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**The Rhetoric of Public Expectation: An
Enquiry into the Concepts of
Responsiveness and Responsibility
Under the Environmental Laws**

Gerald M. Levine*

I. Introduction

A. *The Craft of Communication*

Statutes are a form of literary composition. They may not share all of the same purposes as other compositions, but they do share certain features and techniques which are the common property of all writers. Compositions are organizations of words and ideas. Particular kinds of compositions dictate different organizations, so that what may be appropriate to one is not appropriate to another. Statutes state the law. They are read for instruction, as other compositions may be read for entertainment. Whether for instruction or entertainment, readers sensitive to language will be able to glean more from a particular composition than what is literally said. For example, evidence of a writer's meaning can be found not only in the choice of words, but also in their arrangement.

Lawmakers have the same imperative need as authors of other kinds of works to state what they intend in a manner

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that their readers can understand. To accomplish this, they use rhetorical techniques and organizational principles which are at once common to the craft of communication and, at their most effective, integral to the message. The kind of statutes discussed below embody society's response to actual and potential degrading of the environment. Environmental statutes encourage people to act responsibly. Those who are targeted are more likely to act responsibly if they know what the public expects of them and how government and courts will respond to their failure to comply with statutory mandates.

This article examines public expectation and expectation of private response, as these are revealed in statutory language, organization, and judicial construction of environmental laws. Interpretation of any text rests on a cultural understanding of what words mean in their context. Where meanings are uncertain or disputed, then interpretation rests on deducing meaning from evidence within and outside of the text. Expectation — that is, what is expected of one — is implicit in statutes, and its presence is some evidence of legislative intention. Misreading of expectation has far reaching consequences. After all, it is for departure from expectations that penalties are imposed.

Language and organization are traditionally concerns of rhetoric. Rhetoric is an ancient discipline. Even though rhetorical and compositional strategies may not generally be associated with legislation, they are nevertheless fundamental to composing statutes. In fact, it is impossible to imagine statutes being effective without rhetoric. The way in which material is set forth is important, both for itself and for what it contributes to understanding content, although ultimately it is content itself that most concerns statutory readers and courts.

The search for statutory meaning takes interested readers and courts deeply into both text and context. Text is the result of writers making linguistic, rhetorical, and compositional choices. From the choices lawmakers make readers infer attitude and expectation, and these inferences are consequential in influencing judicial interpretations of public law. To a

greater degree than other laws, environmental laws contain the reasons for their existence and explain why governmental intervention is necessary.

The analytical procedures for searching out meaning are well established.¹ Courts "look first, of course, to the statutory language, particularly to the provisions made therein. Then we review the legislative history and other traditional aids of statutory interpretation to determine congressional intent."² They "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."³

"Legislation," said Justice Frankfurter:

[H]as an aim; it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of government. That aim, that policy is not drawn, like nitrogen, out of the air; it is evinced in the language of the statute, as read in the light of other external manifestations of purpose. That is what the judge must seek and effectuate⁴

How judges "seek and effectuate" their reading of a statute is a complex issue. Language is multi-layered and carries many kinds of signals. Any one word may suggest different meanings for different readers. Lawmakers' decision to prefer one word or phrase to another is not just some incidental or prosaic fact, but instead constitutes significant and consequential evidence in determining what they mean.

The public's perception of the environment and its demands on lawmakers has undergone a change over the past

1. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981).

2. *Id.*; cf. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988) (court considers language and design of the statute as a whole).

3. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 285 (1956) (quoting *United States v. Boidore's Heirs*, 49 U.S. (8 How.) 113, 122, (1850)). See also, *United States v. Hell's Canyon Guide Serv.*, 660 F.2d 735, 737 (9th Cir. 1981) (when a statute "is part of an organic whole, the statute should be viewed in context with the whole of which it is a part").

4. F. FRANKFURTER, *The Reading of Statutes*, in *OF LAW AND MEN* 60 (1956).

seventy-five years. It was only in 1969, in the National Environmental Policy Act (NEPA),⁵ that Congress first officially recognized the "profound impact of man's activity on the interrelations of all components of the natural environment."⁶ The following year Congress more openly declared that "man has caused changes in the environment."⁷ Congress found that the changes were attributable to industrial expansion, population growth, new and expanding technological advances, and high-density urbanization.⁸ Identifying "man" as the cause of changes suggested an entirely new approach to the issue of environmental degradation. It was recognized that the environment does not have unlimited capacity.⁹

Since NEPA, Congress and state legislatures have burnished their voices into environmental laws with particularly strong and cogent language. The laws employ their own distinctive rhetoric. The public was becoming alarmed in the early 1960s, and began to make demands of its elected representatives. Statutory language (then and now) is demonstrable evidence that legislators felt and feel powerfully about the environment, and that they are doing more than paying lip-service.

Environmental laws convey an urgent message to polluters and enforcers, urging them to take the environment into account as part of short- and long-term planning, in both the public and private sectors.¹⁰ Lawmakers make choices to

5. 42 U.S.C. §§ 4321-4370b (1988).

6. *Id.* § 4331(a).

7. Environmental Quality Improvement Act of 1970, 42 U.S.C. § 4371(a)(1) (1988).

8. *Id.* §§ 4331(a), 4371(a)(3).

9. See S. REP. NO. 296, 91st Cong., 1st Sess. 4, *reprinted in* 1969 U.S. CODE CONG. & ADMIN. NEWS 2751. The costs of past neglect of environmental crises "can no longer be deferred for payment by future generations, [because] [w]e no longer have the margins for error that we once enjoyed." *Id.* at 5.

10. An example of this urgency are the concerns expressed in the Global Change Research Act of 1990, 15 U.S.C. §§ 2921-2961 (Supp. 1991). Among the "findings" are the following:

(1) Industrial, agricultural, and other human activities, coupled with an expanding world population, are contributing to processes of global change that may significantly alter the Earth habitat within a few human generations.

express attitudes and expectations. The urgency expressed in environmental laws reveals itself through language and organization. Although environmental laws expressly announce public expectations of public and private acts, the large number of legal actions indicates that the duties and liabilities they impose either are not entirely clear, or are not well understood.

B. *Tone and Attitude*

Environmental statutes set forth the law in its technical aspects, but also explicitly or implicitly convey information about attitudes, expectations, etc., and reveal a moral purpose. Legislators choose their language with deliberation and develop their material for specific ends.

Even if a reader is unaware of the techniques that deliver attitudes, he or she can still be receptive to the attitude itself. Awareness of attitudes aids the interpretation of statutes and persuades the reader of the seriousness of its message. Tone and attitude are created through language. Tone designates attitudes implied in a communication. If a writer means to be stern and uncompromising, he shades his language to make that attitude clear. Statutes which grant no defenses to an act, or provide no coercive measures, must be regarded as being qualitatively different from those that do.

There is a tonal difference between the laws of environmental protection and the earlier laws of conservation. The language of early conservation laws was essentially passive and nonconfrontational, reflecting their limited scopes.¹¹ Non-

(2) Such human-induced changes, in conjunction with natural fluctuations, may lead to significant global warming and thus alter world climate patterns and increase global sea levels. Over the next century, these consequences could adversely affect world agricultural and marine production, coastal habitability, biological diversity, human health, and global economic and social well-being.

Id. § 2931(a).

11. In the absence of laws of environmental protection, the federal government turned in the 1960s to the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. §§ 401-467e (1986), to help the government prosecute polluters. Although this law was essentially dedicated to protecting navigation, one of its sections, called the Refuse Act, forbade the discharge of refuse into navigable waters. *Id.* §§ 441-454 (1986).

confrontational language suggests a willingness to accommodate, hence it is perceived as neutral to passive. In the way in which the earlier laws were couched, they assumed people would obey the laws because they ought to.

In contrast, NEPA and subsequent laws approach the problem in a new way. They decree actual government intervention, in language which is at once assertive and uncompromising. This approach assumes that people act first for their self-interest and not for the common good. They are compelled to act responsibly, under the threat and certitude of enforcement and imposition of penalties. Parties whose actions affect the environment are put on the defensive by modern environmental law, something that the earlier laws failed to do. NEPA provides that "each person has a responsibility to contribute to the preservation and enhancement of the environment."¹² The statute then includes the means to achieve the stated goal. "Person" is not defined in NEPA, but in subsequent laws Congress made it clear that the term embraces individuals, private and public entities, governmental agencies, etc.

While the earlier conservation laws incorporated precatory language,¹³ they were not supported by coercive and punitive measures. They also were not as direct and explicit about "human-induced changes" to the environment and their

12. 42 U.S.C. § 4331(c).

13. Major conservation legislation includes the National Park Service Organic Act of 1916, 16 U.S.C. §§ 1-18(f) (1988). It directs the National Park Services to conserve the scenery, the natural and historic objects, and the wildlife in national parks "in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." *Id.* § 1.

Between 1920 and 1948, there was a scattering of acts. The Federal Power Act of 1920, 16 U.S.C. §§ 791-824 (1988), is designed to promote the comprehensive development of the use of water for power purposes. *See id.* § 797 (1988). The Act specifically requires that any license issued under it shall provide for "adequate protections, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses" *Id.* § 803(a)(1).

The Fish and Wildlife Coordination Act of 1934, 16 U.S.C. §§ 661-666(c)(1988), declares that wildlife conservation is to receive equal consideration with other features of water resource development programs. *Id.* at § 661.

The precatory language apart, the statutory provisions are not coercive.

consequences.¹⁴ The absence of mutually supporting features suggests an entirely different legislative attitude.

When the various features are combined in an integrated text, they give environmental laws a new imperative force. People are put on notice that they ignore or discount the risk of enforcement and punishment at their peril. Prayers standing alone yield a different interpretation from prayers supported by coercive and punitive measures. The absence of coercive and punitive measures lessens the force of the prayers. Precatory language alone was never a sufficient basis for liability and punishment.

