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Judges' Bench Memorandum*

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QUESTIONS PRESENTED

I. Is § 7002, the citizen suit provision of RCRA is constitutional as applied to NURD.

II. Is NURD liable to BRANU under RCRA 7002 for NURD's disposal of the chemical known as "roof acid"?

III. Is NURD liable to EPA and BRANU under CERCLA 107 for NURD's disposal of roof acid?

TABLE OF CONTENTS

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TABLE OF AUTHORITIES

United States Supreme Court Cases

Federal Circuit Court Cases

Other Federal Cases

Environmental Appeals Board Case

Books and Periodicals

STATUTES

REGULATIONS

Legislative Materials

STATEMENT OF THE CASE

New Union Roofing and Drywall (NURD) is a three employee business which specializes in roofing. All of its business was performed within New Union, in the 1 mile square neighborhood of Moll's Gardens of Cathertown. In the course of its roofing business activities NURD prepared batches of "roof acid" a chemical which is applied to an existing roof to ease the removal process. As mixed with water roof acid is a listed hazardous waste under the Resource Conservation and Recovery Act (RCRA), which the United States Environmental Protection Agency (EPA) implements in New Union. 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. NURD disposed of its excess "roof acid" by mixing it with fruit juice and adding it to its compost pit. 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 Brownfields Redevelopment Associates of New Union (BRANU) is a three employee for profit business incorporated in New Union in 1984. Since 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. 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.

NURD and BRANU have minimal contacts with interstate commerce. 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 through 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 made in New Union and the roof acid and truck from 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 through, for example, payments to employees which then enable employees to purchase goods and services from out of state, and purchases from 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.

In 1990 following BRANU's purchase of the former NURD site, the EPA was notified that roof acid had been disposed of at the site. EPA spent $100,000 for such sampling and follow-up laboratory analysis of the samples taken, and concluded that the soil was 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."

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. The parties agree that the only CERCLA 107 issue is whether what NURD disposed of is a hazardous substance by cross referencing to other provisions; the only provision through which roof acid might be a hazardous substance is through listing as a hazardous waste under RCRA. With the consent of the parties, the two cases have been consolidated, and EPA participates in the RCRA issues as an amicus.

THE DECISION BELOW

I. 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 grant 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 own 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).

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 RCRA 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 sought 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 an private cause of action for restitution was created, and so this court holds that NURD is not liable to BRANU under RCRA 7002.

II. 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 through 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. This 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 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 Brothers 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 valid from its initial issuance in 1980, without interruption. 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 conducted its work in 1990, that it is sufficient for the rule to be applicable when EPA filed its action in 1993.

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, this 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

BRANU and the EPA have appealed the decision of the United States District Court for the District of New Union.

DISCUSSION

I. IS § 7002, THE CITIZEN SUIT PROVISION OF RCRA CONSTITUTIONAL AS APPLIED TO NURD?

(BRANU and EPA answer in the affirmative, NURD answers in the negative)

The first issue to be decided is the constitutionality of § 7002 of the Resource Conservation and Recovery Act (RCRA), as applied to the facts in this case. Although most of the economic impact from NURD's actions is purely local in nature, the Supreme Court decision in *United States v. Lopez*, 115 S. Ct. 1624 (1995), declaring that a portion of the Gun Free School Zones Act of 1990 violated the Commerce Clause of the United States Constitution does not dictate that the application of federal regulatory statutes to individual cases

where there is very little if any affect on interstate commerce must always be unconstitutional.

A. *Facts and Reasoning in* United States v. Lopez

In *United States v. Lopez*, the defendant, Alphonso Lopez, was convicted of possession of a firearm in a school zone in violation of the Gun Free School Zones Act of 1990 (GFSZA). *United States v. Lopez*, 115 S. Ct. 1624, 1626 (1995). The portion of the GFSZA at issue in the case was section 922(q) which made knowing possession of a firearm in a school zone a federal offense. *Id.* Lopez challenged the law claiming that in enacting section 922(q) Congress exceeded its powers under the Commerce Clause of the United States Constitution. *Id.* The Commerce Clause states that Congress may "regulate Commerce . . . among the several States. . . ." U.S. Const., art. I, § 8, cl. 3. The United States Court of Appeals for the Fifth Circuit reversed Lopez' conviction finding that section 922(q) was constitutionally invalid. *Lopez*, 115 S. Ct. at 1626.

The Supreme Court affirmed the decision of the Court of Appeals holding that section 922(q) was a purely criminal statute which had no relation to commerce or economic activities and was not a proper exercise of Congress' Commerce Clause powers. *Id.* at 1630. In reaching its decision, the Court engaged in a thorough discussion of Commerce Clause cases from the earliest decision in *Gibbons v. Ogden*, 9 Wheat. 1 (1824) to the present. *See Lopez*, 115 S. Ct. at 1626-30. The Court noted that up until 1937, only those activities which were directly related to interstate commerce could be regulated by Congress. *Id.* at 1628. The decision in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) was the turning point in Commerce Clause analysis according to the Court in *Lopez*. *Lopez*, 115 S. Ct. at 1628. The *Lopez* Court called specific attention to the holding in *Jones & Laughlin Steel* that intrastate activities which "'have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions' are within Congress' power to regu-

late." *Id.* (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

The Court in *Lopez* went on to discuss several other cases dealing with the interaction of intrastate and interstate activities and their regulation under the Commerce Clause. *See Lopez*, 115 S. Ct. at 1628. Although the Court noted that Congress' powers under the Commerce Clause were extremely broad, they are not limitless. *Id.* at 1628-29. Generally, legislation enacted under Congress' Commerce Clause powers must be supported by a rational basis in order for it to be constitutional. *Id.* at 1629. The Court concluded that if Congress did not choose to directly control either the channels of interstate commerce or people or things in interstate commerce but instead sought to legislate concerning an activity related to interstate commerce, the activity to be regulated must substantially affect interstate commerce. *Id.* at 1629-30. This test is the essence of the Court's decision in *Lopez*.

The Court concluded that a prohibition on the possession of a firearm in a school zone was neither a control on the channels of interstate commerce nor a regulation of an instrumentality in interstate commerce. *Lopez*, 115 S. Ct. at 1630. Therefore, the activity would have to fit into the third category and substantially affect interstate commerce in order for section 922(q) to be constitutional. *Id.* In analyzing section 922(q), the Court noted that there are a great many activities which substantially relate to interstate commerce. Perhaps the outermost limit on Congress' power to regulate activities which substantially relate to interstate commerce, according to the *Lopez* Court, was recognized when the Supreme Court, in the case *Wickard v. Filburn*, 317 U.S. 111 (1942), permitted Congress to control the amount of wheat grown by farmers even though some of that wheat was never marketed but was used by the farmer to feed his family and his livestock. *Lopez*, 115 S. Ct. at 1630. Even under this broad reach of Congress' Commerce Clause powers, the *Lopez* Court determined that the constitutionality of section 922(q) could not be demonstrated.

In explaining its conclusion, the Court first stated that section 922(q) was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Lopez*, 115 S. Ct. at 1630-31. In a footnote, the Court noted that criminal laws are generally the responsibility of the states rather than the federal government. *Id.* at 1631 n.3. In addition, the Court also determined that, aside from firearm possession in general having nothing to do with commerce, there was no "jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." *Id.* at 1631. Finally, the Court turned to the legislative history in search of specific findings of an effect on interstate commerce but came up empty. *Id.* The Court conceded that formal findings were not required but concluded that such findings might have helped save section 922(q). *Lopez*, 115 S. Ct. at 1631-32.

Finally, the Court considered the government's argument that possession of a firearm substantially affects interstate commerce in at least three ways. The government first claimed that violent crime is costly and that the costs extend throughout the population. *Id.* at 1632. Second, the government asserted that violence deters people from traveling in areas thought to be unsafe. *Id.* Third, the United States proposed that possession of guns in schools affects the learning process to such a degree that decreased productivity and a negative effect on the economy would result. *Id.* The Court rejected these arguments, however, saying that to accept them would make it very difficult if not impossible to find any regulation that Congress could not connect to interstate commerce. *Lopez*, 115 S. Ct. at 1632. The Court refused to accept dissenting Justice Breyer's argument that schools and education could rationally be considered commercial. *Id.* at 1632-33. In its conclusion, the Court acknowledged that while great deference is given to Congress when it exercises its commerce power, further expansion of this power beyond existing precedent was not proper. *Id.* at 1634.

B. *Hazardous Waste, RCRA and Interstate Commerce*

As discussed above, the *Lopez* Court identified three types of activities which can be regulated by Congress under the Commerce Clause. The first category listed is "the use of the channels of interstate commerce." *United States v. Lopez*, 115 S. Ct. 1624, 1629 (1995). The second area is "the instrumentalities of interstate commerce, or the persons or things in interstate commerce, even though the threat may come only from intrastate activities." *Id.* The third type of regulation permitted is control over "those activities having a substantial relation to interstate commerce." *Id.* at 1629-30. With regard to this last category, the *Lopez* Court concluded that regulation will be constitutional if the "regulated activity 'substantially affects' interstate commerce." *Id.* at 1630.

