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**BALANCING LOCAL CONCERNS
WITH CERCLA POLICIES: THE IMPORTANCE OF
PERSPECTIVE IN CONSIDERING THE APPLICATION
OF FEDERAL MANDATES**

*State of Missouri v. Independent Petrochemical Corporation*¹

by Eric Walter

I. INTRODUCTION

The decision in *State of Missouri v. Independent Petrochemical Corporation* follows a series of lawsuits by the United States against Syntex (USA), Inc., Syntex Agribusiness, NEPACCO, IPC, Russell Martin Bliss, and Jerry-Russell Bliss, Inc., pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").² The aim of this consolidated litigation, known for limited purposes as the Missouri Dioxin Litigation, was to seek remedial relief and recovery of

response costs for the release of dioxin and other hazardous materials during the early 1970s at twenty-eight sites in eastern Missouri, most notably Times Beach.³

Pursuant to this litigation, the parties entered into two Consent Decrees which authorized the clean-up and outlined the required safety standards.⁴ St. Louis County ("County"), which includes Times Beach, sought more stringent environmental standards for the Syntex Consent Decree and appealed to the United States Court of Appeals for the Eighth Circuit.⁵ The County

petitioned the Court to acknowledge their rights and privileges under the Syntex Consent Decree. The County cited as error both the denial of its motion to intervene and the district court's ruling on the construction and enforcement of the Syntex Consent Decree.⁶

II. FACTS AND HOLDING

Eleven years ago, the Environmental Protection Agency ("EPA") issued a Record of Decision ("ROD"), which found that a form of incineration called thermal treatment would be the most appropriate clean-up remedy at Times Beach and other dioxin-contaminated sites in Missouri.⁷ Within the ROD, the EPA announced the "applicable or relevant and appropriate requirements" ("ARARs") related to this clean-up procedure, as required by CERCLA.⁸ Syntex, the EPA, and

¹ 104 F.3d 159 (8th Cir. 1997).

² *Id.* at 160. See also *City of Eureka, Missouri v. United States*, 770 F. Supp. 500, 502 (Mo. E.D. 1991). CERCLA was amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA). Hereafter, reference to CERCLA is intended to include the amendments made by SARA.

³ *Independent Petrochemical Corp.*, 104 F.3d at 160. For the purposes of this Note, there are two groups of defendants: the Syntex defendants ("Syntex"), consisting of Syntex (USA), Inc. and Syntex Agribusiness; and the NEPACCO defendants ("NEPACCO"), consisting of Northeastern Pharmaceutical and Chemical Company, Inc. (NEPACCO); NEPACCO's president, Edwin Michaels, and its vice-president, John Lee; Independent Petrochemical Corporation (IPC), Russell Martin Bliss, the individual who actually sprayed the dioxin-contaminated waste oil at the 26 sites in Missouri; and Jerry-Russell Bliss, Inc., Bliss' successor in liability. *United States v. Bliss*, 667 F. Supp. 1298, 1302 (Mo. E.D. 1987) (hereinafter, "Bliss I"). The specific roles these entities played in the contamination will be detailed further in this Note.

⁴ *Independent Petrochemical Corp.*, 104 F.3d at 160.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* A "record of decision" is defined as the EPA's official record of the entire remedy or remedial action, as defined under § 101 of CERCLA and publicly reviewed under § 117 of CERCLA, including the ARARs. 42 U.S.C. § 9601(24) (1995); 42 U.S.C. § 9617 (1995). The actual clean-up procedure is outlined in the National Contingency Plan. 40 C.F.R. Part 300 (1995). The Plan provides that after a hazardous site has been identified, an EPA evaluation will determine whether remedial action is appropriate. See *United States v. Denver, City and County of*, 100 F.3d 1509 (10th Cir. 1996). This evaluation includes feasibility studies to identify the possible remedial alternatives. Based on those studies, the EPA proposes the selected remedy and allows for public comment. Following this, the clean-up plan is then finalized, and the EPA documents its remedy decision in a record of decision (ROD).

⁸ *Independent Petrochemical Corp.*, 104 F.3d at 160. A complete definition is provided for "Applicable or Relevant and Appropriate Requirements" in a Directive from the EPA's Office of Solid Waste and Emergency Response (OSWER): "[a]pplicable' requirements are those clean-up standards of control, and other substantive environmental protection requirements, criteria, or limitations promulgated under federal or state law that specifically address a hazardous substance, pollutant, contaminant, remedial action, location, or other circumstance at a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) site. 'Relevant and appropriate' requirements are those clean-up standards which, while not 'applicable' at a CERCLA site, address problems or situations sufficiently similar to those encountered at the CERCLA site that their use is well-suited to the particular site. ARARs can be action-specific, location-specific, or chemical-specific." OSWER, "Risk Assessment Guidance for Superfund: Volume 1 - Human Health Evaluation Manual (Part C, Risk Evaluation of Remedial Alternatives)," 1991 WL 645477 (December 1991).

the State of Missouri entered into a Consent Decree patterned after the ROD and its ARARs.⁹ The Consent Decree described the clean-up procedures in five workplans, one of which was the Thermal Treatment Workplan.¹⁰ The Consent Decree also required that Syntex apply for a Hazardous Waste Management Permit from the EPA and the State of Missouri to construct and operate the incinerator.¹¹

In July 1993, a draft EPA/Missouri Hazardous Waste Management Facility Permit was issued to Syntex which proposed a formula establishing the levels of dioxin and metal emissions that would not exceed health and environmental laws.¹² The Permit's risk assessment found that the clean-up could be conducted safely using a standard of approximately one nanogram of dioxin per dry standard cubic meter of air.¹³ This effectively constituted a one in one million chance of the most heavily exposed person developing can-

cer.¹⁴

In February 1995, shortly after the hearings concerning the draft Permit, the St. Louis County Council voted to amend its Air Pollution Control Code.¹⁵ The amendments raised the air emissions permit standards for any incinerator intended to burn known concentrations of dioxin.¹⁶ The only incinerator in St. Louis County subject to the new standard was the incinerator at Times Beach.¹⁷ The new standard was approximately six times more restrictive than that approved by the EPA and the State of Missouri.¹⁸ Despite this new requirement, the final EPA/Missouri Permit, issued two months after the County ordinance was passed, retained the original standard.¹⁹

Syntex filed a motion requesting clarification of obligations under the Consent Decree in light of the County's amended ordinance.²⁰ The County filed a motion to intervene either as of right or permissively.²¹ The District

Court rejected intervention as of right, but permissive intervention was effectively granted since the County was allowed to file a brief in opposition to Syntex's motion to construe.²² Pursuant to these proceedings, the District Court declared that the County ordinance did not apply to the Times Beach project and limited the scope of the ordinance to "control of conventional air pollutants, not including dioxin."²³ The decision meant that the parties to the Consent Decree were exempt from the County ordinance's amendments.²⁴

On appeal, the Eighth Circuit found that the nature of hazardous waste clean-up was not given to continual modification, and that such modification would thwart the Congressional mandate for expeditious treatment of toxic sites.²⁵ Further, the Court held, federal law requires that ARAR's be frozen as of the date of the ROD, and that the workplans revealed no intent by the parties to ignore that proposition.²⁶ The Eighth Circuit

⁹ *Independent Petrochemical Corp.*, 104 F.3d at 160.

