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Environmental Law Survey

Christopher L. Cook

ENVIRONMENTAL LAW SURVEY

I. INTRODUCTION

In 1992, the Tenth Circuit addressed several issues certain to have a major impact on the evolution of environmental law. The court considered issues arising under: (1) the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[1] which continues to spawn expensive litigation as parties seek to impose financial responsibility on others for the cleanup of hazardous waste sites; (2) the Clean Water Act (CWA),[2] responsible for maintaining the integrity of the nation's waters; and (3) the National Environmental Policy Act (NEPA),[3] which mandates that federal agencies consider mitigation of adverse environmental effects before taking action.

This Article surveys select environmental cases decided by the Tenth Circuit. Part I discusses the issue of civil suits for medical monitoring expenses under CERCLA.[4] Part II discusses to what extent the Clean Water Act waives sovereign immunity for penalties in a civil action.[5] Part III evaluates the role of permit stipulations in an agency's decision to incorporate a mitigation discussion into its Environmental Impact Statement.[6]

II. MEDICAL MONITORING UNDER CERCLA: *DAIGLE V. SHELL OIL CO.*[7]

A. *Background*

CERCLA, commonly known as Superfund, deals with the cleanup of hazardous waste sites which pose a threat to public health and the environment.[8] The statute also provides for civil suits against the parties responsible for the hazardous waste, imposing liability on responsible parties for the costs of cleanup as well as "any other necessary costs of response incurred by any other person."[9] At issue in *Daigle* was whether provision for response costs extends to the creation of a "medical monitoring" or "medical surveillance" fund for those exposed to hazardous waste. Such a system would detect the onset of latent diseases caused by

1. 42 U.S.C. §§ 9601-9675 (1988 & Supp. 1990).
2. 33 U.S.C. §§ 1251-1387 (1988 and Supp. 1990).
3. 42 U.S.C. §§ 4321-4347 (1988).
4. *See* Daigle v. Shell Oil Co., 972 F.2d 1527 (10th Cir. 1992). *See also infra* text accompanying notes 7-73.
5. *See* Sierra Club v. Lujan, 972 F.2d 312 (10th Cir. 1992)(*Lujan II*). *See also infra* text accompanying notes 74-133.
6. *See* Holy Cross Wilderness Fund v. Madigan, 960 F.2d 1515 (10th Cir. 1992). *See also infra* text accompanying notes 134-182.
7. 972 F.2d 1527 (10th Cir. 1992).
8. 42 U.S.C. § 9604(a)(1) (1988) provides for remedial action "[w]henever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment . . . or substantial threat of release . . . [of material dangerous] to the public health or welfare . . . ."
9. *See id.* § 9607(a)(4)(B).

toxic pollutants.[10]

1. Early Decisions

In *Brewer v. Ravan,*[11] the federal district court for the Middle District of Tennessee attempted to address the issue of medical monitoring costs within the scope of CERCLA. Former employees sued a capacitor manufacturer for exposure to contaminated soil. The defendants moved to dismiss for lack of subject matter jurisdiction, claiming that CERCLA did not contemplate medical monitoring liability.[12] The dismissal was denied. The court concluded that an action to recover costs for assessing the effects of a release of hazardous substances was a recognizable claim under CERCLA.[13] The court reasoned that because the term "response costs" also included costs incurred in the removal of toxic substances, medical testing was a legitimate cost involved in substance removal.[14] Little analysis was offered for this result other than the definitions supplied by CERCLA which provide for removal costs necessary to monitor a release.[15]

In *Coburn v. Sun Chemical Corp.,*[16] the federal district court for the Eastern District of Pennsylvania arrived at a conclusion in direct opposition to that of the *Brewer* court. The *Coburn* court examined in detail the response cost definitions supplied by CERCLA and considered them in light of earlier cases on similar matters.[17] The court began by acknowledging that CERCLA is inherently vague, finding that its definitions give little guidance and its legislative history is equally ambiguous.[18] The court searched prior decisions for guidance on the matter. For example, the *Coburn* court explained that, in *Exxon Corp. v. Hunt,*[19] the Supreme Court determined that Superfund money may not be used to "compensate private parties for *economic* harms that result from discharge of hazardous substances."[20]

The *Coburn* court also disagreed with the *Brewer* conclusion that medical monitoring tests fell within the range of response costs and concluded that the costs of medical screening were not "necessary costs of

10. *Daigle,* 972 F.2d at 1532-1533. Also at issue in *Daigle* was the "discretionary function exception" applicable to federal sovereign immunity jurisprudence, *id.* at 1537-43, and an ultrahazardous strict liability claim. *Id.* at 1543-45.

