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Brief for Appellant: Second Annual Pace National Environmental Moot Court Competition

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No. 89-27

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CITY OF NORTHWOOD,
Appellant,

v.

SECRETARY, UNITED STATES
DEPARTMENT OF THE INTERIOR,

and

MULTI-CHEM CHEMICAL CO.,
Appellees.

BRIEF FOR APPELLANT*

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* The winning briefs published in this issue are reprinted substantially in their original form. The editorial staff of the *Pace Environmental Law Review* made minor revisions to citation form and spelling. The outline, writing style, and use of case and statutory law remains that of each group of authors.

QUESTIONS PRESENTED

I. Whether the district court erred in dismissing the City of Northwood's request for an order to the Department of the Interior to perform a natural resource damage assessment and recover damages from Multi-Chem Chemical Company under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)?

II. Whether the district court erred in dismissing the City of Northwood's CERCLA action for natural resource damages against Multi-Chem Chemical Company?

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OPINION OF THE LOWER COURT

City of Northwood v. Secretary, United States Dep't of the Interior, No. 89-453 (D. New Union 1989).

APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES INVOLVED**

43 C.F.R. § 11.32(d).

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1982 & Supp. V 1987).

U.S. Const. art. II, § 3.

** Full text set out in appendix.

STATEMENT OF THE CASE

This action arose from a pesticide leak that contaminated an underground aquifer connected to the Northwood National Wildlife Refuge. The contamination poses a grave danger to thousands of birds that use the refuge because the pesticide ingredients have been linked to nervous system damage among bird populations. Preliminary tests have found pesticides present in the waters on the refuge, but more complete sampling is necessary to determine the full extent of the contamination. The City of Northwood, New Union, filed this suit to force the United States Department of the Interior to complete the testing and assess natural resource damages against the chemical company responsible for the leak. In the alternative, the city sought permission to sue the chemical company directly. The lower court held that neither action was allowed under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1982 & Supp. V 1987).

I. STATEMENT OF THE FACTS

The appellant, the City of Northwood, is located approximately thirty miles north of New Union City, the capital of the State of New Union. (R. 1). Northwood's boundaries completely enclose the Northwood National Wildlife Refuge, which is a stopping point for waterfowl along an important flyway. (R. 1, 2). Because thousands of birds use the refuge's marshes and wetlands during their fall and spring migration, the refuge plays a vital role in the ecosystem of North American waterfowl. (R. 1, 2). The United States Department of the Interior has concluded that if the refuge were replaced by development, the bird population would drop significantly. (R. 1).

The refuge also plays a major role in the economic and environmental vitality of the City of Northwood. (R. 1, 2). Once a thriving industrial town, Northwood suffered a severe economic setback when many industries left the area following World War II. (R. 1). The unemployment rate rose, and the city's economy looked bleak. (R. 1). In the last ten years,

however, Northwood's economy has improved markedly, mainly due to an influx of young professionals who bought homes in Northwood and commute to work in New Union City. (R. 1).

One of the main reasons for Northwood's popularity among these affluent commuters is the Northwood National Wildlife Refuge. (R. 1). The refuge serves as an important visual and noise buffer between the city and the highway corridor on the opposite end of the refuge. (R. 2). The refuge also features a network of trails for biking, hiking and birdwatching. (R. 2). The city's strong affinity with the refuge is perhaps best illustrated by the large number of cars sporting bumper stickers which read, "Northwood: We're for the birds." (R. 2). Although the refuge is owned and administered by the United States Department of the Interior, which is one of the appellees, the city's ordinances apply within the refuge and the city supplies utilities such as fire protection and trash removal to the refuge. (R. 1, 2).

Until recently, Northwood also was the home of a small pesticide processing plant owned by the other appellee, the Multi-Chem Chemical Company. (R. 2). The plant, which was located within the city limits just outside the refuge's boundary, was closed in 1985 when Multi-Chem consolidated its operations into one of its larger facilities. (R. 2). Shortly before the plant closed, however, the city's health department discovered several Multi-Chem pesticide ingredients in the drinking water wells of homes located near the plant. (R. 2). The ingredients, which all meet the test for "hazardous substances" under federal law and are not naturally occurring, were found downgradient — i.e., downstream in the underground aquifer — from the plant. (R. 2).

The city closed the contaminated wells and connected the affected homes to the city's water system in 1987 at a cost of $230,000. (R. 3). Without admitting liability and without the city's waiver of any legal claims, Multi-Chem agreed to reimburse the city for these costs in 1988. (R. 3). The city, however, remains concerned about the refuge and its waterfowl because articles in the academic literature have linked the pesticides to nervous system damage among bird populations.

(R. 3).

The shallow aquifer in which the pesticides were found is believed to flow from the Multi-Chem plant, underneath the homes tested by the city, and onward to the wetlands and marshes within the refuge. (R. 2). Preliminary testing by the city showed some pesticides present in the refuge waters, but all the parties agree that more complete sampling over several seasons of the year is necessary to determine the full extent to which the contamination has entered the surface waters of the refuge. (R. 2, 3).

The Interior Department has indicated that it would like to perform a damage assessment on the refuge but cannot afford one. (R. 4). The estimated cost of performing the assessment is $1.1 million. (R. 4). The Department concedes that it could legally spend part of its $100 million general operations budget for the assessment. (R. 4). However, the Secretary of the Interior has decided that the money would be better spent on daily upkeep of the various refuges, employee salaries, and some long-planned repairs and improvements for refuge buildings throughout the system. (R. 4). The Department has refused to ask Congress for a line-item appropriation in its budget to pay for the assessment. (R. 4). The Department contends that even if the request were granted, the money would come out of the Department's general appropriation, thus reducing the amount of funds available for the other refuge operations. (R. 4, 5).

The governor of New Union has appointed several state officials as natural resources trustees. (R. 5). However, the governor declined to appoint the mayor of Northwood as a trustee for the resources in Northwood. (R. 5, 6). The designated state trustees have said that they, too, lack sufficient funds to conduct a damage assessment at the refuge. (R. 6).

