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## Brief for Appellee: Second Annual Pace National Environmental Moot Court Competition

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No. 89-27

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE TWELFTH CIRCUIT

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CITY OF NORTHWOOD,  
Appellant,

v.

SECRETARY, UNITED STATES  
DEPARTMENT OF THE INTERIOR

and

MULTI-CHEM CHEMICAL CO.,  
Appellees.

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BRIEF FOR APPELLEE\*

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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 only when necessary for clarification. 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 to 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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**CITATIONS TO THE DISTRICT COURT OPINION**

*City of Northwood v. Secretary, United States Department of the Interior and Multi-Chem Chemical Co.*, No. 89-453 (D. N.Y. 1989)(cited hereinafter as "Opn.") ..... 5, 16, 22

### STATEMENT OF CASE

The City of Northwood is the home of the Northwood National Wildlife Refuge. The City's municipal boundaries completely enclose the refuge. Although the refuge is federally owned, it plays an integral part in the lives of the people of Northwood. The refuge makes Northwood an attractive place to live because each autumn and spring thousands of birds, represented by many different species, pass through the refuge on their journey from Canada to the tropics. Indeed, the City's slogan is "Northwood: We're for the Birds." The refuge also provides the people of Northwood with a recreational facility as bird watching, hiking, and biking trails are found within its boundaries. Finally, the refuge serves as a visual and noise buffer for Northwood because it physically separates the City from a busy highway system. However, the relationship between the refuge and Northwood is one of reciprocity. The refuge is serviced by the City's utilities, including fire protection and trash removal.

In 1984, the City of Northwood Health Department discovered the existence of "hazardous substances" (under federal law) in the well water of homes located near the Multi-Chem Chemical Company ("Multi-Chem"). The hazardous substances were Multi-Chem pesticide ingredients and the contaminated wells were all located downstream from the Multi-Chem plant. The contaminated aquifer is shallow and the City Health Department believes that the aquifer flows from the Multi-Chem plant underneath the homes that were tested and onto the refuge. The Northwood Health Department also believes that the hazardous substances reach the wetlands and marshes of the refuge; however, all parties agree that more complete water sampling is required to determine the extent to which the hazardous substances have reached the surface waters of the refuge. The City remains concerned with the quality of the present and future drinking water supply, and also with the potential long-term effects on the refuge.

In 1989, the City brought two causes of action under The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The first cause of action, a citizen

suit under section 310 of CERCLA, sought to compel the Department of Interior (DOI) to perform its "nondiscretionary" duty to assess natural resource damages and to recover for costs of restoration from Multi-Chem. That cause of action was dismissed by the district court for a lack of subject matter jurisdiction because the City did not allege the non-performance of a nondiscretionary duty.

In its second cause of action, the City sought to act as "natural resource trustee" in its own right under sections 107(a)(4)(C) and 107(f) of CERCLA. The district court also dismissed this cause of action concluding that the City is prohibited from acting as natural resource trustee under section 107(f) of CERCLA.

The City of Northwood now appeals on both causes of action. The DOI opposes the City's appeal of the district court's dismissal of the first cause of action and supports the City's appeal of the dismissal of the second cause of action. Multi-Chem opposes both appeals.

## SUMMARY OF ARGUMENT

Northwood's citizen suit properly was dismissed by the district court for lack of subject matter jurisdiction because section 107(f) of CERCLA does not impose a nondiscretionary duty on the President to assess damage to natural resources. Although section 107(f) provides that an official "shall" assess damage to natural resources under his trusteeship, that language was not intended by Congress to impose a mandatory duty. Furthermore, the DOI's interpretation that 107(f) creates only discretionary duties is controlling because that interpretation does not conflict with the intent of Congress.

Additionally, an agency decision not to take action is presumptively unreviewable by the judiciary. This presumption is rebutted only if Congress circumscribes an agency's discretion with specific guidelines which clearly direct the agency to act under specific circumstances. Congress did not provide specific guidelines under CERCLA which circumscribe DOI's discretion. Accordingly, the DOI's decision not to assess damage to the refuge is beyond the scope of judicial review.

Finally, the DOI simply does not have the resources to conduct an assessment for every allegation of damages to natural resources. The DOI's resources recently were limited severely by Congress when it prohibited the use of the Superfund for natural resource damage assessments. The use of citizen suits to compel action by the DOI would create a tremendous inefficiency in the allocation of an already limited resource. Congress did not intend such a result when it included a citizen suit provision in Superfund Amendments and Reauthorization Act (SARA).

CERCLA section 107(a)(4)(C) provides that generators of hazardous wastes are liable for damages for injury to natural resources. While the Act expressly provides that liability for such injury is to the Federal Government and any State, the broad remedial purpose to be accomplished by CERCLA compels courts to liberally construe its provisions. Courts must therefore interpret the definition of state to include local governments. This result is compelled by Congress' use of the word "includes" rather than "means" in the definition of state. Congress' use of this term contemplates an expansion of the definition which is necessary to accomplish the legislative purpose behind the Act. Furthermore, Congress' inclusion of those resources managed or controlled by local governments in the definition of "natural resources," further supports the proposition that local governments should be allowed to act as resource trustees for those resources under their control.

This conclusion is further compelled by the fact that Congress explicitly endorsed the prevailing judicial interpretation that municipalities can act as natural resource trustees by expressly rejecting an amendment that would have prohibited municipalities from acting as trustees. Thus leading to the inescapable conclusion that Congress intended that local governments be allowed to act as natural resource trustees.

## ARGUMENT

### I. THE DISTRICT COURT PROPERLY DISMISSED THE CITY'S CITIZEN SUIT FOR LACK OF SUBJECT MATTER JURISDICTION BECAUSE THE CITY DID NOT ALLEGE THAT THE DEPARTMENT OF THE INTERIOR FAILED TO PERFORM A NONDISCRETIONARY DUTY UNDER CERCLA.

#### A. *Section 107(f) of CERCLA Does Not Require the Department of The Interior to Assess Every Allegation of Damage to Natural Resources.*

The district court ruled, *inter alia*, that section 107(f) of CERCLA does not establish a mandatory duty for the President to act as natural resource trustee. Opn., at 5. The relevant portions of section 107 are as follows:

(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 . . . .