11. 680 F. Supp. 1176 (M.D. Tenn. 1988).

12. *Id.* at 1178.

13. *Id.* at 1179.

14. *Id.*

15. *Id.* (applying 42 U.S.C. § 9601(23)(1988)).

16. 1988 WL 120739 (E.D. Pa. Nov. 9, 1988).

17. *Id.* at *3-*5.

18. *Id.* at *2-*3.

19. 475 U.S. 355 (1986).

20. *Coburn,* 1988 WL 120739, at *3 (quoting *Exxon,* 475 U.S. at 375)(emphasis added)). The court contrasted this reasoning with that used in cases such as Jones v. Inmont Corp., 584 F. Supp. 1425 (S.D. Ohio 1984), in which medical testing apparently met the definition of "removal" expressed in CERCLA. However, the *Jones* court did not address the question of whether medical monitoring was one of the possible "necessary costs of response." Although the *Jones* decision did not attempt to clear this confusion, it did identify the problems involved in defining response costs. *Id.*

response."[21] The definition of the phrase merely contemplated the cleanup of hazardous substances.[22] The court also noted that legislative history showed that Congress intentionally repealed a provision to provide for recovery of medical expenses.[23] This indicated to the court that Congress did not intend to provide for medical expenses within CERCLA response costs.[24]

2. Recent Decisions

The extensive analysis given by the *Coburn* court set the stage for later decisions. *Werlein v. United States*[25] sought a monitoring fund, based on the response costs provision, to screen for early signs of disease stemming from exposure to toxic substances.[26] The court discussed both the *Brewer* line of cases as well as the cases following *Coburn*. The *Werlein* court found the *Coburn* line of cases persuasive,[27] and particularly emphasized the fact that CERCLA provided a medical care provision through the creation of the Agency for Toxic Substances and Disease Registry (ATSDR),[28] thus showing that Congress intended the medical costs to be provided through a separate system.[29]

A federal district court in *Ambrogi v. Gould, Inc.*[30] also followed the *Coburn* decision by holding that CERCLA response costs did not include provisions for medical monitoring.[31] The *Ambrogi* court recognized the emerging trend developing a consistent manner of dealing with medical monitoring under CERCLA.[32] Furthermore, the *Ambrogi* court asserted that, under the CERCLA definitions, "removal" actions only applied to activities designed to "affect the *threatened* release of hazardous substances."[33] Thus, once the release occurred, the statutory scope no longer considered such activities covered under the definition of removal actions.[34]

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21. *Id.*

22. *Id.*

23. A Legislative comment shows that Congress "deleted the Federal cause of action for medical expenses." 126 CONG. REC. 30,932 (1980).

24. *Coburn*, 1988 WL 120739, at *6.

25. 746 F. Supp. 887 (D. Minn. 1990), *vacated in part*, 793 F. Supp. 898 (D. Minn. 1992).

26. *Id.* at 901.

27. *Id.* at 903.

28. *Id.* The Agency for Taxic Substances and Diseased Registry was established by 42 U.S.C. § 9604(i) (1988).

29. *Id.*

30. 750 F. Supp 1233 (M.D. Pa. 1990).

31. *Id.* at 1246.

32. *Id.* at 1239. For a further examination of the development of medical monitoring, see Allan Kanner, Note, *Medical Monitoring: State and Federal Perspectives*, 2 TUL. ENVTL. L.J. 1 (1989). *See also* Dan A. Tanenbaum, Note, *When Does Going to the Doctor Serve the Public Health? Medical Monitoring Response Costs Under CERCLA*, 59 U. CHI. L. REV. 925 (1992).

33. *Ambrogi*, 750 F. Supp. at 1247 (emphasis in original).

34. *Daigle*, 972 F.2d at 1531.