The *Lopez* Court remarked that many different activities fall within this third area. *See Lopez*, 115 S. Ct. at 1630. Specifically mentioned were restaurants which obtain supplies from out-of-state (*Katzenbach v. McClung*, 379 U.S. 294 (1964)), hotels which have out-of-state guests (*Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964)), and farmers' use of their own home-grown wheat (*Wickard v. Filburn*, 317 U.S. 111 (1942)). Activities that are wholly intrastate can be regulated if they are "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez*, 115 S. Ct. at 1631. The Supreme Court has held that once it has been determined that Congress has the power to regulate under the Commerce Clause, "it may choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities. *United States v. Darby*, 312 U.S. 100, 121 (1942). The Supreme Court has also recently held that solid waste is an item of commerce which can properly be regulated by Congress under the Commerce Clause. *See Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, 504 U.S. 353, 359 (1992); *Chemical Waste Mgmt., Inc. v. United States*, 504 U.S. 334, 340 n.3 (1992).

RCRA provisions can fall into any of the three listed categories. For example listing and documentation requirements for proper transportation of hazardous waste, *See e.g.* 42 U.S.C. § 6923 (1988), may be said to fall under the first category as a regulation of the use of the channels of interstate commerce. Regulation of the storage of hazardous waste, *See e.g.* 42 U.S.C. § 6924, would probably come under the second category as a regulation of a thing in interstate commerce. Finally, RCRA provisions protecting employees who provide information regarding RCRA violations, 42 U.S.C. § 6971 (1988), would come under the third category since they concern activities which substantially relate to interstate commerce. The portion of RCRA specifically at issue in the instant case, § 7002 - the citizen suit provision, is not a direct regulation of the use of the channels of interstate commerce. It is unclear whether a court would consider citizen suits to be a regulation of instrumentalities of interstate commerce since such suits are brought by private citizens instead of the government. An plausible argument can probably be made for placing § 7002 in the third *Lopez* category since § 7002 covers mainly the procedural requirements for bringing a citizen suit and does not directly regulate hazardous waste. The decision in *Lopez* indicates that activities falling under the third category will be more considered more critically. Therefore, it will be assumed that citizen suit enforcement must substantially affect interstate commerce in order to be constitutional.

Almost immediately, an important distinction can be drawn between the facts in *Lopez* and the instant case. The statute at issue in *Lopez* is a criminal statute. A RCRA citizen suit, on the other hand, is a civil action for equitable relief brought in the absence of administrative enforcement by the regulatory agency *See* 42 U.S.C. § 6972(a)(2) (1988). The creation and enforcement of criminal laws has traditionally been a state function. *Lopez*, 115 S. Ct. at 1631 n.3. However, federal regulation and regulatory agencies have been in existence since the government created the Interstate Commerce Commission in 1887. *See* John H. Reese, *Administrative Law Principles and Practices* 7 (1995). Therefore, it

cannot be said that regulation of manufacturing, production, transportation or marketing of goods is a traditional state function. Since the Supreme Court has determined that solid waste can be regulated under the Commerce Clause, it would be difficult to argue that Congress may not regulate hazardous waste as well. While the disposal of hazardous waste may be thought of as a private use of one's land, traditionally a state concern, disposal requirements are simply part of the overall regulation of hazardous waste. Further, when improper disposal contaminates commercial property or goods, interstate commerce is arguably affected.

Once it is established that Congress may regulate a particular activity, it follows that it would be extremely ineffective for Congress to properly grant an agency the authority to promulgate regulations without also being permitted to grant that same agency the power to enforce the regulations it has imposed. To pass the rational basis test, the means chosen to enforce the regulations need only be reasonably adapted to achieve the congressional aim. Thus, an argument can be made that Congress can authorize citizen suits to enforce the requirements of RCRA. Furthermore, given the budgetary constraints placed upon agencies and the possibility of nonaction for political reasons, citizen suits provide a means for ensuring that regulatory statutes work to control interstate commerce in the manner in which they were designed. If violations by certain regulated entities were regularly overlooked, the effect on interstate commerce could be significant in the form of low prices for goods produced by the entities that escape enforcement action.

C. *Local Effects of NURD's Activities*

The major thrust of NURD's argument is that its activities regarding the roof acid are so local in nature as to render the regulation of its activities unconstitutional. However, the facts illustrate that the roof acid as well as other items related to NURD's business did indeed travel through interstate commerce. Furthermore, even if the facts of a particular case demonstrate purely local effects, the regulatory scheme as a whole will not be found unconstitutional if

aggregation of the local activities can have a substantial effect on interstate commerce. Since all the items used in NURD's business are marketed nationally, it cannot be said that the sum of all purely local transactions will not substantially affect interstate commerce under *United States v. Lopez*, particularly in light of the Supreme Court's decisions in cases such as *Wickard v. Filburn*, 317 U.S. 111 (1942), *United States v. Darby*, 312 U.S. 100 (1941) and *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241.

Prior to 1937, the Supreme Court was of the opinion that certain aspects of business, such as manufacturing, only indirectly affected interstate commerce and, thus, could not be properly regulated by Congress under the Commerce Clause. *See United States v. Lopez*, 115 S. Ct. 1624, 1627 (1995). Starting with its decision in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the Supreme Court abandoned its reliance on the distinction between direct and indirect effects on interstate commerce as a basis for ruling on the validity of legislation under the Commerce Clause. *Lopez*, 115 S. Ct. at 1628. Instead, the test adopted by the Court in *Jones & Laughlin Steel* was whether the activities sought to be regulated "have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions." 301 U.S. at 37. Later cases applied this rule to activities which would historically have been considered to only indirectly affect interstate commerce. *See e.g. United States v. Darby*, 312 U.S. 100 (1941); *Wickard v. Filburn*, 317 U.S. 111 (1942); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

In *Darby*, the Court was presented with a challenge to the Fair Labor Standards Act (FLSA) which prohibited the shipment of certain goods manufactured under working conditions which did not meet the standards set out in the FLSA. *United States v. Darby*, 312 U.S. 100, 108 (1941). Despite its concession that the manufacture of goods is not itself an act of interstate commerce, 312 U.S. at 113, the Court nevertheless determined that regulation of wages and hours had enough of an effect on interstate commerce to warrant regulation by Congress, 312 U.S. at 123. With regard to the distinc-

tion between interstate and intrastate effects, the Court stated that "the power of Congress to regulate interstate commerce extends to the regulation through legislative action of activities intrastate which have a substantial effect on the commerce or the exercise of the Congressional power over it." 312 U.S. at 119-20. The Court also noted that "competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great." *Id.* at 123.

The process of examining the aggregate effects of a number of purely local activities was again used in *Wickard v. Filburn*, 317 U.S. 111 (1942). In *Wickard*, a farmer challenged the application of a regulation of wheat he had grown on his farm and used for his own personal purposes in feeding his family and his livestock. 317 U.S. 113-14. In upholding the constitutionality of the regulation, the Court declined to distinguish between producing, consuming and marketing the wheat. *Id.* at 124. Instead, the Court determined that an activity may be regulated, even if entirely local, if it had a "substantial economic effect on interstate commerce [ ] irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'" *Id.* at 125. The Court went on to say that although the farmer's "own contribution to the demand for wheat may be trivial by itself [that] is not enough to remove him from the scope of federal regulation where, as here, his contributions taken together with that of many others similarly situated, is far from trivial." *Id.* at 127-28. The Court refused to further consider the regulation's "wisdom, workability, or fairness." 317 U.S. at 129.

In *Heart of Atlanta Motel, Inc v. United States*, 379 U.S. 241 (1964), the Supreme Court once again had the chance to comment on purely local activities regulated by Congress. *Heart of Atlanta Motel* involved a motel which maintained a policy of not renting rooms to Negroes. 379 U.S. at 243. This policy was in violation of the Civil Rights Act of 1964. *Id.* at 249. In upholding the constitutionality of the Act, the Court noted that, although there were no published formal findings of fact regarding the effect of discrimination on interstate

commerce, 379 U.S. at 252, Congress could exercise its commerce power if it had a rational basis for doing so and the means chosen were reasonable. *Id.* at 258. The Court declared that purely local effects would not defeat the legislation if interstate commerce is affected. *Id.*

The Court in *United States v. Lopez*, 115 S. Ct. 1624 (1995), analyzed the section 922(q) of the Gun Free School Zones Act of 1990 in light of its prior cases dealing with the Commerce Clause. The Court initially found that section 922(q) was unconstitutional since it was a criminal provision which was not related to interstate commerce. *Id.* at 1630-31. After finding no obvious connection to interstate commerce, the Court determined that there was no jurisdictional element in the statute which might help a court conclude that a particular instance of gun possession in a school zone affected interstate commerce. *Id.* at 1631. Finally, the Court, noting that congressional findings are not usually required to find statutes consistent with the Commerce Clause, turned in vain to the legislative history of section 922(q) in search of formal findings which would demonstrate a connection between gun possession in a school zone and interstate commerce. *Id.* at 1631-32. Finally, the Court concluded that "possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect interstate commerce." 115 S. Ct. at 1634.

