Pace Environmental Law Review

Volume 14
Issue 2 *Summer 1997*

Article 14

June 1997

Brief of State of New Union Health Services Agency: Ninth Annual Pace National Environmental Moot Court Competition

Marc Brumberger
University of Houston Law Center

Kristin Kelley
University of Houston Law Center

Civ. No. 96-14

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

WHILE-U-WAIT PHOTO SERVICE
Plaintiff-Appellee,

v.

GREATER UNIONTOWN VOCATIONAL SCHOOL,
Defendant-Appellant.

STATE OF NEW UNION HEALTH SERVICES AGENCY,
Plaintiff-Appellee and Amicus Curiae,

v.

UNIONTOWN VOCATIONAL SCHOOL
and
WHILE-U-WAIT PHOTO SERVICE,
Defendants-Appellants.

On appeal from the United States District Court for the District of New Union

BRIEF OF STATE OF NEW UNION HEALTH SERVICES AGENCY*

Marc Brumberger and Kristin Kelley
University of Houston Law Center
Attorneys for Plaintiff-Appellee
State of New Union

December 2, 1996
Health Services Agency

This brief is produced in a type size of twelve characters per inch.

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

QUESTIONS PRESENTED

1. Is the Comprehensive Environmental Response, Compensation, and Liability Act applicable to the releases of hazardous substances at 123 Laurel Street, considering issues of (a) retroactivity and (b) federal Commerce Clause jurisdiction?

2. Does § 107 of the Comprehensive Environmental Response, Compensation, and Liability Act provide for liability (a) for medical monitoring costs and (b) to a potentially responsible party?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Statutes

Cases

Miscellaneous

Secondary Sources

OPINION BELOW

The opinion and judgment of the United States District Court for the District of New Union (Civ. No. 94-22,046), decided April 23, 1996, is unreported.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved are U.S. Const. art I, § 8, cl. 3, and U.S. Const. amend. XI. Both provisions can be found at appendix A1. The statutory provisions involved are:
42 U.S.C. § 9601(23) (1988); 42 U.S.C. § 9601(24) (1988); 42 U.S.C. § 9607(a)(1-4) (1988); 42 U.S.C. § 9613(f) (1988); 42 U.S.C. § 9613(g)(2)-(3) (1988). They are also included in the appendix.

STATEMENT OF THE CASE

Greater Uniontown Vocational School ("GUVS") was incorporated in 1963. (R. at 3). From 1963 to 1973, GUVS operated out of a building at 123 Laurel Street in Uniontown, New Union. (R. at 4). Although it was created by the state legislature, GUVS is governed by a Board of Directors responsible for its own selection and replacement and for its bylaws and all other matters of governance, subject only to the same laws applicable to other non-profit corporations incorporated in New Union. (R. at 4). A 1964 opinion of the New Union Attorney General concluded that "GUVS is not an instrumentality of New Union state government." (R. at 4).

Among the programs GUVS offered while at 123 Laurel Street was photography. (R. at 4). GUVS procured all of its

photography supplies from New Union Industrial Supply Corp., a shipper and wholesaler. (R. at 4-5). New Union Industrial Supply Corp. formulated the chemicals and manufactured the equipment used in the program from raw materials drawn from a nationwide market. (R. at 5). The same finished chemicals and equipment were available from any of a large number of suppliers throughout the country. (R. at 5).

Throughout its ownership of 123 Laurel Street, GUVS dumped waste photo processing chemicals into a ditch in the backyard. (R. at 5). In 1973, GUVS sold its real property at 123 Laurel Street to Start-Up Photography Studios ("SUPS"). (R. at 5). SUPS continued the waste disposal practices of GUVS until going bankrupt in 1979. (R. at 5). The property was purchased in the bankruptcy proceedings by While-U-Wait Photo Service ("WUWPS") in September 1980. (R. at 5). WUWPS is a film processing service owned and operated by Elizabeth Andrews. (R. at 5).

Although Ms. Andrews did not dispose of her waste photo processing chemicals in the backyard, she knew that GUVS and SUPS had done so. (R. at 6). However, she neglected to raise the issue when she purchased the property. (R. at 6). The sales contracts and deeds transferring the property from GUVS to SUPS, and subsequently to WUWPS, are silent as to both hazardous waste liability and the general issue of liability from the ownership of the property. (R. at 6).

In 1993, the owners of the house next door, the Marina family, complained of a strange "camera-type" odor emanating from their private drinking water well. (R. at 6). Testing revealed elevated levels of photo processing chemicals in the drinking water. (R. at 6). After investigating the site and sampling the soil, an environmental engineering firm concluded that (1) the source of the chemicals in the Marina's water was the ditch in the backyard of 123 Laurel Street, (2) the geohydrology is such that the contamination could only have reached the Marina's property and no other, and (3) there is no longer a threat to anyone's health or the environment. (R. at 6). Both the water testing and the engineering

firm's work were conducted consistent with the National Contingency Plan at 40 C.F.R. § 300. (R. at 6).

Only GUVS and SUPS ever disposed of chemicals on the property at 123 Laurel Street. (R. at 5). Both had disposed of the same kinds of chemicals, but there are no records indicating how much waste either contributed. (R. at 6).

The Marina family is comprised of two parents and five minor children. (R. at 6). They do not have health insurance and, with the Marina parents working at minimum wage jobs, they have virtually no money for health care. (R. at 6). In 1994, the Marinas were examined by a physician of the State of New Union Health Services Agency ("SNUHSA"). (R. at 6). Based on the physician's examination, the engineering firm's report, and other facts in the case, SNUHSA began a protocol of medical monitoring for the Marinas in September 1994. (R. at 7). The monitoring involves examining each member of the family every calendar quarter for signs of adverse affects from having consumed the contaminated water. (R. at 7). The cost of the examination and the associated laboratory tests is $250 per person per quarter. (R. at 7). SNUHSA has found it will be necessary to continue the medical monitoring protocol through December 2000. (R. at 7). SNUHSA's actions are consistent with the National Contingency Plan at 40 C.F.R. § 300. (R. at 7). To date, there has been no involvement at this site by the United States Environmental Protection Agency. (R. at 7).

SNUHSA commenced an action against both WUWPS and GUVS under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), seeking compensation for its medical monitoring costs. (R. at 7). At the same time, WUWPS commenced an action against GUVS under CERCLA, asserting that GUVS is liable to WUWPS for the costs of the water testing, site investigation, and soil removal. (R. at 7). The district court held that CERCLA is applicable to this case, that medical monitoring costs are recoverable by SNUHSA from both WUWPS and GUVS, and that WUWPS may proceed under CERCLA § 107. (Tr. at 9). The two cases have been consolidated with the consent of the parties. (R. at 7).

