Pace Environmental Law Review

Volume 7
Issue 2 *Spring 1990*

Article 9

April 1990

Judges' Memorandum: Second Annual Pace National Environmental Moot Court Competition

THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT
Spring Term 1990

CITY OF NORTHWOOD,
Appellant

v.

Docket No. 89-27

SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR and MULTI-CHEM CHEMICAL CO.,
Appellees

JUDGES' MEMORANDUM

STATEMENT OF THE CASE

This case involves two causes of action under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1988), by the City of Northwood ("the City") to address chemical contamination of the Northwood National Wildlife Refuge ("the Refuge") from Multi-Chem Chemical Company ("Multi-Chem"), a pesticide processing plant. The City of Northwood commenced this action in the United States District Court for the District of New Union in the spring of 1989. The suit consists of two causes of action under CERCLA. The first seeks to compel an assessment of the natural resource damages incurred at the Northwood National Wildlife Refuge, while the second seeks compensation for these damages.

The first cause of action is a citizen suit by the City of Northwood to compel the Department of Interior ("the Department"), as trustee of the Refuge, to carry out its nondiscretionary duties under section 107(f) of CERCLA, 42 U.S.C. § 9607(f). Specifically, the City desires to force the Depart-

ment to conduct a natural resource damage assessment and to recover from Multi-Chem amounts necessary to restore the Refuge. (R. 4).

Alternatively, in the second cause of action, the City of Northwood asserts rights as trustee of the Refuge and proceeds against Multi-Chem under section 107(a) of CERCLA, 42 U.S.C. § 9607(a), for damages for injury to the Refuge, including the cost of assessing the injury. (R. 5).

The district court granted the motions of the Department and Multi-Chem to dismiss. (R. 3). With respect to the Department's motion to dismiss the citizen suit action, the district court ruled that the Department's decision not to perform a natural resource damage assessment at the Refuge was a discretionary enforcement decision that was not properly the subject of a citizen suit action. The court also dismissed the action brought by the City against Multi-Chem, ruling that a city may not act as a natural resource trustee under section 107(f)(2)(B) of CERCLA, 42 U.S.C § 9607(f)(2)(B), unless authorized by the state. (R. 5, 6).

The City petitioned the United States Court of Appeals for the Twelfth Circuit to review both claims and the petitions were granted. (R. 1). Multi-Chem joins the Department in arguing that the City may not compel the Department to conduct a natural resource damage assessment. The Department joins the City in arguing that the City should be allowed to act as trustee of the Refuge.

SUMMARY OF THE FACTS

The City of Northwood is a municipality in the State of New Union. Within the municipal boundaries is the Northwood National Wildlife Refuge. The Refuge is considered by the City to be the focal point of Northwood, as it is an important aesthetic and recreational resource which has been credited with Northwood's development as an affluent bedroom community for professionals who commute to nearby New Union City. (R. 1, 2).

The Refuge is located along an important flyway for several species of geese and other waterfowl, and serves as an es-

sential haven for these migratory birds. (R. 1, 2). The Refuge is owned and administered by the Department of the Interior, but is subject to municipal ordinances and is served by the City's utilities, including fire protection and trash removal. (R. 2).

Multi-Chem Chemical Company operated a pesticide processing plant on the edge of the Refuge, outside the Refuge but inside the City limits, from 1943 until the plant was closed in 1985. (R. 2). In 1984, the City of Northwood Health Department discovered several Multi-Chem pesticide ingredients in residential water wells located south of the pesticide plant. (R. 2). The substances, which meet the test for "hazardous substances" under federal law, were found down gradient from the plant. (R. 2). The contaminated aquifer is believed to be hydrologically connected to wetlands and marshes within the Refuge, which are nontidal and are not navigable. (R. 2). The City has tested waters within the Refuge and found pesticide contamination, but further study is required to determine the extent of the contamination. (R. 2).

The Mayor of the City ordered the contaminated wells closed. The affected homes were then connected to the municipal water supply. (R. 2). Although not admitting liability, Multi-Chem reimbursed the City for the $230,000 spent in connecting the affected homes to the municipal water supply. (R. 3). In accepting payment, the City did not waive any claims against Multi-Chem. (R. 3).

Negotiations between the City, the Department, and Multi-Chem failed to resolve the question of who should bear the responsibility for assessing and redressing the injury to the Refuge from the pesticide contamination. (R. 3). The Department has indicated that it cannot perform the natural resource damage assessment the City wants because the Department lacks funds. (R. 4). The Department will not have funding available before 1992, at which time the City claims the statute of limitations under section 113(g) of CERCLA, 42 U.S.C. § 9613(g), for proceeding against Multi-Chem will have expired. (R. 4). This litigation ensued.

