

*Report of The Committee
On The Environment*

This report of the Committee on the Environment reviews selected developments in environmental law during 1984 that affect energy interests.

I. DEVELOPMENTS UNDER NEPA

A. *Caselaw*

In *Confederated Tribes and Bands of the Yakima Indian Nation v. FERC*, 734 F.2d 1347 (9th Cir. 1984), the court held that FERC violated NEPA by issuing a new license to authorize the continued operation of an existing hydroelectric project without preparing an environmental impact statement (EIS).¹ The court rejected FERC's argument that the relicensing represented a phase of a continuing activity and thus did not require an EIS under established precedent, reasoning that the purposes, procedures and irreversible commitment of a public resource made relicensing substantially equivalent to initial licensing and thus much more than a mere continuation of the status quo. The court also rejected FERC's argument that an EIS was unnecessary inasmuch as the impact of the project's operation on anadromous fish was being addressed comprehensively in a separate proceeding involving all FERC licensed projects on the Columbia River. The court characterized the separate proceeding as a "modification" proceeding in which the agency's authority is curtailed because the licensee's consent to project modifications is required, and concluded that the FERC could not fulfill its statutory obligation to consider fish issues prior to issuance of a new license in such a proceeding. Rehearing was denied on October 30, 1984, but the court modified its earlier opinion to delete reference to federal takeover as an issue to be considered in the EIS, recognizing that this alternative is foreclosed when the project is owned by a municipality. The licensee intends to file a petition for certiorari, and the FERC has been authorized by the Solicitor General to file a memorandum in support of the licensee's petition. It is expected that the Justice Department, acting on behalf of the Commerce Department, will oppose the licensee's petition.

In *Texas Committee on Natural Resources v. Marsh*, 736 F.2d 262, *reh'g*, 741 F.2d 823 (5th Cir. 1984), an EIS and a supplement thereto, prepared by the Corps of Engineers in connection with the construction of a flood-control project and a reservoir to provide water supply and recreational facilities for surrounding communities, were challenged under NEPA. The District Court issued a permanent injunction against the project upon finding, *inter alia*, that the Corps had failed to cooperate with the United States Fish and Wildlife Service (USFWS) and the Texas Parks and Wildlife Department (TPWD) in developing an adequate plan for the mitigation of losses to fish populations and aquatic habitats.

The court of appeals reversed, finding that the Corps had given ample consideration to the recommendations of the USFWS, but had simply elected not to adopt all of them. The court held that NEPA did not require the Corps to adopt all

¹An EIS was prepared in 1974 when FERC's predecessor issued an amendment of the initial license authorizing substantial redevelopment of the project.

suggestions made by USFWS so long as the Corps gave serious consideration to the views expressed by USFWS and articulated its reasons for rejecting those recommendations.

In *Forelaws on Board v. Johnson*, 743 F.2d 677 (9th Cir. 1984), the court held that an EIS should have been prepared in conjunction with the Bonneville Power Administration's (BPA's) offers of long-term contracts for the sale of power under the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C.A. §§ 839-839h (1982) (Regional Act). While BPA conceded that the offers constituted major federal action, it argued that since Congress mandated it to offer the contracts, its discretion was limited to matters of power allocation which, as a matter of law, could not affect the human environment. The court found, to the contrary, that the contracts would significantly affect both energy conservation and the welfare of fish and wildlife. The court also rejected BPA's argument that because the Regional Act imposed time limitations within which the offers had to be made and accepted, Congress intended to waive NEPA's application.

The court ordered BPA to prepare an EIS but declined to enjoin operation of the contracts. The court explained that since there was such clear tension between NEPA's requirement that the agency evaluate the environmental effects of the action and the Regional Act's requirement that the contracts be placed in effect within 21 months of passage of the statute, this was a situation where NEPA would allow flexibility of remedy. The court also noted that its decision would not deprive the plaintiffs of meaningful relief. Since BPA included provisions in its contracts under which it agreed to negotiate amendments, as necessary, to effectuate the Regional Act's environmental goals of conservation, development of renewable resources and fish and wildlife enhancement, and the contract had 17 years remaining in their terms, the EIS would still serve a valuable purpose as a guide for future action under the contracts.

In *Center for Nuclear Responsibility, Inc. v. NRC*, 586 F. Supp. 579 (D.D.C. 1984), the NRC issued license amendments for Florida Power & Light Company's Turkey Point nuclear power plants to allow the use of a new fuel design. The NRC's decision was based upon its "no significant hazards consideration" finding, made in light of the fact that similar fuel designs were in use at other plants and in view of its determination that no significant changes in the overall safety of the reactors would occur as a result of the amendments. Plaintiffs brought suit in the district court to require the NRC to prepare a supplemental EIS for the Turkey Point Nuclear Units. The court rejected plaintiffs' NEPA claim and held that the NRC was not required to prepare an EIS in conjunction with the issuance of an amendment to a facility license pursuant to 10 C.F.R. § 51.5(d) (1984), which states that an EIS need not be prepared in connection with the issuance of a materials license or amendment to or renewal of a materials or facility license.