STANDARD OF REVIEW

The issues raised on appeal are questions of law and not fact; therefore, a de novo standard of review applies. *United States v. ILCO, Inc.*, 996 F.2d 1126, 1130 (11th Cir. 1993). Specifically, the standard of review for a district court's construction of a federal statute is a question of law to be reviewed de novo. *Heggy v. Heggy*, 944 F.2d 1537, 1539 (10th Cir. 1991).

SUMMARY OF THE ARGUMENT

CERCLA was enacted by Congress in 1980 to deal with the problem of existing hazardous waste sites. Because the problem of hazardous waste is one that is national in scope, and it stems from both intrastate and interstate activities, Congress was within its Commerce Clause authority when it enacted CERCLA. CERCLA is applicable to GUVS, which has acted as a member of the film developing industry—the market for hazardous photo processing chemicals. Furthermore, GUVS is not entitled to sovereign immunity because it is not a state agency. Even if it were a state agency, GUVS would not be immune from the suit brought by SNUHSA, another state agency.

CERCLA does not act retroactively when applied to 123 Laurel Street because the release of hazardous waste, as well as all costs incurred, occurred after CERCLA was enacted. Even if the application of CERCLA to this site were retroactive, such a retroactive application would be constitutionally permissible. A statute can apply retroactively where there is evidence of a clear congressional intent that it do so, and the text and legislative history of CERCLA evidence such intent. Therefore, CERCLA is applicable to GUVS

CERCLA allows States to recover for all removal and remedial costs. Furthermore, several federal district courts have held that medical monitoring costs are recoverable under CERCLA's definitions of "removal" and "remedial" costs. Those federal courts that have found that CERCLA does not create liability for medical monitoring expenses

based their analysis on a single, erroneous district court's reasoning.

Finally, PRPs are not allowed to recover their expenses under CERCLA 107, but, rather, are limited to utilizing CERCLA 113's contribution provisions. CERCLA 113 was enacted to create an express right to contribution, and current case law demonstrates a trend among the federal courts recognizing that PRPs are limited to seeking contribution under CERCLA 113.

ARGUMENT

REPLY POINT 1: THE DISTRICT COURT WAS CORRECT AS A MATTER OF LAW IN HOLDING THAT THE APPLICATION OF CERCLA TO THIS SITE IS CONSTITUTIONAL.

A. The Application of CERCLA to this Site Does Not Exceed Congress' Commerce Clause Authority.

1. Article I of the United States Constitution gives Congress the power to regulate interstate commerce.

The United States Constitution specifically grants Congress the power to regulate interstate commerce. U.S. Const. Art. I, § 8, cl. 3. (Appendix A1). The Supreme Court has interpreted the Commerce Clause to give Congress broad regulatory powers. *Gibbons v. Ogden*, 9 Wheat 1, 195 (1824). *Gibbons* held that the commerce power allows Congress to regulate interstate activities and "those internal concerns which affect the states generally." *Id.* The Court further held that commerce included all "commercial intercourse." *Id.* at 3.

2. The regulation of hazardous waste disposal is within Congress' Commerce Clause authority.

    a. Under Supreme Court Commerce Clause analysis, Congress may regulate intrastate activities having a substantial affect on interstate commerce.

The Supreme Court first held that Congress could regulate intrastate activities having a substantial impact on interstate commerce in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). The Court soon thereafter dispensed with distinctions between commerce and other forms of economic activity, and between direct and indirect effects on interstate commerce. *See, e.g., Wickard v. Filburn*, 317 U.S. 111, 124-25 (1942) ("Whether the subject of the regulation in question was 'production,' 'consumption,' or 'marketing' is, therefore, not material for purposes of deciding the question of federal power before us"; Congress may regulate an intrastate activity having a substantial effect on interstate commerce, "irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect'"). The Court also established a rational basis standard of review that requires federal courts to defer in most instances to Congress' judgment as to whether an intrastate activity substantially affects interstate commerce. *See, e.g., Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 276, 281 (1981) (upholding the Surface Mining Control and Reclamation Act despite claims that it intruded on local land use authority); *Perez v. United States*, 402 U.S. 146, 154-56 (1971) (upholding a conviction for loansharking under the Consumer Credit Protection Act even though the extortionate credit transaction was entirely intrastate).

The Supreme Court did not repudiate any of its post-1937 decisions when it struck down a federal criminal statute barring firearms on or near schools as violative of the Commerce Clause in *United States v. Lopez*, 115 S. Ct. 1624 (1995). *Lopez* cited and discussed the post-1937 case law with approval, reaffirming the Court's holdings in cases where the intrastate activity's relation to interstate com-

merce had been quite modest. *Wickard*, for example, rejected a Commerce Clause challenge to a federal statute that regulated the amount of wheat one could raise, even for home consumption. While the wheat grown and consumed on Mr. Filburn's 23-acre farm might have had only a trivial effect on interstate commerce, the Court held "it is not enough to remove him from the scope of federal regulation where . . . his contribution, taken together with that of many others similarly situated, is far from trivial." 317 U.S. at 127-28. As one of many film developers using identical photo processing chemicals throughout the country, GUVS may likewise be regulated under the Commerce Clause, as discussed further in part 2(B) below.

The Supreme Court found *Lopez* distinguishable from *Wickard* and other post-1937 cases on two grounds: (1) the firearm statute did not involve "commerce" or any sort of economic enterprise; and (2) it intruded into traditional preserves of state authority, thereby undermining state autonomy. *Lopez*, 115 S. Ct. at 1630-31. CERCLA does not suffer from these shortcomings because (1) hazardous waste disposal does involve commerce, and (2) the regulation of hazardous waste disposal does not intrude into a traditional preserve of state authority.

b. Hazardous waste disposal is an intrastate activity having a substantial aggregate affect on interstate commerce.

Like the statutes upheld in *Wickard* and *Perez*, CERCLA regulates activities that arise out of and are connected with a commercial transaction, which viewed in the aggregate, substantially affect interstate commerce. Hazardous wastes typically are generated by out-of-state firms or are byproducts of consumer or industrial goods that move in interstate commerce. *See* John P. Dwyer, *The Commerce Clause and the Limits of Congressional Authority to Regulate the Environment*, 25 ENVTL. L. REP. 10421 (1995). Although CERCLA does not contain legislative findings, Congress stated that "problems of waste disposal . . . have become a matter national in scope" in its congressional finding for the Resource

Conservation and Recovery Act. 42 U.S.C. § 6901(a)(4) (1988). Hazardous photo processing chemicals contribute to that national problem.