(2)(A) Such officials *shall assess* damages for injury to, destruction of, or loss of natural resources under their trusteeship . . . .

CERCLA section 107(f), 42 U.S.C. § 9607(f) (1986) (emphasis added). The district court's ruling should be affirmed because: 1) the legislative history of CERCLA does not indicate that Congress intended to impose a mandatory duty on the President, 2) the DOI interprets section 107(f) as imposing a discretionary duty, and 3) the majority of case law interpreting similar environmental statutes imposes only a discretionary duty on the executive branch.

1. Proper statutory construction requires that language be read in its context and that courts defer to the enforcing agency's interpretation of a statute.

The use of the word "shall" is not dispositive on whether a duty is intended to be mandatory. In *United States v. Reeb*,

433 F.2d 381 (9th Cir. 1970), the court stated that "shall" is not *per se* imperative:

"[S]hall" may sometimes be directory only, as "may" may be mandatory. . . . The interpretation of these words *depends upon the background circumstances and context in which they are used and the intention of the legislativebody or administrative agency which used them.*

*Id.* at 383 (emphasis added). In *Reeb*, the court declined to give imperative meaning to "shall" in a regulation which provided that all local draft board members "shall . . . if at all practicable, be residents of the area in which their local board has jurisdiction." *Id.* After first concluding that the board could practicably have been comprised of residents from the area, the court still refused to give mandatory meaning to the regulation:

A regulation providing that board members reside in the geographical area served by the board, "when practicable" *makes sense* from the standpoint of the administration . . . if this was the purpose we think it is unlikely that the regulation was intended to be mandatory.

*Id.* (emphasis added). Thus, the court looked beyond the "plain meaning" of "shall" and interpreted the regulation in a manner that made sense.

In *Buckley v. Valeo*, 519 F.2d 821 (D.C. Cir. 1975), the court determined that the Attorney General was not required to institute a civil action despite the following language: "upon request by the Commission the Attorney General on behalf of the United States *shall* institute a civil action . . . ." *Id.* at 893 n.191. Because of the traditional discretion of the Attorney General, the court stated that a showing that Congress intended for "shall" to be mandatory would be necessary for "shall" to be given an imperative effect:

There is no showing in this case of a convincing *legislative history* that would enable us to conclude that "shall" was intended to be "language of command." In the ab-

sence of such legislative history, we are unable to agree with Judge MacKinnon that 2 U.S.C. § 437g(a)(7) establishes that Congress intended to eliminate the discretion traditionally vested in the Attorney General.

*Id.* (emphasis added). Like the court in *Reeb*, the court in *Buckley* looked beyond the face value of "shall" and interpreted the statute in light of the traditional discretion of the Attorney General. Proper statutory construction requires more than a cursory examination of the "plain meaning" of a statute.

The second principle of statutory construction which is relevant to the case at bar is that the interpretation of a statute by the agency charged with enforcing the statute is entitled to considerable deference by the judiciary. In *Sierra Club v. Train*, 557 F.2d 485 (5th Cir. 1977), the court affirmed the trial court's dismissal of a citizen suit brought under the Federal Water Pollution Control Act Amendments of 1972 (FWPCA), 33 U.S.C. § 1251 et. seq. (the citizen suit provision in the FWPCA is virtually identical to the citizen suit provision in CERCLA) because of a lack of subject matter jurisdiction. The plaintiff, like Northwood, did not allege that the Environmental Protection Agency (EPA) failed to perform a nondiscretionary duty. The court was unwilling to find a mandatory duty for the EPA to either issue a compliance order or institute civil suit upon discovery of a violation despite the following language in section 309(a)(3) of the FWPCA:

Whenever on the basis of any information available to him the Administrator finds that any person is in violation . . . he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action . . . .

33 U.S.C. § 1319(a)(3) (1972). Once again, the primary issue was whether the use of "shall" imposed a mandatory duty. The court held that it did not: "We hold that the duties imposed by section 1319(a)(3) on the EPA are discretionary." *Sierra Club, supra*, at 491. The court also stated that an agency's interpretation is permissible unless it contravenes

the intent of Congress:

The EPA, as the agency charged with enforcement of the FWPCA, construes this statute as imposing a discretionary duty, and, in the absence of any cogent argument that the agency's construction is contrary to congressional intent, the agency's construction will be sustained.

*Id.* at 489 (emphasis added). Because the legislative history was unclear, the court deferred to the EPA's interpretation that section 309(a)(3) of the FWPCA imposed only discretionary duties.

Section 404(s) of the Clean Water Act (CWA), 33 U.S.C. § 1344(s), which is virtually identical to section 309(a)(3) of the FWPCA, also was interpreted as imposing only discretionary duties on the United States Army Corps of Engineers ("Corps") in *Goodyear v. Lecraw*, 15 ERC 1189 (S.D. Ga. 1987). The district court in *Goodyear* also deferred to an agency interpretation:

[T]he presumption of a mandatory intent created by the use of "shall" may be overridden by contrary evidence revealed by the purpose of the statute, its legislative history, and the agency's interpretation of the statute.

*Id.* at 1191 (emphasis added). In that case, private property owners attempted to compel the Corps to investigate a construction project undertaken by a third party which allegedly was occurring without a permit. The district court deferred to the Corps' view that section 404(s) imposes discretionary duties because the legislative history did not show that Congress intended that 404(s) impose mandatory duties.

The foregoing authority provides two principles of statutory construction that are applicable to the case at hand: 1) a court should look beyond the "plain meaning" of a statute, and 2) an agency's interpretation of a statute it enforces is to be sustained unless the interpretation is contrary to the intent of Congress. The application of those principles to section 107(f) clearly results in the conclusion that the DOI's duties under that section are discretionary.

2. The DOI's determination that section 107(f) establishes discretionary duties must be sustained because that interpretation is not contrary to the intent of Congress.

