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The Strong Arm of CERCLA: EPA Allowed Free Reign to Recoup Cleanup Costs. United States v. W.R & Grace, Inc.

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THE STRONG ARM OF CERCLA: EPA ALLOWED FREE REIGN TO RECOUP CLEANUP COSTS

United States v. W.R. Grace & Co.[1]

I. INTRODUCTION

The judgment requiring W.R. Grace to pay $54.5 million dollars for the cleanup of asbestos in Libby, Montana is the largest award in the history of the federal Superfund law.[2] The Ninth Circuit's decision allows the Environmental Protection Agency ("EPA") to classify a cleanup without regard to the requirements set forth in the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). Under CERCLA, the EPA must classify a cleanup as either a removal or remedial action. A removal action is short term, while a remedial action is continuous. The classification of the action as either removal or remedial determines the procedures the EPA has to follow during cleanup.

This case note argues that the Ninth Circuit's decision allows the EPA to exercise too much authority and grants the EPA the power to classify any action as a removal. Thus, the EPA can now ignore the procedural safeguards that were once required for remedial actions and still require the party to bear the financial burden of the cleanup. By leaving the classification to the EPA, the court effectively removes itself from the picture and shuts off review of further challenges to the EPA's classification of cleanup actions under CERCLA.

II. FACTS AND HOLDING

In the late 1800's, vermiculite ore was discovered in the mountainous regions located near Libby, Montana.[3] Vermiculite ore contains a mineral called tremolite, which is a form of asbestos.[4] In 1939,

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[1] 429 F.3d 1224 (9th Cir. 2005) [hereinafter Grace II].

[2] *9th Cir. Upholds $54.5 Million Order for Libby, Mont. Cleanup Costs*, 28 No. 4 Andrews Asbestos Litig. Rep. 6 (December 16, 2005).

[3] United States v. W.R. Grace & Co.-Conn. (*Grace I*), 280 F. Supp. 2d 1135, 1138 (D. Mont. 2002).

[4] *Id.*

the Zonolite Company began to mine and process the vermiculite.[5] The Zonolite Company then processed the vermiculite into products and insulating materials which in turn contained asbestos.[6] The Zonolite Company was bought by W.R. Grace ("Grace") in 1963.[7] Grace continued the mining and processing operations in Libby until 1990.[8]

During Grace's operation of the plant, materials containing asbestos were transported to both the processing mill and the distribution centers.[9] The materials containing asbestos ended up in the homes of Grace's employees because Grace allowed the employees to use its products to insulate their homes and to condition the soil in their gardens.[10] Grace also donated the asbestos containing products to local schools.[11] The schools used the material in tracks and baseball fields.[12]

Although Grace began its mining operation around 1960, the full extent of the problem facing Libby did not surface until the late nineties.[13] In 1999, the EPA was called to Libby to address health issues related to asbestos contamination.[14] The EPA conducted a study from November 1999 to January 2000.[15] The study "addressed questions and concerns raised by the citizens of Libby regarding possible ongoing exposures to

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[5] *Id.*

[6] *Id.*

[7] *Id.* at 1138-39.

[8] *Id.* at 1139. After Grace discontinued operation of the plant it sold the majority of its facilities and real estate holdings to Kootenai Development Corporation ("KDC"). *Id.* KDC is a subsidiary of Grace and the court only refers to Grace throughout its opinion. *Id.* at 1139 n.1. *See also*, Brief of Appellant at 2, United States v. W.R. Grace & Co, et. al, No. 03-35924 (9th Cir. April 26, 2004).

[9] *Grace II*, 429 F.3d 1224, 1229 (9th Cir. 2005).

[10] *Id.*

[11] *Id.*

[12] *Id.* at 1230.

[13] *Id.* at 1229. Prior to the nineties, studies had been conducted in Libby regarding asbestos exposure. *Id.* At the time, the studies mainly focused on exposure to asbestos in the workplace. *Id.* However, prior to the actions that led to this case no CERCLA activities were performed in Libby. *Id.*

[14] *Id.* at 1225.

