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ARE MUNICIPALITIES ENTITLED TO RECOVER NATURAL RESOURCE DAMAGES UNDER CERCLA?

Town of Bedford v. Raytheon Company, No. 89-2313-WD (Dist. Ct. Mass. Jan. 15, 1991)

INTRODUCTION

On January 15, 1990, the United States District Court, District of Massachusetts found that a municipality is not able to recover natural resource damages pursuant to the Comprehensive Environmental Response and Liability Act of 1980 ("CERCLA") 42 U.S.C.A. sections 9601 to 9675.[1] The court's position directly conflicts with prior interpretations endorsed by the District of New Jersey and the District of New York.[2] The court held that a municipality is not within the term "state" as used in CERCLA section 9607(a)(4)(C), which specifically authorizes states to maintain an action for natural resource damages.[3] Under this holding, not only would a municipality be precluded from recovering natural resource damages, but as a private party, would sustain the heavy burden under section 9607(a)(4)(B) of proving response costs were consistent with the national contingency plan.[4]

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1. Town of Bedford v. Raytheon Company, No. 89-2313-WD (Dist. Ct. Mass. Jan. 15, 1991) (1991 U.S. Dist. LEXIS 896).

2. *See* City of New York v. Exxon Corp., 633 F. Supp. 609, 618-19 (S.D.N.Y. 1986); Mayor of Boonton v. Drew Chem. Corp., 621 F. Supp. 663 (D.N.J. 1985) (holding that municipalities may bring damage actions as trustees of natural resources under CERCLA).

3. For the language of 42 U.S.C.A. § 9607(a)(4)(C) (1980), see *infra* note 4. 42 U.S.C.A. § 9607(f)(1) (1980) further defines who may bring an action for loss to natural resources:

> In the case of an injury to, destruction of, or loss of natural resources under subparagraph (C) of subsection (a) of this section liability shall be to the United States Government and to any state for natural resources within the State or belonging to, managed by, controlled by, or appertaining to such State
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> . . .

4. 42 U.S.C.A. §§ 9607(a)(4)(A)-(D) (1980) provide several avenues to obtain monetary recovery for losses incurred in connection with the release of hazardous substances:

> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—
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> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

The significance of finding that the definition of "state" does not embrace municipalities will have profound consequences if other courts follow the decision. As owners of natural resources, municipalities will not be able to protect their natural resources directly through natural resource damages.[5] Instead, municipalities will be forced to rely on state governments to specifically designate them as trustees in order to protect natural resources within the municipalities' own jurisdiction.[6] This additional hurdle magnifies the uncertainty which surrounds natural resource damages.[7] The Department of Interior has recently promulgated damage assessment regulations to provide guidance in valuing natural resource damages.[8] However, parts of these regulations have been held invalid when tested in court.[9]

If a municipality is not a "state," it may not maintain a CERCLA action under standards applicable to the federal and state government. Under section 9607(a)(4)(A), the United States government or a state may recover response costs *not inconsistent* with the national contingency plan.[10] The national contingency plan is a detailed federal promulgation of procedures and standards to govern cleanup activities. The plan specifies the procedures,

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(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

5. 42 U.S.C.A. § 9601(16) (1980) of CERCLA broadly defines "natural resources" as "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States . . ., any state or local government, or any foreign government."

6. 42 U.S.C.A. § 9607(f)(2)(B) (1980) provides:

The Governor of each State shall designate State officials who may act on behalf of the public as trustees for natural resources under this chapter and section 1321 of Title 33 and shall notify the President of such designations. Such State officials shall assess damages to natural resources for the purposes of this chapter and such section 1321 of Title 33 for those natural resources under their trusteeship.

7. *See generally In re* Acushnet River & New Bedford Harbor Proceedings Re Alleged PCB Pollution, 716 F. Supp. 676 (D. Mass. 1989); Ohio v. United States Dept. of Interior, 880 F.2d 432 (D.C. Cir. 1989).

8. 43 C.F.R. § 11 (1986).

9. *See* Ohio v. United States Dept. of Interior, 880 F.2d 432 (D.C. Cir. 1989), which struck key provisions of Dept. of Interior's regulations noting "a great deal of uncertainty remains with respect to the proper method of assessing natural resource damages under CERCLA."

