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## Order: Second Annual Pace National Environmental Moot Court Competition

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UNITED STATES COURT OF APPEALS  
FOR THE TWELFTH CIRCUIT

CITY OF NORTHWOOD,

Appellant

v.

Civ. No. 89-27

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

Appellees

**ORDER**

The City of Northwood, petitioner, has filed petitions to appeal two controlling questions of law in this case from the district court. Such petitions are granted and each party is instructed to brief the following questions of law:

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

2. Whether the district court erred in dismissing the City of Northwood's CERCLA action for natural resource damages against Multi-Chem Chemical Company? The City's action is supported by the Department of the Interior and opposed by Multi-Chem Chemical Company.

Dated: September 15, 1989

B. Romulus, Chief Judge

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW UNION

CITY OF NORTHWOOD,

Petitioner

v.

Civ. No. 89-453

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

Respondents

Remus, J.

I. BACKGROUND.

The City of Northwood is a municipality approximately thirty miles north of New Union City, the capital of the State of New Union and the state's largest city. First settled in the early 1700s at a natural crossroads, Northwood has been a busy industrial town of working class machinists and factory workers for most of its history. However, since World War II, most industrial companies seeking lower labor costs have left Northwood in favor of other locations in the United States and overseas. For a time, the economy of Northwood looked bleak as unemployment increased. However, during the last 10 years, land prices in the New Union City metropolitan area have markedly increased and many new young professionals have moved to Northwood. Northwood has increasingly become an affluent suburb of lawyers, doctors, engineers, and other professionals who commute daily to New Union City. Nonetheless, a substantial proportion of lifelong Northwood residents remain, principally as shopkeepers and retirees.

One of Northwood's principal attractions, accounting for its popularity among affluent commuters, is the Northwood National Wildlife Refuge. The Refuge, owned and administered by the United States Department of the Interior, is located along an important flyway for several species of geese, ducks, and other waterfowl. The birds use the Refuge as an overnight stopping area each spring and autumn as they

travel between Canada and the warmer southerly regions. For weeks at a time, thousands of birds can be seen in the Refuge. Because the rest of the New Union City area is heavily developed, biologists working for the United States Department of Interior have concluded that any land development permitted in the Refuge would have a significant detrimental effect on the bird population.

The Refuge is also an important aesthetic and recreational resource for residents of Northwood. It buffers the sight and sound of a highway corridor and has a network of trails for biking, hiking, and birdwatching. Residents of the City of Northwood identify closely with the Refuge, and most cars sport bumper stickers with Northwood's slogan: "Northwood: We're for the Birds."

Northwood's municipal boundaries completely enclose the Refuge, municipal ordinances apply within the Refuge to the same extent as elsewhere in the City, and the Refuge is served by City utilities such as fire protection and trash removal.

Closely proximate to the Refuge's boundary but within the Northwood city limits, is the site of a small Multi-Chem Chemical Company pesticide processing plant. Built in 1943 to produce insecticides for American troops in the Pacific, the Multi-Chem plant continued producing agricultural chemicals until its closing in 1985. Multi-Chem is the third largest employer in the State of New Union. In addition to the Northwood plant, Multi-Chem has three larger processing plants in the state, employing about 15,000 people. The corporate headquarters in New Union City has an additional 800 management employees. Over the years, Multi-Chem has gained a reputation as one of the most progressive employers in the state. Multi-Chem has an aggressive affirmative action plan, a generous employee benefit plan for child care and elder care, makes large donations to local hospitals and schools, and funds a shelter for seventy-five homeless persons in New Union City. Several members of the state legislature are Multi-Chem employees.

When Multi-Chem closed the Northwood plant in 1985, the plant employed only thirty-five people. Multi-Chem an-

nounced that it was closing the plant to consolidate its operations into one of the larger facilities. Most of the Northwood employees accepted transfers to another facility and the remainder retired.

In 1984, before the Multi-Chem plant closed or had announced any plans to close, the City of Northwood Health Department tested drinking water wells for homes located near the plant and found several Multi-Chem pesticide ingredients in the water. The ingredients, all meeting the test for "hazardous substances" under federal law, do not occur naturally. They were found down gradient (downstream in the underground water aquifer) from the plant. The aquifer is shallow and its directional flow is believed to go from the area beneath the Multi-Chem plant, under the homes that were tested, and to the Refuge. The aquifer is believed to be hydrologically connected to the wetlands and marshes within the Refuge. The wetlands and marshes are non-tidal and have never been navigable. The City of Northwood sampled waters on the Refuge and found pesticides present, but all parties agree that more complete sampling is necessary to determine the full extent to which the contamination has entered surface waters of the Refuge.

