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BUYING AND SELLING BROWNFIELD PROPERTIES: 
A PRACTICAL GUIDE FOR SUCCESSFUL TRANSACTIONS

by Andrew L. Kolesar & Jacqueline M. Kovilaritch

One of the byproducts of industrial development has been the proliferation of contaminated sites scattered throughout the country. Such sites, which have become known as “brownfield” sites, are often abandoned or under-utilized because fears of immense liability and cleanup costs have scared off potential developers, businesses and banks. Over the past few years, there has been a growing recognition of the need to remove the environmental and legal barriers that have stalled re-development and re-use of brownfield properties.

The re-development of brownfield properties is increasing due to many factors, including financial incentives from state and local governments, diminishing greenfield sites, and increasing pressure to prevent urban sprawl and loss of farmlands. In addition, there has been a proliferation of state brownfield and voluntary cleanup programs which establish objective cleanup standards, allow risk-based cleanups based on use of the property and use of engineering and institutional controls, and provide liability protection to parties which clean up properties. Moreover, lenders have developed a better understanding of the risks associated with brownfield development.

As a result of these factors, parties are now more inclined to purchase brownfield properties than they were several years ago. However, the sale and purchase of brownfield properties can be more complicated than with greenfield properties and can present difficult issues during due diligence, contract negotiations, and, most significantly, after the closing when development occurs, a cleanup is conducted, or third party claims arise.

This article identifies the primary risks of liability associated with brownfield properties, due diligence issues, common contract provisions addressing environmental liabilities, and various problems that frequently arise during and after the sale of brownfield properties and offers some suggestions on how to avoid such problems. It also discusses the role of environmental insurance in brownfield transactions.

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2. The term “greenfields” generally refers to undeveloped sites which require little or no environmental remediation.
I. LIABILITY CONCERNS ASSOCIATED WITH BROWNFIELD PROPERTIES

The primary reason brownfield properties remain vacant and unproductive is that buyers and lenders fear the potentially huge liabilities associated with cleanup, natural resources damages and toxic tort litigation. In most cases, such liabilities attach as soon as a party owns or operates a contaminated property. The costs of cleanup and other liabilities may far exceed the value of the property. This problem is acute in single property transactions where relatively small environmental liabilities may be material, as opposed to large commercial transactions in which a corporation may be able to absorb more significant liabilities in the context of the overall deal. Moreover, it is difficult to limit one's liability to the assets of a particular subsidiary or real estate holding company. Summarized below are some of the primary legal mechanisms under which liability is imposed on owners, operators and lenders.

CERCLA

Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA," commonly called "Superfund") to identify and clean up inactive hazardous waste disposal sites and to impose liability for the costs of remediating hazardous conditions on the parties responsible for creating or contributing to such conditions and other designated parties.\(^3\) Section 107(a) of CERCLA identifies the categories of persons responsible for the costs associated with remediating a contaminated site.\(^4\) The parties include, among others, current "owners and operators"\(^5\) of any "facility"\(^6\) from which "hazardous substances"\(^7\) are "released,"\(^8\) or threatened to be released, and persons owning or operating the facility at the time of waste disposal.\(^9\) Current owners and operators are liable to the federal government for any necessary cleanup costs (and potentially liable to other persons who incur necessary response costs), even though the hazardous substances may have been

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5. Id. § 9601(20) (defining "owner or operator").
6. Id. § 9601(9) (defining "facility").
7. Id. § 9601(14) and 40 C.F.R. § 302.4 (defining "hazardous substance").
8. Id. § 9601(22) (defining "release").
9. Id. § 9607(a)(1), (2).
deposited by a previous owner or operator.

Since the passage of CERCLA, it has become increasingly obvious that environmental liabilities must be evaluated by buyers and their lenders prior to completing the acquisition of real property. This heightened awareness is directly attributable to the liability provisions in CERCLA which, in many circumstances, impose retroactive, strict and joint and several liability (unless the injury is divisible) for cleanup costs associated with contaminated property.\(^{10}\) To put this broad liability scheme in perspective, buyers or their potential lenders could be forced to pay all of the costs to clean up contaminated property, even if they did not cause the contamination and even if the contamination occurred prior to the enactment of CERCLA. Because the costs associated with cleaning up environmental contamination can be substantial (and in many cases far exceed the market value of the property), purchasers must be careful to avoid huge losses which could threaten their financial viability.\(^{11}\)

The statutory defenses to Superfund liability are extremely narrow. Superfund provides an “innocent landowner” defense for an owner who can establish that he/she did not know and had no reason to know of the release of hazardous substances when he/she acquired the facility, after making “all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice.”\(^{12}\)

CERCLA also provides a defense for contamination caused solely by a “third party.”\(^{13}\) The third party must be someone “other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly with the defendant.”\(^{14}\) This defense also requires the defendant to show by a preponderance of the evidence that it acted with due care concerning the hazardous substances and took precautions against any foreseeable acts or omissions by others.\(^{15}\)

Courts have interpreted the innocent landowner and third party defenses very

11. The amount of cleanup costs will depend on the amount of material to be removed and disposed of or treated, the distance such material must be transported to a permitted treatment or disposal site, whether groundwater must be remediated, and other factors. On-site containment or treatment also can be extremely costly, and its effectiveness uncertain, especially with regard to whether hazardous substances will ever reach groundwater.
13. Id.
14. Id.
narrowly. The third party defense is not available to a buyer if the contamination was caused by the seller because a contractual relationship exists, or if the buyer does not exercise due care regarding the contamination. The innocent landowner defense often is unavailable to purchasers of brownfield properties because hazardous substances usually are known or suspected to be present. If hazardous substances are not discovered during a buyer’s pre-acquisition environmental assessment but later are found in significant quantities, such buyer will have great difficulty showing it conducted a sufficient inquiry before purchasing the property. Thus, prospective purchasers should be very careful about relying on these defenses to avoid CERCLA liability. 16

In light of the broad liability scheme of CERCLA and the narrow statutory defenses, it is prudent to assume (absent the transfer of liability to another party) that the purchaser of real property is acquiring the liability for cleanup of the property and for response costs at adjacent sites if a release from the property caused the occurrence of response costs at adjacent sites.

**RCRA**

The Resource Conservation and Recovery Act (“RCRA”) regulates the generation, storage, handling, transportation and disposal of hazardous wastes. 17 Section 7003 of RCRA 18 allows the United States Environmental Protection Agency (“USEPA”) to bring suit against any person, including any past or present generator, transporter, owner, or operator of a treatment, storage or disposal facility who has contributed or is contributing to the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste which may present an imminent and substantial endangerment 19 to health or the environment. 20 The current owner of a property from which there

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18. *Id.* § 6973(a).
19. Courts generally have held that the term “imminent” does not limit the application of RCRA § 7003 to emergency-type situations. An endangerment may be imminent if the conditions giving rise to it are present, even though the harm may not be realized for years. See, e.g., United States v. Waste Indus., Inc., 734 F.2d 159, 164 (4th Cir. 1984).
is a release of hazardous waste which may present an imminent and substantial endangerment is potentially responsible for abating the problem under section 7003 of RCRA, even though the hazardous waste may have been deposited by a previous owner or operator.\footnote{21}{Waste Indus., 734 F.2d at 164.}

\textit{Other Potential Sources of Liability}

The vast majority of states have analogs to Superfund which make the owner of property from which hazardous substances are released, or threatened to be released, strictly liable (and sometimes jointly and severally liable) to the state (and sometimes third parties) for any necessary cleanup costs.\footnote{22}{See, e.g., OHIO REV. CODE §§ 3734.19-.22, 6111.04, 6111.07; MICH. STAT. ANN. §§ 324.20118, 324.20126.} Other state statutory environmental laws, as well as state common law, may make the owner of property from which hazardous substances are released, or threatened to be released, liable to the state or other parties for any necessary cleanup costs and bodily injury and property damages relating to the hazardous substances.\footnote{23}{State common law claims may include trespass, private nuisance, public nuisance, negligence, negligence per se, strict liability for abnormally dangerous activity, contribution and/or indemnity.}

\section*{II. STEPS IN PURCHASING BROWNFIELD PROPERTIES}

After selecting a brownfield property that is available and suitable for a buyer's needs, there are various steps that must be taken before a transaction is consummated.

\textit{Assess Financial Incentives}

Federal, state and local governments provide various tax incentives, financing and other financial considerations to buyers of brownfield properties. A buyer should identify the available incentives early in the process. Some incentives are available only to governmental entities. Thus, in some cases, it is worthwhile to partner with governmental entities and to structure the transaction to be eligible for particular incentives.\footnote{24}{For a more detailed discussion of financial incentives associated with brownfield properties, see Lawrence P. Schnapf, Sources of Financing for Brownfields Redevelopment, in BROWNFIELDS LAW AND PRACTICE 27-1-27-40 (Michael B. Gerrard, ed., 1998).}
**Due Diligence**

Before a buyer can assess its potential liability for environmental matters in connection with a contemplated acquisition, it must perform a thorough investigation regarding the property ownership and operation history and, in particular, how hazardous substances (in the broadest possible sense, including, for example, petroleum) have been handled over the years by the seller and the seller’s predecessors (as well as by neighboring businesses and possibly by trespassers). Once a buyer has certain factual information about a seller’s property, the buyer can decide how it wants to handle potential environmental liability in the purchase agreement and conduct its negotiations accordingly.

In almost all cases, prospective buyers will need the assistance of an environmental consultant to help assess the environmental condition of a property. The first decision facing a prospective buyer is the selection of the consultant. There are many choices of consultants ranging from large international firms to sole practitioners. The different firms and consultants offer varying degrees of experience, qualifications and costs. In some transactions, a high level of experience and expertise is not necessarily required, for example, if a purchaser is buying apartment complexes or a warehouse. However, a buyer will benefit from retaining an experienced consultant in connection with the purchase of a brownfield property that has a more complicated history of operations, more difficult strategic questions concerning the need for Phase II environmental assessment sampling, and which carry a greater risk of significant liabilities. As discussed below, consultants often are asked to attempt to quantify environmental risks. Having a consultant with extensive experience with investigations and remediation becomes very important for that task.

Ideally, information on consultants should be obtained prior to the actual need to retain a consultant for a specific project because deadlines associated with a potential acquisition may prohibit a detailed analysis of the consultant’s capabilities. A prospective buyer usually can obtain advice from its environmental counsel, who likely will have had experience with a variety of consulting firms and can recommend an appropriate consultant for the particular matter. In the absence of such advice from counsel, prospective purchasers can

25. This article addresses due diligence associated with the purchase of real property rather than an ongoing business. The purchase of an ongoing business raises additional due diligence issues, including the business’s compliance with environmental laws and potential liability for off-site disposal of hazardous substances.
collect information from consultants. In general, marketing information provided by consultants is not sufficient. The prospective purchaser should request at least the following information from candidate consulting firms:

(i) resumes of all persons who might be used to staff the project;

(ii) a typical scope of work for environmental assessments;

(iii) example of reports (redacted if necessary to protect confidentiality of prior clients);

(iv) capabilities to conduct Phase II sampling and remediation work;

(v) summary of prior experience, demonstrating, for example, knowledge of a particular industry or potential environmental problems which might be relevant to the property;

(vii) rate schedule; and

(viii) references from clients and attorneys.

After a consultant is retained, it is important to negotiate a contract for environmental consulting services. Consultants often propose that the work will be performed in accordance with standard terms and conditions provided by the consultant. The buyer should carefully review such terms and conditions; they usually are very favorable to the consultant. Some consultants take unreasonable positions with respect to indemnification for negligent or willful conduct by the consultant’s employees or agents.26 For example, standard terms and conditions may limit the liability of the consultant to the amount of the contract, which will be far less than the potential losses that could arise from a consultant’s negligence in performing the assessment. If time allows, contract language normally can be resolved; however, in certain cases, the prospective purchaser may need to find a different consultant.

Many environmental attorneys will have negotiated reasonable terms and conditions with consultants on prior deals. Using such a model agreement will save time and money and result in a fair agreement between the parties. The consulting services agreements need not be lengthy, but should include the

26. Negligent conduct may include the failure to identify an area of potential concern during a Phase I environmental assessment or improperly drilling ground water monitoring wells and thereby aggravating an existing ground water problem.
following key provisions: a description of the scope of services (which may incorporate by reference the consultant’s proposal); the cost expressed as a lump sum or to be billed on a time and materials basis; schedule; the amount of insurance that the consultant must obtain, including professional liability, corporate comprehensive, general liability, automobile, employers’ liability and workers compensation insurance; and the consultant’s indemnity for its errors and omissions. Buyers should resist a consultant’s attempt to limit its liability to the cost of the project, however, unlimited liability may not be reasonable in light of the relatively low fee earned for a typical Phase I assessment. Limiting a consultant’s liability to the amount recoverable from insurance policies also can be problematic since insurance policies typically exclude coverage for certain acts, including willful or criminal conduct. As a middle ground, parties may agree to limit the consultant’s liability to the higher of the amount recoverable from insurance policies or some specified amount (e.g., one million dollars) to fill the gap if coverage is excluded.

The buyer should pay particular attention to the staffing of the project to ensure that competent and experienced persons perform the work in the most cost-effective manner. Buyers should not assume that persons described in marketing information or even the proposal will conduct the assessment. Consultants will staff the project based upon a variety of factors, including the hourly rate and availability of particular employees. The buyer can request that senior persons perform specific tasks such as reviewing particular facilities, reviewing reports, or conducting sensitive interviews with regulators. Less senior persons can capably and cost-effectively perform other tasks, such as conducting records review, less sensitive agency inquiries, or aspects of the site inspection. However, the buyer should not be required to finance the training of these people. A buyer should request that the consultant specify in the proposal the project manager and key team members and insist that such persons actually perform the work unless authorization to change is given by the buyer.

It is advisable to have the buyer’s counsel retain the environmental consultant on the buyer’s behalf so that the consultant’s report and other communications by and with the consultant are protected from disclosure by the attorney-client privilege. The benefit of this approach is that the documents prepared by the consultant would not be admissible as evidence in a judicial or administrative proceeding and would not have to be disclosed in response to an information request by a governmental agency. This may become particularly important if an agency inspector requests a copy of assessment reports or the buyer’s prior knowledge of environmental conditions on the property is relevant in subsequent litigation, for example, if the agency alleges that the buyer had
knowledge of environmental contamination on the property and should have taken appropriate action, such as reporting the contamination to the agency or taking corrective action. Although the agency may be able to obtain information regarding the buyer's knowledge through a deposition of the buyer or the consultant, even if the reports are privileged, it is preferable not to have incriminating documentation admitted into evidence.

The assertion of the attorney-client privilege regarding environmental assessment reports and other communications in connection with a transaction is not without risk. Courts may find that the privilege is inapplicable under the specific circumstances, for example, because the court finds that the communications were made not for the purpose of the client obtaining legal advice, but for business or technical purposes.27 In addition, the privilege likely is waived if the report is provided to the seller or a lender. It generally is advisable to take reasonable steps to establish and preserve the privilege with respect to due diligence activities, including documenting that the consultant is retained by counsel to assist counsel in providing legal advice to the buyer and taking reasonable steps to preserve the confidentiality of the communications. However, it also is advisable to ensure that reports are carefully drafted to avoid inappropriate characterizations or speculative comments in the event that a court finds such documents are not privileged or the buyer chooses to waive the privilege.

Apart from the attorney-client privilege, there may be additional ways to protect a consultant's reports from disclosure. Many states have laws or policies which provide that documents prepared in connection with an "environmental audit" are privileged. Depending on the law or policy at issue (the laws and policies vary from state to state), environmental assessments conducted in connection with a potential acquisition may fall within the definition of "environmental audit" and the accompanying reports may be privileged. The buyer’s environmental counsel should carefully review the applicable audit law or policy to determine if there are limitations on the privilege, for example, if the privilege is waived if the consultant’s reports are provided to a third party.

The innocent landowner defense standard rarely should determine the type or amount of due diligence. The prospective purchaser should conduct due diligence to determine in a cost-effective manner whether any material liabilities exist. This is preferred over reliance on the innocent landowner defense which merely gives the buyer an uncertain chance to escape liability through litigation. Prospective purchasers of brownfield properties face physical constraints (e.g.,

size of the property, inaccessible areas, and latent contamination), timing constraints, cost constraints, and limitations imposed by the current owner concerned about discovering previously unknown problems.

The consultant's investigation of potential environmental liabilities generally begins with the performance of a Phase I environmental assessment consistent with standards published by the American Society for Testing and Materials ("ASTM.") A Phase I environmental assessment is designed to identify possible areas of contamination resulting from releases of hazardous substances or petroleum into structures on the property or into the soil, groundwater or surface water on or immediately surrounding the property, and includes records review; site reconnaissance; interviews with current owners and government officials; and an evaluation and report.

The ASTM standards were designed to satisfy the requirements of the CERCLA innocent purchaser defense and may not address all environmental liabilities relating to the property. In some cases, it is advisable to assess other potential environmental concerns that fall outside the scope of a standard ASTM Phase I assessment, including, for example, whether buildings contain asbestos-containing materials or lead paint, whether radon levels are a concern, whether there is lead in the drinking water, and whether wetlands are present.

At the conclusion of a Phase I assessment, a consultant should provide recommendations concerning the need for Phase II sampling of soil and/or groundwater. It often is necessary to conduct Phase II sampling in connection with the purchase of a brownfield property. However, the decision must be made on a case-by-case basis considering a number of factors, including the value of the property, the time available to conduct the assessment, cost, whether the consultant already has sufficient information to quantify environmental risks within acceptable ranges, the potential magnitude of reasonably expected worst-case risks, the level of risk acceptable to the buyer and its lender, and whether the buyer will assume liabilities or such liabilities will be allocated to another party. In other words, the buyer should evaluate whether it has a sufficient understanding of environmental conditions, what additional information is needed, and if costs for Phase II sampling will be incurred, the consultant's expected increase in confidence level concerning the risks if the work is performed. If the consultant believes that the proposed sampling will sufficiently increase its understanding of the risks or could eliminate significant uncertainties

28. ASTM provides two standards: a Transaction Screen (E 1528) and Phase I Environmental Site Assessment (E 1527).
about environmental conditions, it is worthwhile to undertake the work. Of course, the Phase II sampling may be too costly in the context of some transactions.

In the event that Phase II sampling is recommended, the buyer and seller should negotiate an agreement setting forth the parties' understanding of the scope of the Phase II assessment and other terms and conditions regarding the work. Such agreements generally provide that the buyer will be responsible for repairing any damage to the property and be liable for the negligent acts of it or its representatives. The agreement also should establish the allowable scope of the buyer's Phase II activities and provide that the buyer will share the data with the seller (if the seller wants to see it).

The buyer should be aware that conducting intrusive sampling on contaminated properties could expose the buyer to Superfund liability, even if the property is not purchased. In *K.C. 1986 Limited Partnership v. Reade Manufacturing*, responsible parties under CERCLA sued an environmental consultant which had been retained by a prospective purchaser of the site to perform a pre-acquisition environmental assessment. The plaintiffs alleged that the consultant was a liable party under CERCLA because its installation of monitoring wells during the assessment contributed to the groundwater contamination at the site by creating a conduit allowing contaminants to migrate to an underlying aquifer. The court denied the consultant's summary judgment motion on liability. The court held it could not excuse the consultant from liability as a matter of law because genuine issues of material fact existed, which if proven by the plaintiffs, could subject the consultant to liability as an operator of the site.

If the consultant can be liable under these circumstances, the prospective purchaser could be liable as well. Thus, it is conceivable that a prospective purchaser could discover contamination and walk away from the deal, but not CERCLA liability, despite never being in the chain of title.

The *Reade* case should encourage a buyer to retain a capable, experienced environmental consultant, rather than discourage it from conducting sampling at a potentially contaminated property. Experienced consultants maintain that problems of the type alleged in the *Reade* case almost always can be avoided by the exercise of reasonable care. The case also should serve as a reminder of the

30. *Id.* at 1147.
31. *Id.* at 1150.
32. *Id.*
importance of obtaining reasonable indemnities in the consulting services agreement.

A seller may resist a purchaser's efforts to conduct Phase II sampling. For example, a seller may prefer that problems from historical releases which could trigger statutory reporting or cleanup obligations are not brought to light. In some cases, a seller will take property off the market rather than allow a Phase II environmental assessment to be conducted. Where sampling information is not available, a buyer must determine whether it will go forward without the information. In some cases, a seller's agreement to indemnify the buyer may be sufficient to allow a transaction to proceed. If the seller is giving a broad indemnity, it may prefer that the buyer not look for problems.

One of the most significant roles of the environmental consultant is to assist environmental counsel and the prospective buyer in quantifying the potential liabilities associated with the property. This is when the benefits of retaining an experienced environmental consultant who also has extensive experience in remediating properties will be realized. Experienced environmental counsel will be able to provide advice concerning liability if environmental contamination is discovered in the future. The environmental consultant will provide advice concerning the probability that environmental contamination exists on the property and the range of costs that could be incurred if such contamination is found.

The quantification of environmental liabilities in the context of due diligence usually is more of an art than a science. In almost all cases, the consultant does not have complete information about environmental conditions at the property because complete delineation of soil and groundwater contamination generally is cost-prohibitive in the context of environmental due diligence. Nevertheless, an experienced consultant can provide ranges of potential future costs, including most likely and reasonable worst case costs, and identify the consultant's confidence level in such cost estimates. An experienced consultant will consider that risk-based cleanups are more widely accepted by federal and state regulators, which may allow higher concentrations of contamination to remain on-site and may eliminate any cleanup obligations if contamination will not affect off-site receptors and parties on-site can be protected by engineering or institutional controls. By obtaining this information from an environmental consultant, the prospective purchaser will gain important insights into the probability and magnitude of potential liabilities.
Establishing Allocation of Liability

There are alternatives for dealing with the buyer's and seller's liability in connection with a brownfield property. The buyer may accept the liability, in whole or in part, have the seller retain it, in whole or in part, or transfer it, in whole or in part, to a third party such as an insurance company. The allocation is determined through negotiation of the purchase agreement.

Most purchase and sale agreements involving brownfield properties have two basic provisions concerning environmental matters: representations and warranties provisions, and indemnification provisions. Typical representations and warranties include, among other things, that the seller is in full compliance with all applicable federal, state and local environmental statutory and regulatory requirements; there are no pending environmental, civil, criminal, or administrative proceedings against the seller or involving the property; the seller knows of no threatened civil (including actions by private parties), criminal or administrative proceedings against it relating to environmental matters; the seller knows of no facts or circumstances which may give rise to any future civil, administrative or criminal proceedings against it relating to environmental matters; there have been no releases of hazardous substances, broadly defined, at the property; there are no pending or threatened claims or enforcement actions concerning the property; and the seller has provided copies of all material and environmental reports to the buyer.

Representations and warranties are important because they are a valuable tool for the buyer to obtain information about the site, provide a mechanism for the buyer to terminate the agreement if the representations and warranties are not true at the time of the closing, and can provide the buyer with a claim for losses resulting from any material breach of the representations and warranties.

In some cases, the seller may attempt to sell the property "as is, where is" with no representations and warranties. This issue, as well as the form of any representations and warranties, often is intensely negotiated. From a buyer's standpoint, representations and warranties should be obtained when purchasing a brownfield property. From a seller's standpoint, it may be acceptable to give representations and warranties if they are qualified "to the seller's knowledge" or are otherwise limited.

Indemnity issues, such as who will indemnify who, and the terms and conditions of the indemnification, also are intensely negotiated. In some cases,

33. Environmental insurance is discussed infra Part IV.
the seller may expressly retain all liability for environmental matters arising out of it or its predecessor’s activities, i.e., from pre-closing contamination, and indemnify the buyer for such liabilities. However, there can be many variations on the scope of the indemnity. Issues that are negotiated include how long the indemnification will survive and what types of claims are subject to the indemnification. If a seller is required to give an indemnification to close the sale, it may try to limit the indemnification by indemnifying only against third party claims, putting a term limitation on the indemnification (for example, six months or three years), establishing a basket or cap on the indemnity, limiting the indemnity to specific types of problems and/or placing other limitations or conditions on the indemnity.

If the seller is unwilling to indemnify the buyer for environmental liabilities, or will provide only a limited indemnification, a buyer must consider whether it will have legal recourse against the seller or other previous owners or operators outside the purchase agreement. CERCLA may provide such recourse if there has been a release of hazardous substances at the facility. Most of the courts that have addressed the issue have held that potentially responsible parties, i.e., parties who fall within one of the classes of liable parties provided in CERCLA section 107(a), cannot bring a cost recovery action under section 107(a), but are limited to seeking contribution under CERCLA section 113. Since the current owners and operators of contaminated properties are potentially responsible parties, even if they did not cause the contamination, such parties often are limited to bringing a section 113 contribution action.

While liability under section 107 is joint and several (absent a showing of divisibility of harm), liability under section 113 is several, meaning that each defendant is responsible only for the harm it caused to the site. Moreover, in

34. A basket is a mechanism to limit the indemnity by providing that the indemnity is not triggered until the dollar amount in the basket exceeds a specified level, for example, until cleanup costs exceed $100,000. The basket may apply to the costs to address a particular contamination problem, for example, the costs to remediate groundwater contamination, or cleanup costs in the aggregate.

35. The buyer may have other remedies under RCRA § 7002(a)(1)(B) (RCRA’s citizen suit provision), 42 U.S.C. § 6972(a)(1)(B) (1999), or state statutory or common law.

section 113 contribution actions, a court "may allocate response costs among liable parties using such equitable factors as [it] determines are appropriate."37 Depending on whether the buyers contributed to the contamination of the property and the equitable factors considered by the court (a court may consider as many or as few equitable factors as it deems appropriate), an innocent buyer may be forced to pay a considerable share of the response costs at the site, particularly if it paid a reduced price for the property due to the contamination and will gain a windfall as a result of the cleanup.

Although the ability of parties who have performed voluntarily cleanups to obtain contribution under CERCLA has gone virtually unchallenged since section 113 was created by the Superfund Amendments and Reauthorization Act ("SARA")38 in 1986, and such parties have obtained contribution pursuant to section 113 in numerous cases, a few federal district courts have held that a section 113 action is not available unless the party bringing the action is the subject of a prior or pending CERCLA action under sections 106 or 107.39 In other words, according to these courts, a section 113 action is not available to a party which voluntarily cleans up a property or cleans up a property pursuant to an administrative or judicial settlement with a state based on state law. It is not clear whether such decisions will be reversed on appeal or whether additional district courts will hold similarly. However, buyers of brownfield properties should be aware that their ability to obtain contribution under section 113 may not be completely certain.

In some cases, buyers agree to indemnify sellers for environmental liabilities. If the buyer is accepting the risk of environmental liability associated with a property, it should attempt to quantify such risk, for example, by obtaining a consultant's estimate of what a cleanup would cost and the likelihood that a cleanup would ever be required. The buyer can then attempt to adjust the purchase price to reflect the risk it is assuming. As stated previously, estimating the likelihood that a cleanup will be required and the costs of cleanup is not a precise science. However, experienced consultants can estimate a range of potential costs and communicate their confidence levels on the accuracy of such

37. 42 U.S.C. § 9613(f)(1) (1999). The equitable factors a court may consider include the volume and toxicity of materials contributed by each party, negligence or exercise of due care, knowledge or acquiescence, causal responsibility and fault, violation of or compliance with laws, cooperation with the USEPA or state, and economic and other benefits.
estimates to the buyer.

The parties can consider various sharing arrangements for contingent environmental liabilities, such as splitting some or all categories of contingent liabilities, having the seller retain some liability for known problems or problems that arise within a short defined period after the closing, or agreeing that the seller will perform a partial or full cleanup in return for an indemnification or a covenant not to sue from the buyer concerning the environmental problem.

The parties also can consider transferring the liabilities to a third party, such as an insurance company. Numerous insurance products have developed in recent years which can be tailored to fit the specific circumstances and level of risks acceptable to the parties. Insurance products used in brownfield transactions include coverage for third party claims relating to environmental contamination and cost cap insurance, which requires the insurance company to pay cleanup costs that exceed a specified amount. A more detailed discussion of insurance products is provided below.

III. OBTAINING A LOAN

Lenders have been skittish about providing financing to purchasers of contaminated or potentially contaminated properties since CERCLA and RCRA were enacted. As noted above, CERCLA imposes strict and joint and several liability (unless the injury is divisible) on four classes of potentially responsible parties for releases of hazardous substances, including, among others, past and current owners of contaminated properties.40 However, CERCLA’s definition of “owner or operator” excludes any person who holds indicia of ownership in a facility primarily to protect a security interest and does not “participate in the management” of the facility.41 RCRA contains a secured creditors exemption that is similar to the CERCLA provision, except that it is limited to underground storage tanks (“USTs”).42

In the late 1980s, developing CERCLA case law suggested lenders could be subject to liability if they foreclosed on contaminated property or became too involved in the day-to-day management of the borrower’s operation.43 Banks

41. Id. § 9601(20).
42. Id. § 6991b(h)(9).
became particularly concerned when the U.S. Court of Appeals for the Eleventh Circuit suggested in *United States v. Fleet Factors* that banks could forfeit their immunity from CERCLA liability if they had the mere capacity to control their borrower’s operations. In response to *Fleet Factors*, the USEPA promulgated its lender liability rule in 1992. The rule rejected the *Fleet Factors* decision by providing that lenders were not liable if they exercised financial oversight over a borrower’s operation but also provided that lenders could become liable if they actually controlled operation of the business. In 1994, the United States Court of Appeals for the District of Columbia Circuit held that the USEPA had no authority to promulgate the rule limiting lenders’ liability in Superfund cases, although it did not address the substance of the rule. By vacating the USEPA’s lender liability rule, the court intensified the uncertainty lenders faced concerning environmentally distressed properties.

On September 30, 1996, Congress enacted amendments to CERCLA and RCRA that clarify the scope of the secured creditor exemption contained in both statutes. Both the CERCLA and RCRA lender liability protections clarify the circumstances under which a lender can be deemed liable as an “owner or operator” under the Acts. The general rule is that a secured party which takes title to property to protect the security interest without “participating in management” of the property is not liable. The amendments expressly state that “participation in management” requires actual participation in the management or operational affairs of a facility and does not include merely having the capacity to influence, or the unexercised right to control facility operators. Thus,

44. 901 F.2d 1550 (11th Cir. 1990).
45. Id. at 1557-58.
47. 40 C.F.R. § 300.1100 (vacated).
49. The USEPA reissued the lender liability rule as agency guidance in 1995, but this provided little comfort to lenders since the guidance document could not protect against private party actions. A number of states enacted their own lender liability statutes establishing the circumstances under which secured lenders would be immune from liability under the various state versions of CERCLA and RCRA. The protection afforded by the state statutes varied since many of the state lender liability statutes did not mirror the provisions of the USEPA lender liability rule.
52. Id.
Congress rejected the language contained in the *Fleet Factors* decision. Congress also clarified when a lender will be considered to be “participating in management.” When the borrower is still in possession of the facility, the lender is “participating in management” if the lender exercises decision making control over environmental compliance for the facility so that it has undertaken responsibility for hazardous substances handling or disposal practices, or exercises control or responsibility for the overall management of the facility or over substantially all of the operational functions of the facility other than environmental compliance. The amendments contain a list of nine categories of actions that do not constitute participation in management.

The amendments also allow lenders to foreclose, re-lease or sell its collateral so long as the lender attempts to divest itself of the facility “at the earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements.” However, the amendments do not contain certain of the “bright-line tests” that were contained in the lender liability rule. Thus, lenders will face some uncertainty whether their actions are consistent with the exemption.

The rule also provides that a lender may maintain business operations, wind down operations, and take measures to preserve, protect and prepare the facility for sale or disposition without incurring CERCLA liability. However, lenders remain at risk when engaged in post-foreclosure activities since all such activities will be scrutinized to determine if the lender crossed the line from protecting its security interest to being an operator of the facility.

The amendments contain many helpful clarifications of the secured creditor exemption although they fall short of immunizing lenders from liability. The amendments still leave some room for confusion, which aggressive plaintiffs will attempt to exploit, and which gives lenders reason to continue to be cautious about lender liability. Lenders may be forced to defend against CERCLA claims, even if they ultimately prevail on the merits. Moreover, the CERCLA and RCRA amendments do not eliminate the risk to a lender that a significant environmental liability will harm the borrower’s ability to pay back the loan or wipe out or substantially reduce the value of the collateral given to secure the loan. If the cost of the cleanup is greater than the value of the property, the

53. *Id.*
55. *Id.* § 9601(20)(E)(ii).
56. *Id.*
lender will have little incentive to foreclose and will lose the value of its loan. Thus, lenders have remained conservative about providing loans related to brownfield properties.

IV. INSURANCE

Over the last several years, environmental insurance has emerged as a tool to allocate the potential risks of environmental liability in brownfield transactions and cleanups, as well as in other commercial transactions and cleanup projects. An environmental insurance policy can be tailored to cover virtually any environmental risk. Although insurance is not cheap, it often is not cost prohibitive.

Two of the most common types of policies are pollution legal liability policies ("PLL policies") and cleanup cost cap policies ("cost cap policies"). PLL policies can help seal real estate transactions that might otherwise go awry due to the uncertainty of environmental conditions or historical usage by providing buyers and sellers with a risk-transfer alternative to protect against such uncertainty. Such policies may relieve the pressure on the buyer who is reluctant to lose future value in his purchase, the seller who wants to close its books on sold-off assets, and the lender who wants to protect the value of the collateralized property and the borrower's ability to pay back the loan. Cost cap policies can protect the insured against cost overruns associated with a specific cleanup project and may facilitate investment in brownfield properties as well as cleanups by current property owners.

A. Types of Policies and Coverages

PLL Policies

A PLL policy allows the insured to select the coverage appropriate for the risks of a particular facility. The insured typically can choose from a menu of site-specific environmental coverages, including on-site and off-site coverages for property damage, bodily injury and cleanup costs triggered by pollution conditions. Coverage options may include: coverage for on-site cleanup of unknown pre-existing conditions, diminution in value, and/or loss of operations triggered by discovery or by a third-party claim or government-ordered cleanup; coverage for third-party claims for cleanup costs, property damage and/or bodily injury resulting from off-site pollution conditions; and coverage for bodily injury, property damage or cleanup costs associated with non-owned disposal sites, i.e., coverage for Superfund liability.
The authors were involved in several situations occurring in the past two years in which a PLL policy was instrumental in closing a deal that otherwise would have collapsed. One such situation involved a small manufacturing company seeking to sell its business (including the property on which the manufacturing facility had been located for over thirty years). The shareholders of the company wanted to close the books on the business and walk away and were unwilling to indemnify a purchaser for potential environmental liability associated with the business. Since there was a risk that such environmental liability could be material, the prospective purchaser was unwilling to assume the risk of environmental liability. In addition, the prospective purchaser was unable to obtain financing if it agreed to assume environmental liabilities. This left the manufacturing company and prospective purchaser at an impasse.

The impasse was resolved when the prospective purchaser agreed to assume all environmental liabilities associated with the property and obtained an insurance policy with a ten year term covering third party claims for cleanup costs and off-site property damage. The lender agreed to provide financing for the ten year period in which the policy coverage was in place.

In another example, a family attempted to sell its manufacturing business and real estate. The buyer insisted on receiving an indemnity from the sellers for a minimum of five years. When the family saw the possibility of selling the business (and all of the associated liabilities) for a reasonable price begin to fade, it started to explore the option of granting the purchaser an indemnity and obtaining a PLL policy to insure against the risk of environmental liability. In the end, the company secured a PLL policy for an affordable premium for the five year contractual indemnity period and was able to sell the business. The situation faced by the family business is not at all uncommon and demonstrates the important role that environmental insurance can play in commercial transactions.

Cost Cap Policies

The cost cap policy covers the insured for cleanup costs, as defined in the remedial study, that are above the anticipated cost of cleanup. The policy is designed to address the risk and uncertainty associated with beginning an environmental remediation project. This coverage can be important to investors purchasing brownfield properties as well as to current owners who are cleaning up properties.

The policy attaches above the expected cleanup costs (self-insured retention). Premium discounts may be available if the insured elects to have the coverage
attach in excess of a buffer layer. Additional premium discounts may be available if the insured shares in the cost overruns. Typically, substantial analytical data, agency-approved work plans, sophisticated cost estimates and formal contractor quotations are necessary to underwrite cost cap policies.

Cost cap policies can help parties close transactions by providing certainty to an often otherwise very uncertain endeavor. By doing so, the seller and buyer are free to allocate the cost of a known liability either by the seller retaining it, or the buyer assuming it for a price reduction.

B. Key Terms and Conditions

There are key terms and conditions in an environmental insurance policy that affect who is covered under the policy, what claims are covered and excluded, and other rights and obligations of the insured. In order to ensure that the policy provides the desired protection against environmental liability and that the insured does not have any unpleasant surprises down the road, it is important for the insured and its environmental attorney to carefully review all of the terms and conditions of the policy. Several key terms and conditions are summarized below.

Named Insureds and Additional Insureds

Both the named insured and additional insureds are covered under the policy. The primary difference between the named insured and the additional insureds is that only the named insured has the right to cancel the policy. Additional insureds may be the shareholders, directors and/or officers of a corporation. The nature of certain transactions also may warrant including additional insureds in a policy. For example, if the seller of a facility agrees to indemnify the buyer for environmental contamination and the seller obtains an environmental insurance policy to cover such indemnity, the seller may be the named insured and the buyer an additional insured.

Term

The policy term can be either fixed or rolling. Fixed term policies are generally five, ten or twenty years. Rolling term policies allow the insured to roll the policy over at the end of each year to maintain coverage for a certain number of years. For example, in a five year rolling term policy, the insured can elect at the end of each year to roll the policy over to maintain a five year period of coverage. One benefit of a rolling term policy is that the insured may be able to continue the policy indefinitely without having to renegotiate the terms and
conditions of the policy. However, the insurance company has to agree to the roll over and may choose not to extend the policy or to increase the premium if new information is available that the insurance company believes materially increase the risk of liability.

**Deductibles and Policy Limits**

Deductibles vary widely depending on the type of policy and known risks. Policy limits can range from under $1,000,000 to tens of millions of dollars. Deciding on the amount of the deductibles and the policy limits is a judgment call to be made by the insured based on the level of risk involved and the amount of the premium. In order to assess what options may be available, the party seeking to obtain insurance should ask insurance companies for quotes for policies with various deductibles, policy limits and terms.

**Exclusions**

Most insurance policies carry standard exclusions. It is advisable to consult with an insurance broker and attorney to ensure that the exclusions are appropriate considering the scope of coverage sought to be obtained. Some common exclusions include liability resulting from intentional or illegal acts or omissions; liability due to any civil, administrative or criminal fines or penalties; and liability to others under a contract or agreement.

**Earned Premiums**

An earned premium provision allows the insured to terminate the policy within a certain period of time, for example, sixty days, and receive a refund of a percentage of the premium paid. The time period within which cancellation is permitted and the percentage of premium refunded are negotiable.

**Definitions**

The insured should not assume that all exclusions are clearly listed in the exclusions section of the policy. Definitions of key terms often exclude coverage of certain types of claims. For example, standard policy language often excludes contamination from underground storage tanks from the definition of covered pollution conditions. Therefore, the definitions should be reviewed carefully.

**Reporting**

Reporting to the insurance company often is required upon “discovery” of a
claim or pollution condition. One issue that may arise with regard to reporting is what constitutes “discovery.” It may be unclear how much information about a condition is necessary for that condition to have been “discovered” for purposes of triggering the reporting obligation.

Cancellation

The insured should identify the insurance company’s grounds for cancelling the policy. Such grounds often include failing to disclose in the application a condition which substantially increases the likelihood of on-site or off-site environmental damage and changing the nature or extent of operations at the insured site so as to substantially increase the likelihood of on-site or off-site environmental damage.

Payment

Typically, the insured is required to pay the full amount of the premium up front. However, in some rolling term policies the premium may be paid each year. Like many of the other terms and conditions in an insurance policy, the timing of premium payment may be negotiable.

C. What Information is Required?

The process of obtaining environmental insurance begins with completing an application for insurance. The information provided in the application, for example, a description of the operations conducted at the facility, type and quantity of hazardous materials used and prior history of contamination, allows the insurance company to evaluate the potential risk of on-site and off-site liability associated with the facility. Failure to accurately complete the application can result in the insurance company cancelling the policy or denying a claim.

At a minimum, insurance companies generally require a Phase I environmental assessment of the facility. This may be required either as part of the application or as a condition to binding coverage. A Phase II environmental assessment also may be required if additional investigation is warranted. It is advisable for the applicant to retain its own environmental consultant to perform the Phase I environmental assessment rather than have the insurance company’s consultant conduct it so that the applicant can select the consultant which performs the work and can ensure that the consultant’s report will accurately describe site conditions without portraying such conditions in an unreasonably negative manner.
Once a Phase I environmental assessment has been performed, it often becomes a judgment call whether to collect additional data concerning areas of potential concern identified by the consultant. The benefit of collecting additional data is that this may eliminate or reduce unknown risks, which can substantially lower premiums. The disadvantage of collecting additional data is that this may confirm that there is a serious environmental condition, which may result in exclusions from coverage or increased premiums.

The applicant should require the insurance company to execute a confidentiality agreement before providing it with sensitive information and documents concerning the facility. The insured also should evaluate the effect of providing the insurance company with privileged documents. Disclosing privileged documents to third parties such as the insurance company may have the effect of waiving the privilege in future litigation or enforcement actions.

D. Other Issues to Consider

There are numerous issues that may arise in connection with environmental insurance. Although a detailed discussion of all these issues is beyond the scope of this article, a few of the issues to be aware of are briefly discussed below.

**Named Insureds and Additional Insureds**

The named insured should consider the effect of additional insureds on its rights and obligations under the policy. For example, it may be advisable in some cases to negotiate that the reporting obligation is triggered only by the discovery of a claim or pollution condition by the named insured. This would protect the named insured in the event that an additional insured discovers the claim or pollution condition and does not inform the named insured of such discovery, for example, where a tenant (additional insured) discovers a pollution condition on the insured property and does not inform the owner (named insured) of this discovery.

**Separation of Insured Clause**

A separation of insured clause provides that the insurance applies separately to each insured against whom a claim is made or suit is brought. By way of example, assume that a seller of property agrees to indemnify the buyer for third-party claims related to contamination and obtains an environmental insurance policy in which it is the named insured and the buyer is an additional insured. It is unclear if such a policy would cover the seller if the buyer sues the seller to
enforce the indemnity since this may not be a "third-party" claim. In order to avoid the uncertainty in coverage that may result if one insured sues another insured, it is advisable to include a separation of insured clause in the policy.

Stability of the Insurance Company

A person or entity obtains environmental insurance to guard against the risk of incurring significant costs associated with an environmental condition or, in some cases, of being financially devastated by such costs. Therefore, the stability of the insurance company and the ability of the insured to collect on a claim should be carefully considered when choosing an insurer.

Are Insurance Companies Paying Claims?

It does not appear that there have been widespread disputes between insureds and insurance companies regarding payment of claims under the more recent environmental policies. However, the insured should not assume that once a policy is in place, there is no risk of future liability. An insurance policy is a contract between the insurance company and the covered party. Disputes often arise between parties to a contract over the meaning of provisions and the intent of the parties. Since environmental insurance is a relatively new product, there is minimal precedent regarding how insurance companies are going to interpret various policy provisions. It is important to seek the advice of an attorney concerning the risks associated with potential gray areas in policy coverage.