Applying the Court's reasoning in the above cases to NURD's actions seems to require a finding that, in spite of the purely local effects, there is enough of a nexus to interstate commerce, both by NURD's individual actions and an aggregation of the those actions with other disposers of hazardous waste, to render NURD's constitutional argument unpersuasive. Despite the lack of a jurisdictional element or formal findings contained in RCRA itself, the generation, transportation and disposal of hazardous waste and the pollution it may beget clearly affect interstate commerce.

The parties have stipulated that the roof acid was manufactured in another state and moved through interstate commerce to reach New Union. The parties also agree that the roof acid has a national market with competitive pricing.

These two facts alone already provide more of a nexus to interstate commerce than the home-grown wheat in *Wickard v. Filburn*. Since the *Lopez* Court recognized *Wickard* as the outer boundary of constitutionality under the Commerce Clause, the 12th Circuit should not be strained to find NURD's activities within congressional reach.

Even if NURD's activities were purely local and the roof acid was not obtained through interstate commerce, the requirements of *Wickard* would still be met due to the national market and competitive pricing of roof acid. The aggregate result of many purchases of roof acid locally could substantially affect the national market price if roof acid sold only locally was not subject to extensive regulation that would tend to drive up the price. Furthermore, contamination due to improper storage, transportation or disposal could easily find its way into articles of interstate commerce or affect those who travel in interstate commerce. Several of the sites BRANU had purchased and remediated were resold as businesses which would potentially cater to interstate commerce. The fact that the particular site at issue was used for residential and not commercial purposes should not invalidate application of RCRA in this case. Such action would result in numerous lawsuits requiring courts to make findings of fact regarding many individual transactions to see if each one affected interstate commerce. This type of extreme is not required under either *Wickard* or *Lopez*.

QUESTIONS FOR ORAL ARGUMENT

1. What section(s) of RCRA does NURD want the Court to find unconstitutional?

Unconstitutional on its face or unconstitutional as applied to NURD?

2. What specifically does NURD find unconstitutional in § 7002?

3. NURD and BRANU both maintain that they have no direct effects on interstate commerce, rather they both maintain that they have indirect effects on interstate commerce.

Hasn't the Supreme Court long ago abandoned this distinction?
4. What standard of review should the court apply?
5. What test did the Supreme Court define in *Lopez* to determine if legislation is within Congress' commerce powers? Is this the right test? What do they think the test should be?
6. What aspects of the Gun Free School Zone did the Supreme Court find objectionable? How are the facts here the same or different?
7. BRANU wants the Court to find that the citizen suit provision of § 7002 is constitutional. How can a commercial real estate transaction be an act of interstate commerce that Congress can regulate? Given the *Lopez* decision what type of commerce activity is this?
8. Doesn't *Lopez* seem to require something more than "a connection" to interstate commerce? What if any legislative findings are required? What jurisdictional elements are required?

II. 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 EPA answer in the negative)

A. *The Background of the Resource Conservation and Recovery Act Citizen Suit Provision*

The Resource Conservation and Recovery Act of 1976 (RCRA) was enacted by Congress to protect the public health and environment. RCRA's purpose is to reduce "the generation of hazardous wastes. . .as expeditiously as possible" and to properly treat, store, or dispose of "waste that is nevertheless generated." 42 U.S.C. §6902. Since 1976 RCRA has been amended several times to increase its protection over resources, changing from a prospective statute to one providing a retrospective remedy.

Congress significantly expanded the citizen suit provision of RCRA by adding section 7002(a)(1)(B) in the Hazard-

ous and Solid Waste Amendments of 1984. This subsection provides, in pertinent part, that:

> [A]ny person may commence a civil action on his own behalf . . . against any person . . . including any past or present generator, . . . or past or present owner or operator of a disposal facility, who has contributed to 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. 42 U.S.C. § 6972(a)

The jurisdiction of the court over citizen's suits was similarly expanded:

> "The district court shall have jurisdiction without regard to the amount in controversy or the citizenship of the parties, . . . 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." *Id.*

Prior to 1984 the powers of the district courts were limited in scope. The only jurisdictional powers that the court had under the provision was to "enforce any order or regulation or to order the Administrator to perform such act or duty as the case may be." 42 U.S.C. §6972 (1978), amended by 42 U.S.C. §6972 (1984). The 1984 amendment was devised to complement, rather than conflict with the Administrator's efforts to eliminate threats to public health and the environment, particularly where the Government is unable to take action because of inadequate resources. H.Rep. No. 198, 98th Cong. 2d Sess., pt 1 at 53 (1983), reprinted in U.S.C.C.A.N. 5576, 5612.

The amendments expanded the range of remedies open to citizens by adding a new private right of action against any person whose handling of a solid or hazardous waste contributes or contributed to an imminent and substantial endangerment to human health or the environment. H.Rep. No.

198, Cong. 2d Sess. pt 1, at 53 (1984), reprinted in U.S.C.C.A.N. 5576, 5612. Citizen suits are currently available to private parties seeking to protect the environment and public health from hazardous waste pollutants.

The clarity, as well as any ambiguities associated with § 7002 should be the main point of an argument as to the intent of Congress. First, the language of the statute itself must be assessed to determine its meaning. If the language is unambiguous, then the plain meaning of the statute controls. The Court must assume that the legislative purpose is expressed by the ordinary meaning of words used in a statute *United States v. Locke*, 471 U.S. 84, 96 (1985).

B. *DOES §7002 OF RCRA PROVIDE A PRIVATE CAUSE OF ACTION FOR RESTITUTION*

The issue raised on appeal is whether § 7002, as amended in 1984 allows BRANU to recover its cleanup costs from NURD. Section 7002 does not specifically mention cleanup costs. Under Supreme Court precedent, additional remedies cannot be read into a federal statute which explicitly sets forth a remedy, absent clear Congressional intent. Section 7002 does not specifically limit relief to injunctions. General grants of jurisdiction allow courts their full range of equitable powers to remedy a situation or enforce a statute. *See Porter v. Warner Holding Co.*, 328 U.S. 395 (1946). Only if Congress explicitly restricts the jurisdiction of the court or creates an "inescapable inference, restrict[ing] the court's jurisdiction in equity" can the court's traditional powers be restricted. Absent such language or direction, the "full scope of the jurisdiction is to be recognized and applied." *Porter*, 328 U.S. at 398.

At question is whether the monetary award BRANU seeks is for damages or can it be characterized as restitutionary. As a general rule money damages have been considered a legal and not an equitable remedy. Unless a statute clearly states otherwise, when money damages are for a sum certain they will be deemed equitable only if they are sought to protect against potential future harm or to remedy unjust en-

richment. *Jaffee v. United States*, 592 F.2d 712, 715 (3rd Cir. 1979); *cert. denied* 441 U.S. 961 (1979). Cleanup costs frequently exceed the value of the property. BRANU will argue that unless it is allowed restitution of the cleanup costs, NURD will be unjustly enriched.

The United States Supreme Court holds as a canon of statutory construction that the words employed by Congress were those intended and chosen for their common definition and interpretation. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982). All of the parties may argue for the acceptance of the "plain meaning" of the statute. NURD and EPA will argue that the plain language and legislative history of § 7002 permit only limited injunctive relief for private parties, that there is no implied private cause of action under § 7002. BRANU will argue that the plain language and legislative history of § 7002 grant the Court broad equitable jurisdiction, which includes restitution.

Key portions of § 7002 which must be discussed are the phrases "civil action"; "imminent and substantial endangerment"; "jurisdiction without regard to the amount in controversy"; and "to order such person to take such other action as may be necessary".

In § 7002 Congress provided that any person may commence a "civil action on his own behalf." 42 U.S.C.A. § 6972(a). Black's Law Dictionary defines "civil action" as an "action brought to enforce, redress or protect private rights . . . includ[ing] all actions, both those formerly known as equitable and those known as legal action." Black's Law Dictionary 245 (6th ed. 1990).

Section 7002 states "[a]ny action under paragraph (a)(1) of this subsection shall be brought in the district court . . . ." 42 U.S.C.A. § 6972(a). "Action" as used in a legal context is defined as "an ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, redress or prevention of a wrong . . . ." Black's Law Dictionary 28.

Section 7002 authorizes the district courts to review actions "without regard for the amount in controversy." 42

U.S.C.A. § 6972(a)(2). Typically, an amount in controversy is used to prevent suits seeking small amounts from clogging the federal court system. In the typical action for an injunction the court need not determine damages or establish an amount in controversy.