The legislative history of section 107(f) of CERCLA does not reveal a Congressional intent to impose mandatory duties under that statute. In fact, the legislative history of CERCLA (exclusive of SARA) is almost completely silent with respect to the duty of trustees to assess and recover for damage to natural resources. And, as a general proposition, courts have recognized that CERCLA was the product of a hurried Congress. *United States v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 579 F. Supp. 823, 838-39 n.15 (W.D. Mo. 1984) ("NEPACCO"). Nonetheless, it does not appear that the House of Representatives ("House") intended for the President to act on every allegation of damage to natural resources:

Damages for, injury to, and destruction of natural resources . . . *may be claimed* only by the President, as trustee of those natural resources over which the Federal Government has jurisdiction . . . .

H.R. Rep. No. 172, 96th Cong., 2d Sess. 5, reprinted in 1980 U.S. Code & Admin. News 6151, 6185 (emphasis added). The House's use of the word "may," although not conclusive *ipso facto*, suggests that the President is not under a mandatory duty to take action on every damage to natural resources under the federal trusteeship. However, that language certainly does not impose a mandatory duty.

The legislative history which accompanies SARA is unhelpful because it mirrors the language in section 107(f). The House Conference Report, in pertinent parts, is as follows:

*Senate Amendment* — the President shall designate in the NCP the Federal officials to act as trustees and to assess natural resource damages . . . .

*House Amendment* — the Federal officials designated to act as trustees under the NCP are to assess natural re-

source damages . . . .

H.R. Conf. Rep. No. 962, 99th Cong., 2d Sess. 5, reprinted in 1986 U.S. Code Cong. & Admin. News 3276, 3298. The House's use of "are to assess" merely reinforces that the trustees are to act to the exclusion of private parties. That language cannot reasonably be construed as imposing a mandatory duty on the President. The legislative history of CERCLA and SARA do not include a congressional intent to impose a mandatory duty on the President to assess every allegation of damage to natural resources.

The DOI has interpreted section 107(f) as establishing only a *discretionary duty* to assess damage to natural resources. The DOI regulations (promulgated pursuant to 42 U.S.C. § 9651(c)) do not impose a mandatory duty on trustees of natural resources: "Federal and State agencies who are authorized to act as trustees to natural resources *may assess damages . . . .*" DOI Natural Resource Damage Assessments 43 C.F.R. § 11.10 (1986) (emphasis added). Furthermore, the DOI expressly stated its position in response to a "public comment" in a statement which accompanied an amendment to 43 C.F.R. § 11:

*Comment:* One comment noted that SARA added new language to CERCLA, at section 107(f)(2)(A) and (B), which states that State and Federal trustees "shall" assess damage . . . . The comment interpreted this language to mean that the assessment of natural resource damage is now required by trustees as a non-discretionary duty . . . .

*Response:* The natural resource damage assessment rule is optional and applies only in those instances where a trustee chooses to use the process contained in the rule to conduct an assessment to obtain a rebuttable presumption.

Amendment of Regulation 11, 53 Fed. Reg. 5169-70 (1988) (to be codified at 43 C.F.R. § 11) (emphasis added). Clearly, the DOI interprets sections 107(f)(2)(A) and (B) as merely providing a voluntary mechanism, and not a mandatory duty, for

trustees to obtain a rebuttable presumption of damage assessment accuracy. And, as previously stated, that interpretation is to be sustained because it is not contrary to the intent of Congress.

B. *The Majority of Case Law That Has Interpreted Environmental Statutes Similar to Section 107(f) Has Not Imposed a Mandatory Duty to Act on Agencies.*

Citizen suit provisions have been construed narrowly when they are used as a mechanism to compel an agency to act. Courts are unwilling to substitute the discretion of citizens for that of an administrative agency. In the field of environmental law, this issue has been litigated most frequently under the FWPCA. Section 309(a)(3) of the FWPCA (set out *supra* at p.6) has been the putative basis for many actions by citizens attempting to compel action by the EPA. Under a clear majority view, section 309(a)(3) has been interpreted as establishing a discretionary duty on the EPA.

In *Dubois v. Thomas*, 820 F.2d 943 (8th Cir. 1987), the majority rule recently was affirmed. In that case, the trial court ruled that: 1) the EPA is under a mandatory duty to investigate whenever presented with an assertion by a citizen that a violation has occurred, and 2) that the EPA has a mandatory duty to take action on the findings from the investigation. The court of appeals reversed both rulings of the district court. First, the court stated that it would be impracticable to force the EPA to follow up on every citizen complaint:

[T]he EPA could be compelled to expend its limited resources investigating multitudinous complaints, irrespective of the magnitude of their environmental significance . . . Only if the Administrator has discretion to allocate its own resources can a rational enforcement approach be achieved.

*Id.* at 948 (emphasis added). Next, the court held that an agency's decision not to enforce a statute is to be sustained unless it controverts the intent of Congress:

We believe that neither the language of section 309(a)(3) nor its legislative history can be said to evince a clear intent of Congress as to whether the enforcement duties of the Administrator are mandatory or discretionary. Under such circumstances, the Administrator's interpretation is a permissible construction of section 309(a)(3).

*Id.* at 950. Thus, *Dubois*, like *Sierra Club* (discussed *supra*, at 6), is authority that section 309(a)(3), which states that the Administrator "shall" issue a compliance order or bring civil action, imposes only a discretionary duty on the EPA.

Similarly, the use of "shall" in section 113 of the Clean Air Act, 42 U.S.C. § 7413, has been interpreted as imposing only discretionary duties on the EPA. In *City of Seabrook v. Costle*, 659 F.2d 1371 (5th Cir. 1981), Seabrook brought action under a citizen suit provision to compel the EPA to notify persons that they were in violation of the Clean Air Act. Seabrook contended that notification was a mandatory duty of the EPA under section 113(a):

Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation . . . the Administrator *shall* notify the person in violation. . . .

42 U.S.C. § 7413(a) (emphasis added). The court held that the duty to notify was not mandatory, and, in support of its holding, reasoned that an agency's discretion should not be replaced by the will of citizens: "The enforcement agencies are duty bound to allocate those resources as *they perceive, not in the causes deemed most important by individual citizens.*" *Seabrook*, 659 F.2d 1371, 1374 (emphasis added).