V. RECURRENT PROBLEMS IN BROWNFIELD TRANSACTIONS

Parties involved in the purchase and sale of brownfield properties may become involved in disputes concerning responsibility for cleanup of contamination, the level of cleanup, control of the cleanup, coordination of cleanup activities and site development operations, and other issues unique to brownfield properties. There are several reasons why these problems (discussed below) arise. To begin, buyers and sellers may fail to identify problems prior to the closing, which may cause the parties to inadequately address allocation issues in the agreement. A buyer who is saddled with an expensive cleanup often will

57. One only has to look at the fact that there have been hundreds of cases litigated between insurance companies and covered parties involving claims for environmental damage under the old comprehensive general liability policies to understand the risk that parties may not see eye to eye once a loss has been incurred.
explore legal claims against the seller. Further, the principals for the buyer and/or seller may desire to avoid tough decisions which are viewed as potential deal-killers during contract negotiations, may not consult environmental lawyers and engineers, or may consult them at the latter stages of negotiations when it may be difficult to structure the transaction appropriately to address environmental liabilities. Problems also may arise because the use of broad or vague language to allocate liabilities often will not address the myriad of issues that may arise once contamination is discovered and cleanup is necessary. In addition, sloppy drafting of purchase agreements may lead to uncertainties concerning respective parties’ responsibilities.

Another recurrent problem has arisen due to the uncertainty of lender liability under CERCLA and RCRA. Although the CERCLA and RCRA amendments give some degree of clarity and comfort to lenders concerning permissible activities during the term of a loan and after foreclosure, they do not shield lenders from liability. Consequently, lenders may be reluctant to extend loans to buyers for brownfield properties without taking certain additional measures to guard against potential liability. Such measures (discussed below) may complicate the transaction and increase costs.

A. Problems Which May Arise

Indemnity for Pre-Closing Contamination

A recurrent problem in brownfield transactions arises when the seller broadly indemnifies the buyer for losses and liabilities arising from pre-closing contamination without elaboration. Although the buyer may think that such an indemnity leaves little room for disagreement among the buyer and seller, that is not necessarily the case. There are many issues that this arrangement does not address including applicable cleanup standards; future use of the property that could increase or decrease cleanup costs; costs incurred due to the buyer’s activities; whether a third party claim is required to trigger the indemnity as opposed to the discovery of contamination that may present a health or environmental risk; and who controls the cleanup.

Applicable Laws

It may be difficult to determine if cleanup is “required by applicable laws,” a popular phrase in indemnity agreements. Many buyers who have discovered significant contamination after the closing have been disappointed to learn that
there are no applicable, self-implementing cleanup obligations to trigger the seller's indemnity obligation to clean up to the extent "required by applicable laws" and no governmental agency or other third party involved to bring a third party claim to trigger the obligations.

Moreover, parties may argue about the level of cleanup that the seller must conduct. Phrases such as "conduct a cleanup in accordance with applicable laws" or "cleanup to attain applicable cleanup standards" do not address whether the cleanup must meet standards for residential, commercial or industrial uses, whether published generic standards or site-specific risk-based standards are acceptable, or whether the seller can use institutional or engineering controls. Further, applicable cleanup laws often are complex and confusing. For example, it may be difficult to determine if stringent cleanup levels for polychlorinated biphenyls under the Toxic Substances Control Act are applicable. As discussed below, specifying a cleanup in accordance with a state voluntary action program ("VAP") or to meet published cleanup standards has certain advantages, but is no panacea.

Participation in the Cleanup

Agreements often do not specify the buyer's right to participate in a cleanup conducted by the seller. This may leave the buyer without explicit authority to review, comment on and approve a seller's cleanup plans. If things go smoothly, the parties may cooperate and the seller may give the buyer some opportunity to review and comment. If the relationship sours, the buyer may have little recourse if the seller chooses to exclude it from the process.

Proof Problems

A buyer may have difficulty proving that discovered contamination resulted from pre-closing releases. This problem occurs most often where the buyer conducts operations using hazardous substances, particularly if it uses similar hazardous substances as the seller. Issues of proof become more difficult as significant time passes after the closing.

58. Engineering controls are man-made structures or systems that eliminate or mitigate human or environmental exposure to hazardous substances, such as caps and groundwater gradient systems. Institutional controls are documented restrictions which limit access to or the use of a property such that exposure to hazardous substances is eliminated or mitigated, and include commercial or industrial use restrictions and prohibitions against groundwater use.
Cleanup Under State Voluntary Action Programs

Parties may agree that a seller will conduct a cleanup under a voluntary action program (VAP) to obtain a covenant not to sue or to meet VAP standards without participating in the formal VAP. This approach generally provides needed structure to post-closing activities; however, problems may arise relating to the eligibility of sites to participate in VAP, the scope of cleanup (the scope of cleanup varies widely depending on the use of risk-based levels, natural attenuation, institutional and engineering controls) and increased costs.

Not all sites or areas of contamination will be eligible to participate in VAPs, including units or areas subject to RCRA closure or corrective action, Toxic Substances Control Act requirements, or underground storage tank regulations. Further, the eligibility determination may involve detailed discussions and negotiations with relevant agencies.

Most VAPs allow clean up to site-specific risk-based clean up levels with associated use of engineering and institutional controls. In many cases, active remediation can be avoided if no off-site receptors are affected and on-site workers are protected. There is nothing wrong with this approach, which leads to the most inexpensive cleanup and ensures the protection of human health and the environment, provided buyers are aware that significant levels of contaminants may remain on-site and that they will be asked or required to agree to use restrictions and other controls on the property which could affect its value.

Two other factors must be considered when considering a VAP cleanup as part of a transaction: cost and schedules. The cost and time to complete a VAP cleanup is highly variable depending on the size and location of the property, the nature and magnitude of the environmental problem, and the applicable state program, including, among other things, the level of regulatory agency oversight in the cleanup. Without going into detail, it is clear that participating in a VAP can add considerable cost and time to complete a cleanup. Thus, a buyer and seller may be forced to have a longer relationship after the closing. The cost and schedule factors can lead to a number of other potential problems if not adequately addressed up-front, including problems relating to the level of the buyer’s involvement in the process, or disruption of the buyer’s operations or development activities.

Another way the parties can effectively reduce uncertainties concerning the required scope of cleanup is to require the seller to remediate soils and groundwater to meet generic published standards for specified uses of the property (e.g., residential, commercial or industrial). For example, the seller may
promise that if soil contamination is discovered, the seller will remove the contamination to meet generic standards for industrial use set forth in the state’s VAP. While reducing uncertainty, this approach can greatly increase the seller’s cleanup costs by requiring it to remove contaminants even if there is no legal requirement or health or environmental need to do so. For example, the seller may be required to excavate inaccessible soil from under a building slab to meet the generic level, something that regulators rarely require unless necessary to protect human health or the environment.

More cost-effective alternatives can be considered. For example, the requirement to clean up to generic standards could be triggered only if there is a third party claim against the buyer, or the seller could agree to cleanup to meet generic or site-specific risk-based levels on the condition that the buyer agrees to the use of reasonable engineering or institutional controls. A buyer may be satisfied with a provision that requires the seller to clean up to the extent required by applicable laws or, if no laws are applicable, to abate a condition that poses a material threat to human health or the environment or materially affects the use or value of the property. While such provisions offer less certainty compared to use of generic standards, as discussed above, they (or variations) often are agreed to through negotiations as a reasonable compromise between certainty, cost-effectiveness, and protection of the seller’s and buyer’s other interests.

A VAP covenant not to sue may not protect against claims by the USEPA or third parties. There are several mechanisms which may reduce the risk of future USEPA enforcement actions (and possibly third party claims) related to the VAP property, including prospective purchaser agreements with the USEPA, comfort letters from the USEPA and memoranda of agreement (“MOAs”) between the USEPA and states. However, such mechanisms are available only under certain circumstances and provide limited protection against potential liability.

If a property meets the USEPA’s eligibility criteria, the agency may enter into an agreement with the prospective purchaser of the property. Such an agreement protects the prospective purchaser from USEPA enforcement action and, in some cases, from private cost recovery actions by third parties. USEPA guidance sets forth five criteria that must be met before the agency should consider entering into a prospective purchaser agreement: an action by the USEPA at the facility has been taken, is ongoing, or is anticipated to be undertaken; the USEPA will derive a substantial benefit either in the form of a direct benefit, for example, reimbursement for the cleanup, or as an indirect public benefit in combination with a reduced direct benefit to the USEPA; the continued operation of the facility or new site development will not aggravate or contribute to the existing contamination or interfere with any USEPA response action; the continued operation or new development of the property will not pose
health risks to the community or the persons likely to be present at the site; and
the prospective purchaser is financially viable. Since it is often difficult to
satisfy all of the eligibility criteria, prospective purchaser agreements are not
widely available.

Comfort letters issued by the USEPA provide a prospective buyer with a
statement of the USEPA's position with regard to a contaminated property. The
USEPA may issue these letters when there is a realistic perception or probability
of CERCLA or RCRA liability, when the comfort letter will facilitate
redevelopment, and when there are no other mechanisms to adequately address
the parties' concerns. Again, prospective purchasers may be unable to satisfy
this criteria in the vast majority of cases. Moreover, such letters do not provide
formal protection against USEPA enforcement action at the site, but do allow the
prospective buyer and lender to assess the risk of liability under CERCLA and
RCRA.

Some states have entered into MOAs with their respective USEPA regional
offices. MOAs are policy statements that the USEPA does not anticipate
undertaking federal response action if a property has been cleaned up in
accordance with the state VAP. Before a USEPA region signs an MOA that
acknowledges the adequacy of the state VAP, the region will determine whether
the VAP meets certain criteria, including whether there is an opportunity for
meaningful community involvement, e.g., community notification of the
proposed cleanup plan; whether the VAP ensures that voluntary response actions
are protective of human health, welfare and the environment; whether the
response selection process considers cost-effectiveness, consistent with future
uses at the site, compliance with applicable federal, state and local laws, and
long-term reliability; whether the VAP has adequate resources, including
financial, legal and technical; whether the VAP provides adequate mechanisms
for certification of response action completion; and whether sufficient
enforcement mechanisms are in place to ensure the completion of response
actions. Like comfort letters, MOAs do not provide legal assurance against
future USEPA enforcement action.

Prospective purchasers often are disappointed to learn they are unable to
obtain liability protection or other assurance from the USEPA. This may scare

61. See USEPA, Guidance for Developing Superfund Memorandum of Agreement Language
Concerning State Voluntary Cleanup Programs (July 1, 1997).
off more conservative buyers.

**Demolition, Construction and Renovation**

Buyers often will demolish existing buildings and construct new facilities or substantially renovate existing buildings. These activities may lead to problems. For example, the buyer's construction and the seller's cleanup activities may interfere with one another or the buyer's activities may identify new environmental problems. Further, unless addressed in the agreement, disputes may arise over which party must pay for the buyer's increased construction costs arising from the need to dispose of contaminated excavated soils that are not clean fill, health and safety measures to protect construction workers, and extra work to avoid interrupting the seller's cleanup activities.

Contractors also may raise issues in connection with demolition, construction and renovation activities. Contractors may have concerns related to the health and safety of their employees who are not trained to handle hazardous waste and substances and their potential liability under OSHA and common law for failure to adequately train and protect such workers. Contractors also may be concerned that their reuse, handling or movement of contaminated soil on-site or arrangement for disposal of contaminated soil off-site may trigger liability under CERCLA. These concerns are justified since persons who arrange for the disposal of hazardous substances may incur liability under CERCLA and because contractors which have caused hazardous substances to be dispersed around a site, for example, through grading or excavation activities, may be liable under CERCLA on the theory that they were operators of a facility and "disposed" of hazardous substances.

Prior to demolition, construction or renovation activities, buyers should determine, with the assistance of counsel, whether moving soil around the property, reusing soil on-site or disposing or reusing of soil off-site could expose them to liability. In addition to liability under CERCLA, buyers should evaluate the risk of environmental liability under other federal, state and local laws and regulations. For example, the handling, movement or reuse of contaminated soil

62. OSHA's Hazardous Waste Operations and Emergency Response rule specifies certain training requirements (commonly known as "HAZWOPER" training) for employees that handle hazardous materials. See 29 C.F.R. § 1910.120 (2000).

may constitute the disposal of solid waste or hazardous waste under state solid waste laws or RCRA and, in turn, trigger requirements for the handling, management and disposal of such soil. Reuse of contaminated soil also may be regulated by municipal codes. For example, the Cincinnati Municipal Code regulates the reuse of contaminated soil if the soil contains certain contaminants above specified levels. Construction costs can sky-rocket if soil taken off-site must be disposed of as solid or hazardous waste rather than reused as clean fill. Disputes may arise if such costs are not clearly allocated in the purchase agreement.

**Limitations on the Buyer's Future Use of the Property**

The buyer's use of the property may be subject to limitations relating to the seller's obligation to clean up or to indemnify the buyer. To fulfill its cleanup obligation, the seller may wish to rely on the use of engineering or institutional controls. The seller's obligation to indemnify the buyer may provide exceptions for losses arising from the buyer's activities on the site that disturb or exacerbate the contamination.

The buyer may face other obligations or restrictions relating to agency no further action approvals, covenants not to sue or other applicable legal requirements. No further action approvals and covenants not to sue may be conditioned on the buyer's agreement to, and compliance with, use and other restrictions, as discussed above.

In addition, other legal protections available to the buyer may impose conditions or obligations. For example, under Michigan's Part 201 liability provisions, a person or entity which purchases contaminated property after June 5, 1995 is liable for cleanup costs unless such purchaser conducts a baseline environmental assessment ("BEA") and, if such assessment identifies contamination above residential standards, submits the BEA to the Michigan Department of Environmental Quality. A purchaser can lose the liability exemption if it fails to exercise due care concerning the existing contamination. Due care includes undertaking measures to prevent exacerbation of existing contamination, undertaking response activity necessary to mitigate unacceptable exposure to hazardous substances or fire and explosion hazards, and taking

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64. [Cincinnati Municipal Code ch. 1031 (1996).](#)
reasonable precautions against reasonably foreseeable acts or omissions of a third party.\textsuperscript{67} Depending on the specific facts and circumstances, purchasers may be required to isolate areas of contamination to avoid employee exposure, remove containers of hazardous substances, or take other actions to meet the due care requirements, including, in some cases, remediation in accordance with the Part 201 requirements.

\textit{Obtaining A Loan}

In order to minimize the risk of liability under CERCLA and RCRA, a lender may require the buyer to quantify the nature and extent of environmental contamination associated with the property and/or indemnify it for all environmental liability incurred as a result of the loan. A lender will require a demonstration by the buyer that it has sufficient financial resources to cover the indemnity or has obtained an indemnity from a financially-secure seller or an appropriate environmental insurance policy. Alternatively, the lender may require the buyer to provide collateral other than the brownfield property.

\textbf{B. Tips to Avoid Problems}

\textit{Establish Open Communication}

Buyers and sellers should be made aware of the many issues and complications unique to brownfield properties. There is a higher likelihood of success if both parties understand these issues before a purchase agreement is executed. It is also advisable to include dispute resolution procedures in the agreement so that problems which do arise can be resolved effectively and efficiently.

\textit{Pay Attention to Cleanup Issues}

The parties to a brownfield transaction should pay proper attention to cleanup issues in the purchase agreement. Unless there is a perceived significant advantage to do otherwise,\textsuperscript{68} parties should make an effort to identify the issues and appropriately address them. The agreement should specifically address the

\textsuperscript{67} MICH. STAT. ANN. § 324.20107(a).

\textsuperscript{68} In some cases, a buyer or seller may have a weak bargaining position and will prefer vague contract terms rather than negotiating specific language that likely will be more favorable to the other party.
allocation of responsibility for all possible environmental liabilities; the expiration date (if any) of the seller’s indemnity and the parties’ rights after the expiration date;\textsuperscript{69} the scope of the indemnity (third party claims or cleanup even if there is no legal requirement to do so); applicable cleanup levels; and the buyer’s right to participate in the cleanup. The parties also should address upfront the issues that will arise when construction and cleanup activities are to be coordinated.

\textit{Perform Appropriate Due Diligence}

The buyer should perform appropriate due diligence to develop an understanding of potential liabilities. In addition, it often is easier to allocate responsibility for known problems rather than (sometimes speculative) unknown conditions. Sellers should consider establishing baseline conditions to avoid liability for problems resulting from post-closing releases.

\textit{Consider Environmental Insurance}

The parties should explore insurance options early in the process since obtaining a policy can be time-consuming and delay could scuttle a deal. Obtaining insurance often involves a coordinated effort among the buyer and seller and their respective lawyers and consultants. The buyer’s lender also will be interested and may establish the key coverage requirements. Insurance considerations also may affect the type and degree of the buyer’s due diligence efforts.

An insurance policy is a contract between the insurance company and the insured. Moreover, the insured is obtaining the policy to transfer the risk of liability that potentially could financially cripple the company. Thus, it is critical that the insured (with assistance from its broker and counsel) closely scrutinize the terms and conditions of the policy to ensure that the coverage will be available as anticipated.

The buyer and/or seller face difficult decisions when applying for coverage. If too little is known about the property, the cost of the policy may be prohibitive. However, if sampling confirms that a significant problem exists, the insurance company may exclude coverage for such problem or offer cap insurance. Thus,

\textsuperscript{69} The agreement should address whether the buyer waives all claims against the seller upon the expiration of the indemnity provision, assumes such liabilities, or retains the right to sue the seller under statutory or common law.
the party seeking coverage must work closely with its advisors to develop an appropriate strategy considering the existing facts and circumstances.

*Negotiate Representations and Warranties*

The buyer should request representations and warranties from the seller that, among other things, there have been no releases of hazardous substances (broadly defined) at the property, there are no pending or threatened claims or enforcement actions concerning the property, and that the seller has provided copies of all material environmental reports and other pertinent information. In some cases, a seller may attempt to sell the property “as is,” with no representations and warranties. This issue, as well as the form of any representations and warranties, often is intensely negotiated. From a buyer’s standpoint, when considering the purchase of a brownfield property, representations and warranties should be obtained. Sellers may give them if they are qualified “to the seller’s knowledge” or are otherwise limited. However, buyers should not rely on representations and warranties in lieu of conducting appropriate due diligence.

*Buyers Should Be Cautious About Potential Environmental Liabilities But Need Not Walk Away From a Good Deal Because of Unreasonable Fears*

In light of the increasing acceptance of risk-based cleanups, properties having more limited levels of contamination may never be subject to cleanup requirements. Experienced environmental counsel and consultants can help qualify and quantify the level of risk. Buyers can obtain appropriate protections through VAPs, contractual indemnities, and insurance. Buyers need not always be alarmed by failing to obtain additional comfort from the USEPA. Although the risk of CERCLA and RCRA liability exists, buyers can adequately assess whether this is a legitimate concern under the relevant facts and circumstances. In many cases, particularly where there is little risk of off-site impacts, no specific federal requirements apply (such as RCRA closure or corrective action requirements), or the property is proceeding through or has completed a VAP cleanup, the USEPA or other third parties may have little interest in the property. If the contamination is significant, it may be possible to obtain a USEPA prospective purchaser agreement or comfort letter.

*Consider a VAP Cleanup*

Requiring cleanup under a VAP often is beneficial because it involves specified levels of investigation and cleanup, some government oversight and
receipt of a covenant not to sue. However, many programs substantially increase cleanup costs. Buyers should be careful about waiving future claims against a seller once a covenant not to sue is received because covenants may be limited to identified contamination, may not protect against claims by the USEPA or third parties and may have other limitations. An alternative to requiring cleanup under a VAP is to require cleanup to published generic standards, even if a VAP is not entered. This eliminates many arguments about the necessary scope of the cleanup, but may lead to a more expensive cleanup. In either case, a buyer and seller should reach an agreement concerning whether the seller may clean up using risk-based standards, whether the buyer will allow engineering and institutional controls, and whether the buyer will be compensated for the potential loss in property value resulting from such controls.

Understand the Limitations on the Property and Other Obligations on the Buyer

Buyers can be substantially protected from liabilities through indemnification agreements, covenants not to sue, USEPA prospective purchaser agreements and the like. However, unless the protections are completely open-ended, the buyer may be required under contract or law to restrict the use of the property and/or agree to engineering controls and may be subject to other obligations not to disturb or exacerbate contamination. This type of arrangement is very common and can lead to the most efficient use of brownfield properties. It need not create problems for the buyer or between the buyer and seller provided that the parties have identified the limitations and obligations and addressed them in the purchase agreement, if necessary. The buyer needs to determine whether the limitations are consistent with its plans for use, development, and re-sale of the property and to have a clear understanding that it may incur costs relating to contamination that are not covered by the seller’s indemnification or insurance coverage.

Sellers Can Benefit from Pre-Sale Preparation

Sellers can hope to find a prospective purchaser who is uninformed and unconcerned about environmental liabilities. There are still a few around but the numbers are dwindling. Selling to such buyers is not without risk because their failure to understand or appreciate environmental liabilities may lead to exacerbation of site conditions or increased exposure to persons on-site or off-site. If claims are made against the buyer relating to such problems, the buyer may not have the financial resources to correct the problem or compensate
injured parties. Thus, the seller may be required to do so.

Many prospective brownfield transactions falter once environmental conditions and potential liabilities are scrutinized, often when the lenders get involved. This may occur after substantial transaction costs have been incurred by both the buyer and seller, including the time spent by a company’s real estate manager to market the property. Owing to the fact that imprudent buyers and inattentive lenders are a dying breed, and the increasing frustration of real estate managers who frequently deal with the divestiture of old manufacturing sites, some companies have become more proactive in identifying, and, in some cases, remediating problems before the property is placed on the market. By identifying the potential problems through Phase I and Phase II assessments, the seller can structure and price a proposed transaction in a reasonable manner and increase the likelihood that the transaction will be consummated. The seller and buyer can negotiate acceptable terms and conditions and allocation of known and unknown liabilities. If the seller chooses to remediate known problems, it will pave the way for a smoother sale of the property and a significant reduction of its future risk of liability associated with the property. Once problems are at least identified, the seller may be able to demand a higher price or more favorable contract terms compared to where environmental risks are uncertain and assumed to be very substantial. In some cases, the seller’s investigation will indicate that significant problems make it unwise to market the property.

Involve Potential Lenders Early in the Process

Lenders remain conservative concerning brownfield properties because they are loathe to deal with the difficulties of measuring environmental risks. However, lenders have become more amenable about providing financing for brownfield properties, provided they are given sufficient information to quantify the risk and protect against liability. The buyer should inquire early in the process about the criteria used by the bank to evaluate the proposed financing. Many banks have developed formal lending guidelines or, in the case of larger loans, may be constrained by guidelines or criteria of other lenders who will participate in the loan. By understanding the criteria early in the process, the buyer can tailor its due diligence efforts and contract negotiations accordingly. If the lender is too conservative, the buyer can shop for better terms from other lenders. In the end, the lender will provide financing if it is convinced the buyer’s (and, thus the lender’s) interests are protected during the term of the loan either through developing an understanding of environmental conditions to a reasonable degree of certainty, obtaining no further action approvals or covenants not to sue from governmental agencies, obtaining an appropriate indemnity from
a financially secure seller, establishing an acceptable escrow account, or obtaining insurance.

VII. CONCLUSION

The re-development of brownfield properties will continue to increase. This increase will result from the recognition that the development of brownfield properties is beneficial to society and also may be beneficial to buyer and sellers, the government's continuing efforts to encourage such development, and many other factors.

The sale of brownfield properties is fraught with difficulties and complexities. In many cases, buyers and lenders may terminate transactions unnecessarily due to unsubstantiated or unreasonable fears. In addition, the failure to pay heed to the details of due diligence and contract drafting leads to dissatisfied buyers, sellers and lenders, increased costs, and, too often, litigation. These problems are not insurmountable if buyers and sellers are made aware of the issues and address them in advance.
ENVIRONMENTAL CONTAMINATION AND THE APPLICATION OF THE OWNED PROPERTY EXCLUSION TO INSURANCE COVERAGE CLAIMS: CAN THE THREAT OF HARM TO THE PROPERTY OF OTHERS EVER GET REAL?

by Robert A. Whitney

INTRODUCTION

The discovery of environmental contamination typically is the beginning of a long process involving local, state and federal authorities in the determination of the scope of contamination, and the remedial activities that will be required to clean up the pollution. When the contamination is centered upon a particular piece of property, the regulatory authorities often look first to the property owner to finance the costs of investigating and remediating the contaminated site. The property owner will then often look to its insurance carrier to provide it coverage for the clean-up costs involved. Under such circumstances, it is to their general liability insurers that the property holders look for insurance coverage.

General liability insurance coverage, provided in the form of a policy commonly referred to as a comprehensive or commercial general liability insurance policy (collectively, "CGL policy"), provides that the insurer agrees to "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies, caused by an occurrence." An "occurrence" is typically defined as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." The term property damage is usually defined in a CGL policy as "physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof."

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2. The insurance policy language used in this Article is predominantly based upon forms issued by the Insurance Services Office ("ISO"). It should be noted, however, that actual insurance policies issued to policyholders invariably contain unique provisions and endorsements that, in many instances, fundamentally alter the text and meaning of the ISO-issued form language.
3. See supra text accompanying note 2.
at anytime resulting therefrom."

As is apparent from the language itself, such insurance coverage is designed to provide liability coverage for damage to the property of others. This is in contrast to a type of insurance coverage known as "first-party" insurance, which provides coverage for losses involving damage to an insured's own property. Examples of "first-party" insurance include fire insurance policies and the like. While the definition of "property damage" contained within a CGL policy typically does not define the "property" suffering "damage" as the property of the insured, these policies have historically contained an exclusion for damage caused to property owned by the policyholder. This "owned property exclusion" usually provides that the insurance policy does not apply to damage to "property owned, occupied by, or rented to, the insured."6

The meaning of the owned property exclusion has become an important issue in the context of disputes over insurance coverage for the cost of cleaning up hazardous waste sites under federal and state laws. For example, contamination located on a particular piece of property owned by an insured could have migrated off-site and contaminated the property of an adjoining landowner. Or else the contamination found in the soil of an insured’s property contaminated an underground stream or aquifer. Another situation is where the environmental contamination resulted in actual damage to property owned by the policyholder, but only a threat of environmental damage to property owned by others; or there has been environmental contamination to the policyholder's property, but there is no immediate threat of damage taking place to other’s property.7 The question of

4. See supra text accompanying note 2.
5. See supra text accompanying note 2.
6. Owned property exclusions also typically provide that there is no coverage for property damage to "property used by the insured" or "property in the care, custody or control of the insured or as to which the insured is for any purpose exercising physical control." For purposes of this Article, all three forms of excluded property will be referred to simply as "owned property." The CGL policies also usually contain an "alienated premises" exclusion. This exclusion typically provides that the insurance does not apply to "property damages to premises alienated by the named insured arising out of such premises or any part thereof." The alienated premises exclusion applies only to property damage where the insured has "alienated" the insured property, that is, where the premise was transferred to another by sale, gift, or other means. Unlike the owned property exclusion, this exclusion is rarely at issue in environmental liability coverage cases since damage to third-party property is clearly outside the scope of the exclusion.
7. It is beyond the scope of this Article to attempt to define what is meant by the term
the application of the owned property exclusion to the various factual circumstances described above becomes less clear cut.

Part I of this Article examines the way in which the courts have addressed the application of the owned property exclusion in the various factual circumstances outlined above. Part II of this Article reviews recent case law to determine whether any new trends have appeared in the application of the owned property exclusion to environmental contamination situations. In the final section, the author suggests an approach that applies the actual language of the owned property exclusion, in conjunction with the other terms and conditions of the CGL policy, to determine insurance coverage in environmental contamination situations. Under this approach, it is posited that the owned property exclusion can only be avoided in those circumstances where actual third party damage has already taken place, not merely where such harm is believed to be "imminent" or "likely" to occur some day.

I. THE APPLICATION OF THE OWNED PROPERTY EXCLUSION TO ENVIRONMENTAL CONTAMINATION CLAIMS

A. The Owned Property Exclusion Does Not Apply Where There Is Actual Harm to Third-Party Property

The purpose of the owned property exclusion is to confirm that a CGL policy is intended to discharge a policyholder's covered legal obligations to third parties and to prevent a CGL policy from providing first-party insurance coverage to the policyholder. To the extent that environmental contamination of third-party property exists, the owned property exclusion would not be applicable since the property at issue would not be owned by the insured.

For example, in Fireman's Fund Insurance Co. v. Ex-Cell-O Corp., various
insurers sought a declaration from the United States District Court for the Eastern District of Michigan that they were not obligated to defend their policyholder, Ex-Cell-O Corporation ("Ex-Cell-O"), against potential liability for allegedly contributing to environmental contamination at 22 locations owned by it. Among other grounds, the insurers argued that the exclusion for damages to property owned by the policyholder contained in each of the policies at issue precluded coverage. The court held that the owned property exclusion did not preclude coverage because the claims of environmental contamination at the sites owned by Ex-Cell-O included property damage claims that pollution had migrated onto adjoining landowners' properties.

In Broadwell Realty Services v. Fidelity & Casualty Co., an often-cited case from the New Jersey Superior Court, the policyholder, Broadwell Realty Services, Inc. ("Broadwell"), owned a piece of property which contained underground storage tanks. A hazardous substance had escaped from the tanks, and migrated to adjacent property not owned by Broadwell. New Jersey's Department of Environmental Protection ("DEP") subsequently investigated the contamination, and ordered Broadwell to undertake "remedial activities to eliminate the source of the continuing pollution at the adjacent properties." Broadwell then demanded that its insurer, Fidelity & Casualty Co. of New York ("Fidelity"), pay for the clean-up costs which Broadwell incurred on its own property in order to respond to the DEP's order. Fidelity denied coverage to Broadwell, relying upon the owned property exclusion contained in the insurance policy at issue. Fidelity maintained that the remedial activities which took place on Broadwell's own property were intended to alleviate the contamination on the policyholder's own property, and, therefore, there was no coverage.

The court held that the remedial activities undertaken on Broadwell's property were designed to prevent the continued release of contamination onto

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10. Id. at 621-22.
11. Id.
12. Id. at 625.
14. Id.
15. Id.
16. Id.
17. Id.
18. Id.
the non-owned adjacent property, and was not solely to remedy damage to Broadwell's own property. As such, the court stated that the purpose of the owned property exclusion, which was to "exclude from the insurer's indemnification obligation claims by the insured based upon damage or loss to its own property," was not implicated. Therefore, the owned property exclusion did not bar the insured's coverage.

In the case Gerrish Corp. v. Universal Underwriters Insurance Co., Gerrish Corporation ("Gerrish"), sought a declaration from the Vermont Federal District Court that a liability insurance policy issued by Universal Underwriters Insurance Company ("Universal") provided coverage for a petroleum pollution clean-up claim asserted against Gerrish by the State of Vermont. Universal opposed Gerrish's petition, and requested a declaration from the court that the policy at issue did not provide coverage for Gerrish's claims.

Gerrish owned property in Woodstock, Vermont, which contained gasoline storage tanks used in connection with a retail gasoline sales operation. Certain piping associated with those tanks leaked petroleum products that migrated off Gerrish's property to at least one adjacent property and also bled into a stream.

In May of 1985, the State of Vermont, through its Agency of Environmental Conservation, notified Gerrish that the agency determined that a petroleum product emanating from Gerrish's property was entering a natural drainage stream, which entered into the Ottauquechee River. The state also informed Gerrish that it intended to investigate and mitigate the situation and seek recovery costs from the responsible parties, including Gerrish.

Gerrish tendered to Universal its defense of the claim brought by the State of Vermont, and demanded that Universal take all responsibility for the costs of monitoring and cleaning up the contamination at issue. Universal subsequently

19. Id. at 82.
20. Id.
21. Id.
23. Id. at 365.
24. Id.
25. Id.
26. Id.
27. Id.
28. Id.
denied coverage altogether, citing the owned property exclusion contained in the policy at issue.\textsuperscript{29} In the coverage lawsuit, the Vermont Federal District Court held that the damage to property resulting from the environmental contamination included not only damage to the Gerrish property, but also included damage to adjacent properties.\textsuperscript{30} The court further stated that it “might be necessary to do remedial work on the insured’s property in order to stop injury to the property of others,” and, therefore, the “cost of such on premises remedial work, as well as any off premises remediation, [was] not excluded by the language of [the owned property exclusion].”\textsuperscript{31}

In the seminal case of \textit{Hakim v. Massachusetts Insurers’ Insolvency Fund}, the Massachusetts Supreme Judicial Court examined the question whether the owned property exclusion in a homeowners’ insurance policy barred coverage for the costs incurred by the policyholders for the cleanup of an oil spill on their property.\textsuperscript{32} The cleanup was undertaken after the policyholders received a notice of responsibility from the Massachusetts Department of Environmental Protection (“MDEP”).\textsuperscript{33} Thereafter, Ralph W. Hakim and Mary F. Hakim (“Hakims”) commenced this action against Abington Mutual Fire Insurance Company (“Abington”) when Abington refused to indemnify the Hakims for the clean-up costs.\textsuperscript{34} Abington then filed a counterclaim seeking a declaration that it had no coverage obligation to the Hakims.\textsuperscript{35} On cross motions for summary judgment, the court allowed Abington’s motion, denied the Hakims’ motion, and entered judgment for Abington.\textsuperscript{36} The Hakims appealed, and the Massachusetts Supreme Judicial Court vacated the order of the superior court granting summary judgment to Abington.\textsuperscript{37}

The Hakims purchased their homeowners’ insurance policy from Abington for the period of October 7, 1990 to October 7, 1993.\textsuperscript{38} On October 8, 1992, a

\begin{thebibliography}{99}
\bibitem{29}lbid.
\bibitem{30}lbid. at 366.
\bibitem{31}lbid.
\bibitem{32}Hakim v. Massachusetts Insurers’ Insolvency Fund, 675 N.E.2d 1161, 1162 (Mass. 1997).
\bibitem{33}lbid.
\bibitem{34}lbid.
\bibitem{35}lbid.
\bibitem{36}lbid.
\bibitem{37}lbid.
\bibitem{38}lbid.
\end{thebibliography}
neighbor of the Hakims reported to the local fire department the appearance of a petroleum sheen on the surface of a stream about ninety feet from the Hakims’ residence. The source of the contamination was a ruptured underground fuel line leading from an aboveground oil storage tank in the Hakims’ basement to their furnace. About one hundred gallons of home heating oil had leaked into the ground and had contaminated the Hakims’ property. The fire department disconnected the leaking pipe and installed a temporary pipe aboveground.

The MDEP was notified, and the next day a representative from the department inspected the site and issued a “notice of responsibility” to the Hakims. In the notice, the MDEP informed the Hakims that it considered them liable for the “assessment, containment and removal actions necessitated by this incident.” It stated further that if they did not assume responsibility for the cleanup, the MDEP would do so and take appropriate action to “recover all costs, charges and damages” from the Hakims, including interest and treble damages. “It advised the Hakims that, if they did assume responsibility for the cleanup, they were to ‘[d]ispose of the contaminated soil generated at the site’ in conformance with the department’s current policies.” A licensed environmental engineering firm, ENPRO Services, Inc. (“ENPRO”), responded to an emergency call from the MDEP and performed certain emergency response actions. In response to the notice of responsibility, the Hakims also retained ENPRO to perform assessment and related remedial work.

ENPRO determined that the leaking oil migrated through the drainage system of the Hakims’ house to an outfall pipe, and from there into a stream that flowed through a corner of the Hakims’ property. Beyond the property, the oil had passed from the stream, through a pond, and eventually into the Charles

39. Id.
40. Id.
41. Id.
42. Id.
43. Id.
44. Id.
45. Id.
46. Id.
47. Id.
48. Id.
49. Id.
River. ENPRO took emergency measures to confine and remove the oil contamination of the adjacent waterways through the use of oil absorbent booms and pads which were placed where the outfall pipe from the Hakims’ property connected to the stream, as well as at other locations downstream. An oil spill containment boom was also placed in a downstream pond. These emergency actions were completed by October 12, 1992.

In the following months, ENPRO undertook additional assessment and remedial work. It appears that at least through April 1993, the oil absorbent booms and pads placed on the waterways were kept in place, and that ENPRO checked and changed them from time to time. The remedial work also included the excavation and removal of contaminated soil from beneath the basement slab of the Hakims’ house. This remedial action was recommended by ENPRO “to remove and eliminate the secondary source (contaminated soils)” and “in order to achieve compliance with governing environmental guidelines and policies.” This work was completed by June 1993.

The Hakims filed a timely notice of claim with Abington, seeking reimbursement for all the costs they had incurred for the assessment and cleanup. Abington agreed to, and apparently did pay for, the costs incurred for all the assessment work and for the containment and cleaning of the waterways located near the Hakims’ property. It refused, however, to pay for the costs of the excavation and removal of the contaminated soil from the Hakims’ property. The homeowner’s policy at issue contained an owned property exclusion, which provided there was no coverage for “property damage to property owned by the insured.”

50. Id. at 1162-63.
51. Id. at 1163.
52. Id.
53. Id.
54. Id.
55. Id.
56. Id.
57. Id.
58. Id.
59. Id.
60. Id.
61. Id.
62. Id.
The Massachusetts Insurers’ Insolvency Fund (“Fund”), the successor in interest to Abington, argued that the owned property exclusion limited the scope of liability coverage based on the location of the property harmed and barred coverage for any damage to the policyholder’s own property.63 According to the Fund, it was contractually obliged to pay only for damage to third-party property, in this case, the waterways adjacent to the Hakims’ property.64 The Hakims argued that the location of the cleanup was irrelevant; they sought indemnification for all the clean-up costs that they claim were incurred “because of” the property damage to the surrounding waterways.65

The court noted that it had not previously addressed the question of whether an owned property exclusion bars coverage for the costs of an environmental cleanup of a policyholder’s own property.66 It noted that in cases where environmental contaminants migrated from a policyholder’s property to an adjacent property, courts generally agreed that the owned property exclusion did not relieve the insurer of all liability for response costs incurred by the cleanup of the policyholder’s own property.67 Instead, coverage was not barred if the cleanup was designed to remediate, to prevent, or to abate further ongoing migration of contaminants to the off-site property.68 The court followed the lead of these courts and held that where there was actual contamination of the adjacent third-party property, the costs of remedial efforts to prevent further contamination of that property were not excluded from coverage by the owned

63.  Id. at 1164.
64.  Id.
65.  Id.
66.  Id.
67.  Id.
68.  Id. (citing E.I. du Pont de Nemours & Co. v. Allstate Ins. Co., 686 A.2d 152, 157 (Del. 1996) (“coverage [is] not provided for measures taken on an insured’s property unless it is in response to damage to third party property.”)); Gerrish Corp. v. Universal Underwriters Ins. Co., 947 F.2d at 1030-31 (2d Cir. 1991) (applying Vermont law); Bankers Trust Co. v. Hartford Acc. & Indem. Co., 518 F. Supp. 371, 373 (S.D.N.Y.) (applying New York law) (“work done on the property to prevent further oil seepage was as a matter of law within the coverage.”), vacated on other grounds, 621 F. Supp. 685 (S.D.N.Y. 1981); Olds-Olympic, Inc. v. Commercial Union Ins. Co., 918 P.2d 923 (Wash. 1996); see also New Jersey v. Signo Trading Int’l, Inc., 612 A.2d 932, 939 (N.J. 1992) (“this case does not fall within the narrow exception allowing recovery for the cost of measures intended to prevent imminent or immediate future damage when a present injury has already been demonstrated.”).
property clause in the Hakims’ policy.69

The Fund argued that the plain meaning of the disputed provision excludes coverage of all of the costs of cleanup on the Hakims’ property, regardless of the reason for the cleanup.70 In the Fund’s view, it was irrelevant whether the excavation and removal of soil from the Hakims’ property was to eliminate the source of the contamination or to protect the adjacent waterways from further contamination.71 According to the Fund, liability coverage extended only to third-party property damage and the costs to remediate the contamination of third-party property.72

The Hakims argued that the plain language of the owned property exclusion does not bar coverage for the excavation and removal of the contaminated soil from their property.73 They argued that since the clean-up activity was conducted because of the contamination of the adjacent waterways, the owned property exclusion did not apply to any of the clean-up costs incurred.74

The court stated that it was appropriate to consider “what an objectively reasonable insured, reading the relevant policy language, would expect to be covered.”75 The court concluded that a reasonable policyholder would have expected coverage of some and possibly all of the disputed clean-up costs in the circumstances of this case.76 It was undisputed that the Hakims incurred their costs when oil contamination was discovered in the waterways adjacent to their property and when the department issued its notice of responsibility.77 When the repair of the ruptured fuel line stopped further leaks of the heating oil into the ground, the Hakims could reasonably have expected that the costs incurred to prevent continuing contamination of the waterways from the migrating oil would not be excluded from coverage.78

The Massachusetts Supreme Judicial Court, however, concluded that the

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70. Id.
71. Id.
72. Id.
73. Id.
74. Id.
75. Id.
76. Id.
77. Id.
78. Id.
Fund was not liable for all of the clean-up costs incurred by the Hakims.\textsuperscript{79} The court held that the policy covered clean-up costs incurred to remediate or prevent further migration of the contaminants to the off-site waterways.\textsuperscript{80} Those costs incurred for the sole purpose of remediating the Hakims' property, however, were barred by the owned property exclusion.\textsuperscript{81}

The court noted that even after the initial emergency cleanup of the waterway, oil absorbent pads and booms were required to remediate the contamination to the waterways for some months after the initial emergency responses.\textsuperscript{82} The court also found that the ENPRO report provided an argument that there was a threat of further contamination of the adjacent waterways unless the contaminated soil was removed from beneath their basement.\textsuperscript{83} Summary judgment was precluded since there was a dispute as to material facts concerning which costs were to remediate the third party property damage and which were expended to clean up the Hakims' own property.\textsuperscript{84}

Generally, if environmental contamination has taken place on the property of others, as a result of the migration of hazardous waste or other chemicals from the property of the policyholder, then the owned property exclusion is not applicable to the remediation of the adjacent property.\textsuperscript{85} Similarly, if the environmental contamination resulting from the activities of the policyholder has polluted surface or groundwater which is migrating or flowing from the policyholder's property offsite, thereby causing contamination to the property of others, then the owned property exclusion is not applicable for the same reason.\textsuperscript{86} However, there is a question whether the owned property exclusion is applicable

\begin{footnotes}
\item[79.] Id.
\item[80.] Id. at 1165-66.
\item[81.] Id. at 1166.
\item[82.] Id.
\item[83.] Id.
\item[85.] Hakim, 675 N.E.2d at 1166.
\item[86.] Id.
\end{footnotes}
with respect to claims for remediation of contaminated on-site waters which have not left the confines of the policyholder’s property and have not caused contamination to the real property of others.\(^\text{87}\)

Courts reviewing this issue have come to a conclusion with respect to the application of the owned property exclusion usually only after determining whether the waters involved are the property of the policyholder.\(^\text{88}\) Where groundwater or surface waters are deemed to be owned by the public, or by the state itself, courts have found that the owned property exclusion does not prevent coverage for remediation of environmental contamination of those waters.\(^\text{89}\)

For example, in *Upjohn Co. v. New Hampshire Insurance Co.*, the Michigan Court of Appeals concluded that the contamination of the groundwater at issue was not excluded due to the owned property exclusion because “the ground water belonged to the people of Puerto Rico rather than to Upjohn.”\(^\text{90}\) Similarly, in *Patz v. St. Paul Fire & Marine Insurance Co.* ("Patz I"), the Federal District Court for the District of Wisconsin concluded that under Wisconsin law, groundwater was within the definition of “waters of the state,” and was not the property of the policyholder.\(^\text{91}\) In *Intel Corp. v. Hartford Accident & Indemnity Co.*, the Ninth Circuit Court of Appeals, construing California law, concluded that environmental contamination of groundwater on the property of the insured was damage to property owned by others because “[a]ll water within the State is the property of the people of the State . . .”\(^\text{92}\)

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87. *Id.*
89. See *id.*
90. *Upjohn*, 444 N.W.2d at 819.
92. *Intel Corp.*, 952 F.2d at 1565 (quoting the California Water Code, §102 (West 1971), which provides that groundwater belongs to the state of California).
However, at least one court determined that it was irrelevant whether the groundwater beneath the policyholder's property was owned by the policyholder or by the state. In *Patz v. St. Paul Fire & Marine Insurance Co.* ("Patz II"), the policyholders sought to recover the costs of cleaning up groundwater and soil contaminated by paint sludge which had been buried in barrels on the policyholder's land. The Patzes also sought coverage from St. Paul Fire & Marine Insurance Co. ("St. Paul") for the costs of cleaning up groundwater and soil which was contaminated as a result of the dumping of waste water from the insured's painting operations into an evaporation pit located on the property. St. Paul denied coverage to the Patzes because of the existence of an owned property exclusion contained in the insurance policy.