There were several significant cases involving oil and gas leasing. In *State of California v. Watt*, 712 F.2d 584 (D.C. Cir. 1983), the U.S. District Court for Alaska held that the Secretary of the Interior had not violated NEPA by failing to prepare a supplemental EIS prior to reducing the seasonal drilling limitations on lessees in certain Alaskan offshore areas. The court deemed the plaintiffs' NEPA challenge to be foreclosed by the D.C. Circuit's decision in *North Slope Borough v. Andrus*, 642 F.2d 589 (D.C. Cir. 1980), where the court held that the EIS prepared for the lease sale of

the area in dispute adequately addressed the seasonal drilling limitation issue. The court in *Andrus* refused to accept the argument that a reasonable discussion of alternatives is somehow rendered inadequate by the mere passage of time.

In *Massachusetts v. Clark*, 21 Env't Rep. Cas. (BNA) 1673 (Sept. 26, 1984), the plaintiffs sought to enjoin the sale of oil and gas leases on the outer continental shelf off the coast of Massachusetts until certain alleged deficiencies in the EIS were cured. The U.S. District Court for Massachusetts granted the motion for preliminary injunction because the Secretary had failed to consider adequate alternatives to the particular group of tracts offered for sale. Out of the 13 alternatives presented in the final EIS, 12 were declared illegal because they included certain tracts subject to a United States-Canada boundary dispute and other tracts subject to a congressional leasing moratorium. Furthermore, the court found that the EIS covered too wide an area to be adequate given the enormous ecological diversity of this particular region of the Atlantic.

In *Village of False Pass v. Clark*, 733 F.2d 605 (9th Cir. 1984), the court considered whether the Secretary of the Interior violated NEPA by proceeding to sell oil and gas leases in Alaska's St. George Basin without preparing a worst case analysis for oil spills of 100,000 bbl or greater. While the court noted that the CEQ regulations implementing NEPA required a worst case analysis where such information would be "important to the decision," it further pointed out that failure to consider a worst case analysis of a 100,000 bbl oil spill at the initial lease sale stage does not foreclose consideration of such an analysis at later stages. Indeed, since drilling is not even permitted at the lease sale stage, a subsequent stage when a 100,000 bbl spill would be possible would clearly be a more appropriate point at which to undertake the worst case analysis sought by the plaintiffs. Accordingly, the court concluded that the Secretary acted within his discretion in deeming consideration of a 100,000 bbl oil spill to be unimportant to his lease sale decision.

B. Legislation

Two NEPA-related bills were introduced last year but no further action was taken on either prior to the adjournment of the 98th Congress. On February 28, 1984, Senator Specter of Pennsylvania introduced S. 2536, the "Urban Radioactive Materials Protection Act of 1984." The bill was referred to the Senate Committee on Environment and Public Works and would have amended NEPA to require an EIS from the agency which approves the transportation of radioactive waste materials by highway routing through standard metropolitan areas. The bill would also have amended the Hazardous Materials Transportation Act to direct the Secretary of Transportation to issue new regulations on routing requirements after filing and considering an EIS, and after making an environmental and safety assessment of alternative routes for shipment of such materials.

The "Federal Oil and Gas Leasing Act of 1984," H.R. 4989, was introduced by Representative Weaver of Oregon on February 29, 1984. The bill was referred to the House Committee on Interior and Insular Affairs and was in turn referred to the Subcommittee on Mining, Forest Management and Bonneville Power Administration. This bill would have amended the Mineral Leasing Act of 1920 by permitting the Secretary to lease on-shore Federal lands for oil and gas

development by competitive bidding only. Furthermore, the Secretary would be required to invite public nomination of areas favorable for the discovery of oil or gas at least once every quarter. Any actions taken by the Secretary under the bill regarding bidding, nominating and leasing procedures would not be considered "major Federal actions" for purposes of NEPA.

II. DEVELOPMENTS UNDER THE CLEAN AIR ACT

A. *Caselaw*

Two decisions by Judge Posner for the U.S. Court of Appeals for the Seventh Circuit addressed the authority of EPA to partially approve state implementation plans (SIPs) under Section 110 of the Clean Air Act. In the first decision, *Indiana & Michigan Electric v. EPA*, 733 F.2d 489 (7th Cir. 1984), EPA had approved a ceiling on sulfur dioxide emissions included in a revised SIP submitted by Indiana, but refused to take action on an accompanying provision in the plan which allowed compliance with the ceiling to be determined by 30-day averaging of daily emissions. The court held that EPA had the authority to approve parts of an SIP and disapprove others, but that it could not simply ignore specific provisions in a given plan. Thus, the court ordered EPA to determine whether the 30-day averaging provision met the requirements of the Clean Air Act (and therefore should be approved), and suspended application of the ceiling until that determination was made.