[15] *Id.* at 1229. The EPA study focused on checking airborne asbestos levels and gathering information on friable asbestos levels around the community. *Id.* The information gathered in these two areas would allow the EPA to determine if it needed to immediately intervene to protect the public health. *Id.*

asbestos fibers as a result of historical mining, processing and exportation of asbestos-containing vermiculite."[16] The study showed that asbestos contamination was pervasive.[17]

Based on its investigatory findings, the EPA concluded that a removal action was necessary.[18] The EPA determined that the asbestos export and screening plants posed the greatest threat and should be cleaned up first.[19] This cleanup would cost approximately $5.8 million.[20] The EPA later determined that cleanups were necessary at six other locations and would cost $20.1 million.[21] In 2002, the EPA declared that it would be necessary to further expand the scope of the cleanup to residential homes and businesses in the community.[22] After the third cleanup effort all future efforts were to be deemed remedial actions.[23] The estimated cost for the cleanup in Libby totaled $55.6 million.[24]

In March 2001, the EPA filed suit against Grace seeking recovery of cleanup costs and a declaration holding Grace liable for future cleanup costs.[25] In its defense, Grace argued that: 1) the EPA's actions were

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[16] *Id.* The study showed "(1) 'a large number of current and historic cases of asbestos related diseases centered around Libby,' including '33 incidents of apparently non-occupational exposures'; and (2) a 'high likelihood that significant amounts of asbestos contaminated vermiculite still remained in and around Libby.'" *Id.* at 1230.

[17] *Id.* The EPA found that the asbestos problem in Libby was especially troubling because the residents were surrounded by asbestos. *Id.* The residents were being exposed to asbestos when they walked because foot traffic put asbestos in the air. *Id.* Additionally, the wind carried particles throughout the town, which made them easy to inhale. *Id.* As further proof of the contamination, a study of the residents showed that 18% had lung abnormalities, compared to an expected rate of 0.2% to 2.3% in the United States. *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.* This project should have been capped at $2 million. *See* 42 U.S.C. § 9604(c)(1) (2000); 40 C.F.R. § 300.415(b)(5) (2005). However, under CERCLA, the EPA may exceed this cap if it determines that an immediate threat is posed to the surrounding community. 42 U.S.C. § 9604(c)(1).

[21] *Grace II*, 429 F.3d at 1231. The EPA also determined that an exemption from the monetary cap applied to the cleanup of these six sites. *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.* At this time, the EPA also determined that continuing action in Libby would be necessary to remedy the exposure problem. *Id.*

[25] *Grace I*, 280 F. Supp. 2d 1135, 1140 (D. Mont. 2002).

inconsistent with the actions required by the National Contingency Plan, 2) the EPA did not properly account for its costs, 3) the EPA's activities covered areas where the asbestos containing material was naturally occurring, and 4) the release of asbestos was an act of God and not the fault of Grace.[26] The United States filed a motion for summary judgment, which the Montana District Court granted in part and denied in part.[27] The district court determined that the substantial number of asbestos related diseases and the amount of asbestos containing material in Libby supported the EPA's contention that there was an imminent and substantial threat to the residents.[28] Thus, the EPA's classification of the cleanup as a removal action was not arbitrary or capricious.[29] The court also stated that the EPA acted within its authority when it exceeded the $2 million statutory cap for removal actions because of the immediate risk that the asbestos posed to the surrounding community.[30]

The district court next focused on whether the United States could recover its costs from Grace.[31] After the United States established a prima facie case, Grace had to rebut the evidence by showing that the EPA did not follow the National Contingency Plan ("NCP").[32] At that time, Grace stipulated that it was liable for cleanup costs at a majority of the properties at issue.[33] However, the court determined that there were issues of

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[26] *Id.*

[27] *Id.* at 1148. The United States actually filed three separate summary judgment motions. *Id.* However, the court found three predominant themes throughout the motions: 1) was the EPA's action arbitrary and capricious, 2) was Grace liable for the cleanup costs under CERCLA, and 3) was the EPA entitled to receive compensation for the $55 million spent to cleanup Libby? *Id.* at 1142.

[28] *Id.* at 1142-43.