St. Paul argued that the policy excluded coverage for property damage to the Patzes' own property, and that the only contamination from the waste materials generated by the painting operation was to the soil and groundwater within the boundaries of the Patzes' own land. The Seventh Circuit Court of Appeals determined that the Patzes were not attempting to obtain an insurance award for a reduction in value of, or other damage to, their own land. To the contrary, the court stated that the Patzes were seeking to recover the cost of complying with a government order to clean up a "nuisance." The fact that the cleanup occurred on the Patzes' own land, according to the court, was irrelevant. Under this approach it was of no concern to the court whether or not the groundwater beneath the Patzes' property was owned by them or by the state, because the Patzes were not seeking to recover for damage to their own property. Instead they were seeking to recover the cost of the liability that the Wisconsin Department of Natural Resources imposed on them for maintaining a "nuisance."

On the other hand, if in the jurisdiction that controls the dispute, the owner of

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93. See *Patz II*, 15 F.3d. at 705.
94. *Id.* at 701-02, 705.
95. *Id.* at 705.
96. *Id.* at 701-02, 705.
97. *Id.*
98. *Id.* at 705.
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
the property owns the groundwater beneath it, then the owned property exclusion may be applicable to claims for insurance coverage for the remediation of groundwater. In *Bausch & Lomb, Inc. v. Utica Mutual Insurance Co.*, the Maryland Court of Appeals held that Bausch & Lomb failed to prove that the State of Maryland asserted a damages claim to state-owned property to overcome the preclusive effect of the policy’s owned property exclusion. Bausch & Lomb sought coverage for clean-up costs at one of its facilities where there had been demonstrated environmental contamination of the groundwater under the property. The court held that while the State of Maryland had the power to preserve and regulate groundwater under an individual owner’s property, that power was not the equivalent of a “property interest within the contemplation of the insurance policy.”

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103. See *Bausch & Lomb, Inc. v. Utica Mut. Ins. Co.*, 625 A.2d 1021, 1036 (Md. 1993); Wiggins v. Brazil Coal & Clay Corp., 452 N.E.2d 958, 967 (Ind. 1983) (groundwater is part of the land in which it is present and belongs to the owner of the land); Natural Resources Comm’n v. Amax Coal, 638 N.E.2d 418 (Ind. 1994) (land owner owns the groundwater under his property); Shell Oil Co. v. Winterthur Swiss Ins. Co., 15 Cal. Rptr. 2d 815, 844 (App. Dep’t Super. Ct., 1st Dist. 1993) (the fact that private ownership rights in water may be limited by state law, like waters and groundwater could still be within the insured’s care, custody or control for purposes of the owned property exclusion); Gamer v. Milton, 195 N.E.2d 65, 67 (Mass. 1964). In *Bausch & Lomb*, Maryland’s highest court denied coverage, even in the absence of an owned property exclusion, where the insured could not establish that the environmental response costs for which it sought coverage arose out of injury to a third party’s property. The remedial steps at issue in *Bausch & Lomb* involved removal of on-site soil and equipment as a consequence of groundwater pollution discovered at the site and were performed as part of a “cooperative arrangement” with the State of Maryland. *Bausch & Lomb*, 625 A.2d at 1026. The court relied on the standard CGL policy language obligating the insurer to pay sums which the insured becomes legally obligated to pay because of “property damage to which this insurance applies...” *Id.* at 1031. The court held that “[a] hallmark of the comprehensive general liability policy is that it insures against” injury done to a third party’s property, in contradistinction to all ‘all-risks’ policy covering losses sustained by the policyholder.” *Id.* at 1033 (citation omitted). Following a lengthy analysis of Maryland law, the court concluded that the State of Maryland did not possess the requisite property interest in the affected groundwater “to qualify it as a third party whose property was damaged by the pollutants emanating from the... site.” *Id.*

104. *Bausch & Lomb*, 625 A.2d at 1036.

105. *Id.*

106. *Id.*
Also, in Gamer v. Milton, the Massachusetts Supreme Judicial Court held that a landowner had "absolute ownership in the subsurface percolating water in his land." In Gamer, a contractor, who had pumped water from a pond in order to excavate gravel from the land upon which the pond was located, caused withdrawal of water from the subsoil in neighboring land, the compacting of the subsoil, and the settlement of a house on the neighboring property. The court held that the contractor was liable to the neighboring landowner for its negligence in failing to take reasonable precautions to prevent the injury.

The court stated that it was a settled matter under Massachusetts law that a landowner, having absolute ownership in the subsurface percolating water in his land, may use it as he sees fit, even if this results in a loss of water in a neighbor's land. The court noted, however, that the issue before the court was whether the contractor's procedures in excavating and in pumping out the water were negligent. The court concluded that there was sufficient evidence to establish liability on the part of the contractor and that it failed to take reasonable precautions to protect the plaintiff's adjacent property. While this decision did not involve interpretation of an insurance policy's owned property exclusion, the holding would affect future cases interpreting the application of this insurance exclusion in environmental cases.

108. Id.
109. Id.
110. Id.
111. Id.
112. Id.
113. Id. In Allstate Ins. Co. v. Quinn Constr. Co., 713 F. Supp. 35 (D. Mass. 1989), vacated because of settlement, 784 F. Supp. 927 (D. Mass. 1990), the court held that the owned property exclusion would preclude coverage of environmental contamination of groundwater below a policyholder's property because under Massachusetts law the groundwater is owned by the property owner. Allstate, 713 F. Supp. at 40 (citing Gamer, 195 N.E.2d at 67). The court concluded that the evidence before it was that the clean-up activities on the policyholder's own property were necessary to prevent damage to adjacent third party property owners. Id. at 41. The court stated:

[i]n the unique context of environmental contamination, where prevention can be far more economical than post-incident cure, it serves no legitimate purpose to assert that soil and groundwater pollution must be allowed to spread over boundary lines before they can be said to have caused the damage to others people's property which liability
B. The Application of the Owned Property Exclusion Where There Is No Actual or Threatened Third Party Property Damage

Where there has been no actual environmental contamination to third party property and there is no threat of contamination of third party property, the owned property exclusion should preclude coverage for any environmental contamination on the insured's own property. However, some courts have determined that the owned property exclusion would not apply because the "damage" at issue was not to "property" of the insured, but was instead an injury to the public at large. Therefore, the owned property exclusion would not bar coverage regardless of whether the contamination was confined to the insured's property or had migrated or might migrate elsewhere.

In *Patz v. St. Paul Fire & Marine Insurance Co.* ("Patz II"), the Seventh Circuit Court of Appeals, interpreting a CGL policy, concluded that the location of the cleanup was "irrelevant." It reasoned that the insureds "[were] not seeking to recover for damage to their property; they [were] seeking to recover the cost of the liability that the Department of Natural Resources imposed on them for maintaining a nuisance." Similarly, in *Unigard Mutual Insurance Co. v. McCarty's Inc.*, four insurance companies sought a declaratory judgment that

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115. *Id.*


117. *Id.*
they owed no duty to defend or indemnify their policyholders in two pending actions growing out of the disposal of polychlorinated biphenyls ("PCBs"). The policyholder, McCarty's Inc. ("McCarty's"), was an Idaho corporation operating a scrap metal recycling business on a 30-acre parcel of land in Pocatello, Idaho, from 1949 to 1979.

In March of 1983, agents of the Environmental Protection Agency ("EPA") discovered PCBs in the scrap yard property and ultimately sued McCarty's successors in interest alleging that PCB liquid leaked into and contaminated a large amount of soil on the property. The EPA's action sought to prevent further PCB disposal at the facility and to recover the government's cost of cleaning up the soil.

In cross motions for summary judgment, the insurers argued that their insurance policies each contained an owned property exclusion that absolved them from any duty to defend or indemnify the policyholder in the EPA clean-up cost recovery action. The insurers argued that the PCB contamination was confined exclusively to the property owned by the insured at the time of the occurrence of the contamination. The insurers further argued that the EPA had determined that there was no imminent hazard to the population or the environment due to the contamination at the site and that no migration off-site occurred. In fact, the insurers contended that the EPA concluded that the PCBs remained in the shallow soils where they were deposited and had not spread to adjacent lands or into the groundwater.

The Idaho Federal District Court denied the insurers' motions for summary judgment concerning the EPA clean-up action. The court stated that a number of other courts had held that the owned property exclusion was not applicable where the underlying complaint had alleged that measures were required to prevent damage to the "environment" or "public health."

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119. Id.
120. Id.
121. Id.
122. Id. at 1368.
123. Id.
124. Id.
125. Id.
126. Id. at 1369.
The court noted that the EPA's complaint alleged that there was an "imminent and substantial endangerment to the public health and welfare in the environment because of actual and threatened releases of hazardous substances" from the policyholder's property. The court explained that the evidence presented questions of fact concerning the potential for future PCB contamination of adjoining lands. The insurers argued that more than a mere "potential" for damage was needed in order to trigger coverage under the CGL policies, and that because no actual harm to adjoining lands was established, no "property damage" occurred under the terms of the policies.

In response to the insurers' argument, the court concluded that an examination of the terms of the policies at issue revealed that the term "property damage" could encompass hazardous waste clean-up costs incurred by a policyholder to prevent future damage to the "public." The court noted that the term "property damage" was not defined exclusively as damage to adjoining lands. Thus, the definition could include damage to the insured's own property. While the court noted that, under the terms of the owned property exclusion, the cost of remediating the insured's own property for the insured's own benefit could not be recouped, the exclusion did not prevent coverage for liability to third parties caused by property damage to the insured's own property.

The court explained that the broad definition of property damage as "injury to or destruction of tangible property," read in conjunction with the owned property exclusion, demonstrated that coverage was expressly provided when the


129. Id.
130. Id. at 1368-69.
131. Id. at 1369.
132. Id.
133. Id.
134. Id.
insured became liable to third parties for events confined exclusively to the insured’s own property.\textsuperscript{135} The court stated that a careful reading of the policies showed that while coverage was excluded for the actual property damage to the insured’s property, coverage was extended for liability to third parties caused by that property damage.\textsuperscript{136} Since the EPA alleged that PCB dumping on the policyholder’s property harmed the “environment” and endangered the “public,” the EPA’s suit against the policyholder was not aimed at restoring the policyholder’s property for their benefit.\textsuperscript{137} To the contrary, the court concluded that the suit was brought on behalf of a third party, that is, the “public at large.”\textsuperscript{138} Therefore, since the policy provided for third policy coverage, the court could not, as a matter of law, hold that coverage was excluded for the EPA’s underlying suit, pursuant to the terms of the owned property exclusion.\textsuperscript{139}

At least one insurance commentator concluded that the owned property exclusion bars coverage for costs incurred in cleaning up pollution if it contaminated only the insured’s property, even if the cleanup is designed primarily to prevent threatened migration of the pollution to the property of another.\textsuperscript{140} Other courts have also found that preventative measures, in the form of environmental contamination remediation completed before property damage has occurred to third party property, are not “costs incurred” covered under the terms of the CGL policy. For example, in \textit{Olds-Olympic, Inc. v. Commercial Union Insurance Co.}, the policyholder argued that it was legally obligated under the compulsion of the State of Washington’s Model Toxic Control Act of 1989, to remediate the contaminated soil on its own property.\textsuperscript{141} Thus, the contamination of its own land caused property damage “to the environment,” and the owned property exclusion contained in its CGL policy did not apply.\textsuperscript{142} Olds-Olympic’s theory was that the owned property exclusion could never preclude coverage when property damage was to a “governmental property interest.”\textsuperscript{143}

\textsuperscript{135} \textit{Id.}
\textsuperscript{136} \textit{Id.}
\textsuperscript{137} \textit{Id.}
\textsuperscript{138} \textit{Id.}
\textsuperscript{139} \textit{Id.}
\textsuperscript{140} \textit{See 7 A. J. Appleman, Insurance Law and Practice § 4526, at 233 (Supp. 1999).}
\textsuperscript{142} \textit{Id.}
\textsuperscript{143} \textit{Id.}
The Supreme Court of Washington rejected Olds-Olympic's argument. The court held that "[w]hile the State undoubtedly has a police power interest in regulating the environment, that interest does not rise to the level of a property interest cognizable under present insurance contracts." The court declined to read into the language of the policies a promise to indemnify Olds-Olympic for "general environmental damage" unattached to any specific property interest.

In *Western World Insurance Co. v. Dana*, the Federal District Court for the Eastern District of California came to a similar conclusion. In *Western World*, the Western World Insurance Company ("Western") sought a declaratory judgment that it owed no duty of defense or indemnity because of environmental contamination. The wastes, resulting from the dumping of hazardous waste and chemical materials inside and around a barn located on the Danas' property, were either explosive, highly flammable or otherwise extremely unstable or known to be highly toxic. Investigators for Solano County found that the chemicals were poorly contained or stored, chemical spills were discovered in and around the barn, and other chemicals had been, and still were, escaping into the environment in vapor form.

The county officials became concerned that the conditions at the site posed a serious threat to the lives and property of the residents in the area due to the substantial risk of fire or explosion and the concomitant release of poisonous gas. The officials were also concerned that environmental contamination occurred and would continue to occur. The District Attorney and the Department of Environmental Management ultimately demanded that Catellus Development Corporation ("Catellus"), who leased the site to the Danas, take immediate action to mitigate the public safety threat and to arrest the ongoing contamination. Catellus subsequently engaged two environmental consulting firms, which discovered and removed contaminated soil that they determined to

144. *Id.*
145. *Id.*
146. *Id.*
148. *Id.* at 1011-12.
149. *Id.* at 1012.
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
be a “threat” to groundwater.\textsuperscript{154}

The governmental officials acknowledged that the remediation was essential to eliminate the serious and immediate threat to the lives and property of the area residents and were necessary to prevent a substantial threat of further environmental contamination damage, including damage to groundwater.\textsuperscript{155} The officials also concluded that Catellus succeeded in arresting the migration of chemicals and contaminants before they had reached groundwater or neighboring property.\textsuperscript{156}

Western argued that in the absence of any off-site property damage or groundwater contamination, all of the property damaged was confined to property “owned or occupied by or rented to the insured” which was excluded from coverage by virtue of the policy’s owned property exclusion.\textsuperscript{157} The policyholders argued that the owned property exclusion would not preclude them from recovering governmentally-compelled clean-up costs where the environmental contamination on their property posed a “risk” to the public and other third parties.\textsuperscript{158}

The district court determined that no California Appellate Court had yet addressed whether governmentally mandated costs incurred to remove hazardous materials before the migration of toxic materials reached adjacent land or the groundwater could be recovered under a CGL insurance policy containing an owned property exclusion.\textsuperscript{159} Catellus urged the court to adopt the rationale put forward the \textit{Intel Corp v. The Hartford Accident and Indemnity Co.}\textsuperscript{160}

In the \textit{Intel} case, the United States District Court for the Northern District of California concluded that the identical “owned property” exclusion did not preclude the insured from recovering governmentally mandated clean up costs where the water beneath the policyholder’s own property was polluted and the lives and property nearby were placed “in peril.”\textsuperscript{161} The \textit{Intel} court came to this

\textsuperscript{154} Id.

\textsuperscript{155} Id.

\textsuperscript{156} Id.

\textsuperscript{157} Id. at 1013.

\textsuperscript{158} Id.

\textsuperscript{159} Id.

\textsuperscript{160} Id. at 1014.

\textsuperscript{161} Id. (citing \textit{Intel Corp. v. Hartford Acc. \\& Indem. Co.}, 692 F. Supp. 1171, 1182 (N.D. Cal. 1988), \textit{aff’d}, 952 F.2d 1151 (9th Cir. 1991)).
conclusion relying upon two alternate grounds. First, the court reasoned that under California law, all groundwater was property of all Californians and thus constituted “damage to third parties” sufficient to eliminate the owned property exclusion from consideration. Second, the court concluded that the polluted condition of the insured’s property was a “public nuisance,” and, therefore, the response costs incurred were necessary to protect the health and welfare of the “public” and the environment.

In the absence of any actual groundwater contamination as in the *Western World* case, Catellus urged the court to extend the *Intel* decision and to find that other natural resources such as soil and air were the “property” of all Californians under California law. Catellus also argued that the contamination at the policyholder’s site constituted a “public nuisance” and these mandated clean-up costs were not encompassed within the owned property exclusion. Catellus further contended that the costs incurred to mitigate the potential harm to third parties should not be precluded by the owned property exclusion.

The federal district court in *Western World* concluded that the California Supreme Court would not extend the rationale of the *Intel* decision, with respect to the recognition of public ownership of all underground water, to find public ownership of all “soil.” The court held that the soil constituting an owner’s real property was never considered a shared “public resource” in the way that water had been deemed a shared “public resource.” The court noted that while the government ordered Catellus to rectify a condition on its property before it damaged adjacent property, or migrated into the common water supply, the damage was confined to the site owned by the policyholder. As such, the owned property exclusion precluded coverage from remedying the contamination on that insured’s property.

The *Western World* court also concluded that the California Supreme Court

163. *Id.* at 1183.
164. *Id.* at 1184.
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
would reject Catellus's "public nuisance" argument, and, therefore, would reject the alternate rationale set forth in the Intel decision.\textsuperscript{172} The court noted that although the site may have constituted a "public nuisance," this did not mean that the costs associated with dismantling the nuisance would be covered by a liability insurance policy.\textsuperscript{173} The terms of the policy itself were controlling and, under those terms, the insurance was not available until property damage actually occurred.\textsuperscript{174} Although there existed various considerations that favored incentives for the prompt clean up of environmental contamination, the court concluded that it was not empowered to rewrite insurance contracts in order to further desirable public policy.\textsuperscript{175} The court held that the owned property exclusion precluded recovery under the policies for the damage to soil on the policyholder's own property.\textsuperscript{176}

\textbf{C. The Application of the Owned Property Exclusion Where Third Party Property Is Only Threatened with Harm}

Another question involving the application of the owned property exclusion is whether it applies where there has been no actual off-site or public water contamination, but there is only the threat that such harm will take place if no remedial action is undertaken. The courts are divided as to the application of the owned property exclusion under such circumstances. One line of cases holds that the owned property exclusion does not apply where third party property damage is "threatened."\textsuperscript{177} Another line of cases holds that the owned property exclusion bars coverage for clean-up costs incurred to remediate environmental contamination to the policyholder's own property, even where the contamination on the insured's own property presents an imminent threat of harm to third party property.\textsuperscript{178}

An example of the latter approach is \textit{New Jersey v. Signo Trading International, Inc.}\textsuperscript{179} In this case, the New Jersey Supreme Court held that the

\begin{footnotes}
\item 172. \textit{Id.}
\item 173. \textit{Id.}
\item 174. \textit{Id.}
\item 175. \textit{Id.}
\item 176. \textit{Id.}
\item 179. \textit{Id.}
\end{footnotes}
owned property exclusion relieved the insurance carrier of any obligation to
indemnify or defend potential liability to the Department of Environmental
Protection ("DEP") for the cost of cleanup of toxic substances resulting from a
fire on the insured's own property. 80 In April of 1983, the insured, Morton
Springer & Co. ("Springer"), owned a warehouse at 140 Thomas Street, Newark,
New Jersey. 81 Springer leased space to various tenants, including defendant
Signo Trading International, Inc. ("Signo Trading"). 82 On April 11, 1983, a fire
occurred at the warehouse. 83 After the Newark Fire Department extinguished the
fire, Springer hired a contractor to contain wastewater accumulated in trenches
along the building perimeter. 84 The contractor secured the wastewater in drums,
after which the DEP ordered Signo Trading to clean up the debris from the floor
on which the fire had occurred. 85 By May 3, 1983, the fire-damaged material
was removed from the property. 86
Because the fire revealed the presence of hazardous materials, a DEP
representative surveyed the premises to determine the warehouse's contents. 87
He discovered chemicals and hazardous waste, leaking drums and other safety
and security problems. 88 The DEP directed that the premises be cleaned up and
the offending materials removed. 89 The DEP filed a complaint in July of 1983 to
obtain judicial enforcement of this clean-up order. 90
Because neither Springer nor Signo Trading complied with the court's order
to decontaminate the property under the DEP's supervision, in July of 1984 the
trial court ordered the DEP to take possession of the warehouse and to clean up
the property. 91 The DEP then conducted the cleanup, at a cost of approximately
$3.6 million. 92

180. Id. at 934.
181. Id.
182. Id.
183. Id.
184. Id.
185. Id.
186. Id.
187. Id.
188. Id.
189. Id.
190. Id.
191. Id.
192. Id.
During the clean-up process, Springer filed a third-party complaint against his insurance carrier, Federal Insurance Co. ("Federal"), seeking defense and indemnification with respect to the DEP's claims.\textsuperscript{193} The CGL policy excluded from coverage any property damage to "property owned . . . by the insured."\textsuperscript{194} Springer moved for summary judgment on the carrier's duty to defend, and Federal cross-moved for summary judgment.\textsuperscript{195} The trial court denied Springer's motion and granted Federal's, concluding in part as follows:

An occurrence in the policy is defined in such a way that basically it comes down to damage inflicted upon the person or properties of people other than the insured. That's essentially what it comes down to.

In our present case we simply do not have any damage inflicted upon a third party or the property of third parties.

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\textsuperscript{193} Id.
\textsuperscript{194} Id.
\textsuperscript{195} Id.
policies really aren’t designed to cover this kind of a situation, and they should not on a casual ad hoc basis be violently torn asunder in order to serve some make-way social policy. Just doesn’t make sense.196

Thereafter Springer moved to vacate the trial court’s order granting summary judgment to Federal and for summary judgment on Springer’s third-party complaint, relying on two appellate division decisions decided after the trial court’s earlier ruling: Broadwell Realty Services, Inc. v. Fidelity & Casualty Co.197 and CPS Chemical Co. v. Continental Insurance Co.198 Federal resisted the motion by distinguishing these cases since they both involved actual ongoing damage to property of third persons.199 The trial court recognized that no actual off-site damages had taken place:

It has never been proved before me, and indeed I don’t think it’s been alleged, in any way supported by significant evidence, that, in fact, there was migration of the chemical pollutants off the Morton Springer property onto any adjacent properties or actually into any of the waters of the state.200

The trial court held that the Broadwell decision required that coverage be found for clean-up costs incurred to prevent threatened third-party property damages:

My view was and is that that is not what these policies are designed to do. But my view also is that the Appellate Division has ruled in this reported case [Broadwell] that this policy does cover that kind of loss.

I am obliged as a trial judge to follow the legal rulings of the Appellate Division even though I do not agree with them. And it seems to me that if this defendant insurance company and others wish relief, they’ll have to get it either from the Appellate Division or from the Supreme Court.201

Broadwell involved the leakage of a hazardous substance onto adjacent property from underground storage tanks located on Broadwell’s land.202

196. Id. at 935.
200. Id.
201. Id.
directed Broadwell to clean up the area and prevent future harm. The issue was whether Broadwell’s liability policy covered such clean-up costs. The court held that "the costs of preventive measures taken by Broadwell on its own property in response to the DEP directive which were designed to abate the continued flow of contaminants on to adjacent lands are recoverable under the policy."

Having found "damages," the appellate division then considered whether the owned property exclusion precluded recovery because the clean-up costs occurred while remediating the insured's own property. The court rejected that conclusion, stating:

We are satisfied that Fidelity would have been obliged to indemnify Broadwell for the costs of the interceptor trenches and the observation/recovery pumping wells had they been installed on adjacent properties in order to prevent further loss to third parties. It would be folly to argue, under such circumstances, that the insured would be required to delay taking preventive measures, thereby permitting the accumulation of mountainous claims at the expense of the insurance carrier. Stated another way, the policy does not require the parties to calmly await further catastrophe. Abatement measures designed to prevent the continued destruction of adjacent property are plainly compensable under the policy.

In CPS Chemical Co. v. Continental Insurance Co., the insured property owner was legally obligated under the New Jersey Spill Act and the New Jersey Water Pollution Control Act to pay the cost of cleaning up contamination from its plant. The hazardous waste toxins released from the plant completely contaminated a nearby watershed. As in Broadwell, the appellate division held that:

[Monetary amounts awarded to the DEP for the purpose of implementing measures designed to abate the continued migration of hazardous wastes into the

Div. 1987).
203. Id. at 81.
204. Id.
205. Id.
206. Id.
207. Id. (citation omitted).
209. Id.
Prickett’s Brook watershed and the Runyon well field in order to restore the acreage and the water to their natural condition prior to the unlawful discharge constitute damages subject to the carrier’s obligation of indemnification.  

In *Summit Associates, Inc. v. Liberty Mutual Insurance Co.*, 211 Summit Associates, Inc. ("Summit") attempted to seek indemnification from its insurance company, Liberty Mutual Insurance Co. ("Liberty Mutual"), for costs associated with a DEP-mandated cleanup order of its property. 212 Summit argued that the *Broadwell* decision precluded application of the owned-property exclusion because its cleanup sought to prevent damage to the environment in general. 213 Liberty Mutual contended that *Broadwell* operated to exclude coverage because the facts revealed no actual third-party property damage. 214 On remand, the appellate division ordered the trial court to determine whether the pollution released on Summit’s own property damaged or threatened damage to third-party property. 215 If no such harm or threat existed, the inquiry was to end. 216 On the other hand, if the trial court found harm or threat of harm, it should apply the analysis set out in *Broadwell*, including whether application or non-application of the owned-property exclusion would best carry out the reasonable expectations of the parties. 217  

Finally, in *Diamond Shamrock Chemicals Co. v. Aetna Casualty & Surety Co.*, the insured sought indemnification for the costs of a dioxin cleanup on its own premises, where there was no actual off-site property damage. 218 The appellate division first noted that the decisions in *Broadwell* and *CPS Chemical* did not provide for coverage in the absence of third-party property damage. 219 The court also noted that *Summit Associates* was the first case to raise the possibility that mere threatened property damage might fall within the policy’s...
provisions, but only after a showing that the parties intended such coverage.\textsuperscript{220}

The case also raised the possibility that a court might find that the State of New Jersey's interest in its air and land might qualify as "third-party property damage."\textsuperscript{221} The appellate court declined to decide that last question, stating that such a decision "implicates highly significant policy considerations, and for this reason, [is] best decided on a full record developed at trial."\textsuperscript{222} As in \textit{Summit Associates}, the appellate division remanded the matter to the trial court for a determination of whether the dioxin contamination posed an imminent threat, and if so, then to determine, using traditional contract interpretation, whether the parties intended coverage for threatened harm.\textsuperscript{223}

In \textit{New Jersey v. Signo Trading International, Inc.}, the appellate division reversed the holding of the trial court after examining the four decisions noted above.\textsuperscript{224} The court noted that in both \textit{Broadwell} and \textit{CPS Chemical} the waste actually escaped from the insurer's property and caused injury to the property of third parties.\textsuperscript{225} That circumstance distinguished the case at issue where no off-site migration of contaminants was proved.\textsuperscript{226} The appellate division then turned to the \textit{Summit Associates'} decision and noted that:

the 'owned property' exclusion of a liability insurance policy does not bar coverage for costs associated with the clean-up of an insured's property, despite the absence of third-party damage, if 'the threatened damage of third-party property was immediate and imminent' and if 'non-application of the owned property exclusion would best carry out the reasonable expectations of the parties.'\textsuperscript{227}

Since "the threat of off-site contamination had not been shown to be either 'immediate' or 'imminent,' the threatened harm to third parties was, at best, 'undefined and speculative' and, consequently, excluded from coverage."\textsuperscript{228}

\begin{itemize}
\item \textsuperscript{220} Id.
\item \textsuperscript{221} Id.
\item \textsuperscript{222} Id. at 1350.
\item \textsuperscript{223} Id.
\item \textsuperscript{225} Id. at 259.
\item \textsuperscript{226} Id.
\item \textsuperscript{227} Id. (quoting \textit{Summit Assoc., Inc. v. Liberty Mut. Ins. Co.}, 550 A.2d 1235, 1239-40 (N.J. Super. Ct. App. Div. 1988)).
\item \textsuperscript{228} Id. (quoting \textit{Summit Assoc., Inc. v. Liberty Mut. Ins. Co.}, 550 A.2d 1235, 1240 (N.J. Super.
On appeal, the New Jersey Supreme Court found that the appellate division's analysis of the case, while reaching the correct conclusion, did so utilizing the wrong approach. The finding by the appellate division that the threat of off-site contamination from the Springer fire had not been shown to be either "immediate" or "imminent" was incorrect. The trial court, after months, even years, of exposure to the case, determined that potential damages to adjacent properties were imminent.

Although the insured, Springer, showed physical damage to its own property, there was no evidence that any third party suffered a "physical injury to or destruction of tangible property," nor was there evidence of a "loss of use" of tangible property owned by an entity other than the insured. Although the trial court did find a threat of harm to the property of a third party, it found "no third party damage within the meaning of this policy or any of its concepts." The policy's definition of property damage did not include "threatened harm" even if that threat was "imminent" and "immediate." As such, the policy did not cover the costs of cleanup performed by or on behalf of an insured on its own property when those costs were incurred to alleviate damage to the insured's own property and not to the property of a third party.

The New Jersey Supreme Court noted that in the case before it, as in Summit Associates, no present or past injury to the property of a third party was proven. Therefore, in both cases, the appellate division erred to the extent that it determined that an insured may recover the cost of measures intended to prevent future injury, even in the absence of a present or past injury, if the threat of such injury appears to be "imminent" or "immediate." By the plain language of the

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230. Id. at 937.
231. Id.
232. Id. at 938.
234. Id. at 938.
235. Id.
236. Id. at 938-39.
CGL policy at issue, the cost of future damage was not covered, and this case did not fall within the narrow exception allowing recovery for the cost of measures intended to prevent imminent or immediate future damage when a present injury was demonstrated.238

The New Jersey Supreme Court recognized that there were several public policy arguments supporting a finding of coverage.239 One argument was that a finding of non-coverage "would create the situation in which an insured would have an incentive to permit hazardous substances that have discharged on [its] property to migrate off-site in order to collect from its insurer for the costs of cleanup."240 The court noted that any such recovery would be barred under several policy provisions that exclude from coverage damages that were "expected or intended from the standpoint of the insured."241 Also, even if the release of contaminants caused actual damage to property of a third party without the knowledge of the insured, the owned property exclusion would still preclude coverage of response expenses incurred to cover the cost of cleanup of the insured's own property.242 To the extent clean-up expenses serve both objectives, the court held that apportionment would be required.243

However, the court held that public policy considerations alone were not sufficient to permit a finding of coverage in an insurance contract when its plain language cannot fairly be read to provide that coverage.244 The effect of the

238. Id. at 939 (citing Western World Ins. Co. v. Dana, 765 F. Supp. 1011, 1014 (E.D. Cal. 1991)).
239. Id.
241. Id.
243. Id. at 940. Where remediation expenses were incurred to remediate contamination of both insured's own property as well as property owned by others, most courts have ruled that an allocation should be made with respect to those expenses which have been demonstrated to have been incurred solely to remediate the insured's own property. See e.g. Broadwell Realty Servs. v. Fidelity & Cas. Co., 528 A.2d 76, 82 (N.J Super. Ct. App. Div. 1987). Where such an allocation is permitted, the insurer would likely be held responsible for proving a reasonable basis to support any requested allocation of clean-up expenditures. See Hakim v. Massachusetts Insurers' Insolvency Fund, 675 N.E.2d 1161, 1162 (Mass. 1997).
244. Id.
owned property exclusion made the policies’ coverage inapplicable in the absence of property damage to third persons, as defined in the policies. No definition of “damages” could surmount that exclusion, nor could it somehow enlarge or expand the policies’ carefully-framed coverage provisions.

II. RECENT TRENDS IN THE INTERPRETATION OF THE OWNED PROPERTY EXCLUSION

A. The Owned Property Exclusion Does Not Apply Where There Is Actual Harm to Third-Party Property

In recent decisions, courts have continued to affirm that the owned property exclusion does not apply where there is actual harm to third-party property. For example, in Mapco Express, Inc. v. American International Specialty Lines Insurance Co., the policyholder Mapco Express, Inc. (“Mapco”) was sued by private third party property owners for contamination to their property, and sought coverage from its insurer. Although Mapco was denied coverage for its on-site remediation efforts because of the owned property exclusion, the Alaska Superior Court found that coverage existed for the off-site remediation efforts. Likewise, some courts continue to hold that groundwater is “third-party property,” and consequently find the owned property exclusion does not apply to costs incurred in the remediation of groundwater found beneath the insured’s property. Other courts have deviated from this approach and have found that

245. Id.
246. See New Jersey v. Signo Trading Int’l, Inc., 562 A.2d 251, 258 (N.J. Super. Ct. App. Div. 1988) (“Notwithstanding the ‘highly significant policy considerations’ raised by the issues under review, there exists no legal principle that would permit this court to ignore or circumvent the clear language of the insurance contracts.”); Broadwell, 528 A.2d at 80 (recognizing “competing public policies” but stating that “[o]ur role is merely to interpret the language of the insurance contract.”).
248. Id.
groundwater was not "third-party property." For example, in Dana Corp. v. Hartford Accident & Indemnity Co., the Indiana Superior Court found that "under Indiana law, contamination of on-site groundwater is damage to the insured's own property, and therefore within the owned property exclusion." \(^{250}\)

**B. The Application of the Owned Property Exclusion Where There Is No Actual or Threatened Third Party Property Damage**

Courts also continue to disagree on whether the owned property exclusion bars coverage when there is no actual or threatened third party property damage. In some recent decisions, courts reiterated that at least actual or threatened damage to third-party property is a prerequisite to coverage, and that regulatory interests do not constitute third-party property.

For example, in Craig Baumann v. North Pacific Insurance Co. the insurer refused to indemnify Craig Baumann ("Bauman") for costs incurred in remediation of contaminated soil on the insured's property, relying upon the policy's owned property exclusion. \(^{251}\) Baumann argued that the state's "regulatory interest" in cleaning up the environment was sufficient to preclude the application of the owned property exclusion. \(^{252}\) The Oregon Court of Appeals, finding that the owned property exclusion precluded coverage, held that under the policy language:

"[F]or liability coverage to arise, actual damage must have occurred to the property of a third party. The policy's definition of property damage does not encompass the threat or potential for harm. . . . 'Property damage' does not result unless an 'occurrence' produces damage to tangible property. A  


\(^{252}\) Id.
regulatory interest is not tangible property. 253

Likewise, in the unpublished decision Purdy Co. v. Travelers Insurance Co., the insured sought indemnification for remediation efforts taken pursuant to an order from the California Department of Health. 254 The Ninth Circuit Court of Appeals upheld the lower court's finding that no off-site damage or imminent risk of damage existed, and granted judgment in favor of the insured, despite the governmental order that forced the cleanup. 255

Similarly, in Mapco Express, Inc. v. American International Specialty Lines Insurance Co., Mapco entered into a compliance order by consent with the Alaska Department of Environmental Conservation to remediate his property, and sued for coverage for the remediation efforts made pursuant to the compliance order. 256 The court found that coverage did not exist: "It is ordered that the owned property exclusion . . . precludes damage for property owned, occupied by or rented to the insured absent proof of actual, or an imminent threat of, third-party property damage during [the] policy periods." 257

The State of Georgia has also followed the lead of the courts that hold state-ordered clean-ups do not constitute damage to third-party property. In Boardman Petroleum Inc. v. Federated Mutual Insurance Co., the Eleventh Circuit Court of Appeals certified questions to the Georgia Supreme Court as to the interpretation of an owned property provision under Georgia state law. 258 Georgia's highest court found that:

[w]here there is no evidence of a reasonable present threat of harm to third-party property, coverage is barred. . . . [T]he plain language of the owned or rented property exclusion bars coverage for indemnification for the cost of a state-ordered contamination clean-up when that clean-up involves soil and groundwater contamination to property owned or rented by the insured, and does not involve property of a third party, and poses no immediate or imminent threat of off-site contamination. 259

253. Id. at 1055.
255. Id.
257. Id.
259. Id. at 1328 (quoting Boardman Petroleum, Inc. v. Federated Mut. Ins. Co., 498 S.E.2d 492,
Other courts, however, have found that the owned property exclusion does not apply to remediation activities pursuant to a governmental order. In *Aetna Casualty & Surety Co. v. Dow Chemical Co.*, the Federal District Court for the Eastern District of Michigan found that an insured might escape the owned property exclusion's bar to coverage upon a showing of "governmental demand to perform environmental remediation." Although the court also stated that a threat of imminent harm to third-party property could trigger coverage, the court found that a governmental demand was sufficient grounds for coverage of environmental clean-up of certain sites and granted summary judgment for the insured as to those sites.

Likewise, in *Arco Industries Corp. v. American Motorists Insurance Co.*, the Michigan Court of Appeals found that costs incurred by the cleanup of contaminated soil were covered under the insurance policy despite the existence of an owned property exclusion. The insurer conceded that the owned property exclusion would not apply to any groundwater contamination beneath the insured's facility. However, it asserted that the exclusion precluded coverage for expenses relating to remediation of contaminated soil on the insured's property when there was no contamination to a third party's property. Finding in favor of the insured, the court stated, "in environmental contamination clean-up cases, this Court has long recognized an independent public interest in the state's natural resources that supersedes any owned property exclusion."
C. The Application of the Owned Property Exclusion Where Third Party Property Is Only Threatened With Harm

Recent decisions reveal that courts continue to disagree as to whether the owned property exclusion bars coverage where third party property is only threatened with harm. Over the past two years, some courts held that coverage exists in such situations. For example, in *Aetna Casualty & Surety Co. v. Dow Chemical Co.*, the court found that the owned property exclusions did not preclude coverage for remediation costs when the insured could show "damage or imminent damage to a third-party's property." Because the insured made the required showing of the threat of contamination of groundwater or other third-party property, the court granted the insured's motion for summary judgment.267

Similarly, in *Arco Industries Corp. v. American Motorists Insurance Co.*, the Michigan Court of Appeals held that "on-site soil clean-up is not barred by an owned property exclusion where there is a threat that the contaminants in the insured's soil would migrate to the ground water or to the property of others." The court affirmed the trial court's finding of a "substantial threat" that the contaminants on the insured's property would migrate into the ground water absent remediation.268

While some courts have stated that the owned property exclusion does not apply when there is threat of imminent harm to third-party property, they have nevertheless denied such coverage when an insured has failed to show such a "threat."270 Others have found mere "allegations" of the "threat" to be sufficient. For example, in *Timex Corp. v. Home Insurance Co.*, the insured was sued by several adjoining landowners.271 The insurer denied coverage on the grounds that

267. *Id.* at 458, 460.
269. *Id.* at 67-68
270. See *Mapco Express, Inc. v. American Int'l Specialty Lines Ins. Co.*, No. 3AN-95-8309-CIV, slip op. at 1 (Alaska Super., Anchorage Jan. 25, 1999) (remediation efforts made pursuant to government order not covered absent proof of actual, or an imminent threat of, third-party property damage); *Boardman Petroleum Inc. v. Federated Mut. Ins. Co.*, No. 96-8362, slip op. at 2 (11th Cir., August 18, 1998) ("Where there is no evidence of a reasonable present threat of harm to third-party property, coverage is barred.").
the owned property provision excluded coverage unless there was actual damage to third-party property.\textsuperscript{272} Applying New York law, the court stated that "so long as the ... complaint contains allegations that encompass the possibility that off-site contamination exists or that the cleanup was performed to prevent damage to the property of third parties, the owned property exclusion would not be applicable to work done to the property."\textsuperscript{273}

Other courts, however, have held that the mere threat of damage to third-party properties does not allow the insured to avoid application of the owned property exclusion. For example, in \textit{Baltimore Gas \& Electric Co. v. Certain Underwriters at Lloyd's of London}, the insured sought coverage for clean-up costs incurred at its former gas manufacturing plant.\textsuperscript{274} The insurers were granted summary judgment on the basis that the insured failed to establish the existence of a claim for third-party property damage.\textsuperscript{275} The Maryland Court of Appeals agreed that no coverage existed when an insured failed to establish the existence of third-party claims for damages.\textsuperscript{276} The court also found that the insured had not demonstrated that the State of Maryland had made a claim for damages to state-owned property in an environmental coverage action.\textsuperscript{277}

Likewise, in \textit{Dana Corp. v. Hartford Indemnity Co.}, the Indiana Superior Court found that the owned property exclusion barred coverage when there was only the threat of imminent harm to third-party property.\textsuperscript{278} In \textit{Dana}, the landowner sought to obtain coverage for costs of cleaning up sites, even though there was no evidence that off-site contamination existed, neighboring landowners were not claiming damage to their property, and the government was not seeking compensatory damages for harm to the environment.\textsuperscript{279} The court held that the owned property exclusion precluded coverage:

\textit{June 2, 1998).}
\textsuperscript{272.} \textit{id. at *2.}
\textsuperscript{275.} \textit{id. at 16.}
\textsuperscript{276.} \textit{id.}
\textsuperscript{277.} \textit{id.}
\textsuperscript{278.} \textit{Dana Corp. v. Hartford Indemnity Co., No. 49D01-9301-CP0026, slip op. at 7 (Ind. Super., Marion Co. Feb. 10, 1999), reprinted in Mealey's Lit. Rpt. – Ins., Vol. 13, Iss. 17 at D-1 (3/2/99).}
\textsuperscript{279.} \textit{id.}
Although there may be a threat of damage to other property or a risk to human health, the threat of property damage is not itself property damage. Accordingly, the plain language of the policies bars coverage for the contamination located on the sites, even if these clean ups are undertaken because of potential liability.

Some courts continue to condition coverage for threats of imminent harm on a finding of actual harm. For example, in Borough of Sayreville v. Bellefonte Insurance Co., the insured was ordered by a government agency to clean up sites. The order did not require the insured to remediate groundwater. Nonetheless, the policyholder investigated possible groundwater contamination and sought reimbursement for the associated costs. The trial court granted summary judgment for the insurer, who argued that there was insufficient evidence of contamination to merit the investigation.

On appeal, the New Jersey Appellate Division first stated some general rules: "The typical CGL policy does not cover costs of preventing future environmental damage to a third party, except in order to prevent imminent or immediate future damage when a present injury has already been demonstrated." The court then held that there was a genuine issue of fact as to whether there was sufficient evidence of contamination to warrant the investigation of the groundwater.

III. A PRINCIPLED APPROACH TO THE APPLICATION OF THE OWNED PROPERTY EXCLUSION TO ENVIRONMENTAL POLLUTION CLAIMS

Thus far, this article has examined the application of the owned property exclusions to different factual circumstances involving, primarily, whether any actual third-party property damage in the form of environmental contamination

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280. Id.; see also Craig Baumann v. North Pac. Ins. Co., 952 P.2d 1052, 1055 (Or. 1998) (holding that "for liability coverage to arise, actual damage must have occurred to the property of a third party. The policy's definition of property damage does not encompass the threat or potential for harm.").