The evolution in approach from purely conservation laws to laws of environmental protection is exemplified by changes in language and approach. Environmental laws evidence a shift away from laissez faire business practices, characteristic of the earlier conservation laws, to interventionism. Environmental laws: A) demand that affected parties act responsibly; B) authorize intervention; C) prescribe substantial penalties for non-compliance; D) encourage preventive planning; E) create financial and evidentiary burdens; and F) compel parties to voluntary action.

Statutes are special both in what they communicate and how they communicate. They say much in a small compass and frequently mean more than they appear to say. The words in compressed communications, whether in poetry or law, carry a greater than usual burden of meaning. Literal readings produce alternative meanings, and the resulting disputes become grist for the judicial mill.

II. Discovering Legislative Intention

A. *Intention Expressed in Statutory Text*

Intention and expectation are expressed or conspicuously implicit in every part of a statutory text, and every part of the text must be considered evidence of meaning. Interpretation involves the marshaling of evidence for express commands, if they are there, or for implied commands, if tone, attitude, and

14. Global Change Research Act of 1990, 15 U.S.C. §§ 2921-2961 (Supp. 1991).

policy support such a reading. What the legislature is saying, and how it is saying it, answers the fundamental questions of responsibility and liability. Interpretation determines whether a "person" (which under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) is a globally defined term) will have liability or not.¹⁵

Attitudes implicit in statutes, or expressed in lawmakers' contemporaneous statements, significantly influence how courts read statutes. When a court holds that, although Congress did not specifically address an issue, it nevertheless intended a particular result,¹⁶ it makes a choice that has both financial and moral implications.

Environmental statutes have several conjunctively operating components: prefaces (not all statutes), definitions, jurisdictional statements, and law. Where they are present, prefaces are typically legislative "findings," "declarations," and "purpose," and are typically written in precatory language. Prefaces also make it clear what is at stake.¹⁷ The law component consists of proscriptions/prescriptions, penalties, rights, and remedies. Persons who administer the law, and those affected by it, want to know what statutes require, how responsibilities are distributed, and how liability is determined.

The definitions component, in essence a lexicon, serves

15. 42 U.S.C. §§ 9601-9675 (Supp. 1991). The environmental laws are extraordinary in reach. No person is exempt from regulation or free from administrative attention. Under CERCLA, the term "person" embraces the universe of actors, governmental and private, who contributed to the deterioration of the environment. "The term 'Person' means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." *Id.* § 9601(21). The term "individual" has been found to include officers, directors, managers, and shareholders of corporations.

16. *Louisiana-Pacific Corp. v. ASARCO, Inc.*, 909 F.2d 1260, 1262 (9th Cir. 1990) ("Preliminarily, we must decide whether there is successor liability under CERCLA. Although Congress failed to address specifically the issue of corporate successor liability in CERCLA, we . . . hold that Congress did intend successor liability.").

17. Global Change Research Act of 1990, 15 U.S.C. § 2931(a)(3) (Supp. 1991). "The release of chlorofluorocarbons and other stratospheric ozone-depleting substances is rapidly reducing the ability of the atmosphere to screen out harmful ultraviolet radiation, which could adversely affect human health and ecological systems."

two purposes: it educates the reader to the specialized meanings which the statute uses, which do not necessarily correspond with definitions in standard dictionaries, and it promotes statutory self-containment — that is, the statute itself provides sufficient information to the reader to make it unnecessary for him to go outside the statute to understand its meaning. Courts typically say that the language of a statute ordinarily is conclusive “[a]bsent a clearly expressed legislative intention to the contrary.”¹⁸

Words included in definitions run the gamut. Under CERCLA, for example, the term “barrel” means forty-two United States gallons at sixty degrees Fahrenheit.¹⁹ “Administrator” is the Administrator of the United States Environmental Protection Agency.²⁰ But the lexicon also includes the measurable and tangible, such as “contaminant”²¹ and “animal”;²² the abstract, such as “significantly”;²³ and the non-quantifiable, such as “taking.”²⁴ Two terms are indispensable to understanding the meaning of environmental statutes: “environment” and “liability.”

B. *Defining Environment*

The national policy is to “encourage productive and enjoyable harmony between man and his environment.”²⁵ In the

18. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

19. 42 U.S.C. § 9601(3).

20. *Id.* § 9601(2).

21. “Contaminant”, as defined in the Safe Drinking Water Act, means “any physical, chemical, biological, or radiological substance or matter in water.” 42 U.S.C. § 300(f)(6)(1988).

22. “Animal” is defined as “all vertebrate and invertebrate species, including but not limited to man and other mammals, birds, fish, and shellfish.” Federal, Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136(d)(1988).

23. Council on Environmental Quality, 40 C.F.R. § 1508.27 (1990).

24. The term “take,” as defined in the Endangered Species Act, means “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19)(1988); see S. REP. No. 307, 93d Cong., 1st Sess. 7, reprinted in 1973 U.S. CODE CONG. & ADMIN. NEWS 2989, 2995 (“‘Take’ is defined . . . in the broadest possible manner to include every conceivable way in which a person can ‘take’ or attempt to ‘take’ any fish or wildlife”).

25. 42 U.S.C. § 4321 (1988)(Congressional declaration of purpose in NEPA).

regulations promulgated by the Council on Environmental Quality (CEQ) (established under NEPA), "human environment" is defined "comprehensively to include the natural and physical environment and the relationship of people with that environment."²⁶

Words are like organisms which carry the code of their origins even as they mature and expand in meaning and nuance. The word "environment" has a range of meanings today, but when it was first employed, its meaning was limited to locality. Today, particularly when it is preceded by the article "the," "environment" usually signifies the larger rather than the smaller — regional, even global — rather than local. Substituting an adjective for the article, such as "home" or "workplace," the word "environment" can also describe small areas.²⁷ Nevertheless, when the subject is *the* environment, one thinks first of nature,²⁸ of the interactive ecological systems and the biosphere. The environment that the laws seek to protect is that which is physically encompassing.

The word "environment" is an import into English from old French. The Oxford English Dictionary (OED) records the first use of the word in the thirteenth century.²⁹ The word has two components: *en* ("in") and *viron* ("neighborhood"). *Environ* still carries its original meaning, "in the neighborhood or round about," as in "environs" (surrounding district of a town). It was later expanded to include the "region surrounding anything." The OED notes the first use of "environment" in this sense in 1830, in a work by Thomas Carlyle.³⁰

26. Council on Environmental Quality, 40 C.F.R. § 1508.14 (1990). An Environmental Impact Statement (EIS) is required under NEPA when a proposed Federal action will affect the quality of the "human environment." 42 U.S.C. § 4332. This has been interpreted to be limited to effects on the natural or physical environment. See *Image of Greater San Antonio v. Brown*, 570 F.2d 517 (5th Cir. 1978); *Breckinridge v. Rumsfeld*, 537 F.2d 864 (6th Cir. 1976), *cert. denied*, 429 U.S. 1061 (1977).

27. The "workplace" environment is the concern of the Occupational Safety and Health Act, 29 U.S.C. § 651 (1988).

28. The word "nature" shares a common base with *gnasce* signifying "beginning," "giving birth". L. THOMAS, *On Various Words*, in *A LONG LINE OF CELLS* 100 (1990).

29. 5 THE OXFORD ENGLISH DICTIONARY 315 (2d ed. 1989).

30. *Id.*

According to the OED, "environment" retained its local meaning and added other senses, including reference to the soil and the air (as used by Herbert Spencer in a work dating from 1855).³¹ "Environment" seems to have become increasingly inclusive as the pace of communications accelerated. Acceleration created the impression that the world was diminishing, and this fostered a realization that the symbiotic relationship among all living things pays no attention to political or geographical boundaries.³²

From the limited sense of "around about," "environment" has come to mean "surrounds"³³ in the sense of every part of their physical surroundings that humans know. The federal laws tend to define environment in the larger sense. For example, under CERCLA, "environment" means "(A) the navigable waters, the waters of the contiguous zone, and the ocean waters . . . and (B) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States."³⁴ The Toxic Substances Control Act (TSCA)³⁵ and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)³⁶ define "environment" as including "water, air, and land and the interrelationship which exists among and between water, air, and land and all living things."³⁷

How broadly the term "environment" is construed has been answered by courts in a variety of ways. One answer was given by the United States Supreme Court in an action under NEPA, which involved restarting a nuclear power plant at Three Mile Island after another plant at the same location suffered a meltdown.³⁸ An association of residents contended

31. *Id.*

32. *See*, *The Queen ex rel. Ontario v. United States EPA*, 912 F.2d 1525 (D.C. Cir. 1990).

33. 5 *THE OXFORD ENGLISH DICTIONARY* 315.

34. 42 U.S.C. § 9601(8).

35. 15 U.S.C. §§ 2601-2671 (1988).

36. 7 U.S.C. §§ 136-136y (1988).

37. § 3(5), 15 U.S.C. § 2602(5) (1988); § 2(j), 7 U.S.C. § 136(j) (1988).

38. *People Against Nuclear Energy v. United States Nuclear Regulatory Comm'n*, 678 F.2d 222 (D.C. Cir. 1982), *rev'd sub nom. Metropolitan Edison Co. v.*

that restarting the plant would cause both severe damage to the psychological health of persons living in the vicinity, and serious damage to the stability, cohesiveness, and well-being of the neighboring communities. The Nuclear Regulatory Commission (NRC) decided that it would not take evidence on the issue — that is, it would not consider whether the approval that was being sought was an action which would significantly affect the quality of the human environment — and the association brought suit.

The association was successful in the court of appeals, which held that the NRC improperly failed to consider whether the risk of an accident might cause harm to the psychological health of the surrounding area.³⁹ This conclusion implied that psychological health came within the ambit of NEPA and was an appropriate subject for study. The Supreme Court disagreed and held that NEPA does not require an agency to assess every impact or effect of its proposed action, but only the impact or effect on the environment. In the opinion of Justice Rehnquist, “[i]f we were to seize the word ‘environmental’ out of its context and give it the broadest possible definition, the words ‘adverse environmental effects’ might embrace virtually any consequence of a governmental action that someone thought ‘adverse.’”⁴⁰ The Chief Justice continued, “[b]ut we think the context of the statute shows that Congress was talking about the physical environment — the world around us, so to speak. NEPA was designed to promote human welfare by alerting governmental actors to the effect of their proposed actions on the physical environment.”⁴¹

Similarly, purely economic interests are not within the “zone of interest protected by NEPA,” unless they are inter-

People Against Nuclear Energy, 460 U.S. 766 (1983).