¹⁰ *Id.*

¹¹ *Id.* Although in no way required to do so under § 121(e)(1) of CERCLA, Syntex agreed in the Consent Decree to apply for air, water and hazardous waste permits to construct and operate the thermal treatment unit, including a St. Louis County Department of Health air construction/operating permit. *Id.* at 162. The County bases its argument that Syntex must comply with the County's new ordinance on this clause. *Id.*

¹² *Id.* at 161. (The determination of the appropriate level of emissions was based on a site-specific Times Beach Risk Assessment of this incineration project.)

¹³ *Id.*

¹⁴ *Id.* (The decision offered no information on why one nanogram of dioxin per dry standard cubic meter of air equated with the project being conducted "safely." It only stated the fact in a conclusory manner, that "safely" was the standard the EPA and the State of Missouri defined as creating a one in a million chance of the most heavily exposed person developing cancer.)

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* (The decision did not explain why the motion to intervene as of right was rejected by the district court. The Court only explained that whatever the reason, an error would have been harmless given the fact that the County had the opportunity to present its position regarding Syntex's motion to construe and effectively was heard.)

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 162. See also 40 C.F.R. § 300.430(f)(1)(ii)(B)(1); 55 Fed. Reg. 8666, 8757 (1990).

²⁶ *Independent Petrochemical Corp.*, 104 F.3d at 162.

held that due to the federal government's involvement in the project, the County's amended ordinance was inconsistent with federal law and thus, inapplicable to the Times Beach project.²⁷

III. LEGAL BACKGROUND

Dioxin is a unique and harmful substance and has been the subject of extensive study and research.²⁸ A by-product of combustion and other industrial processes, its physical and chemical properties predispose dioxin to exist primarily in soil, sediments, and living things.²⁹ Studies have shown dioxin to be one of the most potent animal carcinogens ever tested.³⁰ While dioxin's effects vary depending on the particular strain of the chemical, there are effects common to most forms.³¹ Experimental exposure to low concentrations of common dioxins has produced varying degrees of cancer, adverse effects on immune and male reproductive systems, and most commonly, chloracne.³² Sci-

entists have generally agreed that human data is too limited, leading them only to conclude that dioxin is a "probable" human carcinogen under some conditions of exposure.³³

Despite the scientific uncertainty surrounding dioxin's harmful effects, the EPA elected to regulate dioxin emissions to protect human health and the environment.³⁴ Critics of these regulations have argued that the stringent rules are overly cautious, while others have sought more restrictive regulation.³⁵ In addition, supporters of increased regulation suggest the elimination of all chlorinated organic compounds that do not readily degrade into harmless substances.³⁶ For the time being, the EPA is awaiting new scientific evidence before modifying its dioxin regulations.³⁷ Unfortunately, the EPA's regulations came too late for some communities that were knowingly exposed to dioxin.

A. Factual Background Hoffman-Taff, Inc., a

chemical company located in Verona, Missouri, manufactured Agent Orange for the Vietnam War effort in the late 1960s.³⁸ A dioxin-laden residue, which the plant stored in large drums, was a by-product of the process used to manufacture Agent Orange.³⁹ Syntex, Inc., acquired the rights and liabilities of Hoffman-Taff, effective December 31, 1968, and subsequently transferred those interests to Syntex Agribusiness.⁴⁰ In the early 1970's, Northeastern Pharmaceutical and Chemical Company ("NEPACCO") moved into the Verona plant and began manufacturing trichlorophenol ("TCP"), which also produced dioxin as a by-product. This additional dioxin was added to the waste left by Hoffman-Taff.⁴¹ NEPACCO sought to dispose of these wastes, so it retained Independent Petrochemical Corporation (IPC).⁴² Ultimately, IPC hired Russell Bliss to perform the disposal, which Bliss did by mixing the by-products with waste oil and other substances and spraying the mixture at a number of

²⁷ *Id.*

²⁸ Linda-Jo Schierow, *Dioxin: Reassessing the Risk*, 7 RISK: HEALTH, SAFETY & ENVIRONMENT 7, 8 (1996). See also William B. Johnson, *Liability Under § 7003 of Resource Conservation and Recovery Act Pertaining to Imminent Hazards from Solid or Hazardous Waste*, 115 AMERICAN LAW REPORTS FEDERAL 491 (1993).

²⁹ Schierow, *supra* note 28, at 8.

³⁰ *Id.* *United States v. Vertac Chemical Corporation*, 10 ENVTL. L. REP. 20709 (1980). Experiments which involved painting a dioxin mixture on mice caused tumors to appear on the animals' skin. See Environmental Protection Agency, *Chemical, Physical, and Biological Properties of Compounds Present at Hazardous Waste Sites*, 1985 WL 263592 (1985).

³¹ *Id.* at 630.

³² *Id.* Chloracne is a severe skin disorder marked by painful symptoms that can persist for long periods of time. Jamon A. Jarvis, Note, *The Discretionary Function Exception and the Failure to Warn of Environmental Hazards: Taking the "Protection" Out of Environmental Protection Agency*, 78 CORNELL L. REV. 543 (1993). Extreme cases can lead to the development of disfiguring lesions. Arnold W. Reitze, Jr. & Andrew N. Davis, Comment, *Regulating Municipal Solid Waste Incinerators Under the Clean Air Act: History, Technology and Risks*, 21 B.C. ENVTL. AFF. L. REV. 1 (1993).

³³ Schierow, *supra* note 28, at 8.

³⁴ *Id.* at 9.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *United States v. Bliss*, 133 F.R.D. 559, 561 (Mo. E.D. 1990) (hereinafter, "Bliss III").

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

sites in eastern Missouri.⁴³

Health concerns over dioxin and TCP contamination have been warranted at twenty-eight sites due to this spraying.⁴⁴ The EPA has in fact determined that several of these sites, most prominently Times Beach, contain levels that create a potentially imminent and substantial danger.⁴⁵ The result has been a series of consolidated litigation to resolve liability and determine the appropriate method of clean-up.⁴⁶

B. Litigation

Aside from insurance liability cases and personal indemnity suits, there have been four significant cases stemming from the factual situation outlined above.⁴⁷ The first case involving the dioxin contamination of Times Beach was aimed at establishing primary liability for the environmental damage.⁴⁸

In *United States v. Bliss* ("Bliss I"), the United States sought a determination of liability against

NEPACCO under section 107 of CERCLA for damage to natural resources and expenses associated with response costs and remedial action.⁴⁹ The government motioned for summary judgment against each defendant for the contamination resulting from their common interest in disposing of the Verona plant by-products, arguing that the fact that Bliss physically sprayed the dioxin mixture did not excuse the other defendants.⁵⁰

Prima facie liability under CERCLA requires four elements: (1) each of the sites is a "facility"; (2) a "release" or a "threatened release" of a "hazardous substance" from the sites has occurred or is occurring; (3) the release or threatened release has caused the United States to incur response costs; and (4) the defendants fall within at least one of the classes of liable persons described by sections 107(a)(1)-(a)(4).⁵¹ Since CERCLA provides for strict liability, a defendant's prior knowledge or

intent is not an issue.⁵² The three defenses to CERCLA liability are: (1) an act of God; (2) an act of war; or (3) an act or omission of a third party.⁵³ Since the defendants failed to present any evidence supporting any one of the defenses, and the government successfully established a prima facie case of CERCLA contamination, the District Court found NEPACCO jointly and severally liable.⁵⁴

In *United States v. Bliss* ("Bliss II"), the United States District Court for the Eastern District of Missouri heard motions by the cities of Eureka and Fenton (the Cities) to intervene and file complaints against Syntex and NEPACCO.⁵⁵ The Cities sought intervention to express their concern over the possible adverse effects of using nearby Times Beach as a locus for the area's dioxin clean-up.⁵⁶ The Court determined that the relevant requirements for intervention as of right were listed in 42 U.S.C. §

⁴³ *Id.* During the early 1970's, Bliss was receiving oil from over a thousand sources, primarily crankcase oil from service stations. Oil was placed into and drained from two large storage tanks at Bliss' facility in Frontenac, Missouri on a daily basis. Most of the oil was loaded onto tanker trucks and taken to oil refineries, but some was sprayed at the contaminated sites for dust suppression. *Bliss I*, 667 F. Supp. at 1303 (Mo. E.D. 1987).