II. THE PROCEEDINGS BELOW

Northwood brought this suit in 1989 under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) §§ 103-405, 42 U.S.C. §§ 9601-9675 (1982 & Supp. V 1987). (R. 3).

In its first cause of action, the city sought an order under CERCLA's citizen suit provision, 42 U.S.C. § 9659 to force the Interior Department to fulfill its role as "natural resources trustee" for the refuge as required by section 107(f) of CERCLA, 42 U.S.C. § 9607(f). (R. 3). The city wants the Department to complete the testing necessary to assess natural resource damages against Multi-Chem. (R. 3). The funds recovered from Multi-Chem would be used to build an aquifer treatment plant to cleanse the groundwater and to restock the bird population if it falls below present levels. (R. 3).

In the alternative, the city's second cause of action sought permission for the city to act as natural resources trustee under section 107(f) of CERCLA, 42 U.S.C. § 9607(f), thereby allowing the city to file its own suit against Multi-Chem for natural resource damages. (R. 3).

The Interior Department and Multi-Chem filed motions to dismiss the suit. (R. 3). The Interior Department argued that CERCLA does not authorize the city to seek an order forcing the Department to take action; but the Department supported the city's efforts to serve as natural resources trustee under CERCLA. (R. 3). Multi-Chem argued that the city is not authorized to serve as natural resources trustee. (R. 3).

The lower court granted both motions to dismiss. (R. 5, 6). The court ruled that it lacked subject matter jurisdiction over the first cause of action because CERCLA's citizen suit provision can be used only to force a government official to perform a nondiscretionary duty. (R. 4, 5). The court said the Interior Department's decision not to perform a damage assessment was within the Department's discretionary authority. (R. 5). On the second cause of action, the lower court held that CERCLA does not authorize a municipality to act as a natural resources trustee. (R. 6). The court said CERCLA gives such authority only to federal and state officials, and that municipalities do not come within CERCLA's definition of a state. (R. 5, 6).

The city subsequently filed petitions to appeal, and this court granted the petitions.

SUMMARY OF ARGUMENT

Section 107(f) of CERCLA provides that liability for damages to natural resources shall be to the United States government or to the states that own, manage or control the resources. 42 U.S.C. § 9607(f). The President is required to designate federal officials who shall act on behalf of the public as trustees of the nation's natural resources. *Id.* § 9607(f)(2)(A). The section further requires that such trustees shall assess damages to natural resources for the purpose of recovering such damages from the responsible party. *Id.*

These provisions of CERCLA impose upon the Interior Department a nondiscretionary duty (1) to act as a natural resources trustee and (2) to conduct damage assessments for resources protected by the trustee. The mandatory character of this duty, which is evident from CERCLA's plain language and statutory purpose, belies the lower court's finding that the decision to conduct a damage assessment is a discretionary enforcement decision.

Under CERCLA's citizen suit provision, any person — including municipalities — may file suit to force a federal official to perform a nondiscretionary duty. *Id.* § 9659. Therefore, the lower court erred in holding that it lacked subject matter jurisdiction over this suit to force the Interior Department to conduct a damage assessment at the Northwood National Wildlife Refuge.

The lower court also erred in ruling that a municipality may not serve as a natural resources trustee. CERCLA's natural resource damage provisions, when taken in context and read as a whole, require that municipalities be allowed to act as trustees to preserve their own natural resources.

Section 107(f) provides that liability shall be to the federal government and to any State for damage to natural resources belonging to, managed, or controlled by the State. *Id.* § 9607(f)(1). Two well-reasoned federal court decisions have concluded that CERCLA's expansive definition of "State" is broad enough to encompass local governments. Legislative history shows that Congress effectively codified these judicial interpretations by refusing to alter the statutory definition

when it enacted the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (1986).

Allowing cities to serve as trustees is also necessary to carry out CERCLA's twin goals of (1) protecting and preserving public health and the environment, and (2) ensuring that the parties who are responsible for releasing hazardous substances will bear the costs for remedying the problems they cause. As this case demonstrates, federal and state authorities are often overburdened and underbudgeted; in many cases, only local governments will have the interest and incentive to protect the resources in their own backyards.

ARGUMENT

I. THE INTERIOR DEPARTMENT, AS A NATURAL RESOURCES TRUSTEE UNDER CERCLA SECTION 107(F), HAS A NONDISCRETIONARY DUTY TO ASSESS AND RECOVER NATURAL RESOURCE DAMAGES.

Section 301(a)(2) of CERCLA authorizes any person to file a civil action against "the President or any other officer of the United States . . . where there is alleged a failure of the President or of such officer to perform any act or duty [under CERCLA] . . . which is not discretionary with the President or such other officer." 42 U.S.C. § 9659(a)(2).

The City of Northwood qualifies as a person under the definition in section 101(21), 42 U.S.C. § 9601(21) (1982) ("The term 'person' means . . . United States Government, State, municipality, commission, political subdivision of a State, or any interstate body."). Therefore, the city is authorized to seek a court order forcing the Interior Department to perform its nondiscretionary duties as trustee over national wildlife refuges. As discussed below, the Department's nondiscretionary duties include conducting an assessment of the natural resources damage at the Northwood National Wildlife Refuge and recovering from the Multi-Chem Chemical Company for those damages.

A. *CERCLA's Plain Language Establishes a Nondiscretionary Duty to Perform Damage Assessments.*

Under section 107(a) of CERCLA, a party responsible for the release of a hazardous substance is liable for any injury to or destruction of natural resources. 42 U.S.C. § 9607(a). Natural resources are 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, any foreign government, any Indian tribe, or . . . any member of an Indian tribe.