The interpretation of section 107(f) of CERCLA is a question of first impression. Case law interpreting the FWPCA and the Clean Air Act have construed strictly the ability of citizens to compel action by administrative agencies. This court should follow that lead and affirm the trial court's ruling that CERCLA does not impose on federal trustees a mandatory duty to act on every allegation of damage to natural resources.

## II. THE DOI'S DECISION NOT TO TAKE ACTION IS AN ENFORCEMENT DECISION THAT IS NOT REVIEWABLE BY THE JUDICIARY.

### A. *An Agency Decision Not to Take Action Is Presumptively Unreviewable and That Presumption Only May be Rebutted by Specific Guidelines Intended by Congress to Circumscribe the Agency's Discretion.*

A decision not to take action by an agency charged with the enforcement of a statute is reviewable only under limited circumstances. Congress precluded judicial review of certain agency decisions when it passed the Administrative Procedure Act (APA) 5 U.S.C. § 551 et seq. (1982). In *Heckler v. Chaney*, 470 U.S. 821 (1985), the Supreme Court determined the reviewability of agency decisions not to take action under the APA. In *Chaney*, a group of death row inmates brought an action to compel the Food and Drug Administration (FDA) to prevent the use of certain drugs for lethal injections. The FDA refused to act on the inmates demands. The Supreme Court ruled that the APA created a presumption of non-reviewability for agency decisions not to take action: "an agency's decision not to take action should be presumed immune from judicial review under section 701(a)(2)." *Chaney*, *supra*, at 832. The Supreme Court then described the narrow circumstances under which the presumption can be rebutted. Congress may rebut the presumption only:

[I]f it has indicated an intent to circumscribe agency enforcement discretion, *and has provided meaningful standards for defining the limits of that discretion*, there is "law to apply" under section 701(a)(2), and courts may require that the agency follow that law; if it has not, then an agency refusal to institute proceedings is a decision "committed to agency discretion by law."

*Chaney*, *supra*, at 834-35 (emphasis added). The inmates in *Chaney* argued that Congress intended to limit the FDA's discretion by forcing prosecution in all cases because the relevant statute stated that violators "shall be imprisoned." *Id.* at 835.

However, the Supreme Court held that language was insufficient to rebut the presumption of non-reviewability.

In *Harmon Cove Condominium Association v. Marsh*, 815 F.2d 949 (3rd Cir. 1987), a condominium association attempted to compel the Corps to force compliance by a third party developer with the conditions of a permit the developer was issued and was allegedly in violation of. The association argued that section 404(s) of the FWPCA (discussed *supra* at p. 7) limited the Secretary's discretion because the provision required the issuance of a compliance order or the filing of a civil action upon discovery of a violation. The court of appeals upheld the district court's denial of relief because section 404 did not constitute sufficient guidelines to rebut the presumption of non-reviewability:

The statute imposes no duty on the Secretary to make a finding of violation, because it contains *no guidelines for the Secretary to follow in choosing to initiate enforcement activity*.

*Harmon Cove, supra*, at 953 (emphasis added). The holding in *Harmon Cove* clearly suggests that only specific guidelines will be sufficient to rebut the presumption of non-reviewability set out in *Chaney*.

Under *Chaney* and *Harmon Cove*, an agency's decision not to take enforcement action is unreviewable unless Congress specifically circumscribes the agency's discretion. The application of that rule to the case at hand results in the conclusion that the DOI's decision not to assess the alleged damage to the Northwood National Wildlife Refuge is beyond judicial review.

B. *The DOI's Discretion Was Not Circumscribed by Congress in CERCLA and Therefore Its Decision Not to Take Action Is Not Reviewable by This Court.*

Neither CERCLA nor SARA provide enforcement guidelines sufficient to rebut the presumption of non-reviewability of agency inaction. Section 107(f)(1) merely states that "The

President . . . shall act . . . as trustee." 42 U.S.C. § 9607(f). Obviously, that language does not provide any guidelines for the DOI. Although section 107(f)(2) is more specific, that section is also insufficient to limit the DOI's discretion. Section 107(f)(2)(A), in pertinent parts, is as follows:

The President shall designate . . . officials who shall act on behalf of the public as trustees . . . . Such officials shall assess damages for injury to, destruction of, or loss of natural resources . . . for those resources under their trusteeship . . . .

42 U.S.C. § 9607(f)(2)(A). First of all, that language does not provide guidelines in regard to: 1) when an assessment should or should not be performed, 2) how an assessment should be performed, or 3) what constitutes injury to, destruction of, or loss of natural resources. Those questions were specifically left unanswered by Congress and left to the discretion of the executive branch because Congress authorized the President to promulgate regulations to enforce section 107(f) under section 301(c) of CERCLA, 42 U.S.C. § 9651(c).

Second, Congress expressly limited the DOI's ability to perform damage assessments when, under SARA, it revoked the ability of the DOI to be reimbursed under the Superfund for the cost of those assessments. In part V of SARA, Congress expressly prohibited the use of the Superfund for natural resource claims by trustees:

Amounts of the Superfund *shall be available*, as provided in the appropriations Act, only for purposes of making expenditures . . . .

(ii) Section 111(c) of CERCLA (as so in effect) *other than paragraphs (1) and (2) thereof* . . . .

I.R.C. § 9507(c) (emphasis added). Paragraphs (1) and (2) of section 111(c) respectively authorized the use of the Superfund for the costs of assessing damages to natural resources, and the costs of restoring, rehabilitating, or replacing natural resources. Thus, SARA effectively forces the DOI to pay for the cost of assessments in the first instance and there

is no reimbursement unless the DOI is able to recover from a responsible party. (*See also* Withdrawal of Natural Resource Claims Procedure 40 C.F.R. § 306, 52 Fed. Reg. 51,169, which explains how SARA makes the Superfund unavailable to the DOI). Because the Superfund is now “off limits” to the DOI, Congress would have imposed an incredible burden on the DOI if it intended for the DOI to assess damage to natural resources, pursuant to section 107(f)(2)(A), upon demand from private citizens. It strains credulity to find that Congress intended to impose such a burden on the DOI when, at the same time, Congress revoked the DOI’s ability to be reimbursed under the Superfund for natural resource damage assessments.

