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Case Summaries

CASE SUMMARIES

CERCLA

G.J. Leasing Company, Inc. v. Union Electric Company, 54 F.3d 379 (7th Cir. 1995)

G.J. Leasing Company brought suit against Union Electric Company, alleging ownership liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9607(a)(2), (3). G.J. Leasing's predecessor bought a 52-acre tract with a decommissioned power plant from Union Electric in 1979. G.J. Leasing claimed Union Electric arranged for or disposed of a hazardous substance, asbestos, by selling the tract of land. In addition, G.J. Leasing claimed Union Electric should be strictly liable and responsible for clean-up costs, because the sale was allegedly abnormally dangerous according to Illinois tort law.

The Seventh Circuit Court of Appeals affirmed the district court's finding in favor of Union Electric. The court emphasized that it could only reverse a clearly erroneous determination of mixed fact and law.

The court noted that although the Cahokia Power Plant, located in Illinois, contained asbestos for heat insulation, it was not decommissioned because of the substance. Instead, the plant became uneconomical to operate. Union Electric proceeded to sell the plant to the highest bidder, who happened to be a salvage contractor. G.J. Leasing then purchased the plant from the contractor on the same day as the original sale. An expert who inspected the plant found asbestos in th basmnt wher G.J. Leasing stored grain. G.J. Leasing incurred $200,000 in expenses in removing some of the asbestos.

G.J. Leasing argued that the sale of the tract, which contained asbestos, constituted a disposal or arrangement for disposal of a hazardous substance. The court rejected this argument, because Union Electric could not have known whether selling the tract would result in the release of a hazardous substance.

The court also found that Union Electric was not a responsible party under CERCLA, because the salvage contractor caused the release of the asbestos. In addition, the court found that the clean-up costs were not necessary and, therefore, Union Electric would not be liable even if it had disposed of or arranged for the disposal of the hazardous substance. The expert who inspected the plant merely recommended that the grain be stored elsewhere and that the employees receive only limited exposure to the asbestos. The court noted that the expert did not consider the asbestos to be dangerous enough to justify its removal. Thus, the court found the expert's appraisal of costs G.J. Leasing incurred to be unnecessary.

The court also refused to hold Union Electric strictly liable under common law tort claim for an abnormally dangerous activity. G.J. Leasing attempted to show that the sale of the property constituted an abnormally dangerous activity, however, the court found the tort claim barred by a five-year statute of limitations.

- by Jill A. Morris

Control Data Corp. v. S.C.S.C. Corp., 53 F.3d 930 (8th Cir. 1995)

The Eighth Circuit Court of Appeals affirmed the district court's decision that the S.C.S.C. Corporation (S.C.S.C.) was liable under CERCLA and the Minnesota Environmental Response and Liability Act (MERLA) for 33.3% of Control Data Corporation's (Control Data's) response costs resulting from S.C.S.C.'s discharge of toxic chemicals into the environment, but reversed the district court's decision that S.C.S.C. was liable for attorney fees as well.

S.C.S.C. appealed the district court's decision claiming, 1) that it was not liable for the response costs for investigating the contamination, 2) that it was erroneous to allocate 33.3% of the costs to it when it was only responsible for 10% of the chemicals released, and 3) that awarding attorney's fees was improper. Control Data cross appealed, claiming that S.C.S.C. should be responsible for 100% of the attorney's fees, because the fees would not have been necessary had S.C.S.C. cooperated.

S.C.S.C. operated a dry-cleaning supply business across the street from Control Data, which operated a printed circuit-board facility. Control Data, while investigating a leak in its sewer line, discovered groundwater contamination under its property. As a result of the investigation, it determined that contamination consisted of two chemicals, 1,1,1 trichloroethane (TCA) and tetrachloroethylene (PERC). Control Data immediately notified the Minnesota Pollution Control Agency and began working with the agency to clean up the contamination. Upon further investigation, Control Data realized that it was only responsible for the release of TCA and that S.C.S.C. had been releasing PERC for the past 14 years. Apparently, the PERC "migrated" underneath Control Data's property and mixed with its own contamination. However, Control Data had already installed a remediation system to remove both TCA and PERC. Thus, it brought suit to recover the portion of its costs attributable to the release of PERC.

The district court held S.C.S.C. liable for 33.3% of the costs, despite the fact that PERC constituted only 10% of the contamination, because of the higher toxicity of PERC and its difficulty to clean. S.C.S.C. argued that this determination was erroneous because the degree of toxicity was not a proper factor in determining percentages of contribution.

In denying S.C.S.C's argument, the court looked at two elements. First, it recognized the "Gore factors" as guidance on the issue of resolving contribution claims. One of those factors is "the degree of toxicity of the hazardous waste." Then, it looked to the policy of CERCLA and determined that its primary goal is to "encourage timely cleanup of hazardous waste sites" and "to place the cost of that response on those responsible." Thus, the court reasoned that increasing liability based on toxicity served the policy and goals of CERCLA, because it holds the polluting party responsible for the costs attributable to the pollution and speeds up the response time.

S.C.S.C. also argued that it was not responsible for the investigation costs, because the sole reason for the investigation was Control Data's releases. The court explained that this argument would require it to interpret CERCLA such that every response would have to be attributed to a specific release. This, the court said, would be too strict an

interpretation. Once again, the court looked to the policies of CERCLA to determine that accepting S.C.S.C's argument would encourage people to overlook possible contamination in the hopes that someone else will discover it and initiate the investigation themselves.

Finally, S.C.S.C. argued that it was improper for the court to allocate attorney's fees against it. The court reversed the portion of attorney's fees awarded under CERCLA, citing *Key Tronic*, which held them unavailable under CERCLA. The court, however, went on to affirm the award of attorney fees under MERLA. In doing so, it refuted S.C.S.C's argument that Control Data was not a "prevailing party" as required by MERLA. Specifically, S.C.S.C. claimed that the MERLA award was merely an alternative to CERCLA and thus it did not actually prevail under MERLA. The court explained that while a plaintiff may not recover under two different statutes for the same violation, it may prevail under both statutes. The court stated that because liability under both statutes depended on a "common core of facts," Control Data prevailed under both.

Control Data cross appealed on the issue of attorney's fees, claiming that S.C.S.C. should be responsible for 100% of its attorney's fees because none would have been necessary had S.C.S.C. cooperated. This determination was within the discretion of the trial court, and the court found the lower court's determination was not an abuse of discretion.