42 U.S.C. § 9601(16).

Section 107(f) provides that such 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). "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." *Id.*

The statute, as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (1986), requires the President to designate federal officials who shall act as trustees. 42 U.S.C. § 9607(f)(2)(A). "Such officials shall assess damages for injury to, destruction of, or loss of natural resources . . . for resources under their trusteeship 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." *Id.*

These natural resource damages provisions in CERCLA establish both a general duty to act as a trustee, and a specific duty to conduct damage assessments for resources protected by the trustee. In interpreting these provisions, the court should keep in mind that "CERCLA is essentially a remedial statute designed by Congress to protect and preserve public health and the environment. We are therefore obligated to

construe its provisions liberally to avoid frustration of the beneficial legislative purposes." *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986).

The duties imposed upon natural resources trustees are directly applicable to the Interior Department in this case because the President has delegated the trusteeship over national wildlife refuges to the Department. Exec. Order No. 12580, 52 Fed. Reg. 2923 (1987).

1. The duties of a trustee under general trust law.

The statute does not define the term "trustee." Therefore, the court must look to its ordinary meaning. "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979).

At the very least, Congress intended to use the word "trustee" in its general sense — i.e., as "one in whom an estate, interest or power is vested, under an express or implied agreement to administer or exercise it for the benefit or use of another . . . ." *Black's Law Dictionary* 1357 (5th ed. 1979). Under this definition, the trustee has certain fiduciary duties to the beneficiaries of the trust. Most notably, a trustee has general duties "to take reasonable steps to take and keep control of the trust property . . . to use reasonable care and skill to preserve the trust property . . . and to take reasonable steps to realize on claims which he holds in trust." *Nedd v. United Mine Workers of America*, 506 F. Supp. 891, 900 (M.D. Pa. 1980) (quoting Restatement (Second) of Trusts §§ 175-77 (1959)). The latter of these duties is particularly applicable to the instant case involving natural resource damages. As explained in the Restatement's comment, "If a third person commits a tort with respect to the trust property, it is the duty of the trustee to take reasonable steps to compel him to redress the tort." Restatement (Second) of Trusts § 177, comment a (1959).

The Interior Department, therefore, has a duty as a natu-

ral resources trustee to preserve the trust corpus — in this case, the Northwood National Wildlife Refuge — and to take reasonable steps to recover for damages to the refuge. Thus, the Department has nondiscretionary duties that can be enforced through CERCLA's citizen suit provision.

This rule applies even where the trustee is a government official, as illustrated in the school land trust cases. To protect against unauthorized diversions of trust property, the courts adopted a policy "favoring judicial protection of the school lands trusts." *United States v. 111.2 Acres of Land in Ferry County, Wash.*, 293 F. Supp. 1042, 1047 (E.D. Wash. 1968) ("[I]t has fallen to the courts to protect the trust corpus and assure that it is devoted solely to support the common schools.").

2. The duties imposed by the public trust doctrine.

A number of commentators have suggested that Congress, in using the word "trustee" in CERCLA § 107(f), intended to invoke the public trust doctrine. "[T]he roles of government claimants in resource damages proceedings under CERCLA are consistent with the common law public trust doctrine, which authorizes a sovereign to act on behalf of the public to protect natural resources." Menefee, *Recovery for Natural Resource Damages Under Superfund: The Role of the Rebuttable Presumption*, 12 Envtl. L. Rep. (Envtl. L. Inst.) 15,057, 15,058 (1982). *See also* Kenison, Bucholz & Mulligan, *State Actions for Natural Resource Damages: Enforcement of the Public Trust*, 17 Envtl. L. Rep. (Envtl. L. Inst.) 10,434, 10,435 (1987).

A review of CERCLA's legislative history strongly suggests "that Congress intended to structure CERCLA's natural resource provisions in accordance with the public trust doctrine." Comment, *CERCLA's Natural Resource Damage Provisions: A Comprehensive and Innovative Approach to Protecting the Environment*, 45 Wash. & Lee L. Rev. 1417, 1435 (1988) [hereinafter Comment, *Damage Provisions*]. As an illustration of this legislative intent, the Senate Environment and Public Works Committee Report on CERCLA states:

> The Committee found during its own hearings and from Committee-requested research by the Library of Congress (Report No. 96-13) that damage to natural resources due to releases of hazardous wastes is a very serious problem. . . . The Committee received testimony indicating that both short and long-term damages to natural resources resulted from releases of hazardous substances and that standardized techniques for assessing both the biological and economic damages from such releases should be developed. Testimony also indicated that it was appropriate and necessary for the State or in some instances the Federal Government acting as trustee for such resources to seek restitution for damages or restoration of such resources.

S. Rep. No. 848, 96th Cong., 2d Sess. 84 (1980).

One of the biggest problems facing claimants prior to the enactment of CERCLA was that traditional common law tort theories did not adequately redress the damages inflicted upon natural resources. "The legislative history illustrates . . . that a motivating force behind the CERCLA natural resource damage provision was Congress' dissatisfaction with the common law." *State of Ohio v. United States Dep't of the Interior*, 880 F.2d 432, 455 (D.C. Cir. 1989). *See also Hazardous and Toxic Waste Disposal Field Hearings, Joint Hearings Before the Subcomms. on Environmental Pollution and Resource Protection of the Senate Comm. on Environment and Public Works*, 96th Cong., 1st Sess. 155 (1979) (statement of Peter H. Weiner, special assistant, California Governor's Office: "We think it is especially essential, and we know it is your special interest, to provide for recovery of environmental damages which otherwise might be difficult to obtain in some courts."). *Id.*

One of the most troubling aspects of the common law was the issue of standing. The courts routinely held that citizens did not have standing to sue for damages to natural resources, and the resources themselves do not have standing. *See generally* C. Stone, *Should Trees Have Standing*? (1974). Therefore, in order to allow recovery for damage to natural resources, it was necessary for Congress to create a statutory

cause of action.

It is important to note, however, that CERCLA does not merely establish a federal remedy; such a remedy could have been created simply by declaring that a polluter is liable for natural resource damages and must compensate the state or federal government for these damages. This was the approach taken in the original House version of CERCLA: "In the case of any such damages or loss with respect to natural resources owned, controlled, or managed by the United States or by a State or local government, the liability for such damages or loss shall be to the United States or to such State or local government, as the case may be." H.R. 7020, 96th Cong., 2d Sess. § 3071(c)(2). In contrast, the final wording of CERCLA goes one step further, declaring that the federal and state governments are the trustees of these resources. The only logical reason for inserting this language is to impose *duties*, as well as rights, upon the federal and state governments.