39. *People Against Nuclear Energy*, 678 F.2d at 228. Since “NEPA was designed to ‘promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man,’ ” in the context of NEPA, health encompasses psychological health. *Id.* at 227 (emphasis added).

40. *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 760, 772.

41. *Id.*

related with environmental effects. If there is such an interrelation, courts have concluded that all significant effects on the human environment should be considered by the decision maker.⁴²

State and local laws define environment in both the large and smaller senses. In New York law, "environment" is defined in the State Environmental Quality Review Act (SEQRA),⁴³ New York City's Environmental Quality Review Procedure Act (CEQR),⁴⁴ and the New York State Parks, Recreation and Historic Preservation Law (PRHPL).⁴⁵ In SEQRA and CEQR, environment includes "objects of historic or aesthetic significance, existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character."⁴⁶ In the PRHPL, environment or "environmental asset" includes "the historical, archeological, architectural and cultural heritage of the state."⁴⁷ The Declaration of Policy in the PRHPL finds that, "[t]he existence of irreplaceable properties of historical, archeological, architectural and cultural significance is threatened by the forces of change."⁴⁸ The phrase "forces of change," reminiscent of the Environmental Quality Improvement Act, does not otherwise appear in New York law.

Invocation of local meaning is illustrated in cases arising out of development in urban areas.⁴⁹ In *Chinese Staff &*

42. See *Highland Coop. v. City of Lansing*, 492 F. Supp. 1372, 1378 (W.D. Mich. 1980) ("most courts will review the agency's threshold decision only where the plaintiff raises 'substantial environmental issues'").

43. N.Y. ENVTL. CONSERV. LAW §§ 8-0101 (McKinney 1984). Governor Carey noted in his approval memorandum that the bill was modeled after NEPA. 1975 N.Y. LAWS 1761-62 (Governor's Approval Memorandum). The purpose of the act is "to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources; and to enrich the understanding of the ecological systems, natural, human and community resources important to the people of the state." *Id.*

44. New York, N.Y., Exec. Order 91 (1977).

45. N.Y. PARKS, REC. & HIST. PRES. LAW § 14.01 (McKinney 1984).

46. N.Y. ENVTL. CONSERV. LAW § 8-0105(6) (McKinney 1984).

47. N.Y. PARKS, REC. & HIST. PRES. LAW § 14.01.

48. *Id.*

49. Some federal courts have recognized that NEPA review encompasses in the urban setting the quality of urban life. See *Hanly v. Mitchell*, 460 F.2d 640 (2d Cir.

Workers Ass'n v. City of New York,⁵⁰ residents challenged the actions of the New York City Planning Commission and the Board of Estimates in approving a special permit for construction of a proposed high-rise luxury condominium on a vacant lot in their community.⁵¹ Both city and state laws require lead agencies to consider the short- and long-term primary and secondary effects of a proposed action.

The approval for the proposed development plan in the Chinatown section of New York City was annulled because the lead agency did not consider the potential effects on the surrounding community. The court held that "the impact that a project may have on population patterns or existing community character, with or without a separate impact on the physical environment, is a relevant concern in an environmental analysis since, the statute includes these concerns as elements of the environment."⁵²

Whichever "environment" is protected, the courts strictly construe the requirement that environmental factors are to be considered equally with other, more traditional concerns.⁵³

C. *Defining Liability*

Congress made a choice in fashioning CERCLA when it determined that liability attaches regardless of whether an af-

1972); *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972).

50. 68 N.Y.2d 359, 502 N.E.2d 176, 509 N.Y.S.2d 499 (1986).

51. *Id.* at 362, 502 N.E.2d at 177-78, 509 N.Y.S.2d at 500-01.

52. *Id.* at 366, 502 N.E.2d at 180, 509 N.Y.S.2d at 503. *Cf. Laurel Heights Improvement Ass'n v. Regents of the Univ. of California*, 47 Cal. 3d 376, 764 P.2d 278, 253 Cal. Rptr. 426 (1988), *as modified on denial of rehearing*, 205 Cal. App. 3d 354, 238 Cal. Rptr. 451 (1989).

53. *Calvert Cliffs' Coordinating Comm., Inc. v. Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971). *See also* *Natural Resources Defense Council v. Texaco*, 906 F.2d 934 (3rd Cir. 1990). In *Texaco*, the district court presumed that the mere fact of statutory violation warranted relief and enjoined *Texaco* from violating its pollutant discharge permit. In vacating the injunction and remanding the issue, the Third Circuit held that the court must apply traditional equitable standards and should not presume irreparable injury. *Id.* at 941. However, the court stated, "[W]e do recognize, and so advise the district court on remand, that . . . [e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration [and is often] irreparable." *Id.* (quoting *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987)).

fected party is blameworthy.⁵⁴ The terms "liable" and "liability"⁵⁵ are defined by reference to section 311 of the Clean Water Act.⁵⁶ The standard of liability under section 311 has been construed to be strict.⁵⁷ Liability strictly construed includes almost any permutation of liability. Three examples will suffice. The first example is from CERCLA, the second and third are from RCRA.

In order to reach corporate officers and directors, courts have taken several different, sometimes circuitous routes in order to find liability. In one leading case, the court first considered the definition of "owner or operator" contained in CERCLA's lexicon and found that it meant "any person owning or operating" an onshore facility.⁵⁸ It then looked up the definition of person in the same lexicon, which it found includes individuals as well as corporations.⁵⁹ From this internal evidence, the court reasoned:

More important, the definition of "owner or operator" excludes "a person, who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the facility." [42 U.S.C.] § 9601(20)(A). *The use of this exception implies that an owning stockholder who manages the corpora-*

54. The original House version of the bill imposed liability on "any person who caused or contributed to the release or threatened release . . ." H.R. REP. No. 1016, 96th Cong., 2d Sess. 33, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS, 6119, 6136. The House Committee Report accompanying the House bill noted that "for liability to attach . . . the plaintiff must demonstrate a causal or contributory nexus between the acts of the defendant and the conditions which necessitated response action . . ." *Id.* at 6136-37.

In its final version, owners and operators are liable without regard to fault or causation, and they cannot assert statute of limitations or contractual indemnification as a defense to any governmental action. 42 U.S.C. § 9607(a)-(b).

In contrast, New York made a different choice. The law provides that a person's "responsibility" for cleaning up contaminated property is to be determined "according to applicable principles of statutory or common law liability." N.Y. ENVTL. CONSERV. LAW § 27-1313(4) (McKinney 1984).

55. CERCLA § 101(32), 42 U.S.C. § 9601(32)(1988).

56. 33 U.S.C. § 1321 (1988).

57. *Steuart Transp. Co. v. Allied Towing Corp.*, 596 F.2d 609, 613 (4th Cir. 1979).

58. *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1052 (2d Cir. 1984).

59. *Id.*

tion, such as *LeoGrande*, is liable under CERCLA as an "owner or operator."⁶⁰

The court found liability by implication. Other courts have pursued different routes and reached the same conclusion.⁶¹

The Resource Conservation and Recovery Act (RCRA) provides that the wastes regulated by the statute do "not include solid or dissolved material in domestic sewage."⁶² In *Comite Pro Rescate de la Salud v. Puerto Rico Aqueduct and Sewer Auth.*,⁶³ the court was asked to determine whether factory wastes that mix with sewage emanating from bathrooms at factory workplaces are exempt from the application of RCRA. Defendants owned factories within a large industrial park. Sewer lines connected the plants to a major, privately owned sewer line, which in turn connected with a publicly owned sewer line that ran outside the park to a publicly owned sewage treatment plant.

The court, in rejecting defendants' interpretation of the statute, held:

First, the word "domestic" (coming from the Latin "domus" or "house") in ordinary English means "relating to the household or the family . . . connected with the supply, service, and activities of households and private residences." *Webster's Third New International Dictionary* 671 (1976). Following the Supreme Court, "we assume that the legislative purpose is expressed by the ordinary meaning of the words used."

Second, the statutory provision defines "solid waste," not simply in terms of type of material, but also in terms of source. Thus, it speaks of material "resulting from industrial, commercial, mining, . . . agricultural . . . and . . . community" operations and activities and then contrasts "domestic" sewage. In context, exempt "domestic sewage" therefore seems to refer, not simply to type, but also to

60. *Id.* (emphasis added).

61. See *infra* note 128 and accompanying text.

62. 42 U.S.C. § 6903(27) (1988).

63. 888 F.2d 180 (1st Cir. 1989).

source.⁶⁴

Thus, the court held the fact that when "domestic sewage" mixes with factory waste, the latter is not elevated to the exempt category. As in other instances, unless there is an express command to the contrary, courts tend to interpret the law strictly in favor of protection, by giving the statute an interpretation consistent with the attitudes expressed and the general object and purpose of the legislation.

It has already been observed that culpability is not the sole predicate for liability. Not every person liable under a statute (CERCLA) caused or created the condition for which liability attaches. For the most part, however, where emissions (Clean Air Act) or effluvia (Clean Water Act, RCRA) exceed the standard, there is a direct causal connection between the activities of a person and liability. If "A" causes harm to the environment, "A" is the target of the legislation and is answerable in penalties and damages. Failure to comply with protective requirements is *prima facie* evidence of violation. In *Ecodyne Corp. v. Shah*,⁶⁵ the dispute concerned who would ultimately bear the cost of cleaning up groundwater and soil polluted by chromium. It was undisputed that the plaintiff, who was seeking contribution from subsequent owners of the property, introduced the pollutant to the environment during the time it owned the property.⁶⁶ Plaintiff's theory was that subsequent owners were nonetheless liable because the general movement and migration of the chromium constituted a "disposal" as that term is defined in the statute.⁶⁷ If this were true, then defendants would not be able to escape liability even though they had not caused the condition.⁶⁸

The term "disposal" means:

[T]he discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste

64. *Id.* at 184-85 (citations omitted).