In *Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d 1028 (7th Cir. 1984), the court went one step further and declared that EPA may not partially approve an SIP if the effect is to establish a more stringent pollution control requirement. In that case, EPA had approved an opacity limit of 40% applicable to coke ovens contained in Indiana's SIP, but disallowed a provision in the same plan permitting the opacity limitation to be exceeded for up to 15 minutes every 24 hours. Judge Posner concluded that EPA may not use its approval authority to unilaterally *revise* SIPs, and ordered EPA to follow the provisions of Section 110(c), which expressly authorizes EPA to disallow provisions within SIPs that do not comport with the Act and to propose alternative regulations in the Federal Register.

B. *Regulation*

On June 19, 1984, EPA issued proposed New Source Performance Standards (NSPS) pursuant to Section 111 of the Clean Air Act applicable to new and modified industrial, commercial, and institutional boilers with greater than 100 MMBtu/hr heat input. 49 *Fed. Reg.* 25102 (1984). The proposed standards would govern the emission of nitrogen oxides (NO_x) and particulate matter (PM). The NO_x standards are based on the use of low excess air combined with so-called "low NO_x" burners (*i.e.*, staged combustion). The PM standards are based on the use of full baghouses or high efficiency electrostatic precipitators. Unlike existing NSPA for large industrial and utility boilers, these proposed NSPS would apply to both fossil and non-fossil fuel-fired boilers. Since, under Section 111, any NSPS that are finally promulgated are applicable to all new units constructed after the date the standards

are *proposed*, the impact of these proposals is already being felt in planning departments throughout the industry.

III. DEVELOPMENTS UNDER THE CLEAN WATER ACT

A. *Caselaw*

The Supreme Court heard oral arguments in a dispute which will have a significant impact on EPA's pretreatment requirements for discharge of toxic pollutants. *Chemical Manufacturers Association v. Natural Resources Defense Council Inc.*, (NRDC), No. 83-1013; *EPA v. NRDC*, No. 83-1373. In the proceeding below,² the Third Circuit considered consolidated challenges by NRDC and several industries of EPA's general pretreatment regulations and categorical pretreatment standards for the electroplating industry under § 307(b) of the Clean Water Act. Section 307 addresses so-called indirect discharges, or point sources which discharge their pollutants not directly into navigable waters but into publicly owned treatment works (POTW) engaged in the treatment of municipal sewage or industrial wastewater. Overall, the court affirmed the EPA's pretreatment regulations, but it did invalidate several important aspects of the regulations.

Section 370(b) directs the EPA to promulgate pretreatment standards to prevent the discharge of any pollutant through a POTW which "interferes with, passes through or is otherwise incompatible with such works." 33 U.S.C. § 137(b)(1). The regulations defining "interference" and "pass through" were challenged because they imposed liability on a discharger whether or not the indirect discharge caused a violation by the POTW of the applicable discharge standard. Finding that Congress contemplated a causation requirement, the court set aside the regulations. The court also invalidated the EPA definition of a "new source" indirect discharger because the definition was inconsistent with the court's previous holding in *Pennsylvania Department of Environmental Resources v. EPA*, 618 F.2d 991 (3d Cir. 1980).

In addition, the Third Circuit set aside the EPA regulations which permitted the Administrator to grant a variance from a categorical pretreatment standard to an existing indirect discharger within the category if the Administrator, in establishing the categorical standard, has considered factors "fundamentally different" from (FDF) the factors relating to that source. The court found that section 301(1) of the Act, 33 U.S.C. § 1311(1), does not permit FDF variances and pretreatment standards for indirect discharges of toxic pollutants.

The oral arguments before the Supreme Court addressed the validity of the FDF variances. In its challenge of this aspect of the Third Circuit's decision, the U.S. government argued, *inter alia*, that if FDF variances cannot be granted, development of categorical standards will become unduly burdensome since EPA will have to take into account every fundamentally different factor that may affect every covered plant.

The scope of a citizens suit under the Act was another issue addressed in 1984. In *Scott v. City of Hammond, Ind.*, 741 F.2d 992 (7th Cir. 1984) the plaintiffs alleged,

²National Assn of Metal Finishers (Metal Finishers) v. EPA, 719 F.2d 624 (3d Cir. 1983), rev'd 105 S. Ct. 1102, 53 U.S.L.W. 4193 (1985).

inter alia, that EPA acted improperly by approving state water quality standards governing the discharge of pollutants into Lake Michigan which failed to adequately protect the public health. The court found that the content of water quality standards cannot ordinarily be challenged through a citizens suit under Section 505(a) of the Act. The only avenue to challenge EPA's action, the court held, would be by seeking judicial review under the Administrative Procedure Act.