⁴⁴ *Bliss III*, 133 F.R.D. at 561.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See generally *Bliss I*, 667 F. Supp. 1298 (Mo. E.D. 1987); *United States v. Bliss*, 132 F.R.D. 58 (Mo. E.D. 1990) (hereinafter, "Bliss II"); *Bliss III*, 133 F.R.D. 559 (Mo. E.D. 1990); *City of Eureka v. United States*, 770 F. Supp. 500 (Mo. E.D. 1991).

⁴⁸ *Bliss I*, 667 F. Supp. at 1302.

⁴⁹ *Id.* at 1304. Section 107 of CERCLA is codified at 42 U.S.C. § 9607.

⁵⁰ *Bliss I*, 667 F. Supp. at 1303.

⁵¹ *Id.* at 1304. A "facility" is defined as "(A) any building, structure, . . . pipe, . . . pond, . . . vehicle, . . . or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, . . . or otherwise comes to be located." 42 U.S.C. §9601(9). CERCLA defines a "release" as "any spilling, leaking, pumping, . . . dumping, or disposing into the environment [any hazardous substance or pollutant or contaminant] (with exceptions). See 42 U.S.C. § 9601(22). A "hazardous substance" is defined in § 101 of CERCLA as including toxic pollutants, hazardous air pollutants, and hazardous chemical substances or mixtures. For a complete and detailed listing, see 42 U.S.C. § 9601(14)

⁵² *Bliss I*, 667 F. Supp. at 1304.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Bliss II*, 132 F.R.D. 58 (Mo. E.D. 1990). (Eureka is approximately two miles from Times Beach and Fenton is located within ten miles of Times Beach.)

⁵⁶ *Id.* at 59.

9613(i) (CERCLA) and subject to Federal Rule of Civil Procedure 24.⁵⁷ Regarding the timeliness of the application, the Court found that the Cities' application was untimely in light of the broad media coverage and considerable pendency of the consolidated cases.⁵⁸ The Court found it was unreasonable to believe the Cities were unaware of the significance of the case or the prior opportunities to be heard on the issues.⁵⁹

The Court ruled that the Cities need not achieve party status to have their interests represented.⁶⁰ The Court further concluded that workplans contained in the Consent Decree, which included the EPA's recommendation of Times Beach as the center of the clean-up effort, would be published, and any interested party, including the Cities, would have an opportunity to submit written comments to the Department of Justice.⁶¹ In addition,

the Court stated, government entities exist to act in the public interest, so there was a presumption that Missouri and the United States were adequately representing the Cities' interests.⁶² The Court held that this presumption, along with the available forms of public participation, sufficiently protected the Cities.⁶³ Moreover, had these parties failed to adequately represent the Cities' interests, the Court stated that it could have permitted intervention upon a showing of bad faith or malfeasance on the part of the government entities.⁶⁴

United States v. Bliss ("Bliss III"), involved the District Court's review of the two Consent Decrees, one signed by Syntex and the other by NEPACCO.⁶⁵ The proposed Consent Decrees, if approved by the Court and the parties, would have resolved all pending issues in the consolidated cases concerning the Syntex and

NEPACCO defendants.⁶⁶ The Court praised the Syntex Consent Decree and the workplans contained within it as exhaustive, detailed, and commendable.⁶⁷ The public, on the other hand, submitted comments on the Consent Decrees which indicated a profound concern for potential hazards, such as contaminated smoke emanating from the incinerator or flood waters carrying dioxin to other areas in Missouri and possibly farther.⁶⁸ After reviewing the provisions regarding Times Beach and the thermal incinerator, the Court indicated that it believed the public's sentiments were the product of unfounded anxiety.⁶⁹ In particular, the Court noted the explicit timetable, and the sizable penalties associated with failure to adhere to the specifications of the Consent Decrees.⁷⁰

The NEPACCO Consent Decree provided that the defendants

⁵⁷ *Id.* The elements under these statutes require a potential intervenor to: "(1) make a timely application for intervention; (2) have an interest in the subject of the action; (3) be so situated that without intervention, the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect this interest, and; (4) have an interest not adequately protected by existing parties." 42 U.S.C. § 9613(i).

⁵⁸ *Bliss II*, 132 F.R.D. at 60. At the time of the trial, the EPA's Record of Decision was almost two years old and the Cities had participated in many of the state and federal processes addressing both the dioxin problem and its litigation. In addition, since the town of Times Beach was forced to evacuate due to the contamination, this factual situation had been a topic of media coverage for several years. *Id.*

⁵⁹ *Id.* To illustrate one such opportunity, the Director of the Department of Natural Resources discussed intervention with the Cities' counsel, who advised that the Cities were not interested in intervention. *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 61.

⁶⁴ *Id.* The Eight Circuit has applied this standard, as promulgated by the Supreme Court: "[b]ad faith or malfeasance on the part of the Government in negotiating and accepting a consent decree must be shown before intervention will be allowed." *United States v. Associated Milk Producers*, 534 F.2d 113, 117 (8th Cir. 1976) (quoting *Sam Pox Publishing Co. V. United States*, 366 U.S. 683, 689 (1961)). *See also United States v. Hooker Chemicals & Plastics*, 749 F.2d 968 (2d Cir. 1984), an enforcement action in which the government sued as "parens patriae." The Court of Appeals found that, "it is proper to require a strong showing of inadequate representation before permitting intervenors to disrupt the government's exclusive control over the course of its litigation." *Id.* at 987.

⁶⁵ *Bliss III*, 133 F.R.D. at 559. At the time these were signed, no liability had attached to Syntex. *Id.* at 562.

⁶⁶ *Id.*, at 562.

⁶⁷ *Id.*

⁶⁸ *Id.* at 563. Times Beach is located in the five-year flood plain of the Meremac River. The Consent Decree required the U.S. Army Corps of Engineers to erect a ring levee around the incinerator three feet higher than the 100 year flood height.

⁶⁹ *Bliss III*, 133 F.R.D. at 563.

⁷⁰ *Id.* The Court also pointed out the logic in selecting Times Beach as the site of the incinerator. Not only is "Times Beach the largest of the twenty-eight sites in both geographic size and volume of contaminated waste," it would not be feasible to build an incinerator at each site. Some of the sites would not be large enough to house such a facility. Also, Times Beach is a logical choice because it has already been evacuated. *Id.* at 564.

would pay the plaintiffs \$225,000.00 within thirty days of the entry of the Consent Decree.⁷¹ This payment acted in discharge of the NEPACCO defendants' entire liability for the incident.⁷² Part IV of the Consent Decree protected NEPACCO with a discretionary covenant not to sue, but also included a means to reopen the case should new information reveal the need for further remedial action to protect human health, welfare, and the environment.⁷³

Finally, the Court explored the legal standards governing entry of Consent Decrees and made findings of fact and conclusions of law.⁷⁴ The Court has discretion in approving a consent decree, but that discretion is limited, in that rejection must be due to "unfairness, inadequacy, or unreasonableness."⁷⁵ The judge should be concerned only with the adequate protection of the parties and the public, not the optimal terms of settlement.⁷⁶