10. 42 U.S.C.A. § 9607(a)(4)(A) (1980) provides:

all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan.

techniques, materials, equipment, and methods to be employed in identifying, removing, or remedying releases of hazardous substances.[11] The federal government or a state need not prove that its present and future costs are necessary and consistent with the national contingency plan. Rather, the burden shifts to opposing counsel to prove any inconsistencies. However, as "any other person" under section 9607(a)(4)(B), a municipality must affirmatively demonstrate that all response costs were necessary and consistent with the national contingency plan.[12]

FACTS

The Town of Bedford, Massachusetts brought suit against Raytheon Company, Massachusetts Port Authority, the U.S. Department of the Air Force, and the U.S. Department of the Navy to recover for natural resource damages for contamination of the town's principal drinking water source. Bedford claimed that each of the defendants engaged in activities that either used or generated hazardous substances which contaminated sites owned or operated by the defendants. The hazardous pollutants from the contaminated sites leached into the town's aquifer. Bedford alleged the aquifer to be polluted by hazardous substances eliminating the town's supply of potable water.

The defendants moved to dismiss Count II of Bedford's complaint which sought natural resource damages under section 6907 of CERCLA. The defendants argued that Bedford, as a municipality, was not authorized to bring suit for natural damages. In response, Bedford not only opposed the motion but sought by its own motion for partial summary judgment. Although conceding its status as a municipality, Bedford argued that it was entitled to the less demanding burden of proof applicable to states in a CERCLA cost recovery action.

LANGUAGE OF THE STATUTE

In finding that a municipality is not a state under CERCLA, the court first looked to the definition of a state provided in CERCLA section 9601(27). That section states:

> The terms "United States" and "state" include the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United

11. 42 U.S.C.A. § 9605 (1980).
12. 42 U.S.C.A. § 9607(a)(4)(B) (1980). *See supra* note 4.

> States Virgin Islands, the Commonwealth of the Northern Marianas, and any other territory or possession over which the United States has jurisdiction.[13]

The court distinguished municipalities from the entities listed in the definition on the basis that the entities were all sovereigns, and unlike municipalities, do not depend on states to grant them power. Furthermore, the court looked at the definition of "person" under Section 9601(21) and noted that that term did include "municipality" or other "political subdivision of a state."[14]

CRITICISM OF PAST DECISIONS

The court did not end its analysis at this point because other district courts have taken the directly contrary position that a municipality is a "state" for purposes of recovery under CERCLA. In *Mayor and Board of Aldermen of the Town of Boonton v. Drew Chemical Corp.* (D.N.J. 1985)[15] and *City of New York v. Exxon Corp.*, (S.D.N.Y. 1986),[16] both courts relied on policy reasons for a broad reading of the word "state" to assimilate municipalities within its definition.[17] The strongest policy argument adhered to by the *Drew Chemical* and *Exxon* courts was the broad remedial purposes of CERCLA to ensure prompt and effective cleanup of hazardous wastes:

> Since the statute (CERCLA) specifically includes within its ambit "natural resources" which are under control of local governments, the Act's broad remedial intention is not furthered by a reading which requires the State, which is not the government charged with managing and conserving these resources to bring suit to recover for damages done to them. The clear purpose of the Act, which is to ensure prompt and effective cleanup of hazardous wastes and the restoration of environmental quality, is not advanced by preventing the authorities entrusted with the management of public resources from bringing actions to recover the cost of protecting them.[18]

The court, however, emphasized that the framework of legislation

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13. 42 U.S.C.A. § 9601(27) (1980).
14. 42 U.S.C.A. § 9601(21) (1980) defines "person" as:
> an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, municipality, commission, political subdivision of a State, or any interstate body.
15. 621 F. Supp. 663 (D.N.J. 1985).
16. 633 F. Supp. 609 (S.D.N.Y. 1986).
17. 633 F. Supp. at 618-619.
18. 633 F. Supp. at 619.

was also designed to restrain unwise and excessive clean-up activity. This restraint was to be achieved by imposing a burden upon those entities without the attributes of sovereignty to establish entitlement. The court further relied upon the Superfund Amendments and Reauthorization Act of 1986 (SARA) which set up a scheme for states to designate "natural resource trustees" to bring natural resource damage actions.[19] Because SARA did not provide for municipalities' automatic appointment as natural resource trustees, the court concluded that Congress did not intend municipalities to recover natural resource damages directly.

The court also addressed concerns which arise from the nature of natural resource damages. The court found natural resource claims of municipalities to be of regional concern and therefore, subject to the parochial views of states' political subdivisions. Additionally, because of the unsettled and complex nature of natural resource damages, the court thought that only those trustees designated by the Governor of each state should be allowed to bring such claims in order to avoid inconsistent approaches by a range of different plaintiffs with counsel of variable quality and experience.