Scott also raised an important issue regarding the impact of a state's failure to exercise its authority under the Act to establish effluent standards. Each state must develop total maximum daily loads (TMDL) for discharges of pollutants into those waters within its boundaries where water quality standards will not be achieved by application of technology-based limitations. The TMDL cannot go into effect unless approved by the EPA. If the EPA rejects the TMDL, the EPA must establish its own. Because Michigan had not yet established a TMDL for Lake Michigan, *Scott* alleged that EPA had a non-discretionary duty to find either that a TMDL was not warranted or to promulgate a TMDL. The Seventh Circuit found that Congress did not intend to allow states to frustrate the federal scheme of water pollution control by failing to establish TMDLs. "[I]f a state fails over a long period of time to submit TMDLs," the court held, "this prolonged failure may amount to the 'constructive submission' by that state of no TMDLs." *Id.* at 996. The court found that it was unclear whether EPA's failure to act despite the long period of inaction by Michigan could be considered a constructive approval of the state's decision that no TMDL was needed and remanded to the district court to resolve this issue.

Another important issue explored during the past year was whether a state agency or official can be sued for violation of environmental laws. *Allegheny County Sanitary Authority (ALCOSAN) v. EPA*, 732 F.2d 1167 (3d Cir. 1984), involved a suit by Alcosan in which it alleged, *inter alia*, that the Pennsylvania Department of Environmental Resources (DER) and its officials, in failing to fund ALCOSAN's proposed municipal sewage project, (1) violated state law by determining project priority ratings on the basis of unpublished regulations, and (2) violated the Clean Water Act by failing to revise its priority system after the 1981 amendments to the Act. ALCOSAN also alleged that EPA failed to perform its mandatory duty under the Act to disapprove the non-complying priority list submitted by DER. The Third Circuit relied heavily on the 1980 Supreme Court decision in *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1980), where the Supreme Court found that a "federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when . . . the relief sought . . . has an impact directly on the State itself." The Third Circuit determined that *Pennhurst* precluded the claim against DER based on Pennsylvania law.

The court reached a similar finding with respect to the claim against the state defendants based on the Clean Water Act. The Act limits defendants in citizen suits under the Act to (1) parties who violate an effluent standard or an order issued with respect to such a standard, and (2) EPA for failure to perform non-discretionary acts or duties. 33 U.S.C. § 1365(g) (1982). The state defendants fell under neither of these categories, noted the court. The court went on to reject ALCOSAN's argument that there is an implied private cause of action under the Act. It relied on the Supreme Court's finding that "where . . . Congress has made clear that implied private actions are not contemplated, the courts are not authorized to ignore this

legislative judgment.” 732 F.2d at 1175, citing *Middlesex County Sewerage Authority v. National Sea Clammers Assoc.*, 453 U.S. 1, 18 (1981).

B. Legislation

In 1984 the House passed H.R. 3282. The bill would have, *inter alia*: (1) reauthorized the Clean Water Act through fiscal year 1988, (2) extended deadlines for compliance with certain clean water standards, (3) permitted integrated facilities subject to pretreatment standards for more than one category to comply one year after the first deadline to which they are subject, (4) permitted runoff from oil and gas facilities to be exempt from wastewater treatment provisions as long as the water is clean and companies monitor and report to EPA, (5) required coal companies that reopen mines to control only wastewater runoff from the reopened portion of the facilities, and (6) increased the term of industrial discharge permits from five to ten years while requiring EPA to reopen the permits when new standards are issued.

Senate consideration of the bill was delayed primarily by disputes regarding a cap on discharges by New York industries. In addition, the House and President Reagan were unable to reach a compromise on the provision in the House bill increasing funding for sewage treatment construction. As a result, the Senate never considered the House bill.

C. Regulation

In 1984, EPA proposed a rule, pursuant to section 301(g) of the Clean Water Act, which proposes standards governing variances from best available technology (BAT) requirements controlling discharges of non-conventional pollutants such as ammonia and chlorine. 49 *Fed. Reg.* 31462 (1984). Under the rule, the discharger must show that the proposed modified effluent limitation (1) satisfies the best practical technology (BPT) requirements, which are less rigorous than BAT, and (2) does not present a threat to human health or the aquatic environment. The proposed rule has been criticized by several industry groups in written comments as too burdensome and possibly not worth pursuing.

In addition, EPA issued final regulations setting standards under the Clean Water Act for industrial monitoring and reporting of toxic pollutant discharges. 49 *Fed. Reg.* 37998 (1984). The regulations provide that holders of permits under the National Pollution Discharge Elimination System (NPDES) must test for all toxic pollutants known or believed to be discharged in concentrations above specified levels. However, permit holders no longer need to report new toxics used or manufactured after a permit application is submitted. Permit holders will be required to report new toxic discharges that occur on a “routine or frequent” basis. The new regulations also provide that a discharger that originally obtained a permit based on the best professional judgment of the permitting agency cannot “backslide”, or reduce its level of treatment if less rigorous guidelines are adopted later by the agency.

EPA also decided to allow a three year extension of the July 1, 1984 deadline for compliance with the Act’s effluent limitations guidelines for any discharger that

plans to install innovative technology for meeting the guidelines. 49 *Fed. Reg.* 25978 (1984). To obtain the extension, the discharger must show that the new technology either produces a significantly greater effluent reduction than the BAT prescribed by EPA, or achieves the same level of effluent reduction at a significantly lower cost. In addition, the discharger must demonstrate that the proposed technology has potential for industry-wide application.