Third, Congress imposed specific deadlines on the executive branch action under CERCLA when it intended to impose a mandatory duty. For example, section 301(c) of CERCLA required the President to promulgate regulations *within six months* after SARA was enacted. Similarly, section 120(e) requires federal agencies to conduct a remedial investigation and feasibility study within six months of the inclusion of an agency facility on the National Priorities List. The absence of a deadline for executive response under section 107(f)(2)(A) further supports the DOI interpretation that no mandatory duty is imposed under that section.

Finally, Congress intended for section 107(f)(2)(A) to create a mechanism for trustees to obtain a rebuttable presumption of assessment accuracy (this argument is set out in detail *supra*, at 9-10). Thus, Congress created an optional mechanism rather than a mandatory procedure under section 107(f)(2)(A). The language in that section was not intended to act and is insufficient to act as guidelines for the DOI to follow in the enforcement of CERCLA. Accordingly, the DOI’s decision not to act on Northwood’s allegations is outside of the scope of judicial review.

III. THE CITY OF NORTHWOOD'S RELIANCE ON THE PUBLIC TRUST DOCTRINE IS WITHOUT MERIT BECAUSE CONGRESS DID NOT INTEND TO INVOKE THE PUBLIC TRUST DOCTRINE WHEN IT PASSED CERCLA.

The district court rejected Northwood's argument that Congress intended to invoke the public trust doctrine when it used the words "trust" and "trustee." Opn. at 5. That doctrine certainly is too amorphous to be codified into CERCLA by the use of "trust" or "trustee." Furthermore, the legislative history accompanying CERCLA does not include a Congressional intent to invoke that doctrine.

One commentator has argued that Congress considered the public trust doctrine when it drafted CERCLA:

The overlap can be traced to the original Senate CERCLA bill, which stated that the purpose of natural resource damage liability was "to preserve *the public trust* in the Nation's natural resources . . . ."

Miller, *Making CERCLA Natural Resource Damage Resources Work: Use of the Public Trust Doctrine and Other State Remedies*, 18 Env'tl. L. Rep. 10,299 (August 1988), quoting from S. Rep. No. 96-848, 96th Cong., 2d Sess. 84 (1980) (emphasis added). However, the reference to the preservation of the "public trust" should be read as the statement of Congress' goal to preserve the *public confidence* in natural resources and not as evidence of a Congressional intent to invoke the public trust doctrine. Congress would have explicitly commented about the public trust doctrine and its previous application by the judiciary if it had intended to incorporate that doctrine into CERCLA.

IV. THE DISTRICT COURT ERRED IN DISMISSING THE CITY OF NORTHWOOD'S CLAIM FOR DAMAGES FOR INJURY TO NATURAL RESOURCES UNDER THEIR MANAGEMENT AND CONTROL.

Section 107(a)(4)(C) of CERCLA provides in relevant part that generators of hazardous wastes are 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)(4)(C). CERCLA defines "natural resources" 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 . . . .

42 U.S.C. § 9601(16) (emphasis added). Under this definition, both the Wildlife Refuge and the aquifer that is hydrologically connected to the wetlands and marshes within the refuge, are "natural resources" because they are under the management and control of the city. Thus, damages for injury to them, including the cost of assessing such injury, may properly be recovered in an action under CERCLA.

The district court, however, relying on an overly literal interpretation of CERCLA, ruled that the city was not a proper plaintiff under section 107(f) and dismissed the complaint. Section 107(f) provides in pertinent part that:

in the case of an injury to, destruction of, or loss of natural resources under subparagraph (C) of subsection (a) of this section liability shall be to the United States Government and to any State . . . .

42 U.S.C. § 9607(f). Rejecting two recent court decisions allowing cities to prosecute claims for damages to natural resources, as well as substantial legislative history to the same effect, the court based its decision on an overly rigid application of the "plain meaning" rule, stating that "to my reading,

'state' means 'state,' not 'state and city.' There is no need to look to the legislative history. If Congress meant to include cities it could have done so." Opn. at p.5.

*A. The Definition of State Should be Liberally Construed to Include Local Governments in Order to Effectuate the Broad Remedial Purpose of CERCLA.*

While it is true that all statutory construction must begin with the language of the statute itself, *Touche Ross v. Redington*, 442 U.S. 560 (1979), the plain meaning rule is not a rule of law and does not preclude consideration of persuasive evidence if it exists. *Watt v. Alaska*, 451 U.S. 1673 (1981). As one court put it, the "[m]ere incantation of the plain meaning rule . . . cannot substitute for meaningful analysis." *Shippers National Freight Claim Council v. I.C.C.*, 712 F.2d 740, 747 (2d Cir. 1983). Furthermore, "the plain meaning doctrine has always been considered subservient to a truly discernible legislative purpose." *Aviation Consumer Action Project v. Washburn*, 535 F.2d 101, 106 (D.C. Cir. 1976). Here, as will be shown, the legislative history surrounding the enactment of CERCLA and especially SARA indicates Congressional intent that municipalities be allowed to act as natural resource trustees and sue for injuries to natural resources under their management and control.