In *Cort v. Ash*, the Supreme Court found that four equally-weighted factors must be reviewed when determining whether a private cause of action was implied by Congress: (1) is the plaintiff a member of a class for which the statute was enacted to provide an "especial benefit?"; (2) is there implicit or explicit legislative intent to create the remedy?; (3) is the action within the purposes of the legislative scheme?; and (4) is the cause of action usually relegated to state law? *Cort v. Ash*, 422 U.S. 66, 78 (1975).

The Supreme Court has since modified the holding in *Cort v. Ash*. These factors are no longer balanced equally, the central inquiry in applying the test is finding an intent to create a private cause of action in the legislative history. *Touche Ross v. Redington*, 442 U.S. 560, 575 (1979). Once intent is established, the Court may consider the three remaining *Cort* factors. *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 13 (1981). The Courts have found that "the legislature alone has the responsibility for determining the jurisdiction of the lower federal courts" and that Congress alone should determine when private parties are to be given causes of action under the legislation which it adopts. *Cannon v. University of Chicago*, 441 U.S. 677, 742-749 (1979). The "key to the inquiry" is whether there is a "strong indicia of Congressional intent to provide the remedy in question." *Sea Clammers*, 453 U.S. at 12, 15.

1. Court Decisions On Implied Private Causes of Action Under Other Statutes

In *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979) the Court failed to find a private cause of action for damages under §17(a) of the Securities Exchange Act of 1934, stating that "we are extremely reluctant to imply a cause of action in §17(a) that is significantly broader than the remedy Congress chose to provide." *Touche Ross*, 442 U.S. at 574. In *Trans-*

america Mortgage Advisors v. Lewis, 444 U.S. 11 (1979), the Court held that § 206 of the Investment Advisor's Act of 1940 did not create a private cause of action for damages, citing *Touche Ross* and invoking the "elemental canon" of statutory construction that where a statute expressly provides a particular remedy or remedies, courts will be extremely reluctant to read other remedies into it. *Transamerica Mortgage Advisors*, 444 U.S. at 19. In *Karahalios v. National Federation of Federal Employees*, 489 U.S. 527 (1989), the Court held that no private cause of action existed under Title VII of the Civil Service Reform Act of 1978, finding no Congressional intent to create such a right in the Act's language, structure or legislative history. *Karahalios*, 489 U.S. 527, 537. The Supreme Court has also failed to find a private cause of action in federal environmental statutes as well.

In *California v. Sierra Club*, the Supreme Court held that no private cause of action existed under §10 of the Rivers and Harbors Act. *Sierra Club*, 451 U.S at 287. The Court applied the *Cort* factors as the criteria for deciding whether Congress intended to create a private cause of action. *Sierra Club*, 451 U.S. at 293. The Court criticized the lower court, for failing to examine either the language or the legislative history of the Act, stating that "the federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *Sierra Club*, 451 U.S. at 293. The Court then examined the language of the statute and its legislative history. It found that the Act was not intended to create federal rights for the especial benefit of a class of persons, but rather that it was intended to benefit the public at large through a general regulatory scheme. *Sierra Club*, 451 U.S. at 297-8. The Court found no evidence that Congress intended a private cause of action. *Id.* The Court found it unnecessary to determine whether the purpose of the Act would be advanced by an implied private action or whether such a remedy was within the federal domain of interest. *Id* at 298. These factors, the Court stated, were only of relevance if the first two factors give indication of congressional intent to create the remedy. *Id.*

In *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1980), the Supreme Court held that no private causes of action for damages existed under the citizen suit provisions of the Federal Water Pollution Control Act and the Marine Protection, Research, and Sanctuaries Act (FWPCA). *Sea Clammers*, 453 U.S. at 15. The Court held that both Acts contained detailed provisions explicitly authorizing enforcement suits by government officials and private citizens, which therefore precluded finding that Congress intended to authorize additional judicial remedies for private citizens suing under the Acts. *Id* at 14. The Court further cited *Transamerica* and reiterated that when "a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it."

The FWPCA citizen suit provision authorized private parties to file suit in federal district court to force the EPA administrator to perform any non-discretionary duty or to enforce an effluent standard or limitation. 33 U.S.C. § 365. This provision served as a model for the original RCRA citizen suit provision. Sullivan, *Implied Private Causes of Action and the Recoverability Under the RCRA Citizen Suit Provision*, 25 Envtl. L. Rep. 10408 (Aug. 1995) at 10410, n. 36. The lack of an implied action for restitution in the FWPCA may be an indication that such an action was not intended in the original RCRA § 7002. However, since the 1984 Amendments to RCRA expanded §7002, this alone is not dispositive that an implied private cause of action cannot now be maintained.

2. Court Decisions On Implied Private Causes of Action Under § 7002

In *Environmental Defense Fund v. Lamphier*, 714 F.2d 331 (4th Cir.1983), state agencies and private plaintiffs brought an action against an operator of industrial waste disposal business to enjoin alleged violations of state and federal law. The court held that a private cause of action for injunctive relief was available under the RCRA citizen suit provision. However, the Court stated in dicta, that no private cause of action for damages was available under the provision. In distinguishing the case from *Sea Clammers*, the

court stated that the "private plaintiffs here did not seek an award of damages, but rather acted as private attorneys general in seeking the assessment of civil penalties and an injunction against Lamphier . . . [p]rovided that plaintiffs are genuinely acting as private attorneys general rather than pursuing a private remedy, nothing in RCRA, as in the FWPCA, bars injunctive relief." *Lamphier*, 714 F.2d at 337.

Walls v. Waste Resource Corp, 761 F.2d, 311, (1985) was the first case to consider whether there is a private cause of action for damages under § 7002. The Court held that the citizen suit provision of RCRA did not provide express or implied private causes of action for damages. *Id.* at 316. The court relied on *Sea Clammers* and the dicta in *Lamphier*, and stated that standing under § 7002 is "limited by the subsequent provisions which restrict the type of relief available to injunctive and other equitable remedies." *Walls*, 761 F.2d at 315.

Parties relying on the above two cases will need to note that both were decided on the pre-1984 citizen suit provision. BRANU will argue that it is seeking restitution, a form of equitable relief, not damages.

In *Commerce Holding Co., Inc. v. Buckstone*, 749 F.Supp. 441 (E.D.N.Y. 1990), a landowner brought an action against tenants to recover clean-up costs, under § 7002. The Court held that while injunctive relief is available under § 6072(a)(1)(B), the statute does not provide a private action for damages, nor should one be implied. *Commerce Holding* at 445. The Court relied on *Lamphier*, stating that if it awarded the relief sought, *Commerce* would be the direct beneficiary of substantive relief, and that such relief would not comport with the statute's purpose of allowing private parties to bring suit only if they were genuinely acting as private attorneys general rather than pursuing a private remedy.

In *Kaufman and Broad-South Bay v. Unisys Corp.*, 822 F.Supp. 1468 (N.D. Cal. 1993), the Court held that the citizen suit provision of RCRA which permitted the court to enjoin imminent and substantial endangerment to health or environment did not create a private cause of action restitutionary relief. The Court relied on *Lamphier*, *Commerce*, and

Walls . It distinguished those cases which allowed for restitution in suits brought by the EPA under § 7003. *See, United States v. Aceto*, 872 F.2d 1373 (8th Cir. 1989); *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726 (8th Cir. 1986); *United States v. Price*, 688 F.2d. 205 (3rd. Cir. 1982).

In *Portsmouth Redevelopment & Housing Auth. v. B.M.I*, 847 F.Supp. 380 (E.D. VA. 1994), the Court held that the RCRA citizen suit provision does not authorize an award of damages for remedial/response costs or the cost of an investigation of hazardous waste. *Portsmouth*, 847 F. Supp at 384. The court based its decision on Congressional intent, demonstrated by the plain language and legislative history of the § 7002, as well as on the existence of an alternate remedy. *Id* at 385. The court held that remedial and response costs were beyond the powers of the district court to grant under the citizen suit provision, as it allows only claims by parties acting as private attorneys general, not those pursuing private remedies. *Id* (citing *Lamphier*, 714 F.2d 331).

The *Portsmouth* court also addressed the issue of the impact the amended citizen suit provision on its interpretation of RCRA. The Court stated that the amended provision did not allow the claimant to be the direct beneficiary of the relief. *Id.* Finally, the Court stated that even if the citizens suit provision of RCRA were intended to reach past activity, the court would be empowered only to award injunctive relief and to require the offender to take such other action as may be necessary, not to award damages. *Id.*

In Agricultural Excess and Surplus Insurance Company v. A.B.D. Tank & Pump Co., 878 F.Supp. 1091 (N.D. Ill. 1995), the Court held that the purchaser of an underground petroleum storage tank could not bring an action under the RCRA citizen suit provision to recoup past remediation expenses. The court found that while injunctive relief was available under § 6972(a)(1)(B), the statute did not provide a private action for damages.