EPA enforcement of the Clean Water Act came under sharp attack during 1984. A December 1983 General Accounting Office (GAO) study showed that 31% of discharges surveyed were in "significant" non-compliance with effluent guidelines. Also, 82% of the permitted discharges surveyed in six states were found to have exceeded effluent limits during the 18-month study period, and thousands of plants were discharging with expired permits. In testimony before a House panel, an official of the GAO suggested that inadequate funding and lack of will were responsible. In particular, EPA's method of compiling compliance data for isolated, one day periods was faulted. Also, two members of Congress criticized the policy of delegating enforcement of the Act to the states. They noted that there is a great discrepancy among the enforcement policies maintained by the states and that some of these policies, in effect, reflect an abdication of enforcement responsibilities.

IV. DEVELOPMENTS UNDER THE FEDERAL HAZARDOUS WASTE STATUTES (RCRA & CERCLA)

A. *Caselaw*

One very significant development under the Resource Conservation and Recovery Act (RCRA) is the decision of the Third Circuit in *United States v. Johnson & Towers, Inc.*, 741 F.2d 662 (3d Cir. 1984), extending criminal liability under section 3008(d)(2)(a) beyond "owners and operators" of waste facilities to include employees involved in handling improperly disposed of waste materials. The court of appeals overturned the district court's dismissal of the indictments against a trucking repair firm's foreman and service manager and held that employees of an owner or operator who treat, store or dispose of any hazardous waste and know or should have known by reason of their position that such treatment, storage or disposal was done without a permit or in violation of a permit are subject to criminal liability. The government can now obtain a tremendous advantage in corporate enforcement litigation by seeking indictments against any employee involved in an alleged RCRA violation and thus possibly depriving the corporate defendant of the employee's cooperation in defending the allegations or even using an immunized employee's testimony of his own actions to convict the corporation of "its" violation.

Under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund), 42 U.S.C. § 9601, *et seq.*, a number of courts have responded in recent months to the legislative gaps left by Congress in areas such as culpability, liability, contribution and others. In late 1983, a federal district court eased the government's burden regarding causation in section 107 suits by ruling that the government need only prove that a defendant's waste was disposed of at a site and that the substances that make the defendant's waste hazardous also are

present at the site. *United States v. Wade*, 577 F.Supp. 1326 (E.D. PA 1983). In a case of first impression, the court ruled that the government need not identify the waste of a particular generator as the subject of the cleanup. Upholding the government's position on another CERCLA issue, the court's decision states that section 107 defendants may be jointly and severally liable unless they can apportion the damages at the site among themselves. This holding agrees with *United States v. Chem-Dyne Corp.*, 572 F.Supp. 802 (S.D. Ohio 1983).

Less than a month later, two other federal district courts agreed with the *Wade* decision on joint and severable liability. See *United States v. A & F Materials, Co., Inc.*, 578 F.Supp. 1249 (S.D. Ill. 1984); *United States v. Northeastern Pharmaceutical and Chemical Co., Inc.*, (NEPACCO) 579 F.Supp. 823 (W.D. Mo. 1984). Further, the court in *A & F Materials* considered the fact that the abatement of imminent hazards provision of section 106 contains no definition of who may be liable thereunder and ruled that it is reasonable to apply the liability standards of section 107, which include offsite generators, to section 106. Accord, *United States v. Price*, 14 Env't Rep. Cas. (BNA) 654 (Aug. 19, 1983). In *NEPACCO*, the federal district court for the Western District of Missouri ruled that the standard of liability under CERCLA is strict liability rather than a negligence standard. The court applied sections 104, 106 and 107 retroactively so as to impose joint and several liability upon the defendants (non-negligent, off-site generators and transporters) for all cleanup costs incurred since CERCLA's effective date at a disposal site which has been inactive and abandoned since long before the enactment of CERCLA. Three days later, another federal district court judge of the Western District of Missouri entered a similar decision on a different waste disposal site. In *United States v. Conservation Chemical Co.*, 14 Env't Rep. Cas. 1749 (Feb. 10, 1984), the court again imposed joint and several strict liability under section 107 upon non-negligent off-site generators for damages related to an inactive disposal site. The retroactive application of CERCLA is presently on appeal to the Eighth Circuit in the *NEPACCO* case.

On March 23, 1984, the CERCLA juggernaut was slowed briefly when the federal district court of the Eastern District of Pennsylvania issued another ruling in the *Wade* case rejecting the government's claim that cleanup costs incurred prior to the effective date of CERCLA may be imposed on defendants. *United States v. Wade*, 14 Env't Rep. Cas. 2208 (Apr. 6, 1984). However, the government's positions on causation, joint and several liability and retroactivity under CERCLA confirmed in *Chem-Dyne*, *Wade*, *A & F Materials* and *NEPACCO* were adopted by yet another district court in *United States v. South Carolina Recycling and Disposal, Inc.*, 14 Env't Rep. Cas. 2208 (Apr. 6, 1984). See also *United States v. Stringfellow*, 14 Env't Rep. Cas. 2260 (Apr. 20, 1984).

