Georgia State University Law Review

Volume 10
Issue 4 *May 1994*

Article 1

9-1-1993

Challenging the National Priorities List

Amelia Susan Magee

CHALLENGING THE NATIONAL PRIORITIES LIST

INTRODUCTION

The National Priorities List (NPL) identifies and prioritizes former waste disposal sites that the Environmental Protection Agency (EPA) deems to present significant hazardous risks to human health and the environment and therefore require further investigation.[1] To date, the EPA has identified over 1100 former waste disposal sites in the United States which pose risks significant enough to warrant their placement on the NPL.[2] The EPA compiles the NPL pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[3] Placing a site on the NPL can have devastating effects on those who are held liable for the costs to remediate the site under CERCLA,[4] and the repercussions of an NPL listing are felt in many other areas of law.[5] In an unprecedented manner, the United States Court of Appeals for the District of Columbia recently vacated four EPA decisions to list particular sites on the NPL.[6]

This Note will focus on the judicial challenges raised against the EPA's decisions to place certain sites on the NPL and the

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1. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 § 105(a)(8), 42 U.S.C. §§ 9601-9675, 9605(a)(8) (1988) [hereinafter CERCLA]; Eagle-Picher Indus. v. EPA, 759 F.2d 905, 911, 919 (D.C. Cir. 1985) [hereinafter *Eagle-Picher I*]; S. REP. NO. 848, 96th Cong., 2d Sess. 60 (1980).

2. *See* 40 C.F.R. pt. 300 app. B (1992).

3. CERCLA § 105(a)(8), 42 U.S.C. § 9605(a)(8) (1988). The President subsequently delegated his authority to the EPA, pursuant to CERCLA. CERCLA § 115, 42 U.S.C. § 9615 (1988); Exec. Order No. 12,580, 3 C.F.R. 193 (1987), *reprinted in* 42 U.S.C. § 9615 (1988).

4. *See, e.g.*, City of Stoughton v. EPA, 858 F.2d 747 (D.C. Cir. 1988).

5. *See, e.g.*, B.F. Goodrich Co. v. Murtha, 958 F.2d 1192 (2d Cir. 1992) (holding municipality liable under CERCLA for hazardous waste it collected); Reardon v. United States, 947 F.2d 1509 (1st Cir. 1991) (applying CERCLA liens to real property); *In re* Chateaugay Corp., 944 F.2d 997 (2d Cir. 1991) (discharging CERCLA claims brought in bankruptcy proceeding); United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 498 U.S. 1046 (1991) (holding secured lender that participated in management of borrower's hazardous waste liable under CERCLA).

6. National Gypsum Co. v. EPA, 968 F.2d 40 (D.C. Cir. 1992); Anne Arundel County v. EPA, 963 F.2d 412 (D.C. Cir. 1992); Kent County, Del. Levy Ct. v. EPA, 963 F.2d 391 (D.C. Cir. 1992); Tex Tin Corp. v. EPA, 935 F.2d 1321 (D.C. Cir. 1991).

recent opinions by the United States Court of Appeals for the District of Columbia vacating the EPA's decisions to add four sites to the NPL. Section I describes the various environmental statutes and regulations that permit the EPA to place those areas which pose significant risks to human health and the environment on the NPL. The application of administrative law to these types of agency decisions is explained in Section II. Section III analyzes the various challenges raised against the EPA's decisions to place a particular site on the NPL and demonstrates the court's tremendous deference to the EPA's NPL decisions and the court's recent trend to limit the EPA's ability to place sites on the NPL. This Note concludes by discussing the possible rationales for the court's recent decisions vacating the EPA's determinations to place particular sites on the NPL and the impact that these decisions are likely to have on future challenges to the NPL.

I. ALPHABET SOUP—ENVIRONMENTAL STATUTES AND REGULATIONS: WHAT ARE CERCLA, SARA, NCP, NPL, AND HRS?

To understand the NPL process, one must first be familiar with the environmental statutes and regulations that authorize the EPA to compile the NPL and the tools the EPA uses to decide which sites pose significant threats to human health and the environment. Unfortunately, the environmental statutes and regulations are full of scientific terms and definitions which often intimidate the first-time reader. Adding to the confusion are hundreds of acronyms commonly used in the statutes and regulations themselves. To aid the reader, the most common acronyms used in this Note are identified and summarized in this section.

A. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

In the late 1970s, newspapers and televisions across the country described the discovery of some of the nation's worst abandoned waste disposal sites, complete with thousands of oozing drums and horrifying stories of chemicals leaking into one

community's basements and school.[7] In response to public outrage over threats to human health from such haphazard chemical disposal, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to address these former waste disposal sites.[8] The purposes of CERCLA are to provide monies to remediate the dangers posed by the improper disposal of "hazardous substances,"[9] and to impose liability on the parties responsible for these waste disposal sites.[10] With CERCLA, Congress also created the "Superfund," the source of financing for the cleanup of these waste disposal sites, primarily through a tax on those industries which Congress determined had benefitted most from the manufacture and use of these hazardous chemicals.[11] In addition, CERCLA authorizes the President to respond to releases or threats of releases of hazardous substances with removal or remedial activities.[12] CERCLA also imposes strict liability for removal or remedial costs on past and present owners of the site, persons who arranged for the disposal of the hazardous substances, and persons who transported the hazardous substances to the site.[13]

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7. S. REP. NO. 848, *supra* note 1, at 2-10.

8. *Eagle-Picher I,* 759 F.2d 905, 909 (D.C. Cir. 1985); S. REP. NO. 848, *supra* note 1, at 2-10.

9. CERCLA §§ 105(a)(8), 111, 42 U.S.C. §§ 9605(a)(8), 9611 (1988); Eagle-Picher Indus. v. EPA, 759 F.2d 922, 925-26 (D.C. Cir. 1985) [hereinafter *Eagle-Picher II*]. CERCLA defines "hazardous substance" to include those chemicals regulated by five different environmental statutes. CERCLA § 101(14), 42 U.S.C. § 9601(14) (1988). To date, these statutes together regulate over 1000 different chemicals. *See* 40 C.F.R. § 302.4 (1993).

10. CERCLA § 107, 42 U.S.C. § 9607 (1988); S. REP. NO. 848, *supra* note 1, at 13.

11. S. REP. NO. 848, *supra* note 1, at 19-22. Since 1986, Congress has authorized $13,600,000,000 for the Superfund to pay for the cleanup of these waste disposal sites. CERCLA § 111, 42 U.S.C. § 9611 (1988).

12. CERCLA § 104(a)(1), 42 U.S.C. § 9604(a)(1) (1988); *Eagle-Picher II*, 759 F.2d at 925-26; *Eagle-Picher I*, 759 F.2d at 909. "[R]emoval" is defined as "the cleanup or removal of released hazardous substances from the environment." CERCLA § 101(23), 42 U.S.C. § 9601(23) (1988). "[R]emedial action" is defined as "those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release . . . of a hazardous substance." CERCLA § 101(24), 42 U.S.C. § 9601(24) (1988).

13. CERCLA § 107(a), 42 U.S.C. § 9607(a) (1988); City of Stoughton v. EPA, 858 F.2d 747, 749 (D.C. Cir. 1988); *Eagle-Picher II*, 759 F.2d at 926.

B. Superfund Amendments and Reauthorization Act (SARA)

CERCLA was amended in 1986 by the Superfund Amendments and Reauthorization Act (SARA), which substantially revised certain mechanics of the statute,[14] while leaving intact the President's mandate to compile the NPL. However, dissatisfied with the accuracy of the method the EPA used to assess the risks posed to human health and the environment by a hazardous waste disposal site, Congress added section 105(c) to CERCLA, which directs the President to amend the scoring system used to place sites on the NPL.[15]

C. National Contingency Plan (NCP)

CERCLA authorizes the President to remove or remediate releases or substantial threats of releases of hazardous substances in accordance with the National Contingency Plan (NCP).[16] The NCP is the procedural "blueprint"[17] that the EPA must follow when responding to releases or threatened releases of hazardous substances.[18] Two major components of the NCP are the National Priorities List and the Hazard Ranking System.