Parties relying on the *Commerce Holding*, *Kaufman*, *Portsmouth*, and *Agricultural Excess* need to note that all

these cases relied on *Walls*, which was decided on the pre-1984 citizen suit provision.

In the past year, two cases with fact patterns very similar to the case at bar have been decided. In *KFC Western, Inc. v. Meghrig*, 49 F.3d 518 (9th Cir. 1995), *cert. granted*, 116 S.Ct. 41 (1995), the Court examined the statutory language and concluded that § 7002 gave citizens an action in restitution, stating that restitution falls within the statutory authorization of the district courts to require parties to take "such other action as may be necessary." *KFC* at 521. In *Furrer v. Brown*, 62 F.3d 1092 (8th Cir. 1995), the Court held that § 7002, did not explicitly provide for restitution. The court then applied the *Cort* factors to determine whether there is an implied private cause of action under § 7002. After examining the legislative history, the court held that no private cause of action for restitution could be implied.

C. *The Intent Of Congress To Grant A Private Cause Of Action For Restitution Under RCRA § 7002*

Unless "congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist." *Thompson v. Thompson*, 484 U.S. 175, 179, (quoting *Northwest Airlines*, 451 U.S. at 94). Congress has expressly included monetary remedies in some environmental statutes, but not in RCRA. The Comprehensive Environmental Response and Recovery Act (CERCLA), allows an action for monetary compensation to recover cleanup costs, 42 U.S.C §9613(f)(1) (1988). The inclusion of a monetary remedy in CERCLA, may show that Congress did not intend for an identical remedy to be read into RCRA. In *United States v. Rohm and Haas Delaware Valley, Inc.*, 2 F.3d 1265, 1272 (3rd Cir. 1993) the EPA adopted this position and sought recover of its cleanup costs under CERCLA instead of RCRA.

RCRA § 7003 , 42 U.S.C. 6973(a), authorizes EPA to seek court orders requiring the abatement of imminent and substantial endangerments related to the handling, storage and

disposal of solid and hazardous waste. Specifically, § 7003 authorizes suit when "the past present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment." *Aceto Agricultural Chemicals Corp.v. United States*, 872 F.2d 1373, 1377 (8th Cir. 1989). The suit may be brought against "any person . . . who has contributed or who is contributing to such handling, storage, treatment, transportation, or disposal to restrain such person [or] to order such person to take such other action as may be necessary or both." *Id.* Section 7003 also authorizes suit upon receipt of evidence of an imminent and substantial endangerment:

> "[u]pon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit . . . against any person . . . who has contributed or who is contributing to such handling, storage, treatment, transportation or disposal to restrain such person from [such activity], to order such person to take such other action as may be necessary, or both." 42 U.S.C. 6973(a); RCRA sec. 7003(a).

In *United States v. Price*, 688 F.2d 204 (3rd Cir. 1982), the Court held that § 7003 of RCRA gave the district court equitable powers to grant the Administrator a preliminary injunction to obtain funding for diagnostic study of a waste site from the defendants. The Court stated that prompt preventive action was the most important consideration, and reimbursement could thereafter be directed against those parties ultimately found liable. However, the court limited its equitable jurisdiction "to the extent necessary to eliminate any risks posed by toxic wastes." *Id.* at 214.

Relying on *Price*, the Eighth Circuit gave the EPA a right of restitution in *United States v. Northeastern Pharmaceutical & Chemical Co. Inc.*, 810 F.2d 726 (8th Cir. 1986) and *Aceto*. In *Northeastern Pharmaceutical*, the Court held that the Administrator may collect an equitable award of abate-

ment costs from persons who non-negligently contributed to endangerment. *Northeastern Pharmaceutical* 810 F. 2d at 731. The court stated that the Act imposed liability for present and future conditions resulting from past acts. *Id.* In *Aceto*, the Court allowed the EPA to sue to recover its response costs incurred in the clean-up of a pesticide manufacturing facility. *Aceto*, 872 F.2d at 1375. In deciding these cases, the court found that the EPA had an implied right of restitution under § 7003 of RCRA. Subsequent to *Northeastern Pharmaceutical* and *Aceto* EPA determined that it has no right of restitution under RCRA, *Rohm and Haas*, 2 F.3d at 1272.

The language of § 7003 that permits governmental bodies to recover restitution for cleanup costs is almost identical to the language of § 7002. Identical words used in different parts of the same statute are intended to have the same meaning *Gustafson v. Alloyd Co. Inc.*, 115 S.Ct 1061, 1067 (1995). The legislative history states that citizens were to be given "exactly the same broad substantive and procedural claim for relief which is already available to the United States under § 7003" such that "[a]ny difference in language between these amendments and § 7003 are not intended to reflect a difference in such claims, but to merely clarify that citizens will have the same claim presently available to the United States." S. Rep. No. 284, 98th Cong., 1st Sess. 55, 57 (1983),(citing 42 U.S.C.A. §§ 6972-73), *reprinted in* Legislative History, at 2082.

However, the House Committee on Energy and Commerce explained in its report concerning the 1984 RCRA Amendments to § 7002 that the new provision would give citizens a limited right to sue in endangerment cases "only if the Administrator after receiving notice, fails to file an action." H.R. Rep. No. 198, Part I, 98th Cong., 2d Sess. 53, *reprinted in* 1984 U.S.C.C.A.N. 5576, 5611-12. The Senate Report also states that the citizen suit provision was "carefully restricted to actions where violations of standards and regulations or a failure on the part of officials to perform mandated actions is alleged." Senate Committee on Public Works, Solid Waste

Utilization Act of 1976, S. Rep. No. 988, 94th Cong., 2d Sess. 17-18 (1976).

The only limitation placed on the citizen suit in the House Report proposal prohibited suits challenging the siting of a hazardous waste facility. Committee on Energy and Commerce, Hazardous Waste Control and Enforcement Act of 1983, H.R. Rep. 98-198(I), 98th Cong., 1st Sess. 53 (1983), *reprinted in* 1984 U.S.C.C.A.N. 5576. The Senate proposal placed four limitations on citizen suits, however, all four seek to prevent public interference with the federal plan for hazardous waste controls and disposal. The amendments and conference report adopted the Senate amendment which restricts citizen suits: (1) for siting of hazardous waste facilities; (2) when the Administrator has commenced and is diligently prosecuting actions under § 7003; (3) while the state or administrative agency is actively in the removal process pursuant to § 104 of CERCLA; and (4) where the Administrator has obtained a court order. Committee on Environment and Public Works, Solid Waste Disposal Act Amendments of 1983 to Accompany S. 757, S. Rep. 98-284, 98th Cong., 1st Sess. 55-57 (1983). These amendments limit citizen interference with federal actions or federally-designed removal and disposal plans pursuant to RCRA. H.R. Rep. 98-1133 at 118. The Senate sought to "authorize the federal courts, in actions initiated by citizens under § 7002 . . . to seek relief, including abatement." S. Rep. 98-284 at 55. This language may indicate that citizens are authorized to seek relief in federal courts including, but not limited to, abatement.

D. *The "Imminent And Substantial Endangerment" To Health Or The Environment Requirement To Maintain An Action Under RCRA § 7002.*

NURD did not know at the time of its dumping that roof acid was a listed hazardous waste. However, they have since acknowledged that the substance they disposed of was a mixture of a listed waste and fruit juice. Under RCRA, there is no "good faith" exception that would indemnify a party from liability due to ignorance. The committee notes for the Solid

Waste Disposal Act Amendments, discussing the imminent hazard standard in § 7003, states that RCRA has always reached "generators, regardless of fault or negligence." H.R. Rep. 98-198(I) at 58. At issue is whether NURD's disposal fulfilled the "may present an imminent and substantial endangerment" standard in RCRA.

The Supreme Court has allowed the government to recover an award of restitution in taking actions to protect the public from imminent and substantial endangerment. *See Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 204-205 (1967) (allowing the government a right to recover restitution for abatement actions under the Rivers and Harbors Appropriation Act of 1899). *Wyandotte* promulgated a federal rule reflecting the common law principle that government entities may recover the costs of abating public nuisances. Under this federal rule, the Administrator can recover restitution under §7003 for costs incurred in abating an "imminent and substantial endangerment" where a private party cannot under §7002.

The United States Supreme Court established in *Gwaltney* that RCRA is both a prospective and retrospective statute, providing a remedy for past and ongoing endangerment. *Gwaltney*, 484 U.S. 49 (1987). "May" is an expansive term which does not require an actual finding of "imminent and substantial endangerment." Black's Law Dictionary defines "imminent" as "impending . . . threatening [and] something close at hand . . . ." Black's Law Dictionary 750. The threat of harm required under RCRA is one likely to occur based on factual considerations. The parties to this action have agreed that site presented imminent and substantial harm until it was remediated.