B. *Tenth Circuit Decision*

1. Facts

The Rocky Mountain Arsenal (Arsenal) is a federally controlled CERCLA site near Commerce City, Colorado.[35] In 1956, the Army began using an area on the Arsenal known as Basin F to incinerate hazardous waste materials.[36] Shell Oil Company also used the basin to impound wastes generated in its herbicide and pesticide production facility.[37] The combination of the wastes created one of the most toxic hazardous waste sites in the country.[38] In 1984 the Army began a Remedial Investigation and Feasibility Study,[39] under which the Army identified Basin F as a site which needed an "Interim Response Action" to deal with the spread of contaminants from the site.[40] During the following year the Army transferred liquid hazardous wastes to on-site storage tanks and lined surface impoundments and moved solids into a lined waste pile, which was capped and then covered with top soil and vegetation.[41]

During this cleanup procedure, the plaintiffs complained of noxious odors and airborne pollutants being carried into their trailer park, located one-and-one-half miles from Basin F.[42] Residents allegedly suffered economic damage as well as a variety of physical ailments and the possibility of more serious latent diseases.[43] Under the CERCLA provision for "response costs," plaintiffs brought suit in federal district court for the District of Colorado to establish a long-term medical monitoring fund to detect any diseases that may be produced by exposure to the contaminants.[44] Shell Oil and the United States Government moved to dismiss the suit for lack of subject matter jurisdiction, claiming that response costs under CERCLA did not include medical monitoring.[45] The district court denied this and other motions and both parties sought interlocutory appeal. On appeal, the Tenth Circuit reversed in part, affirmed in part and remanded, concluding that medical monitoring costs

35. *Id.*.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.* This study took place pursuant to 42 U.S.C. § 9604 (1988).
40. *Daigle*, 972 F.2d at 1532.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 1532-33. CERCLA provides that:

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

42 U.S.C. § 9607(a)(4) (1988).
45. *Daigle*, 972 F.2d at 1531.

were not included under CERCLA response costs.[46]

2. Holding

In reversing the district court's decision not to dismiss the medical monitoring charges, the Tenth Circuit concluded that the issue centered on the definition of "any other necessary costs of response."[47] The court decided that medical monitoring was not included in the definition. CERCLA does not directly define this phrase, rather, it only attempts to define the word "response." A "response" is defined by CERCLA as a removal action or a remedial action.[48] "Removal" is defined as the cleanup of already released hazardous substances from the environment.[49] These actions are designed to effect an interim solution to a contamination problem,[50] as opposed to "remedial actions," which are designed as permanent solutions to the contamination.[51] Implementation of remedial actions occurs instead of, or in addition to, removal actions.[52]

Plaintiffs in this case argued that a broad reading of the CERCLA language, — "other actions as may be necessary to prevent, minimize, or mitigate damage to the public health"[53] — within the definition of "removal" suggests that removal actions do include medical monitoring costs.[54] In support of this reading, the park residents relied primarily on *Brewer v. Ravan*,[55] which held that medical monitoring costs were included under CERCLA removal and remedial costs.[56]

The *Daigle* court decided that the *Brewer* interpretation was too far reaching and that the response cost provision of CERCLA did not contemplate medical monitoring costs.[57] Instead, the Tenth Circuit relied on the analysis given in *Coburn v. Sun Chemical Corp.*,[58] which rejected the

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46. *Id.* at 1537.

47. *Id.* at 1533. *See also* 42 U.S.C. § 9607(a)(4)(B) (1988).

48. "The terms respond or response means [sic] remove, removal, remedy, and remedial action . . . ." 42 U.S.C. 9601(25)(1988).

49. The terms 'remove' or 'removal' means [sic] the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances . . . .

Id. § 9601(23).

50. *Daigle*, 972 F.2d at 1533-34.

51. *Id.* at 1534. *See also* 42 U.S.C. § 9601(24) (1988).

52. 42 U.S.C. § 9601(24) (1988) provides:

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

53. *Daigle*, 972 F.2d at 1535.

54. *Id.*

55. 680 F. Supp. 1176 (M.D. Tenn. 1988).

56. *Id.* at 1179. *See also supra* text accompanying notes 11-15.

57. *Daigle*, 972 F.2d at 1535-36.

58. 1988 WL 120739 (E.D. Pa. Nov. 9, 1988). *See also supra* text accompanying notes 16-24.