A break in the string of government successes occurred in *Aminoil Inc. v. EPA*, 15 Env't Rep. Cas. 1056 (Oct. 26, 1984). The U.S. District Court for the Central District of California ruled that CERCLA denies due process rights to alleged responsible parties charged with violating section 106 emergency cleanup orders issued by EPA because the harsh penalty provisions of sections 106(b) and 107(c)(3) unconstitutionally inhibit or chill such a defendant's right to a fair hearing. The court found that a defendant seeking to challenge the validity of a section 106 cleanup order has no opportunity for a hearing before daily accumulating penalties are imposed. Similarly, where the defendant chooses to obey the order so as to avoid

the risk of penalties, the statute provides no clear opportunity for a hearing on the order's validity subsequent to compliance. According to the court, CERCLA failed to provide even the rudiments of due process in this circumstance and the court enjoined EPA from assessing daily penalties or treble damages under section 106(b) or section 107(c)(3), respectively.

In sum, the district court developments referenced above made significant strides in the interpretation and enforcement of CERCLA. Further litigation and appellate review will continue the stabilizing process necessary to fair and effective hazardous waste cleanup and control.

B. *Legislation*

Perhaps the most significant environmental legislation enacted during the 98th Congress was the Hazardous and Solid Waste Amendments of 1984 (HSWA), signed by the President on November 8, 1984, P.L. 98-616, 98 Stat. 3221 (1984). The HSWA amended substantially the Solid Waste Disposal Act of 1976, as amended by the Resource Conservation and Recovery Act (RCRA) — the Nation's basic management system for regulating the transportation, storage and disposal of hazardous wastes. The HSWA addresses many of the problems that had become evident during the EPA's implementation of RCRA in recent years. Its dominant purpose is to move industry away from reliance upon land disposal of hazardous wastes toward practices such as process substitution, materials recovery, recycling, reuse, and treatment. The principal statutory changes that are significant for energy companies are summarized as follows:

a. *Small Quantity Generators*. Section 221 of HSWA reversed EPA's decision to exempt from RCRA requirements those who produce 1,000 kg/mo. or less of hazardous wastes. Manifest shipping forms will be required and further manifest, recordkeeping, and disposal requirements will come into effect on March 31, 1986, if EPA has not met deadlines for promulgating regulations tailored to such generators.

b. *Underground Storage Tanks*. Section 601 of HSWA regulates storage tanks that have or will have ten percent or more of their volume, including connected piping, underground and are used for storage of Superfund hazardous substances and petroleum products. EPA will issue standards for design, construction, and installation of new tanks, and standards for release-detection, prevention and correction, closure, and financial responsibility. This program is intended to direct and be harmonized with State programs.

c. *Land Disposal*. Section 201 of the HSWA provides that, unless otherwise directed by the EPA by specified dates, land disposal of dioxins and solvents is prohibited 24 months after enactment. Land disposal of other statutorily listed hazardous wastes will be banned in phases after 32 and 66 months. Six months after enactment, the landfilling of bulk or containerized liquids is prohibited.

d. *Surface Impoundments*. Section 215 of the HSWA established minimum technological retrofit and ground water monitoring requirements for certain existing surface impoundments having interim status.

e. *Mining and Utility Wastes*. Section 209 of the HSWA states that EPA is authorized to modify certain RCRA section 3004 requirements for landfills and

surface impoundments to take into account the special characteristics of these wastes and sites.

f. *Burning and Blending.* Section 204 of the HSWA provides that after 90 days from enactment, anyone who produces, distributes or markets fuel containing hazardous waste must provide warnings on invoices or bills of sale. Those who burn or produce fuel derived from hazardous waste or used oil must so notify EPA within 15 months, and within 24 months, EPA must promulgate rules setting standards for producers and consumers of such fuel.

g. *Waste Minimization.* Section 204 of the HSWA provides that after September 1, 1985, generators must certify on manifests that their firm has reduced the volumes and toxicity of its hazardous wastes. Biennial reports to that effect will be required.

Unlike previous statutory mandates which left the substance and timing of environmental regulations to EPA's discretion the HSWA is replete with deadline "hammers" and particularized standards that deserve careful scrutiny by those generating, transporting, storing, and disposing of petroleum and hazardous wastes.

The 98th Congress adjourned without reauthorizing CERCLA, parts of which are scheduled to expire on September 30, 1985, and that task promises to be an agenda item of high priority when the 99th Congress convenes. The bills originating in each chamber during 1984, S. 2892 and H.R. 5640, are sure to be the starting points for legislation in 1985.