282. Id. at 29.

283. Id.

284. Id.

285. Id.

286. Id.
occurred. As shown, where actual third-party property damage has taken place, the owned property exclusion does not bar coverage. Likewise, where the environmental contamination was found to have migrated into the groundwater, in the jurisdictions where such waters are held not to be the property of the insured surface land owner, then the owned property exclusion does not bar coverage. This article has also noted that where environmental contamination has not caused any actual damage to third party property, and where there is no alleged threat of imminent or immediate damage to third party property, the owned property exclusion operated as a bar to coverage.

Some courts have held that where the harm to third party real property or third party groundwater is only “threatened,” there is no “property damage” covered by the policy that is not precluded by the application of the owned property exclusion. As explained by the New Jersey Supreme Court in *New Jersey v. Signo Trading International, Inc.*, there was no record that any third party suffered any “physical damage to or destruction of tangible property,” nor was there evidence of any “loss of use” of tangible property owned by any entity other than the policyholder.

The court noted that although the lower court found that there was a threat of environmental contamination to third party property, the definition of property damage under the policy did not encompass “threatened harm” even if that threat was “imminent” or “immediate.” The court concluded that “under its clear terms, the policy does not cover the costs of clean up performed by or on behalf of an insured on its own property when those costs are incurred to alleviate damages to the insured’s own property and not the property of a third party.”

Other courts have come to a different conclusion, holding that the mere “threat” of releases of hazardous substances onto property not owned by the insured was sufficient to overcome the application of the owned property exclusion. In *Savoy Medical Supply Co. v. F & H Manufacturing. Corp.*, the Federal District Court for the Eastern District of New York held that even though contamination was only found in soil samples taken from the site, and there was no actual contamination of any third party property or groundwater, the owned property exclusion is not applicable.

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288. *Id.*
289. *Id.*
290. *Id.*
property exclusion did not apply. The court stated that the clean up costs incurred by F & H were not to "benefit" F & H, but, instead, were to benefit the public health and welfare of the public at large. The court found that the mere threat to the public due to F&H's contamination of its own property placed the damage outside the confines of the owned property exclusion. The court stated that to "rule otherwise and find that no third party damage could have occurred would necessitate an unrealistically narrow view of the extent of potential damage, as well as the gravity of environmental pollution in general."

Underscoring this latter approach, some courts have held that as a matter of "public policy" the failure to allow recovery of clean-up costs prior to the actual occurrence of third-party property damage created an incentive for the policyholder to simply wait until third-party damage occurred before taking any preventative action. In Allstate Insurance Co. v. Quinn Construction Co., the Massachusetts Federal District Court stated that the owned property exclusion did not bar coverage for remedial activities performed on the policyholder's own property where such activities would prevent future migration of the environmental contamination off-site. The court's conclusion centered upon its belief that there should be incentives for a policyholder to take preventative measures before actual contamination to others' property. The court stated:

[i]n the unique context of environmental contamination, where prevention can be far more economical than post-incident cure, it serves no legitimate purpose to assert that soil and groundwater pollution must be allowed to spread over boundary lines before they could be said to have caused the damage to other people's property which liability insurance is intended to indemnify.

293. Id. at 709.
294. Id.
295. Id.
297. Id.
298. Id.; see Consolidated Rail Corp. v. Certain Underwriters at Lloyds of London, No. 87-2609, 1986 WL 6547 (E.D. Pa. June 5, 1986) ("there is no logical or just reason why an insured should allow a condition on his land to result in damage to others simply to assure and secure coverage when preventative measures could prevent not only substantial damage or laws to the property of others, but also prevent sizable claims for damages against the insured and his insurer.") (quoting Lehigh Elec. and Eng'g Co. v. Selected Risks Ins. Co., 30 Pa. D. & C. 3d 120-126 (1982)), aff'd
In order to determine the best approach when applying an owned property exclusion, it is necessary to examine the interaction of the owned property exclusion with the definition of “property damage” contained within a CGL policy. In the definition section of a CGL policy, “property damage” typically means physical injury to or destruction of tangible property that occurs during the policy period, including the loss of use thereof at anytime resulting therefrom, or the loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period. The owned property exclusion typically reads, “This policy does not apply... to property damage... to property owned... by... the insured.”

The question whether there has been any “property damage” which would trigger coverage under the policy necessarily depends upon what the words “[t]his policy does not apply” mean as they are found in the owned property exclusion. One commentator has suggested that this phrase can be interpreted in one or two ways, each having a significant implication for the application of the owned property exclusion and its effect on coverage under a CGL policy. Under one interpretation, the phrase simply means that there is no coverage for any liability resulting from damage to owned property. Under this interpretation, it can be argued that property damage “occurs” when any property is first damaged, without regard to whether the damaged property is owned by the policyholder. As such, the policy on the risk during the year when any “property” was damaged would cover any liability that was ultimately imposed “because of” that property damage.

To the extent, however, that the term “property damage” in the policy is modified by the existence of the owned property exclusion itself, the term would not include any damage to owned property by definition. Therefore the term “property damage” in the CGL policy would not include any property owned by the policyholder. Under this interpretation, no coverage under the policy

without published opinion, 853 F.2d 917 (3d Cir. 1988).
299. See supra text accompanying note 2.
300. Id.
302. Id.
303. Id.
304. Id.
305. Id.
306. Id.
would be triggered unless and until there has been actual damage to non-owned property because there would have been no applicable property damage “during the policy period” until non-owned property was damaged.307

When the factual circumstances are such that third-party property has actually been damaged as a result of environmental contamination emanating from a policyholder’s activities or property, then there is no dispute that the insured is covered. Also, in a situation where there has been no actual third party property damage and no realistic threat of imminent or immediate third party harm, most courts would find that the property damage would not be covered because of the owned property exclusion.

The more difficult situation is where the owned property exclusion might be held not to bar coverage even where non-owned property has not yet been damaged. For example, when environmental contamination to third party property was imminent or “threatened” or if the clean up of the owned property was deemed to benefit non owned property or the “public” at large. Under such circumstances, one approach is to reject the use of the owned property exclusion to interpret the coverage grant of the CGL policy, especially when this results in altering the meaning of the term property damage, a term already expressly defined by the policy.308

Utilizing this approach, the term “property damage” is limited to its specified definition, and it is not interpreted in light of the text of the owned property exclusion.309 As such, the definition of “property damage” would include damage to both owned and third party property.310 Therefore, the CGL policy could be triggered by “property damage” to owned property.311 Once the policy is triggered, there might be coverage of at least a portion of the costs of cleaning up the policyholder’s property even before there has been any actual damage to third party property if the environmental harm to third party property was imminent.312

The approach outlined above is flawed, however, because it assumes that the policy can be properly interpreted by looking only at its individual parts and not by reading its terms together as a whole. Under this approach, a court must blind itself to the fact that the policy contains an owned property exclusion until after it

307. Id.
308. Id. at 173.
309. Id.
310. Id.
311. Id.
312. Id.
has determined whether or not a particular insurance policy has been triggered by a finding of some "property damage" under the coverage section of the CGL policy. By looking at a policy this way, a court would violate a basic premise of insurance coverage law, namely that an insurance policy must be read as a whole and not merely as the sum of its parts. Thus, coverage under an insurance policy can only be determined by reading together all of the potentially applicable provisions, such as the main coverage grant of a policy along with one or more of its endorsements. The extent of coverage can only be determined by an integration of the meaning of the many parts of the CGL policy. The CGL policy as an entirety could not be triggered if third party property was not injured when reading and integrating the owned property provisions into the definition of "property damage," even though the owned property exclusion might not by itself completely bar coverage.

Where there is no actual third party property damage, there can be no "property damage" under the terms of the CGL policy and any claim for remediation for environmental contamination on the policyholder's property would fall outside the scope of the coverage provided by the CGL policy. Thus, there could be no coverage of any of the costs of cleaning up a policyholder's own property unless there was actual, existing damage to non-owned property that was also being remedied. Absent such damage to non-owned property, the CGL policy would not be triggered and damage only to owned property cannot do so either. As one court explained, the purposes of the owned property exclusion are to prevent "first party" losses (that is the policyholder's own environmental damages) and to "protect against the moral hazard problem where an insured has less incentive to take precautions owing to the existence of insurance."

By reading the owned property exclusion out of a CGL policy and by not having it apply to those situations where third party property damage is only "threatened," and not real, the protection against the "moral hazard problem"

314. See Truck Ins. Exch. v. Marks Rentals, 418 A.2d 1187, 1191 (Md. 1980) ("Of course, if the provisions of the endorsement were in conflict or inconsistent with the master policy, the endorsement would control to the extent of the conflict or inconsistency . . . . [G]enerally, [however], an endorsement and the main policy to which it relates together constitute a single insurance contract, and an effort should be made to construe both in harmony.").
315. Id.
becomes lost. An insured would have no incentive whatsoever to attempt to preclude contaminating its own property, knowing that almost any release of contaminants into the environment would be deemed a “threat” to the public or other third parties, at least on some level. Moreover, the lack of a “bright line standard,” lashed to the provisions of the CGL policy itself, forces courts to determine whether a threat of third party contamination is “imminent” or “immediate” or “likely,” instead of looking to see if third party property damage “occurred.” The only principled approach is an approach that adheres to the actual language of the policy, where “threatened” property damage doesn’t ever get “real” until it becomes real.

CONCLUSION

As demonstrated above, the best way to approach the application of the owned property exclusion to the situation where third-party property damage is threatened, but not yet actual, is to apply the exclusion and preclude coverage for any remediation costs incurred by the policyholder on its own land. To do otherwise, and allow coverage to be extended, is to reject the rule that the various parts of a policy are to be read together, as a harmonious, unitary document. When the “threat” of third party property damage gets “real,” when the damage becomes actual, then the preclusive effect of the owned property exclusion would be lifted. Until the threat is realized, however, a principled application of the exclusion can only result in there being no coverage for the policyholder’s remediation efforts on its own property.
MORRIS-SMITH V. MOULTON NIGUEL WATER DISTRICT:1 THE DOUBLE STANDARD FOR ATTORNEY FEES UNDER THE CLEAN WATER ACT

by Monica Dias

I. INTRODUCTION

On January 7, 1997, Briggs Christian Morris-Smith swam in the Pacific Ocean, not knowing that 100 yards away a stream of human waste from a malfunctioning sewage pumping station was flowing into the sea.2 Morris-Smith sued two water districts for the pollution, bringing his claim under the citizen-suit provision of the Clean Water Act.3 After Morris-Smith lost his case when the U.S. District Court granted the defendants' motion for summary judgment, the defendants asked the court to award $208,472 in attorney fees.4 The court denied the request.5 The defendants in Morris-Smith v. Moulton Niguel Water District6 became the casualty of an emerging judicial interpretation of environmental statutes that holds defendants to a higher standard than plaintiffs in seeking awards of attorney fees.8 While plaintiffs who win their claims will be "readily awarded"9 attorney fees, defendants who prevail in the case must prove that the lawsuit was frivolous before a court will award attorney fees.10

This note examines the double standard, particularly as the standard applies to the Clean Water Act. Part II of this note reviews the legislative history of the

5. See Morris-Smith, 44 F. Supp. 2d at 1085.
6. Id. at 1087.
7. Id.
10. Id. at 1086.
Act as well as the reasoning from civil rights law that has guided courts in determining when defendants can win attorney fees under environmental statutes. Part III examines the facts and procedural history of *Morris-Smith*. Part IV recounts the court's reasoning in applying the interpretation of civil rights cases to the Act. Part V analyzes the double standard and its fairness to plaintiffs and defendants. Part VI offers some concluding thoughts.

II. BACKGROUND

A. Legislative History

1. The Clean Water Act

Congress first passed the Clean Water Act in 1972 in response to ineffective efforts of states to rid the nation's streams and lakes of pollution. In addition to limiting the amount of pollution that can be released into the nation's waters, with the eventual goal of ending all discharges, the Act allows citizens to sue any person, including the government or a government agency, for failing to comply with the Act. Thus, the Act allows citizens to enforce the nation's premier law to control water pollution.

2. The American Rule and the Clean Water Act

A party who wins a lawsuit is not guaranteed that the losing party will pay the prevailing party's attorney fees. Under the so-called "American rule," each

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15. 33 U.S.C. § 1365(d) (1994); see also S. REP. No. 92-414, which states: "Under the bill, citizens themselves may go to United States District Courts against those who violate effluent standards or compliance orders. Citizens may also go to court against the Administrator for failure to carry out non-discretionary duties under the law." S. REP. No. 92-414, at 10 (1971), reprinted in 1972 U.S.C.C.A.N. 3668, 3677.
party is responsible for the costs of its attorney fees unless a statute provides otherwise.\textsuperscript{18} Congress has allowed such fee-shifting provisions in several environmental statutes,\textsuperscript{19} including the Clean Water Act.\textsuperscript{20} However, the Clean Water Act does not expressly state the standards under which a prevailing party can collect attorney fees.\textsuperscript{21} Instead, the statute leaves the decision to the discretion of the courts, which are charged with determining the “appropriate” standard under which attorney fees are awarded.\textsuperscript{22} The pertinent text provides: “The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate.”\textsuperscript{23}

The legislative record provides some insight into the intent of Congress in guiding a court’s decision as to whether an award of attorney fees is appropriate.\textsuperscript{24} A court may award attorney fees “whenever the court determines that such action is in the public interest.”\textsuperscript{25} However, the legislative record does not provide any definition of “public interest” to guide the courts.\textsuperscript{26} Instead, this definition of “appropriate” as an “action . . . in the public interest” was intended to address the concern of some members of Congress that lawyers would use the citizen-suit provision of the Clean Water Act to bring “frivolous and harassing


\textsuperscript{20} 33 U.S.C. § 1365(d) (1994).

\textsuperscript{21} \textit{Id.}

\textsuperscript{22} \textit{Id.}

\textsuperscript{23} \textit{Id.}


\textsuperscript{25} Id.

\textsuperscript{26} Id.
actions.” As the Senate Report notes: “The court could thus award costs of litigation to defendants where the litigation was obviously frivolous or harassing. This should have the effect of discouraging abuse of this provision, while at the same time encouraging the quality of the actions that will be brought.” The non-mandatory language used in the Senate Report and the lack of express language in the Act have resulted in judicial interpretation that has created a double standard in determining a prevailing defendant’s ability to obtain attorney fees under the Act.

B. Judicial Treatment: Different Standards Emerge

I. Guidance from Civil Rights Law

Federal district courts have turned to other federal statutes for guidance in determining the standard to apply to prevailing defendants who seek attorney fees under the Clean Water Act. Specifically, courts have applied the reasoning of the U.S. Supreme Court in Christiansburg Garment Co. v. EEOC to requests for attorney fees under the Clean Water Act. Christiansburg involved a racial discrimination case under Title VII of the Civil Rights Act of 1964. In language similar to the Clean Water Act’s provision for attorney fees, Title VII allows the court, in its discretion, to award a reasonable attorney fee to the prevailing party, as long as that party is not the Equal Employment Opportunity Commission or the United States.

27. Id.
28. Id.
30. See Morris-Smith, 44 F. Supp. 2d at 1085; Consumers Power Co., 729 F. Supp. at 63-64.
32. Id. at 414 (citing Title VII (current version at 42 U.S.C. § 2000e-5(k) (1994))).
34. See Christiansburg, 434 U.S. at 413-14. The Supreme Court set out the text of section 706(k) of Title VII in full:

In any action or proceeding under this title the court, in its discretion, may allow the
Christiansburg began as an administrative matter when Rosa Helm filed a Title VII charge of racial discrimination against Christiansburg Garment Co.\textsuperscript{35} Two years later, the Equal Employment Opportunity Commission notified her that it had been unable to resolve the matter and that she had the right to sue in federal court.\textsuperscript{36} In 1972, almost two years after Helm's decision not to sue, Congress amended Title VII to allow the Commission to sue in its own name on charges that were pending before the Commission.\textsuperscript{37} The Commission sued the garment company, which moved for summary judgment on the grounds that Helm's case was no longer pending before the Commission.\textsuperscript{38} The district court granted summary judgment,\textsuperscript{39} and the company petitioned for attorney fees from the Commission.\textsuperscript{40} The district court refused to grant the company's request, and the court of appeals affirmed.\textsuperscript{41} Relying on its previous decision involving a prevailing plaintiff's request for attorney fees under a similar civil rights statute,\textsuperscript{42} Title II of the Civil Rights Act of 1964,\textsuperscript{43} the Supreme Court articulated different standards for prevailing plaintiffs and prevailing defendants.\textsuperscript{44} While a prevailing plaintiff under the civil rights legislation "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust,"\textsuperscript{45} prevailing defendants must meet a much more stringent standard to win attorney fees.\textsuperscript{46} Prevailing defendants must show that plaintiff's action "was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith" before a district court will award attorney fees in a Title VII action.\textsuperscript{47}
The Court discussed several policy reasons for treating prevailing plaintiffs differently from prevailing defendants in actions for attorney fees under the civil rights statute:

[T]here are at least two strong equitable considerations counseling an attorney’s fee award to a prevailing Title VII plaintiff that are wholly absent in the case of a prevailing Title VII defendant. First . . . the plaintiff is the chosen instrument of Congress to vindicate “a policy that Congress considered of the highest priority.” . . . Second, when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law. . . . “[T]hese policy considerations which support the award of fees to a prevailing plaintiff are not present in the case of a prevailing defendant.”

2. Application to Environmental Lawsuits

The Court’s reasoning in Christiansburg quickly began appearing in environmental lawsuits, especially in lawsuits involving the Clean Air Act. Most notably, the Court in its landmark decision in Ruckelshaus v. Sierra Club referred to the frivolity standard that courts must apply in determining when to award attorney fees under the Clean Air Act. While the issue before the Court was not one of a prevailing defendant seeking attorney fees, the Court restated

49. See, e.g., Consolidated Edison Co. v. Realty Invs. Assocs., 524 F. Supp. 150, 153 (S.D.N.Y. 1981) (holding that prevailing defendants can recover fees under the Clean Air Act only when plaintiff’s lawsuit was frivolous or harassing).
50. Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983). The ruling has been labeled a landmark decision because the Court for the first time defined “prevailing party” to mean that litigants had to achieve at least some success on the merits of their case before a court could award attorney fees. Id. Previously, some courts had held that it was appropriate to award attorney fees to parties “whether they were successful in a law suit or not, so long as the position that was advocated contributed to the goals of the Clean Air Act.” See Long, supra note 18, at 539.
52. Id. at 687.
53. Id. at 682. The issue in Ruckelshaus was whether plaintiffs who had lost their case could nevertheless recover attorney fees from a defendant. The Court denied attorney fees in such circumstances, ruling that “some success on the merits [must] be obtained before a party becomes eligible for a fee award under § 307(f)” of the Clean Air Act. Id.
the purpose of the attorney-fee provision in the Clean Air Act: "[T]he purposes of the authority to award fees are not only to discourage frivolous litigation, but also to encourage litigation which will assure proper implementation and administration of the Act or otherwise serve the public interest."  

3. Application to the Clean Water Act

The double standard articulated in Christiansburg has crept into Clean Water Act lawsuits in which defendants were the prevailing party. Although cases on point are scarce, at least two federal courts before 1999 dealt with prevailing defendants who were seeking attorney fees under the Clean Water Act. The Ninth Circuit, hearing a claim under both the Clean Water Act and the Resource Conservation and Recovery Act, applied the Christiansburg rationale with little discussion and denied the prevailing defendant’s request for attorney fees.

A federal district court in Michigan examined the issue in more depth. In National Wildlife Federation v. Consumers Power Co., an environmental group charged that the defendant had failed to obtain a permit to discharge turbine water into Lake Michigan. The district court granted the plaintiff’s motion for

54. Id. at 687.
55. See, e.g., Atlantic States Legal Found. v. Onondaga Dep’t of Drainage and Sanitation, 899 F. Supp. 84 (N.D.N.Y. 1995). The plaintiff and defendant both claimed to be the prevailing party under the Clean Water Act’s fee-shifting provision, and both sought an award of attorney fees. Id. The court noted the lack of cases on point and turned to the differing standards for prevailing plaintiffs and prevailing defendants under civil rights laws articulated in Newman and Christiansburg. Id. The court held that the plaintiff was the prevailing party; thus, the court did not reach the question of whether the defendant in the case would have been awarded attorney fees under the Christiansburg standard. Id. at 87.
58. See Razore, 66 F.3d at 240. Specifically, the court held: "We agree with the district court that Christiansburg Garment Co. is the proper standard for RCRA and CWA suits." Id.
59. Id. at 240-41. In a terse statement following the holding, the court ruled that the plaintiffs’ lawsuit was not frivolous or unreasonable; the defendant’s request for attorney fees was denied. Id.
61. Id. at 62-63.
summary judgment, which the Sixth Circuit reversed. Arguing that it had prevailed in the litigation, the defendant sought an award of $500,000 in attorney fees. The defendant tried to move the district court away from the double standard of Christiansburg; the defendant argued that it should win attorney fees because it had "served the public interest by assisting the interpretation or implementation" of the Clean Water Act. However, the court applied Christiansburg and ruled that it would grant attorney fees to the defendant only if the plaintiff's suit was frivolous.

The Consumers Power Co. court examined the legislative history of the Clean Water Act and determined that Congress wanted to encourage citizen suits by allowing successful plaintiffs to recover attorney fees. At the same time, Congress wanted to discourage frivolous suits by allowing successful defendants to recover attorney fees where a plaintiff's claim was frivolous. Thus, the court reasoned, requiring prevailing defendants to meet a higher standard than prevailing plaintiffs in recovering attorney fees complied with Congress' intent. Since the defendant in Consumers Power Co. agreed that the plaintiff's claim was not frivolous, meritless, or vexatious, the court rejected the defendant's request for attorney fees. This was the state of the law when Morris-Smith v. Moulton Niguel Water District pitted a private-individual plaintiff against two municipal water and sewer districts in California.

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64. Id. (quoting Alabama Power Co. v. Gorsuch, 672 F.2d 1, 3 (D.C. Cir. 1982)).
65. Id. at 64.
66. Id.
67. Id.
68. Id. The court noted three equitable reasons for requiring a different standard for prevailing defendants:
First, as the Court noted in Christiansburg, the plaintiff is Congress' "chosen instrument" to vindicate an important federal policy. Second, a fee award to a prevailing plaintiff punishes a defendant who has violated federal law, while a fee award to a prevailing defendant does not. Third, allowing prevailing defendants to recover fees under the same standards as prevailing plaintiffs would unreasonably deter citizen suits, which Congress sought to encourage, without serving Congress' correlative goal of deterring frivolous actions. Id.
69. Id. at 65.
70. 44 F. Supp. 2d 1084 (C.D. Cal. 1999).
III. FACTS AND PROCEDURAL HISTORY

A. Facts and Summary Judgment

On January 7, 1997, 440,000 gallons of raw sewage spewed into Aliso Creek in South Orange County, California, as a result of a malfunctioning pumping station operated by Moulton Niguel Water District. At the time of the spill, the South Coast County Water District was treating Moulton Niguel’s waste water at a treatment plant operated by South Coast. The malfunction in Moulton Niguel’s pumping station caused an overflow of sewage into an 18-inch sewer line; the sewage backed up in the line and erupted through a manhole and into the creek. Because of the spill, more than one mile of Aliso Beach on the Pacific Ocean was closed for several days, angering swimmers and surfers who had grown tired of frequent pollution in Aliso Creek. The spill was the second largest in Orange County since 1993, and it outraged beach residents who had pushed the sewer agencies to stop polluting the creek and the beach.

One outraged member of the public was Briggs Christian Morris-Smith, who swam in the ocean more than 100 yards from the mouth of Aliso Creek, unaware of the spill that had occurred a few hours earlier. Two days later, his body grew swollen, a condition he blamed on the sewage but which was not confirmed by a

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71. Plaintiff’s Opposition to Defendants’ Motion for (1) Summary Judgment; or (2) Dismissal of Plaintiff’s Claim for Injunctive Relief as Moot; Memorandum of Points and Authorities at 1, Morris-Smith v. Moulton Niguel Water Dist., 44 F. Supp. 2d 1084 (C.D. Cal. 1999) (No. SACV 98-35 GLT (EEx)). The plaintiff described the spill as “equivalent to 100,000 household toilet flushes.” Id.

72. Defendants’ Motion for (1) Summary Judgment; or (2) Dismissal of Plaintiff’s Claim for Injunctive Relief as Moot; Memorandum of Points and Authorities in Support at 5, Morris-Smith v. Moulton Niguel Water Dist., 44 F. Supp. 2d 1084 (C.D. Cal. 1999) (No. SACV 98-35 GLT (EEx)). Id. at 14.


75. Andrew Horan, 440,000-gallon Sewage Spill Closes O.C. Beach, ORANGE COUNTY REG., Jan. 10, 1997, at B1. The article notes: “Aliso Beach ... is so frequently fouled by spills and urban runoff that locals call it ‘Avoid Aliso.’” Id.

In January 1998, Morris-Smith sued the two water districts in U.S. District Court under section 505(a) of the Clean Water Act, claiming that his health and environmental interests had been, and would continue to be, adversely affected by the pollution. He charged that he had been injured by ingesting sewage-contaminated water as a result of the violations. Both defendants were public entities. Specifically, Morris-Smith claimed that the defendants were in violation of the Act and cited nine incidents of spills to support the claim. He also argued that there was a reasonable likelihood that the two water districts would commit a recurring violation by spilling untreated sewage into the creek. Morris-Smith sought an injunction to shut down the defendants' sewer facilities, payment to a fund established to restore Aliso Creek, civil penalties of $25,000 for each day of the violations over a five-year period, and an order that the

78. Id. The article notes: “Having recently watched his mother wither from chemotherapy, Morris-Smith elected not to go to a doctor. But he said believes (sic) the inflammation is related to swimming in sewage.”

79. 33 U.S.C. § 1365(a) (1994). This provision states, in pertinent part:

[A]ny citizen may commence a civil action on his own behalf--

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title. Id.

80. Plaintiff’s Complaint at 2, Morris-Smith v. Moulton Niguel Water Dist., 44 F. Supp. 2d 1084 (C.D. Cal. 1999) (No. SACV 98-35 GLT (EEEx)).

81. Id.

82. Defendants’ Motion at 3, 5, Morris-Smith (No. SACV 98-35 GLT (EEEx)).

83. Id. at 3.

84. Plaintiff’s Complaint at 4, Morris-Smith (No. SACV 98-35 GLT (EEEx)).
defendants document compliance with the Act for one year. The district court granted the defendants' motion for summary judgment, finding that improvements made to the defendants' sewer facilities made future spills unlikely.

B. Defendants' Motion for Attorney Fees

I. Defendants' Argument

After summary judgment was granted, the defendants sought $208,472 in attorney fees. They argued that Morris-Smith had no evidence to support his claims and failed to investigate the facts before filing his lawsuit. They further argued that Morris-Smith did not prove that the steps the defendants had taken to avoid future spills were inadequate to avoid future Clean Water Act violations.

In short, the defendants argued that the plain language of section 1365(d) of the Clean Water Act confirmed their right to attorney fees, since summary judgment in their favor made them the prevailing party in the lawsuit. They also argued that public policy should encourage an award of attorney fees to public entities, which are “dependent upon the citizenry for their operating funds, including the cost of this litigation . . . .” After noting that lawsuits against public entities are “not routinely encouraged,” the defendants tried to avoid application of the Christiansburg “frivolous lawsuit” standard by arguing that the language of the Clean Water Act did not mandate this standard: “[I]f Congress had intended to limit public entities’ ability to recoup their cost of defending themselves against a meritless lawsuit, one could reasonably have expected the

85. Id. at 4-5.
86. Defendants' Motion for Costs, Attorney Fees and Expert Witness Fees at 2, Morris-Smith (No. SACV 98-35 GLT (EE)).
87. Id. at 13.
88. Id. at 2.
89. Id. at 3.
90. Id. at 5. “Congress' express language allowing such awards to prevailing parties has to have meaning.” Id. at 9.
91. Id. at 6. “Public entities like Defendants cannot unilaterally pass insurance or defense costs along to their customers as a `cost of doing business.' Fiscal prudence and the realities of public concerns do not permit that flexibility. Therefore, Defendants should be reimbursed for their reasonable fees and costs . . . .” Id.
Congress to have made that point expressly. It did not do so.\textsuperscript{92}

The defendants contended that the rationale in civil rights cases that led to the double standard in awarding attorney fees to prevailing plaintiffs and prevailing defendants should not apply to environmental litigation under the Clean Water Act.\textsuperscript{93} Such cases should be treated differently, the defendants argued, because “no denial of constitutional or civil rights are [sic] alleged in this litigation.”\textsuperscript{94} Finally, the defendants argued that even if the court applied the \textit{Christiansburg} standard, they should win attorney fees because Morris-Smith’s lawsuit was without merit.\textsuperscript{95} Noting the \textit{Consumers Power Co.} court’s concern that awarding attorney fees to defendants in Clean Water Act lawsuits could have a detrimental effect on citizen-suit enforcement of the Act, the defendants in \textit{Morris-Smith} argued “the Court should award fees and costs in the hope that \textit{s[uch] future claims will be deterred.”}\textsuperscript{96}

2. \textit{Plaintiff’s Opposition to an Award of Attorney Fees}

Morris-Smith emphasized that the Clean Water Act grants discretion to the courts to determine whether an award of attorney fees is appropriate.\textsuperscript{97} The plaintiff argued that the U.S. Supreme Court’s logic in civil rights cases would be rightly extended to the Clean Water Act.\textsuperscript{98} In sum, Morris-Smith warned against the chilling effect that an award of attorney fees against plaintiffs would have on citizen suits.\textsuperscript{99} Such a chilling effect would be contrary to Congress’ intent in allowing citizen suits under the Act, “to wit, to promote the protection of our waters by encouraging citizens to bring enforcement actions when government

\textsuperscript{92}\textit{Id.}

\textsuperscript{93}\textit{Id. at 7.}

\textsuperscript{94}\textit{Id.} The defendants allowed that the double standard might be logical in civil rights cases. “Arguably, the public interest in preventing a denial of such rights could be a factor working against allowing a defendant to recoup fees and costs.” \textit{Id.}

\textsuperscript{95}\textit{Id. at 9.}

\textsuperscript{96}\textit{Id. (emphasis in original).}

\textsuperscript{97}\textit{Plaintiff’s Opposition to Motion of Defendants for Costs, Attorney Fees and Expert Witness Fees at 3, Morris-Smith (No. SACV 98-35 GLT (EEx)).}

\textsuperscript{98}\textit{Id. at 4.}

\textsuperscript{99}\textit{Id. “[I]f attorney fees were always awarded against plaintiffs simply because they lost, prospective plaintiffs would be greatly deterred from putting their own resources on the line in order to protect the environment.” \textit{Id.}
organizations fail to do so.\textsuperscript{100}

IV. THE COURT'S REASONING

U.S. District Judge Gary L. Taylor noted that the language of the Clean Water Act does not limit recovery of attorney fees to prevailing plaintiffs.\textsuperscript{101} Under the statute, Judge Taylor noted, "[a] prevailing defendant may also be awarded fees if the Court decides such an award is appropriate."\textsuperscript{102} Further, Judge Taylor stated that neither the U.S. Supreme Court nor the Ninth Circuit\textsuperscript{103} had decided the standard for awarding attorney fees under the Clean Water Act.\textsuperscript{104} Lacking clear guidance from a higher court, the district judge turned to the Supreme Court's analysis of awarding attorney fees under Title VII in Christiansburg.\textsuperscript{105} Judge Taylor reiterated the Supreme Court's policy reasons in Christiansburg for setting different standards for prevailing plaintiffs and prevailing defendants who seek an award of attorney fees,\textsuperscript{106} although he expressed reservations in applying such a double standard to prevailing defendants under the Clean Water Act:

A convincing argument can be asserted that the courts should not make such declarations of legislative policy. The plain words of the statute do not favor a prevailing plaintiff over a prevailing defendant, and Congress could have easily stated such a preference if it had wanted to. Under the doctrine of Separation of Powers, declaration of such policy choices is for the Congress, not the courts. Nevertheless, the Supreme Court has chosen in Christiansburg to make such a policy declaration.\textsuperscript{107}

\textsuperscript{100} Id.
\textsuperscript{102} Id. at 1085.
\textsuperscript{103} The court's statement that the Ninth Circuit had not decided the standard for awarding costs under the Clean Water Act is somewhat perplexing, since the Ninth Circuit appeared to do just that in 1995. See Razore v. Tulalip Tribes, 66 F.3d 236, 240 (9th Cir. 1995). The court's statement is even more confusing because the court relied, in part, on Razore in holding against the defendant. See Morris-Smith, 44 F. Supp. 2d at 1086.
\textsuperscript{104} See Morris-Smith, 44 F. Supp. 2d at 1085.
\textsuperscript{105} Id.
\textsuperscript{106} Id. at 1085-86.
\textsuperscript{107} Id. at 1086.
Nevertheless, Judge Taylor ruled against the defendants. Citing Consumers Power Co. and Atlantic States Legal Foundation v. Onondaga Department of Drainage and Sanitation, the district judge noted that two district courts outside the Ninth Circuit had held the Supreme Court’s reasoning in civil rights cases applied to the Clean Water Act. Further, the Ninth Circuit had followed the policy reasons in Christiansburg, holding in Razore v. Tulalip Tribes that a prevailing defendant can win attorney fees “if the Court finds plaintiff’s actions were frivolous, unreasonable, or without foundation.” Razore involved plaintiffs who sued a Native American tribe for managing a landfill in violation of the Clean Water Act. The case was dismissed, but the defendant’s request for attorney fees was denied because the plaintiffs’ claim was not frivolous. The reasoning in Razore, Consumers Power Co., and Onondaga persuaded Judge Taylor to hold in Morris-Smith that a prevailing defendant under the Clean Water Act can win attorney fees “if the plaintiff’s claims were frivolous, unreasonable, or without foundation.”

Judge Taylor held that Morris-Smith’s claim was not frivolous, unreasonable, or without foundation because Morris-Smith’s complaint was based on the inadequacies of the defendants’ drainage pump station. Defendants improved the sewer facilities after Morris-Smith filed his suit. This result satisfied the court that Morris-Smith’s claim was not frivolous. Judge Taylor stated that the plaintiff “was making a good faith argument for what needed to be done in order to avoid future spills.”

Finally, the court rejected the defendants’ claim that an uninsured public entity should win attorney fees to deter such future claims from potential

108. Id. at 1087.
110. See supra note 55.
111. See Morris-Smith, 44 F. Supp. 2d at 1086.
112. Id. (citing Razore v. Tulalip Tribes, 66 F.3d 236, 240 (9th Cir. 1995)).
113. See Razore, 66 F.3d at 238.
114. Id. at 239.
115. Id. at 240.
117. Id.
118. Id.
119. Id.
120. Id.
In rejecting the claim, Judge Taylor noted that "a Supreme Court criteria for awarding a defendant attorney fees is that Congress did not want to deter a plaintiff from pursuing Congress’ policies." 122

V. ANALYSIS

A. Overview

This analysis explores the double standard and explains why it is the proper judicial approach for determining attorney fees for prevailing defendants. First, the standard that allows defendants to recover attorney fees if a plaintiff’s claim is frivolous poses little risk of stifling legitimate claims of citizen plaintiffs who seek to enforce the Clean Water Act. 123 Second, requiring defendants to meet a more difficult burden to win attorney fees is not inherently unfair, based on the plain language of the Act and canons of statutory construction. 124 Third, the similarities between judicial interpretation of civil rights cases and environmental cases illustrate why the double standard is appropriate. 125

B. The Frivolous Standard: Rule 11 and Judicial Definitions

At first glance, the frivolous standard appears troublesome for unsuccessful plaintiffs in environmental litigation because they have no solid definition of "frivolous" to gauge, before filing their claim, whether their case will be deemed legitimate. Courts have used the term "frivolous" without defining it. 126

121. Id.
122. Id. The court also noted that no case law distinguishes between an insured and uninsured defendant when determining whether to award statutory attorney fees. Id. Also, a plaintiff should not be penalized because a defendant is not insured. Id. at 1086-87. In a footnote, the court stated that defendants have some insurance protection through a pooled-risk program with other public agencies. Id. at 1086-87 n.1.
123. See infra notes 135-46 and accompanying text.
124. See infra notes 161-76 and accompanying text.
125. See infra notes 177-83 and accompanying text.
126. See Morris-Smith, 44 F. Supp. 2d at 1086. The closest the court came to defining "frivolous, unreasonable, or without foundation" was that the plaintiff was making a good-faith argument. Id. One can infer that a plaintiff who is not making a good-faith argument is pressing a frivolous claim. This, of course, begs the question: What is a bad-faith argument?
Standard definitions of "frivolous" as "fictitious or unfounded litigation"\textsuperscript{127} or "groundless lawsuit with little prospect of success"\textsuperscript{128} do not provide much help for plaintiffs trying to determine whether their claim is strong enough to withstand a ruling of "frivolous."

This lack of explicit judicial guidance could leave plaintiffs vulnerable to the whim of a judge who might deem a lawsuit frivolous and award attorney fees to a defendant, all without giving a firm legal reason why the claim was frivolous. This, in turn, could lead to the chilling effect on plaintiffs that Congress hoped to avoid when drafting the Clean Water Act’s citizen-suit provision.\textsuperscript{129} Without a specific definition of "frivolous," plaintiffs might choose not to press their claims against polluters rather than risk the possibility of a sizable award of attorney fees to the defendants if the lawsuit is found frivolous. This stifling of claims would frustrate the intent of Congress to allow citizens to enforce the Clean Water Act. However, plaintiffs can find comfort in Rule 11 of the Federal Rules of Civil Procedure\textsuperscript{130} and in court decisions that, while not specifically defining "frivolous," have at least stated when particular circumstances are not frivolous.

1. Rule 11

The rulings that the \textit{Morris-Smith} court relied upon did not specifically refer to Rule 11 when discussing frivolous lawsuits. However, the punishment of an award of attorney fees for violating the rule provides a logical starting point for determining when a lawsuit might be frivolous under the Clean Water Act. Under Rule 11, a lawsuit would be frivolous if (1) the plaintiff did not conduct a reasonable inquiry before filing the lawsuit;\textsuperscript{131} (2) the lawsuit was filed to harass, cause unnecessary delay, or to needlessly increase litigation costs;\textsuperscript{132} (3) the plaintiff’s claim was not warranted by existing law, or made a frivolous argument for the extension, modification, or reversal of existing law or the establishment of

\textsuperscript{127} 7 AM. JUR. 2D \textit{Attorneys} § 47 (1997).
\textsuperscript{128} BLACK'S LAW DICTIONARY 461 (Abridged 6th ed. 1991).
\textsuperscript{129} See \textit{Morris-Smith}, 44 F. Supp. 2d at 1086. “First, a Supreme Court criteria for awarding a defendant attorney fees is that Congress did not want to deter a plaintiff from pursuing Congress’ policies.” \textit{Id}.\textsuperscript{130}
\textsuperscript{131} FED. R. CIV. P. 11(b).
\textsuperscript{132} FED. R. CIV. P. 11(b)(1).
new law,\textsuperscript{133} and (4) the claim had no evidentiary support or was unlikely to have evidentiary support upon further investigation.\textsuperscript{134} Using these guideposts, a prevailing defendant under the Clean Water Act would have to meet the substantial burden of proving all of these shortcomings in a plaintiff's claim before a court would award attorney fees.

2. Judicial Definitions

Rulings in environmental cases offer further guidance. For instance, in allowing a prevailing plaintiff to recover attorney fees under the Clean Water Act, a federal district court in New York stated in dicta that a plaintiff who continues to litigate a claim after the claim becomes "frivolous, unreasonable, or groundless" could be liable for the defendant's attorney fees.\textsuperscript{135} This ruling does not define the circumstances under which a claim would be considered frivolous from the moment it enters a courthouse, but it certainly indicates that a claim will be held frivolous if a plaintiff continues to press a meritless complaint.\textsuperscript{136}

While not stating exactly when a claim is frivolous, courts have listed other examples of claims that are not frivolous. A claim will not be considered frivolous if it poses a novel question.\textsuperscript{137} A plaintiff's claim is not frivolous if the

\textsuperscript{133} FED. R. CIV. P. 11(b)(2).
\textsuperscript{134} FED. R. CIV. P. 11(b)(3).
\textsuperscript{135} Atlantic States Legal Found. v. Onondaga Dep't of Drainage and Sanitation, 899 F. Supp. 84, 87 (N.D.N.Y. 1995).
\textsuperscript{136} Id.
\textsuperscript{137} See Razore v. Tulalip Tribes, 66 F.3d 236, 238-41 (9th Cir. 1995). The novel question in Razore involved another environmental statute, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, (CERCLA). \textit{Id.} at 238. After the U.S. Environmental Protection Agency (EPA) declared a closed landfill a superfund site, the landfill's former owner sued a Native American tribe for managing the dump in violation of federal law. \textit{Id.} The year before filing suit, the plaintiffs had signed an order with the EPA agreeing to a remedial investigation/feasibility study (RI/FS) of cleanup alternatives. \textit{Id.} CERCLA bans all challenges to ongoing remedial or removal actions. \textit{Id.} The district court dismissed the plaintiff's claim, holding that the RI/FS was an ongoing remedial or removal action under the statute. \textit{Id.} at 239. The Ninth Circuit affirmed but did not impose attorney fees in favor of the defendant. \textit{Id.} at 241. The appellate court ruled that the issue of whether a RI/FS constituted a remedial or removal action under CERCLA was a novel question. \textit{Id.} at 240.
defendant agrees that it is not. 138 A claim is not frivolous if it has some reasonable basis, even if it is brought by a plaintiff for purposes other than to further the goals of the environmental statute. 139

Extrapolating from these examples, plaintiffs who are unsuccessful in their claims can conclude that, as long as their claims pose a novel question or have some reasonable basis, courts will tend to be generous in finding that those claims are not frivolous. Thus, plaintiffs appear to face a low risk of a court finding their environmental lawsuits frivolous, which should dispel any fears that the “frivolous” standard will create an atmosphere in which plaintiffs are discouraged from filing suits. The standard should pose no barrier to plaintiffs enforcing the Clean Water Act under the Act’s citizen-suit provision.

C. Judicial Generosity to Environmental Plaintiffs

Plaintiffs can take heart in how rarely courts apply Rule 11 to environmental litigation, which indicates just how difficult it can be for a defendant to prevail in a motion for attorney fees. One researcher, comparing Rule 11 activity in environmental litigation with application of the rule to civil rights lawsuits, found that federal courts had rendered fourteen published opinions applying Rule 11 to environmental cases from 1983 to 1992. 140 In comparison, federal judges had issued 191 reported Rule 11 rulings in civil rights cases. 141 The researcher found that “the few courts that have formally applied the Rule [to environmental litigation] were solicitous of the needs of plaintiffs.” 142 More importantly, “no judge has held an environmental plaintiff responsible for the attorneys’ fees that its opponents incurred.” 143 Rather, courts have imposed a token fee, if at all. 144

141. Id. at 435.
142. Id. at 430.
143. Id. at 439.
144. Id. at 439-40. Tobias discusses Maine Audubon Soc’y v. Purslow, 907 F.2d 265 (1st Cir. 1990), in which two attorneys for a citizens’ group sued developers under the Endangered Species Act to stop construction of a residential subdivision that would harm the habitat of American bald
However, some courts have warned environmental plaintiffs of the possible application of Rule 11 to plaintiffs’ suits. Nevertheless, even the judges who imposed mandatory sanctions were aware of the possible chilling effect on citizen suits:

The courts seemed to recognize, for instance, that significant resource disparities can exist between many environmental plaintiffs and their adversaries and that the imposition of large financial assessments can chill the plaintiffs’ enthusiasm.