In the case at bar, the City seeks to compel the Department, as a designated "natural resources trustee" under sec-

tion 107(f) of CERCLA, 42 U.S.C. § 9607(f), to perform the scientific testing necessary to assess the natural resource injury to the Refuge and to recover funds from Multi-Chem necessary to build an aquifer treatment plant, to cleanse the groundwater, to monitor, and if necessary, to restock bird populations if they fall below current levels. (R. 3). Alternatively, the City claims the right to proceed as trustee of the Refuge and has sued Multi-Chem directly for the cost of the natural resource damage assessment and remediation. (R. 3).

ISSUE 1

WHETHER THE CITY OF NORTHWOOD CAN COMPEL THE DEPARTMENT OF THE INTERIOR TO PERFORM A NATURAL RESOURCE DAMAGE ASSESSMENT OF THE NORTHWOOD NATIONAL WILDLIFE REFUGE?

A. *The Statutory Context.*

Congress enacted CERCLA, 42 U.S.C. §§ 9601-9675, to address mounting public concern over the dangers of past improper hazardous waste disposal.[1] CERCLA was reauthorized and substantially amended by the Superfund Amendments and Reauthorization Act of 1986, commonly known as "SARA."[2] CERCLA establishes a framework for remedial action and broad-based liability for the costs of remediating hazardous waste sites. In pertinent part, section 107(a) of CERCLA provides that:

> [A]ny person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of . . . shall be liable for . . . damages for injury to, destruction of, or loss

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1. Originally enacted December 11, 1980, Pub. L. No. 96-510, 1980 U.S. CODE CONG. & ADMIN. NEWS (94 Stat. 2767) 6120 (discussing goals of CERCLA). *See also* H.R. REP. No. 253 (I), 99th Cong., 2d Sess. 4, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 2836 (discussing whether the goals of CERCLA were achieved prior to the 1986 amendments).

2. Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 1613 (codified at 42 U.S.C. §§ 9601-9675 (Supp. 1988)) [hereinafter SARA].

> of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release . . . .

42 U.S.C. § 9607(a). The liability provisions of section 107 of CERCLA, 42 U.S.C. § 9607, have generally been interpreted by the courts to impose strict, joint and several, and retroactive liability.

In addition, section 107(f)(2)(A) of CERCLA, 42 U.S.C. § 9607(f)(2)(A), provides that the President shall designate federal officials to act on behalf of the public as trustees of natural resources under this section, and that the trustees shall assess damages for injury to natural resources under the federal trust.

Section 310(a)(2) of CERCLA, 42 U.S.C. § 9659(a)(2), is a citizen suit provision which was added to CERCLA by the 1986 SARA amendments.[3] This section authorizes suit "against the President or any other officer of the United States . . . where there is alleged a failure of the President or of such other officer to perform any act or duty under this chapter . . . which is not discretionary with the President or such other officer." 42 U.S.C. § 9659(a)(2).

B. *Summary of the Arguments.*

The first cause of action is a citizen suit by the City against the Department seeking to compel the Department to conduct an assessment of natural resource damage at the Refuge. The question in this case is whether the Department has a nondiscretionary duty to conduct an assessment of natural resource damage at the Refuge. The City will argue that the Department has such a nondiscretionary duty under the plain meaning of section 107(f)(2)(A) of CERCLA, 42 U.S.C. § 9607(f)(2)(A), which provides that the Department, as trustee, "shall" conduct a natural resource damage assessment.

The Department will argue, as the district court below held, that the authority to make natural resource damage as-

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3. *Id.*

sessments is part of the arsenal of enforcement powers which the government in its discretion may elect to exercise. The Department will also argue that the decision not to exercise this enforcement authority is discretionary and not the appropriate subject of a citizen suit action against the Department.

Arguments may also be raised with respect to the public trust doctrine. The City will argue that Congress' use of the term "trustee" in section 107(f) of CERCLA, 42 U.S.C. § 9607(f), invokes duties under the public trust doctrine. The Department will argue in response that the public trust doctrine has historically been limited to protection of public use of navigable waterways and has no application in this case.