Brewer analysis. In so doing, *Coburn* set the trend for most CERCLA medical monitoring cases to follow. The *Coburn* court based its decision on the plain meaning of the statute and concluded that CERCLA response costs did not extend to long-term medical monitoring costs.[59]

As had the court in *Werlein v. United States*,[60] the *Daigle* court also concluded that medical monitoring could not be used once a hazardous release occurs.[61] Because CERCLA defined remedial actions as actions used to prevent a release,[62] once a release occured, as in the *Daigle* case, the scope of CERCLA response costs no longer covered the type of long-term monitoring requested.[63]

The *Daigle* court found support for denying the medical monitoring action by pointing to the fact that CERCLA contains a provision for a type of medical monitoring.[64] CERCLA established the Agency for Toxic Substances and Disease Registry (ATSDR),[65] which allows individuals to petition for a health assessment and long-term health surveillance programs.[66] Despite the plaintiffs' argument that this provision indicate that CERCLA provides for medical monitoring expenses, the court decided that ATSDR does not extend a generalized adoption of medical monitoring to other CERCLA provisions.[67] As grounds for this conclusion, the court noted that the funding for ATSDR is separate from the funding for response costs.[68]

C. *Analysis*

As the first federal appellate court to address directly the matter of medical monitoring costs under CERCLA,[69] this case will significantly influence future cases in other circuits. The *Daigle* decision adds little to the analyses developed by the lower federal courts in *Coburn* and *Ambrogi*. The *Daigle* court adopted the analysis of CERCLA definitions used by the *Coburn* court. This interpretation follows the structure of CERCLA and concludes that the private right of recovery for response costs does not include a right to costs for medical monitoring.[70] The *Daigle* court also adopted the analysis used by the *Ambrogi* court, as the circuit court concluded that long-term medical monitoring does not prevent

59. *Id.* at *6.
60. 746 F. Supp. 887 (D. Minn. 1990), *vacated in part*, 793 F. Supp. 898 (D. Minn. 1992).
61. *Daigle*, 972 F.2d at 1535.
62. 42 U.S.C. § 9601(24) (1988).
63. *Id.* at 1535-36.
64. *Daigle*, 972 F.2d at 1536-37.
65. 42 U.S.C. § 9604(i) (1988).
66. *Id.* § 9604(i)(6)(B).
67. *Daigle*, 972 F.2d at 1537.
68. *Id.* For a discussion of the role of ATSDR within CERCLA as well as its many inherent problems, see Martin R. Siegel, *Integrating Public Health Into Superfund: What Has Been the Impact of the Agency for Toxic Substances and Disease Registry?*, 20 ENVTL. L. REP. 10013 (1990).
69. *Daigle*, 972 F.2d at 1533.
70. *Id.* at 1535.

contact between a hazardous substance and the public.[71] Once a release occurrs, monitoring is no longer within the scope of response costs.[72]

While the *Daigle* decision may add nothing new to the trend emerging in the lower courts, it does solidify and refine the law by compiling the persuasive arguments from prior decisions. As noted in *Ambrogi*, the law on this issue is slowly developing a certain consistency.[73] The Tenth Circuit gave the *Coburn* and *Ambrogi* decisions enough emphasis to establish a lasting degree of clarity in this previously murky area of law.

III. Sovereign Immunity under the Clean Water Act: *Sierra Club v. Lujan* (Lujan II)[74]

A. *Background:* Sierra Club v. Lujan *(Lujan I)*[75]

The Tenth Circuit originally held in *Sierra Club v. Lujan* (Lujan I) that the Clean Water Act (CWA) waived sovereign immunity for civil penalties.[76] Normally, the United States is immune from any suit in the absence of consent. A waiver of sovereign immunity "must be unequivocally expressed" by Congress.[77] Courts are also required to strictly construe a waiver and not extend it beyond the language of the statute.[78] However, the CWA exposed the federal government to liability through section 1323 of the Act.[79]

Lujan I involved a citizen suit concerning alleged violations of a CWA permit at the Leadville tunnel in Lake County, Colorado.[80] Section 1365(a) allows citizens to bring suit against the United States for violations of the CWA.[81] The statute also gives federal district courts jurisdiction over these matters and allows them to "apply any appropriate civil penalties under section 1319(d) of this title."[82] The court determined that section 1319(d), which authorizes civil penalties for CWA violations,[83] could be applied because a permit for the tunnel had been