In short, judicial holdings that award attorney fees to defendants when plaintiffs file frivolous lawsuits pose little threat to plaintiffs and present little practical risk of a chilling effect on citizen suits. With judges reluctant to impose Rule 11 sanctions on environmental plaintiffs, a requirement that a plaintiff’s lawsuit be found frivolous before a defendant can win attorney fees does not jeopardize the congressional intent to allow citizens to enforce the Clean Water Act.

D. Should the Same Standard Apply to Plaintiffs and Defendants?

Prevailing defendants in environmental lawsuits have struggled against the double standard imposed on them to win attorney fees. They have argued alternatively that: (1) they should win attorney fees because their success in defeating the lawsuit served the public interest by advancing the interpretation of environmental statutes; or (2) the plain language of environmental statutes such as the Clean Water Act does not differentiate between prevailing plaintiffs and defendants. Id. at 266. The Act requires a prospective plaintiff to give sixty days’ notice of intent to sue. Id. The plaintiff’s attorneys gave defendants only one day’s notice. Id. The court upheld a fine of $250 against the attorneys. Id. Tobias also discusses Anderson v. Beatrice Foods, 900 F.2d 388 (1st Cir. 1990), in which the court affirmed the trial court’s ruling that the defendant’s discovery violation canceled out the plaintiffs’ Rule 11 violation; therefore, the plaintiffs were not required to pay a financial penalty. See Anderson, 900 F.2d at 395.

Tobias, supra note 140, at n.44.

Id. at 439-40.

prevailing defendants, so a double standard is improper.148 Courts have rejected both claims, preferring instead to rely on legislative history that favors plaintiffs, even when those plaintiffs are defeated in their claims.149 An exploration of defendants' arguments is helpful in exposing why the judicial approach in favoring plaintiffs is proper.

1. The Public Interest Argument

The underpinning of the public interest argument is that attorney fees should be awarded if the prevailing party somehow serves the public interest, especially by “assisting in the interpretation or implementation” of the environmental statute.150 It is a curious distortion that defendants have adopted the “public interest” argument in attempting to win awards of attorney fees.151 The argument more commonly arises in the context of plaintiffs’ claims, as was the case when the Supreme Court considered two environmental plaintiffs’ claims for attorney fees in Ruckelshaus.152 The Court noted the legislative history of the Clean Air Act: “[T]he purposes of the authority to award fees are not only to discourage frivolous litigation, but also to encourage litigation which will assure proper implementation and administration of the act or otherwise serve the public interest.”153 Since plaintiffs file suits, it makes sense for a judge to consider,

148. See Morris-Smith v. Moulton Niguel Water Dist., 44 F. Supp. 2d 1084, 1086 (C.D. Cal. 1999); see also supra note 103 and accompanying text.
when a plaintiff has prevailed on a claim and seeks an award of attorney fees, whether that plaintiff’s lawsuit served the public interest.\textsuperscript{154}

Such is not the case with defendants, who attempt to turn the “public interest” argument inside-out. In essence, defendants who defeat a plaintiff’s environmental claim argue that, by winning the case, they have aided “the interpretation or implementation” of the environmental statute in question.\textsuperscript{155} In \textit{Consumers Power Co.}, the defendant power company tried to bolster its “public interest” argument with ammunition from other cases in which prevailing plaintiffs were awarded attorney fees even though their claims were “non-pro-environment.”\textsuperscript{156} Since those cases held that “a plaintiff’s environmental stance or financial interest in the litigation was irrelevant to their entitlement to fees[,]” the defendant power company maintained that it should be awarded fees.\textsuperscript{157} The court rejected this argument:

\begin{quote}
[Application of . . . [the public interest] standard to prevailing defendants would result in a fee award whenever a defendant prevailed, since resolution of any non-frivolous controversy would shed some new light on the interpretation or implementation of the statute. Such a result would, as Consumers admits, frustrate the congressional policy behind [the Clean Water Act].\textsuperscript{158}

Applying the “public interest” standard to prevailing defendants would nullify the American rule. If a defendant could so easily win attorney fees, there would be no need for the American rule.\textsuperscript{159} In addition, environmental plaintiffs would be more reluctant to sue to enforce the Clean Water Act, leading to the chilling effect that Congress hoped to avert.\textsuperscript{160}
\end{quote}

\begin{enumerate}
\item \textsuperscript{154} See \textit{Alabama Power}, 672 F.2d at 4 (holding that plaintiff environmental groups cannot recover attorney fees under the Clean Air Act unless they show that they added to the Environmental Protection Agency’s stance on the issues).
\item \textsuperscript{155} See \textit{Consumers Power Co.}, 729 F. Supp. at 63.
\item \textsuperscript{156} \textit{Id. at 64} (citing \textit{Alabama Power}, 672 F.2d at 5; \textit{Florida Power and Light Co. v. Costle}, 683 F.2d 941, 942 (5th Cir. 1982)).
\item \textsuperscript{157} \textit{Id.}
\item \textsuperscript{158} \textit{Id. at 65.}
\item \textsuperscript{159} See \textit{generally} \textit{Christiansburg Garment Co. v. EEOC}, 434 U.S. 412, 417 (1978) (arguing that awarding attorney fees only against defendants who had acted in bad faith would not have required a new statutory provision since the American rule would allow attorney fees in such circumstances). \textit{See also supra} notes 17-29 and accompanying text.
\item \textsuperscript{160} \textit{See supra} notes 140-46 and accompanying text.
\end{enumerate}
2. Statutory Interpretation

The greatest source of unease for the court in Morris-Smith was the language of the Clean Water Act itself. Nowhere does the statute’s provision for attorney fees differentiate between prevailing plaintiffs and prevailing defendants; the plain language indicates that either can win attorney fees, presumably under the same standard. 61 Indeed, under traditional canons of statutory interpretation, the plain language of the Clean Water Act provides defendants with their strongest argument for discard the double standard. However, since the Supreme Court was not persuaded by this argument in the civil rights context, 62 it is unlikely that the Court would be persuaded by this argument in the environmental arena. 63

Rules of statutory interpretation prefer deducing the meaning of legislation from the plain language that was used in writing the law. 64 “[T]he plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or hidden sense.” 65 “Where the language of a statute is plain and unambiguous there is no occasion for construction, and the statute must be given effect according to its plain and obvious meaning.” 66 Furthermore, rules of construction cannot be used to create doubt in the meaning of a statute. 67

The language of the Clean Water Act, while ill-defined, is not ambiguous. It

161. 33 U.S.C. § 1365(d) (1994); see supra note 19 and accompanying text.
162. See Christiansburg, 434 U.S. at 418. In discussing the fee-shifting provision of Title VII of the Civil Rights Act of 1964, the court stated: “[T]he permissive and discretionary language of the statute does not even invite, let alone require, such a mechanical construction. The terms of [the statute] provide no indication whatever of the circumstances under which either a plaintiff or a defendant should be entitled to attorney’s fees.” Id.
163. See Marbled Murrelet v. Babbitt, 182 F.3d 1091, 1095 (9th Cir. 1999) (noting that “the Supreme Court [has] indicated that attorney’s fees provisions in environmental statutes with similar language and purpose as the attorney’s fees provisions in the Civil Rights Acts should be interpreted in the same way.”).
164. 82 C.J.S. Statutes § 322 (1953). “The intention of the legislature is to be ascertained primarily from the language used in the statutes, irrespective of the fact that the phraseology of the statute may be awkward, slovenly, or inartificial.” Id.
165. Id. § 311.
166. Id. § 322.
167. Id. § 311. “There is a presumption that every word, sentence, or provision was intended for some useful purpose, has some force and effect, and that some effect is to be given to each . . . .” Id. § 316.
allows courts to award attorney fees "whenever the court determines such an award is appropriate." While that phrase fails to define "appropriate," the plain meaning of the phrase as a whole is obvious. It grants wide discretion to courts in determining when a prevailing or substantially prevailing party should be awarded attorney fees. This discretion includes the power of the courts to determine whether attorney fees will be granted under differing standards to prevailing plaintiffs and prevailing defendants.

In addition, rules of interpretation allow for "acquiescence in construction." That is, when courts have interpreted a statute in a particular way, and the legislature has not rewritten the statute to avoid the courts' interpretation, then "the legislature has acquiesced in that interpretation." The Supreme Court's ruling in Christiansburg, setting out the double standard for plaintiffs and defendants seeking awards of attorney fees in civil rights cases, was issued in 1978. The double standard was applied to defendants under the Clean Air Act in 1981. Consumers Power Co. was decided in 1989, applying the Christiansburg reasoning to the Clean Water Act. After each of these rulings, Congress declined to change the language of the statutes in question to clarify that it intended for the same standard to be applied to plaintiffs and defendants seeking awards of attorney fees under those statutes. Applying the rules of statutory construction, one can reasonably infer that Congress approves of the double standard. The inference with regard to the Clean Water Act becomes a firm conclusion after examining the plain language of the Act's legislative history: Congress wanted courts to award attorney fees to defendants only if the lawsuit was "obviously frivolous or harassing." Faced with such a

169. 82 C.J.S. Statutes § 316 (1953).
170. Id.
174. See 33 U.S.C. § 1365(d) (1994), the attorney-fee provision of the Clean Water Act. Its language has not changed since Consumers Power Co. was decided in 1989; see also 42 U.S.C. § 7604(d) (1994). The attorney-fee provision of the Clean Air Act has not changed since Consolidated Edison was decided in 1981.
clear statement of intent, courts can, and should, apply different standards to plaintiffs and defendants seeking attorney fees under the Act.\textsuperscript{176}

\textbf{E. Application of Logic from Civil Rights Cases}

Civil rights statutes and environmental statutes, such as the Clean Water Act, have more in common than they have differences. First, civil rights and environmental laws have the common purpose "to promote citizen enforcement of important federal policies. . . ."\textsuperscript{177} Second, they share the same legislative goal of balancing the statutory right to enforce federal law with the precaution that frivolous lawsuits will not be rewarded with the blind eye of the courts.\textsuperscript{178} Finally, both types of statutes recognize that "enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law."\textsuperscript{179} By making a plaintiff a "private attorney general,"\textsuperscript{180} environmental and civil rights legislation carves out a special niche for plaintiffs, allowing them to step into the shoes of the government and force polluters and those who would violate civil rights statutes to comply with the law. "[T]he policies behind the statutes are identical, and their judicial interpretation ought also to be consistent."\textsuperscript{181}

More importantly, civil rights statutes and environmental legislation recognize the unequal balance of power between many plaintiffs and defendants.\textsuperscript{182} Often, those who trod on an individual’s civil rights, as well as

\begin{itemize}
\item \textsuperscript{176} 82 C.J.S. Statutes § 321 (1953). This section states, in part:

\[\text{The fundamental rule of construction, to which all other rules are subordinate, is that the court shall, by all aids available, ascertain and give effect . . . to the intention or purpose of the legislature as expressed in the statute. Thus, it is the duty of the court to endeavor to carry out the intention and policy of the legislature . . . .}\]

\textit{Id.}


\item \textsuperscript{178} See Consumers Power Co., 729 F. Supp. at 64.

\item \textsuperscript{179} See Newman v. Piggie Park Enters., 390 U.S. 400, 401 (1968).

\item \textsuperscript{180} Id. at 402.

\item \textsuperscript{181} See Consumers Power Co., 729 F. Supp. at 64.

\item \textsuperscript{182} See Delaware Valley, 478 U.S. at 559-60. The Supreme Court noted that “unless reasonable attorney’s fees could be awarded for bringing these [civil rights] actions, Congress found that many
those who pollute, have more money, more influence in a community, and more legal resources than the citizens who are empowered by statute to enforce the country's civil rights and environmental laws.\textsuperscript{183} Citizens who press their claims may begin on an unequal footing with the defendant; however, judicial imposition of a tougher standard on defendants regarding an award of attorney fees properly tips the balance at the conclusion of a lawsuit toward the plaintiff. The double standard levels the field.

VI. CONCLUSION

Three months after the district court ruled in \textit{Morris-Smith}, the Ninth Circuit applied the \textit{Christiansburg} standard to the claim of several defendants for attorney fees under the Endangered Species Act.\textsuperscript{184} The Ninth Circuit noted that the language of the Endangered Species Act differs from civil rights statutes and other environmental statutes, but the differences weren't sufficient to warrant a standard other than the one espoused by \textit{Christiansburg}.\textsuperscript{185} Thus, the issue appears well-settled in the Ninth Circuit. Whether the double standard will spread to other circuits is an open question, but defendants appear to face an uphill struggle.

The alternative to the double standard would be to treat defendants and plaintiffs the same when they ask the court for attorney fees. In other words, prevailing defendants could recover attorney fees from plaintiffs in all but "special circumstances."\textsuperscript{186} This standard would almost certainly lead to the chilling effect that Congress sought to avoid in including a citizen-suit provision in the Clean Water Act.\textsuperscript{187}

\textsuperscript{183.} Tobias, \textit{supra} note 140, at 439.
\textsuperscript{184.} \textit{Id.} at 1095. The Endangered Species Act (ESA) allows courts to award attorney fees to any party, while civil rights statutes and other environmental statutes, including the Clean Water Act, require that the party must have prevailed in a claim before a court will award attorney fees. \textit{Id.}
\textsuperscript{185.} \textit{Id.} at 560; see also Tobias, \textit{supra} note 140, at 439.
\textsuperscript{186.} \textit{Id.}
\textsuperscript{187.} \textit{Supra} notes 19-23 and accompanying text.
The Clean Water Act's citizen-suit provision is a vital tool in cleaning up the nation's waters. The Natural Resources Defense Council, a nonprofit environmentalist group of scientists and lawyers, states:

Studies by both government and private groups show high levels of permit violations by industrial and publicly owned facilities. Federal, state, and local governments frequently lack the will and the resources to take enforcement action against all significant violators. Government enforcement actions that are brought are often ineffective. . . . The result is a regulatory environment in which it still pays to pollute. To fill the gaps in government enforcement, hundreds of citizen suits have been filed over the last ten years.

However, citizens face inherent difficulties in bringing claims under the Act. Citizen suits have been dismissed when past violations have ceased, or when companies change ownership, or when polluters negotiate settlements with states with little or no penalties. Citizens must spend large amounts of time establishing their standing to sue, they have difficulty gaining access to records to investigate violations, and they often lose on legal technicalities when they sue the Environmental Protection Agency to prod government to enforce the Act. Citizens would be further chilled from enforcing the Act if courts lowered the standard under which defendants could recover attorney fees.

The problem of water pollution is prevalent. About 40 percent of rivers, lakes, and estuaries in the United States are too polluted for fishing or

189. Id. at 238-39 (emphasis in original).
190. Id. at 239.
191. Id.
192. Id.
Clearly, government needs all the help it can get in enforcing the Clean Water Act. Congress provided that help by allowing citizens to enforce the Act. Without the double standard, citizens surely would be discouraged from bringing their claims to court, the intent of Congress to make citizens enforcers of the law would be frustrated, and the nation's waters would suffer.

193. Letter from Carol M. Browner, Administrator, Environmental Protection Agency, to Albert Gore, Vice President (1994) (included in EPA NATIONAL WATER QUALITY INVENTORY 1994 REPORT TO CONGRESS).
UNITED STATES V. HOECHST CELANESE CORPORATION: 
CAN THE AGENCY DEFERENCE DOCTRINE WITHSTAND A 
REGULATORY CONFUSION DEFENSE?

by Diana R. Miller

I. INTRODUCTION

In response to the growing amount of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, Congress enacted the Clean Air Act to promote federal, state and local government actions towards pollution prevention. The Clean Air Act, like other environmental statutes, does not address every nuance of the law. Instead, Congress has delegated power to the United States Environmental Protection Agency (EPA) to prescribe the specific rules and regulations. Unfortunately, environmental regulations often leave persons questioning their intended meaning, due to their complex, technical nature.

In the event that a regulated party's interpretation differs from the agency's interpretation, an enforcement action will likely ensue to bring the party into compliance with the regulation. In such cases there is a struggle between two principles of law: (1) courts should defer to the agency's interpretation of its own regulation, and (2) due process requires that defendants have fair notice of what

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4. See, e.g., United States v. Tull, 769 F.2d 182 (4th Cir. 1985) rev'd on other grounds, 481 U.S. 412 (1987). The federal government sought civil penalties from a developer for dumping fill into the wetlands on Chincoteague Island, Virginia. Tull, 769 F.2d at 183-85. Tull argued that the Clean Water Act regulations were unconstitutionally vague because the imprecise definition of "wetlands" made it too difficult for landowners to determine their potential liability. Id. at 185-86. The court rejected the defendant’s claim of ambiguity based on extensive testimonial evidence that contradicted Tull’s findings. Id. at 188.
conduct a regulation prohibits or requires before they can be held liable for violating it.7 A complaint about a vague or confusing regulation employed as due process defense has been coined "regulatory confusion" by commentators.8

Recently, in United States v. Hoechst Celanese Corp.,9 the Fourth Circuit wrestled with the competing doctrines of agency deference and fair notice and held that without a direct statement from the authoritative agency, a company cannot be held liable for violating an ambiguous regulation.10 This decision is particularly significant because it stretches the regulatory confusion doctrine further than its predecessors, by ignoring the reasonableness of the agency's interpretation while employing the fair notice standard.11 In addition, since the Supreme Court denied Hoechst Celanese Corporation's petition for writ of certiorari,12 agencies, regulated parties, and legal practitioners alike must be aware of various applications of the regulatory confusion doctrine among the circuit courts.

The purpose of this note is to illustrate that the Hoechst decision harmonizes with the developing trend of regulatory confusion cases, and to expose the practical problems of this doctrine. Section II of this note, the background, discusses the legal principles and the regulation at issue in Hoechst. Section III is a summary of the Fourth Circuit's holding and rationale. Section IV analyzes the Hoechst decision in light of the developing trend and illustrates the effect of these decisions on the agency deference principle. Section V concludes by

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7. See, e.g., General Elec. Co. v. EPA, 53 F.3d 1324, 1334-34 (D.C. Cir. 1995) (holding that General Electric was not responsible for its actions at issue in this proceeding because the company did not have fair warning of the EPA's interpretation of the regulations); Gates & Fox Co., Inc. v. OSHRC, 790 F.2d 154, 156 (D.C. Cir. 1986) (holding that the regulation did not provide adequate notice that an employer could be sanctioned for failing to provide rescue equipment for employees).
11. Id. at 225.
posing the realistic concerns of the regulatory confusion doctrine.

II. BACKGROUND

This section explores the cases employing the regulatory confusion defense to illustrate the development of the precedent on which the Hoechst decision rests. Included is a brief analysis of the EPA regulation, National Emission Standard for Hazardous Air Pollutants (NESHAP). Providing a thorough backdrop of both the case law and statutes will aid in analyzing the Hoechst decision.

A. Development of the Regulatory Confusion Defense: Conflict between Agency Deference and Fair Notice Principles

The U.S. Supreme Court has repeatedly declared that a court should defer to an agency's interpretation of an ambiguous regulation. However, the mere existence of the ambiguity weakens the effectiveness of the doctrine because the challenger has not been provided fair notice of what the law proscribes prior to the resolution of the competing interpretations. The fair notice principle, rooted in the constitutional guarantee of due process, holds that persons may not be punished for failing to comply with a law of which they could not have been aware. Facing the tension between these two competing principles of law, courts have created a trend of holdings that hinder the agency deference principle in light of regulatory confusion.

15. See Rollins Envtl. Servs. (NJ), Inc. v. EPA., 937 F.2d 649, 653 (D.C. Cir. 1991) (giving deference to the government interpretation of the confusing regulation, but utilizing the existence of the confusion to mitigate the penalty to zero).
16. See U.S. CONST. amend. V; see also Gates & Fox Co. v. OSHRC, 790 F.2d 154, 156 (D.C. Cir. 1986) (holding, on due process grounds, that sanctions could not be imposed on a party alleged to have been in violation of a safety regulation which failed to provide adequate notice of the conduct it prohibited).
18. See General Elec. Co. v. EPA, 53 F.3d 1324, 1333-34 (D.C. Cir. 1995) (holding that General Electric was not responsible for its actions at issue in this proceeding because the company did not have fair warning of the EPA's interpretation of the regulations); Rollins Envtl. Servs., Inc. v. EPA,
The U.S. Court of Appeals for the Fifth Circuit was confronted with a powerful deference argument made by the Occupational Safety and Health Review Commission (OSHRC) in Diamond Roofing Co. v. OSHRC.\textsuperscript{19} The argument of the OSHRC was that the regulations at issue\textsuperscript{20} should be liberally construed to give broad coverage because Congress intended to provide safe working conditions for employees.\textsuperscript{21} The court rejected this argument, relying on the existence of intra-agency conflict over the meaning of the provision in question, and the principle that ambiguities should be construed against the drafter of a text.\textsuperscript{22} Ultimately, the court held that “a regulation cannot be construed to mean what an agency intended but did not adequately express.”\textsuperscript{23}

The role of deference to agency interpretations outlined in Diamond Roofing was further developed a decade later in Gates & Fox Co. v. OSHRC.\textsuperscript{24} In Gates & Fox Co., although the court recognized that deference must be given to an agency’s interpretation of its own regulations, it held that “the due process clause prevents that deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires.”\textsuperscript{25} Therefore, lack of fair notice served as a bar to utilizing the agency deference doctrine.\textsuperscript{26}

The volume and complexity of environmental regulatory programs that developed in the last two decades set the stage for an abundance of challenges to the enforcement of confusing regulations.\textsuperscript{27} In the last decade, courts have

\textsuperscript{19} 937 F.2d 649, 653 (D.C. Cir. 1991) (declaring lack of fair notice a mitigating factor sufficient to reduce a civil penalty for violations of a confusing regulation to zero); Gates & Fox Co. v. OSHRC, 790 F.2d 154, 156 (D.C. Cir. 1986) (holding on due process grounds, that sanctions could not be imposed on a party alleged to have been in violation of a safety regulation which failed to provide adequate notice of the conduct it prohibited).

\textsuperscript{20} 528 F.2d 645 (5th Cir. 1976).

\textsuperscript{21} Id. at 648. (citing 29 C.F.R. § 1926.500(d)(1) (1985)). The regulations required that a standard railing be placed around open-sided floors. \textit{Id}. Diamond Roofing was penalized for failure to install railings around roofs upon which their employees worked because they believed the ‘floor’ regulations would not apply to roofs. \textit{Id}. at 649.

\textsuperscript{22} \textit{Id}. at 648.

\textsuperscript{23} \textit{Id}. at 649.

\textsuperscript{24} 790 F.2d 154 (D.C. Cir. 1986).

\textsuperscript{25} \textit{Id}. at 156.

\textsuperscript{26} \textit{Id}. at 154.

\textsuperscript{27} \textit{See} Kilbert and Helbling, \textit{supra} note 5, at 454.
heeded the regulated community’s due process rights with scrutiny.\textsuperscript{28} In \textit{Rollins Environmental Services, Inc. v. EPA},\textsuperscript{29} the court was faced with the competing doctrines of agency deference and fair notice.\textsuperscript{30} The court found the regulation to be confusing, stating “EPA’s interpretation would not exactly leap out at even the most astute reader . . . .”\textsuperscript{31} Nevertheless, the court upheld the EPA’s interpretation of the regulation, explaining “in a competition between possible meanings of a regulation, the agency’s choice receives substantial deference.”\textsuperscript{32}

The regulatory confusion argument posed by \textit{Rollins Environmental Services} was a success, however, because the court found the lack of adequate notice resulting from the regulation’s inherent uncertainty a mitigating factor when assessing the civil penalty.\textsuperscript{33} The court thereby held that \textit{Rollins} violated the regulation, but reduced the civil penalty to zero.\textsuperscript{34} Among the several reasons given for this holding were the agency’s internal conflict over the provisions meaning and conflicting advice given by the agency to the regulated community.\textsuperscript{35} The \textit{Rollins’} decision left largely unanswered the crucial precedential question of what standard should be applied by the reviewing court when assessing regulatory ambiguity.\textsuperscript{36}

In \textit{General Electric Co. v. EPA},\textsuperscript{37} the D.C. Circuit went one step further in weakening the agency deference principle, by using the regulatory confusion defense to set aside the finding of liability as well as the penalty.\textsuperscript{38} After discussing the principle that an agency’s interpretation of its own regulations is due a high level of deference, the court held that the EPA’s interpretation would prevail over GE’s reasonable interpretation.\textsuperscript{39} Despite this finding, the court held that the violation and fine could not be sustained because GE did not have fair

\begin{itemize}
\item \textsuperscript{28} See Kilbert and Helbling, \textit{supra} note 5, at 454.
\item \textsuperscript{29} \textit{Rollins}, 937 F.2d 649 (D.C. Cir. 1991).
\item \textsuperscript{30} \textit{Id}.
\item \textsuperscript{31} \textit{Id}. at 654.
\item \textsuperscript{32} \textit{Id}. (citing Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 566 (1980)).
\item \textsuperscript{33} \textit{Id}. at 652.
\item \textsuperscript{34} \textit{Id}.
\item \textsuperscript{35} \textit{Id}. at 653.
\item \textsuperscript{36} Strand, \textit{supra} note 8, at 10333.
\item \textsuperscript{37} 53 F.3d 1324 (D.C. Cir. 1995).
\item \textsuperscript{38} \textit{Id}. at 1334.
\item \textsuperscript{39} \textit{Id}. at 1328.
\end{itemize}
notice of the interpretation. The court declared that the standard of review in a regulatory confusion issue is whether the regulating party, acting in good faith, is able to identify with ascertainable certainty the standards with which the agency expects the party to conform. Thus, prior to the Hoechst decision, challengers to regulatory penalties have been successful in the U.S. appellate courts by proving a lack of fair notice of the correct reading of the law.

B. The National Emission Standard for Hazardous Air Pollutants (NESHAP)

The primary purpose of the Clean Air Act is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population. . . ." To fulfill this purpose, Congress required the EPA to promulgate emission standards for hazardous air pollutants in order to protect the public with an ample margin of safety. Pursuant to this authority, the EPA established the National Emission Standard for Hazardous Air Pollutants (NESHAP) for benzene, to regulate hazardous benzene that leaks from equipment. This type of pollution is known as "fugitive emissions." The EPA concluded that the control of fugitive emissions would significantly reduce the incidence of leukemia for people living within twenty kilometers of leaking equipment.

40. Id. at 1329 (stating that "in the absence of notice -- for example, where the regulation is not sufficiently clear to warn a party about what is expected of it -- an agency may not deprive a party of property by imposing civil or criminal liability.").
41. Id. at 1329 (emphasis added).
42. See supra note 18.
46. Id.
47. NESHAP preamble, 49 Fed. Reg. 23,498 at 23,501 (1984). The preamble states as follows: Approximately twenty to thirty million people live within twenty kilometers of the 128 plants with these fugitive emissions. These people are exposed to higher levels of benzene than is the general population. Due to lack of a demonstrated threshold for benzene's carcinogenic effects, these people not only incur a higher benzene exposure, but also run a greater risk of contracting leukemia due to that exposure.
"Specifically, the NESHAP requires industrial plants that are designed to produce, use, or otherwise have in service benzene to monitor equipment regularly for leaks, repair leaks promptly, and install equipment that prevents, captures or destroys benzene emissions." 48 The regulations include reporting and record-keeping requirements and provide that violations are to be punished by civil penalties. 49

The regulations, however, provide an exemption for plants with equipment designed to produce or use less than 1,000 megagrams 50 of benzene per year. 51 EPA drafted the exemption in response to comments that the first NESHAP proposed in 1981 was not cost-effective for some plants. 52 The conflict, which led to the enforcement action against the Hoechst Celanese Corporation, concerned the meaning of the word "use" in the exemption. 53

C. The Facts of United States v. Hoechst Celanese Corporation 44

Hoechst Celanese Corporation (HCC) owns the Celriver Plant in Rock Hill, South Carolina, which used benzene in the production of acetic anhydride. 55 The

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49. NESHAP, 40 C.F.R. § 61.247 (1999). The regulation requires an initial report to be submitted within 90 days of the effective date of the promulgated regulation that includes the following: equipment identification number; type of equipment, for example pump or pipeline valve; percent by weight benzene in the fluid at the equipment; process fluid state at the equipment; and method of compliance with the standard. Id. Thereafter a report shall be submitted to the Administrator semi-annually that includes all leaks detected and repair procedures. Id.
50. One megagram is equal to approximately 2200 pounds.
52. Office of Air Quality, EPA, Pub. No. 450/3-80-032B, BENZENE FUGITIVE EMISSIONS-BACKGROUND INFORMATION FOR PROMULGATED STANDARDS 2-104 (1982). In a document supporting the final regulations, the agency wrote: "EPA believes it is reasonable to exempt plants from the standard when the cost of the standard is unreasonably high in comparison to the achieved emission reductions. Therefore, EPA decided to determine a cutoff for exempting these plants based on a cost and emission reduction analysis." Id.
55. Hoechst, 128 F.3d at 219. The Celriver plant used benzene to separate water and other impurities from the chemical compounds acetic anhydride and acetic acid. Id. at 220.
benzene was used in both a “quench chamber” and a main still as a reflux agent.\textsuperscript{56} “Benzene entering the quench chamber and main still had a prescribed temperature and purity.”\textsuperscript{57} After each of these processes, “the benzene was cooled, purified and then recirculated as a ‘quench’ or ‘reflux agent.’”\textsuperscript{58} HCC claimed the Celriver plant was exempt from the NESHAP because it felt the quantity of benzene used never exceeded 1,000 megagrams a year.\textsuperscript{59} Under the company’s theory, the term “use” in the exemption had the narrow meaning of “consumption,” and thus recycled benzene was not part of the calculation for purposes of the exemption.\textsuperscript{60} The EPA on the other hand, read the term “use” to cover every time the benzene recirculated through pipes that were capable of leaking.\textsuperscript{61}

In support of this narrow interpretation, HCC argued that shortly after the promulgation of the NESHAP, it inquired about the meaning of the exemption regarding an HCC plant located in Bishop, Texas.\textsuperscript{62} The state agency that the EPA had empowered to implement and enforce the NESHAP in Texas, Texas Air Control Board (TACB), referred HCC to an August 1984 letter that EPA’s Region VI office sent to a plant that similarly recycled benzene.\textsuperscript{63} “This letter stated that ‘use is not meant to imply consumption, but rather is meant to reflect the overall quantity of benzene used in equipment at a facility.’”\textsuperscript{64} Although HCC initially thought this indicated that the term use included recycled benzene,\textsuperscript{65} the TACB advised HCC that the letter indicated overall inventory was

\textsuperscript{56} United States v. Hoechst Celanese Corp., 964 F. Supp. 967, 970 (D.S.C. 1996). “Hot ketene gases flowed into a quench chamber and were cooled with a continuous stream of benzene with some of the ketene thereby being converted to acetic anhydride.” \textit{Id.} The substances then moved to a main still where benzene was used as a reflux agent to excite water and other substances forcing them to rise to the top, leaving acetic anhydride in the bottom of the still. \textit{Id.}

\textsuperscript{57} \textit{Id.}

\textsuperscript{58} \textit{Hoechst}, 128 F.3d at 220.

\textsuperscript{59} \textit{Id.}

\textsuperscript{60} \textit{Id.} at 220. Under HCC’s narrow meaning, the calculation should be based on a yearly inventory. For example, the amount of benzene the plant consumed, plus the amount of benzene that is remaining in the equipment at the year’s end. \textit{Id.}

\textsuperscript{61} \textit{Id.}

\textsuperscript{62} \textit{Id.} at 225.

\textsuperscript{63} \textit{Id.}

\textsuperscript{64} \textit{Id.}

\textsuperscript{65} \textit{Id.} One HCC official hand wrote on the letter “Read it and weep” and another HCC official
the determining factor in qualifying for an exemption. Therefore, the TACB held that the Bishop, Texas plant was exempt from the record-keeping and reporting requirements of Section 61.112 of the regulation. HCC then concluded that the Celriver plant in South Carolina, which used benzene in a manner similar to the Texas plant, was also exempt.

From the time of enactment of the NESHAP in 1984 until June of 1989, the EPA was not aware of the substantial benzene emissions at the Celriver plant because HCC never applied for an exemption for the Celriver plant or filed any reports as to its benzene usage. In June of 1989, the Director of EPA Region IV "expressly notified the company in writing that if 'benzene is recycled or reused in any process... the total cumulative flow through the process rather than net benzene consumption...' is to be counted as 'use' of benzene for purposes of the regulations." After further communication between the parties, the EPA concluded that the Celriver plant had violated the NESHAP and subsequently initiated this action. Under the EPA's definition of use, the Celriver plant used more than a million megagrams of benzene a year, with substantial amounts of the carcinogen leaking, thereby ranking in the top 5% of all plants reporting benzene fugitive emissions each year.

D. Procedural Posture

The District Court of South Carolina sustained the EPA's interpretation of its own regulations, an interpretation that did not exempt the HCC Celriver plant. Nevertheless, because the court concluded that the EPA did not provide HCC

wrote a memo noting, "EPA recently advised that use of benzene includes recycle." Id.

66. Id.
67. Id.
68. Id. HCC concluded the exemption was self-executing. Id.
69. Hoechst, 128 F.3d at 220; see also, 40 C.F.R. § 61.247 (1999) (stating that reporting requirements are such that "within 90 days of the effective date of the regulation, an owner or operator shall submit a statement to the Administrator that the standards are being complied with.").
70. Hoechst, 128 F.3d at 220.
71. Id. EPA alleged that HCC violated NESHAP leak detection and control devices, reporting, and recordkeeping. Id.
72. Id. at 220.
with "fair notice" of the EPA's interpretation of the exemption, the court declined to find HCC liable for any regulatory violations.\(^74\) Both the EPA and HCC appealed.\(^75\)

III. THE HOLDING AND RATIONALE OF *UNITED STATES V. HOECHST CELANESE CORPORATION*\(^76\)

The Fourth Circuit affirmed the district court's opinion in most respects, finding that the lower court correctly deferred to the EPA's interpretation of its own regulation and correctly held that the EPA did not afford HCC fair notice of the EPA's interpretation.\(^77\) However, the Fourth Circuit looked at the fair notice issue in two distinct periods of time.\(^78\) The court determined that after 1989 the EPA had provided the company with actual notice of its interpretation and thus held that HCC violated the regulations between 1989 and 1992.\(^79\) The Fourth Circuit thereby remanded the case for penalties to be assessed during this latter time period.\(^80\)

A. The First Issue: Whether the EPA's interpretation of the NESHAP Exemption Should Be Afforded Deference

The Fourth Circuit began its analysis by observing that an agency's interpretation of its own regulation is accorded deference and will be controlling unless the interpretation is plainly erroneous or inconsistent with the language of the regulation.\(^81\) The appeals court found that the EPA's asserted meaning of use in the NESHAP exemption was consistent with the plain language and the purposes of the regulation.\(^82\) For example, the word "use," in its ordinary sense,

\(^{74}\) *Id.* at 979-86.

\(^{75}\) *Hoechst*, 128 F.3d at 219.

\(^{76}\) 128 F.3d 216 (4th Cir. 1997).

\(^{77}\) *Id.* at 219.

\(^{78}\) *Id.*

\(^{79}\) *Id.* at 228-29.

\(^{80}\) *Id.* at 230.

\(^{81}\) *Id.* at 221 (citing *Chevron U.S.A.*, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) for the proposition that the EPA is granted power to create regulations and citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) for the proposition that agency interpretation is entitled to substantial deference).

\(^{82}\) *Hoechst*, 128 F.3d at 221.
means "to make use of, to employ, to utilize." The court also found the EPA's interpretation harmonized with the purpose of the NESHAP, since recycled benzene is just as likely to create a health threat as new benzene; each time benzene passes through a valve or pipe, it can potentially leak.

In addition, the court was not persuaded by the HCC's contention that the EPA created the interpretation only for this litigation. The scattered instances in which the EPA employed the term "consume" in lieu of "use" in the NESHAP and in EPA correspondence scarcely proved to the court that the EPA limited its meaning of "use" in the regulations to this narrow definition. Further, the court summarized five different occasions prior to this litigation when the EPA expressed its interpretation to exemption seeking applicants. In view of this evidence, the court concluded that the exemption interpretation was not a litigation strategy. Finding the EPA's interpretation consistent with the language and purpose of the NESHAP, and that it was established prior to the litigation, the Fourth Circuit held that the EPA's interpretation of the exemption deserved deference.

B. The Second Issue: Whether HCC Had Fair Notice of its Exemption Status

According to the Fourth Circuit, "[t]he more difficult question is whether, and if so when, HCC was afforded fair notice of the EPA's interpretation." The court reasoned that due process requires that a regulation allowing monetary penalties for violations, "must give . . . fair warning of the conduct it prohibits or requires, and it must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority. . . ." The court examined

83. Id. (citing BLACK'S LAW DICTIONARY 1541 (6th ed. 1990)).
84. Id. at 221.
85. Id.
86. Id. (explaining that in the NESHAP preamble, the EPA does occasionally employ the term consume in lieu of use in a discussion of the operations of pharmaceutical companies).
87. Id. at 223.
88. Id.
89. Id.
90. Id. at 224.
91. Id. (citing First American Bank v. Dole, 763 F.2d 664, 651 n.6 (4th Cir. 1985) and quoting Diamond Roofing Co. v. OSHRC, 528 F.2d 645, 649 (5th Cir. 1976)).
whether HCC received fair notice in two separate time frames: (1) the period from 1984 to 1989 (when the NESHAP was promulgated to when the EPA directly contacted HCC); and (2) the period after 1989 to 1992 (after the EPA contacted HCC until HCC complied with the regulation). 92

1. 1984 through 1989: NESHAP Promulgation to EPA’s Direct Contact with HCC.

The Fourth Circuit found that Hoechst did not have fair notice of the EPA’s interpretation of the word “use” in the NESHAP exemption at the time the regulation was enacted in 1984. 93 In resolving this issue, the court considered each of the EPA’s arguments in turn. First, the EPA argued that the plain language of the NESHAP and the rulemaking record was enough to put HCC on notice that it did not qualify for an exemption. 94 In support of this argument, the EPA claimed that exemptions should be narrowly construed 95 and that the claim of a lack of fair notice is overcome when a reasonable party reading the regulation would know that their conduct is at risk. 96 The EPA also recognized that “it is crucial to examine the particular situation of the defendant, and whether it lacked reasonable notice.” 97 Rejecting the argument, the court concluded that neither the language of the regulation nor the rulemaking record clearly compelled the EPA’s interpretation. 98 In so finding, the court explained that although “nothing in the NESHAP itself or the rulemaking record foreclosed the EPA’s interpretation of the exemption, at the same time nothing mandated it.” 99 Thus, HCC was not put on notice of the EPA’s broad interpretation of “use” in the NESHAP by the plain language of the regulation, nor the rulemaking record. 100

In response to the EPA’s second argument that HCC should have asked for

92. Id. at 224.
93. Id. at 225.
94. Id. at 224.
95. Id. (citing Duquesne Light Co. v. EPA, 698 F.2d 456 (D.C. Cir. 1983)).
96. Id. (citing Maynard v. Cartwright, 486 U.S. 356, 361 (1988)).
97. Id. at 224 (quoting Brief of Appellant at 29, United States v. Hoechst Celanese Corp., 128 F.3d 216 (4th Cir. 1997)).
98. Id.
99. Id.
100. Id. at 226.
clarification of the regulation, the court found that HCC did make an inquiry in 1984 by contacting the Texas Air Control Board (TACB) regarding HCC’s Texas plant. Since the TACB told HCC that its Texas plant which similarly used recycled benzene, was exempt, HCC had reason to believe the Celriver plant would also be exempt. Thus, since the court concluded HCC lacked fair notice that it did not qualify for an exemption to the NESHAP in the 1984 – 1989 period, they were not liable for violations.

2. 1989 through 1992: The Period after EPA Contacted HCC until HCC Complied with the Regulation

In 1989, when the EPA’s Region IV office wrote to HCC, the Fourth Circuit declared that HCC had received fair notice that it did not qualify for an exemption and was therefore in violation for not following the NESHAP provisions. The court reasoned that the letter unequivocally set forth the agency’s interpretation, and that HCC well understood that it did not qualify for an exemption under such an interpretation. HCC contended that it had legitimate reasons to believe that the 1989 letter from Region IV was not authoritative after considering letters that the EPA and state environmental agencies had written giving contrary interpretations of the regulation. The Fourth Circuit, however, viewed the other letters as immaterial, because they were not directed to HCC and they were not issued by EPA Region IV, the governing agency for South Carolina. The alleged conflicting interpretations of the exemption expressed to other owners and operators does not undermine the only message that HCC received from EPA Region IV in the June 13, 1989 letter. In addition, minutes from a July 1989 meeting of HCC Celriver officials

101. Id. EPA maintained that HCC had an obligation to ask for meaning of use, since the “NESHAP and rulemaking record at least provided HCC with reason to know that its exemption claim rested on extremely shaky grounds.” Id.
102. Hoechst, 128 F.3d at 225.
103. Id. at 226.
104. Id. at 227-29.
105. Id. at 228.
107. Id. at 228.
108. Id.
supported their awareness of their exemption status. Accordingly, the appeals court found HCC was subject to penalties for violating the NESHAP regulation between 1989 and 1992, and remanded the case for that determination. Hoechst Celanese Corporation’s petition for writ of certiorari was denied on June 26, 1998.

C. Dissenting Opinion

Judge Niemeyer concurred with the majority’s holding of no violations during the first time period, but dissented from the majority’s finding that HCC had fair notice of the EPA’s interpretation after 1989. Due to the contradictory statements that various EPA sources made regarding proper interpretation of the exemption language, Judge Niemeyer agreed with the district court’s holding that the 1989 letter to HCC from EPA’s Region IV was not sufficient to provide fair notice to the Celriver plant of its exemption status. Judge Niemeyer explained that “to impose penalties in the circumstances of this case is tantamount to punishment on the unfocused whim of a bureaucracy that could not itself agree on the proper reading of its own regulation.”

IV. Analysis

The court’s opinion accords with the recent trend of environmental enforcement actions that have weakened the agency deference principle. The trend is to bifurcate the holding into two phases: agency deference and fair notice. The Hoechst decision illustrates that the Fourth Circuit, like the other circuit courts, is unwilling to defeat the long-standing agency deference principle. A successful regulatory confusion defense is a much stronger segment of the

109. Id. at 227. “The limit of 1000 megagrams benzene per year . . . is applied to throughput instead of consumption. Process throughput or recycle is considerably greater than this limit. Stringent EPA controls would thus apply . . . .” Id.
110. Id. at 230.
112. Hoechst, 128 F.3d at 233 (Niemeyer, J., concurring in part and dissenting in part).
113. Id. at 230.
114. Id.
115. See Kilbert and Helbling, supra note 5, at 455-64 (summarizing the appellate court decisions employing the regulatory confusion doctrine in environmental enforcement actions throughout the 1990s).
holding than the court's granting of deference to the agency.

A careful analysis of the two phases of Hoechst decision in parts A & B will demonstrate that there is a strict standard in the Fourth Circuit for promulgating a regulation clear enough to withstand the powerful regulatory confusion defense. In part C, the Hoechst decision is criticized for failing to consider the reasonableness of the EPA's interpretation of the NESHAP. Part D of the analysis is a prediction of a future conflict resulting from the Fourth Circuit's failure to define an authoritative agency interpretation.


The court's decision to accept the EPA's interpretation of the NESHAP exemption in Hoechst was in accordance with the principle of agency deference. The court explained that the broad reading of the term "use" was the most sensible in light of the cost benefit analysis performed to determine the cutoff for the exemption. In so finding, the court illustrated not only that the EPA interpretation was consistent with the regulation, the standard necessary for agency deference, but also that the EPA interpretation was the most reasonable one. This was determined after a careful reading of the regulation itself, and an evaluation of the purposes behind the NESHAP and the Clean Air Act.