In 1987, at a cost of \$230,000, the City of Northwood connected the affected homes to the municipal water supply, which had not been affected by the groundwater contamination. In addition, contaminated wells were closed. In 1988, Multi-chem agreed to reimburse the City for these costs without admitting any liability and without a unilateral agreement by the the City to waive any claims against Multi-Chem.

The City of Northwood remains concerned, however, about the fate of pesticide ingredients which continue to flow through the aquifer into the Refuge, and into the marshes and wetlands used by the birds. Some academic literature links the pesticides with nervous system damage among bird populations.

Because the City of Northwood, the Department of the Interior, and Multi-Chem failed to resolve the problem of pesticide contamination in the Refuge, marshes, and wetlands, in 1989 the City brought this suit, consisting of two causes of

action. The first cause of action, brought under section 310 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9659, seeks an order compelling the Department of the Interior to fulfill its role as "natural resources trustee" for the Refuge under section 107(f) of CERCLA, 42 U.S.C. § 9607(f). The City of Northwood asks this court to order the Department of the Interior to perform the scientific testing necessary to calculate and assess natural resource damages against Multi-Chem. The damages recovered would finance the construction of an aquifer treatment plant which would cleanse the groundwater and would fund a program to monitor the bird population and to restock it if it falls below present levels. In its second cause of action, the City of Northwood asks this court to permit the City to sue Multi-Chem, thereby entirely bypassing the Department of the Interior.

The Department of the Interior and Multi-Chem have filed motions to dismiss the first cause of action, arguing that CERCLA does not authorize the City of Northwood to seek an order to the Department of the Interior to carry out duties as a natural resources trustee. The City opposes the motion to dismiss; however, the Department of the Interior supports the City of Northwood's efforts to serve as a natural resource trustee.

For the reasons discussed below, both motions to dismiss are GRANTED.

## II. THE DEPARTMENT OF THE INTERIOR'S DUTY TO SERVE AS NATURAL RESOURCES TRUSTEE.

Under section 107(f) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9607(f), the President of the United States is ordered to act as trustee of natural resources, to recover for "damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release." CERCLA § 107(a)(C), 42 U.S.C. § 9607(a)(C). With respect to National Wildlife Refuges, the President has delegated his authority to

the Department of the Interior. Executive Order No. 12,580, 40 C.F.R. § 300.72 (1987). Procedures for assessing damage to natural resources are provided at 43 C.F.R. § 11 (1989), now being revised in light of *Colorado v. United States Dep't of the Interior*, 880 F.2d 481 (D.C. Cir. 1989) and *Ohio v. United States Dep't of the Interior*, 880 F.2d 432 (D.C. Cir. 1989).

Under CERCLA section 310(a)(2), 42 U.S.C. § 9659 (a)(2) "any person" is authorized to sue "the President or any other officer of the United States . . . where there is alleged a failure of the President or of such other officer to perform any act or duty [under CERCLA] . . . which is not discretionary with the President or such other officer."

In essence, the City of Northwood argues that it is a "person" under CERCLA section 101(21), 42 U.S.C. § 9601(21). The City seeks to force the Secretary of the Interior to perform a nondiscretionary duty to serve as trustee for the resources in the Refuge, including performing a damage assessment, and then to recover from Multi-Chem amounts necessary to restore the resources.

For its part, the Department of the Interior would like to perform a natural resources damage assessment but cannot afford to do so. It may perform an assessment in the future, but according to its five-year budget plan, funds will not be available before 1992. The City of Northwood asserts that under CERCLA section 113(g), 42 U.S.C. § 9613(g), the statute of limitations will have already expired.

The estimated cost of performing the natural resources damage assessment is \$1.1 million. The Department of the Interior concedes that it has available funds in excess of one hundred million dollars which were appropriated by Congress for general operation of the National Wildlife Refuge System, and that it could legally allocate some of its funds for the natural resource damage assessment. But the Department of the Interior has concluded that this money is already overcommitted for day-to-day upkeep of the various refuges, salaries of the refuge employees and some long-planned repairs and improvements for refuge buildings throughout the system. As a policy decision, the Secretary of the Interior has concluded that these expenditures are of a higher priority than funding

the natural resource damage assessment at the Northwood Refuge.