71. *Id.*
72. *Id.*; *see also supra* text accompanying notes 30-34.
73. *Ambrogi*, 750 F. Supp. at 1239.
74. 972 F.2d 312 (10th Cir. 1992).
75. 931 F.2d 1421 (10th Cir. 1991).
76. *Id.* at 1429.
77. *Id.* at 1423 (quoting United States v. Testan, 424 U.S. 392, 399 (1976)).
78. *Id.* (citing Ruckelshaus v. Sierra Club, 463 U.S. 680, 686 (1983)).
79. 33 U.S.C. § 1323(a) states that "[e]ach department, agency, or instrumentality . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and *process and sanctions* respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity . . . ." (emphasis added).
80. *Lujan I*, 931 F.2d at 1422.
81. Section 1365(a)(1) allows any citizen to file suit "against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter . . . ." 33 U.S.C. § 1365(a)(1) (1988).
82. *Id.* § 1365(a)(2).
83. For violations of the CWA:
> Any *person* who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a

issued by the EPA under section 1342.[84]

The court examined section 1323(a) to determine the extent to which the federal government is liable for civil penalties. The section states that "the United States shall be liable only for those civil penalties arising under *Federal law* or imposed by a State or local court to enforce an order or the process of such court"[85] Finally, the court looked to section 1362 of the CWA for the definition of "person." The section defines person as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body."[86]

The main issue in *Lujan I* was whether the term "sanctions" in the section 1323(a) phrase "process and sanctions" encompassed "civil penalties" under Section 1319(d).[87] The court held that the CWA clearly authorized courts to assess civil penalties against federal agencies,[88] and decided that "sanctions" encompassed civil penalties as provided in sections 1365 and 1319.[89]

The United States Department of the Interior and the United States Bureau of Reclamation[90] urged the court to view "sanctions" as including only coercive sanctions.[91] Coercive sanctions may be used to force agency compliance with a court order.[92] The agencies argued against including punitive sanctions designed to punish an agency for past noncompliance.[93] However, the agencies cited only *McClellan Ecological Seepage Situation v. Weinberger*[94] to defend this position, which concluded that Congress had not unambiguously waived sovereign immunity for punitive fines. The *Lujan I* court pointed out that *McClellan*, however, is an isolated case and that many courts have held that the CWA does waive sovereign immunity for punitive fines.[95]

The *Lujan I* court also rejected the defendants' argument that the CWA generally excludes the federal government as a person for the purpose of assessing penalties.[96] Because section 1365 states that a civil

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State . . . shall be subject to a *civil penalty* not to exceed $25,000 per day for each violation . . . .

33 U.S.C. 1319(d) (1988) (emphasis added).

84. *Lujan I*, 931 F.2d at 1424.

85. 33 U.S.C. § 1323(a)(2)(C) (1988) (emphasis added).

86. *Id.* § 1362(5).

87. *Lujan I*, 931 F.2d at 1425.

88. *Id.*

89. *Id.*

90. The United States Dept. of the Interior and the United States Bureau of Reclamation jointly own and operate the Leadville tunnel and are both subject to the CWA permitting regulations. *Id.* at 1422.

91. *Id.*

92. *Id.* at 1425.

93. *Id.*

94. 655 F. Supp. 601 (E.D. Cal. 1986).

95. *Lujan I*, 931 F.2d at 1425. *See* Ohio v. United States Dep't of Energy, 904 F.2d 1058 (6th Cir. 1990), *rev'd*, 112 S. Ct. 1627 (1992); Metropolitan Sanitary Dist. v. United States Dep't of Navy, 722 F. Supp. 1565 (N.D. Ill. 1989), *dismissed in part*, 737 F. Supp. 51 (1990); California v. United States Dep't of Navy, 631 F. Supp. 584 (N.D. Cal. 1986), *aff'd*, 845 F.2d 222 (9th Cir. 1988).

96. *Lujan I*, 931 F.2d at 1426-27.

suit may be brought against "any citizen (including . . . the United States)", Congress showed an express desire to waive sovereign immunity for civil actions under the CWA.[97]

B. *Supreme Court Action*

The question in *United States Dep't of Energy v. Ohio*[98] parallels the issue in *Lujan II*. The state of Ohio sought punitive fines from the Department of Energy for past violations of the CWA.[99] The lower court held that the CWA waived sovereign immunity for punitive fines and the Supreme Court reversed.[100] The Court distinguished punitive fines from coercive fines, holding that while the CWA waived sovereign immunity for coercive fines,[101] Congress did not explicitly waive sovereign immunity for punitive fines.[102]