65. 718 F. Supp. 1454 (N.D. Cal. 1989).

66. *Id.* at 1455.

67. *Id.* at 1457.

68. *Id.*

into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any ground waters.⁶⁹

In arguing that the general movement and migration of the chromium constituted a disposal, plaintiff primarily focused on the words "discharge" and "leaking."⁷⁰ The court was not impressed. However broad Congress may have intended the definition, plaintiff's interpretation distorted Congressional intent.⁷¹ Therefore, the court stated "[t]he meaning of a word is or may be known from the accompanying words—this is the principle of *noscitur a sociis*."⁷² "*Noscitur a sociis*" means known by its associates.⁷³ The court continued:

In ascertaining what disposal means, the court looks at its definitional components and finds that these three nouns (discharge, deposit, and injection) and four gerunds (dumping, spilling, leaking, and placing), when read together, all have in common the idea that someone do something with hazardous substances. Taking the clearest example, the court notes that "placing," read in the context of the statute, means a person introducing—putting—formerly controlled or contained hazardous substances into the environment.⁷⁴

The court concluded, "for plaintiff solipsistically to read, for example, 'leaking' as meaning the general migration of chemicals and, as such, a disposal under [the statute] renders not only the definitional phrases . . . 'into or on any land or water' superfluous, but would also conflict with the general

69. 42 U.S.C. § 6903(3).

70. *Ecodyne Corp.*, 718 F. Supp. at 1456.

71. *Id.* at 1457. "However broad Congress may have intended the definition, Congressional intent does not justify the distortion [of] the statute. Therefore, instead of relying on legislative history (an exercise unnecessary in this case), the Court will apply sound principles of statutory and grammatical interpretation." *Id.*

72. *Id.*

73. BLACK'S LAW DICTIONARY 1060 (6th ed. 1990).

74. *Ecodyne Corp.*, 718 F. Supp. at 1457.

structure of [the provision].”⁷⁵

In a government suit, a prior owner who caused or contributed to a hazardous condition cannot escape liability by the mere fact of its having conveyed property to a subsequent owner. A subsequent owner, albeit “innocent” of having released pollutants into the environment, is no less liable for the condition, even if not culpable. “Innocent” does not mean that a party can escape liability to the government. Their remedy in the event of a governmental action is to look back in the chain of title for indemnification or contribution from prior owners and operators, whichever applies.⁷⁶

III. Institutionalizing Responsibility and Accountability

The manner in which responsibilities and liabilities are distributed has both moral and financial implications. The attitude toward responsibility is conspicuously apparent in introductory statutory provisions entitled “Findings” and “Declarations.” The precatory language and plain speaking concerns of these provisions set a tone, an expectation. Findings and declarations combine the concrete and scientific with the abstract and the emotive to express the scope of the laws and the depth of public commitment. They establish a basic set of values both by the facts which they present and the tone of presentation.

The environmental laws opt for particularized responsibility. They do this by institutionalizing responsiveness and responsibility. It has already been suggested that the environmental laws put the regulated community as well as enforcement personnel on the defensive. Persons whose activities affect the environment are compelled to account for their actions and to regard protection as a primary rather than an incidental element of planning.⁷⁷

75. *Id.*

76. Levine, *Spreading Costs for Cleaning up Contaminated Property: Contribution and Indemnification under CERCLA*, N.Y.S.B.J. July-Aug. 1991, 41, 42.

77. See *United States v. Cannons Eng'g Corp.*, 899 F.2d 79 (1st Cir. 1990). The court's attitude toward non-cooperative potentially responsible parties (PRPs) is particularly relevant: “Crown argues that it was unfairly subjected to a double penalty

These findings and declarations are intended to be read into the subsequent provisions and to promote appreciation for the environment. For example, the legislature's declaration in NEPA that its purpose is to "create and maintain conditions under which man and nature can exist in productive harmony" expresses the implicit concern that certain conditions are not conducive to productive harmony.⁷⁸

NEPA states it is the "responsibility of each person to contribute to the preservation and enhancement of the environment."⁷⁹ If each person has a "responsibility," then no person can claim that he is exempt, or can excuse behavior which is not responsible. A degraded environment is an unhealthy environment. An unhealthy environment is a breach of trust. Environmental laws seek to remedy past abuses and to prevent future ones. Responsibility connotes accountability; the ability to fulfill an obligation or trust. Implicit in this meaning is the sense of liability for the failure to fulfill expectations. Environmental laws are based on these explicit and implicit assumptions.

Responsibility is inferred from expectation. In the conference report which followed the reconciliation of the House and Senate bills for the Hazardous and Solid Waste Amendments of 1984,⁸⁰ the conferees stated that the law was "intend[ed] to convey a clear and unambiguous message to the regulated community and the Environmental Protection Agency" with respect to land disposal of hazardous waste:

Conferees intend that through the vigorous implementation of the objectives of this Act, land disposal will be eliminated for many wastes and minimized for all others, and that advanced treatment, recycling, incineration and other hazardous waste control technologies should replace land disposal. In other words, land disposal should be used only as a last resort and only under conditions

because withholding the information resulted both in its exclusion from the settlements and in the imposition of bad-faith penalties. We see nothing amiss." *Id.* at 93.

78. 42 U.S.C. § 4331(a).

79. 42 U.S.C. § 4331(c).

80. Pub. L. No. 98-616, 98 Stat. 3221 (1984).

which are fully protective of human health and the environment.⁸¹

These intentions were expressed under the heading "Congressional Findings" in RCRA.⁸² One of the four Findings announces that there is a "rising tide of scrap, discarded and waste materials."⁸³ The Finding reads:

[T]he economic and population growth of our Nation, and the improvements in the standard of living enjoyed by our population, have required increased industrial production to meet our needs, and have made necessary the demolition of old buildings, the construction of new buildings, and the provision of highways and other avenues of transportation, which, together with related industrial, commercial, and agricultural operations, have resulted in a rising tide of scrap, discarded, and waste materials.⁸⁴

In the same provision, under the heading "Environment and Health," Congress found that:

- (1) although land is too valuable a national resource to be needlessly polluted by discarded materials, most solid waste is disposed of on land in open dumps and sanitary landfills; [and]
- (2) disposal of solid waste and hazardous waste in or on the land without careful planning and management can present a danger to human health and the environment.⁸⁵

81. H.R. REP. NO. 1133, 98th Cong. 79, 80-81, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 5576, 5651 (emphasis added).

82. 42 U.S.C. § 6901. As originally enacted, RCRA "did not require permittees to take significant remedial action to correct past mismanagement of hazardous waste." *United Technologies Corp. v. United States EPA*, 821 F.2d 714, 717 (D.C. Cir. 1987).

In 1984, Congress decisively changed that focus with the Hazardous and Solid Waste Amendments (HSWA), Pub. L. No. 98-616, 98 Stat. 3221 (1984). This Amendment greatly increased the authority of the Environmental Protection Agency to require corrective action, even for releases that occurred before HSWA was enacted.

83. 42 U.S.C. § 6901(a)(2).

84. *Id.*

85. *Id.* § 6901(b).

Consequently, of the eleven objectives of RCRA, one prohibits "future open dumping on the land" and another requires that "hazardous waste be properly managed in the first instance thereby reducing the need for corrective action at a future date."⁸⁶

Similar concerns for improving the quality of the environment are expressed in the Clean Air Act⁸⁷ (subsequently much amended, most recently in the 101st Congress). In the Clean Air Act, Congress found that:

The growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportations.⁸⁸

The Clean Water Act⁸⁹ is even more ambitious because it aims to have international influence as well as national effectiveness. Nationally, the objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."⁹⁰ The international objective, according to the Congressional policy statement, is:

That to the fullest extent possible all foreign countries shall take meaningful action for the prevention, reduction, and elimination of pollution in their waters and in international waters and for the achievement of goals regarding the elimination of discharge of pollutants and the

86. *Id.* §§ 6902(a)(3) and (5). RCRA permits both the federal government and private citizens to ask a court for injunctive relief against any person connected with the handling, storage, treatment or disposal of "any solid waste or hazardous waste [which] may present an imminent and substantial endangerment to health or the environment." *Id.* § 6973(a) (authorizing administrator to bring suit); *Id.* § 6972(a)(1)(B) (authorizing citizens' suits to enforce the "imminent and substantial endangerment" provision).

87. 42 U.S.C. §§ 7401-7642 (1988).

88. *Id.* § 7401(a)(2).

89. 33 U.S.C. §§ 1251-1387 (1988).

90. *Id.* § 1251(a).

improvement of water quality to at least the same extent as the United States does under its laws.⁹¹

Other laws make specific reference to the countryside and public park and recreation lands. For example, in the Department of Transportation Act of 1966, Congress declared that it is the "national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites."⁹² Congress wrote the identical language into the Federal-Aid Highway Act of 1968.⁹³

State constitutions are similarly broad. The point can be made by quoting the language of the Constitutions of New York and Michigan. The Constitution of the State of New York reads, "the policy of the state shall be to conserve and protect its natural resources."⁹⁴ The Constitution of the State of Michigan reads, "the conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people."⁹⁵

The general language of conservation in these Constitutions acquire greater resonance by juxtaposition with the interventionist language in particular environmental statutes and regulations. Preambles to quality review statutes, in particular, set forth ideals which are introductory to the prescriptive parts of the statutes. They establish a framework for all actions that may have a significant effect on the environment.⁹⁶ In the preamble to New York's statute, the Legislature recognizes that at all times the environment must be "healthful and pleasing to the senses and intellect of man now and in the future."⁹⁷ That language, and the use of words such

91. *Id.* § 1251(c).

92. 49 U.S.C. § 1653(f), *repealed by* Pub. L. No. 97-449 § 7(b), 96 Stat. 2444, (Jan. 12, 1983).

93. 23 U.S.C. § 138 (1988).