1. National Priorities List (NPL)

To identify and prioritize those sites which pose the most significant threats to human health and the environment, CERCLA authorizes the President to develop the NPL.[19] The EPA uses various methods to identify sites where releases or threatened releases of hazardous substances pose risks to human health or the environment. These methods include reports of a release of a hazardous substance and petitions from concerned citizens.[20] Once a site has been identified as a risk, the EPA

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14. Timothy B. Atkeson et al., *An Annotated Legislative History of the Superfund Amendments and Reauthorization Act of 1986 (SARA),* 16 Envtl. L. Rep. (Envtl. L. Inst.) 10,360, 10,370 (1986).

15. CERCLA § 105(c), 42 U.S.C. § 9605(c) (1988); Linemaster Switch Corp. v. EPA, 938 F.2d 1299, 1302 (D.C. Cir. 1991).

16. CERCLA § 104(a)(1), 42 U.S.C. § 9604(a)(1) (1988).

17. Lawrence E. Starfield, *The 1990 National Contingency Plan—More Detail and More Structure, But Still a Balancing Act,* 20 Envtl. L. Rep. (Envtl. L. Inst.) 10,222, 10,226 (1990).

18. CERCLA § 105, 42 U.S.C. § 9605 (1988); 40 C.F.R. § 300.3 (1993).

19. CERCLA § 105(a)(8), 42 U.S.C. § 9605(a)(8) (1988); *Eagle-Picher I,* 759 F.2d 905, 919 (D.C. Cir. 1985); S. REP. NO. 848, *supra* note 1, at 60.

20. 40 C.F.R. § 300.405 (1993); *see also* CERCLA §§ 103(a), 105(d), 42 U.S.C.

typically performs a preliminary assessment of the site to determine the source and magnitude of the hazardous substances present and to assess the threat posed by the hazardous substances to the public.[21] Information collected in the preliminary assessment may warrant a site inspection, which includes sampling groundwater and soils to examine the extent of the release of the hazardous substances and its impact on human health and the environment.[22] With this data, the agency can determine if the risks of the release of hazardous substances warrant placement of the site on the NPL.[23] Only those sites listed on the NPL are eligible to use the Superfund monies to pay for the remediation of the site.[24] To determine if a site should be placed on the NPL the EPA uses the Hazard Ranking System to evaluate the site.[25]

2. *Hazard Ranking System (HRS)*

The Hazard Ranking System (HRS) is a detailed set of scientific formulas and estimates[26] which the EPA uses to determine in a quick and cost-effective manner[27] the relative risk that a release or threatened release of hazardous substances poses to human health or the environment.[28] Using the HRS, the EPA evaluates the impact of the hazardous substances present in the groundwater, surface water, air, and soil by ranking the likelihood of a release, the hazardous nature of the substances released, and the targets affected by the release, including humans and the ecosystem.[29] Those sites that score above 28.5 using the HRS formulas are placed on the NPL for further investigation.[30]

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§§ 9603(a), 9605(d) (1988).

21. 40 C.F.R. §§ 300.410(b), -.420(b) (1993).

22. *Id.* §§ 300.410(d), -.420(c).

23. *Id.* § 300.425(c).

24. City of Stoughton v. EPA, 858 F.2d 747, 749 (D.C. Cir. 1988); 40 C.F.R. § 300.425(b)(1).

25. 40 C.F.R. § 300.425(c)(1) (1993).

26. *See* Bradley Mining Co. v. EPA, 972 F.2d 1356, 1357 (D.C. Cir. 1992); *Eagle-Picher I*, 759 F.2d 905, 910 (D.C. Cir. 1985); 40 C.F.R. pt. 300 app. A (1993).

27. *Eagle-Picher I*, 759 F.2d at 909, 919.

28. CERCLA § 105(c)(1), 42 U.S.C. § 9605(c)(1) (1988); Anne Arundel County v. EPA, 963 F.2d 412, 414 (D.C. Cir. 1992); *Eagle-Picher I*, 759 F.2d at 910; 40 C.F.R. pt. 300 app. A § 1.0 (1993).

29. Tex Tin Corp. v. EPA, 935 F.2d 1321, 1322-23 (D.C. Cir. 1991); 40 C.F.R. pt. 300 app. A § 2.0 (1993).

30. *Anne Arundel*, 963 F.2d at 414; 55 Fed. Reg. 51,532, 51,569 (1990). Note that a

The original HRS was promulgated in 1982.[31] The EPA amended the HRS in 1990 to address Congress' concerns that the 1982 HRS incorrectly placed many mining sites on the NPL due to the high volume of low toxicity waste associated with the mining process.[32] The revised 1990 HRS was designed to more accurately assess risks posed by these sites.[33] Although the 1990 HRS[34] reflects significant changes in the methodology used to score a site,[35] Congress specifically stated that any site scored under the 1982 HRS was not required to be reevaluated under the 1990 HRS.[36]

II. JUDICIAL REVIEW OF THE EPA'S DECISION TO PLACE A SITE ON THE NPL

Petitioners who challenge the EPA's decision to list a site on the NPL must first overcome the hurdles of standing, reviewability, and timeliness, as with any request for judicial review. The challenge must also survive the court's application of the appropriate standard of review.

A. Standing

Under *Association of Data Processing Service Organizations v. Camp*,[37] to demonstrate standing section 702 of the Administrative Procedure Act (APA)[38] requires the petitioner to show injury in fact and an interest that is within the "zone of interests" which the statute seeks to regulate.[39] Typically, the

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site may also be placed on the NPL if a state designates it as a priority for remediation. 40 C.F.R. § 300.425(c)(2) (1993).

31. 47 Fed. Reg. 31,180 (1982).

32. Linemaster Switch Corp. v. EPA, 938 F.2d 1299, 1303 (D.C. Cir. 1991) (citing S. REP. NO. 11, 99th Cong., 1st Sess. 40 (1985) and H.R. REP. NO. 962, 99th Cong., 2d Sess. 200 (1986)); Atkeson et al., *supra* note 14, at 10,384. The EPA promulgated the revised HRS in December 1990. 55 Fed. Reg. 51,531 (1990).

33. 55 Fed. Reg. 51,531 (1990).

34. 40 C.F.R. pt. 300 app. A (1993).

35. *Linemaster Switch*, 938 F.2d at 1307. *Compare* 40 C.F.R. pt. 300 app. A (1988) *with* 40 C.F.R. pt. 300 app. A (1993).

36. CERCLA § 105(c)(3), 42 U.S.C. § 9605(c)(3) (1988); *Linemaster Switch*, 938 F.2d at 1307. *But cf.* B & B Tritech v. EPA, 957 F.2d 882, 885 (D.C. Cir. 1992) (acknowledging that the 1990 HRS may significantly change the scores of sites previously investigated with the 1982 HRS).

37. 397 U.S. 150 (1970).

38. APA, 5 U.S.C. §§ 551-559, 701-706 (1988).

39. *Data Processing*, 397 U.S. at 153-56.

petitioner challenging the EPA's decision to place a site on the NPL is the past or present owner or operator of the site or a generator or transporter of hazardous substances which were disposed at the site. These parties will suffer various harms from the NPL designation, including damage to business reputation, loss of business goodwill, and loss of property value resulting from the stigma associated with a Superfund site.[40] The court has recognized these harms as adequate injuries.[41] As a result of these injuries, the petitioner has a keen interest in the EPA's application of CERCLA to a particular site, and this interest is within the zone of interests regulated by the statute.[42] Therefore, the typical petitioner challenging the EPA's decision to place a particular site on the NPL can easily demonstrate standing.