Thus, the court affirmed all of the district court's decision except the award of attorney's fees and remanded the case for further proceedings.

- by Joe Hewes

United States v. Cordova Chemical Company of Michigan, 59 F.3d 584 (6th Cir. 1995)

Ott Chemical Company (Ott 1) purchased land in Dalton Township, Michigan, as a site for manufacturing chemicals. During Ott 1's period of ownership from 1957 to 1965, the groundwater beneath the site became contaminated. Ott Chemical Company (Ott 2), a subsidiary of CPC International, Inc., took over as owner of the site in 1965.

Pollution continued after this transfer of ownership. The principle source of pollution stemmed from the usage of unlined lagoons for chemical waste disposal. During the ownership of the Ott companies, however, lagoon seepage was not the only cause of contamination. Chemical spills from train cars and drums, and overflows of chemicals contained in equalization basins also contributed to the pollution level.

In 1972, Story Chemical Company took over as the new owner of the site. Story Chemical continued to operate the site until 1977 when it declared bankruptcy. After Story Chemical's bankruptcy, the Michigan Department of Natural Resources (MDNR) visited the site to evaluate the extent of the contamination. As a result of the severity of contamination and a lack of resources with which to cleanup the site, MDNR became actively involved in searching for a purchaser who could afford to help support the cost of cleanup. This search led to Cordova Chemical Company (Cordova/California), a subsidiary of Aerojet-General Corporation.

Cordova/California and MDNR entered into an agreement for the sale of the land. MDNR agreed to rectify the sludge and waste container problems on the site, while Cordova/California agreed to give MDNR $600,000 toward the agency's cleanup costs, as well a eliminate the phosgene gas problem. This agreement, however, did not provide for a total cleanup of the site. In particular, the parties did not reach an agreement with regard to the groundwater contamination.

In 1978, Cordova Chemical Company of Michigan (Cordova/Michigan), a subsidiary of Cordova/California, acquired ownership of the site. Cordova/Michigan still retained ownership of the site, but its chemical manufacturing operations ended in 1986.

The United States filed a cause of action under § 107(a) of CERCLA to determine financial responsibility for cleanup costs at the manufacturing plant. The district court ruled against the parent companies CPC and Aerojet. The court held that both were liable for the disposal of hazardous substances that occurred while they or their subsidiaries owned the site. CPC and Aerojet appealed to the United States Court of Appeals, Sixth Circuit.

The Sixth Circuit reversed the district court's ruling, finding liability with respect to CPC. The lower court had reasoned that liability could only attach to CPC as a parent corporation in two ways: CPC could be directly liable as an "operator" under § 107 (a) of CERCLA, or CPC could be liable by way of common law veil-piercing.

The Sixth Circuit, however, concluded that a parent corporation incurs operator liability under CERCLA only when the requirements necessary to meet the common law veil-piercing doctrine are met. The court went on to state that in order to have corporate veil-piercing, there must be such a unity of interest and ownership that the separate personalities of the corporation and its owner cease to exist. In addition, the circumstances of the case must be such that adherence to the notion of separate corporations would only promote fraud or injustice. The court reasoned that while the facts showed that CPC took an active interest in the affairs of its subsidiary, these facts alone could not support a finding of corporate veil-piercing.

The Sixth Circuit then turned to the issue of MDNR's liability for cleanup costs. The district court had rejected liability claims brought against MDNR as an operator and arranger. Only the district court's decision regarding arranger liability was appealed. The Sixth Circuit agreed with the district court in determining that MDNR escaped liability. It reasoned that the actions taken by MDNR were in response to an environmental emergency and that MDNR acted with good faith when addressing the groundwater contamination problem at the site.

The final issue addressed on appeal was the district court holding imposing liability on Aerojet and Cordova/Michigan as present owners of the site under § 107(a) of CERCLA. Cordova/Michigan did not challenge the decision of the district court on appeal.

The district court found Aerojet to be liable as both an owner and operator of the contaminated site. In remanding, the Sixth Circuit stated that the summary of activities at the site during the period of ownership of the Cordova Companies directly conflicted with the district court's decision. In support of its decision, the district court noted that additional releases of hazardous substances occurred during the ownership of Cordova/California. However, the Sixth Circuit indicated that greater specificity was needed as to the facts purported to support this finding. The Sixth Circuit also stated, as

it had with regard to the liability of CPC, that Aerojet could not be held liable unless corporate veil-piercing could be found.

The Sixth Circuit directed the district court to revisit its treatment of the defenses raised by Aerojet, Cordova/California and Cordova/Michigan under § 107(b)(3) of CERCLA on remand. The district court concluded that this section of CERCLA includes contractual relationships created by deeds transferring title. In rejecting the defense, the district court stated that a title transfer of this sort makes the defense unavailable to defendants who have a direct or indirect contractual relationship with the parties responsible for the site contamination. The Sixth Circuit stated that the district court, in denying these defenses, ignored the requirement that the release of the hazardous substance must occur as a direct result of an act by a third party made in connection with a contractual obligation to the defendant.

- by Tricia Ann Baker

United States v. Union Electric Co., 64 F.3d 1152 (8th Cir. 1995)

A group of non-settling potentially responsible parties (PRPs) under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) sought to intervene against a consent degree between the EPA and settling PRPs. The United States Eighth Circuit Court of Appeals reversed the lower court decision denying the non-settling PRPs motion to intervene. The court of appeals held that intervention under Federal Rule of Civil Procedure 24 or CERCLA § 113(I) was allowed, because non-settling PRPs have sufficient interest in rights of contribution under CERCLA § 113(f)(1) and (f)(2).

In the early 1980's, the EPA discovered that an electrical equipment repair shop, Missouri Electric Works Site (MEW), was contaminated with environmentally dangerous polychlorinated biphenyls (PCBs). Under CERCLA, the EPA identified 735 PRPs who had sent equipment containing PCB contaminated oil to be repaired, scrapped, or resold by MEW. A large group of these PRPs negotiated with the EPA regarding assignment of clean-up costs. Non-settling PRPs argued that the resulting allocation plan did not account for varying culpability of different PRPs.

In September 1991, the EPA sent a proposed consent decree to all known PRPs with notice that any PRP could join in the consent decree if they did so within sixty days. In June 1992, the EPA filed suit and the consent decree against 179 settling PRPs pursuant to CERCLA §§ 106 and 107, 42 U.S.C. §§ 9606 and 9607. The parties based the consent decree on the negotiated allocation plan, which was a point of contention for non-settling PRPs, and also offered protection from claims based on CERCLA § 113(f)(2).