94. N.Y. CONST. art. 14, § 4.

95. MICH. CONST. art. 4, § 52.

96. N.Y. ENVTL. CONSERV. LAW § 8-0101 (McKinney 1984).

97. *Id.* § 8-0103(1).

as "responsibility" and "obligation," emphasize the urgency of the environmental issues.⁹⁸ The statute declares that "[e]very citizen has a responsibility to contribute to the preservation and enhancement of the quality of the environment,"⁹⁹ and that government has an "obligation to protect the environment for the use and enjoyment of this and all future generations."¹⁰⁰ "Every citizen" is an inclusive group.¹⁰¹ In its sweep the term "citizen" equates with "person" as defined in RCRA and CERCLA.

California's quality review law provides that the "maintenance of a quality environment for the people . . . now and in the future is a matter of statewide concern."¹⁰² It commands that the environment be accorded the fullest possible protection consistent with the statutory language.¹⁰³ New York's invocation is identical to California's in all material respects.¹⁰⁴ New York courts have been particularly insistent on strict and literal compliance with statutory procedural requirements. SEQRA requires literal compliance; substantial compliance is not sufficient.¹⁰⁵

In interpreting Washington State's environmental law, the Supreme Court of Washington made it clear that the "maintenance, enhancement and restoration of our environment is the pronounced policy of this state, deserving faithful judicial interpretation."¹⁰⁶ Under NEPA and state environ-

98. *Id.* § 8-0103(2), (8).

99. *Id.* § 8-0103(2).

100. *Id.* § 8-0103(8).

101. The statute addresses citizens who are applicants. The term "applicant" means any person making an application . . . to an agency to . . . grant an approval in connection with a proposed action." N.Y. COMP. CODES R. & REGS. tit. 6 [hereinafter 6 N.Y.C.R.R.], § 617.2(d) (1987). The term "Person" means "any agency, individual, corporation, governmental entity, partnership, association, trustee or other legal entity." 6 N.Y.C.R.R. § 617.2(z) (1987).

102. CAL. PUB. RES. CODE, § 21,000(a) (West 1986).

103. *Friends of Mammoth v. Board of Supervisors*, 8 Cal. 3d 247, 259, 502 P.2d 1049, 1056, 104 Cal. Rptr. 761, 768 (1972).

104. ENVTL. CONSERV. LAW § 8-0103(1) (McKinney 1984).

105. *Glen Head-Glenwood Civic Council, Inc. v. Town of Oyster Bay*, 88 A.D.2d 484, 490-91, 453 N.Y.S.2d 732, 737 (2d Dep't 1982).

106. *Eastlake Community Council v. Roanoke Assoc.*, 82 Wash. 2d 475, 513 P.2d 36, 46 (1973). "The 'continuing' policy and responsibility of the state is not only to

mental quality review acts generally, lead agencies are not authorized to vary the regulatory procedures by lightening the burdens and responsibilities of either the applicant or agency.¹⁰⁷ The lead agencies cannot give final approvals until they make findings that an action minimizes or avoids adverse environmental effects. The national environmental policy is to "attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences."¹⁰⁸ NEPA and state environmental quality review acts require the sponsor to prepare and circulate an environmental impact statement. Failure to comply with this requirement supports denial of the application for private sponsors¹⁰⁹ and remand for public sponsors.¹¹⁰

To take only one state example, a typical directive is illustrated by the regulations promulgated by the New York State Department of Environmental Conservation. Under New York law, the lead agency is required to find that the "adverse environmental effects revealed in the environmental impact statement process will be minimized or avoided by incorporating as conditions to the decision those mitigative measures which were identified as practicable."¹¹¹ If the measures are reasonable, that is, they relate to the impact sought to be ameliorated, then the court will not disturb an agency's

maintain and enhance our environment, but also to 'prevent or eliminate damage to the environment' and 'restore' it." *Id.* at 46 (emphasis in original).

107. See *Schenectady Chemicals v. Flacke*, 83 A.D.2d 460, 463, 446 N.Y.S.2d 418, 420 (3d Dep't 1981)(substance of SEQRA cannot be achieved without its procedure; therefore, attempts by agencies to vary procedural prerequisites are not permitted since such deviations undermine the law's express purposes); *Rye Town/King Civic Ass'n v. Town of Rye*, 82 A.D.2d 474, 477; 442 N.Y.S.2d 67, 70 (2d Dep't 1981)(lead agency failed to prepare EIS).

108. 42 U.S.C. § 4331, NEPA § 101(b)(3).

109. *Glen Head v. Town of Oyster Bay*, 88 A.D.2d at 490-91, 453 N.Y.S.2d at 737.

110. See *Natural Resources Defense Council, Inc. v. Callaway*, 524 F.2d 79, 94 (2d Cir. 1975). The court held, "[b]y failing to present a complete analysis and comparison of the possible dumping sites, the Final EIS fails to perform its vital task of exposing the reasoning and data of the agency proposing the action to scrutiny by the public and by other branches of the government." *Id.* at 94.

111. 6 N.Y.C.R.R. § 617.9(c)(4) (1983).

decision to attach conditions.¹¹²

IV. Trustees, Guardians and Stewards

A. *Moral Responsibility*

The concept that the each generation has a moral responsibility to succeeding generations for protecting the environment was undoubtedly thought before 1969, but it was not formally expressed as public policy until the enactment of The National Environmental Policy Act of 1969 (NEPA).¹¹³ In that act, Congress declared that, "it is the continuing responsibility of the federal government to use all practicable means, consistent with other essential considerations of national policy, to [ensure] . . . that the Nation may . . . fulfill the responsibilities of each generation as trustee of the environment for succeeding generations."¹¹⁴ The Oxford English Dictionary defines a "trustee" as "one who is held responsible for the preservation and administration of anything."¹¹⁵ To trust is to have confidence in or reliance on some quality or attribute of a person. A trustee is a protector. Mini-NEPAs (state NEPA equivalents), such as N.Y.'s SEQRA, declare that agencies are "stewards of the air, water, land and living resources . . . for the use and enjoyment of this and all future generations."¹¹⁶ For them, non-compliance results in chastisement, injunction, and remand.

A steward is an administrator, one who guards a valuable possession. The first element of the word, "ste," is of uncertain origin, most probably from the Old English word "stig," meaning house, dwelling.¹¹⁷ The element "ward" is found in

112. *Town of Henrietta v. New York Dep't of Env'tl. Conservation*, 76 A.D.2d 215, 430 N.Y.S.2d 440 (4th Dep't 1980).

The holding in *Henrietta* is now incorporated in the New York State Department of Environmental Conservation Regulations, 6 N.Y.C.R.R. § 617.3(b) (1987). See D. Snider & G. Levine, "A Prolegomenon to Understanding the Developer's True Statutory Responsibilities Under SEQRA," 5 *Touro L.R.* 255, 277 (Spring 1989).

113. 42 U.S.C. §§ 4321-4370b (1988).

114. *Id.* § 4331(b).

115. 18 *THE OXFORD ENGLISH DICTIONARY* 625 (2d ed. 1989).

116. N.Y. ENVTL. CONSERV. LAW § 8-0103(8) (McKinney 1984).

117. 10 *OXFORD ENGLISH DICTIONARY* 936 (1st ed. 1933).

several languages. It means watching or guarding.¹¹⁸

A trustee is a fiduciary, a guardian who has legal responsibilities. When the law talks about trust it is not a vague concept. There is a continuum of generational responsibility. The concept applies equally to every person whose activity adversely affects the environment, as it does to enforcers with a legal duty to protect the environment from waste. Expression of the trustee concept is found in NEPA,¹¹⁹ the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),¹²⁰ and the Clean Water Act,¹²¹ as well as in state environmental quality review acts. Trustee, guardian, and steward are words that connote the highest level of trustworthiness and responsibility. With responsibility comes expectation and accountability. Expectation fosters demands and pressures which influence enforcement and interpretation alike.

If a person is unable to protect his or her rights because of minority, infirmity, or some other incapacity, the courts will appoint a trustee or a guardian ad litem to represent him. The environment, essentially passive as it is, is like an incapacitated person who needs a trustee or a guardian ad litem to protect its interest. Its bounty depends on the maintenance of many balances.¹²² It is in this sense that the laws can be regarded as a mediator between man and the environment. The laws direct the stewards and trustees to intercede on behalf of the environment.

To follow through with the analogy, on the federal level the environment is represented by the Environmental Protec-

118. 12 OXFORD ENGLISH DICTIONARY 84 (1st ed. 1933).

119. 42 U.S.C. § 4331(c).

120. 42 U.S.C. § 9607(f)(2) (1988). CERCLA provides for the designation of federal and state "trustees" who are authorized to assess natural resource damages and press claims for the recovery of such damages, both under CERCLA §§ 107(f)(2), 111, 122(j)(2), 42 U.S.C. §§ 9607(f)(2), 9611, 9622(j)(2), and under the Clean Water Act, 42 U.S.C. § 1321 (1988). See *Ohio v. United States Dep't of Interior*, 880 F.2d 432 (D.C. Cir. 1989).

121. 33 U.S.C. § 1321.

122. See R. CARSON, *SILENT SPRING* (1962); books and articles by Barry Commoner, including *THE CLOSING CIRCLE* (1971) and *MAKING PEACE WITH THE PLANET* (1990).

tion Agency (under CERCLA, RCRA, etc.), or by the Interior Department (under the Endangered Species Act), or by the Army Corps of Engineers (under The Clean Water Act). When the trustee agency fails to act, most environmental statutes authorize citizens to take action against persons who violate regulatory standards.¹²³ Liberal rules of standing permit class actions in other instances.

Because they are more assertive in their attitudes toward protection, post-NEPA laws impose significantly greater demands on those whose actions affect the environment than the prior conservation laws. This is demonstrated in the judicial decisions that interpret post-NEPA laws. Failure to comply with specific procedural and substantive requirements results in severe consequences: injunctions, criminal liability, and significant financial penalties.¹²⁴ Indeed, an argument can be made that conservation laws expand in interpretive possibilities because of the existence of the more affirmative and interventionalist attitudes expressed in the environmental laws.