The Senate bill, S. 2892, contained no specific revenue proposals but would have extended the Superfund program for five years at a total cost of \$7.5 billion. The bill expressly defined the degree of cleanup required at Superfund sites and obligated Superfund to pay for operation and maintenance expenses for five years at sites where ground water pumping and treatment is required. Further, S. 2892 provided for additional health studies and toxicological profiles as well as a five year, five state victim assistance demonstration program. In contrast to the House bill, S. 2892 contained no mandatory cleanup schedules or provisions on response authority for leaking underground tanks, citizens suits to require enforcement action or joint and several liability under the section 107 response or section 106 abatement provisions of CERCLA.

The measure which passed the House, H.R. 5640, was broader and more expansive than S. 2892. It would have extended Superfund to cover responses to certain petroleum and petroleum products releases, the financing of certain emergency relief and health effects studies as well as the preparation of additional toxicological studies. Most significantly, the House bill established a mandatory cleanup schedule requiring expansion of the National Priorities List, initiation of remedial investigations on listed sites and on-site work at no less than 150 sites each year. H.R. 5640 would have increased the petroleum tax by tenfold while imposing a greater tax on more feedstock chemicals in order to finance this program expansion. The bill eliminated any further funding of natural resource damage claims and repealed the Post-closure Liability Trust Fund and the related tax, directing that all Fund receipts be returned to the payors. Apparently the potential liability for even properly managed dump sites was too great for the government program. A controversial provision of H.R. 4560 permitted citizens suits to force

EPA into enforcement action. Unlike the Senate bill, H.R. 5640 clarifies CERCLA by imposing strict, joint and several liability upon defendants responsible for abatement orders and cleanup costs under sections 106 and 107. These revisions and other items such as a possible tax on the disposal of hazardous materials or the establishment of an Oil Spill Compensation Trust Fund will be raised again and dealt with during the 99th Congress.

C. Regulation

The EPA expects to issue an Interim Final Rule early in 1985 that incorporates into its RCRA regulations³ the statutorily mandated deadlines and requirements that were enacted by HSWA. Also, the new statutory requirements will affect State programs, 25-30 of which had been authorized by January, 1985.

There are two policy developments being analyzed within EPA at this writing which should be of interest to firms having RCRA or Superfund exposure.

The National Contingency Plan (NCP)⁴ established a process for determining appropriate removal and remedial actions at Superfund sites. The NCP will be amended to provide guidance and standards for achieving the desired level of clean-up at Superfund sites and guidance on the steps necessary to implement response actions. The present distinction in the NCP between immediate and planned removal actions will be eliminated and new standards established for removals. CERCLA-related response activities will be brought into compliance with other environmental laws. The NCP will also be supplemented with guidance on alternatives analysis. The cost-effectiveness criterion for selection of remedies will be clarified to dismiss motions of "least cost." Public participation will be injected into the remedy-selection process.

The second major development was issuance on November 29, 1984, of EPA's restated enforcement and settlement policy under Superfund and section 7003 of RCRA. It is designed to encourage negotiated settlement of clean-up responsibilities. Principal among the provisions of the policy are: EPA will consider proposals for settlement by potentially responsible parties that include an offer to defray a "substantial" percentage of estimated clean-up costs; guidance on settlements with *di minimus* contributors; guidance on acceptance of partial settlements, with the Superfund funding the remainder; Government tendered releases from future liability; "reopener" clauses in settlements; factors to be used by the Government in assessing whether to settle.

V. DEVELOPMENTS AFFECTING THE NUCLEAR INDUSTRY

During 1984, there were a number of legal developments in the nuclear world. The following discussion addresses low-level radioactive waste disposal, high-level waste disposal, and nuclear power

³40 C.F.R. Subchapter I (1984).

⁴40 C.F.R. Part 300 (1984).

A. *Low-Level Waste*

The Low-Level Radioactive Waste Policy Act (Pub. L. 96-573) (Policy Act), enacted in 1980, encouraged the development of regional interstate compacts for the disposal of low-level radioactive waste in order to reduce the burden on the three states which currently host operating low-level waste disposal facilities (Washington, South Carolina and Nevada). The Policy Act provided that regions with compacts which had received congressional consent could, after January 1, 1986, exclude waste not generated within the region.

Approximately 36 states have joined compacts, but no compact has, as yet, received congressional approval. The principal impediment to such approval has been controversy over the disposal of waste generated in regions without existing disposal sites after 1986 and until new capacity is developed. It is estimated that it will take at least several years to site, construct and license new disposal facilities. A similar issue exists with respect to states (such as Texas) which have chosen to establish their own intra-state disposal facilities, but which do not have a currently operating facility. States hosting existing disposal sites have threatened to limit or terminate access to such sites unless prompt action is taken to approve the compacts and establish new capacity.

Although congressional consideration of the compacts is anticipated in the 99th Congress, it is not clear whether any compacts will obtain congressional consent. Furthermore, the terms and conditions of such consent, if unacceptable to the various compacting states, could create additional delays in the implementation of the Policy Act and the development of new disposal capacity.