B. Reviewability

Interpreting section 701 of the APA, the United States Supreme Court in *Citizens to Preserve Overton Park v. Volpe*[43] held that agency actions are subject to judicial review unless the statute itself clearly prohibits judicial review or unless the action is committed to the agency's discretion.[44] CERCLA clearly spells out Congress' intent to provide judicial review by reserving judicial review of EPA's rulemakings promulgated pursuant to CERCLA exclusively for the Court of Appeals for the District of Columbia.[45] The EPA's decision to place a site on the NPL is an informal rulemaking resulting from notice and comment procedures.[46] Hence, the EPA's decision to place a site on the NPL is judicially reviewable. Note, however, that issues not raised before the EPA during the rulemaking comment period cannot be raised for the first time in the petitioner's request for judicial review since judicial review is limited to the "whole"

40. SCA Servs. of Ind. v. Thomas, 634 F. Supp. 1355, 1366 (N.D. Ind. 1986).
41. *See id.*
42. *Id.*
43. 401 U.S. 402 (1971).
44. *Id.* at 410.
45. CERCLA § 113(a), 42 U.S.C. § 9613(a) (1988); *SCA Servs.*, 634 F. Supp. at 1375; *Eagle-Picher I*, 759 F.2d at 908-09.
46. APA, 5 U.S.C. § 553(b) (1988); Bradley Mining Co. v. EPA, 972 F.2d 1356, 1359 (D.C. Cir. 1992); Eagle-Picher Indus. v. EPA, 822 F.2d 132, 137 n.7 (D.C. Cir. 1987) [hereinafter *Eagle-Picher III*]; 40 C.F.R. § 300.425(d)(5) (1993) (requiring EPA to solicit public comments on a proposed listing).

record compiled and relied upon by the agency when making its decision to place a site on the NPL.[47]

C. *Timeliness of Review*

As announced in *Abbott Laboratories v. Gardner*,[48] a petitioner may seek preenforcement judicial review of an agency's rulemaking when the issue is a legal question appropriate for review and when hardship would result without judicial intervention.[49] Agency actions in final form are considered fit for review.[50] The HRS score, used to determine if a site should be placed on the NPL, is the EPA's final position of the risk a particular site poses.[51] Therefore, placing a site on the NPL based on its HRS score is a final agency action fit for review.

As demonstrated by the prerequisites for standing, the petitioner will suffer certain economic hardship if the site remains on the NPL. Since the petitioner can demonstrate that the NPL designation is fit for review and that certain hardship will ensue without judicial review, the petitioner's challenge to the EPA's decision to place a site on the NPL is timely prior to enforcement action,[52] provided that it is filed within ninety days of the promulgation of the rule.[53]

D. *Scope of Review*

Challenges to the EPA's decision to place a site on the NPL have included both challenges to the EPA's statutory interpretation and challenges to the EPA's rulemaking authority.

1. *Statutory Interpretation*

In *Chevron U.S.A. v. National Resources Defense Council*,[54] the Court held that judicial review of an agency's interpretation

47. APA, 5 U.S.C. § 706 (1988); Linemaster Switch Corp. v. EPA, 938 F.2d 1299, 1305, 1308 (D.C. Cir. 1991); *Eagle-Picher III*, 822 F.2d at 146. *Cf.* Kent County, Del. Levy Ct. v. EPA, 963 F.2d 391, 395 (D.C. Cir. 1992) (permitting petitioner to supplement the judicial record).

48. 387 U.S. 136 (1967).

49. *Id.* at 149.

50. *Id.*

51. *See* 40 C.F.R. pt. 300 app. A (1993).

52. *See* SCA Servs. of Ind. v. Thomas, 634 F. Supp. 1355, 1377 (N.D. Ind. 1986).

53. CERCLA § 113(a), 42 U.S.C. § 9613(a) (1988); *Eagle-Picher I*, 759 F.2d 905, 908-09 (D.C. Cir. 1985).

54. 467 U.S. 837 (1984).

of its own statute is limited.[55] When the statute speaks directly to the issue at hand, the agency's interpretation must fail if it differs from the statute.[56] However, when the statute is silent or ambiguous on the issue, the Court will uphold the agency's construction of the statute if it is a reasonable one.[57] Application of this standard has demonstrated the Court's great deference toward the EPA's interpretation of CERCLA and has proved to be a difficult standard for the petitioner to overcome.[58]

2. *Rulemaking Authority*

Interpreting section 706(2)(A) of the APA, the Supreme Court in *Citizens to Preserve Overton Park v. Volpe*[59] held that to uphold an agency's decision the reviewing court must determine that the agency's actions were within its scope of authority and that the agency did not act arbitrarily or capriciously.[60] In the context of the NPL, the Court of Appeals for the District of Columbia has found that the EPA's authority to prioritize sites that pose significant risks to human health and the environment stems directly from section 105(a)(8) of CERCLA and is therefore clearly within the EPA's powers.[61] Under the arbitrary and capricious standard, the court will determine if the EPA has a rational explanation to support placement of a particular site on the NPL.[62] Application of this standard has demonstrated the court's leniency toward the EPA's decisions to place a site on the NPL, even where imprecision[63] or uncertainty[64] exists. The Court of Appeals for the District of Columbia has often reasoned

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55. *Id.* at 844. "[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by . . . an agency." *Id.*

56. *Id.* at 842-43.

57. *Id.*

58. *See* Linemaster Switch Corp. v. EPA, 938 F.2d 1299 (D.C. Cir. 1991); *Eagle-Picher I*, 759 F.2d 905 (D.C. Cir. 1985).

59. 401 U.S. 402 (1971).

60. *Id.* at 415-16.

61. Anne Arundel County v. EPA, 963 F.2d 412, 415 (D.C. Cir. 1992); *Eagle-Picher III*, 822 F.2d 132, 137 n.6 (D.C. Cir. 1987).

62. *Eagle-Picher III*, 822 F.2d at 137 n.7.

63. Bradley Mining Co. v. EPA, 972 F.2d 1356, 1359 (D.C. Cir. 1992); *see also Eagle-Picher III*, 822 F.2d at 137 n.7 (noting that even erroneous findings can be upheld if not prejudicial).

64. Kent County, Del. Levy Ct. v. EPA, 963 F.2d 391, 394 (D.C. Cir. 1992); City of Stoughton v. EPA, 858 F.2d 747, 756 (D.C. Cir. 1988); *see also* Linemaster Switch Corp. v. EPA, 938 F.2d 1299, 1306 (D.C. Cir. 1991) (noting that the court will uphold even cursory actions).

that it must balance these imperfect agency actions with CERCLA's goals of quickly and efficiently identifying and prioritizing those sites that pose significant risks.[65] The court has determined that due to the highly technical nature of this task, great deference should be given to the EPA.[66]

When a petitioner challenges the rulemaking authority of the EPA to place a particular site on the NPL, the remedy is to vacate the agency's decision.[67]

III. SPECIFIC CHALLENGES TO THE NPL

The Court of Appeals for the District of Columbia[68] has decided only a handful of cases in which a petitioner substantively challenged the placement of a site on the NPL.[69] Some of the cases presented statutory challenges, requiring the court to review the agency's interpretation of CERCLA. However, most petitioners challenged the EPA's application of the HRS to individual sites. To give a complete picture of the court's deference to the EPA's decision to place a particular site on the NPL, both statutory interpretations and fact-specific applications will be analyzed.

A. *The* Eagle-Picher *Trilogy*

The Eagle-Picher trilogy consists of three different opinions regarding the EPA's decisions to place certain mining facilities on the NPL.[70] Each decision consolidated six[71] or seven[72]

65. *City of Stoughton*, 858 F.2d at 756; *Eagle-Picher II*, 759 F.2d 922, 932 (D.C. Cir. 1985); *Eagle-Picher I*, 759 F.2d 905, 921 (D.C. Cir. 1985).

66. *Bradley Mining*, 972 F.2d at 1359; *Eagle-Picher III*, 822 F.2d at 137 n.7. *But see* National Gypsum Co. v. EPA, 968 F.2d 40, 41 (D.C. Cir. 1992) (noting three recent occasions when the court has refused to give the EPA unlimited deference on NPL rulemaking decisions); *Kent County*, 963 F.2d at 397 (remanding the NPL decision because the EPA failed to explain why it did not follow its own policy).

67. APA, 5 U.S.C. § 706(2) (1988); Anne Arundel County v. EPA, 963 F.2d 412, 419 (D.C. Cir. 1992); *Kent County*, 963 F.2d at 399.

68. CERCLA limits jurisdiction for challenges to the NPL rulemaking to the United States Circuit Court of Appeals for the District of Columbia. CERCLA § 113(a), 42 U.S.C. § 9613(a) (1988).

69. *See Bradley Mining*, 972 F.2d at 1356; *National Gypsum*, 968 F.2d at 40; *Kent County*, 963 F.2d at 391; *Anne Arundel*, 963 F.2d at 412; B & B Tritech v. EPA, 957 F.2d 882 (D.C. Cir. 1992); Linemaster Switch Corp. v. EPA, 938 F.2d 1299 (D.C. Cir. 1991); Tex Tin Corp. v. EPA, 935 F.2d 1321 (D.C. Cir. 1991); City of Stoughton v. EPA, 858 F.2d 747 (D.C. Cir. 1988); *Eagle-Picher III*, 822 F.2d at 132; *Eagle-Picher II*, 759 F.2d at 922; *Eagle-Picher I*, 759 F.2d at 905.

