectfully requests this court uphold the District Court's decision that Congress was within its Commerce Clause authority in enacting RCRA, and that a private cause of action for restitution is not created in Section 7002. Furthermore, this court should reverse the District Court's decision that NURD is not liable under CERCLA § 107.

Respectfully submitted,
Counsel for Appellant and Amicus