In determining whether a

consent decree should be approved, the Court applied a rubric first offered by the First Circuit.⁷⁷ The rubric's four elements are (1) procedural fairness, (2) substantive fairness, (3) reasonableness, and (4) fidelity to the statute.⁷⁸ An evidentiary hearing on the suitability of a consent decree was available, but as the First Circuit noted, courtrooms are busy, and a hearing should be held only when oral argument is necessary.⁷⁹

The Court found that no evidentiary hearing would be necessary because all relevant issues were fully argued and thoroughly briefed.⁸⁰ Specifically, each of the four elements of the rubric indicated that the Consent Decree should be approved and entered.⁸¹ The successful application of the rubric and the Court's perception of the facts and Consent Decrees compelled the judge to grant the joint motion of the United States and Missouri to enter the Consent

Decrees between those government entities and the Syntex and NEPACCO defendants.⁸²

Finally, nearly eight months after the decision in *Bliss III*, the cities of Eureka and Fenton, Missouri, brought an action to challenge the EPA's selection of a remedial action plan prior to the plan's implementation.⁸³ The defendants, the United States and the EPA, moved to dismiss for lack of subject matter jurisdiction.⁸⁴ They argued that under 113(h)(4) of CERCLA, no affirmative challenges to an EPA response action plan could be made prior to implementation, effectively removing the case from the limited jurisdiction of the federal courts.⁸⁵

The Court began by reviewing the thorough and public procedure employed by the EPA to arrive at its clean-up decision.⁸⁶ Pursuant to these efforts, the EPA issued a ROD recommending centralized thermal treatment of

⁷¹ *Id.* at 566.

⁷² *Id.*

⁷³ *Id.* The opinion also included comments from non-settling defendants. This group includes Independent Petrochemical Company, American National Can Company, and Primerica Corporation. They argued that the Syntex Consent Decree left too much liability on them, recommended ultraconservative clean-up procedures, and was not consistent with the National Contingency Plan. *Id.* at 566-67. (This portion of the decision is not relevant here).

⁷⁴ *Bliss III*, 133 F.R.D. at 567.

⁷⁵ *Id.* The Ninth Circuit provided in *Securities and Exchange Commission v. Randolph* that: "[t]he initial decision to approve or reject a settlement proposal is committed to the sound discretion of the trial judge... Unless a consent decree is unfair, inadequate, or unreasonable, it ought to be approved." *Securities and Exchange Comm'n v. Randolph*, 736 F.2d 525, 529 (9th Cir. 1982).

⁷⁶ *Bliss III*, 133 F.R.D. at 567.

⁷⁷ *Id.* at 568 (citing *United States v. Cannons Engineering Corp.*, 899 F.2d 79 (1st Cir. 1990)).

⁷⁸ *Cannons Engineering Corp.*, 899 F.2d at 86-93.

⁷⁹ *Bliss III*, 133 F.R.D. at 568.

⁸⁰ *Id.* at 569.

⁸¹ *Id.* The Court found that negotiations between all the parties had been characterized by arm's length relations and good faith. Consequently, procedural fairness was accomplished. Substantive fairness was a more difficult element to meet. The Court determined, though, that the consent decree "falls along the broad spectrum of plausible approximations," so it should not be judicially disturbed or second-guessed. *Id.* Next, the Court held that not only the cost apportionment, but also the clean-up procedure and workplans sufficiently satisfied the element of reasonableness. Finally, fidelity to CERCLA was evident in the appropriate obligation of the settling defendants and the accountability of the responsible parties for their environmental misdeeds. *Id.* at 570.

⁸² *Id.*

⁸³ *City of Eureka*, 770 F. Supp. at 501. The plaintiffs acted under section 310 of CERCLA. *Id.*

⁸⁴ *Id.* The motion to dismiss for lack of subject matter jurisdiction is Rule 12(b)(1) of the Federal Rules of Civil Procedure.

⁸⁵ *City of Eureka*, 770 F. Supp. at 501.

⁸⁶ *Id.* The EPA's efforts began in 1982. *Id.* The EPA conducted feasibility studies on both Times Beach and an area known as the Minker/Stout/Romaine Creek site. *Id.* These studies were released independently to the public and comments were received for periods of several months. *Id.* In addition, public meetings were held where interested citizens could offer viewpoints and have concerns addressed. *Id.* Only after all these activities were concluded, and the comments considered and responded to, did the EPA select a remedy for the ROD. *Id.*

contaminated soils at the temporary facility at Times Beach.⁸⁷ The ROD formed the basis of the plaintiffs' challenge.⁸⁸

The United States argued that CERCLA completely prohibited pre-enforcement or pre-implementation review of remedial actions taken by the EPA pursuant to CERCLA.⁸⁹ Consequently, the defendant contended that the plaintiffs' claims were premature.⁹⁰ The Court found for the United States, stating that federal judicial review was not available when the remedial plan was chosen but had not been "taken" or "secured".⁹¹ The Court concluded that the opinions supporting the plaintiff's argument were inconsistent and not on point, and dismissed the claim for lack of subject matter jurisdiction.⁹²

C. Federal Preemption

The existence of CERCLA and other federal hazardous waste or pollution regulations has led to a

great deal of litigation regarding whether control of remedial selection is vested in the federal, state, or local government, or some combination thereof.⁹³ Section 121(d)(2) of CERCLA outlines the level of input and control granted to the states in this process.⁹⁴ Any state standard that is more stringent than the federal standard, and which a state has identified to the President in a timely manner, is legally applicable or relevant and appropriate under the circumstances of the release or threatened release.⁹⁵ By the conclusion of the remedial action, the level of control for the hazardous substance must be equal to or greater than the state standard.⁹⁶

However, the state's role in the remedial selection is not immutable.⁹⁷ Subsection (d)(4) grants the President the power to violate subsection (d)(2) if the President finds one of six circumstances to exist.⁹⁸ Examples of such

circumstances a greater risk of human health resulting from compliance with the state standards, and the technical impracticability of compliance with the state standards from an engineering perspective.⁹⁹ In the event the President finds one of these circumstances to exist, the state standards and requirements may be disregarded.¹⁰⁰

The state does have another avenue of relief for enforcement of its standards.¹⁰¹ If the President proposes a remedial action plan inconsistent with state regulations, the proposal must toll thirty days before it can be entered into a consent decree.¹⁰² This thirty day grace period allows the state to decide whether to concur in the selection.¹⁰³ If the state concurs, the state has the opportunity to become a signatory to the consent decree.¹⁰⁴

Should the state elect to not concur in the President's selection, preferring a remedial action plan conforming to its own standards,

⁸⁷ *Id.*

⁸⁸ *Id.* at 502. This action was in response to the unsuccessful attempt by the parties to intervene on an earlier action for the purpose of challenging the ROD's approval by the court. *Id.* The judge in that action denied the parties on both their initial motion and on reconsideration. *Id.*; See also *Bliss II*, 132 F.R.D. 58 (Mo. E.D. 1990).

⁸⁹ *City of Eureka*, 770 F. Supp. at 502. The defendants offered a wealth of case law in support of their contention that section 113(h)(4) of CERCLA explicitly prohibits pre-implementation review of such remedial actions. *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* Section 113(h) of CERCLA reads in relevant part: "No Federal court shall have jurisdiction under Federal law... to review challenges to removal or remedial action selected... except... (4) An action under section 159 alleging that the removal or remedial action taken under section 104 or secured under section 106 of CERCLA was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site." *Id.* See 42 U.S.C. § 9613(h).

⁹² *City of Eureka*, 770 F. Supp. at 503.