As previously noted, Congress provided that liability for damage to natural resources shall be to the United States and any State. 42 U.S.C. § 9707(f). These two terms are defined to 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). The fact that Congress chose to use the term "includes" rather than "means" in defining these terms evinces a legislative intent that the list was to be considered

illustrative rather than exclusive, and therefore susceptible to expansion. *Puerto Rico Maritime Shipping Authority v. I.C.C.*, 645 F.2d 1102 (D.C. Cir. 1981). In two recent cases considering the issue presented here, courts applied this reasoning to conclude that the statutory provision in question allows municipalities to serve as natural resource trustees under CERCLA. *Mayor of Boonton v. Drew Chemical Corp.*, 621 F. Supp. 663 (D.N.J. 1985); *City of New York v. Exxon Corp.*, 633 F. Supp. 609 (S.D.N.Y. 1986). In so concluding, one court stated that "[t]he definitional section in question explicitly contemplates an expansion of the illustrative list to the fullest extent where to do so would be consistent with the remedial intent of the act." *Mayor of Boonton v. Drew Chemical Corp.*, 621 F. Supp. 633, 666 (D.N.J. 1985) (citing *Winterrowd v. David Freedman and Co., Inc.*, 724 F.2d 823, 825 (9th Cir. 1984)). It is especially appropriate to expansively construe the provision in question in a situation such as here where the statute is "hardly a paradigm of clarity or precision."<sup>1</sup> *City of Philadelphia v. Stepan Chemical Co.*, 713 F. Supp. 1484, 1488 n. 11 (E.D. Pa. 1989) (citing *Artesian Water Co. v. Gov't of New Castle County*, 851 F.2d 643, 648 (3d Cir. 1988)). Furthermore, because CERCLA is essentially a remedial statute designed to protect and preserve public health and the environment, [courts] are therefore obligated to construe its provisions liberally to avoid frustration of the beneficial legislative purposes. *City of New York v. Exxon Corp.*, 697 F. Supp. 677, 685 (S.D.N.Y. 1988) (quoting *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986) (concluding that defining "state" to include municipalities would most effectively advance the Act's remedial purpose)). It is the totality of these circumstances that led each of the only two courts dealing with the precise issue presented here to conclude that cities could in fact act as natural resource

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1. The deficiencies in the drafting of CERCLA are well documented. In fact, one of the leading cases on the interpretation of the Act has stated that CERCLA is "a hastily drawn piece of compromise legislation, marred by vague terminology and deleted provisions . . ." thus placing courts "in the undesirable and onerous position of construing inadequately drawn legislation." *NEPACCO, supra*, 579 F. Supp. at 838-839 n.15.

trustees and bring an action for damages to natural resources that are under their management and control.

In *Mayor of Boonton v. Drew Chemical Corp.*, 621 F. Supp. 663, a local government brought an action seeking recovery for damages to natural resources caused by the defendant's dumping of hazardous wastes. In moving for summary judgment, the defendant argued, as defendant here argues, that the city was not the proper plaintiff, inasmuch as cities are not expressly included in the definition of "State." *Id.* at 666. The court rejected this argument, first noting the distinction between statutory definitions that use "include" rather than "means," and then reasoning that it was therefore proper to give an expansive interpretation to the definition of the term state in order to effectuate the broad remedial purpose of CERCLA. *Id.* As further support for its decision, the court noted that while liability for damages to natural resources is to the United States and any state under section 107(f), the act includes in its definition of natural resources those resources "belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by . . . any State or local government." 42 U.S.C. § 9601(16) (emphasis added). The court then concluded that:

[i]t should 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).

*Mayor of Boonton, supra*, 621 F. Supp. at 666. Therefore, reasoning that CERCLA should be given a broad and liberal construction, the court concluded that municipalities are within the group of entities on whom Congress conferred standing to sue for damages for injury to, destruction of, or loss of natural resources under CERCLA.

The only other court to address this issue in a reported opinion, *City of New York v. Exxon Corp.*, 633 F. Supp. 609, also reached the same result. In *Exxon*, the city of New York

brought an action under CERCLA against certain generators and transporters of hazardous wastes for damages to natural resources under its management and control. *Id.* at 618. The city alleged that the defendants had dumped the wastes into certain landfills owned and operated by the city. It further alleged that the wastes had contaminated ground water at each of the landfills and leached into surface waters surrounding the landfills, thus threatening aquifers which constituted either present or potential sources of drinking water for the city's residents. *Id.* at 613.

The defendants moved to dismiss the action for failure to state a claim on which relief could be granted, arguing, as did the defendants in *Boonton* and the defendants here, that under section 107(f) they could not be liable to the city for damages for injury to natural resources, but rather could be liable only to the Federal Government or to the State for such damages. *Id.* at 618-619. The *Exxon* court also rejected that argument, noting that such an argument "depends upon an overly literal reading of 107(f)," and that to follow such an approach "would be to disregard Judge Learned Hand's advice 'not to make a fortress out of the dictionary . . .'" *City of New York v. Exxon, supra*, 633 F. Supp. at 619 (quoting *Cabell v. Markham*, 148 F.2d 737 (2d Cir. 1945)).

The court then opined that because CERCLA defines natural resources to include those resources managed or controlled by local governments, to prevent such local governments from prosecuting claims for damages to those resources under their control would defeat the manifest purpose of CERCLA. Emphasizing the broad remedial nature of CERCLA, the court concluded its analysis by stating:

[T]he Act's broad remedial intention is not furthered by a reading which requires the State, which is not the government charged with managing and conserving those resources, to bring suit to recover for damage done to them. The 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.

*City of New York v. Exxon, supra*, 633 F. Supp. at 619 (footnote omitted). Furthermore, a local government is the logical party to bring suits for damage to natural resources. After all, it is the City that is most closely related to the natural resources under their control. This is especially true in situations such as the one presented here, where the natural resources are "an important aesthetic and recreational resource to the City of Northwood." (R. 2.)

The district court's interpretation barring the City from proceeding on its own behalf creates the undesirable result of pitting states and local governments against one another. As an example of the absurd result that could occur under the court's decision, imagine that an invaluable natural resource, such as a city's entire drinking water supply, is threatened with destruction due to the dumping of hazardous wastes. The State, for whatever reason, decides that it is unable, or unwilling, to bring an action for damages for the injury to the natural resources. Applying the district court's decision to these facts, the City's only alternative is to pay for the clean-up out of its own already strained coffers, thus giving the toxic polluter an unintended windfall. Clearly, this result was not intended by Congress in enacting CERCLA, and would fail to accomplish one of the preliminary purposes of CERCLA — to ensure that those responsible for environmental harm bear the cost of remedying the harm they created.