C. *The City of Northwood Will Argue that the Word "Shall" in Section 107(f) of CERCLA Creates a Mandatory Duty.*

To support the claim that the Department has a nondiscretionary duty to act, appellants will point to the plain language of section 107(f), which provides:

> (1) . . . The President, or the authorized representative of any State, shall act on behalf of the public as trustee of such natural resources[4] . . . . (2)(A) The President shall designate . . . the Federal officials who shall act on behalf of the public as trustees for natural resources under this chapter . . . . Such officials shall assess damages for injury to, destruction of, or loss of natural resources . . . and may, upon request of and reimbursement from a State and at the Federal officials' discretion, assess damages for those natural resources under the State's trusteeship.

42 U.S.C. § 9607(f)(1) & (f)(2)(A).

Pursuant to section 115 of CERCLA, 42 U.S.C. § 9615, the President delegated to the Department the authority to

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4. "[N]atural resources" is defined as "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States . . . any State or local government . . . ." CERCLA § 101(16), 42 U.S.C. § 9601(16) (1988).

act as natural resources trustee for all National Wildlife Refuges. Exec. Order No. 12,580, § 1(c)(2), 52 Fed. Reg. 2923 (1987). *See also* 40 C.F.R. § 300.72 (1989).

Appellants will argue that the court need not look further than the statutory language. "If Congress has directly spoken to the precise question at issue [and] if the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984). In *Chevron*, the Supreme Court discussed the standard of review that courts should apply when reviewing any agency's interpretation of a statute. *Chevron*, 467 U.S. at 842-45. The Court reviewed a regulation promulgated by the EPA pursuant to the Clean Air Act, 42 U.S.C. §§ 7401-7642 (1988), which defined the term "stationary source." The Court, in finding that the EPA interpretation was reasonable, set forth a two step analysis: (1) the court should first determine "whether Congress has directly spoken to the precise question at issue," *Chevron*, 467 U.S. at 842, and (2) if it is determined that Congress has not addressed the issue, then the court should determine "whether the agency's answer is based on permissible construction of the statute." *Id.* at 843.

Following the plain meaning rationale, the City will assert that Congress chose the word "shall" in section 107(f) of CERCLA, 42 U.S.C. § 9607(f), rather than "may" intending to require a mandatory duty to act. If Congress had intended to provide the trustee with a discretionary duty, the word "may" would have been used. Asserting that "a fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted taking their ordinary, contemporary, common meaning," appellants will argue that the Department, as appointed by the President, is under a mandatory duty to conduct a damage assessment of the Refuge.

The City may also argue that mandatory effect should be given to the use of the word "shall" in section 107(f)(2)(A) of CERCLA, 42 U.S.C. § 9607(f)(2)(A), because within that same section Congress distinguished between mandatory and discretionary duties. The section imposes upon the President or

his designee three separate mandatory duties and a fourth duty which is clearly discretionary. Section 107(f) of CERCLA, 42 U.S.C. § 9607(f), states that the President *shall* designate federal officials who *shall* act as trustees on behalf of the public and *shall* assess damages for injury to natural resources within their trusteeship. 42 U.S.C. § 9607(f) (emphasis added). Within the same sentence, Congress goes on to provide that with respect to natural resources under the state's trusteeship, designated federal officials "*may*, upon request of and reimbursement from the State and *at the Federal officials' discretion*" assess damages for those natural resources. *Id.* (emphasis added). The City may argue that Congress knows how to draw the distinction between mandatory and discretionary duties and has made those distinctions plainly in this section of the Act.

The City may also argue that construction of the Act requiring a mandatory duty to conduct a natural resource assessment is consistent with the broad remedial purpose of CERCLA. If "shall" is given a discretionary effect in this section, it may undercut the mandatory effect of other parts of CERCLA that use the word "shall" to establish duties and responsibilities. To interpret the word "shall" as imposing only a discretionary duty throughout CERCLA would frustrate the intended purpose of the statute. *See Mayor of Boonton v. Drew Chem. Corp.*, 621 F. Supp. 663, 666 (D.N.J. 1985) (CERCLA is a "far reaching remedial statute"); *City of New York v. Exxon Corp.*, 697 F. Supp. 677, 685 (S.D.N.Y. 1988) (CERCLA is a remedial statute designed by Congress to "protect and preserve the public health and the environment") (citing Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986)).

D. *The Department of Interior Will Argue that Its Authority to Conduct a Natural Resource Assessment Is Part of Its Enforcement Arsenal and that a Decision Not to Exercise this Enforcement Option Is Discretionary and Not Reviewable by the Court.*

The Department will argue that its authority to conduct a

natural resource damage assessment of the Refuge is part of the arsenal of enforcement options under CERCLA, and that the decision not to exercise this option is a discretionary enforcement decision. Appellees will cite to *Heckler v. Chaney*, 470 U.S. 821, 832 (1985), for the proposition that "an agency's decision not to take enforcement action should be presumed immune from judicial review . . . [as] such a decision has traditionally been 'committed to agency discretion' . . . ."