Courts have found that the EPA administrator may seek and receive reimbursement for the cost of investigating and remediating hazardous sites pursuant to § 7003 of RCRA. *Aceto*, 872 F.2d 1373, 1383 (8th Cir. 1989). Specifically, the *Aceto* court held that a statute authorizing suit upon receipt of evidence of imminent and substantial endangerment to health or environment as a result of solid or hazardous waste does not require the EPA to file and prosecute the action

while the endangerment exists. *Id.* The court stated that in the context of a reimbursement action, this would be an "absurd and unnecessary" requirement. *Id* (quoting district court). The endangerment language, the court stated, is intended by Congress to limit the reach of RCRA to sites where the potential for harm is great.

The Ninth Circuit found that Congress worded § 7003 and § 7002 "almost identically" and chose to "interpret similarly the relief available under the two provisions." *KFC*, 49 F.3d at 521-22. Neither *Aceto* nor *KFC* found that a cause of action must be filed before remediation is completed. The Eighth Circuit determined that the imminent and substantial endangerment language in § 7003 "does not require the EPA to file and prosecute its RCRA action while the endangerment exists." *Aceto*, 872 F.2d at 1383. The Ninth Circuit similarly held that "RCRA authorizes citizen suits with respect to contamination that in the past posed imminent and substantial danger." *KFC*, 49 F.3d at 521.

Public policy may favor allowing a plaintiff to clean contaminated property first and seek reimbursement later. *KFC W., Inc. v. Meghrig*, 49 F.3d 518, 523-24 (9th Cir. 1995). BRANU will argue that if § 7002 only allowed recovery for remediation of existing or future danger, many citizens would have no incentive to immediately respond to and restore the environmental integrity of hazardous sites. NURD will argue that this need simply does not exist in the context of a private cause of action for restitution, because no imminent and substantial endangerment continues to exist.

QUESTIONS FOR ORAL ARGUMENT

1. What specifically in § 7002 limits relief to injunctions? If injunctions are the only type of relief possible, why does the section refer to an "amount in controversy"?

2. What meaning should this court give to the phrase "order such person to take such other action as may be necessary? What "actions are included? What actions are excluded? Why?

3. A present landowner is more likely to expeditiously abate a hazardous condition if he can recover his clean up costs. Why would allowing recovery of cleanup costs thwart the purpose of RCRA?
4. If NURD is allowed to avoid paying for its improper disposal of roof acid hasn't NURD been allowed an unjust enrichment, at BRANU's expense?
5. Sections 7002 and 7003 are nearly identical. Why should the court allow the EPA to recovery its cleanup costs, but not allow a private citizen to recover his?
6. When must the "imminent danger to health and environment exist to allow recovery of cleanup costs?
7. The legislative history appears to both support and counter allowing a citizen to recoup cleanup recovery costs. What should the court do when the legislative history is conflicting?

III. IS NURD LIABLE TO EPA AND BRANU UNDER CERCLA 107 FOR NURD'S DISPOSAL OF ROOF ACID

A. *The Background of CERCLA and the "Mixture Rule."*

The Comprehensive Environmental Response and Recovery Act (CERCLA),
42 U.S.C. §§9601-9657 is a remedial statute which Congress enacted to respond to such national disasters as Love Canal. As a remedial statute, it is to be liberally construed to effectuate the remedial purpose for which it was enacted. 52 FR 15937, 15937 (May 1, 1987). (citing *Westinghouse Elec. Corp. v. Pacific Gas & Elec. Co.*, 326 F.2d 575 (9th Cir. 1964).

Congress broadly defined "hazardous" waste so to insure "cradle-to-the-grave" regulation. "Hazardous waste" is defined as a "solid waste" which may "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). The EPA was delegated the responsibility of promulgating criteria which would more specifically define which chemicals are "hazard-

ous", 42 U.S.C. § 6921(a),(b), RCRA § 3001(a),(b), and further required the EPA to promulgate regulations "as may be necessary to protect human health and the environment." 42 U.S.C. §§ 6922-6924. Accordingly, the EPA promulgated a "mind-numbing" set of regulations designed to further the general Congressional mandate set out in CERCLA. One of these promulgated rules was the much litigated "mixture rule." Congress re-authorized and amended CERCLA in 1986, without altering the final 1980 "mixture" rule.

EPA issued its final "hazardous waste" definition rules in 1980. A "solid" waste is "hazardous" if, it is not expressly excluded, and if, it is either "listed" as a hazardous waste,(40 C.F.R §261.3 (A)(2)(II) (1994) or, it fails any of the "characteristic" tests

40 C.F.R. § 261.3 (a)(2)(i) (1994). A mixture of characteristic and solid waste is hazardous, unless the resultant mixture no longer fails any of the "characteristic tests". 40 C.F.R. § 261.3 (a)(2)(iii) (1994). A mixture of listed hazardous waste and solid waste is hazardous until the listed material is "delisted." 40 C.F.R. § 261.3 (a)(2)(iv) (1994). Any solid generated by the transport, storage, or disposal of such waste is a "derived-from" waste, which is also subject to the hazardous waste regulatory regime. 40 C.F.R. 261.3 (c)(2) (1994).

The time at which a solid waste becomes hazardous is when it is listed,

40 C.F.R. § 261.3 (b)(1) (1994) when a listed waste is first added to a solid waste,

40 C.F.R. § 261.3 (b)(2) (1994) or when the waste fails any of the "characteristic" tests.

40 C.F.R. § 261.3 (b)(3) The time at which a solid waste is no longer hazardous is when it does not fail the "characteristic" tests, 40 C.F.R. § 261.3 (d)(1) (1994) and, if the waste "contains," or is "derived from" listed waste, such listed wastes must also be delisted.

40 C.F.R. § 261.3 (d)(2) Until the conditions in subsection (d) occur, wastes determined to be "hazardous" under subsections (a) and (b) do not lose their hazardous designation.

40 C.F.R. § 261.3 (c)(1) (1994).

1. *Shell Oil*

The D.C. Court of Appeals invalidated the "mixture" and the "derived-from" rules, because the EPA failed to comply with the APA "notice-and-comment" provisions 5 U.S.C. § 553(b)(3)(B). The court held that the final 1980 EPA regulations, which included the "mixture" and the "derived-from" rules were not "logical outgrowths" of its proposed 1978 regulations. See, e.g. *American Fed,n of Labor v. Donovan*, 757 F.2d 330, 338-339 (D.C. Cir. 1985). The court examined the EPA's stated intent concerning how to regulate hazardous waste, as revealed in its final 1980 statements in the Federal Register, and compared these statements to its expressed intentions concerning how it intended to regulate hazardous wastes as published in the proposed 1978 regulations.

The proposed rules indicated that listed hazardous wastes could be automatically delisted whenever Industry could show that such wastes possessed no "characteristic" of hazardous waste, 43 Fed. Reg. 58946 (Dec. 18, 1978). However, the complexity of a comprehensive hazardous waste regime made it impossible for EPA to accurately determine credible "characteristic" tests for certain types of chemicals, 45 Fed. Reg. 33,095 (May 19, 1980). Further, the demands of developing a comprehensive, national hazardous waste management plan made precise tailoring to individual cases impossible, so that the EPA was unable to avoid underregulation and overregulation. *Id.* at 33,088. The 1980 final legislative rules issued pursuant § 3001(a) included for the first time a complicated, formal "delisting" process as the sole means for a company to escape Subtitle C regulation if it used a listed hazardous waste. The court invalidated the "mixture' and "derived-from" rules because these legislative rules were not "logical outgrowths" of the 1978 proposed regulations, and, therefore, the "mixture" and "derived-from" rules had not been promulgated in accordance with the APA "notice and comment provisions. The court did not reach Industry's argument that these rules unlawfully expanded EPA's Subtitle C jurisdiction, as it invalidated the mixture rule on procedural grounds.

The extent to which the Court vacated § 261.3 will likely be contested. As the "mixture" and "derived from" rules do not explicitly refer to § 261.3(c)(1) and (d)(2), EPA has maintained that these two sections are still valid. Upon these sections EPA has based its "contained in" policy, discussed infra. NURD will refer to the EPA's preamble to the 1980 final rules where it stated that EPA created the "mixture" rule to close a "major regulatory loophole", 45 Fed. Reg. 33,095 (May 19, 1980)

2. The "Good Cause" Exemption.

The EPA followed the D.C. Court of Appeals' recommendations and reissued the mixture rule, 57 Fed. Reg. 7628 (March 3, 1992), again stating that without such a rule, generators of hazardous waste could potentially evade regulation by mixing listed hazardous waste, even though land disposal restrictions ("LDRs"), and the EPA's prohibition of diluting as a substitute for adequate treatment apply at the point of a waste's generation.
40. C.F.R. § 2618.3(a). The EPA stated, "wastes may be mixed with other wastes at the point of generation, so that they arguably would not meet the listing description at [the point of generation] and so would not be subject to LDRs." 57 Fed. Reg. 7628 (March 3, 1992). The EPA also stated its belief that the holding in Shell Oil does not retroactively remove the mixture rule, citing *Chevron Oil Co. v. Huson*, 404 U.S. 97, and American Gas Association v. FERC, 888 F.2d 136, 150. The holding as such was purely procedural, and the court's recommendation that:

> In light of the dangers that may be posed by a discontinuity in the regulation of hazardous wastes, however, the agency may wish to consider reenacting the rules, in whole or part, on an interim basis under the "good cause" exemption of 5 U.S. § 553(b)(3)(B) pending full notice and opportunity for comment. *Shell Oil* at 950 F.2d 741, 752, 292 U.S.App.D.C. 332, 343.

suggests that the "dangers of discontinuity" in regulating hazardous wastes outweigh the concerns usually given when a court retroactively voids an administrative rule.