In this case, GUVS is one member of a class of activities having a substantial aggregate affect on interstate. During its operations at 123 Laurel Street, GUVS engaged in film processing. (R. at 4-5). The photo processing chemicals and equipment GUVS used were of a kind available from many suppliers throughout the country. (R. at 5). Moreover, the specific chemicals and equipment GUVS purchased from New Union Industrial Supply Corp. were formulated and manufactured from raw materials drawn from a nationwide market. (R. at 5). Thus, as a film developer, GUVS was part of the national market for photo processing chemicals and equipment, a market within the reach of federal Commerce Clause power. Where the class of activities regulated is within the reach of federal power, the courts have no power "to excise, as trivial, individual instances" of the class. *Maryland v. Wirtz*, 329 U.S. 183, 193 (1968).

c. Hazardous waste disposal regulation does not intrude into a traditional preserve of state authority

The argument that federal environmental statutes interfere with the State's role in regulating land use was raised and rejected in *Hodel*. In that case, a coal operator trade association claimed that the Surface Mining Control and Reclamation Act violated the Commerce Clause because it regulated private, intrastate land use activities. In rejecting the argument, the Court made two observations concerning the validity of the federal regulation as it affected land use. First, the statute was held constitutional because Congress wanted to protect the states from competing with each other for industry by relaxing environmental controls. "The prevention of this sort of destructive interstate competition is a traditional role for congressional action under the Commerce Clause." *Hodel*, 452 U.S. at 282 (citing *United States v. Darby*, 312 U.S. 100, 115 (1941). Second, the Court held "the power conferred by the Commerce Clause [is] broad enough

to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State." *Id.* at 282. The Court will uphold federal environmental statutes as long as the congressional scheme is "reasonably related to the goals Congress sought to accomplish." *Id.* at 283. In this case, regulation of the disposal of hazardous wastes, such as photo processing chemicals, is reasonably related to preventing water and soil contamination. Given that *Lopez* cited *Hodel* with approval and adhered to the "cumulative effects" test for intrastate activities, GUVS's contention that it may not be reached under CERCLA since *Lopez* is incorrect.

B. The Application of CERCLA to this Site Does Not Implicate Sovereign Immunity Under the Eleventh Amendment.

1. Sovereign immunity only attaches in suits brought against a state or state agency by a citizen of either the United States or a foreign state.

Under the Eleventh Amendment, federal judicial power excludes only suits "against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. The Eleventh Amendment does not bar federal jurisdiction over suits brought (1) by one state against another, (2) by the United States against a state, or (3) by one state agency against another agency of the same state.

a. GUVS is not a state agency.

GUVS is a non-profit corporation governed by a Board of Directors responsible for its own selection and replacement and for its by-laws and all other matters of governance, subject only to the same laws applicable to other non-profit corporations incorporated in New Union. (R. at 4). Furthermore, a 1964 opinion of the New Union Attorney General concluded that "GUVS is not an instrumentality of New Union state government." (R. at 4). Contrary to GUVS contention, the Supreme Court did not hold that state chartered

entities are to be treated the same as traditional state agencies under the Eleventh Amendment in *Seminole Tribe of Fla. v. Florida*, 116 S. Ct. 1114 (1996). GUVS is therefore not entitled to sovereign immunity.

b. SNUHSA is not a citizen, it is a state agency.

Even if this court were to hold that GUVS is a state entity entitled to sovereign immunity, immunity would not attach in this case because SNUHSA is a state agency. The Eleventh Amendment does not bar federal jurisdiction over suits brought by one state entity against another entity of the same state.

C. The Application of CERCLA § 107 to this Site Is Not Retroactive Because Hazardous Waste Continued to Be Released After CERCLA's Enactment.

CERCLA took effect on December 11, 1980. 42 U.S.C. § 9601(22). In part, CERCLA provides for liability for "costs of removal or remedial action incurred," 42 U.S.C. § 9607(a)(4)(A), and "any other necessary" response costs, § 9607(a)(4)(B). The medical monitoring costs at issue in this case were not incurred until 1994. (R. at 6). Since all costs were incurred after CERCLA's enactment, there is no need to apply CERCLA retroactively in this case. *See United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 996 (D.S.C. 1984), *aff'd in part and vac. in part sub nom. United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988).

In *Landgraf v. USI Film Prods.*, 114 S. Ct. 1483 (1994), the Supreme Court reaffirmed that a statute does not operate retroactively simply because it is applied to conduct antedating the statute's enactment. *Id.* at 1499 (citing *Republic Nat'l Bank of Miami v. United States*, 113 S. Ct. 554, 556-57 (1992) (Thomas, J., concurring in part and concurring in judgment)); *see also Cox v. Hart*, 260 U.S. 427, 435 (1992) (a statute "is not made retroactive merely because it draws upon antecedent facts for its operation"). *Landgraf* held that a statute does have a retroactive effect when "it would impair the rights a party possessed when he acted, increase a party's

liability for past conduct, or impose new duties with respect to transactions already completed." 114 S. Ct. at 1505.

CERCLA did not criminalize the past release of hazardous substances, and even before CERCLA there was potential liability for such releases under common law negligence. Although CERCLA was designed to more effectively deal with hazardous waste sites, it did not impair the rights GUVS had when it dumped hazardous chemicals at 123 Laurel Street, increase GUVS's liability for those releases, or impose new duties on GUVS with respect to those releases. Thus, the application of CERCLA to the pre-enactment releases of hazardous wastes in this case is not retroactive under the Supreme Court's analysis. *Cf. Chicago & A. R.R. v. Tranbarger*, 238 U.S. 67, 73, 76 (1915) (a statute requiring a bridge culvert did not apply retroactively to a railroad which built a bridge without a culvert three months before the statute was enacted; the railroad was subject to liability because "after that time [enactment of the statute] it maintained the embankment in a manner prohibited"); *City of Bakersfield v. Miller*, 410 P.2d 393, 399, *cert. denied*, 384 U.S. 988 (1966) (building that was constructed in accordance with existing building codes ordered modified pursuant to revised code which was enacted "to eliminate presently existing public danger").

D. Even If the Application of CERCLA § 107 to this Site Were Retroactive, Such Retroactive Application Would Be Constitutionally Permissible.

1. Under applicable Supreme Court analysis, a statute applies retroactively if there is evidence of a clear congressional intent that it do so.

The Supreme Court set forth the proper approach for determining the retroactive effect of a statute in *Landgraf*. 114 S. Ct. at 1505. Where Congress does not expressly prescribe a statute's proper reach, the statute governs retroactively if there is "clear congressional intent favoring such a result." *Id.* Since Congress did not expressly state that CERCLA is

retroactive, this court must determine if there is evidence of a clear congressional intent to apply CERCLA retroactively.