⁹³ See generally *City and County of Denver*, 100 F.3d 1509 (10th Cir. 1996); *Idylwoods Associates v. Mader Capital, Inc.*, 915 F. Supp. 1290 (W.D.N.Y. 1996); *Chatham Steel Corp. v. Brown*, 858 F. Supp. 1130 (N.D. Fla. 1994).

⁹⁴ 42 U.S.C. § 9621 (1995). Interestingly, the statute does not mention any measures of control applicable to governmental entities besides the state level. Evidently, the Congressional intent was to exclude county and municipal laws to achieve efficiency. As the instant decision mentions, these smaller governmental units can petition their state to represent their wishes. *Independent Petrochemical Corp.*, 104 F.3d at 159 (8th Cir. 1997).

⁹⁵ 42 U.S.C. § 9621(d)(2)(A).

⁹⁶ *Id.*

⁹⁷ 42 U.S.C. § 9621(d)(4).

⁹⁸ *Id.*

⁹⁹ *Id.* For a complete list of the six situations in which the President may ignore state standards in selection of remedial action, see 42 U.S.C. § 9621(d)(4)(A)-(F).

¹⁰⁰ *Id.*

¹⁰¹ 42 U.S.C. § 9621(f).

¹⁰² 42 U.S.C. § 9621(f)(2)(A).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

the state has two choices.¹⁰⁵ One option is intervention as a matter of right, in which the state could attempt to show that the President's findings were not supported by substantial evidence.¹⁰⁶ If the court rules for the state, the remedial action shall be modified to conform with the state's standards, and the state may become a signatory to the decree.¹⁰⁷ If the court determines that the remedial action need not conform to the state's standards, the state can choose to pay the additional costs necessary to comply with the state's standards, in which case the state shall become a signatory to the decree.¹⁰⁸

There have been many cases litigated on interpretation of this facet of CERCLA. Primarily, the dispute has revolved around whether federal law preempts the state law, absent some statutory

provision protecting the state law.¹⁰⁹

Generally, the rule is that if the federal law does not have clear, preemptive language, the court must consider whether Congress intended to preempt state law.¹¹⁰ Courts have ruled, "an intent can be found where the scheme of federal regulation is so pervasive that it is reasonable to assume that Congress has left no room for supplementation by the states."¹¹¹ In *Witco Corporation v. Beekhuis*, the Delaware District Court faced a preemption issue.¹¹² Delaware had a state non-claim statute, requiring that claims against a decedent's estate be made within eight months of the decedent's death.¹¹³ On the other hand, CERCLA provides that claims for contribution may be made for three years after the date of the judgment or judicially approved settlement.¹¹⁴

Federal courts have found in many cases that Congress, in enacting CERCLA, did not intend to explicitly preempt all state environmental law.¹¹⁵ In addition, these courts have agreed that CERCLA is not so comprehensive as to preclude supplementation by the states.¹¹⁶ However, it is undisputed that federal law preempts any conflicting state law.¹¹⁷ Thus, the *Witco* Court found two relevant inquiries regarding preemption: (1) Is it possible to comply with both laws?; and (2) does state law stand as an obstacle to the intent of Congress?¹¹⁸

Regarding the first question, the Delaware court found that it was possible to comply with both statutes.¹¹⁹ This could be accomplished by giving the estate notice of a contingent claim and filing a contribution action within the three

¹⁰⁵ 42 U.S.C. § 9621(f)(2)(B).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ See *Independent Petrochemical Corp.*, 104 F.3d at 159; *Witco Corp. v. Beekhuis*, 822 F. Supp. 1084 (D. Del. 1993). In *United States v. Akzo Coating of America, Inc.*, the Court provided three instances when preemption can occur, stating: "(1) When Congress, while acting within constitutional limits, preempts state law by stating so in express terms; (2) When the federal regulation is sufficiently comprehensive to make it reasonable to infer that Congress left no room for supplementary state regulation; and (3) In areas where Congress has not completely displaced state regulation, federal law may preempt state law to the extent that the state law actually conflicts with the federal law." *United States v. Akzo Coating of America, Inc.*, 949 F.2d 1409 (6th Cir. 1991). The first situation is commonly referred to as "express preemption," while the second is known as "field preemption." *City and County of Denver*, 100 F.3d at 1509. In *City and County of Denver*, the Court noted a fourth example of preemption, "conflict preemption," which occurs where it is impossible to comply with both the federal and state laws, or the state law stands as an obstacle to the accomplishment of Congress's objectives. *Id.*

¹¹⁰ See *Witco*, 822 F. Supp. at 1084; *Akzo Coating of America, Inc.*, 949 F.2d at 1409.

¹¹¹ *Witco*, 822 F. Supp. at 1088.

¹¹² *Id.*

¹¹³ *Id.* at 1087. The statute, 12 Del. C. § 2102, states in relevant part: "All claims against a decedent's estate which arose before the death of the decedent... whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort or other legal basis... are barred against the estate, the personal representative and the heirs and devisees of the decedent unless presented as provided in § 2104 of this title within eight (8) months of the decedent's death whether or not the notice referred to in § 2101 of this title have been given." *Id.*

¹¹⁴ *Id.* at 1088. CERCLA § 113(g)(3) provides in pertinent part: "No action for contribution for any response costs or damages may be commenced more than three (3) years after... (A) the date of judgment in any action under this Act for recovery of such costs or damages, or... (B) the date of... entry of a judicially approved settlement with respect to such costs or damages." 42 U.S.C. § 9613(g)(3) (1995).

¹¹⁵ *Witco*, 822 F. Supp. at 1088.

¹¹⁶ *Id.*

¹¹⁷ *Id.* See U.S. CONST. art. VI, cl. 2; *State Department of Health v. The Mill*, 887 P.2d 993 (Colo. 1994). Preemption is deemed to exist (1) when compliance with both federal and state regulations is a physical impossibility, or (2) where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Witco*, 822 F. Supp. at 1088.

¹¹⁸ *Witco*, 822 F. Supp. at 1088.

¹¹⁹ *Id.*

year limitation provided in CERCLA.¹²⁰ For the second question, the Court found that the state statute did stand as an obstacle to the intent of Congress, in that one of the policies behind the federal law is to force responsible parties to bear the cost and obligation for remedying the harmful conditions they created.¹²¹ Moreover, two district courts have held that state non-claim statutes stand as an obstacle to Congress' intent in enacting CERCLA.¹²²

The *Witco* Court rejected these prior decisions and found that CERCLA does not preempt state law in this area.¹²³ First, since the Federal Rules of Civil Procedure govern CERCLA, the Court found that Rule 17(b) gives the states the exclusive power to pass laws relating to the capacity of a person to sue or be sued.¹²⁴ Therefore, state capacity statutes, like the Delaware non-claim statute, may not be preempted by CERCLA.¹²⁵

A second argument against preemption involved the probate

nature of the *Witco* case.¹²⁶ Obviously, a deceased person would not experience the same deterrent effect and sense of responsibility for environmental damage.¹²⁷ In addition, states have traditionally had a strong interest in the prompt settlement of its residents' estates.¹²⁸ Thus, the Court found that since *Witco* knew it was being investigated as a potentially responsible party before the decedent passed, the corporation could have notified the Beekhuis estate of *Witco's* contingent CERCLA contribution claim.¹²⁹ *Witco's* failure to do so did not change the Court's finding that the non-claim statute was the true barrier to CERCLA preemption.¹³⁰

Witco is a rare case, in that state law prevailed over federal law. In most cases, the result is similar to the one in *United States v. City and County of Denver*.¹³¹ In that decision, the EPA and the Colorado Department of Health (CDH) issued a proposed remediation plan for a site known as OU-VIII, which

identified excavation and replacement of contaminated soils as the preferred alternative.¹³² However, the plan also encouraged public comment on all seven feasible alternatives.¹³³ Following this input, the EPA and CDH issued a ROD reflecting the public support for on-site solidification of the contaminated soils.¹³⁴

However, when the responsible party attempted to begin the on-site remedy, Denver issued a cease and desist order based on asserted violations of the city's zoning ordinances.¹³⁵ After negotiations with Denver failed, the United States sought a declaratory judgment finding the cease and desist order void and unenforceable.¹³⁶ The district court granted the United States' motion for summary judgment based on the Supremacy Clause.¹³⁷ Among the possible forms of preemption, the Court of Appeals for the Tenth Circuit found that the instant variation was "conflict" preemption.¹³⁸ As Denver conceded, the

¹²⁰ *Id.*

¹²¹ *Id.* at 1088-89.