In *Heckler*, the Supreme Court considered the extent to which a decision by an agency "to exercise its 'discretion' not to undertake certain enforcement actions is subject to judicial review . . . ." *Heckler*, 470 U.S. at 823. In *Heckler*, the inmates of a prison sought to force the Food and Drug Administration (FDA) to commence an enforcement action pursuant to the Federal Food, Drug and Cosmetic Act (FDCA). *Id.* The prisoners contended that the FDA violated the FDCA by not approving specific drugs used in death penalty executions. *Id.* The Supreme Court emphasized the difference between affirmative agency actions under a clear statutory scheme and the refusal to act or undertake an enforcement action within the prosecutorial discretion of that agency. *Id.* at 832. The Court held that the Agency's refusal to act is presumptively nonreviewable by the judiciary. *Id.* at 832-33.

The Court in *Heckler* stated that an agency's enforcement decisions are based on its expertise in matters that often require the specialized knowledge of the agency. *Id.* at 831. The Court concluded that, while administrative actions are generally immune from judicial review, the action is only "presumptively unreviewable; the presumption may be rebutted where the substantive statute has provided guidelines for the Agency to follow in exercising its enforcement powers." *Id.* at 832-33.

Appellees will argue that the Department's decision not to perform an assessment of the natural resource damages in the instant case constituted an enforcement decision, and therefore, a discretionary act. Appellees will assert that an enforcement action begins with the investigation; the assessment that enables the Secretary to determine whether or not the Department had to act in order to protect the resource for

which it serves as a trustee under section 107(f) of CERCLA, 42 U.S.C. § 9607(f). Under *Heckler*, appellees will contend the City has the burden of showing that Congress intended to circumscribe an agency's enforcement discretion by providing meaningful standards to define the limits of this discretion. If Congress has not provided such standards, "then an agency refusal to institute (enforce) proceedings is a decision 'committed to agency discretion by law . . . .' " *Heckler*, 470 U.S. at 834-35. Therefore, the Department, as natural resources trustee, has only a discretionary duty to act.

The Department may also rely on citizen suit actions brought under other environmental laws, in which efforts to compel enforcement action by the EPA were rejected because they did not involve a nondiscretionary duty by the agency to enforce the law against a particular violator. *See, e.g., City of Seabrook v. Costle*, 659 F.2d 1371 (5th Cir. 1981).

The Department and Multi-Chem will assert that section 107(f) of CERCLA, U.S.C. § 9607(f) commits the question of enforcement to the sole discretion of the natural resources trustee, the Interior Department, thus opposing the City's contentions that the phrase, "shall act as a trustee," in section 107(f) of CERCLA, 42 U.S.C. § 9607(f), imposes a mandatory duty on the Department to conduct testing and assess damages. Section 107(f) of CERCLA, 42 U.S.C. § 9607(f) provides, in pertinent part, that "the President or the authorized representative of any state, shall act on behalf of the public as trustee of such natural resources to recover for such damages." 42 U.S.C. § 9607(f)(1). The power of enforcement duties, with regard to all National Wildlife Refuges, was delegated by the President to the Interior Department. Exec. Order No. 12,580, 52 Fed. Reg. 2923 (1987).

While the Department is described as a "trustee" for purposes of damage recovery, it is in fact the trustee for all natural resources. 42 U.S.C. § 9607(f)(1). Appellees will urge that since the Department is charged with the responsibility to recover damages for a vast amount of land, the Department must make practical choices as to when and where to assert its administrative authority. CERCLA's legislative history demonstrates that Congress intended that the Interior De-

partment limit the amount of claims through the use of settlements. H.R. REP. No. 98, 96th Cong., 1st Sess. 4, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6195.

The National Priorities List (NPL), created under CERCLA, ranks the most severe threats to the environment and to public health. 42 U.S.C. § 9605(a)(8)(B). The NPL contains designations of various sites which are known as the "top priority among known response targets." *Id.* Each of the fifty states is allowed to designate one facility to be placed on this list. *Id.* In *Eagle-Pitcher Industries v. EPA*, 759 F.2d 905, 919 (D.C. Cir. 1985), the court recognized that agencies charged with the enforcement of CERCLA may refuse to collect and assess damages against certain release sites because of limited funds or other priorities. The court stated that even if a site was on the NPL, an administrative agency could still refuse to take action at that release site. *Id.* at 908.