Before bringing this lawsuit, the City of Northwood suggested to the Department of the Interior that the Department request extra funds to pay for the Northwood Refuge natural resources damage assessment as a line-item in its next budget submission to Congress. The Department of the Interior refused, saying it was likely that the President's Office of Management and Budget and the relevant congressional committees would either not approve the line-item request, or if approved, they would simply transfer funds from the Department of the Interior's general appropriation to the line-item requests, thereby keeping the overall appropriation unchanged.

I am not persuaded by the City of Northwood's argument. I recognize the use of the word "shall" in CERCLA section 107(f), 42 U.S.C. § 9607(f), is normally associated with mandatory duties, and that some other federal statutes authorizing natural resources damage use the more discretionary term "may." I also recognize the use of the term "trustee" in the statute may have indicated congressional intent to assign duties akin to the trustee of a trust, whereby the beneficiary of the trust has some rights to force the trustee to act. The City of Northwood argues that the terms "trust" and "trustee" are meant to invoke the public trust doctrine but the doctrine is too narrow for this. See Huffman, *Phillips Petroleum Co. v. Mississippi: A Hidden Victory for Private Property?*, 19 *Envtl. L. Rev. (Envtl. L. Inst.)* 10,051 (1989). Federal agencies are expected to fund all their legal duties from budgets set by Congress; if the budgets prove insufficient, Congress expects to be so advised by the agencies.

Overall, the decision of whether and when to perform a natural resources damage assessment is really an enforcement decision. Congress used the term "trustee" in this instance to provide the government with an additional weapon to use in its enforcement arsenal against polluters. It did not use the term "trustee" to invoke the public trust doctrine. If I were to agree with the City of Northwood, federal agencies would have to perform natural resources damage assessments at

many of their properties. Many court opinions have concluded that enforcement is discretionary, not nondiscretionary, under the other citizen suit provisions of the various environmental statutes, which are worded similarly to CERCLA section 310, 42 U.S.C. § 9659. Therefore, I grant the motion to dismiss, finding that this court lacks subject matter jurisdiction under CERCLA section 310, 42 U.S.C. § 9659.

### III. CITY OF NORTHWOOD'S AUTHORITY TO BRING ACTION ON ITS OWN BEHALF AS A TRUSTEE OF NATURAL RESOURCES.

Apparently sensing that it may fail in its attempt to force the Department of the Interior to perform a natural resources damage assessment, the City of Northwood also filed a cause of action for natural resources damage on its own behalf, claiming that CERCLA also authorizes it to serve as natural resources trustee. Indeed, under CERCLA section 107(f), 42 U.S.C. § 9607(f), federal *and state* officials may serve as trustees, and section 107(f)(2)(B), 42 U.S.C. § 9607(f)(2)(B), requires the governor of each state to designate state officials who will serve as trustees.

But the City of Northwood is not a state and its officials are not state officials. The court notes that the officials designated by the governor of New Union to serve as trustees are all heads of state departments, such as the Department of Natural Resources and the Department of Environmental Protection. Although the Mayor of Northwood requested the governor to designate her as trustee for resources in Northwood, the governor declined. The designated trustees have said that their circumstances parallel those of the federal Department of the Interior. They do not have sufficient funds to conduct a natural resource damage assessment.

I recognize that other judges have concluded that municipalities can serve as natural resource trustees under CERCLA. See *Mayor of Boonton v. Drew Chem. Corp.*, 621 F. Supp. 663 (D.N.J. 1985); *City of New York v. Exxon Corp.*, 633 F. Supp. 609 (S.D.N.Y. 1986) and 697 F. Supp. 677 (S.D.N.Y. 1988). I think these cases are either distinguishable or were decided erroneously. While some legislative history can be read to per-

mit cities to serve as natural resource trustees (see Maraziti, Jr., *Local Governments: Opportunities to Recover for Natural Resource Damages*, 17 *Envtl. L. Inst.* 10,036 (1987), the legislative history is, for the most part, ambiguous. In such instances it is preferable to interpret statutes by their plain meaning. For the statute in question, I therefore interpret "state" to mean "state" not "state and city." If Congress had meant to include cities, it would have done so. I find support for my interpretation in *City of Philadelphia v. Stepan Chem. Co.*, 713 F. Supp. 1484 (E.D. Pa. 1989).

For these reasons, I grant the motion to dismiss the City of Northwood's action for natural resources damage.