In any event, trustee, guardian, and steward are words that connote the highest level of trustworthiness and responsibility. With responsibility comes expectation and accountability. Expectation fosters demands and pressures which influence enforcement and interpretation alike. As already noted, expectation is registered expressly and implicitly in language and tone. If you change language, tone and expectation are changed.

B. *Protecting the Snail Darter*

Laws protective of the environment and nature do not stop with individuals and private organizations. Regulatory

123. Of course, the citizen in a citizens' suit, or an opponent of an action likely to have a significant effect on the environment must discharge its burden of proving that actions or conduct violate the law.

124. Under the Internal Revenue Code, a "fine or similar penalty paid to a government for the violation of any law" is not allowed as a business expense. I.R.C. § 162(f) (1988).

One court rejected a taxpayer's argument that the Code precludes deduction of only those civil penalties that serve a punitive purpose. *Colt Indus. v. United States*, 880 F.2d 1311, 1313 (Fed. Cir. 1989).

agencies also have responsibilities. One striking case, *Tennessee Valley Authority (TVA) v Hill*,¹²⁵ decided by the United States Supreme Court involved the snail darter. This three inch fish is found in a habitat that would have been destroyed by the operation of the proposed Tellico Dam. "It may seem curious to some," the U.S. Supreme Court held, "that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than \$100 million."¹²⁶

In concluding that the explicit provisions of the Endangered Species Act¹²⁷ required precisely that result,¹²⁸ the Court stated:

One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies "to insure that actions *authorized, funded, or carried out* (by them do not) *jeopardize* the continued existence" of an endangered species or "*result in the destruction or modification of habitat of such species . . .*" This language admits of no exception. Nonetheless, petitioner urges, as do the dissenters, that the Act cannot reasonably be interpreted as applying to a federal project which was well under way when Congress passed the Endangered Species Act of 1973.¹²⁹

For TVA to sustain its position, the Court explained, "we would be forced to ignore the ordinary meaning of plain language."¹³⁰ The Court continued, "it has not been shown, for example, how TVA can close the gates of the Tellico Dam without 'carrying out' an action that has been 'authorized' and

125. *Tennessee Valley Authority v Hill*, 437 U.S. 153 (1978).

126. *Id.* at 172.

127. 87 Stat. 884 (1973), 16 U.S.C. §§ 1531-1544 (1988).

128. *Cf. Defenders of Wildlife v. Lujan*, 882 F.2d 1294 (8th Cir. 1990), in which the court rejected the interpretation of the Secretary of the Interior concerning a limitation on his authority.

129. *Tennessee Valley Auth.*, 437 U.S. at 173 (citation omitted).

130. *Id.*

'funded' by a federal agency. Nor can we understand how such action will 'insure' that the snail darter's habitat is not disrupted."¹³¹

The Court found that it could arrive at the meaning intended by Congress by examining an earlier, less comprehensive act, the Endangered Species Act of 1966. In the earlier act, Congress qualified the obligation of federal agencies by stating that they should seek to preserve endangered species only insofar as is practicable and "consistent with [their] primary purposes."¹³² The Court found that "[l]ikewise, every bill introduced in 1973 contained a qualification similar to that found in the earlier statutes."¹³³

However, during committee hearings for amending the Endangered Species Act, a representative of the Sierra Club attacked the use of this wording, because it "could be construed to be a declaration of congressional policy that other agency purposes are necessarily more important than protection of endangered species and would always prevail if conflict were to occur."¹³⁴ The final version of the 1973 Act, therefore, omitted all the reservations. The Court held that, "[t]he pointed omission of the type of qualifying language previously included in endangered species legislation reveals a conscious decision by Congress to give endangered species priority over the "primary missions" of federal agencies."¹³⁵

In an attempt to retrieve its position, the TVA had invited the Supreme Court to view the Endangered Species Act "reasonably," and to shape a remedy that would accord "with some modicum of common sense and the public weal."¹³⁶ To this invitation the Supreme Court responded:

But is that our function? We have no expert knowledge on the subject of endangered species, much less do we have a mandate from the people to strike a balance of

131. *Id.*

132. *Id.* at 182 (quoting H.R. REP. NO. 4758, 93d Cong., 1st Sess. (1973)).

133. *Id.*

134. *Id.* (citation omitted).

135. *Id.* at 185.

136. *Id.* at 194 (quoting Powell, J., dissenting, *id.* at 196).

equities on the side of the Tellico Dam. Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as "institutionalized caution."¹³⁷

The majority's interpretation did not impress Justices Powell and Blackmun. In their view the Court's construction violated common sense, was not consistent with "the ordinary meaning of plain language," and was a disservice to the public weal.¹³⁸ Nevertheless, the Court's interpretation of the Endangered Species Act was consistent with post-NEPA attitudes. It enforced the concept of trusteeship to the dismay of those who would have had it otherwise.

C. *Protecting Wetlands and Waterways*

Under the Clean Water Act, the Army Corps of Engineers has permitting jurisdiction over navigable waterways, including wetlands extending from the waterways. In *Buttrey v. United States*,¹³⁹ the Court upheld a determination by the Corps of Engineers involving protection of wetlands. Congress has determined that "[w]etlands are vital areas that constitute a productive and valuable public resource."¹⁴⁰

Buttrey's contention was that the Corps of Engineers should have considered the public benefits that its construction of a proposed housing project would have created. Buttrey argued that filling in forty acres of wetland was a "mere flyspeck" in relation to the entire watershed in which it was located. The regulations note that "[a]lthough a particular alteration of wetlands may constitute a minor change, the cu-

137. *Id.*

138. *Id.* at 173. In remarking on Justice Powell's dissent that the meaning of "actions" is "far from 'plain,'" the Court made reference to Lewis Carroll's classic advice on the construction of language: "'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.'" *Id.* at 174.

139. 690 F.2d 1170, 1182 (5th Cir. 1982).

140. 33 U.S.C. § 1251 (1976). *See also* 33 C.F.R. § 320.4(b)(1).

mulative effect of numerous such piecemeal changes often results in a major impairment of the wetland resources."¹⁴¹ The court concluded that Buttrey's argument amounted to a demand that the Corps of Engineers engage in precisely the kind of limited review of "piecemeal" changes that the regulations forbid.¹⁴²

Agencies cannot avoid accountability. This notion is reinforced over and over by legislative declarations. It is also supported by contemporaneous statements which make clear what is expected from the agencies and, conversely, what is expected from the regulated communities. In *Action for Rational Transit v. West Side Highway Project*,¹⁴³ which also illustrates agency failure, Judge Griesa wrote:

Under the mandate of NEPA, the Corps [of Engineers] was required to make a full disclosure of the information about fishery resources, and to give an opportunity for comment by interested parties The total failure of the Corps to comply with these obligations has been demonstrated beyond any question. At no point did the Corps make any effort of its own to ascertain the facts about marine life in the interpier area The Corps had no right to swallow up these issues in the privacy of its bosom. It was required to make fair and open disclosure not only of the available facts, but of the responsible scientific views as to the risks involved in the loss of this habitat.¹⁴⁴

The Corps of Engineers had a procedural responsibility

141. 33 C.F.R. § 320.4(b)(3).

142. *Buttrey*, 690 F.2d at 1181. See *Bersani v. Robichaud*, 850 F.2d 36 (2d Cir. 1988), cert. denied, 489 U.S. 1089 (1989). Action brought by developers to challenge the final determination of the Environmental Protection Agency denying them permission to construct a shopping mall on a swamp. The denial was upheld and the judgment affirmed. *Id.* at 38.

143. 536 F. Supp. 1225 (S.D.N.Y. 1982).

144. *Id.* at 1253. Cf. *H.O.M.E.S. v. New York State Urban Dev. Corp.*, 69 A.D.2d 222, 418 N.Y.S.2d 827 (4th Dep't 1979), where the Court took the New York State Urban Development Corporation to task for failing to comply with SEQRA requirements. "Like the proverbial ostrich, respondents have incredibly put out of sight and mind a clear environmental problem." 69 A.D.2d 222, 231, 418 N.Y.S.2d 827, 831.

which it failed to discharge. Because the Corps disobeyed an explicit command of NEPA, the court vacated the approval.

D. *Protecting Public Lands*

CERCLA allows trustees of public lands to recover not only for damages, but also for the "reasonable costs of assessing such injury, destruction, or loss."¹⁴⁵ The law provides that:

The President, or the authorized representative of any State, shall act on behalf of the public as trustee of [the] natural resources to recover for the costs of replacing or restoring such resources. Sums recovered . . . shall be available for use to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies¹⁴⁶

The law continues that damage assessment regulations must "take into consideration factors including, but not limited to, replacement value, and ability of the ecosystem or resource to recover."¹⁴⁷

In 1986, the Department of the Interior (DOI) promulgated regulations for natural resource damage assessment.¹⁴⁸ Under the regulations, the trustee is assigned a number of tasks which range from establishing the extent of the damages to the environment and identifying the potentially responsible parties, to preparing a restoration plan and determining damages. The regulations address two types of situations, A and B. Type A applies to simplified assessments with regard to valuing damage resulting from minor, short-duration releases of hazardous waste or oil.¹⁴⁹ Type B applies to physical injuries of greater magnitude.¹⁵⁰ The regulations proposed that damages be measured by the lesser of either restoration or re-

145. 42 U.S.C. § 9607(a)(4)(C).

146. *Id.* § 9607(f)(1).

147. *Id.* The law proscribes "double recovery" for damages to natural resources. *Id.*

148. 43 C.F.R. pt. 11 (1990).

149. 43 C.F.R. §§ 11.40-11.41 (1990).