[29] *Id.* at 1143. In order for the court to find the EPA's actions arbitrary and capricious, it must find that the EPA was clearly erroneous when it discharged its duties under the NCP. United States v. Ne. Pharm. & Chem. Co., Inc., 810 F.2d 726, 748 (8th Cir. 1986).

[30] *Grace I*, 280 F. Supp. 2d at 1144.

[31] *Id.* In order to establish recovery the United States had to prove: "(1) the site was a facility; (2) a release or threatened release of a hazardous substance occurred; (3) the government incurred costs in responding to the release or threatened release; and (4) the defendant was the liable party." *Id.*

[32] *Id.* The NCP "specifies procedures for preparing and responding to contaminations and was promulgated by the [EPA] pursuant to CERCLA." *Grace II,* 429 F.3d 1224, 1227, 1227 n.3 (9th Cir. 2005).

[33] *Grace I*, 280 F. Supp. 2d at 1145.

material fact as to whether Grace was responsible for cleanup costs at the remaining locations and thus denied the United States' motion for summary judgment on this claim.[34]

The district court next focused on Grace's liability for the costs of the cleanup action.[35] The court determined that if the EPA had failed to follow the NCP, then Grace would not be liable for costs.[36] Because the EPA had followed this plan, Grace was responsible for all of the cleanup costs.[37] Therefore, if Grace was found liable for the cleanup costs at the properties that remained in dispute, it would be responsible for the entire cost of the cleanup.[38] After determining these issues, the court held a three day bench trial and found Grace liable for a total of $55 million in cleanup costs.[39]

Grace appealed the judgment to the Ninth Circuit.[40] On appeal, the Ninth Circuit reviewed the district court's grant of summary judgment regarding the classification of the cleanup action as a removal.[41] The Ninth Circuit affirmed the district court's decision.[42] The court found that the classification was not arbitrary or capricious and that the administrative record supported the classification.[43]

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[34] *Id.*
[35] *Id.* at 1145-46.
[36] *Id.* at 1146.
[37] *Id.*
[38] *Id.*
[39] *Grace II*, 429 F.3d 1224, 1232 (9th Cir. 2005).
[40] *Id.*
[41] *Id.* at 1225.
[42] *Id.* at 1227.
[43] *Id.* at 1233.

III. LEGAL BACKGROUND

Congress enacted CERCLA on December 11, 1980.[44] CERCLA was enacted in order "to provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites."[45] Congress recognized that many businesses were negligently, recklessly, and improperly disposing of hazardous waste.[46] Congress deemed this problem the "Inactive Hazardous Waste Site Problem."[47] It determined that there were between 30,000 and 50,000 inactive sites throughout the county and between 1,200 and 2,000 of those posed a serious risk to public health.[48] Congress believed that because these sites posed such a serious threat to public health, a statutory means of cleanup was necessary.[49]

The act created a "hazardous waste response trust fund," which imposed excise taxes on oil, feedstock, and specified inorganic substances.[50] The proceeds of this fund were earmarked for cleanup of hazardous wastes that were threatening or causing harm to the public or the environment.[51] The imposition of the excise tax was slated to end in 1985; however, Congress extended CERCLA by enacting the Superfund Amendments and Reauthorization Act of 1986.[52] The act was again amended by the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996[53] and again in 2002 by the Small Business Liability Relief and Brownfields Revitalization Act.[54]

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[44] CERCLA, Pub. L. No. 96-510, 94 Stat. 2767 (1980).
[45] 94 Stat. at 2767.
[46] H.R. REP. NO. 96-1016(I), at 17 (1980).
[47] H.R. Rep. No. 96-1016(I), at 17.
[48] H.R. Rep. No. 96-1016(I), at 18.
[49] H.R. Rep. No. 96-1016(I), at 25.
[50] H.R. REP. NO. 96-1016(II), at 1 (1980).
[51] H.R. Rep. No. 96-1016(II), at 2.
[52] Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 1, 100 Stat. 1613.
[53] Asset Conservation, Lender Liability, Deposit Insurance Protection Act of 1996, Pub. L. No. 104-208, § 2501, 110 Stat. 3009, 3009-462.
[54] Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (2002).