¹²² *Id.* at 1089. Essentially, these cases held that to the extent state law purports to release responsible parties from liability for releasing hazardous wastes into the environment, CERCLA preempts state law.

¹²³ *Witco*, 822 F. Supp. at 1089.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 1090.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 1091.

¹³⁰ *Id.*

¹³¹ 100 F.3d 1509 (10th Cir. 1996).

¹³² *Id.* at 1511. The contamination in Denver was the result of exposure to radioactive waste in the early 1900's. *Id.* The entire Superfund site was divided into eleven operable units comprising over forty locations. *Id.* The site at issue, known as OU-VIII, consists of three parcels, the largest of which is the only privately-owned unit in the entire Superfund site. *Id.* It is owned by S.W. Shattuck Chemical Company, the responsible party. *Id.*

¹³³ *Id.*

¹³⁴ *Id.* Denver expressed support for excavation and replacement, but did not claim that onsite remediation would violate its zoning ordinances. *Id.* at 1512.

¹³⁵ *Id.* The zoning ordinances prohibit the maintenance of hazardous waste in areas zoned for industrial use. *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* The Court noted that its review of this decision was de novo, and applied the standard that, "Summary judgment is appropriate if 'there is no genuine issue as to any material fact and... the moving party is entitled to a judgment as a matter of law.'" *Id.* See also Fed. R. Civ. P. 56(c).

¹³⁸ *City and County of Denver*, 100 F.3d at 1512. See also *Witco*, 822 F. Supp. at 1088, for discussion of the forms of preemption.

responsible party could not possibly comply with both the local zoning ordinances and the EPA's remedial order.¹³⁹ Denver offered two arguments against preemption.¹⁴⁰

First, Denver suggested that Congress did not intend to preempt local zoning ordinances.¹⁴¹ Its argument was that since CERCLA includes an express preemption in section 121, Congress would have expressly provided for any other appropriate means of preemption.¹⁴² Denver claimed that a Supreme Court case, *Cipollone v. Liggett Group, Inc.*, stood for the proposition that an implied preemption cannot exist where Congress has included an express preemption elsewhere in the statute.¹⁴³

The Tenth Circuit found Denver's interpretation of *Cipollone* erroneous.¹⁴⁴ The Court's reading was that implied preemption is precluded by an express preemption clause only if that clause offers a "reliable indicium of congressional intent with respect to state authority."¹⁴⁵ In fact, the Court found two federal cases stating that an express preemption provision does not necessarily preclude the possibility

of implied preemption or an analysis for its presence.¹⁴⁶ Consequently, the Court found that the express preemption clause in section 121 did not qualify as a sufficiently reliable indicium of Congress's intent.¹⁴⁷ Moreover, the Court suggested that a contrary holding would conflict with CERCLA's policy goal of prompt and efficient clean-up of hazardous waste sites.¹⁴⁸

Second, Denver argued that its zoning ordinances constituted "a state environmental or facility siting law."¹⁴⁹ If this had been the case, the ordinance would have fallen within the definition of "applicable or relevant and appropriate requirements" of state law, requirements which the EPA must comply with when the state requirements are more restrictive than the federal standards.¹⁵⁰ Denver reached this conclusion relying on *Wisconsin Pub. Intervenor v. Mortier*, a Supreme Court case finding that the use of the term "state" in a portion of a federal statute included "political subdivisions" of the state.¹⁵¹

The circuit court decided

that *Mortier* did not apply in this situation because it would produce a result contrary to the policy objectives and legislative history of CERCLA.¹⁵² The Court based its holding on the fact that the applicable federal statute in *Mortier*, the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), unlike CERCLA, did not emphasize in its legislative history the prompt and efficient remediation attending issues relating to public health.¹⁵³ Essentially, the decision held that had Congress intended to define "state law" as including local zoning ordinances, it would have expressly done so, and thus, the ordinances were preempted.¹⁵⁴

These cases provide examples of the interplay and relationship between federal law and state and local laws. As *Witco* demonstrates, federal law does not always supersede state and local law. However, the Supremacy Clause dictates that federal law will usually preempt state and local law, as evidenced by *City and County of Denver* and the instant decision.

¹³⁹ *City and County of Denver*, 100 F.3d at 1512.

¹⁴⁰ *Id.* at 1513.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

¹⁴⁴ *City and County of Denver*, 100 F.3d at 1513.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* See *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995); *Montag v. Honda Motor Co.*, 75 F.3d 1414 (10th Cir. 1996).

¹⁴⁷ *City and County of Denver*, 100 F.3d at 1513.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* See *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597 (1991). The statute at issue in *Mortier* was the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136(y) (1995).

¹⁵² *City and County of Denver*, 100 F.3d at 1513.

¹⁵³ *Id.*

¹⁵⁴ *Id.* The remainder of this decision regards Denver's challenges to the EPA's chosen remedy. *Id.* The Tenth Circuit rejected these challenges on the basis of § 113 of CERCLA, which provides that no federal court shall have jurisdiction to review any challenges to removal or remedial action selected by the EPA under § 104 or § 106(a) of CERCLA. *Id.* at 1514. There are five exceptions to this provision, but Denver did not argue that any are applicable to these facts. *Id.* The Congressional policy behind § 113 is to prevent protracted litigation interfering with CERCLA's overall goal of effecting the prompt clean-up of hazardous waste sites. *Id.*

IV. INSTANT DECISION

Circuit Judge Ross wrote the opinion in *State of Missouri v. Independent Petrochemical Corporation* for the United States Court of Appeals for the Eighth Circuit.¹⁵⁵ As a threshold matter, Judge Ross set out the applicable standards of review.¹⁵⁶ When reviewing the district court's interpretation of a consent decree, the appellate court will apply Missouri's rules of contract interpretation.¹⁵⁷ The court will exercise de novo review if the interpretation is based entirely on the written instrument.¹⁵⁸ If the interpretation is also based on extrinsic evidence, however, the court will apply clearly erroneous standard.¹⁵⁹ The court noted that a consent decree is a unique form of law, a private agreement between parties subject to the interpretation of the court.¹⁶⁰ Consequently, a court interpreting a consent decree must consider the context in which the decree was signed.¹⁶¹ The Eighth Circuit noted that the District Court that entered the decree had a superior perspective, stating that the District Court's interpretation would receive deference.¹⁶²

The District Court's denial of the County's motion to intervene as a matter of right was not given formal treatment by the Eighth Circuit.¹⁶³ The Appellate Court ruled that even if the District Court erred in denying the motion, it was harmless error, not reversible error, since the lower court allowed the County to present its arguments regarding Syntex's motion to construe.¹⁶⁴ Thus, the County was heard and had no cause to complain.¹⁶⁵