2. There is evidence of a clear congressional intent to apply CERCLA retroactively.

Since *Landgraf*, several federal courts have been presented with the question of CERCLA retroactivity. *United States v. Alcan Aluminum Corp.*, 96 F.3d 1434 (3d Cir. 1996); *Nevada ex rel. Dep't of Transp. v. United States*, 925 F. Supp. 691 (D. Nev. 1996); *United States v. Olin*, 927 F. Supp. 1502 (S.D. Ala. 1996); *Gould Inc. v. A & M Battery & Tire Serv.*, 933 F. Supp. 431 (M.D. Pa. 1996). Of these courts, all but *Olin* have held that CERCLA does apply retroactively. *Alcan*, 96 F.3d at 1434; *Nevada*, 925 F. Supp. at 696; *Gould*, 933 F. Supp. at 438. *Contra Olin*, 927 F. Supp. at 1519 . *Nevada* concluded that there was clear evidence of a congressional intent to apply CERCLA retroactively. 925 F. Supp. at 695. CERCLA's retroactive effect had also been upheld by numerous courts which had addressed the issue of congressional intent prior to *Landgraf*. *E.g., United States v. Northeastern Pharmaceutical & Chem. Co.* [hereinafter "NEPACCO"], 810 F.2d 726, 733, 737 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987); *United States v. Shell Oil Co.*, 605 F. Supp. 1064, 1079 (D. Colo. 1985); *City of Philadelphia v. Stepan Chemical Co.*, 748 F. Supp. 283, 287-88 (E.D. Pa. 1990); *Ohio ex rel. Brown v. Georgoeff*, 562 F. Supp. 1300, 1314 (N.D. Ohio 1983). Furthermore, earlier this year the Supreme Court observed that "the 'two . . . main purposes of CERCLA' are 'prompt cleanup of hazardous waste sites and imposition of all cleanup costs on the responsible party.'" *Meghrig v. KFC Western, Inc.*, 116 S. Ct. 1251, 1254 (1996) (quoting *General Electric Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1422 (C.A. 8 1990)). Notably, the California appellate decision the Supreme Court chose to quote is one that applied CERCLA to costs incurred in 1985 in response to hazardous wastes released between 1959 and 1962. *General Electric*, 920 F.2d at 1416.

In *Landgraf*, the Supreme Court identified both a statute's text and its legislative history as factors to consider in

evaluating the evidence of a clear congressional intent to apply a statute retroactively. 114 S. Ct. at 1493, 1496. CERCLA's text and legislative history reveal a clear congressional intent to apply CERCLA retroactively.

a. CERCLA's text reveals a clear congressional intent to apply CERCLA retroactively.

i) Negative inference analysis of CERCLA's text reveals a clear congressional intent to apply CERCLA retroactively.

CERCLA's civil liability section, § 107, sets forth three distinct forms of liability: (1) "costs of removal or remedial action," 42 U.S.C. § 9607(a)(4)(A); (2) "any other necessary" response costs, § 9607(a)(4)(B); and (3) natural resource damages, § 9607(a)(4)(C). (Appendix A1-A2). Section 107(a) is silent on the matter of retroactivity. However, two sections closely related to the natural resource damages provision do speak to the issue. Under § 107(f), persons may be held liable for natural resource damages only "where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before December 11, 1980." 42 U.S.C. § 9607(f)(1). Relatedly, under § 111(d), no money from the established "Superfund" may be used where the natural resource damage and "the release of a hazardous substance from which such damage[ ] resulted have occurred wholly before December 11, 1980." 42 U.S.C. § 9611(d)(1). Section 111(d)'s limitations on expenditures from the Superfund for pre-enactment damages and releases specifically applies only to purposes listed in § 111(b) and §§ 111(c)(1) and (2). *Id.*

As reasoned in cases like *NEPACCO*, *Nevada*, and *Shell Oil*, the presence of the two "prospective only" provisions indicates that other key CERCLA provisions should be construed to apply both prospectively and retrospectively.*NEPACCO*, 810 F.2d at 736; *Nevada*, 925 F. Supp. at 693-94; *Shell Oil*, 605 F. Supp. at 1076. Had Congress similarly intended to limit recovery of pre-enactment costs, it would have done so

explicitly. *Shell Oil*, 605 F. Supp. at 1079. In that regard, *Shell Oil* concluded:

> If the presumption against retroactivity were sufficient to preclude recovery for pre-enactment response costs, it would also be sufficient to preclude recovery for pre-enactment damages to natural resources. Obviously that was not intended. If it were, the limiting provisions of sections 107(f) and 111(d) would be mere surplusage. In order to give meaning to these provisions, one must assume that liability for other damages—cost of removal or remedial action incurred by . . . any other person (§ 107(a)(4)(B))—is not so limited.

605 F. Supp. at 1076.

Although the Supreme Court in *Landgraf* did not accept the negative inference argument put forth for the Civil Rights Act, it did not preclude the use of negative inference analysis in support of retroactive intent for other statutes. The negative implication in CERCLA is much more persuasive than that of the Civil Rights Act at issue in *Landgraf*. In *Landgraf*, the three "prospective only" provisions on which petitioner relied were §§ 402(a), 402(b), and 109(c). 114 S. Ct. at 1493. Section 402(a) was the Act's effective date provision. Section 402(b) was written to exempt a single disparate impact case against the Wards Cove Packing Company. *Id.* Finally, § 109(c) addressed only the application of amendments to that section of the Act which extended Title VII to overseas employers. *Id.*

The Supreme Court held that § 402(a), standing alone, was not probative of legislative intent. 114 S. Ct. at 1493. The Court also held that in light of the tangential roles §§ 402(b) and 109(c) played within the Act's statutory scheme, the petitioner was placing "extraordinary weight on two comparatively minor and narrow provisions in a long and complex statute." *Id.*

In contrast, "the sections of CERCLA which create liability for response costs on the one hand, and damage to natural resources on the other, are hardly 'minor and narrow provisions.'" *Nevada ex rel.*, 925 F. Supp. at 701 (quoting *Lan-*

dgraf, 114 S.Ct. at 1493)). The role which these sections play in CERCLA—the very core of the Act's liability scheme—stands in sharp contrast to the tangential role which the Civil Rights Act's three "prospective only" provisions played in its overall statutory scheme. *Id.* at 701-702.

The analysis employed in cases like *Nevada* and *Shell Oil* remains a permissible approach after *Landgraf*. Both courts applied the presumption against retroactivity, in accord with *Landgraf*, and held that it was outweighed by the evidence of clear congressional intent for CERCLA retroactivity. *See Nevada*, 925 F. Supp at 698, 702-704; *Shell Oil*, 605 F. Supp .at 1069, 1076-77.

ii) CERCLA's use of the past tense reveals a clear congressional intent to apply CERCLA retroactively.

Section 107 of CERCLA speaks in the past tense. It states that "any person who at the time of disposal of any hazardous substance *owned* or *operated* any facility at which such hazardous substances were *disposed* of," and "any person who . . . *arranged for disposal . . . at any facility . . . shall be liable . . . .*" 42 U.S.C. § 9607(a)(2), (a)(3), and (a)(4) (emphasis added). (Appendix A1-A2). The use of the past tense suggests that Congress intended for CERCLA liability to reach back before the enactment date. On its face, this language refers to the time of disposal and does not place a temporal limit on its scope. This evinces Congress' intent to apply CERCLA retroactively.

iii) The prospective language of the CERCLA's effective date provision does not negate the clear congressional intent to apply CERCLA retroactively.