In November 1992, non-settling PRPs moved to intervene as a claim of right under Federal Rule of Civil Procedure 24(a) and § 113(I) of CERCLA, 42 U.S.C. § 9613(I). The non-settling PRPs argued that settling PRPs should still be liable for potential contribution claims. Non-settling PRPs also argued that they should be allowed an opportunity to defend against unfair allocations of liability from the MEW site.

This issue, whether non-settling PRPs had sufficient, legally protectable interest in contribution claims based on CERCLA § 113(f)(1) to intervene in a suit between settling PRPs and the EPA when the settling PRPs were sheltered from contribution claims of non-settling PRPs pursuant to CERCLA § 113(f)(2), was one of first impression before the court.

The court noted that the requirements for intervention under Rule 24 and § 113(I) of CERCLA were almost identical, except that under CERCLA, the government must show that the potential intervenor's interest is adequately represented by parties already in the lawsuit, and under Rule 24, the intervenor must show that the current representation is inadequate. The court noted that the trial court had not applied the proper standards to the claim of intervention as of right, because it had improperly considered CERCLA's policy of encouraging speedy settlement rather than the rule itself. The court conducted a de novo review of the motion for intervention.

The court ruled that the non-settling PRPs had a substantial, direct, and legally protectable interest. The court expressly sided with a judicial minority position on this issue. The majority of courts had decided that the policy and legislative intent of CERCLA was to encourage PRPs to settle, and that allowing intervention would not encourage settlement, because there would be no incentive for PRPs to protect their contribution interest. However, the court here decided that policy and legislative history were improper elements to consider in deciding whether to allow intervention. The court found that the terminology of CERCLA § 113(I) clearly and unambiguously gave intervention rights to "any person."

In so ruling, the court denied the EPA and settling PRPs' argument that allowing § 113(I) contribution claims would conflict with the intent of CERCLA § 113(f)(2). EPA and settling PRPs had argued for the majority position, that Congress designed § 113(f)(2) to encourage prompt settlement and that allowing intervention to protect contribution interest would conflict with legislative intent, and so must not be allowed. The court ruled that there was no inherent conflict. In fact, since § 113(f)(2) cuts off contribution rights from non-settling PRPs, CERCLA itself creates sufficient interest to warrant intervention by non-settling PRPs.

The potential liability of non-settling PRPs was not "too contingent," nor speculative with respect to the issues of further litigation, and the outcome of that litigation. The court held that under § 113(f)(2), a contribution interest arises immediately after litigation, pursuant to CERCLA §§ 106 or 107, has begun. Thus, only the recovery of the contribution claim is contingent on further litigation. The court ruled that there was no "daisy chain" of events necessary to create liability for the non-settling PRPs.

The court denied the EPA and settling PRPs' argument that non-settling PRPs' interests had been adequately protected in the procedures leading up to the litigation. The court based this finding on the fact that there was no party whose interests were "identical" to the non-settling PRPs'. The EPA was at odds with the non-settling PRPs, and therefore could not be said to be representing non-settling PRPs as a sovereign representative.

The court also decided other factors of intervention in the non-settling PRPs' favor. The motion to intervene had been timely and the interests of the intervenors would, as a practical matter, have been impaired, because the present litigation may have resulted in a bar or reduction of the contribution claims by the non-settling PRPs. In addition, non-settling PRPs had an interest in challenging the "fairness" of the Consent Decree.

- by Kevin Murphy

RCRA

Systech Environmental Corp. v. United States, 55 F.3d 1466 (9th Cir. 1995)

After applying for a Resource Conservation and Recovery Act (RCRA) permit to incinerate hazardous waste, Systech Environmental Corporation (Systech) filed for review of the Environmental Protection Agency's (EPA's) denial. The EPA's determination hinged on the fact that Systech did not meet the RCRA permit requirement which states that in addition to lessees, landowners must also verify that the application was "processed under [their] direction and supervision."

In this case, Systech was unable to secure the necessary certification from its lessor, the Tejon Ranchcorp (Tejon). Tejon leased a segment of a ranch to the General Portland Cement Company, which in turn subleased a part of the ranch to Systech. Systech collected, processed and incinerated Portland's wastes, a service it continued to provide after Portland sold its interests to the National Cement Company of California, Incorporated (National). A change in EPA regulations made these activities allowable by permit only in 1991.

EPA notified National that the permit application was deficient, based on the requirements of 40 C.F.R §270.10, and later issued a statement indicating that it intended to deny the request. Although National was later able to secure the signature of Tejon's representatives, the EPA determined that National did not meet the permit requirements. After National exhausted its administrative appeals, the EPA issued a final determination denying the permit.

The Ninth Circuit Court of Appeals reviewed EPA's final decision for abuse of discretion. The court agreed that Tejon qualified as the landowner under the statute, and a plain reading of the relevant sections indicated that landowners such as Tejon must either submit their own applications, or co-sign the application prepared by the lessees who are conducting the regulated activity.

However, the court did find EPA's demands unreasonable in light of the certification landowners must also submit, which in many cases might require them to make false statements. The certification, in effect, required Tejon to state not only that it had knowledge of the activity, but that it directed and supervised the application process. The court found that even the admittedly important policy goals behind the statute did not justify the enormity of the burden it placed on absentee owners.

Instead, the court found it reasonable to only require owners to indicate they are aware of the activity taking place on their property, and that they are potentially liable for any environmental violations. Thus, the EPA's goal of impressing upon landowners the significance of their part in hazardous waste joint-ventures is achieved, without the additional requirements that landowners might not be able to meet.

Vacating the EPA's denial, the court remanded the application for further agency consideration. However, the court left little room for EPA to maneuver. The court stated that Tejon's "alternate" certification met statutory requirements because it sufficiently showed knowledge of the occurrence and extent of the hazardous waste activity.

- by Sarah Madden

Furrer v. Brown, 62 F.3d 1092 (8th Cir. 1995)

J. Richard and Margaret L. Furrer brought this action under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6987 (1988 & Supp. V 1993), for the recovery of cleanup costs associated with soil contamination caused by leaking underground gasoline storage tanks. The Court of Appeals for the Eighth Circuit affirmed the district court's order granting the Brown's motions to dismiss.