Moreover, it appears clear that CERCLA's natural resource damage provisions were based upon existing state programs. For example, the Senate subcommittees heard testimony about Alaska's hazardous waste management program, which was developed under the state's general environmental policy "to develop and manage the basic resources of water, land and air to the end that the State may fulfill its responsibility as trustee of the environment for the present and future generations." *Hazardous and Toxic Waste Disposal Field Hearings, Joint Hearings Before the Subcomms. on Environmental Pollution and Resource Protection of the Senate Comm. on Environment and Public Works*, 96th Cong., 1st Sess. 173 (1979) (statement of Deming Cowles, deputy commissioner of the Alaska Department of Environmental Conservation).

Thus, it appears to presume that Congress intended to invoke public trust principles when it used the word "trustee" in CERCLA's natural resource damages provisions.

The district court in the instant case rejected this view of CERCLA's trust provisions, however, finding that the public trust doctrine "is too narrow for this." (R. 5). The court cites to Huffman, *Phillips Petroleum Co. v. Mississippi: A Hidden*

Victory for Private Property?, 19 Envtl. L. Rep. (Envtl. L. Inst.) 10,051 (1989), to support its decision. This article, however, is inapposite to the facts of this case.

Huffman's proposition is that the geographic reach of the public trust doctrine is limited to lands affected by the tides or underlying navigable waters: "nontidal, nonnavigable wetlands are beyond the reach of the public trust doctrine." *Id.* at 10054. Thus, the lower court appears to be saying that the public trust doctrine is inapplicable to the nontidal and nonnavigable wetlands and marshes of the Northwood National Wildlife Refuge.

This view, however, misses the point. The city is not attempting to apply the common law public trust doctrine in this case. Rather, the city is arguing that Congress has taken the basic principles of the public trust doctrine — that the government must protect and preserve such property for the benefit of the public — and applied these principles to all natural resources owned or controlled by the government. Thus, the court is not being asked to expand the geographic reach of a common law remedy, but to recognize that Congress itself has expanded that reach by creating a statutory duty that applies to all of the nation's natural resources.

3. The statutory duty to conduct damage assessments.

In addition to the general duties implied by CERCLA's declaration that federal and state officials must act as trustees over natural resources, CERCLA explicitly imposes upon these trustees the duty of assessing natural resources damages.

Section 107(f)(2) expressly states that the President shall designate federal officials to act as natural resources trustees. 42 U.S.C. § 9607(f)(2)(A). The section goes on to require that "[s]uch officials shall assess damages for injury to, destruction of, or loss of natural resources . . . for resources under their trusteeship 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 trustee-

ship." *Id.* The plain language of the statute, therefore, establishes a nondiscretionary duty for federal officials to conduct these assessments on federal lands.

Where a statute states that an act "shall" be carried out, such language generally is regarded as mandatory. *See, e.g., Anderson v. Yungkau*, 329 U.S. 482 (1947). "Though this rule of construction is not absolute, where the statute's purpose is the protection of public or private rights, as opposed to merely providing guidance for government officials, courts usually interpret 'shall' as imposing mandatory rather than directory duties." *South Carolina Wildlife Fed'n v. Alexander*, 457 F. Supp. 118, 130 (D.S.C. 1978).

Also significant is the fact that Congress used the word "shall" with respect to a federal trustee's duties toward lands under the federal trusteeship, and "may" with respect to lands under state trusteeship. When "shall" and "may" are used in the same document, " 'shall' imposes a mandatory obligation and 'may' grants discretion." *Koch Refining Co. v. United States Dep't of Energy*, 504 F. Supp. 593, 596 (D. Minn. 1980) (citing *Farmers' & Merchants Bank v. Federal Reserve Bank*, 262 U.S. 649, 662-63 (1923)). In addition, the statutory provision uses the words "at the Federal officials' discretion" with respect to the lands under state trusteeship. Thus, the wording in section 107(f)(2)(A) makes it clear that Congress knew how to establish mandatory duties, as opposed to discretionary duties. The obvious construction of this provision is that Congress intended to make it mandatory for federal officials to conduct assessments on federal lands, but gave them discretion to conduct such assessments on state lands.

The mandatory character of the statutory provisions is consistent with CERCLA's dual purposes of protecting and preserving natural resources and the public health, and ensuring "that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created." *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986) (quoting *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982)). A natural resources trustee can recover from a responsible party

only after the damages to a natural resource have been assessed. Therefore, in order to fulfill the statutory purpose, the trustees must assess these natural resource damages.

Moreover, legislative history on SARA demonstrates that the language in section 107(f)(2) was added to "clarify existing language about the responsibilities of Federal and State natural resources trustees." H.R. Rep. No. 253, 99th Cong., 1st Sess., pt. 1, at 133, *reprinted in* 1986 U.S. Code Cong. & Admin. News 2835, 2915. The House Committee on Merchant Marine and Fisheries expressly states:

> The primary obligations of the federal trustees under CERCLA are twofold. The trustees are directed to assess the damages to natural resources under their authority in order to determine the degree of injury and the value of the damages resulting from the releases. With this information, they are then directed to bring actions against responsible parties to recover the damages to the natural resources and to use the sums recovered to restore the natural resources.

H.R. Rep. No. 253, 99th Cong., 1st Sess., pt. 4, at 39, *reprinted in* 1986 U.S. Code Cong. & Admin. News 3068, 3069. Thus, it seems clear that CERCLA imposes a nondiscretionary duty, enforceable through the statute's citizen suit provisions, to perform natural resource damage assessments and to attempt to recover damages from the responsible party.