The Department made its decision not to act at the Refuge only after it conducted preliminary testing of the site and had extensive conversations with Multi-Chem. (R. 3). In *Sierra Club v. Clark*, 774 F.2d 1406 (9th Cir. 1985), the court permitted the Department, through the Bureau of Land Management, to interpret duties of the Federal Land Policy and Management Act of 1976 to pertain to the lands covered by that Act as a whole, rather than reviewing each on a case-by-case basis. In the case at bar, appellees will argue that this court should follow the language and intent of CERCLA and allow the Department to decide what is best for the country as a whole rather than on a claim system of first come first serve.

E. *The City of Northwood Will Argue that Section 107(f) of CERCLA Imposes upon the Department of Interior as Trustee Duties Under the Public Trust Doctrine.*

The City will further argue that Congress' use of the term "trustee" in section 107(f) of CERCLA, 42 U.S.C. § 9607(f), invokes the public trust doctrine and that the nondiscretionary duties of the Department of the Interior include the du-

ties of a trustee under the common law. The public trust doctrine is deeply rooted in Anglo-American common law. Huffman, *Phillips Petroleum Co. v. Mississippi: A Hidden Victory for Private Property?* 19 Envtl. L. Inst. 10051 (Feb. 1989).[5] The City will argue that the Department is subject to a general public trust duty. In *Sierra Club v. Department of the Interior*, 376 F. Supp. 90, 95 (N.D. Cal. 1974), the court held that the Department has a legal duty to "utilize the specific powers . . . whenever reasonably necessary for the protection of the park and that any discretion vested in the Secretary . . . is subordinate to his paramount legal duty imposed, not only under his trust obligation but by the statute itself . . . ." *Id.*

The Department of the Interior is subject to a general public trust duty under the National Park System Act, 16 U.S.C. §§ 1-460ee (1988). In *Sierra Club v. Department of the Interior*, 398 F. Supp. 284 (N.D. Cal. 1975), the court ordered the Department of the Interior to acquire lands on the periphery of the Redwood National Park in order to protect the scenery and wildlife within the park.

States have applied the public trust doctrine to protect their natural resources. State courts have not restricted the application of the doctrine to navigable waters. In New Jersey, the public trust doctrine applies to recreational uses of all publicly held beaches. *Borough of Neptune City v. Borough of Avon-By-The-Sea*, 61 N.J. 296, 294 A.2d 47 (1972). In Delaware, the public trust doctrine applies to public parks. *City of Wilmington v. Lord*, 378 A.2d 635 (1977).

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5. The earliest case in the United States was Arnold v. Mundy, 6 N.J.L. 1 (1821), in which the New Jersey Supreme Court rejected the claim of a riparian landowner to exclusive rights over oyster beds in tidal waters. The New Jersey Supreme Court in *Arnold* declared "[t]he sovereign power . . . cannot . . . make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right." *Id.* at 78. The United States Supreme Court first recognized the public trust doctrine in Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367 (1842), a case in which a claimant sought exclusive rights of oyster beds adjacent to his riparian land. The Supreme Court found the pre-statehood grants of the English Crown were invalid, as the public trust doctrine prevented the English Crown from granting such rights. *Id.* at 418.

F. *The Department of the Interior Will Argue that the Public Trust Doctrine Is Limited to Protection of the Public Use of Navigable Waterways and Has No Application to this Case.*

The Department, joined by Multi-Chem, will argue that application of the public trust doctrine is limited to the protection of navigable waterways for use by the people for navigation, fishing, and commerce, and has no application in this case.[6] This argument has support in a recent Supreme Court decision. In 1988, the United States Supreme Court decided *Phillips Petroleum v. Mississippi*, 484 U.S. 469, *reh'g denied*, 486 U.S. 1018 (1988), a case which involved competing private and public claims to nonnavigable, inland, tidal lands; *i.e.*, waters affected by the tides but not adjacent to the coast. The Supreme Court decided that Mississippi held the legal title to lands underlying nonnavigable tidewaters. 484 U.S. at 481. Titles remain in the state unless the tide land was granted by the state or unless subject to a pre-statehood grant, recognized at the time of statehood. The *Phillips Petroleum* opinion reaffirms the traditional "navigability in fact" test to determine whether non-tidal submerged lands are public trust lands. 484 U.S. at 479.