B. *High-Level Waste*

Significant steps were taken by the Department of Energy (DOE) in implementing the Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10101 *et seq.* ("NWPA" or "Act"). Key action included the final adoption by DOE of site selection guidelines for the recommendation of sites for repositories for disposal of high-level radioactive waste and spent fuel in geologic formations. 49 *Fed. Reg.* 47714. These guidelines are required by the Act to be used in various steps of the site-selection process.

In addition, DOE published for comment draft environmental assessments for nine potentially acceptable sites for a repository. *See* 49 *Fed. Reg.* 49540. Following the receipt of comments and issuance of final environmental assessments, DOE will, in accordance with section 112 of the NWPA, nominate at least five sites as suitable for further study. 42 U.S.C. § 10132. Thereafter, DOE will recommend not fewer than three of the nominated sites to the President for full characterization as candidate sites for the first repository. *Id.*

Almost simultaneously with the issuance of the draft environmental assessments for comment, a number of suits were filed seeking to overturn various actions by DOE in implementing the Act. In *Environmental Policy Institute v. Hodel*, No. 84-7854 (9th Cir. filed Dec. 18, 1984), the court is being asked to set aside the site selection guidelines as having been improperly adopted under the Act. In *Texas v. Department of Energy*, No. 84-4826 (5th Cir. filed Dec. 19, 1984), the State of Texas is

challenging DOE's action under section 116 of the Act, 42 U.S.C. § 10136, as it pertains to early notification of states with potentially acceptable sites, as having been improperly taken. In a third suit, *Nevada v. Hodel*, No. 84-7846 (9th Cir. filed Dec. 14, 1984), the State of Nevada is seeking review of certain actions by DOE resulting in the partial denial of funds allegedly due under the Act. All of these cases are pending. Taken together, they offer some indication of the intensity of litigation which is likely as DOE proceeds to implement the waste disposal program.

VI. DEVELOPMENTS UNDER THE COASTAL ZONE MANAGEMENT ACT

In *Secretary of the Interior v. California*, ___ U.S. ___, 104 S. Ct. 656 (1984), the Supreme Court held that the Department of Interior's sale of oil and gas leases on the outer continental shelf (OCS) off the California coast was not an activity "directly affecting" the coastal zone under section 307(c)(1) of the Coastal Zone Management Act, 16 U.S.C.A. § 1451 *et seq.* (CZMA). Under the CZMA, coastal states are encouraged to develop their own coastal management plans. Once a state plan has been approved, section 307(c)(1) of the statute requires federal activities conducting or supporting activities "directly affecting" the coastal zone to be consistent with the state plan to the maximum practicable extent. When the Department of Interior announced its intention to proceed with the sale, California sought an injunction in federal district court on the basis that leasing set in motion a chain of events that would culminate in oil and gas development, thus directly affecting the coastal zone within the meaning of section 307(c)(1) of the CZMA.

In a five to four decision authored by Justice O'Connor, the Supreme Court held that the question of whether the sale of leases on the OCS was an activity directly affecting the coastal zone was not self-evident from the plain language of the CZMA. The Court therefore undertook a detailed consideration of the legislative history of the statute and concluded that Congress had not intended for OCS lease sales to fall within the ambit of CZMA § 307(c)(1). Moreover, the Court determined that lease sales were not the type of federal agency activity covered by section 307(c)(1). That subsection referred to activities "conducted or supported by a federal agency" whereas the activity in question was federally authorized conduct by private parties within the meaning of section 307(c)(3).

The Court also rejected the argument that a consistency determination was required by section 307(c)(3)(B), which provides that applicants for federal licenses or permits to explore, produce or develop oil or gas on the OCS must first certify consistency with affected state plans. The Court pointed out that since 1978, the Outer Continental Shelf Lands Acts (OCSLA) has imposed a statutory scheme for the development of offshore oil wells with three distinct stages: leasing, exploration, and development and production. At the lease sale stage, the lessee acquires no right to proceed with full exploration, development or production, but merely attains a priority in submitting plans to conduct those activities. Congress made very clear CZMA's applicability to the exploration and development and production phases but was silent regarding lease sales. Furthermore, even if the CZMA did apply to lease sales, lease sales could no longer be characterized as "directly affecting" the coastal zone since passage of the OCSLA in 1978. Under that legislation, the lessee is

granted only the right to conduct very limited preliminary activities on the OCS until separate federal approval has been obtained.

Justice Stevens wrote a dissenting opinion, joined by Justices Brennan, Marshall and Blackmun. Justice Stevens took a contrary view of the legislative history, arguing that since early versions of the CZMA applied only to federal agencies conducting activities in the coastal zone, the substitution of the words "directly affecting the coastal zone" clearly indicated the congressional intent to cover activities outside the zone that are the functional equivalent of activities within the zone. The dissent also maintained that the majority's construction of section 307(c)(1) was at odds with the CZMA's purpose of promoting orderly, long-range planning.

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