CERCLA's effective date clause, § 302(a), reads: "Unless otherwise provided, all provisions of this Act shall be effective on December 11, 1980." 42 U.S.C. § 9652(a). However, an effective date clause, without more, does not speak to the issue of retroactivity for every section of a statute. *See Landgraf*,

114 U.S. at 1505. In this case, the standard effective date provision cannot "seriously be considered to negate CERCLA's overriding statutory scheme of retroactive liability." *Nevada ex rel.*, 925 F. Supp. at 695 (quoting *Shell Oil*, 605 F. Supp. at 1075).

b. CERCLA's legislative history reveals a clear congressional intent to apply CERCLA retroactively.

In addition to the textual analysis set forth in part B(1) above, CERCLA's legislative history further evinces Congress' intent to apply CERCLA retroactively. "CERCLA was a response to the perceived deficiencies and inadequacies of existing federal environmental protection law, particularly the Resource Conservation and Recovery Act ('RCRA'), Pub. L. No. 94-580, 90 Stat. 2795, codified as an amendment to the Solid Waste Disposal Act, 42 U.S.C. § 6901, et seq." *Nevada ex rel.*, 925 F. Supp. at 703 (citing *Shell Oil*, 605 F. Supp. at 1070-72; *United States v. Wade*, 546 F. Supp. 785, 792-93 (E.D. Pa. 1982); Lynda J. Oswald, *Strict Liability of Individuals Under CERCLA: A Normative Analysis*, 20 B.C. ENVTL. AFF. L. REV. 579, 603 n. 94 (1993)). One of the problems Congress identified in RCRA was that it applied prospectively only:

> (c) Deficiencies in RCRA have left important gaps.
> (1) The Act is prospective and applies to past sites only to the extent they are posing an imminent hazard. . . . . It is the intent of Committee in this legislation to initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites.

H.R. Rep. No. 1016, 96th Cong., 2d Sess. 22 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6125. The use of the phrase "abandoned and inactive" is an unequivocal reference to dumping that had occurred prior to CERCLA's enactment, and therefore compels retroactive application of CERCLA liability. The Report also referenced several notorious inactive

sites, including Love Canal, and iterated Congress' concern as to the cleanup costs associated with such sites. *Id.* at 6121-6122.

The Senate Report characterized CERCLA's liability scheme as one designed to assure "that those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their actions." S. Rep. No. 848, 96th Cong. 2d Sess. 13 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119. The same report further explained:

> [S]ociety should not bear the costs of protecting the public from hazards produced *in the past* by a generator, transporter, consumer, or dumpsite owner or operator who has profited or otherwise benefitted from commerce involving those substances and now wishes to be insulated from any continuing responsibilities for the present hazards to society that have been created.

Id. at 98 (emphasis added).

CERCLA's legislative history therefore reveals that (1) Congress passed CERCLA, in part, to deal with pre-existing inactive sites like Love Canal, and (2) that CERCLA was intended to impose liability on the parties responsible for such inactive sites. To effectuate this result, CERCLA must be applied retroactively. To find otherwise would frustrate a primary purpose of the Act.

REPLY POINT 2: THE DISTRICT COURT WAS CORRECT AS A MATTER OF LAW IN HOLDING THAT CERCLA § 107 DOES PROVIDE FOR LIABILITY FOR MEDICAL MONITORING COSTS.

A. CERCLA Allows States to Recover All Removal or Remedial Action Costs.

CERCLA § 107 (a)(4)(A) allows states to recover "all costs of removal or remedial action incurred . . . not inconsistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(A) (1988) (Appendix A2). "Remove" and "removal" are defined to include the physical removal or cleanup

of released hazardous substances as well as actions "necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances" and to "prevent, minimize or mitigate damage to the public health or welfare or to the environment." 42 U.S.C. § 9601(23) (1988) (Appendix A1). "Remedy" and "remedial action" include "any monitoring reasonably required to assure that [other remedial actions such as dredging, for example] protect the public health and welfare and the environment" and "those actions consistent with permanent remedy taken." 42 U.S.C. § 9601(24) (1988) (Appendix A1). *See also*, Susan L. Martin and Jonathan D. Martin, *Tort Actions for Medical Monitoring: Warranted or Wasteful?*, 20 COLUM. J. ENVTL. L. 121, 133 (1995).

CERCLA § 107 imposes liability for such removal or remedial costs on four categories of potentially responsible persons ("PRPs"); among these categories are current owners or operators of the facility where the substance was released, such as WUWPS, and parties who owned or operated the facility when substances were released, such as GUVS. 42 U.S.C. § 9607(a) (1988) (Appendix A1-A2). *See also In re Hemingway Transport, Inc.*, 993 F.2d 915, 921 (1st Cir. 1993). The parties in this case have stipulated that SNUHSA's actions are consistent with the national contingency plan. (R. at 7). Thus, the sole remaining issue is whether SNUHSA's medical monitoring costs constitute "removal or remedial action" costs. These terms are defined in CERCLA § 101(23) and (24). 42 U.S.C. § 9601 (23) - (24) (1988) (Appendix A1).

B. Including Medical Monitoring Costs as Removal or Remedial Costs Advances CERCLA's Objectives.

CERCLA was enacted in 1980 to address the ever-increasing danger to public health resulting from past and present dumping and improper storage of hazardous wastes. *See* A&P S. Rep. 96-848. *See also Exxon Corp v. Hunt*, 475 U.S. 355, 358-60 (1986); Steven F. Baicker-McKee and James M. Singer, *Narrowing the Road of Private Cost Recovery: Recent Developments Limiting Recovery of Private Response Costs under CERCLA § 107*, 25 ENVTL. L. REP. 10593, 10595 (1995). CERCLA protects public health in part by encourag-

ing prompt response to and clean-up of hazardous waste contamination. *In re Hemingway*, 993 F.2d at 921; B.F. *Goodrich Co. v. Murtha*, 958 F.2d 1192, 1198 (2nd Cir. 1992). *See also* Anthony R. Laratta and Brian S. Paszament, *Diagnosing Medical Monitoring Costs Under CERCLA: Checking for a Pulse*, 7 VILL. ENVTL. L. J. 81, 83 (1996). Allowing recovery of the costs of medical monitoring, which may be necessary to determine both the extent of the contamination and the effectiveness of the response action, advances these policies by holding polluters liable for the response costs incurred as a result of their conduct. Imposing the costs of medical monitoring on polluters also creates an incentive for polluters to engage in proper disposal activities. *See* Amy B. Blumenberg, Note, *Medical Monitoring Funds: The Periodic Payment of Future Medical Surveillance Expenses in Toxic Exposure Litigation*, 43 HASTINGS L.J. 661, 681 (1992). Awarding these costs also allows for the monitoring of persons exposed to hazardous substances who would otherwise be unable to afford monitoring, like the Marina family. (R. at 6). Medical monitoring provides valuable information about the health consequences of such exposure. Blumenberg at 678-82. Therefore, SNUHSA should be allowed to recover the costs of its medical monitoring of the Marina family from the PRPs, GUVS and WUWPS. To disallow the recovery of medical monitoring costs would impede CERCLA's express purpose of protecting human health and welfare. *See* Colin Crawford, *Strategies for Environmental Justice: Rethinking CERCLA Medical Monitoring Lawsuits*, 74 B.U. L. REV. 267, 304 (1994).