The appellees will argue that the Department is subject only to the trust duties imposed by CERCLA. In support of this argument is *Sierra Club v. Andrus*, 487 F. Supp. 443, 449 (D.D.C. 1980), where the court limited the Department's duties to the statutory duties enumerated in the National Park Service Organic Act of 1916, 16 U.S.C. § 1a-1 (1988). In further support of the appellees' position is *Sierra Club v. Block*, 622 F. Supp. 842, 866 (D. Colo. 1985), where the court stated: "Where Congress has set out statutory directives, as in the instant case, for the management and protection of public

6. In Illinois Central R.R. v. Illinois, 146 U.S. 387 (1892), the Supreme Court held unconstitutional an Illinois statute granting lands along the Chicago lake shore to the railroad. The grant violated a "trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties." *Id.* at 452.

lands, those statutory duties 'compris[e] all the responsibilities which defendants must faithfully discharge.' " *Id.* (quoting *Sierra Club v. Andrus*, 487 F. Supp. 443, 449 (D.D.C. 1980)). To hold otherwise, appellees will assert, and interpret the "public trust doctrine" as imposing a higher duty on the Department, would create a new duty to investigate and assess damages for every area with a hazardous release, no matter how minor.

ISSUE 2

WHETHER THE CITY OF NORTHWOOD MAY ACT AS PUBLIC RESOURCE TRUSTEE UNDER CERCLA SECTION 107(F), 42 U.S.C. § 9607, IN PLACE OF THE INTERIOR DEPARTMENT AND IN THE ABSENCE OF DESIGNATION AS TRUSTEE BY THE STATE GOVERNOR?

A. *The Statutory Context.*

CERCLA section 107(f), 42 U.S.C. § 9607(f) provides several potential means by which trustees may act to protect natural resources within a state. Section 107(f)(1) provides that under section 107(a), "liability shall be to the United States Government and to any State for natural resources within the State or belonging to, managed by, controlled by, or appertaining to such State . . . ." 42 U.S.C. § 9607(f)(1). Section 107(f)(1) goes on to provide "[t]he President, or the authorized representative of any State, shall act on behalf of the public as trustee of such natural resources to recover for such damages." 42 U.S.C. § 9607(f)(1). Section 107(f)(2)(A) provides that "[t]he President shall designate in the National Contingency Plan . . . the Federal officials who shall act on behalf of the public as trustees for natural resources . . . ." 42 U.S.C. § 9607(f)(2)(A). In section 107(f)(2)(B), the statute provides that "[t]he Governor of each State shall designate State officials who may act on behalf of the public as trustees for natural resources . . . ." 42 U.S.C. § 9607(f)(2)(B).

B. *Summary of the Arguments.*

In the second cause of action, the City asserts the right to

proceed as the trustee on its own behalf, and has sued Multi-Chem to compel a natural resource assessment and appropriate remedial action. The City will argue that section 107(f) of CERCLA, 42 U.S.C. § 9607(f) should be interpreted broadly to allow the City to act as the natural resource trustee for the Refuge. Multi-Chem will argue that the City may act as natural resource trustee only if it is designated as such by the governor of the state and that no such designation has been made.

C. *Interpretation of "State."*

In *Mayor of Boonton v. Drew Chemical Corp.*, 621 F. Supp. 663 (D.N.J. 1985), the district court, in interpreting section 107(a), held "CERCLA is to be given a broad and liberal construction." *Id.* at 666. The City will contend that it may bring an action under section 107(f) since "State," as defined by section 101(27), 42 U.S.C. § 9601(27), can be construed to include a municipality, such as the City of Northwood. The district court in *Mayor of Boonton* declared "[i]t has been said 'the word included is usually a term of enlargement and not of limitation . . . . It, therefore, conveys the conclusion that there are other items includable, though not specifically enumerated . . . .'" *Mayor of Boonton*, 621 F. Supp. at 666. In contrast, when the term "means" rather than "includes" is used, the definition is construed as being exclusive. *Id.* Following the rationale outlined by the district court in *Mayor of Boonton*, the City will assert section 101(27) explicitly contemplates an expansion of the illustrative list in section 101(27). The term "State" in section 101(27), 42 U.S.C. § 9601(27), does not expressly list municipalities, nor does it expressly exclude them.

In *Mayor of Boonton*, the court held that CERCLA section 101(27) "explicitly contemplates an expansion of the illustrative list by the courts to the fullest extent where to do so would be consistent with the remedial intent of the Act." *Mayor of Boonton*, 621 F. Supp. at 666. The district court went on to state:

> It would be anomalous for this far reaching remedial stat-

> ute [CERCLA] to give states a cause of action for damages to natural resources owned by the State but for it to exclude cities from access to such a cause of action while expressly including resources owned by "local governments" within the scope of the protected subject of § 9607(a)(4)(C).