70. *Eagle-Picher III*, 822 F.2d at 132; *Eagle-Picher II*, 759 F.2d at 922; *Eagle-Picher*

individual claims which challenged the EPA's statutory interpretations of the CERLA,[73] or the EPA's application of the HRS to individual sites pursuant to section 113(a) of CERCLA.[74]

1. HRS Is Consistent with CERCLA's Purposes

The petitioners in *Eagle-Picher I*[75] squarely challenged the EPA's authority to promulgate the HRS, claiming that the application of the HRS did not result in NPL sites that pose the greatest risks to human health and the environment as mandated by CERCLA.[76] Although the issue was time barred,[77] the court upheld the EPA's HRS as a proper rulemaking using the test set forth in *Chevron*.[78] First, the court found that CERCLA was silent on the issue of whether initial sites placed on the NPL because of their HRS scores should only be the nation's most hazardous sites.[79] The court then reviewed the EPA's interpretation of CERCLA which characterized the NPL as a list of sites posing threshold levels of risks that may require response actions under CERCLA.[80] The court determined that this rationale was reasonable and was supported by CERCLA's legislative history.[81] Accordingly, the court found that the HRS is a proper method to prioritize risks posed by sites contaminated with hazardous substances pursuant to CERCLA's goals.[82]

I, 759 F.2d at 905.

71. *Eagle-Picher III*, 822 F.2d at 132; *Eagle-Picher I*, 759 F.2d at 905.

72. *Eagle-Picher II*, 759 F.2d at 922.

73. *Eagle-Picher II*, 759 F.2d at 922; *Eagle-Picher I*, 759 F.2d at 905.

74. *Eagle-Picher III*, 822 F.2d at 132. Note that all challenges to date to EPA's NPL have been brought against the application of the 1982 HRS. *Id.* Hence, all references in the following discussion to the HRS refer to the 1982 HRS, unless otherwise indicated.

75. *Eagle-Picher I*, 759 F.2d at 905.

76. *Id.* at 919.

77. *Id.* The court found that the issue was ripe for review when the HRS regulations were promulgated which started the ninety-day clock under section 113(a) of CERCLA. *Id.* The court also found that the petitioners' request for review was filed outside the ninety-day statutory deadline. *Id.*

78. *Id.* at 920.

79. *Id.* at 919-20.

80. *Id.*

81. *Id.* at 920-21.

82. *Id.*

2. HRS Is Not Arbitrary or Capricious

Pursuant to APA section 706(A)(2), petitioners also challenged the HRS as arbitrary and capricious, focusing on the perceived inability of the HRS to accurately score mining sites, as compared with chemical disposal sites.[83] Following the *Overton Park* analysis, the court found that the EPA presented "thorough and reasoned explanations of the assumptions and methodology" underlying the HRS[84] and that the EPA specifically acknowledged the HRS' limitations to assess risks posed by mining sites.[85] Further, the EPA recognized that the HRS was a screening tool to allow the EPA to determine quickly and efficiently which of the thousands of former waste disposal sites required further study.[86] Since the EPA supported the methods of the HRS with rational explanations, the court held that the HRS itself was not arbitrary and capricious.[87]

3. Mining Wastes and Fly Ash Are "Hazardous Substances"

In *Eagle-Picher II*, the petitioners charged that the EPA exceeded its authority by listing mining waste or fly ash sites on the NPL,[88] because wastes present at these sites are excluded from the definition of "hazardous substances" under CERCLA.[89] Using the *Chevron* analysis, the court looked to the plain language of CERCLA to discern Congress' intent and held that the statutory construction of CERCLA included fly ash and mining wastes as "hazardous substances."[90]

Alternatively, the court found that even if Congress' intent was unclear, the EPA's decision to include fly ash and mining wastes in the definition of "hazardous substances" would be upheld because the agency presented a reasonable interpretation of the statute under the second prong of *Chevron*.[91] In addition, the

83. *Id.* at 921 (noting that the principles underlying the HRS are based on modeling of hazardous chemical disposal sites not mining sites).
84. *Id.* at 922.
85. *Id.*
86. *Id.* at 919-22.
87. *Id.* at 921.
88. *Eagle-Picher II*, 759 F.2d 922, 926 (D.C. Cir. 1985).
89. *See* CERCLA § 101(14), 42 U.S.C. § 9601(14) (1988); 40 C.F.R. § 302.4 (1992) (defining hazardous substances to include hundreds of different chemicals and wastes which are regulated under various environmental statutes).
90. *Eagle-Picher II*, 759 F.2d at 931.
91. *Id.* at 931-33.

court noted that even if fly ash and mining wastes were not "hazardous wastes," these wastes were included in the definition of "pollutants or contaminants"[92] under CERCLA, and hence, the EPA acted within its authority to place these sites on the NPL due to the threat these pollutants or contaminants posed.[93]

4. *EPA's Decisions to Place Five Mining Sites on the NPL Were Not Arbitrary or Capricious*

In *Eagle-Picher III*, the court applied the arbitrary and capricious test to each of the EPA's decisions to place a particular site on the NPL.[94] Although fact-specific, each decision demonstrates that the court was willing to go to great lengths to uphold the agency's decision to place a site on the NPL.

a. The Tar Creek Site

The Tar Creek Site is a former mining facility located in Oklahoma.[95] The petitioner, Eagle-Picher, as owner of the site, argued that the EPA acted arbitrarily and capriciously by listing the site on the NPL.[96] First, the petitioner claimed that the EPA failed to follow its own policy regarding the "aquifer of concern"[97] score component, because the agency used human population figures that included humans who received water from the uncontaminated deep aquifer.[98] The EPA argued that since water from the contaminated shallow aquifer flowed through bore holes and fractures in the rock between the two aquifers, the shallow aquifer was connected to the deep aquifer.[99] This connection permitted contaminants from the

92. CERCLA § 101(33), 42 U.S.C. § 9601(33) (1988) (defining pollutant or contaminant to include materials other than hazardous substances which pose a threat to human health or the environment).

93. *Eagle-Picher II*, 759 F.2d at 932-33.

94. *Eagle-Picher III*, 822 F.2d 132, 136-37 (D.C. Cir. 1987).

95. *Id.* at 137.

96. *Id.* at 138.

97. *Id.* An aquifer is a source of water under the surface of the earth, often used for drinking water purposes. The "aquifer of concern" policy refers to the human population figure used in the HRS to calculate potential human exposure risks. *Id.* The principle requires the EPA to consider only those populations that use the water from the aquifer alleged to be contaminated in the HRS scoring. *Id.; see also* 40 C.F.R. pt. 300 app. A §§ 3.0-.5 (1993).

98. *Eagle-Picher III*, 822 F.2d at 138.

99. *Id.*

shallow aquifer to flow to the deep aquifer.[100] Thus, the EPA argued that it was justified in using the population serviced by the deep aquifer in the HRS score since this population was at risk for exposure to contaminated groundwater.[101] Because the EPA was able to fashion a reasonable basis for concluding that both aquifers were contaminated, the court determined that the EPA was not arbitrary or capricious in its decision to consider both populations served by the aquifers in the HRS score for this site.[102]

In addition, the petitioner argued that the EPA acted arbitrarily and capriciously by considering only a preliminary data report instead of relying on a more extensive, subsequent data report.[103] Despite the fact that the variations in the data results led each report to rest its conclusions on different rationales, the court agreed with the EPA that the conclusions of both reports were similar, and therefore the EPA did not act arbitrarily or capriciously by using the preliminary data report.[104]

b. The Cherokee County Site

The Cherokee County Site is also a former mining facility, located across the river from the Tar Creek Site in Kansas.[105] The petitioner here challenged the EPA's use of the Tar Creek data to score the Cherokee County site.[106] The court found that because the two sites were in reality parts of the same mining facility, the data specific to the Tar Creek facility was representative of the conditions at the Cherokee County Site and that the EPA adequately supported this assumption by collecting supplemental data at the Cherokee County Site.[107] The court held that the EPA did not act arbitrarily or capriciously by using