Medical monitoring and surveillance costs do not include a recovery for personal injury resulting from the polluter's conduct; rather, they play a part in CERCLA cleanup activities. *Id.* at 305-306. SNUHSA is seeking only medical monitoring and surveillance costs, which advances CERCLA's goal of imposing response costs incurred to protect public health on the polluters.

C. Federal Courts Have Held that Medical Monitoring Costs Are Recoverable as Removal or Remedial Costs.

The district court in *Brewer v. Raven*, 680 F. Supp. 1176 (M.D. Tenn. 1988) was the first to recognize the distinction between medical monitoring costs and costs associated with reimbursement for personal injury. *Brewer* involved a class action suit filed under CERCLA against a capacitor manufacturer by former employees. *See* Crawford at 322 (citing *Brewer*, 680 F. Supp. at 1178). Although the court found that medical expenses incurred in the treatment of personal injuries or disease were not recoverable, the court refused to grant a summary judgment denying recovery of plaintiff's medical monitoring costs because it found that the screening and testing in question was "conducted to assess the effect of the release or discharge on the public health or to identify potential public health problems." *Brewer*, 680 F. Supp. at 11789. The court concluded that such medical monitoring procedures were necessary to "monitor, asses [or] evaluate a release" and therefore qualified as "removal" under CERCLA § 101(23). *Id.* The court's reasoning turned on its distinction between costs incurred in the determination of the effects of the exposure and costs incurred in treating any illness caused by the exposure—the former was recoverable, the latter was not. *Id.*

Similarly, in *Lykins v. Westinghouse Electric*, 1988 WL 114522 (E.D. Ky. 1988), the defendants' motion for summary judgment against the plaintiffs' claim for medical monitoring costs was also defeated. The court concluded that costs that are part of a "response to a hazardous waste problem" are recoverable, while costs that are part of a private claim for damages are not. *See* Laratta and Paszament at 94, citing *Lykins*, at *3.

In *Williams v. Allied Automotive, Autolite Div.*, 704 F. Supp. 782 (N.D. Ohio 1988), the Northern District of Ohio also refused to grant summary judgment against plaintiff's claim for medical monitoring costs under CERCLA, finding that "[c]osts of medical testing . . . are recoverable response

costs under CERCLA." 704 F. Supp. at 784 (citing *Brewer*, 680 F. Supp .at 1179). The court concluded that medical monitoring costs are "not categorically unrecoverable as response costs under CERCLA," as long the costs are incurred in a manner consistent with the NCP. *Id.*

As discussed above, SNUHSA is not required to show that its medical monitoring costs were "necessary" under CERCLA § 107(a)(4)(A), and the parties have stipulated that the costs were incurred in a manner consistent with the national contingency plan. (R. at 6). SNUHSA's costs, like the plaintiffs' costs in these cases, are valid CERCLA response costs. SNUHSA is not attempting to recover personal injury costs; rather, the Marina's testing is necessary to assess the long term effects of their exposure to the toxic photo-processing chemicals.

D. Those Federal Courts That Have Not Included Medical Monitoring Costs as Removal or Remedial Costs Relied on a Single District Court's Faulty Reasoning.

Due to the ambiguous phrasing of CERCLA § 107 (a)(4)(B), and the lack of a definition for the term "necessary response costs," the district courts have struggled with determining whether a private party may recover medical monitoring costs under that section. *Williams*, 704 F. Supp. at 785 (citing *Brewer*, 680 F. Supp. at 1179). SNUHSA, however, is not a private party and is seeking to recover its medical monitoring costs under CERCLA § 107 (a)(4)(A). (R. at 7) While this avoids the confusion with respect to the term "necessary response costs", the issue remains as to whether its costs qualify as are recoverable "removal or remedial" costs under CERCLA § 101(23) or (24). *Coburn v. Sun Chemical Corp.*, 1988 WL 120739 (E.D. Pa. 1988), epitomizes the line of federal court decisions finding medical monitoring costs not recoverable under CERCLA. *Coburn*'s reasoning is flawed in several respects, however. First, the court relies heavily on CERCLA's legislative history even though it notes that the legislative history is nearly as far from lucid as the statute itself, specifically citing the Third Circuit's statement that

"[t]he legislative history [of CERCLA] furnishes at best a sparse and unreliable guide to the statute's meaning." *Coburn*, 1988 WL at *3 (citing *Artesian Water Co. v. New Castle County*, 851 F.2d 643, 648 (3rd Cir. 1988)). *See also* Kristin Elizabeth Sweeney, Recent Development, *Daigle v. Shell Oil Company and the Bumpy Road to the Recoverability of Medical Monitoring Expenses under CERCLA*, 47 Vand. L. Rev. 235, 254 (1994).

Coburn also erroneously relied on the creation of the Agency for Toxic Substance and Disease Registry ("ATSDR") under CERCLA and its subsequent expansion under the Superfund Amendments and Reauthorization Act of 1986 ("SARA"). *Coburn*, 1988 WL at *3. *Coburn* and its progeny point to the creation of the ATSDR as evidence that Congress "was not ignorant of the potential need for medical testing arising out of a release of toxic substances" and chose to provide for those needs under § 104(i) of CERCLA rather than § 107. *Werlein v. United States*, 746 F. Supp. 887, 904 (D. Minn. 1990). *See also Bolin v. Cessna Aircraft Co.*, 759 F. Supp. 692, 713-14 (D. Kan. 1991); *Ambrogi v. Gould, Inc.*, 750 F. Supp. 1233, 1249 (M.D. Pa. 1991); *Romeo v. General Chemical Corp.*, 922 F. Supp. 287, 291 (N.D. Calif. 1994).

The ATSDR is charged with compiling a national registry of toxic substance contamination, tracking scientific literature discussing toxic substances and providing emergency medical care and testing to people exposed to hazardous substances. SARA added the requirement that the ATSDR perform research on the effects of toxic exposure on human health. The ATSDR, however, is only effective for sites that have been listed on the NPL. It is limited, by the terms of its creating legislation, to those extremely contaminated sites, which leaves smaller, less severely contaminated site uncovered. *See* Kathryn E. Hand, Comment, *Someone to Watch Over Me: Medical Monitoring Costs Under CERCLA*, 21 B.C. ENVTL. AFF. L. REV. 363, 371-72. Additionally, performing long term medical monitoring is not the ATSDR's focus; rather, it performs medical monitoring when "a significant increased risk of adverse health effects in humans" is found. *Id.* citing 42 U.S.C. § 9604(i)(9)(1988). The ATSDR is designed

"primarily for information gathering," not to provide medical monitoring on a more individualized basis, as is needed at smaller contaminated sites, such as the one involved in this case. *Id.* at 373.