The first segment of the court's holding is in the tradition of agency deference. The second segment, however, quickly rendered this portion of the opinion powerless. The decision implies that if an agency interpretation needs to rely on the principle of deference to successfully obtain a judicial endorsement, then the interpretation is questionable enough to declare insufficient warning to the regulated community. The court asserted the continuing vitality of the Chevron agency deference principle and then rendered

117. Hoechst, 128 F.3d at 221-22.
118. Id. at 221-23.
119. Id.
120. Id.
121. Id. at 224-30.
that doctrine virtually meaningless, at least in the context of regulatory penalties. The fair notice exception swallows the deference rule in the first instance of the asserted construction of the statute or regulation.\textsuperscript{123}

In essence, the existence of the first issue, two permissible interpretations of a regulation, almost inevitably answers the second issue, lack of fair notice. Fair notice has proven to be a strong argument despite the reasonableness of the interpretation because this principle is a central belief of our American system: persons are not accountable for actions they could not have known were wrong.\textsuperscript{124} As in \textit{General Electric}, in \textit{Hoechst}, the D.C. Circuit began its analysis of the due process argument by discussing the enforcement of regulations that impose monetary penalties.\textsuperscript{125} The court explains, "[i]n the absence of notice . . . where the regulation is not sufficiently clear to warn the party about what is expected of it, an agency may not deprive a party of property by imposing civil liability."\textsuperscript{126}

When the principle was boiled down, the court comprised a standard: the regulated party, acting in good faith, must be able to identify with ascertainable certainty, the standards with which the agency expects the party to conform.\textsuperscript{127}

\textbf{B. The Four Factors Used by the Fourth Circuit to Evaluate Whether the Regulated Party Was Given Fair Notice}

Evaluating the regulatory confusion defense proposed by HCC, the court addressed a number of factors to determine whether they received fair notice of their exemption status, including: (1) the plain meaning of the regulation; (2) inconsistencies in the regulation; (3) contradictory agency interpretations; and (4) communication between the agency and the regulated party.\textsuperscript{128}

First, when notice of proscribed conduct was inadequate on the face of regulations and other portions of the rulemaking record, the situation is ripe for a

\begin{itemize}
\item \textsuperscript{123} \textit{See id.} at 1574. Deference to an agency interpretation still has some potency of course, to force a party to comply with the law once the ambiguity is resolved. \textit{id.}
\item \textsuperscript{124} \textit{See, e.g.,} Cheek \textit{v. United States}, 498 U.S. 192, 199-200 (1990).
\item \textsuperscript{125} \textit{General Elec. Co. v. EPA}, 53 F.3d 1324, 1328 (D.C. Cir 1995).
\item \textsuperscript{126} \textit{Id.} (citing Diamond Roofing Co. \textit{v. OSHRC}, 528 F.2d 645, 649 (5th Cir. 1976)).
\item \textsuperscript{127} \textit{Id.}
\item \textsuperscript{128} \textit{See United States v. Hoechst Celanese Corp.}, 128 F.3d 216, 224-30 (4th Cir. 1997), \textit{cert. denied}, 524 U.S. 952 (1998); \textit{see also} Wilkins, supra note 122, at 1572-73 (listing eight favorable factors for a regulatory confusion defense that under the totality of circumstances will lead a court to accept such a defense). \n\end{itemize}
regulatory confusion defense. Here, the court was not persuaded by the EPA’s argument that this dispute involved an exemption and that exemptions are to be narrowly construed. This was an objective inquiry into whether a word or phrase leads to more than one understanding. While the EPA intended to exempt only plants that had so few sources of leaks that they would be expected to emit only six megagrams of fugitive benzene per year, they did not adequately express it. The second factor, also an objective inquiry, was the existence of internal contradictions or inconsistencies in the regulations that undermined the certainty of the agency’s interpretations. The court points to language in the preamble where the EPA makes references to “consume” in lieu of “use” in a discussion of the operations of pharmaceutical companies. Furthering HCC’s defense of confusion, the court acknowledged this as providing conflicting interpretations of “use” in the NESHAP itself.

The third factor favoring a regulatory confusion defense was an agency department or official expressing a contradictory interpretation. Perhaps the event that sealed the EPA’s fate was the Texas Air Control Board’s (TACB) inaccurate explanation of an EPA letter given to the HCC Texas plant officials. As the EPA’s authorized Texas state agency, the court felt TACB’s opinion was official agency communication. Although TACB did not govern the Celriver, South Carolina plant, this gave HCC reason to believe that its own

129. Hoechst, 128 F.3d at 224.
130. Id. at 222. Establishing the exemption, the EPA considered two alternative approaches for setting the 1,000 megagram per year cut-off: (1) number of sources at a plant site, and (2) benzene usage per plant site. The EPA rejected a cut-off based on the number of sources because it would not be as easily understood as usage per site. The exemption was based indirectly, though, on the analysis of equipment count and emissions. See Hoechst, 964 F. Supp. at 974.
131. Hoechst, 128 F.3d at 225.
132. Id.
133. Id.
134. See Hoechst, 128 F.3d at 225; see also General Elec. Co. v. E.P.A, 53 F.3d 1324, 1329-32 (D.C. Cir. 1995) (explaining the regulation’s lack of clarity is heightened by confusion among the EPA’s Regional offices).
136. Id. at 226.
137. Id. However, the TACB’s interpretation was not enough to sustain the defense in the second time period, that is after HCC received notice from the EPA regional office with authority in South
interpretation of the exemption, equating use to consumption, was accurate. A regulated party cannot be expected to second-guess an interpretation if it comes from a governmental body empowered to enforce the regulation.

This third factor was a subjective look at the regulated party's perception of the agency's actions. Alleged inconsistent opinions given to other owners and operators did not have an influence on the decision. The court was only concerned with the instances that shaped HCC's comprehension of the exemption. After HCC was contacted by its governing EPA agency, it did not know of the other internal agency conflicts over the proper reading of the exemption. Therefore, HCC could not have relied on these instances to formulate its own understanding.

Finally, a court will consider any efforts to communicate made by the agency prior to the enforcement action. Since HCC declared the exemption was self-executing, it did not file any reports with the EPA Region IV office prior to 1989. Thus, between 1984 and 1989, the regional EPA office did not take any steps to alert HCC of its misinterpretation of the law. The court found that the EPA did not clearly establish an application procedure for determining exemption status. Therefore, it was their responsibility to contact companies potentially regulated by the NESHAP. The court found HCC was effectively put on notice by the direct communication from the Region IV office in 1989. Thus, despite the continued existence of the other factors, the expressed interpretation from the authorized agency will put a company on notice of a violation.

Carolina. Id. at 228-29.
138. Id.
139. Id. at 227-28.
140. Id. at 228.
141. Id.
142. Id.
143. See Hoechst, 128 F.3d at 227-29. It is well established that "even if the agency has not given notice in the statutorily prescribed fashion, actual notice will render that decision harmless." Id. at 229 (quoting Riverbend Farms, Inc. v. Madigan, 958 F.2d 1479, 1487 n.7 (9th Cir. 1992)).
144. Id. at 220.
145. Id.
146. Id. at 226.
147. Id. at 226-27.
148. Id. at 229.
C. The Missing Element: The Reasonableness of the EPA’s Interpretation

While the factors used above presented a favorable case for the regulatory confusion defense in this decision, they lacked a commonality with virtually all other holdings in this scope of cases. That is, most successful regulatory confusion defenses involve an agency interpretation that is less reasonable than the regulated party’s interpretation. However, courts are forced to yield to the long standing agency deference principle.

This element has been a factor that weighs heavily in the analysis of other circuit court decisions. For example, in General Electric Co. v. EPA, the D.C. Circuit Court of Appeals addressed the regulatory confusion issue to resolve whether distillation was a proper means of disposal of hazardous polychlorinated biphenyl (PCB) according to the Toxic Substances Control Act. The court held that despite the arguable superiority of General Electric’s interpretation, principles of deference dictated that the EPA’s interpretation would prevail. In a prior case, Rollins Environmental Services, Inc. v. EPA, the D.C. Circuit held that no reasonable reader of the provision could have known that the EPA’s current construction was what the agency originally must have had in mind. The EPA’s construction was considered “strained” while the one advocated by Rollins was “reasonable.” Nevertheless, the court upheld the EPA’s

150. Id.
151. See, e.g., Rollins Envtl. Servs. Inc. v. EPA, 937 F.2d 649, 652 (explaining that in a competition between possible meanings of a regulation, the agency’s choice receives substantial deference). But see United States v. Trident Seafoods Corp., 60 F.3d 556, 559 (9th Cir. 1995), cert. denied, 117 S. Ct. 944 (1997). “No deference is owed when an agency has not formulated an official interpretation of its regulation.” Id. “Thus, [t]he responsibility to promulgate clear and unambiguous standards is on the [agency].” Id. (quoting Marshal v. Anaconda Co., 596 F.2d 370, 377 n.6 (9th Cir. 1979)).
152. 53 F.3d 1324, 1326 (D.C. Cir. 1995).
153. Id. at 1326–27.
154. Id.
156. Id. at 652.
157. Id.
interpretation based on the doctrine of agency deference.\(^{158}\)

Another decision that clearly illustrates a reluctance to defer to the agency interpretation of its own regulation is \textit{Beazer East, Inc. v. EPA}.\(^{159}\) Here, the Third Circuit upheld the EPA’s interpretation of the phrase “provide structural support,” in the definition of tank to mean completely self-supporting.\(^{160}\) The court expressed its reluctance however, by noting in the opinion that the regulation at issue “has generated much controversy and uncertainty within the regulated community. It is something of a mystery, therefore, why action has not been taken to make it clearer.”\(^{161}\)

The clear distinction between the above decisions and the case at bar is that in \textit{Hoechst}, the Fourth Circuit found the agency interpretation to be the better of the two possible readings.\(^{162}\) The court stated, “[r]egulations designed to reduce the risk posed by this carcinogen should logically treat new and recycled benzene alike.”\(^{163}\) This conclusion was insignificant in resolution of the fair notice issue.\(^{164}\) Since the regulation was interpreted by the court from an objective standpoint, it did not leave room for analysis into HCC’s expertise on the subject of the regulation. This illustrates the strictness of the standard with which a regulation must be promulgated to withstand a regulatory confusion defense in the Fourth Circuit. The existence of another permissible reading is sufficient to create the uncertainty, which favors a finding of regulatory confusion.

In contrast, a subjective analysis of the adequacy of the regulation on its face would more accurately evaluate the regulated party’s position. For instance, HCC was in the business of processing acetic anhydride that was cleaned with a steady stream of benzene.\(^{165}\) In holding that the company lacked fair notice of the intended reading of the regulation, the court never considered HCC’s expert knowledge in the chemical industry and its hazardous potentials.\(^{166}\) As the NESHAP preamble reads, “the exemption was designed as a ‘small plant

\(^{158}\) Id.
\(^{159}\) 963 F.2d 603 (3d Cir. 1992).
\(^{160}\) Id. at 605-06.
\(^{161}\) Kilbert and Helbling, \textit{supra} note 5, at 458 (quoting \textit{Koppers Co.}, 88-4 RCRA Appeal 130, 138 n.13 (Mar. 21, 1990)).
\(^{162}\) United States v. Hoechst Celanese Corp., 128 F.3d 216, 221 (4th Cir. 1997).
\(^{163}\) Id.
\(^{164}\) Id. at 224.
\(^{165}\) Id. at 220.
\(^{166}\) Id. at 224-30.
exemption’ intended to exclude ‘most research facilities, pilot plants, and other intermittent users of benzene.” The HCC Celriver plant certainly is not an intermittent user of benzene, nor is it unfamiliar with the characteristics of the volatile liquid benzene. Thus, it is not unreasonable to suggest that HCC knew, as easily as the court did, that re-circulated benzene is just as likely to leak through pipes and valves as new benzene. With an objective inquiry, the court ignored the knowledge the defendant possessed and declared the exemption unclear. Perhaps there should not be an objective, reasonable person standard for the regulatory confusion defense when the regulated party is an expert.

In tort law, the courts apply a heightened standard when the subject possesses superior knowledge or skill. Since the reasonable person is expected to use all of the knowledge and skills she possesses, consideration of the defendant’s special qualities is consistent with the objective standard. Similarly, when a party whose acts are regulated by an environmental statute asserts a defense of confusion, the courts should evaluate the party in light of their superior knowledge and skills. The essence of a confusion defense calls into question these very qualities.

Neither the Fourth Circuit, nor the preceding regulatory confusion cases, considered the potential abuse the current standard of review may instigate in the companies regulated by various environmental regulations. In the event that a company finds an ambiguity in the reading, in good faith, it may be compelled

167. Id. at 221. While the court did use this to shore up its agency deference holding, it did not consider it a factor in the fair notice analysis. Id. at 221-30.

168. Id. at 222.

169. See Hoechst, 128 F.3d at 221. In the agency deference analysis, the court finds the EPA interpretation to accord with the purpose of the NESHAP exemption, but did not find it significant to the objective fair notice standard. Id.

170. Id. at 224-25. The court briefly disposes of the EPA’s argument that ignorance of the law is no defense. The court recognizes that it is crucial to examine the particular situation of the defendant but continues with an objective analysis of the regulation. Id.


172. Id.

not to ask for clarification of the standard.\textsuperscript{174} For instance, upon asking for clarification, a company is then effectively given fair notice of what the law requires or prohibits, and the company must comply or it will be in violation. If a company elects not to ask for clarification, however, and continues operating under the assumption that its reading of the regulation is proper, then the company is not put on notice until the agency contacts them.

By making the standard of review for a regulatory confusion analysis a subjective inquiry, regulated parties would err on the side of compliance, rather than noncompliance with an ambiguous regulation. Presently, the Fourth Circuit's standard remains: the regulated party, acting in good faith, must be able to identify with ascertainable certainty, the standards with which the agency expects the party to conform.\textsuperscript{175} This standard could easily be interpreted to allow for a consideration of the regulated parties expertise in future decisions.

\textbf{D. A Problem for the Future: What Constitutes an Authoritative Interpretation?}

An additional flaw in the court's analysis was the failure to set a clear test for determining that an agency interpretation is authoritative, and thus constitutes constructive notice. As pointed out by Justice Neimeyer's dissenting opinion, in holding HCC liable for violations after 1989, the majority penalized the company for following one EPA Region's interpretation over another.\textsuperscript{176} The notice HCC received in 1989 was a written letter from the Director of the EPA Region IV explaining the proper method of measuring benzene use to determine exemption status.\textsuperscript{177} Considering the various contradictory EPA interpretations, it is arguable that this statement was not sufficient to put HCC on notice. The Fourth Circuit's ruling implies that any notice from the governing regional office is authoritative, despite the source of the statement within the office.\textsuperscript{178} This could lead to confusion in future cases where there is inconsistency among one regional office, because it seems any representative of the agency can purport to give an

\begin{thebibliography}{99}
\bibitem{174} See Strand, \textit{supra} note 8, at 10337 (discussing the argument that sanctions, including civil penalties, are necessary to assure that regulated entities have sufficient incentive to comply with the law).
\bibitem{175} \textit{Hoechst}, 128 F.3d at 224.
\bibitem{176} \textit{Id.} at 231.
\bibitem{177} \textit{Id.} at 227.
\bibitem{178} See Kilbert and Heilbling, \textit{supra} note 5, at 472.
\end{thebibliography}
It has been suggested that, in the event of such inconsistencies, only an official statement from the EPA nationwide or a final decision from a court can provide fair notice to the regulated party.\textsuperscript{179} The Fourth Circuit did not find it necessary to address this since HCC received only one statement from an official of the governing EPA Region.\textsuperscript{180} In the future, however, a situation may arise where more than one interpretation is given by the same regional office and the court will be forced to provide a more clear cut definition of authoritative communication.\textsuperscript{181}

CONCLUSION

Despite these noted shortcomings, the \textit{Hoechst} decision was a strong case in the tradition of regulatory confusion. The holding reconciles two doctrines filled with internal tensions, each of which has the potential of destroying the other. The Fourth Circuit took two steps further in defining the regulatory confusion doctrine. First, the court found a lack of fair notice in the first time period,

\textsuperscript{179} \textit{Id.}
\textsuperscript{180} \textit{Hoechst}, 128 F.3d at 229.
\textsuperscript{181} \textit{See} Major Anderson-Lloyd \textit{United States v. Hoechst Celanese Corp.: Challenging Inconsistent Interpretations by EPA Regions}, 1998-SEP \textit{Army Law.} 50, 50-51 (1998). This issue is of interest to any regulated entity that operates in more than one EPA Region. \textit{Id.} Since EPA's regions are not contiguous with federal judicial circuits, there is a real operational impediment when a federal appeals court upholds a regional interpretation that is then controlling in that circuit's jurisdiction when there are conflicting regional interpretations. \textit{Id.}
despite the reasonableness of the agency's interpretation.\textsuperscript{182} Second, the court declared a statement from a Regional office sufficient to provide notice to a regulated entity despite previous contrary interpretations from the agency.\textsuperscript{183}

In light of this analysis, the fair notice doctrine remains the primary focus of a court reviewing a regulatory confusion issue. Agency deference plays a role in the due process analysis, but does not have the strength to uphold a violation without constructive notice. Thus, to ensure environmental control, the EPA must enact crystal clear regulations, free from any other permissible interpretations. Otherwise, the situation that arose in \textit{Hoechst}, where one of the largest contributors of fugitive emissions in the United States from 1987 through 1993 avoided liability by using the regulatory confusion defense,\textsuperscript{184} will inevitably rise again.

\textsuperscript{182} \textit{Hoechst}, 128 F.3d at 224-25.

\textsuperscript{183} \textit{id.} at 228-29.

\textsuperscript{184} \textit{id.} at 219-23.
RLTD RAILWAY CORPORATION V. SURFACE TRANSPORTATION BOARD: A JURISDICTIONAL DERAILMENT—HAS THE SIXTH CIRCUIT THROWN THE SWITCH ON THE CONGRESSIONAL POLICY OF PROMOTING “RAILBANKING,” THE CONVERSION OF ABANDONED RAILROAD TRACKS INTO RECREATIONAL HIKING AND BIKING TRAILS?

by Robin W. Foster

“If Justice Douglas has his way--
O come not that dreadful day--
We’ll be sued by lakes and hills
Seeking a redress of ills.
Great mountain peaks of name prestigious
Will suddenly become litigious.
Our brooks will babble in the courts,
Seeking damages for torts.
How can I rest beneath a tree
If it may soon be suing me?
Or enjoy the playful porpoise
While it’s seeking habeas corpus?
Every beast within his paws
Will clutch an order to show cause.
The courts, besieged on every hand,
Will crowd with suits by chunks of land.
Ah! But vengeance will be sweet,
Since this must be a two-way street.
I’ll promptly sue my neighbor’s tree
For shedding all its leaves on me.”


1. 166 F.3d 808 (1999).
The fact is that the laws of the land have seldom if ever recognized absolute rights. It might almost be said today that the more absolute the control that the law grants, the less likely it is to mean very much: that is, the more important the thing in which property is claimed, the greater the probability that the law will also limit its use, enjoyment and disposal.  

I. INTRODUCTION

A. Overview

Throughout the colorful history of the common law in the United States, few areas of controversy have incited a greater outpouring of emotion, or generated more divisiveness, than disputes over ownership of private property and the extent to which such interests may be limited in some manner by public access needs or demands. As one academician has observed: “[T]he basic problem of property law in general is nothing more or less than determining the relation of the individual to the community with regard to the use and exploitation of resources.”

Indeed, as the poem and the quotation preceding the introduction to this article foretell, disputes over ownership of exclusive, private interests in land, on one hand, and reservations of an interest in such lands for public recreational use, on the other, frequently center on disagreement in regard to the scope of the public’s right to impinge upon private ownership for the benefit of the community at large. The essence of this quintessential form of conflict between private landowners asserting an unqualified right to exclude others, and the public’s need to place limits on private ownership, has never been more clearly evident than in the context of recent disputes over the conversion of abandoned railroad tracks into recreational nature trails for use by hikers and bikers.

Yet, before the substantive doctrines of property law can be applied to resolve heated controversies over environmental and/or public access restrictions on private property ownership, threshold procedural issues such as the doctrine of

“standing” must be addressed. The purpose of this article is to identify and analyze the issues of “standing,” as raised in the context of rail-to-trail conversions in a recent decision by the Sixth Circuit Court of Appeals, RLTD Railway Corporation v. Surface Transportation Board. This article will also endeavor to examine the likely impact this decision may have for future conversions of abandoned railroad tracks in Michigan and other Sixth Circuit jurisdictions.

The remaining portion of this introduction provides an overview of the statutory and case law history concerning rail-to-trail conversions. Section II of this article will recount the history of railroad rights-of-way leading up to the modern rails-to-trails movement in the United States, and will address congressional action affecting abandoned railroad conversions. Section III will briefly explain the facts before the court in RLTD Railway Corporation, and will examine the court’s holding. Section IV will analyze the likely impacts of this opinion. Section V will conclude with the observation that, subsequent to the RLTD Railway Corporation decision, parties wishing to effect a rail-to-trail conversion must still be concerned with state property law implications for a conversion, notwithstanding the fact that, taken together, the Supreme Court’s opinion in Preseault v. Interstate Commerce Commission and the congressionally enacted Rails-to-Trails Act purport to invoke federal preemption of state law in the context of a railroad track abandonment.

B. Statutory and Case Law History

In 1983, Congress passed the Rails-to-Trails Act, amending the National Trails System Act of 1968. This new amendment provided that any section of

6. “Standing” refers to a party’s right to make a legal claim or seek judicial enforcement of a duty or right. BLACK’S LAW DICTIONARY 1413 (7th ed. 1999). For example, to have standing in federal court, a party must be able to show: 1) that the challenged conduct has caused the plaintiff actual injury; and, 2) that the interest sought to be protected is within the zone of interests meant to be regulated by the statutory or constitutional guarantee in question. Id.
7. 166 F.3d 808 (1999).
8. Id.
11. Id.
railroad track for which active railroad use has been discontinued "shall not be treated, for any purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." In preventing abandonment and preserving railroad track rights-of-way for public use under the rubric of this "railbanking" statute, Congress identified two purposes sufficient under the Commerce Clause to justify the amendment: 1) to preserve established railroad rights-of-way for future reactivation of rail service; and, 2) to encourage development of additional recreational trails on an interim basis. Following the enactment of this statute, in 1990 the Supreme Court of the United States in the decision of Preseault v. Interstate Commerce Commission upheld the constitutionality of the Rails-to-Trails Act. The Act invoked a statutory presumption of non-abandonment for inactive sections of railroad tracks, notwithstanding colorable constitutional challenges to the statute as an uncompensated "taking" of private property without just compensation, and an invalid exercise of Congress' plenary power under the Commerce Clause.

14. "Railbanking" is the term that is applied when the government preserves by federal or state statute the right-of-way interest in an abandoned section of railroad tracks, for the purpose of allowing conversion of the abandoned section of tracks into a recreational trail. The tracks are "banked" in the sense that the government has preserved the right to reactivate the tracks for railroad use, if ever so needed, by permitting "temporary" use as a recreational trail. See 16 U.S.C. § 1247(d) (1994).
15. U.S. CONST. art. I, § 8, cl. 3. Under the Commerce Clause, Congress may preempt state laws by exercising its plenary power to regulate activity within the states, so long as the regulated activity is connected to the manufacture or sale of goods, or the provision of services, and there is some non-negligible impact across state lines. See Michigan Protection and Advocacy Serv., Inc. v. Babin, 799 F. Supp. 695, 732-33 (1992).
19. See generally Preseault v. Interstate Commerce Comm'n, 494 U.S. 1 (1990). The Court held that there was no uncompensated "taking" because the Tucker Act provides an aggrieved party with a remedy to seek compensation for the impingement on private property interests. Id. at 11-17. For a thorough discussion of "takings" under the United States Constitution, see RALPH E. BOYER, ET AL., THE LAW OF PROPERTY: AN INTRODUCTORY SURVEY §§ 12.2-12.3 (4th ed. 1991).
20. Preseault, 494 U.S. 1 (1990); see also U.S. CONST. art. I, § 8, cl. 3. Under the Commerce Clause a measure will be deemed constitutional so long as Congress offers a justification for the
The Preseault decision was widely regarded as a major victory by hikers, bikers, environmentalists, and other advocates for public reservation of interests in land for recreational use. In essence, the Court upheld the statutory mechanisms enabling state and local governments (or private parties) interested in converting abandoned railroad tracks into recreational trails to negotiate with railroads or their successors in interest to transfer ownership in the rights-of-way in the tracks. While there are unquestionably clear benefits to rail-to-trail conversions which inure to the benefit of the public at large, or at least to recreational users within the public sphere, owners of the underlying property interests have been critical of the Preseault opinion and have sought to limit its scope.

In January of 1999, the Sixth Circuit Court of Appeals published an opinion in the case of RLTD Railway Corporation v. Surface Transportation Board which appears to limit the practice of “railbanking,” as sanctioned by the Rails-to-Trails Act and the Preseault decision. The mechanism employed, a challenge based on the Surface Transportation Board’s failure to assert jurisdiction (i.e., a claim that RLTD lacked “standing” to assert a live controversy), is of particular interest to environmental advocates. This technique is important because challenges based on a lack of “standing” have become a common technique for defeating regulations on the use and ownership of private property. The issue of “standing” in a dispute over the right to limit use of

regulation that is rationally related to a legitimate purpose. See Babin, 799 F. Supp. at 733. For a thorough discussion of modern Commerce Clause jurisprudence, see id. at 731-33.

23. 166 F.3d 808 (1999).
25. See generally Claudia Polsky & Tom Turner, Justice on the Rampage, THE AMICUS JOURNAL, Summer 1999, at 34-5. This article discusses the Supreme Court’s recent decision in Steel Co. v. Citizens for a Better Env’t., 523 U.S. 83 (1998). In that opinion, Justice Scalia, writing for the Court, rejected the suit of a citizen’s action group because they “did not have ‘standing’ -- that is, the legal status necessary to sue... [because] any penalties would go into the U.S. Treasury [and] would not ‘redress’ past environmental injuries.” Id. at 34. Writing on behalf of the Natural Resources Defense Council, the authors of Justice on the Rampage point out that the issue of “standing” has become a hot topic for environmental advocates, and federal courts are divided on how to apply “standing” criteria in the context of citizen’s group suits. Id. The authors also note
private property was also recently raised in the 1992 Supreme Court opinion of
*Lujan v. Defenders of Wildlife,* where in dissent Justice Blackmun opined: "I
cannot join the Court in what amounts to a slash-and-burn expedition through the
law of environmental standing. In my view, 'the very essence of civil liberty
consists in the right of every individual to claim the protection of the laws when
he receives an injury.'" Notwithstanding Justice Blackmun's terse admonitions,
the Sixth Circuit's opinion is consistent with a posture of limiting the scope of
citizen's group suits which have sufficient "standing" to assert a claim. The
opinion calls into question the continuing vitality of the *Preseault* decision and
use of the Rails-to-Trails Act as a tool for the creation of recreational trails
along abandoned rail tracks.

II. THE HISTORY OF RAIL-TO-TRAIL CONVERSIONS

In the incipient years of industrial growth in the United States the steam
locomotive emerged as a vital tool in the development of the western territories.
It enabled the transportation of people and goods into areas previously beyond
the reach of traditionally used waterways. Indeed, during the period between
1830 and 1860 the amount of railroad track in the United States grew from a
mere 100 miles to over 27,000 miles. Realizing that rapid expansion in the use
of railroads to transport goods was quickly becoming a critical mode for trade
among and between the several states, Congress invoked its constitutional power
eminent domain to assert property rights in land needed to support a national
infrastructure of rail tracks. Therefore, pursuant to its plenary power under the
Commerce Clause to regulate interstate commerce, Congress regulated and
expanded the national railroad infrastructure with the passage of the Transportation Act of 1920. The Transportation Act attempted to define the scope of railroad property interests, and established a policy requiring a railroad that wished to abandon an inactive line to first file an application with the Interstate Commerce Commission for a certificate indicating that the railroad line was no longer needed for public use.

In so acting, however, Congress frequently failed to define clearly what type of property interests it intended to create. As a result, courts were left to interpret the scope of many congressionally created federal grants that were conferred upon the railroads. Initially, the Supreme Court construed these grants as property transfers in fee simple. Later, however, the Court reversed this interpretation, acknowledging that some of the railroad property interests created were merely fee simple determinable estates, or easements limited in scope to use for railroad purposes. The precise delineation of the type of property interest created can be critically important, because, absent federal preemption, the devolution of property interests under state law may follow very different dispositive rules. And, absent evidence of a deed transferring...
ownership of land in fee simple to a railroad, railroads generally have been regarded as owning a lesser estate, typically an easement in gross (often a prescriptive one which terminates in favor of the servient estate when abandoned), or some form of a fee simple determinable estate (which triggers a future interest). 41

By 1990, other methods of transporting goods had long since supplanted railroad common carriers as a preferred method of distribution. As a result, the national rail infrastructure had declined from a high of over 272,000 miles of track in 1920 to only 141,000 miles of track. 42 Experts predict abandonment of an additional 3,000 miles of track every year. 43 Because use of the railroads as

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interest that is personal in nature (e.g., only to Acme Railroad or their successors in interest); or it may limit the purpose for which the land may be used (e.g., to Acme Railroad, but only so long as the land is used for a public railroad right-of-way). Id. In such a case, if the limitation is violated, the terms of the original deed will usually direct disposition of the estate. Id. For example, the land underlying the right-of-way may revert to the owner of the servient estate as of the time the limited grant of use for railroad purposes was created, and therefore the right-of-way would pass to the owner in the chain of title of the original servient estate. Id. Alternatively, the deed may create a future interest in the grantor’s heirs. Id. If the language in the original deed fails to define what happens to the estate upon the occurrence of the determinable event, state property law concepts normally will determine how the interest passes. Id. In contrast to a fee simple determinable, an easement in gross (one not involving a corresponding dominant estate that is appurtenant to the servient estate) is generally not personal in nature: it confers an interest in the land and runs with the land. See BOYER, supra note 39, §§ 10.2-10.3. An easement in gross may be created by deed (i.e., by language explicitly creating a limited right of access across the land for certain purposes, such as a railroad right-of-way); or it may arise by operation of law, as occurs with a prescriptive easement. Id. Where an easement has been created, a legal issue often arises in regard to whether the scope of the easement has been exceeded. Id. If it has been exceeded, either the language of the deed (if so created) or the substantive property laws of the state in which the land rests will govern the passage of the underlying property interests. Id. Thus, in a circumstance where a railroad right-of-way is created by either a fee simple determinable or an easement, state property law concepts frequently will be very important in resolving ownership disputes, and results often will vary depending on the type of legal interest created.

43. Id.
the primary means of transporting goods has gradually been replaced as the
preeminent mode of shipping, a concomitant trend of abandoning old railroad
tracks has emerged, inspiring litigation over who owns the abandoned land.
Purported owners of the underlying real property (owners in the chain of title to
the underlying land in the case of a right-of-way arising from a deed, owners of a
reversionary interest in the case of certain forms of fee simple determinable
estates, or owners of abutting property under certain state statutes and case law)
have from time to time asserted a legal claim to the underlying land where
railroad owners have abandoned tracks or discontinued active use.44

In an effort to foster a stated public policy of converting these abandoned
railroad tracks into hiking, biking, and recreational nature trails, Congress passed
the National Trails System Act (the "Trails Act").45 Subsequent amendments to
the Trails Act provided for a statutory presumption that railroad tracks connected
to the interstate rail network will not be considered abandoned unless and until
certain administrative criteria have been satisfied.46 Under the statute, a railroad
is presumed not to have abandoned tracks under its control.47 This presumption
holds irrespective of the fact that a railroad already has ceased operation along
the line, even if it has removed all track, ballasts and other physical incidents of
railroad track operation.48

To abandon a section of track, a railroad (or its successor in interest) must
apply to the Surface Transportation Board (hereinafter "STB," formerly the
Interstate Commerce Commission, hereinafter "ICC")49 for a Certificate of
Interim Trail Use or Abandonment (hereinafter "CITU").50 Or, in a proceeding
involving exemption of a route from STB regulation, a railroad may instead file
for a Notice of Interim Trail Use or Abandonment (hereinafter "NITU").51 The
CITU or NITU then provides a 180 day period for the railroad to discontinue

44. See generally id.
46. See 16 U.S.C. § 1247(d) (1994); see also Preseault, 494 U.S. at 7 n.5.
47. Id.
48. Id.
to the ICC Termination Act of 1995, the Interstate Commerce Commission ceased to exist and
authority over abandonment applications is now held by the Surface Transportation Board); see
50. See Preseault, 494 U.S. at 7 n.5.
51. Id.
service, cancel tariffs, salvage track and other equipment, and negotiate a voluntary agreement for interim use.\textsuperscript{52} If the railroad negotiates such an agreement, the right-of-way for interim use as a recreational trail under the statute is granted.\textsuperscript{53} However, if no agreement is reached upon expiration of the 180 day period following issuance of the CITU or NITU, the abandonment becomes effective, and the STB thereafter loses jurisdiction over the matter.\textsuperscript{54} Once jurisdiction is lost by the STB, federal preemption no longer obtains, and any property rights affected by abandonment are defined under the provisions of controlling state law.\textsuperscript{55}

III. THE FACTS AND HOLDING OF RLTD RAILWAY CORP. v. STB\textsuperscript{56}

On September 29, 1995, petitioner RLTD Railway Corporation (hereinafter “RLTD”) filed an application to abandon a segment of its rail line.\textsuperscript{57} On the same day, Leelanau Trails Associations (hereinafter “LTA”), a private party interested in operating a recreational trail on the section of track at issue, submitted a statement of willingness to assume managerial and financial responsibility for the track.\textsuperscript{58} Before the NITU could be issued, several parties filed objections to the abandonment, asserting that the stretch of track in question had been abandoned much earlier, and the ICC/STB therefore lacked jurisdiction over the matter.\textsuperscript{59} Following a lengthy review, respondent STB issued a decision in August, 1996, ruling that it lacked jurisdiction to issue the NITU.\textsuperscript{60} The STB subsequently reaffirmed this decision following a request to reconsider in October, 1997.\textsuperscript{61} RLTD appealed the STB decision to the Sixth Circuit Court of Appeals.\textsuperscript{62}

The 1996 STB decision, stating that it lacked jurisdiction, was based on a “de

\textsuperscript{52.} Id.
\textsuperscript{53.} Id.
\textsuperscript{54.} Id.
\textsuperscript{55.} Id. at 7-8.
\textsuperscript{56.} 166 F.3d 808 (1999).
\textsuperscript{57.} Id. at 811 (explaining that RLTD filed for an “out of service exception” under 49 U.S.C. § 10505 (1994), now § 10502).
\textsuperscript{58.} Id.
\textsuperscript{59.} Id.
\textsuperscript{60.} Id.
\textsuperscript{61.} Id.
\textsuperscript{62.} RLTD Ry. Corp., 166 F.3d at 810.
"de jure" abandonment: because there was some evidence that a predecessor in interest to RLTD had consummated an authorized abandonment in the late 1970's, the track appeared already to have been abandoned as a matter of law, and STB no longer had jurisdiction over the current application to abandon. The Sixth Circuit, however, in upholding the STB's opinion that it lacked jurisdiction over the abandonment application, relied instead on the October, 1997 STB opinion. This later STB opinion was based on a "de facto" abandonment: the court explained that "a de facto abandonment [had] occurred because the line was no longer 'linked to and part of the interstate rail system.'" In essence, the court held that because the section of railroad track in question had been cut off from any link to the interstate rail system, they "found that the railway would operate entirely within Michigan and would not sufficiently affect interstate commerce to bring it within its jurisdiction."

At first blush, the Sixth Circuit opinion's reference to a distinction between a "de jure" and a "de facto" abandonment may seem inconsequential. A "de jure" abandonment occurs when a statute or some other source of controlling law defines the terms under which abandonment will result. In contrast, a "de facto" abandonment refers not to a result arising from a statute or other source of law; rather, it arises because a factual condition exists (e.g., a section of track no longer connects to any interstate lines), even if no sources of law recognize the basis for the factual condition. Thus, while the concepts are similar insofar as they both operate to define whether or not the STB retains authority to exert jurisdiction, in practice recognition of a "de facto" standard grants the STB the ability to construe issues of law and issues of fact. As a result, discretion over the decision whether or not to exert jurisdiction is significantly broadened.

By affirming a "de facto" jurisdictional rule (i.e., that a rail track which is cut off from the interstate rail network is by definition considered intrastate, and thus the STB is entitled to assert a lack of jurisdiction to consider an abandonment

63. Id. at 812.
64. Id.
65. Id. (citing the language from the October, 1997 STB opinion).
66. Id. at 813 (citing Magner-O'Hara Scenic Ry. v. ICC, 692 F.2d 441, 445 (6th Cir. 1982), and 49 U.S.C. § 10501 (1994)).
67. Specifically, "de jure" is defined as an event or occurrence existing by right or according to law. See BLACK'S LAW DICTIONARY 437 (7th ed. 1999).
68. Specifically, "de facto" is defined as an event or occurrence existing in fact or having effect even though not formally or legally recognized. See BLACK'S LAW DICTIONARY 427 (7th ed. 1999).
application), the court rejected petitioner's argument that the "de facto" analysis requires a strained interpretation of the normal jurisdictional requirements.

The petitioners argued that the "de facto" interpretation represented an unwarranted extension of standing limitations, because it allows a railroad to avoid having to comply with the abandonment procedures required under 49 U.S.C. § 10903, by simply cutting off the section of track in question from the interstate rail network. 69 The court responded to this argument by asserting that there are also provisions in the general jurisdiction statute which confer on the STB "power [which] extends even to approval of abandonment of purely local lines operated by regulated carriers when, in the [STB's] judgment 'the over-riding interests of interstate commerce require it.'" 70 In short, the STB rejected the notion that a "de facto" abandonment rule would create an incentive for railroads to circumvent the Rails-to-Trails Act. 71 They answered this concern by pointing out that even in the case of a purely intrastate abandonment the STB retains discretion over whether or not to assert jurisdiction over the matter.

Next, the court rejected the argument that the National Trails System Act of 1968, 72 as amended by the Rails-to-Trails Act of 1983, 73 broadens the STB's compulsory jurisdiction as a matter of law. Petitioners argued that since the Act, as amended, explicitly protects a number of rail-trails that are entirely intrastate (e.g., the Florida National Scenic Trail), the Act clearly envisions an expansive (not a restrictive) interpretation of jurisdiction. 74 In spite of the logical import of this line of reasoning, the court rejected this analogy, asserting simply that the STB's refusal to invoke jurisdiction only needs to be reasonable. 75 And, said the court, a restrictive application of the intrastate exception, where "over-riding interests require it," is within this reasonableness requirement. 76

Finally, the court summarily dismissed petitioner's argument that "[The Railroad] has the power of eminent domain under Michigan law [i.e., because it acts as an agent of the government insofar as it acts pursuant to the

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69. RLTD Ry. Corp., 166 F.3d at 813.
70. Id. (citing Chicago and Northwestern Transp. Co. v. Kalo Brick & Tile, 450 U.S. 311, 320 (1981)).
74. RLTD Ry. Corp., 166 F.3d at 813.
75. Id. at 813-14.
76. Id.
Transportation Act] ... so when the need arises, the connection to the interstate line may be had." 77 In responding to the argument that the power of eminent domain and its implicit authority to reestablish an interstate connection in effect cures the "de facto" abandonment limitation on jurisdiction, the court simply pointed out that if this power was used as a basis for a jurisdictional rule, "there could never be any single-state segments that would not be subject to [STB] jurisdiction." 78

Similarly, the court rejected the notion that publication of Notice of Exemption and of Interim Trail Use or Abandonment in the Federal Register in October, 1995 (when RLTD initially sought a NITU certificate) constituted a binding decree. 79 Instead, publishing notice of the NITU was characterized as merely an administrative procedure giving notice to the public of the proceedings for abandonment. 80 It was not a binding decision, and the STB was free ultimately to reject the application. 81

IV. DISCUSSION AND ANALYSIS OF THE RLTD RAILWAY CORP. 82 OPINION

The opinion of the Sixth Circuit in affirming the STB's dismissal of RLTD's application for abandonment is troubling for a number of reasons. First, it vests excessive and unfettered discretion in the STB in deciding when to assert jurisdiction over an abandonment application. Second, it creates a mechanism for railroads to circumvent the policy of encouraging rail-to-trail conversions explicitly advanced by Congress in the Rails-to-Trails Act, 83 and affirmed by the Supreme Court in Preseault. 84 Third, it establishes a standard of review that is likely to reduce the level of uniformity in rail-to-trail conversion disputes. And, finally, it reinforces the restrictive notion of environmental standing originally

77. Id. at 814.
78. Id.
79. See RLTD Ry. Corp., 166 F.3d at 814. Petitioners argued "that 'the STB's reversal of the ICC October 1995 decision was arbitrary and capricious because the STB failed to identify any new relevant factors or evidence upon which it based its reversal.'" Id.
80. Id.
81. Id.
82. 166 F.3d 808 (1999).
propagated by the opinion in *Lujan v. Defenders of Wildlife*, and reaffirmed in *Steel Company v. Citizens for a Better Environment*, a restriction which has the effect of denying many environmental advocates access to the courthouse door.

A. Vesting Excessive & Unfettered Discretion in the STB

Circumspection, due to the prospect of vesting largely unfettered discretion in the STB on the one hand, and due to a concern for circumvention of the explicit congressional policy favoring rail-to-trail conversions on the other hand, characterizes two discrete but closely related concerns. The legal standard for conferring jurisdiction in railroad abandonment cases is primarily discretionary under the rule announced in the RLTD Railway Corporation opinion. As the court stated in the opinion of Magner-O’Hara Scenic Ry. v. Interstate Commerce Commission: “[T]he Commission [succeeded by the STB] also enjoys considerable discretion in its determination of jurisdictional facts . . . and a reviewing court should sustain the judgment of the Commission so long as there is ‘substantial evidence to support the order.’” Moreover, the reviewing court is required to give “considerable weight and due deference” not only to the Commission’s rendition of the facts, but also to its “interpretation of the statutes it administers.” This far-reaching standard of review vests in the STB the power to construe broadly not only jurisdictional law as applied in the context of railbanking conflicts, but also it grants the STB the power to construe jurisdictional facts in an unchecked fashion. In the context of a “de facto” finding of abandonment, for example, this standard grants wide latitude to the STB.

In contrast, having created a presumption of non-abandonment, the stated congressional policy of the Rails-to-Trails Act is to preserve rail corridors for future use, and to encourage interim conversion to recreational trails. Yet, by requiring a high degree of connection to the interstate railroad network, the STB...
can simply interpret a relatively common degree of fragmentation in rail lines as a factual finding that the section of track at issue is purely intrastate. In so holding, the STB can effectively terminate an application for abandonment and conversion of an unused track. This nearly unfettered discretion allows the STB to circumvent the spirit, if not the letter, of the Rails-to-Trails Act. Yet the Act was designed precisely to prevent railroad tracks from being deemed abandoned under state law and possibly reverting to the servient estate, or springing into the hands of a future interest holder. The STB might become more efficient in its administration of abandonment applications due to this unchecked discretionary power by declining to grant railbanking jurisdiction and quickly denying many applications. However, by allowing the STB to wield discretion over jurisdictional decisions in a manner that thwarts Congress' stated policy goal of encouraging rail-to-trail conversions, the cure may be worse than the malady of administrative inefficiency.