100. *Id.*
101. *Id.*
102. *Id.* at 138-39.
103. *Id.* at 139.
104. *Id.* at 139-40. The more detailed report was not available for review until after the comment period closed. *Id.* This is the likely reason that the EPA did not consider the report in the first instance.
105. *Id.* at 141-42. Both the Tar Creek and Cherokee County Sites are owned by the same petitioner and are actually the same facility, although the entire mining facility straddles the Kansas-Oklahoma border. *Id.* The mining facility was split into two NPL sites for administrative purposes. *Id.* at 142.
106. *Id.*
107. *Id.*

the Tar Creek data to score the Cherokee Site because the EPA presented a rational basis for its conclusion.[108]

c. The Whitewood Creek Site

The Whitewood Creek Site is a former gold mining facility initially placed on the NPL at the insistence of the State of South Dakota, which denoted the site as the state's most hazardous.[109] The petitioner's main challenge was that the EPA acted arbitrarily by using unreliable data to score the site.[110] The petitioner claimed the data was unreliable because it showed erratic occurrences of contamination across the site, which indicated improper sampling and analysis.[111] The court found the data valid because the EPA was able to demonstrate that the levels of the contaminants on-site exceeded levels in uncontaminated areas off-site, which by definition indicated that a release of hazardous substances had occurred on-site.[112] Hence, the EPA did not act arbitrarily or capriciously by concluding that contamination was present on-site.[113]

The petitioner also claimed that the EPA acted arbitrarily by choosing to use inflated estimated human population figures rather than actual population figures in its HRS score, which could have reduced the site's score below the threshold leve l of 28.5.[114] The court justified the agency's action by acknowledging that the HRS is a quick and inexpensive method to determine if a site poses significant hazards to justify further investigation.[115] Therefore, the EPA is not required to use the best data available, but only that data which is readily

108. *Id.*
109. *Id.* at 144. The EPA scored the site at 63.76, well above the EPA's threshold score of 28.5 for sites placed on the NPL. *Id.*
110. *Id.* at 145.
111. *Id.*
112. *Id.*
113. *Id.* The petitioner also challenged the natural background levels of contaminants which the EPA used to determine that the site was contaminated. Although the court noted that the issue was not properly before it because the petitioner failed to raise the issue during the comment period, the court held that the agency acted properly in using appropriate safe drinking water standards as background levels. *Id.* at 146.
114. *Id.*
115. *Id.*

available.[116] Hence, the use of estimates instead of actual figures was not arbitrary or capricious.[117]

d. The Milan Site

The Milan Site is an active uranium mining facility. The petitioner argued that the agency acted arbitrarily by ignoring the installation of a groundwater recovery system when it scored the site with the HRS.[118] Since the groundwater recovery system prevented the migration of contaminated water off-site, the petitioner claimed that the risk posed to the surrounding population was zero.[119] Calculation of the HRS based on this zero risk factor would have resulted in an HRS score for the site below the threshold of 28.5.[120] Recognizing that the HRS was designed to be a quick and inexpensive method to evaluate the need for further investigations at a given site, the court reasoned that the EPA's policy of ignoring any remedial measures the petitioner implemented was an efficient means to evaluate sites.[121] As a result, the EPA's action was not arbitrary or capricious.[122]

e. The Churchbrook Site

The Churchbrook Site is a uranium mining and processing facility.[123] The petitioner here also challenged the population at-risk figures the EPA used, claiming that the population that

116. *Id.*
117. *Id.* (citing *Eagle-Picher I*, 759 F.2d 905, 921-22 (D.C. Cir. 1985)). The court refused to address the merits of the petitioner's claims that no one in the vicinity of the site used the alleged contaminated groundwater and that the nearest well used for drinking water purposes was farther from the site than estimated by the EPA, finding again that the petitioner had failed to raise these issues during the rulemaking process. *Id.*
118. *Id.* at 148-49. The system is designed to collect contaminated water as it seeps into the ground to prevent the hazardous substances in the water from reaching the aquifer that provides drinking water. *Id.*
119. *Id.*
120. *Id.*
121. *Id.* at 149.
122. *Id.* (citing *Eagle-Picher I*, 759 F.2d 905, 921-22 (D.C. Cir. 1985)); *cf.* 55 Fed. Reg. 51,532, 51,567 (1990) (noting that while the 1982 HRS scoring was based on initial site conditions, the 1990 HRS now considers remedial activities in scoring). However, CERCLA clearly states that sites scored under the 1982 HRS are not required to be rescored under the 1990 HRS. CERCLA § 105(c)(3), 42 U.S.C. § 9605(c)(3) (1988).
123. *Eagle-Picher III*, 822 F.2d at 149.

used the groundwater varied by season and that the population figures should therefore be lowered to reflect the average number of people using this aquifer for drinking water purposes.[124] The EPA used an intermediate population figure based on its analysis of various government maps and data furnished by other agencies.[125] The court found the EPA's analysis to be rational and upheld the agency's decision to use the intermediate population value.[126]

The petitioner also argued that past remedial actions at the site should be factored into the HRS score.[127] Again, the court noted that the EPA's policy of ignoring past cleanup activities is not arbitrary or capricious.[128] The court also agreed with the EPA's determination that past spills or releases of hazardous substances are indicative of the potential for future spills or releases of hazardous substances and that this is a rational basis on which to conclude that the site posed a significant threat to human health and the environment.[129]

f. The Eagle-Picher III *Legacy*

At all five *Eagle-Picher III* sites, the court concluded that the EPA used rational analyses to score these sites, and therefore the EPA did not act arbitrarily or capriciously in placing these sites on the NPL.[130] The court stated further that even if the EPA erred in its decisions underlying the scorings, the mistakes were not prejudicial to the petitioners, even though these insignificant "mistakes" could have dropped a particular HRS score below the threshold of 28.5.[131] Together, these decisions demonstrate the extreme deference that the court was willing to give the EPA in these types of situations.

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124. *Id.*
125. *Id.* at 149-50.
126. *Id.*
127. *Id.* at 151.
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*

B. Post Eagle-Picher *Challenges—Continuing Great Deference to the EPA's Decisions to Place Sites on the NPL*

On the heels of the Eagle-Picher trilogy came challenges to four more sites placed on the NPL.[132] Reluctant to find that the EPA acted arbitrarily or capriciously, the court upheld each of the challenged listings.

1. The Stoughton Landfill Site

The Stoughton Landfill is a former landfill that received both household and industrial wastes.[133] A groundwater sample taken from the site was sent to two different laboratories for analysis.[134] Only one of the laboratories detected contamination in the groundwater sample. The petitioner argued that the positive laboratory result was invalid because the duplicate analysis performed by the second laboratory indicated that no contamination was present in the groundwater sample.[135] The petitioner claimed that the EPA acted arbitrarily and capriciously in relying on the negative data in its HRS score for the site.[136] The court agreed with the EPA that the agency was following its own regulations by relying on positive data indicating that there was contamination on site and that the negative result did not invalidate the positive result.[137] The court thus concluded that the EPA acted rationally by using this data in the HRS score.[138]

2. The Intel Sites

The Intel Sites are industrial facilities which manufacture and test microprocessors.[139] Like the Tar Creek Site in *Eagle-Picher III*,[140] the Intel Sites had two connected aquifers with

132. City of Stoughton v. EPA, 858 F.2d 747 (D.C. Cir. 1988). The four challenges were addressed in one opinion.
133. *Id.* at 749.
134. *Id.* at 750.
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.* at 750-51.
139. *Id.* at 751. Due to the close proximity of these sites, the petitioner and the court treated them as one for discussion purposes. *Id.*
140. 822 F.2d 132 (D.C. Cir. 1987).

contamination present only in the shallow aquifer.[141] The petitioner claimed that the EPA ignored its own "aquifer of concern" policy when the EPA concluded that the shallow and deep aquifers were connected. As a result of this erroneous assumption, the EPA used an inflated human population figure to score the site.[142] Although the EPA later confirmed that the water from the shallow aquifer flowed to the deep aquifer by subsequent studies, the petitioner claimed that the EPA did not permit the petitioner to provide comments on this additional investigation and therefore the EPA violated its own rulemaking procedures which require public notice and comment.[143] The petitioner maintained that using data generated from this faulty rulemaking procedure in the HRS was arbitrary and capricious.[144] The court reasoned that the agency was not required to permit additional comments on this new data because the conclusion that the aquifers were connected was set forth in the original proposed notice.[145] Consequently, the petitioner had the opportunity to comment on this issue at that time.[146] Since no additional comment period was required, the court concluded that there was no defective rulemaking and that the EPA did not act arbitrarily by relying on the additional studies to confirm its conclusion that the aquifers were connected in scoring the site under the HRS.[147]