Finally, in drawing its conclusion that medical monitoring costs are not recoverable, the *Coburn* court stated "we find it difficult to understand how future medical testing and monitoring of persons who were exposed to contaminated well water . . . will do anything to 'monitor, assess, [or] evaluate a release' of contamination from the site." *Coburn*, 1988 WL at *6. This statement is erroneous is several respects. First, it incorrectly concludes that hazardous materials are never released during the remediation process; such possible releases make continued medical monitoring part of the remediation process. *See* Crawford at 308. The conclusion also disregards CERCLA's objective of protecting public health, focusing solely on cleaning up the environment without considering the needs of the people exposed to the hazardous substance. *Id.* The *Coburn* court also failed to recognize that CERCLA remediation is a long-term process, refusing to recognize that medical monitoring is a long-term response to the release of hazardous substances, made necessary by the latent effects of many of these materials. *Id.* at 308-309.

The Tenth Circuit was the first Circuit Court to consider the recoverability of medical monitoring costs under CERCLA. In its opinion, the court endorsed and paralleled *Coburn*'s "comprehensive analysis". *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1535 (10th Cir. 1992). *See also Crawford* at 309. The *Daigle* court also relied on the absence of medical monitoring in the list of specific examples of "removal costs." 972 F.2d at 1535. CERCLA, however, is designed to "have a broad sweep with respect to protection of public health . . . or the environment," and the list of examples of what constitutes a removal action is specifically nonexclusive. Crawford at 310. *See also* 42 U.S.C. § 9601(23) (1988) (Appendix A1). The *Daigle* court's reliance on CERCLA's legislative history and the creation of the ATSDR is as misplaced as the analysis of the *Coburn* court. Subsequent district court decisions have followed *Daigle* with little or no analysis. *See, e.g., Romeo,*

922 F. Supp. at 290-91; *Yslava v. Hughes Aircraft Co.*, 845 F. Supp. 705 (D. Ariz. 1993).

The Ninth Circuit considered the recoverability of medical monitoring costs under CERCLA in *Price v. United States Navy*, 39 F.3d 1011 (9th Cir. 1994). It also deferred to *Daigle*'s analysis. *Id.* at 1017. Upon revisiting the issue in *Durfey v. E.I. DuPont de Nemours & Co.*, 59 F.3d 121 (9th Cir. 1995), the Ninth Circuit noted that the ATSDR ". . . has yet to undertake any medical monitoring activities anywhere in the country." *Id.* n5. This strengthens the argument that the ATSDR is not a sufficient provider of medical surveillance and that the *Coburn* and *Daigle* courts' reliance on its creation as an alternate means of meeting the public's testing needs is erroneous.

POINT OF ERROR 1: THE DISTRICT COURT ERRED AS A MATTER OF LAW IN HOLDING THAT WUWPS, A POTENTIALLY RESPONSIBLE PARTY, HAS THE CHOICE OF PROCEEDING UNDER EITHER CERCLA 107 OR CERCLA 113(f) IN ITS CONTRIBUTION CLAIM AGAINST GUVS.

CERCLA's original provisions did not specifically allow for contribution actions for parties that incurred response costs; parties were limited to cost recovery actions under § 107. *See* William D. Buckley, Jr., *Making a Case for Statutory Amendment to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"): Solving the Section 107/Section 113 Cause of Action Controversy*, 31 TULSA L.J. 851, 856 (1996). Courts, however, recognized an implied right of contribution under §107. *Id.*

In 1986, Congress expressly articulated the implied right to contribution under CERCLA through an amendment to § 113 in SARA. *United States v. Colorado & E. R.R.*, 50 F.3d 1530, 1535 (10th Cir. 1995). Congress' purpose in creating this express right to contribution was to "clarif[y] and confirm[ ] the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has assumed a

share of the cleanup or cost that may be greater than its equitable share under the circumstances." A&P S. Rep. 99-11 (1985).

A. Limiting Contribution Claims to § 113(f) Comport with CERCLA's Statutory Objectives.

As discussed earlier, one of the basic objectives of CERCLA is to encourage prompt response to and cleanup of hazardous waste contamination. CERCLA §113(f)(2) provides the government with a means to encourage "timely" settlements, thereby avoiding protracted litigation. *United Technologies v. Browning Ferris Indus., Inc.*, 33 F.3d 96, 102-103 (1st Cir. 1994). *See also* 42 U.S.C. § 9613(f)(2) (1988) (Appendix A2). Parties that settle with the government "shall not be liable for claims for contribution regarding matters addressed in the settlement." *United Technologies*, 33 F.3d at 103. If PRPs were allowed to recover for contribution under §107, §113(f)(2)'s protection for settling parties would "afford very little protection" and therefore would greatly "greatly diminish the incentive for parties to reach early settlements with the government, thereby thwarting Congress' discernible intent." *Id.* Other courts have also recognized the danger posed to §113(f)(2)'s protections by allowing contribution actions under §107. *See Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994) (finding defendant's settlement with government precluded plaintiff's §107 claim and noting that the plaintiff was "seeking to apportion liability for an injury to which it contributed"); *Colorado & E. R.R.*, 50 F.3d at 1536 (court refused claims filed under §107 against parties that had previously settled with the government). *See also* Baicker-McKee and Singer.

CERCLA also insures prompt remedial and removal actions by specifying a statute of limitations for actions brought to recover removal and remedial expenditures. 42 U.S.C. §§ 9613(g)(2), (3) (1988) (Appendix A2-A3). Section 113(g)(3)(B) provides that the three year statute of limitation for a contribution claim starts to run when a "judicially approved settlement' is entered. *Id. See also United Technologies*, 33 F.3d at 98. Allowing PRPs to seek contribution under

§107 rather than §113 will unnecessarily protract the cleanup process, thereby contravening CERCLA's objective of encouraging prompt resolution of and response to contamination. In *Untied Technologies*, the court struck down a §107 claim that was an attempt to circumvent §113's shorter statute of limitations. *Id.* at 103.

B. Current Case Law Demonstrates a Trend Among the Federal Courts Recognizing That PRPs Can Only Seek Contribution Through §113(f).