B. Concerns of Circumvention of the Rails-To-Trails Act

A similar circumvention mechanism is created by the court's liberal construction of a "de facto" abandonment standard: a railroad owner that desires to abandon tracks no longer in use can simply cut itself off from the interstate railroad network, thereby removing itself from the jurisdictional hold of the STB, and the concomitant federal preemption which was the purpose of the Rails-to-Trails Act. The court responds by claiming that this potential for bypass of the abandonment procedures set forth in 49 U.S.C. § 10903 is sufficiently accounted for by the discretionary language in the Act granting the STB power over "approval of abandonment of purely local lines . . . when in the Commission's judgment 'the over-riding interests of interstate commerce requir[e] it.'" This position is perhaps tenable, but it is not convincing.

While it is true that statutory discretion provides at least some check on railroad owners who might attempt to bypass the normal abandonment procedures, it does nothing to insure that the STB itself will not abuse its discretion (as explained in the preceding paragraphs). Nor does it provide any

93. Id.
94. RLTD Ry. Corp., 166 F.3d at 813.
95. Id.
96. Id.
clear set of guidelines for when the STB should step in. Rather, it is merely a “saving clause,” devoid of any meaningful standards. It is simply no answer to assert that a discretionary power to regulate intrastate lines will hold in check railroads seeking to circumvent the Rails-to-Trails Act. 97

To illustrate an example of the potential for circumvention, suppose that a hypothetical common carrier named the Acme Railroad Company operates a line between Cincinnati, Toledo and Detroit. Under the Rails-to-Trails Act, 98 Congress has expressed a clear intention to prevent unused sections of the track from reverting to owners in the servient estate’s chain of title, or springing into the hands of a future interest holder under the terms of a fee simple determinable, or even falling into the hands of abutting property owners by adverse possession or other state law remedies. 99 Instead, Congress envisions negotiations with organizations willing to use the old railways for recreational trails. 100 Yet, under the “de facto” abandonment standard recognized by the court, the hypothetical Acme Railroad Company might deliberately cut off a section of the track somewhere short of the Michigan/Ohio border, and so long as the track does not also connect to lines running into other states, Acme thereafter would be free to sell the severed section of track to the highest bidder.

Moreover, a railroad that uses this technique to manipulate STB jurisdiction will only be prevented from doing so in circumstances where the STB has a desire or incentive to invoke its discretionary power over purely local lines. Such incentives appear to be absent, given the STB’s pluralistic desires in handling railroad right-of-way conflicts: 1) to enhance administrative efficiency (i.e., to resolve claims quickly); and, 2) to avoid involvement in potentially highly politically charged public policy debates (i.e., whether recreational use interests should be superior to the rights of private landowners). In pragmatic effect, recognition of a “de facto” abandonment mechanism allows railroad owners to circumvent federal law when private sale or state law remedies are more attractive. While the railroads and private landowners often profit in this arrangement, the public loses access to a potentially valuable natural resource. Moreover, to the extent that the railroad rights-of-way were created by federal grants a hundred or more years ago, expressly for the purpose of encouraging

98. Id.
100. Id.
economic and industrial growth and prosperity for the benefit of our growing nation, that policy cannot be said to be advanced by a "de facto" abandonment provision which instead favors the purely economic interests of private landowners.

C. Lack of Uniformity in Abandonment Cases

A third concern with the Sixth Circuit's decision in *RLTD Railway Corporation* is that it establishes a standard of review that is likely to reduce the level of uniformity in rail-to-trail disputes, because conflicts frequently will be decided under state law in cases where the STB has failed to invoke jurisdiction. Under the Rails-to-Trails Act, Congress vested in the federal government vis-à-vis the STB the authority to preserve property interests in abandoned railroad tracks to be converted for interim use into recreational trails. However, by limiting the occasions under which the STB must properly invoke jurisdiction (i.e., compulsory jurisdiction), and by further granting ample discretion to the STB in circumstances where a grant of jurisdiction is merely permissive, the court leaves for determination under state law the outcome of many railbanking claims. Where the ownership of a property interest in a right-of-way hinges on state law concepts of whether or not the right-of-way has been abandoned, disparate outcomes are quite likely.

In a sense, Congress has opted for a doctrine of selective federal preemption, as opposed to field preemption. While such a strategy is clearly within the

101. See Drumm, *supra* note 22, at 159 n.11 (citing 2 Jackson J. Spielvogel, *Western Civilization* 718 (2d ed. 1994)).
102. 166 F.3d 808.
104. Id.
105. As the foregoing analysis makes clear, the STB exercises broad discretion in deciding whether or not to accept jurisdiction in an abandonment application. The principal case makes plain that acceptance of jurisdiction over an abandonment application is frequently not compulsory. The principal case does not attempt to define a bright-line rule for when jurisdiction is in fact compulsory, and this article does not endeavor to accomplish this task either. This article merely asserts that a bright-line rule for compulsory jurisdiction is needed.
ambit of constitutionally authorized powers vested in the federal government under Congress' power to regulate interstate commerce, failure to exercise full field preemption necessarily implies the risk of a lack of uniformity in construing ownership of railroad property interests. Indeed, many of the jurisdictions that comprise the Sixth Circuit are characterized by very different state law presumptions regarding what happens to abandoned railroad tracks. There are significant variations in presumptions under Ohio, Tennessee, and Michigan laws.

In Ohio, for example, non-use is not a sufficient condition to cause abandonment of a railroad right-of-way. To establish abandonment of a railroad right-of-way under Ohio law, the party seeking a declaration of abandonment must prove: 1) non-use, and 2) intent to abandon. Moreover, even though the original interest was merely a prescriptive easement in gross, and not a fee simple determinable, the change from use as a railroad to use as a recreational trail does not exceed the scope of the easement. Where an easement is created by deed, facts that show both non-use and an intent to abandon are sufficient to discharge the burden of the easement, and possession reverts to the owners of the servient estate. Prior to abandonment of a railroad right-of-way, federal law preempts devolution of an easement or a fee simple determinable in accord with state law doctrines. However, nothing in the federal Rails-to-Trails Act preempts Ohio law from determining the creation and dimensions of residual property rights, which are defined by state law.

In contrast, in Tennessee if the deed creating an easement specifically reserves the right to the easement upon extinguishment, the terms of the

109. Id. at *2-3.
110. Id.
113. Id.
document are controlling. However, absent a specific reservation of rights by the original owner, an abandoned easement reverts to the owner of the fee simple estate (i.e., the possessory estate) at the time of the abandonment, and not to the original owner of the servient estate or her heirs. Where railroads or highways border land divided into more than one adjoining estate, there is a presumption in favor of dividing the land upon which the abandoned road or railroad track rests at the centerline, with abutting land owners each taking their respective shares. As stated in Stokley v. Loudon: "It is a rule of property law in Tennessee that a person conveying land bounded by or abutting upon a highway or railroad right-of-way intends to convey to the center line of the underlying fee in the absence of a clear intention expressed by the grantor to the contrary."

In Michigan, the state has enacted its own statutes to govern property rights and interests coincident to an abandoned railroad right-of-way. In a manner analogous to federal preemption of state law under the Rails-to-Trails Act, the Michigan Trailways Act (a state statute) was held to preempt local zoning ordinances that attempt to limit the scope of conversions of abandoned railroad tracks into recreational trails. As Michigan attorney Lawrence P. Hanson explained:

"[I]n this state and others the character of the title taken to the [railroad right-of-way] strip depends upon the language of the conveyance. Where the grant is not of the land but is merely of the use of the right of way, or, in some cases, of the land specifically for a right of way, it is held to convey an easement only.

Thus, while similar state property law concepts may underlie the Michigan

116. Id.
118. Id.
Trailways Act statute, a result different than what might occur in neighboring Sixth Circuit forums is possible, and indeed, quite likely.

D. Restrictive Notions of the Doctrine of Standing

A final criticism of the RLTD Railway Corporation decision is that it reinforces a restrictive notion of environmental standing, first propagated by the Supreme Court in the opinion of Lujan v. Defenders of Wildlife, and recently reaffirmed in Steel Company v. Citizens for a Better Environment. This view has the effect of denying many environmental advocates access to the courthouse door. As explained by Claudia Polsky and Tom Turner, writing in the NRDC publication The Amicus Journal, federal district courts are strongly divided on the issue of whether or not citizen’s groups can assert claims on behalf of the environment where the parties sued come into technical compliance after litigation is initiated. The RLTD Railway Corporation opinion supports the proposition that jurisdictional limitations may prevent reliance on the Rails-to-Trails Act by advocates for recreational use (such as, for example, the Rails to Trails Conservancy). In turn, this opinion reinforces the legitimate concerns of environmental advocates in regard to the growing jurisprudential trend of restricting access to federal courts by redefining the concept of environmental standing. Following the trend toward stricter standing requirements for environmental citizen’s action organizations, the less permissive approach adopted by the Sixth Circuit may be anticipated to have a ripple effect for similar environmental citizen’s actions. This represents a significant limitation on the power to redress injuries to the environment, or to promote environmental policy

124. 166 F.3d 808 (1999).
126. 523 U.S. 83 (1998); see also supra note 25.
127. See generally Polsky & Turner, supra note 25, at 34-5.
129. The Rails to Trails Conservancy is a non-profit organization dedicated to development and expansion of a national system of bicycling and recreational trails by conversion of abandoned railroad tracks. RTC can be reached online at <www.railtrails.org>. It should be disclosed that the author of this article is a supporting member of RTC, and an active advocate for its mission.
130. Polsky & Turner, supra note 25, at 34-5.
objectives. The inability to hold in check private landowners whose actions harm the environment, or to expand public access to recreational resources, is a disturbing trend in the law of environmental standing.

V. CONCLUSION

The Sixth Circuit’s opinion in *RLTD Railway Corporation v. Surface Transportation Board* is troubling insofar as it represents an unwarranted extension of the trend toward limiting standing in civil actions, impinging on the public’s right to restrict certain private land ownership interests for the benefit of the environment and society at large. Specifically, the opinion reflects a trend toward vesting broad, indeed excessive and unfettered, discretion in the STB to decide whether or not to assert jurisdiction over any particular applicant seeking to abandon a railroad track and convert it to an interim use for recreational trails.

The reliance on a “de facto” abandonment mechanism to determine whether or not a potential abandoning railroad has standing to seek a NITU or CITU certificate is equally troubling. For example, a railroad owner might find that private sale arrangements or state property law remedies are more attractive than railbanking under the federal Rails-to-Trails Act. If this occurs, these same railroad owners will be free to bypass the Act by cutting off their connections to the interstate railroad network. While the language of the statute gives the STB limited power to intervene in purely intrastate matters, the constitutionality of such an arrangement is subject to attack under the Commerce Clause. Furthermore, the limited statutory discretion to intervene in intrastate matters is wholly lacking in guidelines that might indicate when the exercise of discretionary (i.e., non-compulsory) jurisdiction should be initiated.

A third problem with the strict jurisdictional interpretation of the Sixth Circuit’s “de facto” test is that it rejects a federal field preemption approach. Application of a “de facto” standard allows the STB to sit as judge and jury in rejecting jurisdiction over any particular dispute, and this broad power will inevitably result in many railbanking cases being decided under principles of state law. This is a prospect which contravenes Congress’ clear attempt to exercise its regulatory power in this area, and introduce uniformity into the laws governing conversion of old unused railroad tracks into new recreational hiking trails (while still preserving the trails for future railroad use if ever needed).

131. 166 F.3d 808 (1999).
A final concern with the strict jurisdictional interpretation of the Sixth Circuit in sustaining the STB's refusal to assert jurisdiction is that it represents a disturbing trend in the area of the law of environmental standing. Frequently attributed to Justice Scalia, post-modern jurisprudence on environmental standing has had the practical effect of favoring the interests of private landowners, while foreclosing litigation options for concerned citizens and environmental advocates.\textsuperscript{133} As Henry David Thoreau wrote in his famous essay, \textit{Walden}: "[Y]et we think that if rail fences are pulled down and stone walls piled up on our farms, bounds are henceforth set to our lives and our fates decided . . . but the universe is wider than our views of it."\textsuperscript{134} Thoreau's wisdom should serve as a reminder of the folly in relying solely on a system of laws which historically defines societal rights and duties largely in terms of the legal protections afforded to private landowners. Ultimately, such an antiquated view often will fail in its service to society as a whole. Sadly, on this count, the \textit{RLTD Railway Corporation}\textsuperscript{135} opinion appears to represent a retrenchment of historical favoritism toward property owners, and may indeed be a harbinger of darker days to come for those seeking to protect the environment or expand public access to land for recreational purposes through redress in the federal courts.

\begin{itemize}
\item \textsuperscript{133} \textit{See generally supra note 25.}
\item \textsuperscript{134} \textit{Henry David Thoreau, Walden} 264 (Barnes & Noble Classics ed. 1993).
\item \textsuperscript{135} \textit{RLTD Ry. Corp. v. Surface Transp. Bd.}, 166 F.3d 808 (1999).
\end{itemize}
HASTEE, INC.
Petitioner

v.

CHEMICAL ASTHMATICS ASSOCIATION, et al.
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

BRIEF FOR THE RESPONDENT
CHEMICAL ASTHMATICS ASSOCIATION, et al.

Christopher J. Combs
Ryan O. White
Counsel for Respondent
University of Dayton Law School
QUESTIONS PRESENTED FOR REVIEW

I. UNDER THE EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT OF 1986 (EPCRA), DOES A LOCAL ENVIRONMENTAL GROUP HAVE ARTICLE III STANDING TO MAINTAIN A CITIZEN SUIT AGAINST A CORPORATION WHEN THE CORPORATION CONSISTENTLY FAILS TO FILE REQUIRED INFORMATION ABOUT TOXIC CHEMICALS PURSUANT TO ENVIRONMENTAL LAW AND WHEN A MEMBER OF THE LOCAL ENVIRONMENTAL GROUP IS PERSONALLY INJURED BY THE CORPORATION'S FAILURE TO FILE?

II. UNDER THE EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT OF 1986 (EPCRA), DOES A PRIVATE CITIZEN HAVE THE ABILITY TO BRING SUIT WHEN A CORPORATION FAILS TO FILE REQUIRED ANNUAL EMERGENCY AND HAZARDOUS CHEMICAL INVENTORY FORMS AND TOXIC RELEASE FORMS FOR A PERIOD OF NINE YEARS AND ONLY COMES INTO COMPLIANCE AFTER NOTICE OF A PENDING SUIT IS RAISED?
OPINION BELOW

The United States District Court for the Northeastern District of Chase granted Hastee, Inc.'s motion to dismiss. The decision is contained in the record at page 1. The United States Court of Appeals for the Sixteenth Circuit reversed and remanded on appeal. The decision is contained in the record at page 11.

STATEMENT OF JURISDICTION

Respondent Chemical Asthmatics Association, et al., brought this action in the United States District Court, Northeastern District of Chase, for alleged violations of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), 42 U.S.C. §11046(a)(1)(iii) and (iv). The District Court granted Petitioner Hastee, Inc.'s motion to dismiss. The United States Court of Appeals for the Sixteenth Circuit reversed on standing grounds and remanded the case to the District Court. The United States Supreme Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1254. This Court invoked jurisdiction over this appeal pursuant to its grant of certiorari on December 15, 1998.

STATUTES INVOLVED

The relevant statutes are presented in full in Appendix A.

STATEMENT OF THE CASE

Petitioner, Hastee, Inc., is a medium sized company that manufactures widgets in Freshaire, Chase. (R. at 2). Petitioner has been in operation since 1989, and has recently expanded to over 250 employees. (R. at 2).

As a result of manufacturing widgets, petitioner utilizes many chemical agents, such as Sensitize. (R. at 2). Sensitize contains the chemical methyl-allergen, which is known to cause an allergic reaction within approximately twenty-percent of the public. (R. at 2). Despite the low levels of methyl-allergen produced by petitioner, the magnifying effect of the chemical can still seriously affect the respiratory system. (R. at 2).

Respondent, Chemical Asthmatics' Association (Chemical) is a local organization pursuing public chemical awareness through promotion of improved air quality. (R. at 4). Chemical's goal of improving air quality is furthered through recognizing debilitating effects of toxic chemicals present in the environment, such as methyl-allergen. (R. at 4).

In response to rising health, safety and environmental concerns, petitioner
began having trouble staying compliant with programs such as OSHA and the EPA. (R. at 2). For example, on December 24, 1997, one of petitioner’s own employees became extremely ill after being exposed to Sensitize. (R. at 2). Furthermore, this incident did not get reported to either Erik or Lyle Hastee, the two owners of the corporation. (R. at 2,3).

As a result of this incident, petitioner’s owners decided to hire a full-time individual to manage the health, safety and environmental program for the company. (R. at 3). Petitioner hired Rachel Carlson to take this position because she had extensive OSHA knowledge and one year of work experience; however, she had no knowledge about the requirements of the EPA. (R. at 3).

After commencing her employment at Hastee, Ms. Carlson began working on complying with OSHA standards; however, she did not put in the same efforts for the EPA. (R. at 3). For instance, Ms. Carlson received a notice from the EPA on May 12, 1998, explaining the Emergency Planning and Community Right-to-Know Act (EPCRA). (R. at 3). Ms. Carlson was aware that this act would likely require her to submit a chemical inventory; however, she decided to postpone this information and focus on other priorities. (R. at 3).

During August of 1997, one of the members of Chemical, Carol Brady and her family, decided to move to Freshaire, Chase. (R. at 3). The Brady family picked Freshaire because they heard that the air quality was excellent. (R. at 3). To secure that Freshaire was in fact a chemically safe community, Marsha Brady thoroughly studied the Internet for any reported information about chemicals within Freshaire as required by the EPCRA. (R. at 4). The Brady family was concerned about air quality because they had previously been affected by chemical sensitization, specifically methyl-allergen. (R. at 3, 4). In fact, Mr. Brady had become sensitized by methyl-allergen on several industrial construction sites; thus causing his wife and daughter to develop an allergic reaction to the chemical. (R. at 3, 4).

After moving to Freshaire, in May of 1998, the Brady family began experiencing breathing difficulty and adverse allergic reactions. (R. at 4). Despite efforts to minimize these reactions, the Brady family was unable to reduce their allergic effects. (R. at 4).

As a result, Mrs. Brady contacted her association president of Chemical to investigate the situation. (R. at 4). Soon after Chemical’s investigation, it was discovered that the petitioner had been in violation of EPCRA by being delinquent in filing annual emergency and hazardous chemical inventory and toxic release forms. (R. at 4, 5). The petitioner was delinquent in filing these forms from 1989 to 1998 because they were using reportable amounts of methyl-allergen. (R. at 5).
According to EPCRA's citizen suit provision, the filing of a lawsuit against a violator must give the EPA, the State, and the alleged violator 60-days notice. (R. at 5). On October 15, 1998, the Brady family, with help from Manly, commenced suit by giving the relevant parties notice. (R. at 5). As a result, the petitioner quickly filed Hastee's overdue forms on December 5, 1998 before the 60-day period expired. Thereafter, the petitioner moved to dismiss the case according to Federal Rule of Civil Procedure 12(b)(1) and (6), claiming the court lacked jurisdiction and cannot try a wholly past issue.

SUMMARY OF THE ARGUMENT

Chemical has adequate Article III standing pursuant to the U.S. Constitution to maintain this action, and can initiate a citizen suit of EPCRA for a wholly past violation. To test the standing issue of an environmental group under Article III requirements, three distinct factors are utilized. First, the plaintiff must show an injury in fact through the defendant's alleged conduct. Secondly, there must be a causal connection between the injury and the disputed conduct of the defendant. Lastly, the requested relief that the injured party is pursuing must likely redress the injury.

Under this tripartite analysis, Chemical satisfies the first prong because their organization was injured through the petitioner's delinquency in filing toxic chemical forms required by EPCRA. Furthermore, Mrs. Brady, a member of Chemical, additionally suffered an injury in fact through petitioner's delinquency. Secondly, the next prong of the tripartite test is satisfied because the injuries suffered by Chemical and the Brady family are directly traceable to the petitioner's failure to timely file as required by EPCRA. Thirdly, the last prong is met because the relief requested by Chemical can be redressed. Thus, Chemical has adequate Article III standing to maintain this action under EPCRA's citizen suit provision.

Chemical is allowed to maintain a citizen suit against petitioner for a wholly past violation pursuant to EPCRA. EPCRA allows citizens to bring suit for violations that are wholly past. A statutory interpretation of EPCRA includes a review of the purpose of the act, the plain language of the act, and a comparison to similar environmental statutes. Such an interpretation suggests that Chemical can maintain this suit despite petitioner's eventual compliance with EPCRA requirements. Additionally, allowing suit for wholly past violations does not defeat the notice provision of EPCRA. The notice provision allows the petitioner to comply with EPCRA, avoid further penalty, and provides the ability to settle prior to litigation. Notwithstanding petitioner's late filing, policy will dictate that
Chemical has the ability to maintain this suit. Therefore, under the citizen suit provision of EPCRA, Chemical can initiate this action against petitioner.

ARGUMENT

I. CHEMICAL ASTHMATICS ASSOCIATION HAS ADEQUATE ARTICLE III STANDING TO MAINTAIN THIS ACTION BECAUSE THEY CAN DEMONSTRATE AN INJURY IN FACT, A CAUSAL CONNECTION BETWEEN THE INJURY AND THE DISPUTED CONDUCT, AND THE ABILITY TO REDRESS THE RELIEF REQUESTED BY THE INJURY.

Chemical Asthmatics Association (hereinafter “Chemical”) qualifies for judicial review under the constitutional requirements of standing pursuant to Article III of the United States Constitution. Under 42 U.S.C. § 11046(a)(1), Congress granted authority to parties, such as Chemical, the ability to commence citizen suits against owners or operators of facilities under the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA) if they have appropriate Article III standing. Don’t Waste Arizona, Inc. v. McLane Foods, Inc., 950 F. Supp. 972, 980 (D. Ariz. 1997); Delaware Valley Toxics Coalition v. Kurz-Hastings, Inc., 813 F. Supp. 1132, 1139 (E.D. Pa. 1993). To determine whether an environmental group has adequate Article III standing, the Supreme Court has stated that persons must satisfy a number of elements. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). To survive the Court’s analysis, thereby establishing standing, the party must first show an injury in fact; second, there must be a causal connection between the injury and the defendant’s conduct or omissions; and finally, there must be a likelihood that the injury will be redressed by a favorable decision. Id. Chemical meets all of these elements, thus establishing appropriate Article III standing for judicial review in this action.

A. Chemical has standing to maintain this action because the petitioner’s conduct has adversely affected them thereby demonstrating an “injury in fact.”

Chemical has suffered an injury in fact through the petitioner’s action, thereby establishing the first prong of Article III standing pursuant to the U.S. Constitution. The Supreme Court has stated that only parties with a sufficient stake or interest in the litigation will qualify for standing under Article III of the U.S. Constitution. Lujan, 504 U.S. at 560. In order to establish standing, Chemical must show that they were adversely affected by the defendant’s

When a defendant failed to file required information about toxic chemicals pursuant to EPCRA, thereby inhibiting plaintiff’s ability to collect this information, an injury in fact was established for standing purposes. *Delaware Valley Toxics Coalition*, 813 F. Supp. at 1139-40 (holding that such a loss of information caused the plaintiff to suffer a legally protected injury). An organization that has been injured by a company’s failure to file information under EPCRA can also have standing to sue when an individual member of the organization has personally suffered as well. *Don’t Waste Arizona, Inc.*, 950 F. Supp. at 980 (finding that defendant’s violation of EPCRA that also affected an individual member of the organization was enough to establish the injury in fact requirement for Article III standing). *But see Lujan*, 504 U.S. at 562-67 (holding that no injury in fact was established for standing purposes when defendant’s violation was too speculative and did not directly injure any individual organization member).

In this case, Chemical’s goals are to collect chemical information, such as the methyl-allergen used by the petitioner, to promote improved air quality. (R. at 4). Petitioner’s failure to disclose their use of methyl-allergen to the EPA as required by EPCRA from 1989 to 1998 injured Chemical by minimizing their efforts to collect chemical data. (R. at 4, 5). To successfully promote the goals of the organization and improve air quality, Chemical must have access to all chemical data, including that of the petitioner. (R. at 4).

Similar to the EPCRA violation in *Delaware Valley Toxics Coalition*, Chemical has been injured by their inability to establish a sufficient chemical data table through petitioner’s delinquent filing of their forms. (R. at 4). Furthermore, as in *Delaware Valley Toxics Coalition*, Chemical has a right to a completely disclosed chemical inventory in order to promote their goals. (R. at 4, 5). Petitioner’s lack of filing has caused Chemical to suffer an injurious result, thereby hampering their goals and efforts as a local informative association. (R. at 4). Additionally, as seen in *Don’t Waste Arizona, Inc.*, Chemical has an individual representative member, Mrs. Brady, who has personally suffered from
the petitioner's violation of EPCRA. (R. at 4). Furthermore, this situation can be distinguished from *Lujan* because there is a direct injury in fact without any speculation, and Chemical has a personally injured individual in Mrs. Brady. (R. at 4, 5). Not only has the Brady family been personally injured by the release of methyl-allergen by the petitioner, the petitioner's delinquency in filing has caused the Brady family to move to Freshaire under the false notion that the air quality was excellent. (R. at 3, 4).

The lack of knowledge caused by petitioner's failure to disclose under EPCRA requirements have caused the entire Brady family to suffer adverse reactions to methyl-allergen, which could have been avoided by petitioner's compliance. (R. at 4). Also, the Brady family may have chosen not to build their home in this area had they known the true chemical breakdown in the Freshaire community. (R. at 4, 5). Thus, both Chemical and the Brady family were subjected to injury due to petitioner's violation of EPCRA. (R. at 4). As a result of this violation, an injury in fact is established against petitioners for failure to meet the EPCRA requirements. Therefore, Chemical has met the first requirement of the tripartite test of Article III standing by demonstrating an injury in fact.

B. Chemical has standing to maintain this action under EPCRA because there is a causal connection between the petitioner's disputed conduct and the injury Chemical has suffered.

There is a causal connection between the petitioner's failure to comply with the EPCRA requirements and the injury suffered by Chemical, thus Chemical meets the second requirement of Article III standing under the U.S. Constitution. In addition to having an injury in fact, Chemical must demonstrate that there is a fairly traceable connection between the injury and the disputed defendant's conduct. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Delaware Valley Toxics Coalition v. Kurtz-Hastings Inc.*, 813 F. Supp. 1132, 1140 (E.D. Pa. 1993). An injury that can be fairly traced to the challenged action under EPCRA will be sufficient to establish traceability for Article III standing. *Atlantic States Legal Found., Inc. v. Buffalo Envelope, A Div. of Am. Envelope Co.*, 823 F. Supp. 1065, 1071 (W.D.N.Y. 1993).

When a defendant failed to timely file information required by EPCRA about toxic chemicals used within the community, the court found that there was a direct causal connection between the plaintiff's injury and the defendant's disputed conduct. *Buffalo Envelope Co.*, 823 F. Supp. at 1071-72 (holding that a lack of knowledge about toxic chemicals due to defendant's failure to comply
with EPCRA directly interferes with plaintiff’s employment goals and duties as
an organization). Furthermore, a causal connection between a wholly past
violation of EPCRA by a defendant and a plaintiff’s injury did not deprive an
environmental group of Article III standing. Delaware Valley Toxics Coalition,
813 F. Supp. at 1140; see also Don’t Waste Arizona, Inc. v. McLane Foods, Inc.,
950 F. Supp. 972, 980 (D. Ariz. 1997) (holding that injury to an environmental
group is traceable to defendant’s conduct because the failure to comply with
EPCRA through not submitting required reports is directly connected to the
injury).

The petitioner was delinquent in filing forms pursuant to EPCRA from 1989
to 1998, and the facility was using a reportable quantity of methyl-allergen. (R.
at 2, 5). The petitioner’s were aware of this violation and only complied after
they were notified of a possible lawsuit. (R. at 5, 6). This violation directly
affected Chemical’s goals of disclosing such chemicals to the public in order to
promote improved air quality. (R. at 4). Furthermore, the interests of the Brady
family were affected after they falsely relied on the reported air quality of the
Fresaire community without realizing the petitioner’s use of methyl-allergen.
(R. at 3, 4). Both of these injuries were a direct result of the petitioner’s failure
to comply with EPCRA requirements. (R. at 4).

Similarly to Buffalo Envelope, Chemical has suffered an injury through their
lack of knowledge about the reportable chemical quantities that the petitioner has
used. (R. at 5). Chemical strives to promote air quality and help recognize and
control the debilitating effects of chemical asthma. (R. at 4). The only way
Chemical can completely and successfully reach these goals is by being fully
aware of all toxic chemicals used within the Fresaire community. (R. at 4, 5).
As seen in Buffalo Envelope, Chemical has been deprived of the “lack of
knowledge” element, which is crucial to achieving their goals. (R. at 4).
Additionally, as seen in Delaware Valley Toxics Coalition, Chemical can still
establish a connection between petitioner’s conduct and their injury for Article
III standing purposes despite the violation being wholly past. (R. at 5, 6). The
injury suffered by Chemical and the Brady family is still prevalent despite the
petitioner’s filing after receiving notice about the lawsuit. (R. at 6). Mrs. Brady,
as representative of Chemical, has suffered an injury by relying on falsely posted
information about Fresaire’s air quality, and thereby purchasing a house
subjected to high levels of methyl-allergen. (R. at 3, 4). Even though the
petitioner subsequently filed these reports, the injury to Chemical and the Brady
family was already present. (R. at 5, 6). Furthermore, these injuries could have
been minimized, if not eliminated, had the petitioners filed their reports as
federally required by EPCRA. (R. at 5). Thus, Chemical’s injury is directly
traceable to the petitioner's failure to comply with the requirements of EPCRA. Therefore, Chemical established a causal connection as required by the tripartite Article III standing test.

C. Chemical has Article III standing to maintain this action against the petitioner because Chemical's injury can be redressed by their requested relief.

The injury Chemical has suffered through the petitioner's failure to comply with the filing requirements of EPCRA can be redressed; thus, Chemical meets the final requirement of Article III standing. In establishing Article III standing under EPCRA, the relief requested must redress the injury the plaintiff has allegedly suffered. Friends of the Earth Inc. v. Laidlaw Envtl. Serv. (TOC), Inc., 149 F.3d 303, 306 (4th Cir. 1998); Allen v. Wright, 468 U.S. 737, 751 (1984). “The concept of standing focuses on the party seeking relief, rather than on the precise nature of the relief sought.” Jekins v. Mckeithen, 395 U.S. 411, 423 (1969). When a defendant filed delinquent forms under EPCRA after the plaintiff had filed a lawsuit, the court still allowed redressability. Delaware Valley Toxics Coalition v. Kurtz Hastings, Inc., 813 F. Supp. 1132, 1140 (E.D. Pa. 1993). The court found that the defendant can be required to pay civil penalties and “costs of litigation” to deter future threats of any violations despite the sum being payable to the U.S. Treasury. Id. at 1140, 1141; but see Steel Co. v. Citizens for a Better Env't, 118 S. Ct. 1003, 1018-19 (1998) (holding that relief cannot be allowed merely by paying the U.S. Treasury). When a plaintiff showed a direct injury fairly traceable to the defendant's conduct, the court allowed redressability through civil penalties, even if payable to the U.S. Treasury. Buffalo Envelope, 823 F. Supp. at 1072 (finding that civil penalties against a wholly past violation pursuant to EPCRA serve an important deterrent effect for future violations); but see Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 59 (1987) (finding wholly past violations do not necessarily give citizen standing).

In this situation, Chemical brought suit against the petitioners pursuant to the citizen-suit provision of EPCRA. (R. at 5). EPCRA allows a citizen to bring suit against a violator as long as he gives sufficient notice and can demonstrate the violation. (R. at 4, 5). The petitioner was delinquent in filing forms under EPCRA from 1989 to 1998; thereafter, Chemical brought suit against the petitioner after appropriately completing the appropriate citizen suit guidelines. (R. at 5). Similarly to Delaware Valley Toxics Coalition, deterring the petitioners from causing any future violations under EPCRA can redress the
harm to Chemical. (R. at 4, 5). As a result of the petitioners violating EPCRA for several years, it is likely that they may continue to violate the provision in the future. (R. at 5). Furthermore, the petitioners received notice through the newsletter “Compliance Alert” that they would be required to submit a chemical inventory; however, they continued to ignore this violation until the plaintiffs subsequently filed suit. (R. at 3, 5). The petitioner’s decision to ignore the required demand of compiling a chemical inventory demonstrates their lack of respect and priority in following the requirements of EPCRA. (R. at 3). Thus, deterring the petitioner from future violations can redress Chemical’s harm.

As demonstrated in Buffalo Envelope, Chemical can receive civil penalties and can be awarded litigation costs within a citizen suit despite paying the U.S. Treasury. (R. at 7). Furthermore, the harm to Chemical should be redressed because they appropriate followed the necessary steps required pursuant to the goals established in EPCRA’s citizen suit provision. (R. at 11, 12). Thus, Chemical can be redressed from the alleged wrong caused by petitioner’s violation of EPCRA. Therefore, Chemical has adequate Article III standing to maintain this action against the petitioner pursuant to the United States Constitution.

II. EPCRA AUTHORIZES A CITIZEN TO COMMENCE SUIT AGAINST A COMPANY FOR PAST VIOLATIONS WHEN THE COMPANY COMES INTO COMPLIANCE AFTER NOTICE OF INTENT TO SUE.

EPCRA is an informational statute designed to notify local communities and states of dangerous materials that are found in their region. The purpose of the act is to prevent disasters from occurring that would threaten human life. To assist the government in it’s endeavor of preventing disasters, Congress placed a citizen suit provision in EPCRA. 42 U.S.C. § 11046(a)(1) (1988). The plain language of this statute points to allowing citizens to sue for wholly past violations. Upon comparison to other environmental statutes, which provide citizen suits, authorization of citizen suits under EPCRA becomes apparent. Therefore, citizen suits for wholly past violations are authorized by EPCRA.

A. The purpose of EPCRA lends itself to citizen suits for violations that are wholly in the past.

EPCRA was added into the Superfund Amendments and Reauthorization Act (SARA) as a means to avoid catastrophic releases of chemicals into the
environment. Such an event took place in Bhopal, India in 1984 as Congress was preparing to amend the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"). 42 U.S.C. §§ 9601-75. To avoid such catastrophic chemical releases into the environment EPCRA has two primary purposes:

1. established programs to provide the public with important information on the hazardous and toxic chemicals in their communities, and

2. established emergency planning and notification requirements to protect the public in the event of a release of extremely hazardous substances.

Exec. Order 12,856, 58 Fed. Reg. 41,981(1993). Congress and the President indicated through passage of the act and the subsequent executive order that the consideration of a major disaster needed to be prevented.

In turn, the Environmental Protection Agency (EPA) makes the information from compliant companies available to the public and state and local agencies to prevent a disaster, such as Bhopal. Private citizens also use the information gathered. 42 U.S.C. § 11044 (1998).

The Brady’s are an example of how private citizens utilize this information. The Brady family, along with twenty percent of the normal healthy population, is allergic to methyl-allergen. (R. at 2, 3). While searching for a community to reside in, the Brady’s relied on information available on the Internet to determine if any companies were reporting the use of methyl-allergen as required by EPCRA. (R. at 3, 4). No company reported usage of methyl-allergen and the Brady family relied on the information to move to Freshaire. (R. at 4). This type of usage is envisioned by the purpose of the act to inform private citizens. Allowing a company to avoid liability for filing late would be plainly in conflict with this purpose of the statute. Additionally, by filing late, community and state emergency planning is defeated.

1. The Union Carbide facility in Bhopal, India had a release of a toxic pesticide which claimed the lives of 25,000 people. The company was also maintaining an identical plant in West Virginia, which also had a toxic chemical release. The company’s officials never notified the local authorities and 150 people were treated for exposure. Additionally, no nationwide plan was established designed to prevent a major disaster such as Bhopal. Rebecca L. Justice, Preserving the Citizen Suit Provision: Citizens for a Better Environment v. The Steel Company, 12 J. NAT. RESOURCES & ENVTL. L. 345, 346-47 (1997).
B. The plain meaning of EPCRA permits citizen suits for wholly in the past violations.

The plain meaning of EPCRA citizen suit provisions allows for wholly past violations to be litigated. EPCRA authorizes citizens to bring suit against “an owner or operator of a facility for failure” to comply with the reporting requirements of the statute. Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. § 11046(a)(1)(A) (1986). Additionally, the venue section of civil actions states that “alleged violation[s]” are to be raised in the district court in which the violation occurred. 42 U.S.C. § 11046(b)(1).


In previous district court cases, courts have held that the citizen suit provision permits wholly past violations based upon the statutory language. See, e.g., Delaware Valley Toxics Coalition, 813 F. Supp 1132, 1141 (E.D. Pa. 1993); Williams, 784 F. Supp. 765, 770 (N.D. Cal. 1992); Atlantic States Legal Found. v. Whiting Roll-up Door Mfg. Corp., 772 F. Supp. 745, 749-50 (W.D.N.Y. 1991). The Sixth Circuit decided against this string of district court cases by stating that the most natural reading of EPCRA’s citizen’s suit provision does not allow suits for historical violations. Atlantic States Legal Found. v. United Musical Instruments U.S.A., Inc., 61 F.3d 473, 477(6th Cir. 1995). However, the Seventh Circuit disagreed by looking at the whole statute to determine that wholly past violations are enforceable by citizens. Citizens for a Better Environment (CBE) v. Steel Co., 90 F.3d 1237, 1244 (7th Cir. 1996), cert. granted, 117 S. Ct. 1079 (1997), vacated on other grounds, 523 U.S. 83 (1998).

The words and clauses in disagreement are “failure to,” “under” and “alleged violation.” Failure means an “omission of performance of an action or task” or “the fact of non-occurrence.” WEBSTER'S THIRD NEW INT’L DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 815 (1993). “Under” in a statute means “in accordance with the requirements of that section.” CBE, 90 F.3d at 1243. Finally, the “alleged violation” provision of the venue section of EPCRA indicates past violations are to be heard by the courts because of the past tense nature of the wording. Id. at 1244. Taken as a whole, EPCRA allows for a citizen to sue an owner or operator for a failure to comply with requirements
under the statute and courts are allowed to hear these alleged violations of the statute.

In opposition to this analysis, the Sixth Circuit stated that this is a "hypertechnical parsing of the language." United Musical, 61 F.3d at 477. Courts have, however, used hypertechnical parsing of language to overturn criminal convictions, violations of environmental statutes and statutes in violation of the Constitution.

Chemical and the Brady family brought suit against Petitioner for failure to comply with EPCRA requirements. (R. at 5). Petitioner, realizing an error, submitted the paper work and did so just ten days prior to the end of the sixty-day notice period. (R. at 5). This late filing was after nine years of non-reporting to the EPA and state and local agencies as required by EPCRA. (R. at 5). Petitioner’s failure to comply with the statute gave rise to this suit. As an owner or operator of a facility, Petitioner is required to comply with EPCRA. Petitioner will point out that they came into compliance with EPCRA within the sixty-day period and, therefore, they are compliant. However, the plain language of the citizen suit provision allows for wholly past violation to be litigated. Thus, Chemical can maintain this action against Petitioner despite have a wholly past violation.

C. A comparison of other environmental statutes shows that Congress intended for EPCRA to allow citizens suits for past violations.

EPCRA’s citizen suit language, when compared to other environmental statutes, shows that Congress meant to allow citizen’s to sue for past violations. When interpreting language, the court should look to similar statutes to determine the ordinary usage. Bennett v. Spear, 117 S. Ct. 1154, 1162 (1997). EPCRA’s citizen suit provision states that a citizen can bring suit against an owner or operator for “failure to” comply with the reporting requirements of the statute. 42 U.S.C. § 11046 (a)(1)(A). The standard language used in other environmental statutes allows citizens to bring suit against those “in violation of” the statute.2 This difference between these statutes is significant. The exception to the “in

violation of” clause is the Clean Air Act (CAA), which Congress amended to allow citizens to bring suit for past violations. 42 U.S.C. § 7604(a)(1), (3) (1990).

The Court has ruled that when a statute entails just the “in violation of” clause, then wholly past violations are not allowed. Gwaltney v. Chesapeake Bay Found., 484 U.S. 49, 57 (1987). The Supreme Court, however, has not addressed the clause found in EPCRA. However, Justice Stevens’ concurring opinion in Steel Co. indicates that the Court may not exercise jurisdiction over citizen suits for past violations. Steel Co., 118 S. Ct. at 1031 (Stevens, J., concurring). Furthermore, Justice Stevens acknowledges a difference in the language between EPCRA and other environmental statutes. Id. However, the Court did not agree with Justice Stevens and only two other justices concurred with his view of wholly past violations. See Steel Co., 118 S. Ct. 1003, 1021. As a result, “[i]f citizen suits are barred for wholly past violations, then facilities have an incentive not to comply with reporting requirements until they have been caught.” Don’t Waste Ariz., Inc. v. McLane Foods, Inc., 950 F. Supp. 972, 979 (D. Ariz. 1997).

Comparing the language of the statutes is vitally important. Justice Stevens’ and the Sixth Circuit’s opinions point to Gwaltney as the deciding factor of EPCRA’s provision for wholly past violations. This analysis needs review in light of the purpose of the act, the language, and the statute’s history. By preventing wholly past violations to be litigated, companies will behave similar to Petitioner. Furthermore, they may not file until threatened with litigation. EPCRA was not intended to provide this loophole for violations. Congress passed EPCRA as a subtitle of SARA, thereby including CERCLA provisions for citizen suits. The language of that provision is identical to CWA by stating that citizen suits can only be brought against someone “in violation of” the statute. EPCRA makes no restriction; thus, Congress’ intent is clear. EPCRA’s citizen suit was intended to allow for past violations to be litigated and Chemical should be allowed to maintain this action.

III. ALLOWING WHOLLY PAST VIOLATIONS DOES NOT DEFEAT THE NOTICE PROVISION OF EPCRA.

The notice provision of EPCRA allows companies to achieve compliance with the statute. It is relatively easy to comply with EPCRA. The EPCRA notice provision does not eliminate wholly past violations. Rather, companies’ compliance is simple and expedited by the notice provision. Petitioner demonstrated the ease in which to comply, as nine years of non-filed toxic chemical release forms and inventory forms were filed within 50 days after nine
years of non-compliance. Therefore, Chemical’s notification of suit allowed petitioner to comply and past violations should still be litigated.

A. EPCRA is an informational statute that requires minimal effort to comply and notice of intent to sue allows companies to comply before litigation.

As an informational statute, compliance with EPCRA requires a minimal effort by a corporation. Items to be submitted under EPCRA include “toxic chemical release forms” and “inventory forms.” 42 U.S.C. §§ 11046(a)(1) (iii) and (iv). Local communities use these forms in planning. To comply with this act, a company will incur a minimal effort and cost:

For Form R, EPA estimates the industry reporting burden for collecting this information (including recordkeeping) to average 74 hours per report in the first year, at an estimated cost of $4,587 per Form R. In subsequent years, the burden is estimated to average 52.1 hours per report, at an estimated cost of $3,203 per Form R. For Form A, EPA estimates the burden to average 49.4 hours per report in the first year, at an estimated cost of $3,101 per Form A. In subsequent years, the burden is estimated to average 34.6 hours per report, at an estimated cost of $2,160 per Form A. These estimates include the time needed to review instructions; search existing data sources; gather and maintain the data needed; complete and review the collection of information; and transmit or otherwise disclose the information. The actual burden on any specific facility may be different from this estimate depending on the complexity of the facility’s operations and the profile of the releases at the facility.