B. *CERCLA's Natural Resource Damage Provisions are not a Matter of Prosecutorial Discretion.*

The lower court erred in finding that the Interior Department's decision of whether to perform a natural resource damage assessment is an enforcement decision which is within the agency's discretion, and that the court therefore lacks subject matter jurisdiction under CERCLA's citizen suit provision to force the Department to conduct the assessment. (R. 5).

The United States Supreme Court, in *Heckler v. Chaney*, 470 U.S. 821, 832 (1985), held that an agency's decision not to take enforcement action is immune from judicial review be-

cause such decisions traditionally have been "committed to agency discretion." However, the court emphasized that an enforcement decision is only presumptively unreviewable.

> [T]he presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement power. . . . Congress may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue.

Id. at 832-33 (footnote omitted).

In this case, Congress has circumscribed the Interior Department's power by explicitly requiring the Department to conduct natural resource damage assessments whenever there has been an injury to, destruction of, or loss of natural resources under section 107(a) of CERCLA. 42 U.S.C. § 9607(a) & (f).

Thus, this case is analogous to *Dunlop v. Bachowski*, 421 U.S. 560 (1975), where the Court held that judicial review was available in a suit filed under section 482 of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 482. The statute in that case provided that, when a union member has filed a complaint regarding violations of the act, "[t]he Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation . . . has occurred . . . he shall . . . bring a civil action . . . ." *Id.* The Court, in its later opinion in *Heckler v. Chaney*, explained that judicial review was available in *Dunlop* because the statute "quite clearly withdrew discretion from the agency and provided guidelines for exercise of its enforcement power." 470 U.S. at 834.

In the case at bar, CERCLA likewise sets precise guidelines for the agency to follow: the agency must conduct a damage assessment whenever there has been "an injury to, destruction of, or loss of natural resources . . . ." 42 U.S.C. § 9607(f)(2)(A). Because the agency's refusal to initiate the damage assessments is "a clear abdication of the agency's statutory responsibilities," the court may order the agency to

make the assessments. *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 751 (1985) (Stevens, J., dissenting).

Furthermore, section 107(f)(2)(A)'s requirement that trustees conduct damage assessments is not an enforcement decision at all. Rather, it is more like the investigation requirement in the statute at issue in *Dunlop*. There, the Secretary of Labor did not dispute the fact that he was required to investigate all complaints to determine whether there was probable cause that a violation occurred. The Secretary merely argued that after making this determination, the Secretary had discretion to prosecute the violation. Similarly, under CERCLA, the natural resources trustees are required to conduct damage assessments to determine the extent of the injury to or destruction of the natural resource. If there is any prosecutorial discretion at all, such discretion would apply only to the trustee's decision on whether to file a claim against the responsible party to recover for those damages.

When viewed from this perspective, CERCLA's natural resource damage provisions are more analogous to the National Environmental Policy Act's requirement that federal agencies "shall" complete an environmental impact statement for "major Federal actions significantly affecting the quality of the human environment . . . ." 42 U.S.C. § 4332(2)(C). It is beyond question that the courts may review an agency's compliance with NEPA's requirements. In *Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n*, 449 F.2d 1109, 1112 (D.C. Cir. 1971), for example, the court flatly rejected the agency's argument that "the vagueness of the NEPA mandate and delegation leaves much room for discretion . . . ." Instead, the court found that section 102 of NEPA, 42 U.S.C. § 4332, "mandates a particular sort of careful and informed decision-making process and creates judicially enforceable duties." 449 F.2d at 1115. Similarly, judicial review must be available where Congress has mandated that natural resources trustees conduct damage assessments.

C. *Protection of the Nation's Natural Resources is a Top Priority Under CERCLA.*

The Interior Department has responded that it would like to conduct a damage assessment at the Northwood National Wildlife Refuge, but lacks the funds to do so. (R. 4). The Department admits that it has $100 million in its general operating budget for the wildlife refuges. (R. 4). But the Department had decided that daily upkeep of the refuges and long-planned repairs and improvements to refuge buildings throughout the system are a higher priority than funding the natural resources damage assessment at Northwood. (R. 4). As demonstrated below, the Department's budgetary priorities run directly contrary to the priorities established by Congress under CERCLA. Moreover, CERCLA's goal is to have the responsible parties pay for natural resource damages — including the cost of damage assessments. Thus, the agency can escape its funding dilemma by contracting with Multi-Chem to have the company itself conduct the assessment.

1. Mandatory duties should take precedence in agency budgetary decisions.

The Interior Department apparently contends that it has full discretion over how it may spend its general appropriation for wildlife refuge operations. There is some authority for the proposition that a lump-sum appropriation "leaves it to the recipient agency . . . to distribute the funds among some or all of the permissible objects as it sees fit." *International Union, United Auto., Aerospace & Agricultural Implement Workers of Am. v. Donovan*, 746 F.2d 855 (D.C. Cir. 1984). Given this discretion, the agency's decision would not be subject to judicial review. *Id.* at 863.

However, Justice Scalia's opinion in the *UAW* case makes it clear that there are some instances in which an agency may be constrained to expend a certain portion of a lump-sum appropriation on a particular program. *Id.* at 863 n.5. Justice Scalia explains that one such constraint would arise where a substantive statute establishes a system of statutory entitlement over which the agency has no control. *Id.*

Similarly, an agency should be constrained to expend a portion of a lump-sum budget for activities which are mandated by Congress. To hold otherwise would allow agencies to substitute their priorities for those priorities mandated by Congress. Such a result would run counter to the tripartite system of government, where each branch has certain defined functions established by the Constitution. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978).

> While "[i]t is emphatically the province and duty of the judicial department to say what the law is," . . . it is equally — and emphatically — the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation. Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought.

Id. The Executive's duty to administer the laws is expressly stated in the Constitution, which provides that the President "shall take care that the Laws be faithfully executed . . . ." U.S. Const. art. II, § 3. If the agency lacks sufficient funding in its general budget to carry out a legislative mandate, the agency should point this out to Congress. *See Campbell v. United States Dep't of Agric.*, 515 F. Supp. 1239, 1249 (D.D.C. 1981) ("If in fact Congress has set [agency officials] with an impossible task, their remedy is with Congress and not this Court.").