B. *The Same Facts That Led the Boonton and Exxon Courts to Conclude That Municipalities Can Prosecute Claims for Damages for Injury to Natural Resources Are Present in the Instant Case.*

The district court in the case at bar rejected, with little or no analysis, the reasoning in both *Boonton* and *Exxon*, stating that "[I] think these cases are either distinguishable or were wrongly decided." Opn. at p. 6. As the following discussion will show, the facts of the present case are extremely similar to the facts in both *Boonton* and *Exxon*. Furthermore, the reasoning employed in both cases applies with equal force to

the facts presented in the case at bar.

As in both cases discussed above, the present action involves a local government, in this case a city, bringing an action on its own behalf seeking damages for injury to natural resources under its management and control. In this case, the natural resources in question consist of a wildlife refuge, completely enclosed within the city's municipal boundaries, and an aquifer containing ground water believed to flow from the defendant's plant, underneath a number of homes in the city, and onward to the refuge, where it is believed to be hydrologically connected to the wetlands and marshes in the refuge. (R. 2). These facts are very similar to the facts presented in *Exxon*. In *Exxon*, the natural resources in question consisted, *inter alia*, of ground water serving as either a present or potential source of drinking water for the city's residents. *Exxon*, 633 F. Supp. at 618. Here, potential sources of drinking water for city residents are also affected, as evidenced by the fact that the City was forced to close several wells that had been providing drinking water to a number of homes near the refuge. Also, in *Exxon*, the surface waters of Jamaica Bay, Eastchester Bay, and Richmond Creek were affected. Here, too, the surface waters of the refuge, as well as the refuge as a whole, are affected. While it is not clear from the record in *Exxon* who owned the surface waters, the court did state that all of the natural resources were managed or controlled by the city. *Id.* at 633. Likewise, here, the natural resources are either managed or controlled by the city.

Management and control are defined, respectively, as "the act of managing by direction of *regulation* . . ." and the "power or authority to manage, direct, . . . *regulate, govern, administer or oversee.*" Black's Law Dictionary 298, 865 (5th ed. 1979). Under these definitions, there can be no doubt but that the City of Northwood manages or controls both the wildlife refuge and the aquifer. With regard to the refuge, the city's municipal ordinances apply just as readily within the refuge as without. In addition, the City provides utility services such as fire protection and trash removal. The fact that the refuge is owned by the Federal Government is of little import, for while it is true that CERCLA defines natural re-

sources to include resources owned by any state or local government, the definition also includes those resources "managed by," "appertaining to," "or otherwise controlled by" any state or local government. 42 U.S.C. § 9601(16). Therefore, ownership of the natural resources at issue is not a prerequisite to bringing an action for damages to those resources. As far as aquifer and potential drinking water supplies are concerned, these are even more clearly under the management and control of the City. It is the City that decides which houses are to be connected to the supply, and it is the city's health department which tests the quality of the water to detect the presence of unwanted chemicals and wastes such as the hazardous substances involved here. Furthermore, the aquifer, and the ground water contained in it, are both "appertaining to" the City. Appertain is defined as, *inter alia*, to be appurtenant to. Black's Law Dictionary 94 (5th ed. 1979).

A thing is deemed to be . . . *appurtenant* to land when it is by right used with the land for its benefit, as in the case of a way, or water-course . . . .

Black's Law Dictionary 94 (5th ed. 1979). Applying this definition to the facts of the instant case, it is clear that the aquifer and the ground water in it both appertain to and are appurtenant to the City of Northwood. Therefore, the City should be allowed to proceed with its claim for damages to natural resources "appertaining to" the City. 42 U.S.C. §§ 9601(16), 9607(a)(4)(C).

C. *The District Court's Reliance on Stepan Chemical Is Misplaced.*

The district court stated that it found support for its interpretation of section 101(16) in *City of Philadelphia v. Stepan Chem. Co.*, 713 F. Supp. 1484 (E.D. Pa. 1989). But a close review of this case reveals that while the court did refuse to construe section 107(a)(4)(A) to allow a municipality to proceed as a state, *Stepan Chem. Co.*, 713 F. Supp. at 1488, the court expressly declined to decide whether a city could bring

an action in its own right to recover for damages to natural resources under 107(a)(4)(C). *Id.* at 1489 n.16. The distinction between suits brought under section 107(a)(4)(A) and those brought pursuant to section 107(a)(4)(C) is crucial. If a city is prevented from bringing suit as a state under section 107(a)(4)(A), it still is able to bring suit in its own right under the "any person"<sup>2</sup> provision of section 107(a)(4)(B). The only drawback is that the City must, as an element of its *prima facie* case, show that the suit is consistent with the national contingency plan, whereas under section 107(a)(4)(A), the burden is on the defendant to show that the suit is inconsistent with the national contingency plan. *Stepan Chem.*, 713 F. Supp. at 1488. Therefore, the detriment to the City is minimal, even if it is prevented from bringing suit under section 107(a)(4)(A). Also, the effect on the remedial purpose of CERCLA, to clean up toxic pollution, is likewise *de minimus*.

On the other hand, because there is no parallel private action for damages to natural resources, if a city is barred from prosecuting a claim in its own right, it is left with nothing to do but hope that the federal government or the state will decide to bring an action as natural resource trustee. Given the fact that the hazardous waste problem is reaching near epidemic proportions,<sup>3</sup> coupled with the ever increasing budgetary problems facing both federal and state governments today, there appears little hope that such suits will be brought with any regularity. It is therefore imperative that local governments be given the right to prosecute claims for natural resource damages in their own right, or the clearly manifested intent of Congress in enacting CERCLA and SARA will be defeated.

D. *Congress Explicitly Acquiesced in the Interpretation of CERCLA Allowing Local Governments to*

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2. Under CERCLA, states are explicitly included in the definition of "any person." 42 U.S.C. § 9601(21).

3. The near crisis condition of today's environment is evidenced by the fact that today there are nearly 1,000 toxic sites on the national priority list, and the list continues to grow at a rate far greater than the resources being committed to solve this problem.