In 1991, the Missouri Department of Natural Resources had ordered the Furrers to remediate their property's petroleum contamination. After doing so, the Furrers sought recovery from Donald F. and Dorothy J. Brown, Louis W. and Geraldine J. Fagas, and Shell Oil Company. The Browns and Fagases had been owners of the property prior to the Furrers, and Shell Oil Company had been a lessee of the property, operating a service station on the premises. In their complaint, the Furrers alleged one count under RCRA and three state common law theories of recovery. The district court, holding that it did not have subject matter jurisdiction over the federal claim, and declining to exercise supplemental jurisdiction over the remaining state claims, granted the Brown's motions to dismiss.

For federal court jurisdiction purposes, the Furrers had relied upon RCRA's citizen suit provision, 42 U.S.C. § 6972(a)(1)(B) (1988). This provision does not give district courts express authority to award money judgments for costs incurred in remediating contaminated sites. In its analysis, the Eighth Circuit determined that if such a remedy were to be available under § 6972, Congress must have implicitly created the remedy by authorizing the district court "to order . . . such other action as may be necessary," or that the "cause of action . . . may have become a part of the federal common law through the exercise of judicial power to fashion appropriate remedies for unlawful conduct."

The court first noted that federal common law was not at issue in this case, leaving the statute and any implied Congressional intention as the sole sources of recovery for the Furrers. In determining whether congressional intent was to authorize a monetary remedy for private citizens, the court relied upon a four-factor test set forth by the U.S. Supreme Court in *Cort v. Ash*, 422 U.S. 66 (1975). In applying the test, the court cited *Thompson v. Thompson*, 484 U.S. 174, 179 (1988), and noted that the *Cort* analysis "no longer involves a balancing of the four factors; they now serve only as 'guides to discerning congressional intent.'" In its four-part analysis, the court first referred to the statute to determine if the Furrers were in the class for whose benefit the statute was enacted, and secondly, to the legislative history to see if it explicitly or implicitly demonstrated an intent to create or deny the cause of action. Then, citing *California v. Sierra Club*, 451 U.S. 287, 298 (1981), the court noted that the last two *Cort* factors "are only of relevance if the first two factors give indication of congressional intent to create the remedy." Despite a negative finding under the first two factors, the court continued its analysis "out of an abundance of caution." Third, the court examined the proposed remedy in the context of the purpose of the statutory scheme, and fourth, considered whether the cause of action is one traditionally a matter state law, so that inferring a federal remedy would be inappropriate. As a result of its analysis under this test, the court determined that none of the factors were sufficient to imply into § 6972 a cause of action for the reimbursement of cleanup costs.

Next, the court discussed a decision from the Ninth Circuit, *KFC Western, Inc. v. Meghrig*, 49 F.3d 518 (9th Cir. 1995), which provided district courts subject matter jurisdiction over private actions for the recovery of cleanup costs and extended a monetary remedy to § 6972 citizen suits. Although the Ninth Circuit had relied upon two Eighth Circuit decisions in its analysis, those decisions did not reflect consideration of the subject matter jurisdiction issue nor did they raise the issue of cleanup cost recovery in a case such as the one before the court.

As a result, the court explicitly disagreed with the Ninth Circuit and decided not to extend to the Furrers a remedy under § 6972 for their recovery of cleanup costs. Unable to find that Congress intended such a remedy to be available, the court refused to modify the existing statutory scheme. Meanwhile, the court stated that it was not unsympathetic to the Furrers' case and specifically noted that it did not intend its present decision to interfere with their state court remedies.

- by Bryan D. Watson

CLEAN AIR ACT

American Petroleum Institute v. United States, 52 F.3d 1113 (D.C. Cir. 1995)

In a recent ruling, the D.C. Circuit Court held that the Environmental Protection Agency (EPA) cannot require renewable additives in reformulated gasoline. It found the Clean Air Act (CAA) only authorized the EPA to take actions necessary to improve air quality and not to achieve wider environmental goals such as conservation of fossil fuels.

Congress authorized the EPA to establish requirements for reformulated gasoline (RFG) to be used in nonattainment areas. In order to reformulate gasoline so that it will be less polluting, oxygenates must be added. The primary RFG additives in use today are methyl tertiary butyl ether (MTBE) and ethanol. Ethanol is made from corn, a renewable resource; however, reformulated gasoline made with ethanol results in higher volatile organic compound (VOC) emissions. MTBE is made from nonrenewable sources such as natural gas and petroleum, but MTBE does not increase VOC emissions. A third additive, ethyl tertiary butyl ether (ETBE), is both renewable and does not increase VOC emissions. However, ETBE, which is derived from ethanol and presumably more expensive, is not currently in widespread use.

In August 1994, the EPA issued a final renewable oxygenate rule (ROR) for reformulated gasolines. This rule limited VOC emissions and at the same time, required that thirty percent of the oxygen in RFG come from renewable sources. The EPA noted that this rule would effectively require the use of ETBE.

The American Petroleum Institute challenged the rule and argued that EPA lacked statutory authority to mandate use of renewable oxygenates. The Institute said that § 7545(k) gave the EPA control over air quality concerns but not authority to pursue broader environmental goals. It further suggested, and EPA conceded, that the ROR could actually make air quality worse by increasing use of ethanol over MTBE.

EPA countered that the ROR would help conserve fossil energy and reduce global warming. Although these goals are not directly related to air quality, they were within the Agency's interpretation of the statutory framework. The EPA declared that the rule would reasonably "optimize the resulting impacts on cost, energy requirements, and other health and environmental impacts." EPA asserted that its interpretation should be entitled to deference based on prior case law. Accordingly, the Agency's interpretation should be upheld unless it was manifestly contrary to the CAA. EPA pointed out that when Congress wanted to limit EPA's authority, it did so expressly.

The court held that § 7545(k)(1) unambiguously precluded the adoption of RFG rules that were not directed toward the reduction of VOC and toxic emissions. The court stated that the sole purpose of the RFG program is to reduce air pollution. Therefore, the EPA's interpretation of the Clean Air Act to authorize the ROR was improper. The court flatly rejected EPA's contention that a delegation of power can be presumed if it is not expressly withheld.

The court interpreted the § 7547(k)(1) consideration of non-air quality factors as subordinate to the overriding goal of air quality. The court effectively treated the statements as caveats, which only served to ensure that emission reduction regulations do not have inordinate economic, environmental, or energy conservation effects. Therefore, the court held that EPA lacks authority to advance the use of renewable oxygenates when this effort is not in furtherance of, and may be at the expense of, reductions in toxic emissions.