After the *Shell Oil* decision was published, but before it was scheduled to become effective on January 21, 1992, the EPA filed a petition for rehearing, hoping to "clarify" that the *Shell Oil* ruling applied on prospectively. The court denied the petition for rehearing, and on February 18, 1992, Administrator Reilly simultaneously removed and reissued on an interim basis the mixture and derived-from provisions. 57 Fed. Reg. 7,638 (1992). Also included was a "sunset provision," Id., at 7,633; 40 C.F.R. § 261.3(e) (1992), which would have kept the rules in effect only until April 28, 1993. Due to a storm of opposition by environmental organizations and several States, the "Chafee Amendment" was enacted by Congress. Pub. L. No. 102-389, 106 Stat. 1571 (1992). This amendment forbid the EPA from terminating the mixture rule, and required it to revise the mixture rule by October 1, 1994. *See* 57 Fed. Reg. 49,278 (1992). The EPA subsequently withdrew the "sunset provision," id., and stated that the mixture and derived-from rules "remain in effect until EPA takes final action to revise these rules." Id. The mixture rule has remained in this "interim" posture to date.

The interim final rule was challenged in *Mobil Oil Corp. v. EPA*, 35 F.3d 579 (D.C. Cir. 1994). The D.C. Court of Appeals held that the Chafee Amendment was binding upon the courts, and therefore the court was precluded from offering petitioners the relief they sought. Id., at 583. NURD will bring to the Court's attention that the Chafee Amendment required EPA to promulgate final revisions to the mixture rule by October 1, 1994, which EPA failed to do. Therefore the *Mobil Oil* decision is no longer binding law. EPA will categorize the "interim status" of the mixture rule as described in the next section.

3. Interim Rules Issued on Remand/"Policy Paralysis"

In "good cause" cases, courts are faced with the difficult balancing of the need for public comment and legitimately promulgated rules, against agency interests in fulfilling stat-

utory mandates and deadlines. Some courts have exercised their inherent equitable powers to reconcile the need to uphold the value of public participation, yet allow the agency to carry out important responsibilities. For example, in *Mid-Tex Electric Cooperative v. FERC*, 822 F.2d 1123 (D.C. Cir. 1987), FERC responded to a court's reversal of a promulgated rule by simultaneously issuing a new notice or proposed rulemaking which addressed the deficiencies leading to its reversal in court, and, issued an interim rule which was substantially the same as the vacated rule. Even though the interim rule did not satisfy the APA notice-and-comment provisions, the D.C. Court of Appeals held that an agency can repromulgate promptly a rule that was reversed and remanded if (1) the major elements of the rule were affirmed, (2) the repromulgated rule is adopted only as an interim measure in an ongoing process to establish a permanent rule, and (3) the interim rule includes features that represent a good faith effort to ameliorate on an interim basis the problems created by the original rule that caused the court to reverse the rule. Davis, § 7.13, p. 372.

United States Steel Corp. v. EPA, 649 F.2d 572 (8th Cir. 1981), and *Western Oil & Gas Association v. EPA*, 633 F.2d 803 (9th Cir. 1980) demonstrate the use of the "good cause" exemption in an environmental context. Both cases arose the 1977 amendments to the Clean Air Act, requiring states to list various areas as "attainment" or "nonattainment." Following publication of these lists, several industrial interests filed suit, claiming the publication of the final lists did not satisfy notice-and-comment requirements. The EPA admitted that it did not follow § 553, but argued that the February 3, 1978 deadline provided sufficient "good cause" to allow it to forego normal rulemaking procedures. *Notes, Remedies For Noncompliance with Section 553 of the Administrative Procedure Act*, Duke L.J. 461, at 468. The courts rejected the EPA's argument, but left the lists in effect pending the EPA's compliance on remand, as the court has discretion to shape an equitable remedy. *United States Steel Corp. v. EPA*, 649 F.2d at 577; *Western Oil & Gas Ass'n v. EPA*, 633 F.2d at 576, citing *Ford Motor Company v. NLRB*, 305 U.S. 364 (1939).

Other circuits have similar rulings. See *Republic Steel Corp. v. Costle*, 621 F.2d 797, *United States Steel Corp. v. EPA*, 605 F.2d 283 (7th Cir. 1979), *cert denied*, 444 U.S. 1035 (1980) (EPA "good cause" argument successful); *Sharon Steel Corp. v. EPA*, 597 F.2d 377 (3rd Cir. 1979), *United States Steel Corp. v. EPA*, 595 F.2d 207 (5th Cir.), *modified on rehearing*, 598 F.2d 915 (1979), *New Jersey v. EPA*, 626 F.2d 1038 (D.C. Cir. 1980) (the courts invalidated the challenged designations).

EPA will apply the *Mid-Tex* analysis, arguing that the overwhelming majority of the regulations are still valid and that EPA reissued the "mixture" rule in a way similar to FERC in *Mid-Tex*. NURD will contest this assertion, based upon the retroactivity argument discussed infra.

B. The Retroactive Effect of the Mixture Rule and Shell Oil

Prior to 1988, an agency could give a legislative rule retroactive effect unless a court concluded that retroactivity served no legitimate purpose and was unfair. Davis, §6.6, p. 256, citing *Citizens to Save Spencer Cty. v. EPA*, 600 F.2d 844, 879-881 (D.C.Cir. 1979). "Every case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency. But such retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principle." *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). In that case, the Court upheld the retroactive "clarification" of uncertain law through adjudication and to a slight extent legalizing retroactive overruling of previously established law. This balancing test was further discussed two decades later in *Linkletter v. Walker*, 381 U.S. 618, (1965) The Court stated, "we believe that the Constitution neither prohibits nor requires retrospective effect, . . . once the premise is accepted that we are neither required to apply, nor prohibited from applying, a decision retrospectively, we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will

further or retrad its operation." *Linkletter v. Walker*, 381 U.S. 618, 629 (1965), *See also*, *Chrysler Corp. v. Brown*, 441 U.S. 281 , 313, 99 S.Ct. 1705, 1723, 60 L.Ed.2d 208 (1979) (holding that a regulation not promulgated pursuant to the proper notice and comment procedure has no force or effect of law, and therefore is void ad initio); *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991) ("when equity demands, an unlawfully promulgated regulation can be left in place while the agency provides the proper procedural remedy.").

This balancing test was drastically changed, however, after the *Bowen v. Georgetown University Hospital*, 488 U.S. 209 (1988) decision. The Court unanimously held that the Department of Health and Human Services lacks power to promulgate retroactive legislative rules to implement the Medicare Act. In doing so, the Court created a new rule of statutory construction which presumes that a statutory grant of legislative rulemaking power does not, unless expressly conveyed, encompass the power to promulgate retroactive rules. 488 U.S. at 208. This holding was subsequently strengthened in *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994) and *Rivers v. Roadway Express, Inc.*, — U.S.—, 114 S. Ct. 1510 (1994). First, the presumption trumps the canon of construction that requires a court "to apply the law in effect at the time it renders its decision." 144 S.Ct. at 1496. Second, a congressional decision to "legislatively overrule" a prior judicial interpretation of a statute is insufficient alone to establish congressional intent to render the legislative enactment retroactive 114 S. Ct. at 1515. Third, the presumption against retroactive legislation can be overcome only by "clear evidence" of congressional intent to give the legislation retroactive effect. 114 S. Ct. at 1508. See Davis, *Administrative Law* § 6.7, at 48, (Supp. 1995).

This new canon has its limits, however, in *United States v. Carlton*, —U.S.—, 114 S. Ct. 2018 (1994), a unanimous Court held that retroactive taxation is permissible if it is a rational means of furthering a legitimate legislative purpose, provided "clear evidence" existed showing that "Congress itself has considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay

for the countervailing benefits." 114 S. Ct. at 1501. Such countervailing benefits may include the fact that prospective-only changes in rules create a powerful incentive to delay the rulemaking process. Davis, *Administrative Law* § 6.6, at 248, (3rd Ed. 1994).