3. *The Republic Steel Quarry Site*

The Republic Steel Quarry Site is a former rock quarry which Republic Steel used to dispose of industrial process waste for many years.[148] Again, the EPA was attacked for not adhering to its "aquifer of concern" policy.[149] The petitioner argued that the population the EPA used should have been split into two subpopulations which had different water requirements.[150] The court held that the EPA's method was rational, again recognizing

141. City of Stoughton v. EPA, 858 F.2d 747, 751-52 (D.C. Cir. 1988).
142. *Id.*
143. *Id.* at 752-53.
144. *Id.*
145. *Id.* at 753.
146. *Id.*
147. *Id.*
148. *Id.* at 754.
149. *Id.*
150. *Id.* at 754-55.

that the HRS is a quick and inexpensive method to determine which sites pose the most risks. Therefore, the agency is permitted to rely on estimates and readily available data instead of specific and detailed hard facts, such as subpopulation figures.[151]

The petitioner also challenged the validity of the EPA's water quality data, claiming that the samples were not filtered when collected.[152] Since the court could find no evidence to indicate whether the samples were filtered, it presumed that the EPA followed its own procedure by filtering the samples.[153]

The court summarized these decisions by noting that the EPA's actions were imperfect but adequate to satisfy Congress' goals under CERCLA because the need for quick and simple methods to identify those sites which pose the greatest hazards to human health and the environment outweighed the need to use the most specific and accurate data.[154] Again, the court's willingness to grant deference to the agency's decisions to list particular sites on the NPL was overwhelming.

C. Early Warning Signals—A Changing Deference Standard

Given the court's great deference to the EPA's decision to place a site on the NPL, it was not until 1991 that the Court of Appeals for the District of Columbia saw another substantive challenge to the EPA's NPL. Under SARA, Congress directed the EPA to revise both the National Contingency Plan and the Hazard Ranking System.[155] The NCP and HRS revisions were to be completed by April 17, 1988.[156] However, the revised NCP was not finalized until March 1990,[157] and the revised HRS was not finalized until December 1990.[158] In the interim, the

151. *Id.* at 755 (noting that the EPA is not required to make an exact count of the population, let alone assess the availability to each individual of alternative drinking water sources).
152. *Id.* at 755-56.
153. *Id.*
154. *Id.* at 756.
155. CERCLA § 105(b)-(c), 42 U.S.C. § 9605(b)-(c) (1988).
156. *Id.*
157. 55 Fed. Reg. 8,666 (1990). The rule was not effective until April 9, 1990. *Id.*
158. 55 Fed. Reg. 51,532 (1990). The rule was not effective until March 14, 1991. *Id.*

EPA placed an additional seventy-one sites on the NPL, using the 1982 HRS.[159]

Linemaster Switch Corp. v. EPA raised the issue of whether the EPA acted beyond its scope of authority in applying the 1982 HRS to these seventy-one sites after the statutory deadline to promulgate a revised HRS passed.[160] In addition, each petitioner separately raised challenges to the EPA's decision to place a particular site on the NPL.[161]

1. *EPA Did Not Act Beyond Its Scope of Authority by Using the 1982 HRS After the Statutory Deadline*

The petitioners claimed that the EPA acted beyond its scope of authority by using the 1982 HRS to place sites on the NPL after the statutory deadline to issue a revised HRS had passed, relying on Congress' literal intent reflected on the face of the statute.[162] The court upheld the agency's use of the 1982 HRS in these circumstances by reconciling Congress' intent in section 105(c) of CERCLA with the intent in section 105(a)(8)(B), which requires the President to update the NPL annually.[163] The court held that a procedural snafu should not delay the evaluation process of the nation's most hazardous sites, noting that Congress did not include language in CERCLA specifically suspending the EPA's authority to update the list annually with the 1982 HRS.[164] The court reasoned that the concerns Congress raised during the enactment of SARA sufficiently indicated that Congress did not intend to stifle the scoring process until the HRS could be revised.[165]

2. *The Linemaster Switch Site*

The Linemaster Switch facility manufactures electrical equipment.[166] The petitioner claimed that the EPA acted arbitrarily by not considering more recent groundwater data

159. Linemaster Switch Corp. v. EPA, 938 F.2d 1299, 1302 (D.C. Cir. 1991).
160. *Id.*
161. *Id.* at 1305-09.
162. *Id.* at 1302.
163. *Id.* at 1303-04.
164. *Id.*
165. *Id.*
166. *Id.* at 1305.

when scoring the site.[167] The court found that the new data was not included in the record before the EPA when it decided to place this site on the NPL. As a result, the EPA was not required to consider it.[168] Therefore, the EPA did not act arbitrarily or capriciously by not considering this data in its decision.[169]

3. *The Sangamo Weston Site*

The Sangamo Weston Site consists of a manufacturing facility, as well as several landfills and nearby tributaries where the facility disposed of its industrial wastes.[170] The petitioner challenged the validity of the EPA's policy to aggregate these sites for purposes of remedial actions and the applicability of this policy to NPL sites.[171] The court refused to address the merits of the claim because the petitioner failed to raise these issues during the notice and comment period.[172]

4. *The Tyler Refrigeration Site*

The Tyler Refrigeration Site is a former manufacturing facility.[173] The petitioner challenged the EPA's decision to place this site on the NPL, claiming that the EPA acted arbitrarily in using a former employee's estimate to determine the waste quantity factor of the HRS and in ignoring any past remedial actions taken by the petitioner at the site to alleviate any threatened release of hazardous substances.[174] The court agreed with the EPA that the use of the former employee's information, coupled with the actual data gathered from the site by the EPA investigation, was enough to permit the agency to conclude that a certain quantity of waste was deposited on the property.[175] Thus, the court held that the EPA did not act arbitrarily by relying on this data to determine that the waste quantity figure was above zero for the HRS score.[176]

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167. *Id.*
168. *Id.* at 1305-06.
169. *Id.*
170. *Id.* at 1308.
171. *Id.*
172. *Id.* at 1308-09.
173. *Id.* at 1306.
174. *Id.* at 1306-07.
175. *Id.* The court dismissed the petitioner's claim regarding improper use of population figures as meritless. *Id.*
176. *Id.*

As it had done in previous decisions, the court also upheld the EPA's policy to ignore past remedial activities when scoring a site.[177] However, the court took great pains to explain that the recently revised 1990 HRS addressed many of the petitioner's concerns.[178] The court noted that the 1990 HRS required the EPA to take into consideration past remedial activities, and that the new method to determine waste quantity was significantly expanded.[179] The court suggested that under the revised 1990 HRS, the Tyler Refrigeration Site might not have scored the threshold 28.5 required for placement on the NPL.[180] The court cautioned the EPA to "carefully consider its current policies in developing a remedial plan" for the site, further illustrating the court's frustration with the result of this case.[181]

D. The Tide Turns—The Court Vacates Four EPA Decisions to Place Sites on the NPL

In an unprecedented manner, four different panels of the Court of Appeals for the District of Columbia vacated and remanded four separate EPA decisions to place particular sites on the NPL within one year's time.

1. The Tex Tin Site

The Tex Tin Site consists of piles of tin slag.[182] The petitioner's main charge was that the EPA acted arbitrarily in using the chemical properties of arsenic to calculate the toxicity component of the HRS score.[183] The EPA argued that the tin slag piles were composed of rocks containing levels of arsenic, and since these piles were exposed to the air, it was possible for

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177. *See, e.g., Eagle-Picher I,* 759 F.2d 905, 921-22 (D.C. Cir. 1985).
178. Linemaster Switch Corp. v. EPA, 938 F.2d 1299, 1307 (D.C. Cir. 1991).
179. *Id.*
180. *Id.*
181. *Id.* The court also noted that although CERCLA did not require the EPA to rescore NPL sites under the revised 1990 HRS, the EPA did have the discretion under the revised 1990 HRS to modify a site's score to reflect the site's decreased risk due to a remedial response. *Id.*
182. Tex Tin Corp. v. EPA, 935 F.2d 1321, 1323 (D.C. Cir. 1991). *Tex Tin* was argued before the same court panel on the same day that *Linemaster Switch* was argued. *See Linemaster Switch*, 938 F.2d at 1299; *Tex Tin,* 935 F.2d at 1321.
183. *Tex Tin*, 935 F.2d at 1323. The court rejected the petitioner's other argument challenging the EPA's use of copper in its calculation of the observed release component of the HRS because the petitioner had failed to raise this issue during the rulemaking process. *Id.*

the arsenic contained in the rocks to be released into the air.[184] The EPA concluded that the mere presence of arsenic posed a threat of release to the air.[185] The petitioner maintained that the EPA had no scientific basis to prove that the arsenic contained in the rocks could be released into the air without artificially heating the rocks to a very high temperature.[186] The court agreed with the petitioner and remanded the EPA's decision to list the Tex Tin Site on the NPL, because the EPA's record lacked a sufficient explanation of how the tin slag piles would pose a threat of release of arsenic.[187] This case represents the first time that the court remanded an EPA decision to place a site on the NPL. It was followed by a series of opinions in 1992 that vacated and remanded the EPA's decisions to place particular sites on the NPL.