- by Kin Semsch

National Mining Association v. United States, 59 F.3d 1351 (D.C. Cir. 1995)

The District of Columbia Circuit Court of Appeals denied the petition by National Mining Association, American Forest and Paper Association, and General Electric for review of § 112 of the 1990 Clean Air Act. The petition challenged the Environmental Protection Agency's (EPA's) definition of "major source" and its inclusion of fugitive emissions in a source's aggregate emissions for "major source" classification purposes. The court granted review, however, of the claim raised by Chemical Manufacturers Association and American Petroleum Institute that the EPA should not deny consideration of the effect of state and local controls on emissions solely because they are not federally enforceable.

EPA defined a "major source" as a stationary source or contiguous group of sources under common control that emits ten tons per year of one pollutant or twenty-five tons per year of a combination of pollutants. For purposes of the major source definition, the guidelines did not exempt equipment from source categories or create industrial classifications for major source designations. The court found that this rule was reasonable and need not be set aside.

The second argument by National Mining was that the EPA did not conduct special rulemaking pursuant to § 302(j), 42 U.S.C. § 7602(j), before counting fugitive emissions when accounting the aggregate emissions from a source. The court distinguished § 302(j) from § 112(a)(1), the statutory section at issue here, and found that fugitive emissions were emissions from stationary sources for the purposes of § 112(a)(1).

The EPA did not persuade the court, however, on the issue of accepting only federally enforceable controls on emissions. The EPA argued that Congress left this issue up to the agency when it failed to mention the problem in § 112. Further, the EPA stated, there were ways for states to have their restraints considered federally enforceable and so, the EPA has not limited the controls on emissions to those initiated by the federal government.

The court found that while the question was not specifically addressed by the legislature, § 112 did not confer upon the EPA the option to reject controls on bases other than their effectiveness. It also decided that the procedures required by the EPA for state controls to be granted federally enforceable status bore little or no relation to the effectiveness of the controls. Finally, it held that the interest the EPA had in lessening the administrative burden involved in reviewing the state control provisions was not sufficient to impose the limitations it had imposed.

– by Rebecca Tenbrook

CLEAN WATER ACT

Northwest Environmental Advocates v. Portland, 56 F.3d 979 (9th Cir. 1995)

In 1991, an environmental action group, the Northwest Environmental Advocates (NWEA), initiated a suit against the city of Portland and alleged its municipal sewage treatment procedures were not in compliance with Environmental Protection Agency (EPA) standards. More specifically, NWEA advanced two arguments: 1) Portland's sewage releases into local rivers violated a 1984 National Pollution Discharge Elimination System (NPDES) permit by exceeding the number of places it designated for sewage release; and 2) the releases also violated the Clean Water Act (CWA), which categorized all unpermitted pollution as illegal, regardless of the circumstances.

NWEA sought civil damages, as well as an injunction to prevent the city from allowing these "combined sewer overflows" (CSOs), which occurred during periods of precipitation and created sewage that exceeded the city's treatment capacity. The district court found for the city and determined not only did the permit cover the contested CSO points, but that NWEA did not have standing to bring a citizen suit under the CWA. The court did not consider the merits of NWEA's allegations that Portland was also violating the CWA itself.

The Ninth Circuit Court of Appeals affirmed, and NWEA filed a petition for rehearing. While the petition was pending, a United States Supreme Court case established that citizens do have standing under the CWA to challenge quality standard violations.

In accepting the petition for rehearing, the court of appeals vacated its previous opinion, in consideration of its conflict with the Supreme Court concerning standing. It found that NWEA did have a cause of action under the CWA, based on a plain reading of the statute, legislative history, and recent case law.

However, the court's new holding reestablished its previous finding that the city did not violate the permit's requirement. The court first determined the standard of review for the interpretation of the permit to be de novo, since this is the appropriate standard for all legal writings, regardless of their ambiguity. It rejected NWEA's argument that the permit only anticipated two "outfalls," or points of release, rather than the more than fifty points where CSOs took place. Instead, the court found that although the permit did not detail the additional outfalls, the language of the permit was broad enough to cover other "permitted activities," including these CSOs. It based this interpretation on the plain meaning of the permit and extrinsic evidence from various sources.

However, the court of appeals remanded the case on a final issue. Because the district court did not consider one of NWEA's alternative theories in the original cause of action, that Portland was in fact violating the CWA by allowing any unpermitted pollutants to enter the rivers, the case still contained a genuine controversy.

– by Sarah Madden

NEPA

Mount Graham Coalition v. Thomas, 53 F.3d 970 (9th Cir. 1995)

This case was the latest in a string of five cases that challenged the construction of the Mount Graham international observatory. The main issue in these cases dealt with the protection of the highly endangered red squirrel population living on the various mountains on which the University of Arizona (University) wished to construct its observatory. The plans for this observatory called for the construction of several telescopes on different peaks within the Mount Graham, Arizona, area. Because the construction of such telescopes could potentially harm or destroy the habitat of the red squirrel, the organizations charged with approving such projects, the United States Forest Service (FS) and the United States Fish and Wildlife Service (FWS), must comply with the requirements set forth in § 7 of the Endangered Species Act, 16 U.S.C. § 1536 (ESA), and § 102 of theNational Environmental Policy Act, 42 U.S.C. § 4332 (NEPA), before granting approval for the construction. In this case, the Mount Graham Coalition (Coalition), an alliance composed of environmental groups and individuals who wanted to protect the red squirrel, contended that the FS and FWS did not comply with these regulations before granting approval to the University to construct a large binocular telescope on Peak 10,477 in Mount Graham.

Originally, the University had proposed that it build the telescopes necessary for its project on three different peaks within Mount Graham, including one telescope on Peak 10,477. However, the FS and the FWS had issued a biological opinion that this type of construction would likely create grave danger to the red squirrels and that the red squirrel population was "extremely vulnerable to extinction." After making this report, the FWS presented the University with three "reasonable and prudent alternatives." Essentially, these alternatives, called RPAs, presented the University with three options: 1) The project could be terminated altogether; 2) construction of the telescopes could be allowed, but only on one specific peak, High Peak; 3) three telescopes, support facilities, and an access road could be constructed on another peak, Emerald Peak, but only if the University met very specific conditions in regard to this construction. Soon after the FS and FWS issued these RPAs, and before the University was able to select one of these alternatives, the U.S. Congress passed the Arizona-Idaho Conservation Act (AICA), Pub. L. No. 100-696, §§ 601-607, 102 Stat. 4597, 4597-99 (1988). Basically, this act gave the University a green light to "immediately" proceed with the construction of the three telescopes, support facilities, and access road if it complied with the terms and conditions as set forth in RPA 3. If the University met these terms, AICA provided for a "Special Use" authorization for this construction, which exempted the University from complying with NEPA and ESA. In 1989, the University received a Special Use Permit and Management Plan. The permit incorporated RPA 3 by reference, including a site map that indicated exactly where to locate each telescope

and other structures.