The County's primary argument was that the parties to the Consent Decree agreed that Syntex would be required to obtain a county permit.¹⁶⁶ Under section 121(e)(1) of CERCLA, federal law does not require a local permit for any onsite removal or remediation action.¹⁶⁷ However, Syntex did agree to obtain the necessary waste permits to construct and operate the Thermal Treatment Unit.¹⁶⁸ Under the agreement, the County claimed authority to impose their more restrictive air emissions standards.¹⁶⁹

The District Court found that the County's argument was well-supported by the Consent Decree, except that federal law

mandates that all related ARARs are "frozen" as of the date the ROD is issued.¹⁷⁰ The ARARs may be changed after that date, but only if the EPA finds that "new standards are necessary to ensure that the remedy is protective of human health and the environment."¹⁷¹ This regulatory requirement was included in the Consent Decree and Thermal Treatment Workplan, along with the parties' agreement that Syntex apply for County air and pollution permits.¹⁷²

The court stated that the EPA's policy for "freezing" ARARs is based on efficiency.¹⁷³ If the ARARs were not given a measure of consistency, the EPA would constantly be modifying the remedies and standards in light of new or different requirements.¹⁷⁴ Consequently, such an outcome would slow the clean-up operation and defeat Congress's mandate of quick, effective clean-up of hazardous sites.¹⁷⁵

The District Court found that the EPA was not required to adhere to the County's stricter standard.¹⁷⁶ Pursuant to its research, the EPA determined the appropriate standards, and there was no

¹⁵⁵ *Independent Petrochemical Corp.*, 104 F.3 at 160.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 162.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

evidence outside the County's ordinance and claims which indicated the EPA's determination was inaccurate.¹⁷⁷ The Court concluded that the EPA knew of the County's more restrictive standard but elected to ignore that standard in the Final Permit.¹⁷⁸ In fact, by excluding the stricter standard, the EPA implicitly rejected it as necessary for the protection of human health and the environment.¹⁷⁹

The County argued that, despite federal law operating to freeze the ARAR's on the date the ROD is issued, the Consent Decree reserved the County's right to impose stricter dioxin standards after the ROD was issued in September, 1988.¹⁸⁰ The Court found that the Thermal Treatment Workplan included a limited agreement by the parties that Syntex would apply for County air emission permits.¹⁸¹ However, that agreement specifically mentioned only conventional pollutants, which does not include dioxin.¹⁸² The Court implied that the provision could have received broader treatment, but in light of the County's heavy, unexpected reliance, the Court felt compelled to limit the provision to its literal interpretation.¹⁸³

The Court also found nothing in the workplans to indicate

an intent by the parties to modify or waive federal law regarding ARARs being frozen on the date of the ROD.¹⁸⁴ The agreement did not grant the County power to modify the ARARs, which were fixed when the ROD was issued.¹⁸⁵ The only means of modifying the ARARs was to convince the EPA that an alteration was necessary for human health and the environment.¹⁸⁶

The Court concluded by noting that the County could have asked Missouri to request a higher standard regarding dioxin emissions in 1988 when the ROD and ARARs were being issued.¹⁸⁷ The County knew of the project, yet waited some seven years to amend the ordinance, long after the standards had been established.¹⁸⁸ The Circuit Court found that the County's higher air pollution "standards were insufficient to overcome the clear federal law" on this issue.¹⁸⁹ The Court held that the County's ordinance regarding dioxin emissions was inapplicable to the Times Beach project because once the EPA published ARARs and the ROD, they became federal law, and thus, preempted inconsistent local law.¹⁹⁰

V. COMMENT

This case offers an interesting perspective on the struggle

between the patriarchal federal government and the narrowly interested local governments. Who should decide what level of protection is sufficient for families living and working near Times Beach, Missouri? On the one hand, the federal government possesses nearly endless experience, knowledge and resources. However, local governments are comprised of the citizens who will be left behind after the clean-up is over. Would the experts in the EPA issue the same ARARs if their children were attending nearby Eureka High School? This note does not suggest that the federal government is not equally concerned with the safety of Americans throughout the country. The issue involves comparing the ability and interest of government officials with the interests of Joe Q. Public in the resolution of environmental contamination.

The instant decision is rather unique, in that very few cases have involved ordinances on the county or municipal level conflicting with federal CERCLA operations.¹⁹¹ There is, however, a great body of precedent concerning preemption questions between state law and federal law.¹⁹² The *Witco* case offers the relatively rare situation of a state law preempting a CERCLA provision.¹⁹³ This result

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 162-63.

¹⁸⁶ *Id.* at 163.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ See *City and County of Denver*, 100 F.3d 1509; *Idylwoods Associates*, 915 F. Supp. 1290; *Chatham Steel Corp.*, 858 F. Supp. 1130.

¹⁹² *Id.*

¹⁹³ *Witco*, 822 F. Supp. at 1084.

will generally be limited to issues involving profound state interest or public policy concerns. The instant decision clearly stays within the realm of environmental law dominated by federal legislation, and thus, the state law is preempted.¹⁹⁴

Express preemption obviously leaves nothing for the courts to decide. In terms of implied preemption, the District Court in *Witco* offered two relevant inquiries, both of which resolve conflicts by preempting the state law.¹⁹⁵ With exceptional situations such as the one in *Witco*, courts have found that a state's compelling interest in an area of law warrants denying preemption for a relatively weak federal interest.¹⁹⁶

The policy underlying the EPA's decisions are derived primarily from CERCLA. While forcing responsible parties to bear the cost of remedial action, the EPA must also refrain from excessive clean-up costs.¹⁹⁷ Therefore, the EPA's goal is to apply the quickest, most efficient, most reasonable means of remediation at Superfund sites.¹⁹⁸

On the other hand, the County's policy is also compelling.

Its constituents living in the County fear the adverse effects an ill-conceived clean-up effort could produce.¹⁹⁹ Consequently, the County has an incentive to seek a more restrictive standard for these chemical emissions. In cases like these, where the local government cannot represent the people's interests, the citizens are not simply bereft of alternatives. The citizens can utilize public participation.²⁰⁰

As a threshold matter, it is important to distinguish between "citizen suits" and "public participation" under CERCLA.²⁰¹ For a citizen suit, a plaintiff files a civil suit in a district court against any potentially responsible person or governmental entity (to the extent permitted under the 11th Amendment to the United States Constitution), alleging the person or governmental entity violated "any standard, regulation, condition, requirement, or order which has become effective pursuant to this chapter."²⁰² A second form of citizen suit entails filing a complaint against the President or any other officer of the United States.²⁰³ The complaining party alleges a failure

to perform any act or duty under this chapter which is not at that person's discretion.²⁰⁴

Those avenues consume both time and resources. Public participation differs from citizen suits, in that it does not involve a legal action.²⁰⁵ Public participation is the means by which citizens living in and around the contaminated site can join in the study and selection of an appropriate remedy.²⁰⁶

There are numerous public policies served by encouraging and facilitating public participation. Community empowerment is one benefit offered by public participation.²⁰⁷ When a community discovers it has become a hazardous waste site, the sense of impotence can be mitigated by allowing the people to provide input on the decision.²⁰⁸ Direct public involvement helps ease the community's feelings of helplessness.²⁰⁹

A second policy advanced is legitimacy.²¹⁰ The Superfund has not enjoyed overwhelming success in its clean-up efforts, and this has led to distrust.²¹¹ In addition, the government has demonstrated no ability to prevent hazardous waste

¹⁹⁴ See *Independent Petrochemical Corp.*, 104 F.3d at 159.