2. *The Houston Landfill Site*

The Houston Landfill Site is an old county landfill.[188] The petitioners argued that the EPA acted arbitrarily in basing the HRS score for the site on the analysis of only one groundwater sample, which was not filtered prior to analysis.[189] According to the petitioner, using only one unfiltered sample to determine the presence of contamination in the groundwater on-site violated the EPA's own policy, which required the EPA to analyze both filtered and unfiltered samples.[190] The petitioner claimed that the EPA acted arbitrarily by relying only on one unfiltered sample to determine the waste characteristic component of the HRS score for this site.[191]

The EPA argued that analyses of both filtered and unfiltered groundwater samples were not required because this procedure was not in the EPA's regulations.[192] The EPA also relied on groundwater sampling protocols used in the EPA's solid and

184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.* at 1324. "Where the agency has failed to exercise its expertise or to explain the path that it has taken, we have no choice but to remand for a reasoned explanation." *Id.*
188. Kent County, Del. Levy Ct. v. EPA, 963 F.2d 391, 393 (D.C. Cir. 1992).
189. *Id.*
190. *Id.* at 394-95.
191. *Id.*
192. *Id.* at 395.

hazardous waste program, which is governed by a completely different statute, arguing that under that program unfiltered samples are required to reflect accurately the metals present in the groundwater and adsorbed onto the soils.[193] Finally, the EPA argued that the unfiltered on-site sample showed levels of contaminants above those found in unfiltered samples taken off-site, which demonstrated that a release of contaminants had occurred on-site.[194] Therefore, the EPA was not required to use filtered samples.[195]

The court discarded the EPA's argument based on the sampling policy of the agency's solid and hazardous waste program, noting that the EPA must consider policies from the CERCLA program before considering other program protocols.[196] Next, the court found that even if unfiltered on-site samples indicated levels of contaminants above those found in unfiltered off-site samples, this analysis did not account for the possible difference in well turbidity, which can produce misleading, elevated analytical results.[197] Finally, the court agreed with the petitioner that the agency did not follow its own internal expert opinions, which recommended analysis of both filtered and unfiltered groundwater samples to determine if groundwater contamination is present.[198] Since the EPA gave no plausible reason for abandoning its own policy, the court found that the EPA acted arbitrarily in relying only on one unfiltered sample to determine the waste characteristic component of the HRS score for this site.[199] Thus, the court vacated and remanded the EPA's decision to place the Houston Landfill Site on the NPL.[200]

The petitioner also challenged the EPA's use of population figures served by irrigation wells in the HRS, but the court dismissed this argument because the petitioner failed to raise this particular issue during the rulemaking process.[201] However, the court strongly suggested to the EPA that it

193. *Id.*
194. *Id.* at 393, 396-98.
195. *Id.*
196. *Id.* at 396.
197. *Id.* at 398.
198. *Id.* at 397-98.
199. *Id.*
200. *Id.* at 399.
201. *Id.*

reconsider this issue when reevaluating the HRS score for this site.[202] The suggestion was an uncharacteristic measure by the court, given the court's past deference to the EPA in these types of technical decisions.

3. *The Glen Burnie Site*

The Glen Burnie Site is a former landfill used for the disposal of unknown types of wastes.[203] The petitioner here also challenged the EPA's decision to use only unfiltered groundwater sampling analyses for the basis of the HRS score.[204] As with the Houston Landfill site, the court agreed that the EPA acted arbitrarily by placing the Glen Burnie Site on the NPL because the EPA did not follow its own sampling protocols, which required both filtered and unfiltered samples.[205] Nor did the EPA provide a valid reason to explain the departure from its policy.[206]

The petitioner argued that the EPA acted arbitrarily by not providing the petitioner with the opportunity of notice and comment regarding the "distance to the nearest well" figure the EPA used in its final rulemaking.[207] The well the EPA used in the proposed rule was later determined to be out of service, as the petitioner noted in its comments to the EPA.[208] The EPA then used another nearby well as the basis of the HRS score.[209] Because this second well was also within one mile of the landfill, the EPA used the same "distance to nearest well" factor in its HRS score as it used for the first well.[210]

The EPA argued that because the distance to the nearest well was already at issue in the proposed rule, and because the distance to the second well still led the agency to the same scoring conclusion, there was no need to provide an additional comment period on the distance to the second well.[211] Relying

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202. *Id.*
203. Anne Arundel County v. EPA, 963 F.2d 412, 414 (D.C. Cir. 1992).
204. *Id.* at 415.
205. *Id.* at 416-17.
206. *Id.*
207. *Id.* at 417.
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.* at 417-18 (relying on the rationale set forth in City of Stoughton v. EPA, 858 F.2d 747 (D.C. Cir. 1988)).

on its policy to ignore past remedial response activities when scoring a site with the HRS, the EPA argued that it could still use this second well distance figure to calculate its HRS score.[212] The EPA also argued that the lack of notice and opportunity to comment was harmless.[213] However, the petitioner pointed to past HRS scores that the EPA had revised after finding that wells initially relied upon in the HRS were subsequently closed for purposes other than remedial response to argue that the EPA's conduct was arbitrary and capricious in that instance.[214]

The court accused the EPA of "intentionally conceal[ing] the existence of the [second] well from the petitioner" while being fully aware that the county ordinance would have required the well to be closed.[215] The court reasoned that if the well had been closed, the distance to this second well may no longer have been valid for purposes of the HRS, and that the HRS score may have decreased because the third nearest well was more than one mile from the site.[216] The court described the EPA's actions as "wholly at odds with the letter and spirit of the APA's notice requirement."[217] The court also chastised the agency for permitting the owner of the second well to continue to use his well despite the EPA's determination that this well was within one mile of a potential threat to human health so great as to require its placement on the nation's list of most hazardous sites.[218]

The court examined the record and determined that since the agency did not address whether the ordinance requiring the closing of the second well would be a response action, the court could not determine whether the EPA could rely on its policy to ignore past remedial actions.[219] The court therefore vacated the agency's decision to place the Glen Burnie Site on the NPL and remanded back to the agency for further evaluation the issue of whether the county ordinance represented a response action or an action other than response.[220]

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212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.* at 418.
216. *Id.*
217. *Id.* at 419.
218. *Id.* at 418-19.
219. *Id.*
220. *Id.* The court noted that if the EPA determined that the local ordinance was in

4. The Salford Quarry Site

The Salford Quarry Site is a former rock quarry which was subsequently used for the disposal of tile and other processing wastes.[221] In applying the HRS, the EPA used toxicity and persistence data for elemental boron and highly toxic boron compounds instead of using toxicity and persistence data for boron oxide, which was the actual form of the boron wastes deposited at the site.[222] The petitioner challenged this EPA action as arbitrary and capricious.[223] The court agreed with the petitioner, reasoning that because the EPA did not explain its basis for determining that forms of boron other than boron oxide existed at the site, it was arbitrary to rely on the toxicity data of those other forms of boron when developing the site's HRS score.[224] In addition, the court found that the EPA acted arbitrarily in attributing the same persistence qualities of metals to boron oxide, a metalloid, absent rationale to show that metals and metalloids exhibit the same persistence characteristics.[225] The court described the agency's rationales for each HRS component as "woefully lacking."[226] Since the EPA did not provide a rational basis for its use of toxicity and persistence values for compounds other than boron oxide at the site, the court concluded that the EPA acted arbitrarily and vacated the EPA's decision to place the Salford Quarry Site on the NPL.[227]

E. The Tide Ebbs—Recent Decisions Upholding the EPA's Placement of a Site on the NPL

Two petitioners have recently brought individual substantive challenges to the EPA's decisions to place particular sites on the

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fact a response action, thereby warranting the EPA's decision to ignore the effects of the well closure, the error in not providing adequate notice to the petitioner would indeed be harmless. Thus, the EPA would have been justified in relying on this second well distance in the HRS scoring for this site. *Id.*

221. National Gypsum Co. v. EPA, 968 F.2d 40, 41 (D.C. Cir. 1992).

222. *Id.* at 41-42. Other issues raised by the petitioner mainly attacked the agency's interpretation of its own regulations for which the court was willing to defer to the agency's expertise and plain reading of the regulations to uphold the agency's actions and determinations in those instances. *Id.* at 45-46.