The main difficulties occurred in March 1993, after the University had already built two of the three telescopes called for in RPA 3. The University then requested permission to build the third telescope in one of four locations that were different than the location approved by the Special Use Permit. Initially, the FWS indicated that the University would need to comply with § 7 of the ESA. However, the FS completed a biological assessment which indicated that there would be less harm to the squirrels by allowing the University to construct its telescope on Peak 10,477 than on the other locations that the University had presented. Therefore, on December 5, 1993, the FS, without first conforming to the guidelines required by the ESA and NEPA, gave the University permission to build its telescope on Peak 10,477. Soon after it granted this permission, the coalition filed suit against FS and FWS for violating the ESA and NEPA. The district court granted the Coalition's motion for summary judgement and found that the FS and FWS had violated the ESA and NEPA. The court permanently enjoined the FS and the FWS from allowing construction of the telescope to take place on Peak 10,477, unless the construction plan was in compliance with the ESA and NEPA. FS, FWS, and the University appealed this ruling.

The primary argument the defendants put forth was that Congress' enactment of AICA exempted them from complying with NEPA and ESA regulations for the telescope project. Congressional exemption is the only way to avoid compliance with these regulations. The key point of contention was in interpreting what Congress had intended to be allowed when it enacted the AICA. Defendants argued that the AICA stated that its provisions are to be "subject to the terms and conditions of Reasonable and Prudent Alternative Three." Defendants then argued that there are only two parts of RPA 3 which are expressly labeled as terms and conditions. These conditions required that the University report all instances in which a red squirrel is killed or wounded and that it monitor the squirrel population in order to see how it reacts to the construction. Accordingly, defendants contended that AICA should allow the University to construct the telescopes anywhere it pleased, so long as it complied with these two "terms and conditions."

The Ninth Circuit Court of Appeals summarily rejected this interpretation of AICA's intent. In previous decisions regarding AICA, the court ruled that the AICA incorporate all of the provisions of RPA 3, including the locations where the telescopes should be built. The court found that there was no indication that Congress meant to allow the University to build the telescope at any other location without first conforming with NEPA and ESA. The court pointed to three different occurrences to further show that Congress did not intend for there to be analternative site.

First, it indicated that where the AICA did alter RPA 3 in order to further its intent, it did not change or make any allowances for there to be a different location for any of the proposed telescopes. The court reasoned that because in certain places Congress did alter provisions of RPA 3, it would have altered any other provisions that did not further its intent. Arguably then, if Congress had wanted to change RPA 3 to allow the University to select an alternative site, it would have done so.

Second, AICA exempted from NEPA and ESA a specific access road that would need to be built on Emerald Peak. The construction of the telescope on Peak 10,477 would require that a new access road be built on this peak which would have a different type of shape than the one contemplated for Emerald Peak. Because AICA specifically exempted only one access road, the court held that it probably did not intend to exempt additional roads. Again, if Congress had intended for there to be an exemption for other roads, it would have stated so in the Act.

Third, AICA specifically stated that construction of the telescopes, as contemplated in RPA 3, should proceed as soon as possible. Therefore, the court reasoned, Congress would not have intended for there to be delays that would inevitably arise by the selection of another construction site. The court indicated it believed that Congress approved these specific sites for construction, because it knew that by doing so, there would be much less delay in the construction of the project.

For these reasons, the court affirmed the district court's ruling that AICA did not vest the FS with the authority to give the University permission to construct on a site different than that contemplated by RPA 3. In order for further construction on this site to be allowed, compliance with both the ESA and NEPA must be confirmed.

- by Byron Woehlecke

Duncan Energy Company v. United States Forest Service, 50 F.3d 584 (8th Cir. 1995)

The U.S. Forest Service (Forest Service) appealed the grant of a declaratory judgment against it that denied it the power to regulate, the access to, and use of, an area located within the Custard National Forest that held privately owned mineral rights. The judgment allowed Duncan Energy Co. (Duncan), the mineral rights holder, to continue mineral exploration on the property without first getting approval of its "surface use plan." The United States Court of Appeals for the Eighth Circuit reversed the declaratory judgment and remanded the case back to the United States District Court for the District of North Dakota.

The dispute arose due to conflicts between Duncan and the Forest Service as to whether Duncan could begin construction of an access road to reach its mineral rights in order to begin drilling for oil and gas. The Forest Service insisted on doing environmental impact investigations according to the National Environmental Policy Act (NEPA) before construction began, which might have taken longer than 2 years. Duncan contended that along with the Forest Service, it was party to a Memorandum of Understanding (the Understanding), which provided that the Forest Service would process any of its surface use plans within ten working days of receipt. Duncan believed it had this right, because its predecessors to the mineral rights negotiated and entered into the Understanding. However, the Forest Service disagreed and chose to follow the policies of NEPA.

Upon written request, the Forest Service agreed to comply with the Understanding as long as Duncan completed necessary environmental surveys on certain amendments to its original survey plan. However, the Forest Service later failed to comply as agreed, and Duncan began construction and erected its drill without approval. Ultimately, the Forest Service terminated the Understanding and both parties filed suit. Duncan requested a declaratory judgment prohibiting the Forest Service from impeding access to its mineral rights or regulating its explorations. The

Forest Service requested a permanent injunction against Duncan prohibiting it from further activity on the property or any other National Forest land.

The district court held in favor of Duncan, because it said the mineral right estate was superior to the Forest Service's surface estate. Thus, according to the court, Duncan could completely destroy the value of the surface area in exploring its mineral rights.

The Forest Service appealed, claiming that under federal law, 36 C.F.R. § 251.50(a), and under North Dakota law, it had the authority to regulate surface access to mineral rights through the "special use" regulations. However, Duncan argued that because reserved mineral rights are addressed separately in 36 C.F.R. § 251.15, the special use regulation provision did not apply. Initially, the Forest Service disagreed with Duncan's use of its property because it failed to get approval from the Service pursuant to 36 C.F.R. § 251.50.