When Congress enacted the CERCLA, it defined "removal" as the cleanup of released hazardous substances into the environment and included actions that would be necessary to prevent the release of hazardous substances into the environment.[55] Removal actions included, but were not limited to, actions that were "necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare."[56] Congress also defined remedial actions as those actions that were consistent with a permanent remedy.[57] The remedial actions were to be taken in the event of a release or a threatened release of a hazardous substance or to help minimize the threat to public health or welfare.[58] Remedial actions could be taken in addition to removal actions.[59]

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[55] CERCLA, Pub. L. No. 96-510, 94 Stat. 2767 (1980).

> The terms "remove" or "removal" means the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary [sic] taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act.

42 U.S.C. § 9601(23) (2000).

[56] § 101, 94 Stat. at 2767. *See* 42 U.S.C. § 9601.

[57] § 101, 94 Stat. at 2767.

[58] § 101, 94 Stat. at 2767.

> The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances or contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of

The definitions of removal and remedial actions remained relatively unchanged by the amendments to CERCLA. Thus, the interpretation of both removal and remedial has been left to the courts, which have developed one major distinction between the two actions. The major distinction between a removal and remedial action is whether there is a need for an immediate action.[60] When there is an immediate threat to public health, a removal action is typically justified.[61] Courts have further tailored the definitions of removal and remedial actions. Courts have found that a removal action is generally short term, while a remedial action is long-term and permanent.[62]

Courts have also focused on CERCLA's primary purpose to guide them in their interpretation of the statute. Courts have stated that CERCLA's primary purpose is cleaning up hazardous waste sites and,

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> alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. The term includes the costs of permanent relocation of residents and businesses and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or welfare.

42 U.S.C. § 9601(24).

[59] § 101, 94 Stat. 2767.

> The terms "remedy" or "remedial action" means those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment.

42 U.S.C. § 9601.

[60] *See* City of Wichita v. Trs. Of APCO Oil Corp. Liquidating Trust, 306 F. Supp. 2d 1040, 1077-78 (D. Kan. 2003); Hatco Corp. v. W.R. Grace & Co.-Conn. 849 F.Supp. 931, 963 (D. N.J. 1994).

[61] *See* Carson Harbor Vill., Ltd. v. Unocal Corp., 287 F. Supp. 2d 1118, 1157 (C.D. Cal. 2003) (action was remedial because there was no evidence of an immediate threat to human health).

[62] *See* Prisco v. New York, 902 F. Supp. 374, 385-86 (S.D.N.Y. 1995); City of New York v. Exxon Corp., 633 F. Supp. 609, 614 n.6 (S.D.N.Y. 1986).

thus, should be construed liberally.[63] Liberal construction is necessary in order to ensure that the EPA is able to respond efficiently and promptly to the hazardous waste site.[64] Additionally, broad interpretation allows the government to hold the polluting party responsible for the costs of the cleanup.[65] Courts have stated that if the costs of the cleanup could not be recouped, the Superfund would be depleted and taxpayers would have to bear the financial burden of the cleanup, which defeats the purpose of CERCLA.[66]

In *United States v. Hardage*,[67] the court allowed a private party to challenge the government's classification of cleanup.[68] The court stated, "[A] defendant who is declared liable for future response costs may still challenge those costs as unrecoverable because the underlying response actions giving rise to the costs are inconsistent with the NCP."[69] Other cases have also held that where the government's costs are inconsistent with the response plan, they should not be recoverable.[70] Therefore, the NCP sets guidelines that limit the EPA in its ability to recover CERCLA costs.[71]

In *Grace*, the costs incurred would be inconsistent with the NCP if the EPA incorrectly classified the action as a removal. Until *Grace*, no court had tackled the distinction between removal and remedial actions. Previous courts glossed over the definitions of removal and remedial, while *Grace* dives deeper into the definitions in order to determine the distinction between removal and remedial.

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[63] *See* United States v. Witco Corp., 865 F. Supp. 245, 247 (E.D. Penn. 1994); United States v. Distler, 741 F. Supp. 637, 642 (W.D. Ky. 1990) (CERCLA is remedial in nature and a court should not interpret it in any way that frustrates the goals of the statute).

[64] *Witco*, 865 F. Supp. at 247.