Id.

The district court in *Mayor of Boonton* based its liberal construction of the statutory definition of "State" on a previous Supreme Court decision which found that a federal statutory definition utilizing the phrase, "shall be deemed to include," was "inclusive rather than exclusive." *Pfizer, Inc. v. India*, 434 U.S. 308, 312 (1978). This rationale was followed in *City of New York v. Exxon*, 697 F. Supp. 677, 684 (S.D.N.Y. 1988), where the court interpreted the definition of "State" in CERCLA section 101 to include a municipality. *Id.* at 684.

Based on the *Mayor of Boonton* and *City of New York* decisions, the City, supported on this issue by the Department, will urge the Court of Appeals for the Twelfth Circuit to find that the definition of "State" is not an exclusive term, and that a municipality such as the City is within the definition of the term "State" within section 107(f)(1). On this basis, the City will urge that it may act as the natural resource trustee of the Refuge and bring an action on behalf of the public under section 107(f)(1), 42 U.S.C. § 9607(f)(1).

Additionally, the City will argue that Congress tacitly affirmed the *Mayor of Boonton* and *City of New York* decisions at the time of the 1986 SARA amendments to CERCLA. The conference committee intentionally left the definition of "State" unchanged when enacting SARA stating it was "leaving it to the court's interpretation of [the provision]." Maraziti, *Local Governments: Opportunities to Recover for Natural Resource Damages*, 17 Envtl. L. Inst. at 10036(7) (Feb. 1987), *citing* H.R. REP. No. 962, 99th Cong., 2d Sess. 185 (1986). Further support of the congressional affirmation of the decisions in *Mayor of Boonton* and *City of New York* are the comments made by Senator Lautenberg, a member of the Conference Committee. Senator Lautenberg stated the

amendment would "uphold the *Boonton* decision allowing municipalities to sue for cost recovery under the same Superfund provisions available to states, and to *serve as trustees for natural resources.*" *Id.* (emphasis added), *citing* 135 CONG. REC. S14912 (daily ed. Oct. 3, 1986).

Multi-Chem will contend that cities are not included in the section 101, 42 U.S.C. § 9601, definition of "State" and the court should not hold to the contrary, against the plain language of the statute. Section 101(27) states: "The terms 'United States' and 'State' include the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, [and] the Commonwealth of Northern Marianas . . . ." This statute makes no reference to political subdivisions such as cities; therefore, appellees will urge that cities are not to be included in the definition. Additionally, there is no reference to political subdivisions in the Code of Federal Regulations authorizing cities to act as trustees for natural resources. 40 C.F.R. § 300.73 (1989).

D. *"Authorized Representative."*

The City and the Department will contend that the City can be designated as an "authorized representative" of the state and therefore can act as a trustee for the Refuge. Under section 107(f)(1), "[t]he President, or the authorized representative of any State, shall act on behalf of the public as trustee of such natural resources . . . ." 42 U.S.C. § 9607(f)(1). "[A]uthorized representative" is not defined within CERCLA, but the term has been defined by the courts. In *Mayor of Boonton*, the court held that "authorized representative" included the City of Boonton, and that the municipality could, therefore, serve as a natural resource trustee. *Mayor of Boonton*, 621 F. Supp. at 668. The district court stated:

> [T]hat either by liberally construing the language of CERCLA in light of its broad remedial purposes or by specifically construing § 9607(f) [§ 107(f)] in light of state law giving municipalities broad powers, a municipality is a state or authorized representative thereof for purposes

of invoking the provisions of CERCLA.

Id.

While this decision predates the SARA amendments, which added section 107(f)(2), and provides for the express designation of federal and state trustees, the City and the Department will argue the case should be given great weight based on its logical conclusion.

The Department, appointed by the President as natural resource trustee for all national wildlife resources, supports the City's efforts to act as natural resource trustee. The City will argue the Department's interpretation of the statute should receive deferential treatment by the court. The Supreme Court in *Chevron v. NRDC*, 467 U.S. 837 (1983), supports the City's position. In *Chevron*, the Supreme Court stated "when the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the Agency's answer is based on a permissible construction of the statute." *Id.* at 843. The Supreme Court held that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Id.* at 844. The Department and the City will contend the City may act as a natural resource trustee in accordance with the Supreme Court's decision in *Chevron*.