In the first few years following the enactment of SARA and the codification of the right to contribution, courts continued to recognize contribution claims advanced by PRPs under § 107. *See* Baicker-McKee and Singer. Recently, however, circuit courts have increasingly found that PRPs are limited to §113(f). *See Colorado & E. R.R.*, 50 F.3d at 1539; *United Technologies, Inc.*, 33 F.3d at 103; *Akzo Coatings*, 30 F.3d at 764-65. *But see Velsicol Chemical Corp v. Enenco, Inc.*, 9 F.3d 524 (6th Cir. 1993); *In re Dant & Russell, Inc.*, 951 F.2d 246 (9th Cir. 1991). While *Velsicol* and *In re Dant* may arguably allow for recovery under either §107 or §113(f), neither case "squarely address[es] this issue." *See*, William D. Evans, Jr., *The "Road Warrior" Quality of Superfund Contribution Litigation*, 32-AUG TENN. B.J. 26, 30 (1996). In fact, a district court within the Ninth Circuit held that a PRP may only bring a recovery action under §113(f) after the *Velsicol* decision was handed down. *See Kaufman & Broad-South Bay v. Unisys Corp.*, 868 F. Supp. 1212 (N.D. Cal. 1994).

1. The First Circuit looked to the plain legal meaning of "contribution" and found a PRP could only seek contribution under § 113(f).

United Technologies involved a question as to whether a PRP must bring a contribution action within three years as required by §113(f), or whether it could sue for contribution under §107, which allows for six years to bring a claim. 33 F.3d at 98. In finding that a PRP is limited to §113(f) in seeking contribution, the court looked to the generally accepted

legal meaning of the word "contribution." Id. at 99, 103. The court relied on *Akzo Coatings'* definition of a contribution claim as a claim "by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make." *Id.* at 99 (citing 30 F.3d at 764).

United Technologies recognized that "CERCLA's text indicates that contribution and cost recovery actions are distinct, non-overlapping anodynes," with separate periods of limitations. *Id.* at 103. Therefore, the Supreme Court's dicta in *Key Tronic Corp. v. United States*, 114 S.Ct. 1960, 1966 (1994) is distinguishable. *Id.* at 103, n.12. The Supreme Court stated that CERCLA ". . . authorizes a cause of action for contribution in §113 and impliedly authorizes a similar and somewhat overlapping remedy in §107." *Key Tronic*, 114 S.Ct. at 1966. However, this statement is consistent with *United Technologies'* holding since the Supreme Court "was discussing two different species of contribution actions and expressed no views [about] the relation between contribution and cost recovery actions." 33 F.3d at 103, n.12.

Recent district court decisions have followed *United Technologies'* "113(f)-Only" rule with respect to PRPs. *See Sun Co., Inc. v. Browning-Ferris Inc.*, 919 F. Supp. 1523, 1528 (N.D. Okla. 1996); *Reynolds Metals Co. v. Arkansas Power & Light Co.*, 920 F. Supp. 991, 995 (E.D. Ark. 1996); *Dartron Corp. v. Uniroyal Chemical Co., Inc.*, 917 F. Supp. 1173, 1182 (N.D. Ohio 1996). In the present case, WUWPS, as the present owner of the contaminated site, is a PRP under CERCLA §107 and is therefore jointly and severally liable with GUVS, from whom it seeks cost recovery. (R. at 7) Under the *United Technologies* definition of "contribution", WUWPS must therefore seek recovery under §113(f).

2. Recent Federal Court decisions find PRPs, by virtue of their PRP status, are limited to bringing contribution claims under § 113(f) only.

In *United Technologies*, the First Circuit noted in passing that it is possible that a PRP who voluntarily initiates cleanup proceedings, rather than being compelled to take ac-

tion, may be able to pursue "an implied right of action for contribution under 42 U.S.C. § 9607(c)." 33 F.3d at 99, n.8. The Tenth Circuit, however, in its subsequent *Colorado & E. R.R.* decision, ruled that a PRP, since it is a PRP, must bring a contribution action under §113(f). "There is no disagreement that both parties are PRPs by virtue of their past or present ownership of the site; therefore, any claim that would reapportion costs between these parties is the quintessential claim for contribution." *Colorado & E. R.R.*, 50 F.3d at 1536. The court also cited the Fifth Circuit's reasoning in *Amoco Oil Co. v. Borden Inc.*, 889 F.2d 664 (5th Cir. 1989), which held that "[w]hen one liable party sues another to recover its equitable share of the response costs, the action is one for contribution." *Id.* at 672. The court essentially held that cost recovery claims must be pursued under §107 and contribution claims must be brought under §113. *Id.*

In *Ekotek Site PRP Comm. v. Self*, 881 F. Supp. 1516 (D. Utah 1995), the district court followed *Colorado & E. R.R.*'s reasoning. The plaintiff in *Ekotek* had "voluntarily" assisted in cleanup operations and incurred response costs in the process, and therefore argued that it was distinguishable from the plaintiffs involved in *Colorado & E. R.R.* 881 F. Supp. at 1521. The court, however, ruled that the "plaintiff's status as a PRP, and not the degree of voluntariness with which it initiated cleanup activity" was compelling, and limited the plaintiff to a contribution claim under CERCLA §113.

CONCLUSION

For all of these reasons, the State of New Union Health Services Agency respectfully requests that this court affirm the District Court for the District of New Union's holding] that CERCLA is applicable to 123 Laurel Street and does provide for liability for medical monitoring costs, and prays for all other relief to which it may show itself justly entitled. The State of New Union Health Services Agency also respectfully requests that this Court reverse the District Court for the District of New Union's holding that CERCLA § 107 is available to a potentially responsible party and render judgment.

APPENDIX

U.S. Const. art. I, § 8 cl. 3

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

U.S. Const. amend. XI.

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

42 U.S.C. § 9601(23) (1988).

The terms "remove" or "removal" means the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat or release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measure to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 0604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act [42 U.S.C. § 5121 et seq.].

42 U.S.C. § 9601(24) (1988).

The terms "remedy" or "remedial action" means those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous sub-

stances so that they do not migrate to cause substantial danger

42 U.S.C. § 9607(a)(1-4) (1988).

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

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

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, form which thereis a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for —

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national with the national contingency plan;

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

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

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

42 U.S.C. § 9613(f) (1988).

(1) Contribution

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person of a civil action under section 9606 of this title or section 9607 of this title.

(2) Settlement

A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matter addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

42 U.S.C. § 9613(g)(2)- (3) (1988).

(g) Period in which action may be brought:

(2) Actions for recovery of costs;

An initial action for recovery of the costs referred to in section 9607 of this title must be commenced (A) for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a determination to grant a waiver under section 9604(c)(1)(C) of this title for continued response action; and

(B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the

removal action may be recovered in the cost recovery action brought under this subparagraph.

In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages. A subsequent action or actions under section 9607 of this title for further response costs at the vessel or facility may be maintained at any time during the response action, but must be commenced no later than 3 years after the date of completion of all response action. Except as otherwise provided in this paragraph, an action may be commenced under section 9607 of this title for recovery of costs at any time after such costs have been incurred.

(3) Contribution

No action for contribution for any response costs or damages may be commenced more than 3 years after—

(A) the date of judgment in any action under this chapter for recovery of such costs or damages, or

(B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.