Finally, the court dismissed Bedford's contention that the legislative history of the SARA amendments supports the municipality's position. Adopting the language of *City of Philadelphia v. Stepan Chemical*,[20] the court without much discussion, concluded that the SARA amendments were "inconclusive, indicating neither an endorsement or for that matter, a rejection by Congress of the Drew Chemical position."[21] In summing up its position, the court stated: The language and structure of CERCLA make clear that a municipality is not a "state" as defined in the statute. Although references to the overall philosophy of CERCLA and its "legislative history" can be tailored to suggest that a different definition would be appropriate, such tailoring is not the proper way to approach construction of the statute. In light of the conclusion that the words and structure of the statute make evident a congressional intent to treat states differently in important ways from their municipalities or political subdivisions, the language of the statute must be implemented.[22]

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19. 42 U.S.C.A. § 9607(f)(2)(B) (1980). *See supra* note 6.

20. City of Philadelphia v. Stepan Chem. Co., 713 F. Supp. 1484 (E.D. Pa. 1989).

21. City of Philadelphia v. Stepan Chem. Co., 713 F. Supp. at 1489 n.15.

22. Town of Bedford v. Raytheon Co., No. 89-2313-WD (Dist. Ct. Mass. Jan. 15, 1991) (1991 U.S. Dist. LEXIS 896, p. 10).

MUNICIPALITIES AS NATURAL RESOURCE TRUSTEES

In light of *Stepan Chemical* and now *Raytheon*, it appears that, at least in some jurisdictions, municipalities are barred from recovering natural resource damages under CERCLA. However, the language of SARA governs. SARA requires the governor of a state to designate trustees entitled to bring natural resource damage actions.[23] The issue of who are the appropriate trustees for state natural resource damage claims is still unanswered. The policy arguments advanced by *Drew Chemical* and *Exxon* support the finding that municipalities should be "natural resource trustees." CERCLA would be anomalous if interpreted as giving states a cause of action for damages to natural resources owned by the state but not allowing the same cause of action for municipalities with respect to their natural resources. This anomaly is especially apparent in light of section 9601(16) which expressly includes natural resources owned by "local governments" within the scope of protected subjects.[24] The court's fears that local governments would be susceptible to "parochial views" and therefore unworthy trustees are unfounded. Although the court sees natural resource damages as a region-wide concern, owners of contaminated property are in the best position to claim natural resource damages. Municipalities recovering for damages to their natural resources have the capacity and especially the inclination to clean up and contain the contamination. A municipality's dependence upon the state to bring an action on behalf of the municipality will result in further delay to an already slow and complex process.

MUNICIPALITIES' BURDEN OF PROOF

The issue of requiring municipalities to sustain the heavy burden of proving response costs were necessary and consistent with the national contingency plan under section 9607(a)(4)(A), may have been rendered moot by SARA. SARA places new limits on the permissible uses of natural resource damage awards. The new limits prohibit the use of the Superfund to pay for restoring natural resources. Consequently, natural resource trustees must now look to parties responsible for the contamination, and not the Superfund to finance restoration efforts. Additionally, some courts have held that if parties are not seeking reimbursement from the Superfund, but rather directly from other parties whose activities caused the

23. 42 U.S.C.A. § 9607(f)(2)(B) (1980). *See supra* note 6.
24. 42 U.S.C.A. § 9601(16) (1980). *See supra* note 5.

need for response, such costs do not need to be approved under the national contingency plan and certified by the responsible Federal official.[25]

CONCLUSION

A reasonable policy toward natural resource damage claims consistent with the overall cleanup objectives of CERCLA must be developed. CERCLA's enforcement scheme of achieving the clean up of hazardous substance contamination can be furthered through natural resource damages. Natural resource damages may be used to finance resource restoration and replacement costs. Furthermore, because natural resources are often times very significant to the public, we need the deterrent effect of natural resource damages in precluding negligent contamination. Municipalities, as owners of valuable natural resources such as aquifers and land, must be able to protect their resources through a CERCLA natural resource damage cause of action. It is difficult to understand why the state should be entitled to recover damages for a loss or injury which the municipality sustained. All the uncertainty that currently surrounds a CERCLA natural resource damage action dampens most efforts to pursue such a claim. The current decision by the *Raytheon* court compounds that uncertainty, leaving the door to natural resource damages barely open. Municipalities should be entitled access to recover natural resource damages under CERCLA. Such access will encourage and facilitate the cleanup and treatment of hazardous wastes in order to protect and preserve natural resources and public health.

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25. Artesian Water Co. v. New Castle County, 605 F. Supp. 1348, 1357 (D. Del. 1985); City of New York v. Exxon Corp., 633 F. Supp. 609, 616 (S.D.N.Y. 1986).