The court of appeals addressed North Dakota law first and held that the mineral estate was dominant over the surface estate but that the Forest Service, as holder of the surface estate, had the right to require that only reasonable use be made of the surface area. However, the court explained that there was no provision in North Dakota law that allowed the surface estate holder to enjoin the mineral rights holder from unreasonable uses. Instead the law only said that the surface estate holder has the right to receive twenty days written notice of the operations and receive damages as a remedy.

However, the court did find that Congress had the power to regulate federal land under the property clause, found in Article IV, Sec. 3, cl. 2. The court explained that Congress had given the Forest Service broad powers under the "special use" regulations, which required that all special uses of the National Forest System must be approved by an officer of the Forest Service.

The court summarized its holding by explaining that the Forest Service's deviation from the Understanding was not a violation of the Custard National Forest Management Plan and that it had a right to determine the reasonable use of a federal surface area. The court explained that even if North Dakota law was interpreted to be more lenient by allowing unrestricted access to federal land after twenty days notice, it was inconsistent with federal law and could therefore be pre-empted. Additionally, the court explained that protecting federal lands was a congressionally mandated program that would be frustrated under North Dakota law and thus, the choice of law rules required it to chose the federal law.

Ultimately, the court remanded the request for an injunction back to the district court for further proceedings consistent with its holding.

- by Joe Hewes

ENDANGERED SPECIES ACT

Babbitt v. Sweet Home Chapter of Communities For a Great Oregon, 115 S. Ct. 2407 (1995)

Sweet Home Chapter of Communities For a Great Oregon (Sweet Home) brought a declaratory judgment against the Secretary of the Interior Bruce Babbitt (Secretary) and the Director of the Fish and Wildlife Service to challenge the Secretary's definition of "harm" as applied to the Endangered Species Act.

Sweet Home was comprised of landowners, logging companies and families dependent on the forest products industry in the Pacific Northwest and Southeast. The group had been adversely affected by prohibitions against logging on lands inhabited by the red-cockaded woodpecker and the spotted owl. The precursor to the Endangered Species Act (Act) named the red-cockaded woodpecker as an endangered species in 1970. The Secretary, through separate regulations, also extended the Act prohibitions to protect the spotted owl, as it is a threatened species, or species likely to become endangered within the foreseeable future.

In an action brought in the United States District Court for the District of Columbia, Sweet Home challenged the statutory validity of the Secretary's definition of the word "harm," which included habitat degradation and modification that indirectly affected the woodpecker and owl. Sweet Home alleged in its complaint that by expanding the definition of "harm" to include indirect acts as well as the direct application of force against an animal, the Secretary had caused Sweet Home members to suffer economic hardship.

The Interior Department regulations that implemented the taking provision of the Act defined "harm" as an act which actually kills or injures wildlife. The regulations - in effect since 1975, but amended in 1981 to require an actual death or injury of a protected animal for a violation to occur - stated that such an act "may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering."

Sweet Home's main argument was that Congress did not intend the word "take," as used in § 9 of the Act, to include habitat modification and other indirect harm to species; therefore, the Interior Department had wrongfully expanded the scope of the Act's taking provision. Sweet Home focused on three points in support of its argument: 1) the Senate had deleted language from the original version of the Act which had defined "taking" to include indirect harm such as habitat modification; 2) Congress intended for § 5 of the Act, the section that enabled the federal government to buy private lands, to be the exclusive method to prevent habitat modification; and 3) since the Senate had included the term "harm" within the Act's definition of "take" in a floor amendment to the Act, the courts could not approve of a more expansive definition of harm promulgated by the Secretary than that which already existed in the Act's taking provision.

In holding that the Secretary's interpretation of harm was reasonable, the district court entered summary judgment for petitioners, rejecting each of Sweet Home's three arguments. A divided court of appeals first affirmed the judgment. However, in 1994, the panel reversed the decision upon rehearing, stating that although the word harm is subject to numerous definitions, the immediate statutory context in which "harm" appeared counseled against a broad interpretation. The court of appeals stated that the taking provision was intended to apply only to direct acts such as "A hit B."

The U.S. Supreme Court granted certiorari because the court's decision conflicted with a 1988 decision of the Ninth Circuit. The Court reversed, stating that the legislative history of the Act, while not specifically discussing the term "harm," made it clear that Congress intended the taking provision "to cover indirect as well as purposeful actions." The Court further held that the Act gave the

Secretary wide latitude in enforcing the statute and that, combined with the regulatory expertise the Secretary possesses which is necessary for enforcement, courts should not interfere with the Secretary's reasonable interpretation of harm.

The Court stated that the Act supported the Secretary's broader interpretation of the word "harm" in three ways. First, § 3(19) of the Act defined the term "take" by using the direct action verbs. If the Interior Department were to exclude habitat changes from the definition of "harm," the Court reasoned, it in effect would be duplicating the meaning of the term "take." The Court thus refused to approve of a limited definition of "harm" that would be repetitive of other terms in the Act.

Second, the Court reasoned that the Act's comprehensive protection of endangered and threatened species supported the Secretary's interpretation of harm as including both direct and indirect damage to the red cockaded woodpecker and spotted owl. The Court emphasized that the Act's predecessors did not contain the sweeping language of its provisions and did not apply to all lands in the United States and its territorial seas. The Court recognized Sweet Home's argument that certain unforeseeable or minimal harm should not result in violations of the Act. However, Justice Stevens, writing for the majority, refused to lend credence to Sweet Home's facial attack on the Secretary's interpretation of "harm," stating that to do so would enable even the most egregious violators of the Act to wipe out entire habitats by arguing their actions only indirectly caused the harm.

Third, the Court stated that Congress obviously intended that § 9 prohibit both indirect and forceful takings because it had authorized the Secretary to issue permits for takings otherwise prohibited under § 9(a)(1)(B), as long as those takings were incidental to the carrying out of lawful activity. To obtain a permit, applicants must prepare a conservation plan that specifies how they plan to minimize the impact of the proposed land use on endangered and threatened species. The Court offered this as evidence that Congress intended to include in the Act's prohibitions against takings both foreseeable and accidental effects on species.

The Court further rejected Sweet Home's argument that the Secretary's interpretation of harm pursuant to § 9 was inconsistent with the § 5 provision for private land purchases and the § 7 provision that directed federal agencies to avoid destruction or modification of habitats. Unlike the other two provisions, the Court reasoned, § 9 cannot be enforced until an actual killing or injury of an endangered species has occurred. Therefore, the Secretary's prohibition in § 9 against indirect harm, such as the destruction of forests, was not duplicitous of other provisions in the Act.