[65] *Id.*

[66] *Id.* (citing B.F. Goodrich Co. v. Murtha, 958 F.2d 1192 (2d Cir. 1992); United States v. Aceto Agric. Chems. Corp., 872 F.2d 1372, 177 (8th Cir. 1989); City of New York v. Exxon Corp., 744 F. Supp. 474, 485 (S.D.N.Y. 1990)).

[67] 982 F.2d 1436 (10th Cir. 1992).

[68] *Id.* at 1445.

[69] *Id.*

[70] United States v. USX Corp., 68 F.3d 811, 817 (3d Cir. 1995) (stating that summary judgment should not be granted because material issues of fact existed as to whether certain expenses incurred by the EPA were reasonable).

[71] United States v. E.I. Dupont De Nemours & Co., 432 F.3d 161, 169 (3d Cir. 2005).

IV. INSTANT DECISION

In the instant decision, the court of appeals addressed the issue of whether the cleanup action was a removal action or a remedial action under CERCLA.[72] The characterization of the cleanup was at issue because if deemed to be a remedial action, the EPA did not fulfill the statutory requirements of the NCP.[73] However, if the action was classified as a removal action the EPA had broad discretion to tailor its response to the presumed threat.[74] Grace argued even if the cleanup was properly classified as a removal action, it should not have been exempted from the $2 million cap.[75]

Grace argued that the EPA improperly characterized the action as a removal action rather than a remedial action.[76] Grace claimed that the cleanup should have been characterized as a remedial action because it would be ongoing and permanent.[77] On the other hand, a removal action is

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[72] *Grace II*, 429 F.3d 1224, 1226 (9th Cir. 2005).

[73] *Id.* The NCP requires the acting party to perform remedial actions in accordance with 42 U.S.C. § 9621. 42 U.S.C. § 9604(c)(4) (2000). The requirements for performing a remedial action include an analysis of the costs and effectiveness of the remediation and inclusion on the National Priority List. *See* 42 U.S.C. § 9621 and 40 C.F.R. §§ 300.425(b)(1), 300.430 (e)(7) (2005). The court also stated that the distinction between the two classifications was important because, "the requirements for remedial actions are more detailed and onerous." *Grace II,* 429 F.3d at 1228.

[74] *Grace II*, 429 F.3d at 1226.

[75] *Id.* 40 C.F.R. § 300.415 provides in part:

> CERCLA fund-financed removal actions, other than those authorized under section 104(b) of CERCLA shall be terminated after $2 million has been obligated for the action or 12 months have elapsed from the date that removal activities begin on-site, unless the lead agency determines that:
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> (i) There is an immediate risk to public health or welfare of the United States or the environment; continued response actions are immediately required to prevent, limit, or mitigate an emergency; and such assistance will not otherwise be provided on a timely basis; or
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> (ii) Continued response action is otherwise appropriate and consistent with the remedial action to be taken.

40 C.F.R. § 300.415(b)(5).

[76] *Grace II*, 429 F.3d at 1226.

[77] *Id. See supra* notes 57-59 and accompanying text.

a time-sensitive response to public health threats.[78] The basic premise of Grace's argument stems from the EPA's erroneous classification and its effect on the statutory requirements under the NCP.[79] Had the EPA correctly classified the actions as remedial, the EPA would not have met all the statutory requirements and Grace would not be liable for all the cleanup costs.[80]

The court reasoned that the classification should stand because CERCLA states that the selection of the response action should be upheld unless it is arbitrary and capricious or not in accordance with the law.[81] To determine if the EPA acted arbitrarily, a set of eight factors must be considered.[82] The court found that the EPA not only looked at the factors,

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[78] *Grace II*, at 1227-28.

[79] *Id.* at 1226.

[80] *Id.* at 1229. "CERCLA provides that responsible parties shall be liable for 'all costs of removal or remedial action incurred by the United States Government . . . not inconsistent with the national contingency plan.'" *Id.*

[81] *Id.* at 1232.

[82] *Id.* at 1234 n.15.