In the case at bar, the Interior Department's refusal to ask Congress for a line-item appropriation to pay for the damage assessment is indicative of the Department's desire to circumvent the will of Congress. The Department's fear is that if the request were granted, the money would come out of the Department's general appropriation, thus reducing the amount of funds available for the other refuge operations. (R. 4, 5). That may well be the case, but this is precisely the type of decision that should be left to Congress. In effect, by failing to ask Congress for a line-item appropriation, and by refusing

to spend its lump-sum appropriation for the damage assessment, the Interior Department is usurping the legislative powers of Congress. *See Local 2677, The Am. Fed'n of Gov't Employees v. Phillips*, 358 F. Supp. 60, 75 (D.D.C. 1973); *see also State of La. ex rel. Guste v. Brinegar*, 388 F. Supp. 1319, 1325 (D.D.C. 1975) ("To contend that the obligation imposed upon the president to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution and entirely impermissible.").

By enacting the natural resources damage provisions of CERCLA, Congress has made the determination that preservation of the nation's natural resources is of top priority. Thus, Congress has spoken "in the plainest of words, making it abundantly clear that the balance has been struck in favor of" protecting natural resources and recovering from parties who injure or destroy such resources. *See Tennessee Valley Auth. v. Hill*, 437 U.S. at 194. It is not for the Interior Department to decide that the money would be better spent on repairs or improvements to the buildings on refuges throughout the system. Indeed, it makes no sense to pay for improvements that eventually may be left to waste on a wildlife refuge that must be abandoned due to contamination.

2. CERCLA provides alternative funding sources.

As a practical matter, the Interior Department need not rely solely upon its own budget to finance the natural resources damage assessment at the Northwood National Wildlife Refuge. Congress has provided two funding options that may alleviate the Department's budget concerns.

First, the major objective behind CERCLA's natural resource damage provisions is to make responsible parties pay for the harm they have caused. "In order to preserve the public trust in the Nation's natural resources, [CERCLA] establishes strict liability for [natural resource damages]." S. Rep. No. 848, 96th Cong., 2d Sess. 84 (1980). Under section 107(a) parties responsible for releasing a hazardous substance shall be liable for "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." 42 U.S.C. § 9607(a) (emphasis added). Thus, natural resources trustees can collect from the responsible party not only for the actual damages, but also for the costs of assessing the damages.

Moreover, the legislative history of SARA suggests that natural resources trustees also have the option of having the responsible party conduct the damage assessment. The House Merchant Marine and Fisheries Committee identified this option by stating, "[o]f course, by specifying that the federal natural resources trustees shall assess damages, the Committee does not intend to foreclose their flexibility to reach agreements with potentially responsible parties whereby the parties themselves undertake the assessments." H.R. Rep. No. 253, 99th Cong., 1st Sess., pt. 4, at 49 (1985), *reprinted in* 1986 U.S. Code Cong. & Admin. News 3068, 3079. Delegation of the assessment task to potentially responsible parties is authorized in the Department's regulations.

> At the option of the authorized official and if agreed to by any potentially responsible party or parties acting jointly, the potentially responsible party or any other party under the direction, guidance, and monitoring of the authorized official may implement all or any part of the Assessment Plan finally authorized by the authorized official.

43 C.F.R. § 11.32(d). The regulation was upheld in *State of Ohio v. United States Dep't of the Interior*, 880 F.2d 432, 466-67 (D.C. Cir. 1989).

Given this option, the Interior Department may choose to contract to have Multi-Chem conduct the damage assessment, thereby avoiding the necessity of paying for these costs up front and later seeking reimbursement from Multi-Chem under section 107(a). If Multi-Chem is unwilling to make such an agreement, however, the Department can still conduct the assessment out of its own budget and file a claim against Multi-Chem for the costs.

The 1986 amendments to CERCLA also preserved the

Department's right to seek reimbursement from the Superfund for natural resource damage assessments. Although the 1986 amendments provided that "[n]o natural resource claim may be paid by the Fund unless the President has determined that the claimant has exhausted all administrative and judicial remedies to recover the amount of such claim from [the responsible parties]," Congress expressly excluded the costs of natural resource damage assessments from this provision. 42 U.S.C. § 9611(b)(2).

II. CERCLA AUTHORIZES THE CITY TO BRING AN ACTION ON ITS OWN BEHALF AS A NATURAL RESOURCES TRUSTEE.

CERCLA's natural resource damage provisions, when considered as a whole, allow municipalities to act as natural resources trustees and to bring their own actions for natural resource damages. This view, which has been adopted by the two federal courts that have considered the issue, is supported not only by the plain language of the act but also by legislative history. More importantly, however, acknowledgement of a municipality's right to act as a natural resources trustee is vital to the underlying objectives of CERCLA — in many cases, a local government is the only party with sufficient interest and incentive to take the necessary action.

A. *CERCLA's Plain Language Allows Municipalities to Act as Natural Resources Trustees.*

CERCLA's natural resource damage provisions are scattered throughout the Act. In order to determine the precise scope and meaning of each provision, each section of the Act must be carefully pieced together and read in context. "It is a generally accepted precept of interpretation that statutes or regulations are to be read as a whole, with 'each part or section . . . construed in connection with every other part or section.' " *American Fed'n of Gov't Employees Local 2782 v. Federal Labor Relations Auth.*, 803 F.2d 737, 740 (D.C. Cir. 1986).

As a starting point, section 107(a) provides that a respon-

sible party shall be held liable for "damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction or loss. . . ." 42 U.S.C. § 9607(a). Natural resources are 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*, any foreign government, any Indian tribe, or . . . any member of an Indian tribe.

42 U.S.C. § 9601(16) (emphasis added).

Section 107(f) provides that liability for natural resource damages 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) (emphasis added). "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." *Id.* (emphasis added).