223. *Id.* at 41-42.

224. *Id.* at 44.

225. *Id.* at 45.

226. *Id.* at 43.

227. *Id.* at 47.

NPL. Although the court upheld these particular decisions, each carried the undertones expressed in the Tex Tin,[228] Houston Landfill,[229] Glen Burnie,[230] Salford Quarry[231] cases, indicating that the court is no longer willing to grant unyielding deference to the EPA's decision to place a site on the NPL.

1. The B & B Tritech Site

The B & B Tritech Site is a manufacturing facility. At one time, the facility used on-site lagoons to dispose of liquid process wastes.[232] In calculating the HRS score, the EPA used the population figures serviced by wells using a deep aquifer which was different from the shallow aquifer where the contamination had been released.[233] In addition, the EPA had classified these wells as providing drinking water, even though they were not used as drinking water sources.[234]

The court recognized that the 1982 HRS sometimes resulted in unfairness due to the quick and inexpensive methods used.[235] However, the court was forced to uphold the EPA's decision to place this site on the NPL because the EPA was able to provide a rational basis for its actions.[236] The court reasoned that the EPA's use of the wells that withdrew water from the deep aquifer was justified because the contamination released in the shallow aquifer had migrated to the deep aquifer.[237] In addition, the court found that the EPA acted rationally in concluding that the potential risk of exposure to the population still existed, even though these deep wells were no longer used for drinking water, because daily priming of the these wells introduced minuscule amounts of contaminated water into the drinking water system.[238]

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228. Tex Tin Corp. v. EPA, 935 F.2d 1321 (D.C. Cir. 1991).
229. Kent County, Del. Levy Ct. v. EPA, 963 F.2d 391 (D.C. Cir. 1992).
230. Anne Arundel County v. EPA, 963 F.2d 412 (D.C. Cir. 1992).
231. National Gypsum Co. v. EPA, 968 F.2d 40 (D.C. Cir. 1992).
232. B & B Tritech v. EPA, 957 F.2d 882, 883 (D.C. Cir. 1992). This case was argued on the same day as the *Kent County* case. *See id.* at 882; *Kent County*, 963 F.2d at 391.
233. *B & B Tritech*, 957 F.2d at 883-84.
234. *Id.*
235. *Id.* at 884-85.
236. *Id.*
237. *Id.* at 884.
238. *Id.* at 884-85.

Since the EPA provided a rational basis for each of its conclusions, the court would not question the EPA's actions.[239] However, the court noted that under the revised 1990 HRS, sites posing the slightest risks of harm could not be placed on the NPL using such unrealistic rationalizations.[240] Further, the court expressed its concern for the devastating effects that the NPL designation would have on the petitioners in light of the questionable risks posed by the site.[241] The court urged the EPA to conduct further studies at the site to determine the actual risks posed, and if no significant health risks were present, to begin delisting procedures for the site as quickly as possible.[242]

2. *The Bradley Mining Site*

The Bradley Mining Site is a former mining facility located adjacent to a lake.[243] The petitioner argued that the EPA acted arbitrarily by not demonstrating that the elevated mercury levels in the sediments of the lake originated from the facility rather than from the levels of mercury naturally occurring in the sediments of this mining area.[244] The court found that the record amply supported the conclusion that a release of mercury had occurred, noting that the facility at one time had directly disposed of its wastes in the lake.[245] The court also noted that the levels of mercury detected in the upper sediments clearly exceeded the levels detected in background samples the EPA collected and the natural levels of mercury found in deeper portions of those same sediments.[246] Thus, the EPA could rationally conclude that a release had occurred as a result of the facility's activities.[247] However, the court noted that although the EPA's decisions in this highly technical area are given great deference, the court's "deference is not limitless," reinforcing the

239. *Id.*
240. *Id.* at 885.
241. *Id.*
242. *Id.* The EPA may "delist" (remove) sites from the NPL upon a showing that they no longer pose significant threats to human health or the environment. 40 C.F.R. § 300.425(e) (1993).
243. Bradley Mining Co. v. EPA, 972 F.2d 1356, 1358 (D.C. Cir. 1992).
244. *Id.* at 1359.
245. *Id.* at 1360.
246. *Id.*
247. *Id.*

court's new willingness to question the EPA's decision to place a site on the NPL to determine if the EPA acted arbitrarily or without a rational supporting basis.[248]

CONCLUSION

Since the first NPL challenges, many events have occurred which have influenced the United States Court of Appeals for the District of Columbia's recent decisions. On the heels of *Eagle-Picher I* and *Eagle-Picher II*, Congress amended CERCLA to require the EPA to conduct special studies of wastes generated by certain types of mining facilities[249] and to revise the HRS.[250] These amendments make it more difficult for the EPA to place mining facilities on the NPL.[251] Today, sites similar to those in *Eagle-Picher III* are less likely to be proposed for placement on the NPL. Furthermore, the court now recognizes the severe stigma and financial impact imposed on liable parties once a site is placed on the NPL.[252] These factors have caused the court to be more cautious when reviewing EPA rulemakings for arbitrary actions in order to ensure that these costs are not imposed unjustly.[253] Although the court still follows the arbitrary and capricious standard of review, it looks more closely at the EPA's record; the court is now willing and able to sift through the technical findings of the EPA to ensure that the data truly supports the site's placement on the NPL.[254]

The 1990 HRS requires the EPA to conduct more detailed investigations prior to proposing a site for the NPL.[255] In addition, the 1990 HRS considers past remedial activities at a site, which will lead to lower HRS scores for many facilities where the owner or operator has taken the initiative to

248. *Id.* at 1358-59.
249. CERCLA § 105(g), 42 U.S.C. § 9605(g) (1988).
250. CERCLA § 105(c), 42 U.S.C. § 9605(c) (1988).
251. Linemaster Switch Corp. v. EPA, 938 F.2d 1299, 1303 (D.C. Cir. 1991).
252. *See, e.g.*, Kent County, Del. Levy Ct. v. EPA, 963 F.2d 391, 394 (D.C. Cir. 1992); B & B Tritech v. EPA, 957 F.2d 882, 885 (D.C. Cir. 1992); *see also D.C. Circuit Remands Two NPL Listing Decisions, Faults Use of Unfiltered Samples in Scoring Sites,* [May 1, 1992 to Apr. 30, 1993] 23 Env't Rep. (BNA) 272 (May 8, 1992).
253. *See, e.g., Kent County,* 963 F.2d at 394; *B & B Tritech*, 957 F.2d at 885.
254. *Compare Eagle-Picher III,* 822 F.2d 132 (D.C. Cir. 1987) *with Kent County,* 963 F.2d at 391; *see also* National Gypsum Co. v. EPA, 968 F.2d 40 (D.C. Cir. 1992); Anne Arundel County v. EPA, 963 F.2d 412 (D.C. Cir. 1992).
255. *Compare* 40 C.F.R. pt. 300 app. A (1988) *with* 40 C.F.R. pt. 300 app. A (1993).

remediate the waste disposal areas voluntarily.[256] Sites that may have been proposed for the NPL with the 1982 HRS may not meet the 28.5 criteria with the 1990 HRS because the 1990 HRS represents a better evaluation of the true risks present at a site.[257]

In conclusion, the court's standard of arbitrary and capricious review of the NPL rulemaking will remain the same. However, the court is now willing to review the EPA's NPL rulemakings with less deference now than it had in the past since it is no longer intimidated by the technical issues presented in these challenges and because of its recognition of the stigma and financial implications the NPL creates. Consequently, the court is more willing to find an NPL rulemaking arbitrary or capricious than it had in the past, a positive factor for future NPL challenges.

Amelia Susan Magee

256. *See* 40 C.F.R. pt. 300 app. A § 2.4.2.2 (1993); 55 Fed. Reg. 51,532, 51,567-69 (1990).

257. *See B & B Tritech*, 957 F.2d at 885.