> [T]he following factors shall be considered in determining the appropriateness of a removal action:
> (i) Actual or potential exposure to nearby human populations, animals, or the food chain from hazardous substances or pollutants or contaminants;
> (ii) Actual or potential contamination of drinking water supplies or sensitive ecosystems;
> (iii) Hazardous substances or pollutants or contaminants in drums, barrels, tanks, or other bulk storage containers, that may pose a threat of release;
> (iv) High levels of hazardous substances or pollutants or contaminants in soils largely at or near the surface, that may migrate;
> (v) Weather conditions that may cause hazardous substances or pollutants or contaminants to migrate or be released;
> (vi) Threat of fire or explosion;
> (vii) The availability of other appropriate federal or state response mechanisms to respond to the release; and
> (viii) Other situations or factors that may pose threats to public health or welfare of the United States or the environment.

40 C.F.R. § 300.415(b)(2) (2005).

but the EPA's findings were extensively documented.[83] Because the EPA reviewed these factors and found that the threat was imminent and severe, the EPA's decision to classify the cleanup as a removal action was not arbitrary and capricious.[84] However, the court concluded that the analysis should also determine whether the EPA's actions were actually consistent with those of a removal action.[85]

In determining the difference between removal and remedial actions, the court needed to determine how much deference it should give to the EPA's classification of the cleanup.[86] The court noted that agency decisions normally receive deference under the standard detailed in *Chevron*; however, the Supreme Court had recently refined the level of deference an agency interpretation receives in *Mead*.[87] The court was "conflicted as to whether *Chevron* deference only appli[ed] upon formal rulemaking and whether lesser deference applies in other situations."[88] Unable to determine the appropriate standard to apply, the court analyzed the facts under *Chevron*.[89] However, the court declared that the end result of the case would be the same even under the modified standard of review.[90]

The first step in the *Chevron* analysis required the court to look at the legislative history of CERCLA.[91] The court first found that the definitions for both removal and remedial were broad and somewhat vague.[92] In fact, the definitions for removal and remedial actions were so

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[83] *Grace II*, 429 F.3d at 1234. In the first study conducted by the EPA, five of the eight factors were considered. *Id.* at 1234. The study found a substantial threat to human health, that competing exposure pathways existed, and that the contamination could readily migrate. *Id.*

[84] *Id.* at 1232-33.

[85] *Id.* at 1233.

[86] *Id.* at 1236. *See also* Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984); United States v. Mead Corp. 533 U.S. 218, 226-27 (2001).

[87] *Grace II*, 429 F.3d at 1235. *See also Chevron*, 467 U.S. at 842-45.

[88] *Grace II*, 429 F.3d at 1235.

[89] *Id.* at 1236.

[90] *Id.*

[91] *Id.* at 1237.

[92] *Id.* at 1238.

similar that they threatened to collapse into one another.[93] Turning to other rules of construction, the court found little help.[94] The court stated that neither taking the words as a whole nor viewing the purpose of the statute provided any guidance as to the true meaning of removal or remedial.[95] Additionally, the only reference the court could pull from the legislative history was that Congress had an overarching concern for the public welfare.[96] Because of this, the court determined that they could not discern the meanings of removal or remedial by using the normal rules of statutory interpretation.[97]

Since normal rules of interpretation did not apply, the court turned to the EPA-promulgated NCP.[98] The court found that the examples listed by removal actions in this plan closely mirrored the activities that took place in Libby.[99] The court acknowledged that the characterization of the cleanup as removal should not be overturned when the agency is faced with interpreting a complex regulatory scheme.[100] When a regulation scheme is complex, the court reasoned that because the agency administrator is an expert in the area, the expert is in the best position to

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[93] *Id.* The court stated that the definition of removal and remedial almost collapse into one because the triggering factors for each definition sound virtually similar to each other. *Id.* Specifically, the court stated there was almost no difference between the following statements: "such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release" and "those actions consistent with permanent remedy taken to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment." *Id.*

[94] *Id.* at 1239.

[95] *Id.* at 1239-40.

[96] *Id.* at 1240-41.

[97] *Id.*

[98] *Id.* The court turned to the NCP because it details the actions that are to be taken for removal and remedial actions. 42 U.S.C. § 9604 (2000).