Appellees will contend that the City is not authorized to act as a trustee for natural resources under the provisions of CERCLA. Section 107(f)(2)(A) provides that "[t]he President shall designate . . . Federal officials who shall act . . . as trustees for natural resources . . . ." 42 U.S.C. § 9607(f)(2)(A). Section 107(f)(2)(B) provides "[t]he Governor of each state shall designate State officials who may act . . . as trustees for natural resources . . . ." 42 U.S.C. § 9607(f)(2)(B) (1988). The record indicates the Governor did not appoint an official of the City as official trustee. (R. 5-6). Relying on the plain language of section 107(f)(2) and the Governor's failure to appoint the City's mayor to a trustee's position, Multi-Chem will urge that the court should not interfere with the Governor's reasonable discretion.

Additionally, Multi-Chem will assert that section 107(f)

of CERCLA, 42 U.S.C. § 9607(f), added in the 1986 SARA amendments to CERCLA, defined an "authorized representative" as one who has been appointed to the position by the President or by a state governor. Appellees will assert that this section served to reverse prior court decisions which had allowed cities to serve as state trustees for state natural resource damage claims, such as in *Mayor of Boonton v. Drew Chemical Corp.*, 621 F. Supp. 663 (D.N.J. 1985) and *City of New York v. Exxon*, 697 F. Supp. 677 (S.D.N.Y. 1988). Appellees will argue the 1986 amendment was intended to clarify who could serve as a trustee for state natural resource damage claims by vesting the sole appointment power to the President or state governors. Therefore, based on CERCLA section 107(f)(2)(A) and (B), Multi-Chem will contend that the City cannot institute a natural resource damage action since it did not receive the statutorily required appointment from the Governor.

To support its position, Multi-Chem may cite *City of Philadelphia v. Stepan Chemical Corp.*, 713 F. Supp. 1484 (E.D. Pa. 1989). In that case, the district court did not consider the definition of "State" ambiguous nor did it find any support in the legislative history to include municipalities within the definition. *Id.* at 1489. The district court stated that the starting point in attempting to discern the intent of Congress in enacting a particular statutory section is the plain meaning of the words. *Id.* at 1488. The court noted the definition of "State" in CERCLA section 101, 42 U.S.C. § 9601, does not include the word "municipality." *Id.* Additionally, the court stated that "[t]he fact . . . that Congress, in other statutes, has defined 'state' broadly to include municipalities is of no moment" to interpreting "State" in terms of CERCLA. *Id.* at 1489. The district court found that since Congress had referred specifically to "municipalities," "local governments," and "political subdivisions" in certain sections of CERCLA, it was reasonable to conclude that "the omission of municipalities from the definition of 'State' was not accidental and that Congress had no intention of implicitly including municipalities within the word 'State.' " *Id.* at 1489, *citing* 42 U.S.C. §§ 9601(21), 9605(4).

The district court in *City of Philadelphia* declined to accept *Mayor of Boonton* as dispositive. *Id.* at 1489. The court found the language of section 107 conclusive and declined to substitute its judgment for that of Congress. *Id.* Relying on *City of Philadelphia*, appellees will assert that since Congress did not include the term "cities" as one of the parties who may bring an action for natural resource damages, where it had an ample opportunity to do so in the 1986 amendment, it should not reach a conclusion contrary to the intent of Congress. The court in *City of Philadelphia* examined the legislative history of SARA and concluded the amendment reflects Congress' decision not to include local municipalities within the definition of a "State." *Id.* at 1489, n. 15, *citing* H.R. CONF. REP. No. 962, 99th Cong., 2d Sess. 185, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3278. However, appellants may point to the fact that Congress did provide a clause which allows the governor of the state to appoint a local government as a trustee. 42 U.S.C. § 9607(f)(2).

Multi-Chem can argue the case at bar is factually distinguishable from *Mayor of Boonton* and *City of New York*. Unlike those two cases, the present case involves a trustee already appointed for the Refuge. In addition, the present case is distinguishable from these two previous decisions in that the City does not own the Refuge. The Refuge is a federal National Wildlife Refuge, (R. 2), and Multi-Chem will urge, it is the sole responsibility of the Department to act as the trustee for this Refuge.

Finally, the City might try to bring a claim for natural resource damages as a "person" under the citizen suit provisions of section 310(a), 42 U.S.C. § 9659(a).[7] CERCLA does not authorize private persons to assert natural resource damage claims, unless that "person" is a governmental entity. *Artesian Water Co. v. New Castle County*, 851 F.2d 643, 649 (3d Cir. 1988). Appellees will assert that since the City has not

7. Section 310(a) provides that a citizen suit enforcement action may be brought by "any person" "(1) against any person . . . who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to this chapter . . . ." 42 U.S.C. § 9659(a).

received such a designation, it is not authorized to bring such an action.