¹⁹⁵ *Witco*, 822 F. Supp at 1088. As discussed in the legal background *supra*, the two inquiries are, (1) Is it possible to comply with both statutes?; and (2) Does the state [Delaware non-claim] statute stand as an obstacle to Congressional intent? *Id.*; see *supra* text accompanying note 117.

¹⁹⁶ *Witco*, 822 F. Supp at 1089. The *Witco* Court declared prior to finding implicit federal preemption, "courts must consider the federal scheme of legislation, the role of the states in that scheme, and whether the field of legislation is one in which the federal interest is so dominant that it precludes enforcement of state laws on the subject." *Id.* Thus, where state law has traditionally dominated a field of law, courts should be particularly reluctant to find preemption. *Id.*

¹⁹⁷ 42 U.S.C. § 9621 (1995).

¹⁹⁸ 55 Fed. Reg. 8814.

¹⁹⁹ *Independent Petrochemical Corp.*, 104 F.3d at 161.

²⁰⁰ 42 U.S.C. § 9617 (1995).

²⁰¹ 42 U.S.C. § 9659(a) (1995).

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ 42 U.S.C. § 9617 (1995).

²⁰⁶ *Id.*

²⁰⁷ Ellison Folk, *Public Participation in the Superfund Cleanup Process*, 18 Ecology L.Q. 173, 181 (1991).

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 182.

²¹⁰ *Id.* at 179.

²¹¹ *Id.*

contamination, and this further damages the public perception of the government's ability to clean up hazardous sites.²¹² This situation is aggravated by the appearance of impropriety attending the close cooperation between the government and the perceived enemy, the potentially responsible party(s).²¹³ Public participation addresses these problems, in that studies have shown people are generally more willing to accept decisions in which they have contributed.²¹⁴ While citizens cannot participate in ways unavailable under CERCLA, such as attempting to intervene in decisions on the submission of Consent Decrees and enacting more stringent regulations on a local level, citizens can exert considerable influence on the remedy selection.

In the absence of public participation, the EPA and its experts generally tend to make adequate remedial decisions, and Times Beach is no exception. While sympathizing with the motive of the County and its citizens, the EPA's standard is probably more than sufficient. The standard creates a one in a million risk of the most heavily exposed person developing cancer.²¹⁵ In fact, the National Contingency Plan does not

permit the EPA to set a more stringent standard at a Superfund project.²¹⁶ The federal government does not want to jeopardize American lives. The EPA's primary concern seems to be the effective remediation of Superfund sites without requiring the responsible parties to pay huge amounts to alleviate the illogical anxiety which consumes local communities.²¹⁷

The instant decision is based primarily on the idea that CERCLA and Congress mandate expeditious clean-up of hazardous sites.²¹⁸ Evidence of this policy can be found in section 113 of CERCLA, which precludes judicial review of an EPA remedial order until after the remedy has been completed.²¹⁹ The logic supporting this holding is that damage to the environment cannot be enjoined by a court while litigation is pending. The state can influence the decisions regarding remediation under section 121 of CERCLA as discussed *supra*, and local governments can express their concerns through the state's channels.²²⁰ Thus, once an *appropriate*, not *perfect*, remedy has been found and approved, the issue should be put to rest. The Court does not want to open a new avenue of litigation which would interfere with these

policies.

This decision sends a clear message to municipal, county and state governments. If those governmental entities wish to be heard on remediation issues, the federal government would be pleased to hear from them. If those governmental entities remain silent, though, the federal government will jump in with both feet and orchestrate the whole clean-up. There are only two requirements for the local governments to assert their interests in the remedial action plan. First, the local governments must follow CERCLA protocol and petition the state government to express their concerns. Second, the state must provide all its input before the EPA determines ARARs and publishes a ROD.²²¹ Requiring less would defeat the most integral of CERCLA policies.

VI. CONCLUSION

As early as 1982, the EPA had initiated a response program designed at reducing the contamination at Times Beach and the other sites in eastern Missouri.²²² The whole incident enjoyed tremendous media coverage, especially the evacuation of the residents of Times Beach.²²³ The County must have been aware that a clean-up opera-

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* at 180.

²¹⁵ *Independent Petrochemical Corp.*, 104 F.3d. at 161.

²¹⁶ *Id.*

²¹⁷ A recent news article stated that blood tests had revealed that during the first four months of the incinerator's operation in Times Beach, the average dioxin concentration in the residents living near the facility had dropped from 1.81 to 1.24 parts per million. *Blood Tests Reveal Times Beach Incinerator is Relatively Safe So Far*, West's Legal News, 1996 WL 649533.

²¹⁸ 55 Fed. Reg. 8666, 8757 (1990).

²¹⁹ 42 U.S.C. § 9613(h) (1995).

²²⁰ *Independent Petrochemical Corp.*, 104 F.3d at 163.

²²¹ Note, arguments could be made that efficiency suggests removing the intermediary and the state, and allowing the local governments to petition the EPA directly. While that may make sense in some or even most cases, such an approach would prove detrimental if multiple governmental entities offered differing perspectives. The administrative costs, in both time and money, could be tremendous. Considering the state's fiduciary duty to the local governments within its borders, the superior approach would seem to be to allow all interested government entities to present their viewpoints to the state, which could sort out the arguments and then provide the EPA with a comprehensive representation of local concerns.

²²² See *Bliss I*, 667 F. Supp. 1298.

²²³ See *Bliss II*, 132 F.R.D. 58.

tion would eventually take place. At that time, the County should have begun contemplating what safety standards would be necessary to protect the health and welfare of its citizens, and then conveyed those beliefs to the Missouri government. Instead, the County was content to watch the federal government clean-up the Superfund site with no mention of the proposed remedial plan. The Court responded by choosing to perpetuate CERCLA's policies of swift and efficient clean-up by dismissing the County's amended ordinance as a preempted speed bump on the Superfund road to remedial relief for Times Beach.

FEDERAL ENVIRONMENTAL ONLINE SOURCES

EPA HOME PAGE

<http://www.epa.gov/epahome/index.html>

EPA CIVIL CASES AND ADMINISTRATIVE ACTIONS

http://www.rtk.net/www/data/doc_gen.html

EPA PERMIT CONTROL SYSTEM FOR WATER PERMITS

http://www.rtk.net/www/data/pcs_gen.html

EPA ACCIDENTAL RELEASE INFORMATION PROGRAM

http://www.rtk.net/www/data/arip_gen.html

CERCLA SUPERFUND INFORMATION SYSTEMS

http://www.rtk.net/www/data/cer_html

U.S. FISH AND WILDLIFE SERVICE HOME PAGE

<http://www.fws.gov/fwshomep.html>

U.S. FISH AND WILDLIFE SERVICE ENDANGERED SPECIES HOME PAGE

<http://www.fws.gov/~r9endspp/enspp.html>

NATIONAL WILDLIFE REFUGE SYSTEM HOME PAGE

<http://bluegoose.arw.r9.fws.gov/NWRSFiles/Welcome.html>

MISSOURI GOVERNMENTAL ENVIRONMENTAL SOURCES ONLINE

- Missouri State Government Home Page
<http://www.state.mo.us>
- Missouri Department of Conservation Home Page
<http://www.state.mo.us/conservation>
- Missouri Department of Natural Resources Home Page
<http://www.state.mo.us/dnr/homednr.htm>
- Missouri Department of Health Home Page
<http://www.health.state.mo.us>
- Missouri Department of Public Safety Home Page
<http://www.dps.state.mo.us>