Because this language refers to the federal government and states, it is necessary to examine the Act's definition of a "State" to determine whether it also covers local governments. The definitions section of CERCLA provides:

> 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, the Commonwealth of the Northern Marianas, and any other territory or possession over which the United States has jurisdiction.

42 U.S.C. § 9601(27) (emphasis added).

1. CERCLA's definition of "State" includes cities.

The two courts that have considered the issue thus far have ruled that municipalities may sue for natural resource damages under CERCLA § 107(f). *City of New York v. Exxon*

Corp., 633 F. Supp. 609 (S.D.N.Y. 1986); *Mayor of Boonton v. Drew Chem. Corp.*, 621 F. Supp. 633 (D.N.J. 1985). Both courts rejected the argument that local governments cannot act as trustees because the Act specifies that liability is "to the United States or to any State." *Exxon*, 633 F. Supp. at 619; *Drew Chem.*, 621 F. Supp. at 666.

Arguably, the normal meaning of the word "state" would not include political subdivisions of the state. However, the New York court said that such a literal reading of the statute would "disregard Judge Learned Hand's sage advice 'not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.'" *Exxon*, 633 F. Supp. at 619.

More importantly, such an argument ignores the fact that Congress has supplied a definition of the word "state" within CERCLA, and that definition is controlling. *City of New York v. Exxon Corp.*, 697 F. Supp. 677, 684 (S.D.N.Y. 1988) (citing *Conoco, Inc. v. Federal Energy Regulatory Comm'n*, 622 F.2d 796, 800 (5th Cir. 1980)). "Legislative declaration of the meaning that a term shall have in the same or other acts is binding, so long as the prescribed meaning is not so discordant to common usage as to generate confusion." 2A N. Singer, *Statutes and Statutory Construction* § 47.07 (4th ed. 1984).

As the New Jersey court pointed out, it is significant that CERCLA's definition does not provide "that the term 'State' *means* the several states, but instead specifically provides that the term 'state' shall '*include*' the entities listed in § 9601(27)." *Drew Chem.*, 621 F. Supp. at 666 (emphasis in original).

> A term whose statutory definition declares what it "includes" is more susceptible to extension of meaning by construction than where the definition declares what a term "means." It has been said "the word 'includes' 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. . . ."

Id. (quoting 2A N. Singer, *Statutes and Statutory Construction* § 47.07 (4th ed. 1984)).

The New Jersey court thus concluded that CERCLA's broad definition "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." *Id.* at 666. As explained in the following section, municipalities must be included within the term "state" in order to carry out the principal objectives of CERCLA.

The court also observed that Congress has frequently defined the word "state" to include governmental subdivisions as well as the fifty states. *Id.* at 667 (listing thirteen statutes with a broad definition of state). Although CERCLA does not expressly define "state" to include municipalities, the court said, "it is reasonable to expand the illustrative list introduced by the word 'includes' to encompass entities frequently explicitly within the meaning of the term 'state' as legislatively defined." *Id.*

It should be noted that one federal court has construed CERCLA's definition of "state" to exclude municipalities. *City of Philadelphia v. Stepan Chem. Co.*, 713 F. Supp. 1484 (E.D. Pa. 1989). That court decision, however, involved a municipality's attempt to recover response costs under section 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A), as opposed to a claim for natural resource damages. As illustrated below, this distinction is significant.

2. Municipalities must be allowed to protect their own natural resources.

Perhaps the most compelling argument for including municipalities within CERCLA's definition of a "state" is the fact that the natural resources protected by CERCLA include those resources "belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by" local governments. 42 U.S.C. § 9601(16). As the New Jersey court pointed out:

> It would be anomalous for this far reaching remedial statute 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).

Drew Chem., 621 F. Supp. at 666.

This view also was supported in the *Exxon* case, where the New York federal court observed that:

> [t]he clear purpose of the Act, which is to ensure prompt and effective cleanup of hazardous wastes and the restoration of environmental quality, is not advanced by preventing the authorities entrusted with the management of public resources from bringing actions to recover the cost of protecting them.

Exxon, 633 F. Supp. at 619.

The importance of this justification was highlighted in the *Stepan Chemical* case, where the court declined to give an expansive reading to the term "state." 713 F. Supp. at 1487-90. The one important distinction between *Stepan Chemical* and the *Drew Chemical* decision is the fact that *Stepan Chemical* involved a municipality's claim for response costs. In contrast, *Drew Chemical*, *Exxon*, and the case at bar all involve a municipality's claim for natural resource damages. The *Stepan Chemical* court noted this distinction in refusing to follow *Drew Chemical*'s interpretation of the word "state."

> [The *Drew Chemical* court's] decision to allow Boonton to proceed as a state under section 107(a)(4)(A) was undoubtedly influenced by its corollary decision that municipalities should be able to recover for damage to their natural resources under section 107(a)(4)(C). In this case, the City, in contrast, has made no claim for damages to natural resources and does not seek to proceed pursuant to section 107(a)(4)(C).

Id. at 1489. Therefore, the lower court erred in relying upon the *Stepan Chemical* decision to hold that a municipality cannot serve as a natural resources trustee.

In the case at bar, the City of Northwood does not own or

manage the Northwood National Wildlife Refuge. However, the refuge is "controlled by" and "appertaining to" the city, and thus comes within CERCLA's definition of natural resources in section 101(16). 42 U.S.C. § 9601(16). The refuge is "controlled by" Northwood because the city's ordinances apply within the refuge and the city provides governmental services such as trash collecting and fire protection to the refuge. The word control means to "regulate" or "govern." *Black's Law Dictionary* 298 (5th ed. 1979).

The refuge is "appertaining to" the city due to the fact that the city's boundaries completely encompass the refuge. The word "appertain" means "[t]o belong to; to have relation to; to be appurtenant to." *Id.* at 90. The word "appurtenant" means "[b]elonging to; accessory or incident to; adjunct, appended or annexed to . . . ." *Id.* at 94. The wildlife refuge is thus appurtenant to the City of Northwood by virtue of the fact that it is not only attached or annexed to the city, but indeed is a vital part of the city's environment and identity.