[99] *Grace II*, 429 F.3d at 1242. Examples in the NCP provided for fencing of sites, removal of highly contaminated material, and capping of soil to prevent migration. *Id.* The activities in Libby consisted of removing hazardous materials and installing covers over materials that were likely to migrate. *Id.*

[100] *Id.* at 1243.

make a well-informed judgment.[101] In making this determination, the court also focused on the fact that an immediate response was needed to correct the contamination in Libby.[102] Previous internal memoranda to project managers at the EPA stated that the key distinction between remedial actions and removal actions was the "time sensitivity" of the issue.[103] In Libby, an immediate response was needed because of the presence of complete exposure pathways and the fact that the average Libby resident was exposed to asbestos 24 hours a day.[104]

Finding that the action was a removal, the court next focused on whether the EPA properly exceeded the $2 million statutory cap.[105] The court determined that the EPA could exceed the statutory cap if it found 1) that continued response actions were immediately necessary to prevent an emergency, 2) there was an immediate risk to public health, and 3) the assistance would not otherwise be provided on a timely basis.[106] The court determined the EPA had properly met all three of these conditions.[107] Therefore, it was acceptable to exceed the $2 million cap for removal actions.

V. COMMENT

When Congress drafted the removal and remedial provisions of CERCLA, it should have known that it would create a guessing game for courts. It is as if the provisions, "had been drafted by a weary Congressional staffer in the wee hours – even the syntax is incorrect."[108] Even the Ninth Circuit stated that the definitions are so similar they

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[101] *Id.* In determining whether the actions of the EPA were correct the court focused on four factors that courts have previously looked at: 1) whether the threat was time sensitive, 2) the duration of the threat, 3) the permanence of the response, and 4) the seriousness of the threat. *Id.* at 1244-45.

[102] *Id.* at 1243-44, 1243 n.23.

[103] *Id.* at 1244.

[104] *Id.* at 1243.

[105] *Id.* at 1246-47.

[106] *Id.* at 1248. *See* 42 U.S.C. § 9604(c)(1) (2000).

[107] *Grace II*, 429 F.3d at 1248-49.

[108] Jerry L. Anderson, "*Removal or Remedial? The Myth of Cercla's Two-Response System*," 18 COLUM. J. ENVTL. L. 103, 127 (1993).

threaten to collapse into each other.[109] Because of the similarity of the definitions, courts traditionally have not second-guessed the EPA's initial classification of the cleanup.[110] In deciding *Grace*, the Ninth Circuit did not second-guess the EPA's initial classification of the cleanup as a removal.[111] However, the court did determine that it was necessary to look beyond the EPA's classification to see if the EPA acted consistent with its determination.[112] The Ninth Circuit concluded the EPA's actions were consistent with its classification; however, this determination was incorrect.

In order to determine if the EPA's actions were consistent with its classification, the court turned to the legislative history of CERCLA to help it differentiate between a removal and a remedial action.[113] The court then decided it would not look to committee reports that discussed CERCLA because the reports did not address the version of CERCLA that ultimately became law.[114] By deciding not to look at any committee reports, the court could simply skip to the next step in the analysis, which was to decide whether to give the EPA's decision deference.[115] The court determined that the EPA rationally construed the statute and the determination deserved respect.[116] By doing this, the court glossed over the legislative history in order to reach the conclusion that it wanted. By refusing to look at prior committee reports which might shed some light on the removal and remedial distinction, the court was able move on to agency deference. At this point, the court was able to wash its hands of the issue by simply stating that the agency tried its best to construe the statute; therefore, their decision should stand.

In determining not to take a close look at the legislative history, the court ignored the fact that the legislature must have intended two distinct categories of cleanups. When it drafted the statute, Congress had the ability to make only one cleanup category or to state that the EPA's

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[109] *Grace II*, 429 F.3d at 1238.
[110] *See Id.* at 1239.
[111] *Id.* at 1234.
[112] *Id.*
[113] *Id.* at 1238.
[114] *Id.* at 1240.
[115] *Id.* at 1241.
[116] *Id.*

determination should not be reviewed. Congress did neither of these, so it must have meant for there to be a distinction between a removal and a remedial action. Congress surely did not intend for the EPA to be able to use any ambiguity in the statute to bend companies into compliance.