150. *Id.* §§ 11.60-11.84.

placement costs of the natural resource or certain lost values.¹⁵¹

In a lawsuit challenging the regulations, the court was not impressed by the DOI's argument that such a measure correctly expressed congressional intentions, or that it was efficient.¹⁵² In rejecting the lesser-of damage concept, the court concluded that Congress expressed a "distinct preference"¹⁵³ for restoring damaged natural resources, rather than compensation for lost use values defined in narrow terms.¹⁵⁴ DOI argued that its lesser-of rule made sense from an economic standpoint, since one would not want to restore a resource if the cost of doing so exceeded the value society placed on it.¹⁵⁵ However, the court found that the Congressional preference for restoration was motivated not by a hostility to this reasoning per se, but rather by skepticism regarding human ability to measure a resource's true value.¹⁵⁶

The conflict between the lesser-of rule and full restoration involves determining whether the true value of a resource is based on its "use value" or "non-use values."¹⁵⁷ DOI solved the problem by excluding non-use values from consideration. The regulations (as they applied to that particular subject) were remanded to DOI.

V. Fundamental Tasks

Courts worry over legislative intention, examine wording and syntax, study punctuation and tense, compare provisions, analyze terms, ponder why one subject is addressed and another omitted, adduce evidence from the text and context, make deductions, and draw inferences. The purpose is to establish meaning definitively; to make it clear to those who administer the laws and to those who must obey them, what the

151. *Id.* §§ 11.80-11.88.

152. *Ohio v. United States Dep't of Interior*, 880 F.2d 432 (D.C. Cir. 1989).

153. *Id.* at 459.

154. *Id.*

155. *Id.* at 456.

156. *Id.* at 457.

157. *See id.* at 438-59.

laws are and how they are to be enforced. It has been seen that lawmakers, no less than other communicators, organize their material with deliberation, and for specific ends. Attitude and tone are integral to meaning and are direct evidence of intention.

Courts are the final arbiters of meaning, just as much as they are the determiners of liability and the declarers of rights and duties. What laws say, and what and who they regulate or effect are frequently threshold disputes. Interpretation of language and legislative intent are the province of courts, and are discovered in a process known as construction. Construction is to law as textual analysis is to literature. What does the text say and what does it mean? If one subject is dealt with and another is not, that is evidence of attitude. Tolerating an act, even under constraint, is one thing, forbidding it is another.

The word "construe" is related to "construct," which means to build up, to put together.¹⁵⁸ To construe a law is to analyze its construction and show its meaning. Whenever there is a question as to a party's responsibility or a conflict between an action which a regulated person wishes to take and the protection of the environment, decisions tend increasingly to favor the environment.¹⁵⁹ This is so whether the culpable "person" is a governmental entity or an individual.

A. *Application to Government*

Although there is no question that environmental laws apply to government entities, there is a disagreement among circuits as to what immunity the United States enjoys. Government entities can be compelled to act, or can be prohibited from particular acts by injunction, but it is uncertain whether they have to pay fines. There cannot be an implied waiver of

158. E. PARTRIDGE, *ORIGINS, A SHORT ETYMOLOGICAL DICTIONARY OF MODERN ENGLISH*, 675-76 (1958).

159. It has been noted by a number of courts, for example, that CERCLA "is not a model of statutory clarity." *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 578 (D.Md. 1986). CERCLA "has acquired a well-deserved notoriety for vaguely drafted provisions and an indefinite, if not contradictory, legislative history." *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 667 (5th Cir. 1989). The final version of CERCLA was enacted as a last minute compromise among competing bills.

sovereign immunity.¹⁶⁰ "Waivers of immunity must be 'construed strictly in favor of the sovereign' and not enlarge[d] . . . beyond what the language requires."¹⁶¹

Section 6961 of the Resource Conservation and Recovery Act (RCRA) provides that every federal department, agency, and instrumentality "shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirements for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal"¹⁶²

In a Sixth Circuit case,¹⁶³ in which the Department of Energy argued that it enjoyed sovereign immunity from suits for civil penalties, the circuit court pointed out that the first sentence of section 6961 subjects the DOE to "any requirement," including "sanctions," to the same extent as a private entity under the Act.¹⁶⁴ It reinforced its textual analysis by reference to the definition of "sanction" in the Compact Edition of the Oxford English Dictionary.¹⁶⁵ The term means the "specific penalty enacted in order to enforce obedience to the law."¹⁶⁶

An opposite conclusion was reached in a Tenth Circuit decision.¹⁶⁷ There, the circuit court pointed out that Congress "knew how to indicate an intent to waive federal sovereign immunity to state civil penalties, and it did not do so when it enacted RCRA."¹⁶⁸ The court based its analysis on comparing the RCRA provision with provisions of the Clean Air Act, the Clean Water Act, and the Safe Drinking Water Act. In these

160. *United States v. Testan*, 424 U.S. 392, 399 (1976) (quoting *United States v. King*, 395 U.S. 1, 4 (1969)).

161. *Mitzelfelt v. Department of Air Force*, 903 F.2d 1293, 1295 (10th Cir. 1990) (quoting *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 686 (1983) (quoting *McMahon v. United States*, 342 U.S. 25, 27 (1951)).

162. 42 U.S.C. § 6961.

163. *Ohio v. Department of Energy*, 904 F.2d 1058, 1060 (6th Cir. 1990).

164. *Id.* at 1062.

165. *Id.*

166. *Id.*

167. *Mitzelfelt v. Department of Air Force*, 903 F.2d 1293 (10th Cir. 1990).

168. *Id.* at 1295-96.

Acts sovereign immunity is waived for "requirements, administrative authority [or authorities], and process and sanctions."¹⁶⁹

In reaching its decision, the Tenth Circuit discounted the reference in RCRA § 6001(a) to "sanctions" in parenthesis — "such sanctions as may be imposed by a court to enforce such relief"¹⁷⁰ —and concluded that "the penalty New Mexico seeks to exact from the Air Force is not a 'requirement . . . respecting control and abatement of solid waste or hazardous waste disposal.'"¹⁷¹

In a footnote, the court explained that "[s]ubsequent Congresses have interpreted § 6001 as waiving federal sovereign immunity from state civil penalties However, the views of later Congresses are of little value in ascertaining the intent of the Congress which passed the legislation."¹⁷²

All of this goes to demonstrate that the RCRA authors either were not sufficiently careful in their choices of language and syntax to assure a unanimity of understanding, or that the Tenth Circuit misconstrued Congress' intention by failing to recognize its use of "sanction" in juxtaposition to "any requirements."

B. *Application to Private Parties*

In July 1971, a chemical company made arrangements to dispose of its wastes by dumping 55-gallon drums on a farm near Verona, Missouri. During April 1980, the EPA conducted an on-site investigation. It exposed and sampled thirteen of the 55-gallon drums, which were found to be badly deteriorated; water and soil samples were also taken. The samples were found to contain "alarmingly" high concentrations of dioxin, TCP, and toluene.¹⁷³

169. *Id.* at 1295.

170. *Id.* at 1294 (quoting 42 U.S.C. § 6961).

171. *Id.* at 1295 (quoting 42 U.S.C. § 6961).

172. *Id.* at 1296 (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-18 (1980)).

173. *United States v. Northeastern Pharmaceutical and Chem. Co. (NEPACCO)*, 579 F. Supp. 823 (W.D. Mo. 1984), *aff'd in part, rev'd in part, and remanded*, 810 F.2d 726, 730 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

Defendant argued that it should not be found liable for the costs of cleaning up the site because its actions antedated the passage of CERCLA, which did not become effective until December 11, 1980. The court held that, although CERCLA does not expressly provide for retroactivity, it is manifestly clear that Congress intended CERCLA to have retroactive effect. The reason is that:

The language used in the key liability provision . . . refers to actions and conditions in the past tense: "any person who at the time of disposal of any hazardous substances owned or operated" . . . "any person who . . . arranged with a transporter for transport for disposal" . . . "any person who accepted any hazardous substances for transport to . . . sites selected by such person."¹⁷⁴

Furthermore:

[T]he statutory scheme itself is overwhelmingly remedial and retroactive In order to be effective, CERCLA must reach past conduct. CERCLA's backward looking focus is confirmed by the legislative history.¹⁷⁵

Taking CERCLA's "backward looking focus" as a given, is the statute to be regarded as retroactive under every circumstance? One defendant argued in a government suit for natural resource damages that the action was barred by reason of the statute of limitations.¹⁷⁶ The court examined the statutory provision "with due respect for rules of grammar and punctuation."¹⁷⁷ The court found that, although CERCLA did not bar suits to recover "response costs," it did preclude actions for damages for injuries to natural resources which arose prior to the effective date of the law. "The Court reads the . . . phrases as independent clauses which are separated by the conjunction 'nor,' set off by commas, and modi-

174. *NEPACCO*, 810 F.2d at 733 (emphasis added).

175. *Id.*

176. *United States v. Mottolo*, 605 F. Supp. 898, 901 (D.N.H. 1985).

177. *Id.* at 903.

fied by the limiting, dependent clause 'more than three years'¹⁷⁸

Each of these three cases illustrates a particular mentality. A party either refuses to recognize that it has an environmental responsibility, or urges a decision that would give it an economic advantage. Courts are particularly careful to demonstrate that they have adduced persuasive evidence, and that their decisions are based on a proper, although strict, reading of statutes and regulations.

In the snail darter case the Court responded to what it regarded as an express statutory command. Equally, there are examples of courts responding when the command is implicit. In *Inland Steel Co. v. EPA*,¹⁷⁹ for example, the court found no indication that Congress intended to exempt the owners of deep injection wells from regulation under RCRA. The court stated that the "language of the Act does not so compellingly proscribe such a result that we must do or die without reasoning why."¹⁸⁰ However, the court concluded: "If the language does not compel, neither is it deformed by (sic) the EPA's interpretation . . . and which is supported by the policies that appear to animate the Act and rebutted by no other sources of interpretive wisdom."¹⁸¹ Judge Posner's emphasis on policy is pragmatically correct. The ultimate consideration is whether a particular result is consistent with expectations enunciated in public policy.

Although there are contrary examples, environmental laws tend to be applied embracively; financial costs are less important than environmental values. This tendency is illustrated by cases involving owners who sell their property "as is,"¹⁸² financial institutions who foreclose on property,¹⁸³ and

178. *Id.* The provision in issue reads: "No claim may be presented, nor may an action be commenced for damages under this title, unless that claim is presented or action commenced within three years from the date of the discovery of the loss or the date of enactment of this Act, whichever is later" 42 U.S.C. § 9612(d).