- by Douglas T. Cohen

CONSTITUTIONAL CLAIMS

Thomas v. FAG Bearings Corporation, 50 F.3d 502 (8th Cir. 1995)

This appeal sprang from an action filed by residents of Silver Creek against FAG Bearings Corporation (FAG). The gist of this appeal, however, was between FAG and Missouri Department of Natural Resources (MDNR). FAG moved, in district court, to involuntarily join MDNR under Federal Rule of Civil Procedure 19(a), based on MDNR's statements that it intended to sue FAG for the costs of remediation. Since the citizens of Silver Creek sought remediation costs in the their citizen suit, FAG argued that joinder was necessary to prevent multiple or inconsistent obligations. MDNR resisted joinder on the theory that it was subject to Eleventh Amendment immunity as a state agency. The district court granted FAG's motion to join MDNR. This appeal followed.

The basis of MDNR's Eleventh Amendment argument was that involuntary joinder, even if it involves later realignment, constitutes a suit against the state. The Eleventh Amendment states that: "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Since the interpretation of this amendment, based on its plain language, has been so varied throughout the years, the court of appeals rejected a plain words interpretation of the Eleventh Amendment. Additionally, the court was unwilling to examine the few cases involving state joinder. The court noted that these cases were irrelevant since they did not discuss the Eleventh Amendment issue.

The court opted to review the Eleventh Amendment based upon its function within our governmental system. More precisely, the court attempted to define exactly what constituted a suit against the state. The court cited *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1963), for its proposition that a suit is against the state if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act."

By forcing MDNR to prosecute at a time and place determined by the federal courts, the state may lose potential recovery costs and may be barred from future claims against FAG. The court noted that "this disrespect for state autonomy in decision-making is precisely what the Eleventh Amendment was intended to avoid." Therefore, the court of appeals reversed and remanded, concluding that the Eleventh Amendment prohibited the involuntary joinder of MDNR.

- by Greg Moldafsky

National Solid Wastes Management Association v. Meyer, 63 F.3d 652 (7th Cir. 1995)

This dispute arose over a Wisconsin statute enacted to curb the increase in solid waste disposal in Wisconsin landfills. The statute required generators who dispose of solid waste in a Wisconsin landfill to comply with several requirements to keep recyclable materials from disposal. The requirements not only applied to Wisconsin generators, but they also required out-of-state communities to comply with the statute if any generator within that community wished to dispose of solid waste in Wisconsin. A solid waste management trade association, landfill owners, and landfill operators claimed the Wisconsin statute violated the United States Constitution in that it was a direct violation of the Commerce Clause.

The United States Seventh Circuit Court of Appeals applied several tests in reviewing the statute. First, after determining that solid waste disposal is commerce for purposes of review under the Commerce Clause, the court said the statute must not directly regulate interstate commerce. The Wisconsin statute required all out-of-state communities to adhere to the statute if any generator within

that community disposed of solid waste in Wisconsin. The court found this to be a direct attempt to regulate interstate commerce and, therefore, a violation of the Commerce Clause. Second, the court found the statute violated the Commerce Clause because it discriminated against interstate commerce. The court, using a higher standard for discrimination, required the state to prove that no nondiscriminatory alternatives existed. Since the goal of the Wisconsin statute, the removal of all recyclable materials from solid waste before disposal, could be accomplished by requiring all solid waste to be sent to a materials recovery facility before disposal, the court found that the statute failed this test.

The last test the court used, weighed the burdens on out-of-state commerce with the benefits to local interests. The court reasoned that regulating waste that was not brought into Wisconsin had no benefit to local interests. The court found this to be a substantial burden on out-of-state generators and a burden on interstate commerce.

Because the statute regulated, discriminated against, and imposed an intolerable burden on interstate commerce, the court found the Wisconsin solid waste disposal statute to be in violation of the Commerce Clause of the United States Constitution.

- by Marc Poston

MISSOURI

Mueller v. Missouri Hazardous Waste Management Commission, 904 S.W.2d 552 (Mo. Ct. App. 1995)

Atlas Environmental Services, Inc., (AES) applied for a hazardous waste facility permit from the Missouri Department of Natural Resources (MDNR). MDNR issued AES a draft permit on March 29, 1991. MDNR held public hearings which Mueller attended before granting AES an official permit on July 18, 1991. Mueller appealed the issuance of the permit to the Missouri Hazardous Waste Management Commission (Commission). The Commission issued an order conditionally approving the permit after modifying it and ordering MDNR to take "remedial measures." The Commission required MDNR to revaluate AES's status as a "habitual violator" and to re-assess response capabilities and transportation routes around the proposed site. MDNR completed the "remedial measures" and the Commission issued its final order affirming the MDNR permit on May 21, 1993. Mueller appealed to the Jasper County Circuit Court, which denied the petition for review on May 10, 1994.

The Missouri Southern District Court of Appeals held that the MDNR did not grant the Commission the right to modify a hazardous waste disposal permit. Accordingly, it reversed the decision of the trial court and remanded the case so that MDNR could make the ultimate determination of the status of the permit. The court based its holding on its interpretation of the Missouri Hazardous Waste Management Law (Act) and the powers and duties granted the Commission under the Act. The court attempted to construe the language of the Act broadly so as to allow the "administrative machinery" to accomplish the purpose of the Act. Nonetheless, the court found that the legislature had not explicitly granted modification powers in this part of the Act, while explicitly granting such powers elsewhere. The court concluded that the legislature had reserved such power from the Commission in the Hazardous Waste Management Facility Treatment and Storage Permit application process.

The court touched on several other issues. It held that the MDNR was within its rights under the Act to contract with the Missouri Department of Health to prepare a health profile as required by the Act. It found that the Act required the Commission to consider environmental and geological information, but the question of the extent to which the Commission must consider the factors was left unanswered. The court held that the Commission and MDNR are limited to considering geologic and engineering data collected in field work supervised by MDNR. The court decided that the other points on appeal were rendered moot, as they related to the insufficiency of various specific components of the permit application process. The court felt that the specific points would be resolved correctly upon re-evaluation by MDNR.

The ultimate effect of this decision was to limit the options given to the Commission in administrative appeals of Hazardous Waste Management Facility Treatment and Storage Permits. The Commission will retain jurisdiction over such appeals but may only affirm or reverse MDNR's decision to grant a permit.

- by Michael Hunter