B. *Legislative History Supports the Interpretation that Municipalities May Act as Natural Resources Trustees.*

Congress, in enacting on the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (1986), implicitly endorsed the *Drew Chemical* and *Exxon* decisions allowing municipalities to act as natural resources trustees.

More precisely, the bill offered by the House of Representatives would have excluded units of local government from the definition of "United States" and "State" under section 101(27) of CERCLA. H.R. Conf. Rep. No. 962, 99th Cong., 2d Sess. 185 (1986). The Conference Report, however, omitted the House language, thus leaving CERCLA's definition of "state" unchanged. In explaining its action, the conference committee stated: "The conference substitute does not include the House amendment to this definition of 'State' *leaving it to the court's interpretation of this provision.*" *Id.* (emphasis added).

This language is significant in light of the fact that both the *Exxon* and the *Drew Chemical* decisions had been rendered and published prior to the adoption of the 1986 amendments. In fact, Senator Lautenberg, who was a member of the conference committee, stated during the floor debate that the final version of the amendment contained in the Conference Report 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 resource damages." 135 Cong. Rec. S14912 (daily ed. Oct. 3, 1986) (statement of Sen. Lautenberg).

Thus Congress, in refusing to alter CERCLA's definition of "state" when re-authorizing CERCLA in 1986, has effectively codified the *Drew Chemical* interpretation. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change . . . ." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). In the case at bar, this presumption is bolstered by the fact that Senator Lautenberg directed attention to the *Drew Chemical* decision during the floor debate on the final bill.

The fact that SARA also included specific language directing the Governors of each state to delegate state trustees does not contradict this result. The new language states 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) (emphasis added). The selective use of both mandatory and permissive verbs reveals that Congress intended to require that governors *must* appoint certain trustees, but once appointed, these officials *may* act as trustees, "clearly denoting that others may also act in such capacity." Maraziti, *Local Governments: Opportunities to Recover for Natural Resource Damages*, 17 Envtl. L. Rep. (Envtl. L. Inst.) 10,036, 10,039 (1987) (emphasis added).

Thus, this language should be construed as an action-forcing mechanism — designed to compel states to focus on the issue of natural resource damage recovery — rather than mandating that only those officials selected by the governors shall be eligible to act as natural resources trustees. *Id.* The

latter reading would be incorrect because it would be contrary to the overwhelming evidence described above that indicates Congress specifically intended to allow municipalities to serve as natural resources trustees. *Id.* Moreover, neither the Conference Report nor the amendments themselves mention that the appointed officials shall be the exclusive trustees. *Id.*

C. *Municipalities Must Be Allowed to Protect Natural Resources as a Matter of Sound Public Policy.*

The circumstances surrounding the contamination of the Northwood National Wildlife Refuge provide a classic illustration of why municipalities should be allowed to serve as natural resources trustees. It is clear from the facts of this case that if the city does not take action to recover for these damages, then nobody will.

The City of Northwood clearly has a large stake in the environmental vitality of the Northwood National Wildlife Refuge. Indeed, the city's own economic well-being rests in large part upon the existence of the refuge. In addition, the citizenry has strong emotional ties with the refuge and its wildlife; the refuge offers recreational as well as the aesthetics of a natural environment. Therefore, the city has many strong incentives for protecting this resource.

Federal and state officials, on the other hand, have no strong ties to the refuge. To the Interior Department, this refuge is just one of many within the National Wildlife Refuge System. Similarly, to state officials, this refuge is just one of many resources under the state's control.

Thus it seems clear that given the budgetary constraints of the federal and state governments, many of the nation's natural resources will be vulnerable to the ravages of hazardous waste unless the local governments take action. This result is contrary to CERCLA's twin goals of (1) protecting and preserving public health and the environment, and (2) ensuring that the parties who are responsible for releasing hazardous substances will bear the costs for remedying the problems they cause. *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986).

> The past tendency to look primarily to federal and state officials to take the lead in responding to the problem has led to disappointment and frustration. It is clear that the hazardous waste problem is so great that federal and state authorities will continue to be overburdened in their attempts to respond adequately. If responsibility to recover for damages to natural resources were left exclusively with agencies whose capabilities are already strained, many claims would never be asserted. The manifest intent of CERCLA — to place the costs of pollution cleanup on the polluters — would be thwarted.

Maraziti, *Local Governments: Opportunities to Recover for Natural Resource Damages*, 17 Envtl. L. Rep. (Envtl. L. Inst.) 10,036, 10,039 (1987).

Therefore, it is imperative that this court recognize a municipality's ability to serve as a natural resources trustee under CERCLA — particularly if the court finds that it lacks authority under CERCLA's citizen suit provision to order the Interior Department to perform the damage assessment. If federal and state trustees cannot be made to take action, and local governments cannot serve as trustees, we are once again left with the common law dilemma that CERCLA was intended to correct — i.e., where "a homeowner could enjoin a neighbor from harming his or her land and could recover damages for injury to it, [but] public natural resources lacked a clear champion." Anderson, *Natural Resource Damages, Superfund, and the Courts*, 16 B. C. Envtl. Aff. L. Rev. 405, 406 (1989).

CONCLUSION

This court must reverse the lower court's dismissal of the City of Northwood's suit against the Interior Department and Multi-Chem Chemical Company. As the foregoing discussion demonstrates, section 107(f) of CERCLA creates a nondiscretionary duty for the Interior Department to act as a natural resources trustee and to conduct damage assessments for resources protected by the trustee. Therefore, the lower court erred in ruling that it lacked subject matter jurisdiction under

CERCLA's citizen suit provision to force the Interior Department to conduct a damage assessment at the Northwood National Wildlife Refuge.

The lower court's ruling that a municipality may not serve as a natural resources trustee is equally in error. As two prior federal courts have found, CERCLA's natural resource damage provisions, when taken in context and read as a whole, require that municipalities be allowed to act as trustees to preserve their own natural resources. Thus, the city's claim against Multi-Chem should also be allowed to continue.