NURD will argue that the *Georgetown University* line of cases directly applies to the case at bar. EPA will argue that the "contained in" policy, discussed infra is similar to the retroactive "clarification" upheld by the *Chenery* decision. Further EPA will argue that the purpose of CERCLA as " clearly evidenced" in the legislative history is to hold prior owners liable for hazardous waste cleanup costs. Without retroactive application CERCLA's main purpose would be thwarted.

2. Judicial Retroactive and Prospective Overruling of Agency Action.

The EPA has maintained in official statements and when litigating cases that the Shell Oil vacation of the mixture rule was prospective only, based upon the *Chevron Oil v. Huson*, 404 U.S. 97 (1971) case. Three elements must be established for a court to hold that a ruling only applies prospectively. First, the new principle of law must either overrule clearly relied upon past precedent, or, be a case of first impression. Second, the *Linkletter* analysis is applied, and, third, the court must insure that no inequities as described in *Chenery* result.

In *Goodner Brothers*, the court found that *James B. Beam Distilling Co v. Georgia*, 501 U.S. 529 (1991), narrowed the *Chevron Oil* holding, and that the plain meaning of the word "vacate" inferred a retroactive invalidation of the mixture rule. The court interpreted the *James B. Beam Distilling Co.* ruling as stating that if a court does not expressly reserve the question of retroactivity, it is properly understood to have followed the normal rule of retroactive application in civil cases. *James B. Beam Distilling*, 115 L.Ed.2d 490. At issue in the case were two jury instructions stated at trial, one defining "hazardous waste" under RCRA, and one defining "hazardous waste" under CERCLA. As the RCRA instruction included the mixture rule as a way to define

hazardous waste, the court reversed and remanded the trial court's RCRA jury instruction. However, the CERCLA instruction solely relied on the trial court's conclusion that undiluted paint removers, containing 50-70% methylene chloride, before use, constituted a F002 listed "spent solvent", and therefore, was a hazardous waste. On appeal, the court found the CERCLA instruction appropriate and upheld the CERCLA counts, because the description of F002 waste, as published in the CFR, covered the disputed material.

C. *The "Contained-In" Policy*

Although the "mixture" rule and the "derived-from" rule were invalidated by *Shell Oil*, (c)(1) and (d)(2) remain intact. The EPA has used these legally in force regulations upon which to base the "continuing jurisdiction principle." The D.C. Circuit upheld application of this principle to contaminated environmental media. *Chemical Waste Management, Inc. v. EPA*, 869 F.2d 1526 (D.C. Cir. 1989). The court characterized the rule as a "gloss on, not a reiteration of, the 1980 rules." Id. As such, the principle is a new agency action triggering its own statutory review period. Based upon the preamble to the 1980 regulations, the then valid derived-from and mixture rules, and the "hammer" provisions in the 1984 amendments for land disposal, the court held that the interpretive rule was "reasonable." *Accord U.S. v. Bethlehem Steel*, 829 F.Supp. 1023, *vacated* in part.

This opinion was echoed in *U.S. v. Marine Shale Processors*, 1994 WL 419910, 39 ERC 1413 (E.D. La.), reconsideration denied, 1994 Wl 669576 (E.D. La. 1994).

D. *The "Continuing Jurisdiction Principle"*

Besides examining the legislative and administrative record so to determine the specific definitions of specific kinds of listed waste (i.e. F002, F006), an endeavor which is not feasible to pursue in the instant case, the EPA has also advanced a continuing jurisdiction principle, ("CJP") from which to base regulating wastes in lieu of the mixture rule. This theory was first advanced in *Chemical Waste*, which was

heard concurrently with *Shell Oil*. Unlike *Shell Oil*, the court did not rule on the validity of any EPA regulation, but instead examined whether the EPA's "interpretative rules" pertaining to restrictions on land disposal were reasonable. See 53 Fed. Reg. 3117 (August 17, 1988). Interpretive rules simply restate or "clarify" existing statutes or regulations, and, unlike legislative rules, are not subject to 5 U.S.C. § 553(b), *American Hospital Association v. Bowen*, 834 F.2d 1037, 1045. At issue were two "interpretive principles:" the "retroactive principle," and the "media principle." The retroactive principle states that any leachate actively managed after underlying wastes are listed are considered hazardous as well, regardless of the time of disposal. *Id.* at 1147. The media principle states that any mixture of listed and media material (i.e., solid or groundwater) is hazardous. *Id.* at 1142. The court found that the EPA clearly stated the retroactivity principle in the summary to each notice, and, further, even if insufficient notice was given, the principles appear to be interpretations of the "derived from" rule, and were not subject to 5 U.S.C. § 553(b). "The EPA cannot be faulted for attempting to provide clarification of a pre-existing regulation."*Chemical Waste*, at 1535.

As to the "media" principle, the court found that the interpretive rule was not clearly discernable from the 1980 rules. In *General Carbon Company v. Occupational Safety and Health Review Commission*, 860 F.2d 479, the court noted that an agency's interpretation of its own regulations will be accepted unless it is plainly wrong, and that courts necessarily must show considerable deference to an agency's expertise when faced with a highly technical question. *MCI Cellular Telephone Company v. FCC*, 738 F.2d 1322, 133 (D.C.Cir. 1984). The court began its analysis with the "continuing jurisdiction principle," which means that a hazardous waste will remain a hazardous waste until it is delisted. 40 C.F.R. §§ 261.3(c)(1), 261.3(d)(2).See also, 45 Fed Reg 33,0906 (May 19, 1980). The court found the media principle to be consistent with the CJP, as well as the derived-from and mixture rules. The court, in concluding that the "media" princi-

ple was a reasonable interpretation of existing regulations stated:

> [the derived-from and mixture rules] demonstrate that the agency's rule on contaminated soil is part of a coherent regulatory framework. It is one application of a general principle, consistently adhered to, that a hazardous waste does not lose its hazardous character simply because it changes form of is combined with other substances. *Chemical Waste* at 1539

The continuing jurisdiction principle was also addressed in *United States v. Reticel Foam*, 858 F.Supp. 726 (E.D. Tenn. 1993). The EPA argued that even without the mixture rule, hazardous waste remains hazardous until it is delisted. An example of this principle is evidenced in the "media" rule, where a mixture "containing" hazardous waste is treated as hazardous material without application of the mixture rule. The court disagreed, finding that the "contained-in" policy had only been applied to mixtures of hazardous waste and media materials. The court distinguished the ruling in *United States Bethlehem Steel Corporation I*, 829 F.Supp. 1023 (N.D. Ind. 1993), by observing that in that case, the waste at issue was F006, and that the waste in that case clearly fell within the F006 definition for sludge. In *United States v. Bethlehem Steel Corporation II*, 38 F.3d 862 (1994) the 7th Circuit agreed with the ruling in *Reticel Foam*, holding that the CJP applies not to mixtures of hazardous and nonhazardous solid wastes, but to mixtures of hazardous waste and environmental media. *Id.* at 871

The EPA has codified the "contained-in" principle, 57 Fed. Reg. 37,225-26 (1992). Hazardous debris is now regulated under the "contained-in principle," and the EPA has proposed to supplement the contained-in policy by including environmental media. 58 Fed. Reg. 48,092, 48123 (1993). Non-waste media (such as soil or groundwater) that contain listed hazardous waste must be managed as hazardous waste. 57 Fed. Reg. 21450, 21453 (May 20, 1992).

In *Re: Hardin County* is perhaps the most extensive opinion to date concerning the mixture rule and the *Shell Oil*

decision. Citing *Goodner Brothers* and *Reticel Foam*, the Environmental Appeals Board held that the *Shell Oil* vacation was retroactive. Judges Firestone and Reich held that because the state mixture rule is broader in scope than the "contained-in" policy, it was unnecessary for the Board to rule on the validity of the "contained-in" policy. Judge McCallum, noting that in the EPA's preamble to the 1980 final rules it stated that the mixture rule was "necessary to close a major loophole," in Subtitle C, interpreted the *Shell Oil* decision to mean that the EPA no longer retained jurisdiction over waste mixtures composed of listed hazardous waste and non-hazardous solid waste.

QUESTIONS FOR ORAL ARGUMENT

1. To what extent did *Shell Oil* invalidate the hazardous waste definitions?
2. Is the current interim "mixture rule" legally binding on the regulated community?
3. Did *Shell Oil* retroactively invalidate the "mixture rule"?
4. Is the "contained in" policy a legally binding rule? If so to what materials does it apply?
5. Is there clear evidence that Congress wished to give the "mixture rule" retroactive effect?
6. To what extent does the *Georgetown University* holding alter the *Chenery* and *Linkletter* balancing test?
7. Why did the EPA claim to be closing a "major regulatory loophole" when it enacted the 'mixture rule" in 1980? If the mixture rule was invalid, didn't this "loophole" remain open?