*Sue for Recovery for Injuries to Natural Resources.*

Under general rules of statutory construction, Congress is deemed to be aware of the judicial interpretation given to certain statutory provisions, and is considered to have adopted that interpretation when it reenacts the statute without change. *James v. O'Bannon*, 715 F.2d 794 (2d Cir. 1983). With respect to the interpretation of CERCLA allowing local governments to bring claims for damages to natural resources, not only should Congress be deemed to have been aware of the decisions in *Boonton* and *Exxon*, but there is substantial evidence in the Congressional Record indicating that Congress was actually aware of these decisions when it enacted SARA. Both opinions had been rendered prior to the passage of SARA. In fact, during the floor debate leading to SARA's passage, one of the bill's sponsors expressly stated on the record that the final version of the bill would uphold the *Boonton* decision. Senator Lautenberg, one of the bill's sponsors and a member of the Conference Committee, stated that "these provisions would uphold the *Boonton* decision allowing municipalities to sue for cost recovery under the same Superfund provisions available to the states, and to serve as trustees for natural resource damages." 135 Cong. Rec. S14912 (daily ed. Oct. 3, 1986) (statement of Sen. Lautenberg). He further stated that this would "permit communities to move ahead with clean-up plans on their own." *Id.* While it is true that the comments of one senator generally cannot be attributed to the legislature as a whole, it is equally true that statements made by the legislation's sponsor deserve to be accorded substantial weight in interpreting the statute in question. *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976). These facts lead to the inescapable conclusion that Congress intended to leave intact the decisions in *Boonton* and *Exxon* allowing municipalities to sue for damages to natural resources.

Further support for the position that Congress tacitly approved of the *Boonton* and *Exxon* decisions is found in the legislative history accompanying the passage of SARA. The House of Representatives' version of SARA amended the defi-

inition of state to specifically exclude units of local governments. H.R. 962, 99th Cong., 2d Sess. (1986). But the Senate version, the one ultimately enacted into law, did not contain this new definition. *Id.* In explaining the deletion, the Joint Explanatory Statement of the Committee of Conference stated that “[t]he conference substitute does not include the House amendment to the definition of ‘State’ leaving it to the court’s interpretation of this provision.” *Id.*

While the rejection of proposed legislation ordinarily does not conclusively establish legislative intent, the rejection of a specific provision can be particularly significant. *Fox v. Standard Oil Co.*, 294 U.S. 87, 96 (1935); *People for Env’tl. Progress v. Leisz*, 768 F.2d 1030, 1038 (9th Cir. 1986) (concluding that the explicit rejection of a proposed amendment to FIFRA authorizing private suits is a strong indication that Congress was opposed to private suits under FIFRA); *G.A.O. v. G.A.O. Personnel App. Bd.*, 698 F.2d 516, 525 (D.C. Cir. 1983) (concluding that Congress’ rejection of proposed legislation making judicial review unavailable strongly suggests that Congress intended that judicial review be available).

From this, it is logical to conclude that by its explicit rejection of the amendment to the definition of state to exclude local governments, Congress manifested an intent that local governments be *included* within this definition.

E. *The District Court Placed Too Much Emphasis on the Fact That the Governor of New Union Declined to Designate the City of Northwood a Trustee for the Natural Resources in Northwood.*

In its opinion, the district court seemed to place unnecessary emphasis on the fact that the Governor of New Union refused the Mayor of Northwood’s request to be designated a trustee over the natural resources in Northwood. Section 107(f)(2)(B) 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 . . . under their trusteeship.” 42 U.S.C. § 9607(f)(2)(B) (emphasis added). While there is no reported case interpreting this provision, one commentator

has taken the position that the language is nothing more than an action-forcing mechanism designed to clarify which State officials may act as trustees for natural resources under *the State's control*. Maraziti, *Local Governments: Opportunities to Recover for Natural Resource Damages*, 17 *Envtl. L. Rep.* 10,036 (Feb. 1987) (emphasis added). This has little effect on the conclusion that municipalities are able to act as trustees in their own right. To conclude, as the district court apparently did, that the designation of state officials as natural resource trustees bars municipal governments from acting as trustees for resources under their control, leads to exactly the type of anomalous result foreseen by the courts in both *Boonton* and *Exxon*. For under this reasoning, local governments, the very entities charged with management and control of the natural resources, are prohibited from bringing actions to recover the cost of protecting them. *City of New York v. Exxon Corp.*, *supra*, 633 F. Supp. at 619. This not only seems illogical, but goes a long way toward frustrating the broad remedial intention of CERCLA.

## CONCLUSION

The DOI is every bit as interested in seeing that natural resources are protected, and injury to them compensated for, as the City of Northwood. In fact, in the perfect world, the DOI would be more than willing to respond to every possible threat posed to these precious resources. Unfortunately, in today's world of trillion dollar national deficits, and the resulting budget cuts being foisted on public agencies, there is only so much one agency can do. Unfortunate is the reality that, while budgets are shrinking, the crisis facing our environment due to hazardous wastes is increasing exponentially.

While to local governments and other private parties, nothing may appear more urgent than the hazardous substance problem in its own backyard, the fact is that the severity of problems vary to some degree. Giving private parties the right to force the federal government to respond to any natural resource problem, regardless of its severity, is not only contrary to legislative intent, but constitutes an enormous

waste of increasingly limited resources.

The DOI submits that a far better solution to this national problem, indeed one implicitly endorsed by the legislature, is to allow those on the front lines of the problem to wage the battle themselves by allowing local municipalities to sue for damage to natural resources under their management and control. By granting local governments this power, the federal government would be free to devote its resources to areas of broader concern, while local governments would be able to make decisions based on what is best for them. After all, it seems more logical to allow those most closely affected by the problem to make the enforcement decisions affecting those resources under their control.

In interpreting CERCLA, courts must always be mindful that the overriding purpose sought to be accomplished is the clean-up of hazardous substances in the environment. Thus any interpretation that would further this broad remedial goal, without doing violence to the statute itself, should be encouraged. It is just this rationale that led the only two courts publishing on this issue to conclude that municipalities could in fact act as trustees for natural resources under their management and control. And it is this same rationale that should lead this court to the identical conclusion.