This is a clear indication that compliance is not burdensome to complete. The information is, however, invaluable to local communities to plan for emergency situations. To eliminate citizen suits for wholly past violations will be to deter investigation into companies’ compliance by private citizen groups. This will defeat the purpose of the statute’s supplementary role envisioned by Congress and place the entire burden of monitoring companies on the EPA.

Petitioner was required to file both emergency and hazardous chemical inventory forms (Form R) and toxic chemical release forms (Form A). (R. at 5). The Petitioner may point out that compliance is difficult for a small company. However, the EPA report on compliance with EPCRA defeats this contention. Id. Additionally, Petitioner demonstrated the ease in which they could comply. (R. at 5). The notice provision allows for companies to comply with ease thereby preventing any further injury to the community. Without such a notice period, a company may not comply until full litigation of the matter and increase the risk
to the community. Therefore, Chemical’s notification to Petitioner does not defeat the notice provision.

B. The notice provision of EPCRA allows a company to comply with the statute and thereby avoid further penalties and settle the suit prior to litigation.

Notice provisions allow for companies to comply with a statute and avoid further penalties. EPCRA’s notice provision states that a plaintiff may not commence an action under the citizen suit provision prior to a 60-day notice period of the alleged violation. 42 U.S.C. § 11046(d)(1). Notice provisions allow for companies to come into compliance to avoid further penalties and to allow for settlement prior to trial. Citizens for a Better Env’t v. Steel Co., 90 F.3d. 1237, 1244 (7th Cir. 1996). The Court in Gwaltney noted a concern over the issue of a notice provision by looking toward a citizen group suing if an agency did not pursue civil penalties. Gwaltney, 484 U.S. at 60. However, the Court also noted that an agency action barred any use of a citizen suit. Id. at 59. By acting, an agency would in fact bar any citizen suit. 33 U.S.C. § 1365 (b)(1)(B) (1988).

In United Musical, the Sixth Circuit contended that the notice provision would be rendered useless if wholly past violations are litigated for EPCRA violations. 61 F.3d at 476-77. The court in this case chose not to use the language of the Clean Air Act which allowed for past violations and included a 60-day notice period. Id. In doing so, it noted that Congress would have amended EPCRA to allow for past violations. Id. However, each day a company is in violation of any environmental statute, a penalty is incurred if the EPA or the state decides to pursue such a course. CBE, 90 F.3d at 1244. The notice period gives violators an opportunity to fix any violation. Id.

In this case, Chemical gave the required 60-day notice. Petitioner used this time to cure their ongoing violation of the EPCRA. However, this cure did not correct the past violation and no agency action took place. Therefore, Chemical’s action for past violations should be continued.
CONCLUSION

For the foregoing reasons, Respondent Chemical Asthmatics Association, et al., respectfully requests that the judgment of the United States Court of Appeals for the Sixteenth Circuit be affirmed.

Respectfully submitted,

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APPENDIX A

STATUTORY PROVISIONS

28 U.S.C. § 1254. COURTS OF APPEALS; CERTIORARI; CERTIFIED QUESTIONS

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

EPCRA: 42 USC § 11046. CIVIL ACTIONS

(a) Authority to bring civil actions

(1) Citizen suits

Except as provided in subsection (e) of this section, any person may commence a civil action on his own behalf against the following:

(A) An owner or operator of a facility for failure to do any of the following:

(i) Submit a follow-up emergency notice under section 11004(c) of this title.

(ii) Submit a material safety data sheet or a list under section 11021(a) of this title.

(iii) Complete and submit an inventory form under section 11022(a) of this title, containing tier I information as described in section 11022(d)(1) of this title unless such requirement does not apply by reason of the second sentence of section 11022(a)(2) of this title.

(iv) Complete and submit a toxic chemical release form under section 11023(a) of this title.

(B) The Administrator for failure to do any of the following:
(i) Publish inventory forms under section 11022(g) of this title.
(ii) Respond to a petition to add or delete a chemical under section 11023(e)(1) of this title within 180 days after receipt of the petition.
(iii) Publish a toxic chemical release form under 11023(g) of this title.
(iv) Establish a computer database in accordance with section 11023(j) of this title.
(v) Promulgate trade secret regulations under section 11042(c) of this title.
(vi) Render a decision in response to a petition under section 11042(d) of this title within 9 months after receipt of the petition.

(C) The Administrator, a State Governor, or a State emergency response commission, for failure to provide a mechanism for public availability of information in accordance with section 11044(a) of this title.

(D) A State Governor or a State emergency response commission for failure to respond to a request for tier II information under section 11022(e)(3) of this title within 120 days after the date of receipt of the request.

(2) State or local suits

(A) Any State or local government may commence a civil action against an owner or operator of a facility for failure to do any of the following:

(i) Provide notification to the emergency response commission in the State under section 11002(c) of this title.
(ii) Submit a material safety data sheet or a list under section 11021(a) of this title.
(iii) Make available information requested under section 11021(c) of this title.
(iv) Complete and submit an inventory form under section 11022(a) of this title containing tier I information unless such requirement does not apply by reason of the second sentence of section 11022(a)(2) of this title.

(B) Any State emergency response commission or local emergency planning committee may commence a civil action against an owner or operator of a facility for failure to provide information under section 11003(d) of this title or for failure to submit tier II
information under section 11022(e)(1) of this title.

(C) Any State may commence a civil action against the Administrator for failure to provide information to the State under section 11042(g) of this title.

(b) Venue
(1) Any action under subsection (a) of this section against an owner or operator of a facility shall be brought in the district court for the district in which the alleged violation occurred.

(2) Any action under subsection (a) of this section against the Administrator may be brought in the United States District Court for the District of Columbia.

c) Relief
The district court shall have jurisdiction in actions brought under subsection (a) of this section against an owner or operator of a facility to enforce the requirement concerned and to impose any civil penalty provided for violation of that requirement. The district court shall have jurisdiction in actions brought under subsection (a) of this section against the Administrator to order the Administrator to perform the act or duty concerned.

d) Notice
(1) No action may be commenced under subsection (a)(1)(A) of this section prior to 60 days after the plaintiff has given notice of the alleged violation to the Administrator, the State in which the alleged violation occurs, and the alleged violator. Notice under this paragraph shall be given in such manner as the Administrator shall prescribe by regulation.

(2) No action may be commenced under subsection (a)(1)(B) or (a)(1)(C) of this section prior to 60 days after the date on which the plaintiff gives notice to the Administrator, State Governor, or State emergency response commission (as the case may be) that the plaintiff will commence the action. Notice under this paragraph shall be given in such manner as the Administrator shall prescribe by regulation.

e) Limitation
No action may be commenced under subsection (a) of this section against an owner or operator of a facility if the Administrator has commenced and is diligently pursuing an administrative order or civil action to enforce the requirement concerned or to impose a civil penalty under this Act with respect to the violation of the requirement.

(f) Costs
The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and
expert witness fees) to the prevailing or the substantially prevailing party whenever the court determines such an award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(g) Other rights
Nothing in this section shall restrict or expand any right which any person (or class of persons) may have under any Federal or State statute or common law to seek enforcement of any requirement or to seek any other relief (including relief against the Administrator or a State agency).

(h) Intervention
(1) By the United States
In any action under this section the United States or the State, or both, if not a party, may intervene as a matter of right.

(2) By persons
In any action under this section, any person may intervene as a matter of right when such person has a direct interest which is or may be adversely affected by the action and the disposition of the action may, as a practical matter, impair or impede the person’s ability to protect that interest unless the Administrator or the State shows that the person’s interest is adequately represented by existing parties in the action.
Docket No. 97-100

IN THE SUPREME COURT OF THE UNITED STATES

February Term 1999

HASTEE, INC.
Petitioner

v.

CHEMICAL ASTHMATICS ASSOCIATION, et al.
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

BRIEF FOR THE PETITIONER
HASTEE, INC.

Melissa Kurzhals-Cover
Megan E. Shanahan
Counsel for Petitioner
University of Cincinnati
College of Law
QUESTIONS PRESENTED

I. DOES THE CHEMICAL ASTHMATICS ASSOCIATION POSSESS ADEQUATE STANDING IN ACCORDANCE WITH ARTICLE III OF THE UNITED STATES CONSTITUTION TO RAISE A CLAIM UNDER THE EMERGENCY PLANNING AND COMMUNITY RIGHT TO KNOW ACT (EPCRA) CITIZEN SUIT PROVISION, 42 U.S.C. § 11046(A)(1)?

II. DOES THE EMERGENCY PLANNING AND COMMUNITY RIGHT TO KNOW ACT AUTHORIZE THE CHEMICAL ASTHMATICS ASSOCIATION’S LAWSUIT AGAINST HASTEE, INC. FOR A VIOLATION THAT HAS BEEN WHOLLY CURED AT THE TIME THE SUIT WAS FILED?
STATEMENT OF THE CASE

This is a civil action between the Chemical Asthmatics Association [hereinafter “CAA”] and Hastee, Inc. [hereinafter “Hastee”]. Hastee brings this appeal, challenging the Sixteenth Circuit Court’s finding that CAA has adequate Article III standing to proceed with its action, thus allowing the CAA to file suit under the citizen suit provision of the Emergency Planning and Community Right-To-Know Act [hereinafter “EPCRA”] for violations that are wholly past. (R. at 11).

Hastee is a medium sized manufacturing company that was started by two brothers and is located in Freshaire, Chase. (R. at 2). In under ten years, the company has grown from nine employees to two-hundred and fifty employees. (R. at 2). Erik Hastee was initially in charge of monitoring health, safety and environmental compliance within the company. (R. at 2, 3). With the growth of the company came the need to hire Rachael Carlson to monitor such compliance. (R. at 3). On May 12, 1998, Rachael read about EPCRA in a newsletter and recognized that Hastee would need to file a chemical inventory. (R. at 3). Ms. Carlson decided to attend to the matter as soon as she completed her review of the company’s OSHA compliance. (R. at 3).

In August of 1997, the Bradys built a house in Freshaire, Chase. (R. at 3). Mike, Carol, and Cindy Brady were all sensitized to the chemical methyl-allergen when they moved to Chase. (R. at 3). The Bradys moved to Chase without knowing that Hastee used a bonding agent that contains methyl-allergen. (R. at 4). The Bradys began to experience breathing difficulties that persisted after a visit to an allergist. (R. at 4). When the Bradys symptoms worsened, Carol contacted the president of the CAA, a group in which she was a member. The CAA informed Mrs. Brady that they were in the process of conducting an investigation into Hastee’s use of chemicals. (R. at 4). The CAA discovered that Hastee was delinquent in filing forms under EPCRA since the plant contained a reportable quantity of methyl-allergen. (R. at 5).

The Bradys informed the president of the CAA about their intent to sue and he informed them about EPCRA’s sixty day notice provision. (R. at 5). The CAA joined the suit alleging that the group’s members were harmed by Hastee’s withholding of information. (R. at 5). The sixty day notice of the alleged violation of EPCRA was given to Hastee, the EPA, and Chase on October 15, 1998. (R. at 5). Upon receiving notice, Rachael Carlson gathered the necessary information and filed all overdue forms with the proper authorities on December 5, 1998. (R. at 5). When the sixty day waiting period expired, the EPA chose
not to bring a suit against Hastee. (R. at 5). The CAA and the Bradys filed suit in the Federal District Court for the Northeastern District of Chase. (R. at 6).

The District Court granted defendant Hastee’s motion for summary judgment due to the lack of adequate Article III standing. (R. at 1, 9). The CAA appealed the District Court’s decision, and the United States Court of Appeals for the Sixteenth Circuit found that the District Court erred in granting Hastee summary judgment based on the CAA’s lack of Article III standing. (R. at 11). The court reversed and remanded for further proceedings consistent with its opinion that the CAA not only had appropriate Article III standing, but that the group could also bring suit for violations that are wholly past under the citizen suit provision of EPCRA. (R. at 11, 12).

This Court granted certiorari in order to consider two issues: first, whether the CAA has adequate Article III standing to maintain this action; and, second, whether the CAA can initiate an action under the citizen suit provision of EPCRA for violations that are wholly past. (R. at 14).

SUMMARY OF THE ARGUMENT

This case involves two issues that must be decided by this Court. Under the first issue, Petitioner Hastee claims that Respondent CAA lacks appropriate Article III standing to bring this suit. In order to obtain appropriate Article III standing, CAA must fulfill the three part test of the doctrine of standing.

The CAA claims that Hastee’s withholding of its EPCRA information has harmed its members. This Court has not yet determined that the deprivation of information rises to the level of an injury in fact. However, this question need not be answered in this case because CAA has not met the requirements of the third element of standing.

The CAA has requested that civil penalties be imposed upon Hastee and that Hastee reimburse CAA’s prelitigation costs. For a remedy to be appropriate it must redress the alleged wrong. Civil penalties are paid to the U.S. Treasury and, therefore, benefit the public at large and do not redress the alleged injury. The EPCRA permits costs for litigation expenses incurred by the Respondent to be reimbursed by the Petitioner. However, the prelitigation costs that CAA is requesting are not included. Additionally, it is inappropriate to bring suit to recover the cost of bringing suit. Therefore, CAA does not have adequate Article III standing to bring suit.

This Court has consistently held, in the course of interpreting notice provisions identical to EPCRA’s, that such notice provisions are inconsistent with authorization of a citizen suit for wholly past violations. This Court has
reasoned that Congress provided identical notice provisions in other environmental statutes in order to enable the alleged violator to come into compliance and to allow the government agency an opportunity to pursue the alleged violation. Either situation obviates the need for the citizen suit, and accordingly, this Court has consistently held that in either situation, Congress has not authorized a citizen suit.

Also, Congress's 1990 amendment to the Clean Air Act's citizen suit provision does not undercut the applicability of this Court's findings in *Gwaltney of Smithfield v. Chesapeake Bay Found. Inc.*, 484 U.S. 49 (1987), to EPCRA's citizen suit provision because Congress amended portions of EPCRA in 1990 but left both the citizen suit provision and notice provision intact.

Contrary to several lower courts' findings, EPCRA's language is substantially similar to language consistently found by courts, including this Court, to be indicative of Congressional intent only to authorize citizen suits for present or continuing violations.

Furthermore, reading EPCRA as authorizing citizen suits for wholly past violations would undermine EPCRA's twin goals of bolstering the public availability of information and facilitating emergency planning. Finally, EPCRA's plain language and EPCRA's Congressional history do not support the authorization of citizen suits for wholly past violations.

**ARGUMENT**

I. CHEMICAL ASTHMATICS ASSOCIATION (CAA) DOES NOT HAVE ADEQUATE ARTICLE III STANDING TO MAINTAIN THIS ACTION BECAUSE CAA'S CLAIM FAILS TO SATISFY THE THREE PART TEST REQUIRED TO OBTAIN STANDING.

The jurisdictional power of the federal courts is set forth in Article III, § 2, cl. 1, and is limited to "cases" and "controversies" that are justiciable. U.S. CONST. art. III, § 2, cl. 1. The threshold question in all federal court cases is whether the plaintiff presents a "case or controversy" between herself and the defendant under the terms set forth in Article III. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Warth v. Seldin*, 422 U.S. 490, 498 (1975). The doctrine of standing is one of the tests which is invoked to determine whether a "case" or "controversy" is proper for judicial review. *Lujan*, 504 U.S. at 560.

The doctrine of standing is perhaps the most important of the various doctrines that lie within Article III. *Allen v. Wright*, 468 U.S. 737, 750 (1984).
This Court has established that, “the irreducible constitutional minimum of standing contains three elements.” *Lujan*, 504 U.S. at 560. “First, the plaintiff must have suffered an “injury in fact” -- an invasion of a legally protected interest which is concrete and particularized,” *id.* at 560, and “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983). “Second, there must be a causal connection between the injury and the conduct complained of.” *Lujan*, 504 U.S. at 560. “Third, it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’” *Id.* at 561 (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976)).

“*The party invoking federal jurisdiction bears the burden of establishing the elements necessary for a grant of jurisdiction.*” *Lujan*, 504 U.S. at 561. These constitutional requirements are “founded in concern about the proper--and properly limited--role of the courts in a democratic society.” *Warth*, 422 U.S. at 498. “The province of the court is, solely, to decide on the rights of individuals.” *Marbury v. Madison*, 5 U.S. 137, 170 (1803). It is not the role of the court to advocate the general public’s interest in insuring that the government is enforcing the laws and that individuals and businesses obey those laws. *Lujan*, 504 U.S. at 576. “The necessity that the plaintiff who seeks to invoke judicial power stand to profit in some personal interest remains an Article III requirement.” *Simon*, 426 U.S. at 39. The CAA is attempting to sue for past violations in order to assert a general public interest. Not only does the CAA lack an injury in fact, but they also will not personally gain even if they are granted a favorable outcome.

**A. The CAA cannot fulfill the injury in fact element of the doctrine of standing required by Article III.**

The CAA cannot establish the required injury in fact necessary to achieve Article III standing for two reasons. First, Hastee was in compliance with the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11046(f) (1986) (hereinafter “EPCRA”) when the suit was filed. Second, courts have rejected the concept of an informational injury.

This Court held in *Sonsa v. Iowa* that an injury must exist at the time that the complaint was filed. *See Sonsa v. Iowa*, 419 U.S. 393, 402 (1975). At the time that the CAA filed its complaint, Hastee had come into compliance with EPCRA. Additionally, Hastee came into compliance within EPCRA’s sixty (60) day notice provision. This Court previously found that one of the purposes of a sixty (60) day notice provision in environmental statutes is to allow an alleged violator the opportunity to come into compliance, thus rendering a citizen suit
unnecessary. *Halstrom v. Tillamook County*, 493 U.S. 20, 29 (1989); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59 (1987). Furthermore, the fact that the CAA may have suffered a past injury does not establish that a future injury is likely to occur. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983). Since Hastee came into compliance with EPCRA by the time that the complaint was filed, there was no injury in fact to fulfill the first element of the Article III standing test.

The CAA asserts that Hastee’s delinquent filing of the EPCRA information has harmed its members and this withholding of information constitutes an injury in fact. This Court has not yet addressed whether “being deprived of information that is supposed to be disclosed under EPCRA--or at least being deprived of it when one has a particular plan for its use--is a concrete injury in fact that satisfies Article III.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 98 (1998). However, several lower courts have considered the concept of informational injury under Article III standing and have rejected it as an injury in fact. *See Foundation on Econ. Trends v. Lyng*, 943 F.2d 79 (D.C. Cir. 1991) (environmental groups must have a separate and concrete injury and the deprivation of information does not rise to that level); *Citizens to End Animal Suffering and Exploitation, Inc. v. New England Aquarium*, 836 F. Supp. 45 (D. Mass. 1993) (allegations of informational harm were insufficient to establish organizational standing).

This Court should also reject the concept that the deprivation of information rises to the level of an injury in fact. Article III standing based on the deprivation of information contradicts this Court’s opinion in *Sierra Club v. Morton*, 405 U.S. 727 (1972). In *Sierra Club*, this Court stated that a mere interest in a problem, no matter how long-standing the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient to confer standing. *Id.* at 739. Additionally, if this Court grants the CAA Article III standing based upon the delay of receiving information under EPCRA, it would open the floodgates to an endless line of unwarranted lawsuits.

Even if this Court were to assume that the deprivation of information does constitute an injury in fact, and thereafter found that the causal connection between that injury and the conduct complained of had been established, the Respondents still would not fulfill the third element required to gain Article III standing, redressability.
B. Neither civil penalties nor costs are appropriate remedies to fulfill the Article III redressability requirement.

The third element of the Article III standing test requires that it be ‘likely’ as opposed to merely ‘speculative’ that the alleged injury will be redressed by a favorable decision. Lujan, 504 U.S. 555, 561 (1992). The CAA cannot fulfill this Article III redressability requirement. The facts of Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83 (1998), are very similar to the facts in this case. Both cases involve citizen interest groups alleging that EPCRA violations committed by small to medium sized manufacturers have harmed their members by depriving them of the information that the manufacturer failed to file, thus resulting in an injury in fact. In Steel Co., this Court did not decide whether deprivation of information constitutes an injury in fact because the Plaintiff could not fulfill the redressability requirement.

Much like the situation in Steel Co., Hastee came into compliance with EPCRA shortly after receiving notice of their violations and before the CAA filed their complaint. Since there was no longer a basis for injunctive relief, the CAA can only request that civil penalties be assessed and that their pre-litigation costs be reimbursed. As this Court stated in Steel Co., civil penalties and pre-litigation costs are not appropriate remedies under the third prong of the Article III standing doctrine. Steel Co., 523 U.S. at 98

In environmental citizen suits, the plaintiff is seeking a remedy for violations committed against the public. The civil penalties that are authorized by EPCRA are the only damages that are licensed by the statute. Id. These damages would provide compensation or rectification to the Respondent if they were payable to CAA, however, they are payable only to the U.S. Treasury. Id. The Respondent does not receive any personal damages.

Although the Respondent may want to see the Petitioner punished and the U.S. Treasury enriched by the granting of civil penalties, “that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury.” Id. at 99. Additionally, the use of civil penalties as a deterrence to prevent future harms does not constitute an acceptable form of redressability. See Allen v. Wright, 468 U.S. 737, 754-55 (1984). Therefore, in order to obtain adequate standing, the relief requested must redress the alleged injury and not merely benefit the citizenry at large.

The Respondent also requested that their investigation and prosecution costs be granted under the EPCRA statute, § 11046(f). Section 11046(f) costs are limited to the “costs of litigation.” 42 U.S.C. § 11046(f) (1986). These costs
would be paid to the Respondent for their benefit, rather than the benefit of the
general public. However, "a plaintiff cannot achieve standing to litigate a
substantive issue by bringing suit for the cost of bringing suit. The litigation
must give the plaintiff some other benefit besides reimbursement of costs that are
a by product of the litigation itself." Steel Co., 523 U.S. at 99. An "interest in
attorney’s fees is insufficient to create an Article III case or controversy where
none exists on the merits of the underlying claim." Lewis v. Continental Bank
Corp., 494 U.S. 472, 480 (1990). The costs that CAA is attempting to have
reimbursed are the costs of investigation and prosecution. These pre-litigation
costs are not included in the litigation costs that are covered by EPCRA.

This Court has established that there are three elements that must be met for
Article III standing to be granted. It is the Respondent’s duty to show that their
claim fulfills these elements. Additionally, Article III requires that those seeking
judicial review stand to personally profit from an adjudication of the issues. It is
not the role of this Court to decide issues that are based only upon the interest of
the public in insuring that our government enforces laws and that those laws are
followed.

The CAA is unable to show an injury in fact in order to fulfill the first two
elements required to obtain Article III standing. The CAA claims that Hastee’s
withholding of information has harmed its members. This Court has not yet
determined that the deprivation of information constitutes an injury in fact. Even
if this Court were to decide that this withholding of information is an injury in
fact, CAA clearly does not fulfill the third element. There is no available remedy
that will redress any injury that CAA is claiming. Hastee came into compliance
with EPCRA soon after they received notice of their violation, thus an injunctive
remedy is not appropriate. Both civil penalties and prelitigation costs are
inappropriate. Civil penalties do not redress the alleged injury since they are paid
to the U.S. Treasury and do not benefit the Respondent. Costs are only payable
toward litigation expenses, not prelitigation expenses. It is inappropriate to bring
suit to recover the costs of bringing suit. For all of the reasons stated above,
CAA does not have adequate Article III standing.

II. THIS COURT SHOULD REVERSE THE COURT OF APPEALS
BECAUSE EPCRA DOES NOT SUPPORT A CAUSE OF ACTION FOR
VIOLATIONS THAT ARE WHOLLY IN THE PAST.

This Court has held that when a court is interpreting a statute’s meaning, the
court must first examine the statute’s plain language. Caminetti v. United States,
242 U.S. 470, 485 (1917); EEOC v. Monclava Township, 920 F.2d 360, 362 (6th
Where a statute is plain and unambiguous on its face "the sole function of the court is to enforce it according to its terms." Caminetti, 242 U.S. at 485. A reading of the plain language of The EPCRA clearly does not authorize citizen suits for wholly past violations. Once the required forms have been filed, the Congressionally stated purposes of EPCRA, public disclosure and emergency planning, have been satisfied. Atlantic States Legal Found. v. United Musical Instruments, 61 F.3d 473, 475 (6th Cir. 1995). Thus, even reading EPCRA’s plain language in light of giving effect to its remedial purposes does not authorize a citizen suit for wholly past violations. Id. at 478.

EPCRA was enacted immediately after the Bhopal disaster in order to facilitate emergency planning by filling informational voids about the types and amounts of toxins in use in local communities. Citizens for a Better Env’t v. Steel Co., 90 F.3d 1237, 1238 (7th Cir. 1996), vacated, 151 F.3d 1032 (7th Cir. 1998)). EPCRA is just one of a myriad of environmental regulations which places reporting requirements upon even relatively small industries. See, e.g., The Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 (1970). Many industries, like Hastee, in spite of the desire to fully comply with all environmental and other governmental regulations, remain unaware of EPCRA’s requirements until they receive notice from parties intending to file suit against them. Citizens, 90 F.3d at 1238 (citing GAO, REPORT TO CONGRESS, TOXIC CHEMICALS “EPA’s Toxic Release Inventory is Useful But Can be Improved” (June 1991)).

EPCRA seeks to ensure an industry’s compliance with EPCRA by providing for agency enforcement of EPCRA’s requirements. Additionally, if the agency chooses not to take action, private citizens then have the right to file suit. Citizens, 90 F.3d at 1241. However, citizen suits for EPCRA violations are only permitted if, after the 60-day notice period, the industry has still failed to comply with the EPCRA reporting requirements and if the government has chosen not pursue an enforcement action. United, 61 F.3d at 475. Because Congress has provided a 60-day notice period for industries to come into compliance, the substantial burden upon the industries which are required to comply with the multitude of environmental regulations is lessened.

Reading EPCRA as authorizing citizen suits for wholly past violations defies common sense and ignores a forthright reading of the plain language of EPCRA’s citizen suit provision. Such a reading also flies in the face of this Court’s interpretation of identical notice provisions in the Clean Air Act. See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 60 (1987). Furthermore, once the required forms have been filed, EPCRA’s Congressionally stated goals of public disclosure and opportunity for emergency
planning, have been fully satisfied and authorization of a citizen suit serves no further purpose. See United, 61 F.3d at 475.

A. EPCRA's notice provision is inconsistent with a cause of action for wholly past violations.

EPCRA provides that no citizen suit may be filed until 60 days after the plaintiff has given notice of the alleged violation to the violator, the state, and the EPA Administrator. See 42 U.S.C. § 11046(d) (1986). The Clean Water Act has a notice provision identical to EPCRA's. This similarity was examined in Gwaltney, 484 U.S. at 59-62. The Clean Water Act authorized citizen suits against those found "to be in violation of" the applicable provisions. Senate and House reports linked the Clean Water Act to the Clean Air Act citizen suit provisions.

The Clean Air Act authorized citizen suits that were wholly injunctive in nature, and therefore implicitly prospective. Id. at 62. This Court found that the notice provision was a "striking indicia of the prospective orientation of the citizen suit" provision. Id. at 59. This Court also found that any other interpretation of the "to be in violation" language would render the 60 day waiting period after notice superfluous because this Court found that the notice provision was provided in order to give: 1) the alleged violator a chance to come into compliance, and 2) to allow the government to decide whether it desires to pursue enforcement action against the alleged violator. Id. at 60-61 (interpreting identical notice provision in the Clean Water Act); see United, 61 F.3d at 475-78 (interpreting EPCRA's notice provision). This reasoning was also echoed by this Court when interpreting an identical notice provision in the Resource Conservation and Recovery Act (RCRA). See Hallstrom v. Tillamook County, 493 U.S. 20, 32 (1989). Finally, this Court, in the context of the Clean Water Act, distinguished a sporadic and repeat offender from the offender whose violations are wholly past, and found that the citizen suits were not authorized against violators for violations that are wholly past. Gwaltney, 484 U.S. at 63.

In 1990, Congress amended the Clean Air Act. It is now possible for citizens to sue under the Clean Air Act for past violations, but only if the defending party has engaged in a pattern of continuing violations. 42 U.S.C. § 7604(a) (1990). Superficially, this seems to indicate that a sixty (60) day notice provision is not wholly inconsistent with the authorization of EPCRA suits for wholly past violations. However, Congress made no similar amendment to EPCRA despite Congressional amendments to other portions of EPCRA in 1990. Furthermore, this Court has reasoned that substantive changes to the law by Congress should
not be inferred but rather must be explicit. *Ardestani v. INS*, 502 U.S. 129, 136-37 (1991). Therefore, despite assertions that the 1990 Congressional amendment undercuts the importance of this Court’s discussion in *Gwaltney* of the Clean Air Act notice provisions, such an argument is wholly unpersuasive. *United*, 61 F.3d at 477. Furthermore, since Congress did in fact amend the Clean Air Act but left the notice provision in EPCRA intact, Congress fully “intended to limit EPCRA’s citizen suit provision to violations existing at the time the suit is filed.” *Id.*

Similarly, courts have held that a statute must be interpreted “as a whole” and that “every effort” must be made “not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous.” *Greenpeace v. Waste Tech. Indus.*, 9 F.3d 1174, 1179 (6th Cir. 1993).

The Sixth Circuit has held that “prior notice...far from being a mere formality...was viewed by Congress as crucial in defining the proper role of the citizen suit.” *Walls v. Waste Resource Corp.*, 761 F.2d 311, 317 (6th Cir. 1985) (interpreting the Resource Conservation and Recovery Act (RCRA), the Comprehensive Environmental Response, Compensation, & Liability Act (CERCLA), and the Federal Water Pollution Control Act (FWPCA)). The *Walls* court found that notice is typically provided in Environmental Statutes to facilitate dispute resolution and to “reduce the volume of costly private litigation.” *Id.* at 317.

Dispute resolution clearly is not facilitated if citizen groups can merely dig up information concerning an industry’s past acts of non-compliance and then threaten to file suit against the industry. In such a situation, an industry would be forced into a position of entering costly-no-win litigation or the industry would be forced to simply settle the suit. If this Court interprets EPCRA as authorizing citizen suits for wholly past violations, this unappealing scenario would become the norm. Such a scenario would eviscerate the idea that “[l]itigation should be a last resort only after other efforts have failed.” *Hallstrom v. Tillamook County*, 844 F.2d 598, 600-01 (9th Cir. 1987), aff’d, 493 U.S. 20.

B. EPCRA’s overall language is completely consistent with this Court’s finding in *Gwaltney* that the language of the statute plainly does not authorize a cause of action for wholly past violations.

This Court found in *Gwaltney* that the pervasive use of the present tense throughout the citizen enforcement provision was convincing evidence of the Congressional intent to authorize citizen suits only for continuing and present
violations. *Gwaltney*, 484 U.S. at 59. EPCRA’s language, which authorizes a citizen suit for an industry’s “failure to do” certain requirements is not significantly different from the Clean Air Act’s authorization of a suit, analyzed in *Gwaltney*, when a party was found “to be in violation” of certain requirements. Such a reading is consistent with this Court’s finding in *Gwaltney* that “Congress could have phrased its requirements in language that looked to the past” but that Congress “did not choose this readily available option.” *Id.* at 57. Likewise, the Sixth Circuit has rejected a “hyper-technical parsing” of the language of the statutes “in favor of the most natural reading of EPCRA which weighs against allowing citizen suits for purely historical violations.” *United*, 61 F.3d at 477.

Examining the notice provision of EPCRA reveals that present tense language was, in fact, used. 42 U.S.C. § 11046(d)(1) (1986) provides that a citizen plaintiff must provide notice to the alleged violator, the state in which the alleged violation “occurs” and to the EPA. Identical language in the Clean Water Act, 33 U.S.C. § 1365(b)(1)(A) (1987), was examined by this Court in *Gwaltney* and was found to be indicative of the authorization of a purely prospectively oriented citizen suit. *Gwaltney*, 484 U.S. at 59.

Contrary to some district court findings, for example, *Don’t Waste Ariz. v. McLane Foods, Inc.*, 950 F. Supp. 972, 977 (D. Ariz. 1997) (finding that the venue provision in EPCRA does not “contemplate a temporal limitation” like the language of the Clean Water Act), the venue provisions of EPCRA are an exact replica of the venue provisions found in a number of environmental statutes, all of which have been interpreted as not authorizing citizen suits for wholly past violations. *See, e.g.*, *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483-84 (1996) (RCRA, 42 U.S.C. § 6972(a) (1984), requires a continuing violation); *Coalition for Health Concern v. LWD, Inc.*, 60 F.3d 1188, 1193 (6th Cir. 1995) (CERCLA, 42 U.S.C. § 9659(a)(1) (1986), requires a continuing violation).

Although other courts have found that EPCRA does not contain a “pervasive use of the present tense” and therefore does not indicate in the same way as the Clean Air Act that Congress intended citizen suits only for continuing violations, *see, e.g.*, *Atlantic States Legal Found. v. Whiting Roll-Up Door Mfg. Corp.*, 772 F. Supp. 745, 752-53 (1991), this interpretation is not persuasive in light of the actual language of EPCRA. *But cf. McLane*, 950 F. Supp. at 977 (finding that venue provision of EPCRA lends support to a reading authorizing citizen suits for wholly past violations).
C. Reading EPCRA as authorizing citizen suits for wholly past violations would lead to a windfall for citizen groups and would supplant the Environmental Protection Agency’s enforcement authority in numerous environmental statutes.

EPCRA does not authorize citizen suits for wholly past violations. If the Environmental Protection Agency (EPA) decides to pursue an action against a party for an EPCRA violation, the private citizen can not sue. See 42 U.S.C. § 11046(e) (1986). Thus, Congress provided the citizen suit provision, not to supplant the EPA’s enforcement role, but rather to act as a supplement to the EPA’s role. McLane, 950 F. Supp. 972, 979. Congress ensured that the citizen role would remain a supplementary one by limiting suits to “ongoing violations” and by giving the EPA enforcement authority over both “ongoing” and “historical violations.” United, 61 F.3d at 475.

This Court has found, in the context of substantially similar provisions in the Clean Water Act, that Congress did not intend to provide citizens with the same enforcement authority as the government. Gwaltney, 484 U.S. at 58-59. This Court also held that allowing citizen suits for wholly past violations would supplant rather than supplement the government’s primary enforcement role. Id. at 60; United 61 F.3d at 476 (interpreting EPCRA and finding that allowing citizen suits for wholly past violations would lead the citizen suit to become “intrusive” into the government’s enforcement role rather than “interstitial” to it). Furthermore, this Court held that allowing citizen suits for wholly past violations “would create” a “disturbing anomaly” because this Court found that the bar on citizen suits when a governmental enforcement action is underway suggests that the citizen suit merely meant to supplement the governmental action. See Gwaltney, 484 U.S. at 60.

D. In light of the goals of EPCRA, EPCRA’s timeliness requirement does not support an authorization of citizen suits for wholly past violations.

Although EPCRA’s requirements provide that a facility having a reportable amount of a hazardous substance submit the required report by a certain date for the preceding calendar year, 42 U.S.C. § 11022 (a)(2) (1986), there is no indication of Congressional intent to authorize citizen suits to be filed after the Congressional reporting goals of EPCRA have been met. The Sixth Circuit found that the citizen suit provision “emphasizes” only “the completing and the submitting” of the forms and not the dates by which the forms must be completed for compliance with EPCRA. United, 61 F.3d at 475 (case factually
indistinguishable from the one at bar). That is, once the required forms have been filed, the Congressional goals of public disclosure and the facilitation of emergency response plans have been met and there is no violation left for a citizen suit to remedy. United, 61 F.3d at 477. Indeed, as discussed below, reading EPCRA as authorizing a citizen suit for wholly past violations may interfere with the federal government’s own enforcement authority delineated under EPCRA.

Thus, because a plain reading of EPCRA clearly defines authorization of citizen suits for wholly past violations and because such a reading is consistent with the purposes of EPCRA, this Court should not allow CAA’s suit to go forward.

Because EPCRA is merely a paperwork statute, the costs to a citizen enforcement group incurred by tracking down alleged EPCRA violations, is relatively small. A citizen group will not have, as indicated by some courts like Neighbors for a Toxic Free Community v. Vulcan Materials Co., 964 F. Supp. 1448, 1452 (D. Colo. 1997), the monstrous costs of monitoring chemical usage or discharge amounts. On the contrary, if citizen suits for wholly past violations are authorized, this will lead to a no-win situation for the regulated industry and will lead to much financial waste.

Industries that have long since complied with EPCRA’s requirements will be forced to spend money on settling and fighting lawsuits about ancient violations. This money could be more beneficially spent in keeping up with changing environmental statutes and for purchasing cleaner technologies. Despite other courts’ findings to the contrary, the results of authorizing citizen suits for wholly past EPCRA violations would be truly “irreconcilable with the clear intent of Congress.” Id. Any other holding gives plaintiff attorneys an all too lucrative career of researching ancient violations that have since been cured. Such a result would truly be to the detriment of the legitimacy of all environmental legislation as well as a detriment to the very public whom EPCRA is created to protect.
CONCLUSION

For the foregoing reasons, the Petitioner Hastee respectfully requests that this Court reverse the decision of the Sixteenth Circuit Court of Appeals, and reinstate the decision of the District Court for the Northeastern District of Chase, granting Petitioner Hastee's Motion to Dismiss for lack of Article III standing.

Respectfully submitted,

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APPENDIX OF STATUTORY PROVISIONS

U.S. CONST. ART. III, § 2, CL. 1, CL. 2:

Section 2, Clause 1. Jurisdiction of Courts
The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;-- between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

(b) Notice No action may be commenced--
(1) under subsection (a)(1) of this section--
(A) prior to sixty days after the plaintiff has given notice of the alleged violation
(i) to the Administrator,
(ii) to the State in which the alleged violation occurs, and
(iii) to any alleged violator of the standard, limitation, or order

(a) In general
Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf--
(1)
(A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement,
prohibition, or order which has become effective pursuant to this chapter; or (A) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment; or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia. The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under section 6928(a) and (g) of this title.

**THE CLEAN AIR ACT, 42 U.S.C. § 7604 (1990):**

(a) Authority to bring civil action; jurisdiction

Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf--

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to have violated
(if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation,

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator, or

(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment) or who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of any condition of such permit.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties (except for actions under paragraph (2)). The district courts of the United States shall have jurisdiction to compel (consistent with paragraph (2) of this subsection) agency action unreasonably delayed, except that an action to compel agency action referred to in section 7607(b) of this title which is unreasonably delayed may only be filed in a United States District Court within the circuit in which such action would be reviewable under section 7607(b) of this title. In any such action for unreasonable delay, notice to the entities referred to in subsection (b)(1)(A) of this section shall be provided 180 days before commencing such action.

(b) Notice

No action may be commenced-

(1) under subsection (a)(1) of this section-

(A) prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right.
(2) under subsection (a)(2) of this section prior to 60 days after the plaintiff has given notice of such action to the Administrator, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of section 7412(i)(3)(A) or (f)(4) of this title or an order issued by the Administrator pursuant to section 7413(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) Venue; intervention by Administrator; service of complaint; consent judgment

(1) Any action respecting a violation by a stationary source of an emission standard or limitation or an order respecting such standard or limitation may be brought only in the judicial district in which such source is located.

(2) In any action under this section, the Administrator, if not a party, may intervene as a matter of right at any time in the proceeding. A judgment in an action under this section to which the United States is not a party shall not, however, have any binding effect upon the United States.

(3) Whenever any action is brought under this section the plaintiff shall serve a copy of the complaint on the Attorney General of the United States and on the Administrator. No consent judgment shall be entered in an action brought under this section in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator during which time the Government may submit its comments on the proposed consent judgment to the court and parties or may intervene as a matter of right.


(b) Venue

(1) Actions under subsection (a)(1)

Any action under subsection (a)(1) of this section shall be brought in the district court for the district in which the alleged violation occurred.

(a) Basic requirement

(2) The inventory form containing tier I information (as described in subsection (d)(1) of this section) shall be submitted on or before March 1, 1988, and annually thereafter on March 1, and shall contain data with respect to the preceding calendar year. The preceding sentence does not apply if an owner or operator provides, by the same deadline and with respect to the same calendar year, tier II information (as described in subsection (d)(2) of this section) to the recipients described in paragraph (1).

EMERGENCY PLANNING AND COMMUNITY RIGHT TO KNOW ACT, 42 U.S.C. §11046 (1986)

(a) Authority to bring civil actions

(1) Citizen suits

Except as provided in subsection (e) of this section, any person may commence a civil action on his own behalf against the following:

(A) An owner or operator of a facility for failure to do any of the following:

(i) Submit a follow up emergency notice under section 11004(c) of this title.
(ii) Submit a material safety data sheet or a list under section 11021(a) of this title.
(iii) Complete and submit an inventory form under section 11022(a) of this title containing tier I information as described in section 11022(d)(1) of this title unless such requirement does not apply by reason of the second sentence of section 11022(a)(2) of this title.
(iv) Complete and submit a toxic chemical release form under section 11023(a) of this title.

(B) The Administrator for failure to do any of the following:

(i) Publish inventory forms under section 11022(g) of this title.
(ii) Respond to a petition to add or delete a chemical under section 11023(e)(1) of this title within 180 days after receipt of the petition.
(iii) Publish a toxic chemical release form under 11023(g) of this title.
(iv) Establish a computer database in accordance with section 11023(j) of this title.
(v) Promulgate trade secret regulations under section 11042(c) of this title.
(vi) Render a decision in response to a petition under section 11042(d) of this title within 9 months after receipt of the petition.
(C) The Administrator, a State Governor, or a State emergency response commission, for failure to provide: a mechanism for public availability of information in accordance with section 11044(a) of this title.
(D) A State Governor or a State emergency response commission for failure to respond to a request for tier II information under section 11022(e)(3) of this title within 120 days after the date of receipt of the request.

(2) State or local suits
(A) Any State or local government may commence a civil action against an owner or operator of a facility for failure to do any of the following:
(i) Provide notification to the emergency response commission in the State under section 11002(c) of this title.
(ii) Submit a material safety data sheet or a list under section 11021(a) of this title.
(iii) Make available information requested under section 11021(c) of this title.
(iv) Complete and submit an inventory form under section 11022(a) of this title containing tier I information unless such requirement does not apply by reason of the second sentence of section 11022(a)(2) of this title.
(B) Any State emergency response commission or local emergency planning committee may commence a civil action against an owner or operator of a facility for failure to provide information under section 11003(d) of this title or for failure to submit tier II information under section 11022(e)(I) of this title.
(C) Any State may commence a civil action against the Administrator for failure to provide information to the State under section 11042(g) of this title.
(b) Venue

(1) Any action under subsection (a) of this section against an owner or operator of a facility shall be brought in the district court for the district in which the alleged violation occurred.

(2) Any action under subsection (a) of this section against the Administrator may be brought in the United States District Court for the District of Columbia.

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(d) Notice

(1) No action may be commenced under subsection (a)(1)(A) of this section prior to 60 days after the plaintiff has given notice of the alleged violation to the Administrator, the State in which the alleged violation occurs, and the alleged violator. Notice under this paragraph shall be given in such manner as the Administrator shall prescribe by regulation.

(2) No action may be commenced under subsection (a)(1)(B) or (a)(1)(C) of this section prior to 60 days after the date on which the plaintiff gives notice to the Administrator, State Governor, or State emergency response commission (as the case may be) that the plaintiff will commence the action. Notice under this paragraph shall be given in such manner as the Administrator shall prescribe by regulation.

(e) Limitation

No action may be commenced under subsection (a) of this section against an owner or operator of a facility if the Administrator has commenced and is diligently pursuing an administrative order or civil action to enforce the requirement concerned or to impose a civil penalty under this Act with respect to the violation of the requirement.

(f) Costs

The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or the substantially prevailing party whenever the court determines such an award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.