179. 901 F.2d 1419 (7th Cir. 1990).

180. *Id.* at 1424.

181. *Id.* The author of this opinion, Hon. Richard A. Posner, is the author of *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988).

182. See *International Clinical Laboratories, Inc. v. Stevens*, 710 F. Supp. 466 (E.D.N.Y. 1989).

construction contractors¹⁸⁴ who develop property. Equally striking illustrations can be found in NEPA and RCRA cases.

Thus, in one case, the court held that the "as is" clause in a property sales contract did not preclude an action by the purchaser against the seller to recover hazardous waste cleanup costs under CERCLA,¹⁸⁵ because such a clause bars only actions based on breach of warranty. Regardless of any contractual provision, if the purchaser was unable to meet its statutory obligations, either because it had filed for bankruptcy or for any other reason, the seller could never be relieved of its obligations for cleanup costs incurred by the government. However, the seller may by contract maintain a claim for indemnification or contribution against an economically viable purchaser.

In addition, under CERCLA the liability for all costs and expenses associated with cleaning up inactive or abandoned hazardous waste sites is imposed on a strict, joint and several, and retroactive basis.¹⁸⁶ Although this has been tempered to some degree by the enactment of the Superfund Amendment Reauthorization Act of 1986 (SARA),¹⁸⁷ the law as originally enacted implicated all culpable property owners in the chain of title, including non-culpable current owners/operators. It has been held that the court "will not interpret [the liability provision of CERCLA] in any way that apparently frustrates the statute's goal, in the absence of a specific congressional intent otherwise."¹⁸⁸

183. See *United States v. Maryland Bank & Trust*, 632 F. Supp. 573 (D.Md. 1986); but see *United States v. Mirabile*, 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,992 (E.D. Pa. 1985); *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990). "Had Congress intended to absolve secured creditors from ownership liability, it would have done so. Instead, the statutory language chosen by Congress explicitly holds secured creditors liable if they participate in the management of the facility." *Id.* at 1557.

184. See *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568 (5th Cir. 1988).

185. *International Clinical Laboratories*, 710 F. Supp. at 469.

186. 42 U.S.C. § 9601(32). See *supra* note 56 and accompanying text.

187. Pub. L. No. 99-499 (Oct. 17, 1989) 100 Stat. 1613-1782. See U.S.E.P.A., *Guidance on Landowner Liability under Section 107(a)(1) of CERCLA*, (1989).

188. *Dedham Water Co. v. Cumberland Farms Dairy*, 805 F.2d 1074, 1081 (1st Cir. 1986)(quoting *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1045 (2d Cir.

These decisions imply a functional approach to responsibility. The person who causes or creates any hazardous condition is strictly liable, but if that person is out of business or unavailable, then the transferees are liable. Innocence is not a defense to a government action. This policy most effectively accomplishes the desired goal. In any event, even though it may be burdensome, cleanup can only enhance the value of the affected property.

Strictness of application is also illustrated in *New York v. Shore Realty*.¹⁸⁹ In *Shore*, the defendant corporation purchased property with knowledge that it contained hazardous waste.¹⁹⁰ Further, barrels of chemicals were deposited after conveyance of title,¹⁹¹ but the chemicals were not generated by Shore and it did not give permission for the barrels to be delivered to the site.¹⁹² The fact that Shore did not participate in generating or transporting hazardous waste on the site was found irrelevant to the issue of its liability.¹⁹³

At the same time that *Shore* and similar cases illuminate how severely the law is applied,¹⁹⁴ they also illustrate a trend to hold officers and directors personally liable. In *Kelly v. Arco Indus. Corp.*,¹⁹⁵ the court held that in determining the individual liability of a corporate officer, it should weigh the factors of the corporate officer's "degree of authority in general and specific responsibility for health and safety practices, including hazardous waste disposal."¹⁹⁶ The court went on to

1985)).

189. 759 F.2d 1032 (2d Cir. 1985).

190. *Id.* at 1038-39.

191. *Id.* at 1039.

192. *Id.* at 1049.

193. *Id.* at 1044-45.

194. See also *United States v. Carr*, 880 F.2d 1550 (2d Cir. 1989). (Carr was a civilian employee at Fort Drum. His position was that of a maintenance foreman on the Fort's firing range, and as part of his duties he assigned other civilian workers to various chores on the range. On one particular day he directed several workers to dispose of old cans of waste paint in a small, man-made pit on the range. He was found criminally liable and sentenced to one year in jail and one year's probation.)

195. 723 F. Supp. 1214 (W.D. Mich. 1989).

196. *Id.* at 1219. CERCLA defines "owner or operator" in the case of any abandoned facility as "any person who owned, operated, or otherwise controlled activities at such facility immediately prior to such abandonment." 42 U.S.C. § 9601(20)(A)(iii).

explain that such a fact-specific examination would be consistent with CERCLA's goals:

[T]his standard will encourage increased responsibility with increased authority within a corporation. I take this to be a positive result, and thus a better standard than one which measures only the most direct knowledge or involvement in waste disposal activity, because it encourages responsible conduct instead of causing high level corporate individuals 'not to see' and 'to avoid getting involved with waste disposal at their facilities.' . . . Such a liability standard here will encourage increased responsibility as an individual's stake in the corporation increases. I anticipate that responsibility undertaken will also be less frequently neglected.¹⁹⁷

Strict application is a predicate for increased responsibility. In theory, and no doubt in practice also, individuals who understand their exposure will be more careful.

In another case, *Wickland Oil Terminals v. Asarco, Inc.*,¹⁹⁸ plaintiff argued that it was entitled to invoke the innocent land-owner defense promulgated under SARA since it had not caused or contributed to the creation of the hazardous waste on the property. The court found, however, that since Wickland had retained consultants and lawyers who were familiar with the environmental problems at the property it was charged with the knowledge possessed by its agents. As a result, Wickland could not establish that it was an innocent purchaser.¹⁹⁹

While manufacturers of hazardous substances do not have a responsibility for the disposal of their products by their customers,²⁰⁰ they cannot divest themselves of responsibility for unsafe manufacturing practices (OSHA, Clean Water Act) and for transporting hazardous substances (Haz-

197. *Kelly*, 723 F. Supp. at 1220 (emphasis added).

198. 19 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,855 (N.D.Cal. 1988).

199. *Id.* at 20,856.

200. *See Dayton Indep. School Dist. v. U.S. Mineral Prods.*, 906 F.2d 1059 (5th Cir. 1990) (no liability for asbestos manufacturers).

ardous Materials Transportation Act). A final example of inclusiveness is illustrated in *NL Industries, Inc. v. Department of Transportation*.²⁰¹ In *NL Industries* a foreign company ordered chemical products to be delivered to a freight broker, for transshipment to a foreign destination.²⁰² Drums of chemicals delivered to the air carrier did not comply with the requirements of the Hazardous Materials Transportation Act.²⁰³

In the resulting lawsuit against the manufacturer by the Department of Transportation, even though the manufacturer conceded that the drums did not comply with the regulations, it argued that the Act did not apply to it because it was neither the shipper nor the carrier of the drums.²⁰⁴ The court held that the statute's application to a particular person was to be approached functionally, based upon its activities "without regard to whether it is a shipper or a carrier."²⁰⁵ The court found that the implementing regulation was consistent with this interpretation.²⁰⁶ It provides: "No person may offer or accept hazardous material for transportation in commerce unless that material is properly classed, described, packaged, marked, labeled, and in condition for shipment as required or authorized by this subchapter."²⁰⁷ The law placed responsibility with any shipper or carrier who transports hazardous materials or causes them to be transported.²⁰⁸

Explicitly and implicitly environmental laws demand responsibility and exact a toll if their expectations are not satisfied. Courts have concluded that the laws' purposes and policies justify constructions which authorize greater inclusiveness, which in turn significantly expand liability.

201. 901 F.2d 141 (D.C. Cir. 1990).

202. *Id.* at 142.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. 49 C.F.R. § 171.2(a)(1990).

208. The court noted that the statutory definition of "transportation" clearly contemplates that the responsibility may rest with more than one person, and nothing in the dictionary definition of "cause" suggests that an event may not have more than one cause. *NL Industries, Inc.*, 901 F.2d at 143 (citing 49 U.S.C. § 1802).

VI. Conclusion

It is more than the technical expression of law that statutes convey. Readers derive from words more than their literal, denotative meanings. Words convey attitudes and expectations. Statutory text is intended to elicit a particular response and the particular response it demands is clearly implicit from the rhetorical evidence.

In law, as in literature, text is taken seriously. Courts' field of inquiry includes both text and context. When courts interpret statutes, they take into account their language, rhetoric, and composition, as well as the dialogue of competing interests in their formation. The inferences courts draw are themselves chosen from a number of possible interpretations. Different courts and judges draw different inferences. This is most dramatically seen in close decisions and reversals, as cases make their way up the judicial ladder.

We have seen that rhetorical strategies have a place in the discussion of environmental laws because they are so elemental to meaning. The language and rhetoric of the statutory text is the starting point of any consideration of responsibility and enforcement. The purpose of textual analysis is to arrive at an understanding of how the laws are constructed and how rhetoric contributes to understanding legislative intention. Rhetoric is inextricably interwoven with communication and is inseparable from it.

We have also seen that the environmental laws have an extraordinary reach. No private or public person whose activities and actions affect the environment is exempt from the laws or free from regulatory attention. Some laws achieve their aim by constraining or controlling practices harmful to the environment, others by instituting coercive measures to restore past damage, and still others by imposing conditions before permitting changes that may affect the environment.

The choices legislators make are consequential in understanding attitudes and will affect interpretation. Attitude can be explicit and immediately recognized, for example, when the legislature speaks directly in "Findings" and "Declarations." It may be implicit and inferrable from tone, and perhaps not

even recognized until the text and context are examined, and the evidence is adduced and interpreted. Whether explicit or implicit, it is easier to comprehend the meaning of a communication if the reader understands that messages are not necessarily self-revealing. The decoding of a statute is as much an art as its formulation.