The court's view also perpetuates the notion that the EPA should be able to strong arm companies. The court relied solely on, "the drafter's overarching concern for public health" to guide it in its interpretation.[117] This notion led the court to state that removal should be interpreted liberally so CERCLA's goals will be accomplished.[118] Under this view, as long as the EPA is cleaning up waste in order to protect the public, its classification will be upheld. It is hard to imagine a situation where the EPA will be acting arbitrarily when it classifies a site. As long as there is a hazardous waste site nearby there will be a concern for public health. Thus, the EPA's classification of a site will never be overturned.

The Ninth Circuit also inaccurately determined that the asbestos posed an immediate threat to the residents of Libby.[119] The court stated that the threat was immediate because the EPA's study in 2000 found that airborne asbestos exceeded the permissible asbestos exposure level.[120] Additionally, the court noted that complete exposure pathways were present in Libby.[121]

For asbestos to be dangerous it needs to be airborne and a person needs to inhale the asbestos fibers for there to be any exposure risk.[122] Because of this, the EPA has previously stated, "the mere presence of a hazardous substance, such as asbestos on an auditorium ceiling, no more implies that an asbestos-related disease will develop than a poisonous substance in a medicine cabinet or under a kitchen sink implies that a poisoning will occur."[123] In the government's brief, it conceded that there

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[117] *Id.* at 1240.
[118] *Id.* at 1241.
[119] *Id.* at 1244. The four factors the court looks at are immediacy of the threat, duration of the cleanup, the permanence of the cleanup, and the seriousness of the threat. *Id.*
[120] *Id.* at 1241.
[121] *Id.*
[122] *See* Asbestos; Advisory to the Public, 56 Fed. Reg. 13,472 (Apr. 2, 1991).
[123] *Id.*

was no danger of asbestos exposure through the ambient air.[124] As such, the asbestos in Libby posed no threat to the residents.

Additionally, the tests conducted in Libby showed that the level of airborne asbestos was within the range deemed acceptable by the EPA.[125] The acceptable range for a known carcinogen is between 1 in 10,000 and 1 in 1,000,000.[126] The United States admits that only two of the areas in Libby met this risk level.[127] If most of the locations within Libby were in the acceptable range, an immediate danger could not have been present. Additionally, the EPA's webpage for Libby states, "health affects [sic] seen today are primarily related to past exposures to miners and their families."[128] If the health risk was the result of past exposures, then there was not a present risk to the residents of Libby.

VI. CONCLUSION

The United States' recovery of its cleanup costs in Libby was in error. By not reviewing any of the legislative history of CERCLA, the court is granting EPA enormous power. The court is giving the EPA the power to classify the cleanup in any manner that it chooses and effectively shutting off review of the EPA's decision. As long as the EPA makes some effort to look at a few factors, the court says the EPA's decision will not be arbitrary and capricious and the EPA's decision will be upheld. Accordingly, it will not matter whether the EPA deems the cleanup a removal or remedial action; it will be able to recoup its costs.

Additionally, the court erred in simply accepting the EPA determination that the asbestos posed an immediate threat to Libby's

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[124] Brief of Appellee at 34, United States v. W.R. Grace & Co., No. 03-35924 (9th Cir. July 21, 2004).

[125] In determining the appropriate course of action, the EPA should conduct numerous tests. 40 C.F.R. § 300.430 (2005). The guidelines for the studies indicate the normal exposure level for specific toxins. *Id.*

[126] 40 C.F.R. § 300.430(e)(2)(i)(A)(2).

[127] Brief of Appellee, *supra* note 124, at 26. The brief is only able to demonstrate that both the Export and Screening Plant were over the acceptable range. *Id.* The United States indicates that the EPA was able to document scenarios that exceed the acceptable exposure level; however, it is unable to provide any other specific examples. *Id.*

[128] U.S. EPA, *Region 8-Libby Asbestos*, http://www.epa.gov/region8/superfund/libby/index.html (last visited March 24, 2006).

residents. Tests conducted showed that the asbestos level was within the normally accepted range and the EPA even conceded that breathing the air in Libby was not a problem. As such, immediate action was not necessary to cleanup Libby and the EPA erred in classifying the site as a removal action.

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