While the Court analyzed the same important issues as had the *Lujan I* court, it arrived at an opposite conclusion in each instance. The Court found that the overall goal of the CWA excluded the United States from the definition of "person."[103] Although the section 1365 civil suit provision of the CWA included the United States in the definition of person,[104] it was not included as such in the section 1362 definition of person, nor under the section 1323(a) federal facilities pollution control provisions.[105] The Court inferred from this that Congress intended the United States to be deemed a person only when explicitly stated by statute.[106]

The Court then concluded that the section 1323(a) waiver of sovereign immunity for "process and sanctions" did not include a waiver for punitive fines.[107] The Court offered no persuasive authority for this conclusion and ignored the developing trend in the lower courts to include a waiver of sovereign immunity for punitive fines.[108] Nevertheless, the Court clearly stated that, through its own narrow construction of the statute, sovereign immunity was "waiv[ed] no further than the coercive variety."[109] This ruling effectively overruled the *Lujan I* decision and allowed the agencies to appeal the original Tenth Circuit decision. Later, the Supreme Court vacated *Lujan I* and remanded for further consideration.[110]

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97. *Id.* at 1427.
98. 112 S. Ct. 1627 (1992).
99. *Id.* at 1632.
100. *See* United States Dep't of Energy v. Ohio, 112 S. Ct. 1627 (1992).
101. *Id.* at 1634-35.
102. *Id.* at 1634.
103. *Id.*
104. *Id.* at 1635 n.14.
105. *Id.* at 1635.
106. *Id.*
107. *Id.* at 1639.
108. *See id.*
109. *Id.*
110. Lujan v. Sierra Club, 112 S. Ct. 1927 (1992).

C. Sierra Club v. Lujan *(Lujan II)*[111]

1. Facts

The Department of the Interior and the Bureau of Reclamation own and operate the Leadville tunnel, located in Lake County, Colorado. In 1975, the EPA issued to the Bureau of Reclamation a National Pollution Discharge Elimination System (NPDES)[112] permit authorizing the discharge of pollutants.[113] The EPA reissued the permit several times.[114]

On January 13, 1989, the Sierra Club along with the Colorado Environmental Coalition filed a complaint in federal district court alleging the Interior Department and Bureau of Reclamation violated the 1975 NPDES permit.[115] The plaintiffs asked the court to: (1) issue a mandatory injunction enjoining further permit violations; (2) order the agencies to pay civil penalties; and (3) declare that the agencies were in violation of the CWA.[116] The defendant agencies moved to dismiss the civil penalties claim for lack of subject matter jurisdiction, arguing that the CWA did not waive sovereign immunity for civil penalties.[117] The district court denied the agencies' motion and certified the question of civil penalties for interlocutory appeal to the Tenth Circuit Court of Appeals.[118]

2. Opinion

On remand from the Supreme Court, the Tenth Circuit court was forced to follow the Supreme Court analysis in *United States Department of Energy v. Ohio* and reverse its original holding in *Lujan I*. The *Lujan II* court reiterated the Court's arguments pertaining to the definition of the phrase "process and sanctions." It quoted the Court's language that "[t]he very fact . . . that the [section 1323(a)] text speaks of sanctions in the context of enforcing 'process' as distinct from substantive 'requirements' is a good reason to infer that Congress was using 'sanction' in its coercive sense, to the exclusion of punitive fines."[119]

The *Lujan II* court next addressed the problem of the 1323(a) provision subjecting the United states to liability "only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court."[120] While the first part of the phrase indicates that civil penalties may also include punitive fines, the latter part seems to deal only with fines used to enforce a court order—coercive fines. The *Lujan II* court followed the *United States Dep't Of*

111. 972 F.2d 312 (10th Cir. 1992).
112. 33 U.S.C. § 1342 (1988).
113. *Lujan II*, 972 F.2d at 313.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.* at 312.
118. *Id.* at 312-13.
119. *Id.* at 315 (quoting United States Dep't of Energy v. Ohio, 112 S. Ct. 1627, 1637 (1992)).
120. 33 U.S.C. § 1323(a)(2)(C) (1988); *Lujan II*, 972 F.2d at 315.

Energy v. Ohio analysis and resolved this tension through "the requirement that any statement of waiver be unequivocal,"[121] holding that the CWA did not waive sovereign immunity for punitive fines.[122]

D. *Analysis*

The Sierra Club attempted to distinguish *United States Dep't of Energy v. Ohio* from the facts in *Lujan II* case by arguing that the former case involved alleged violations of a state-issued permit[123] while *Lujan II* involved a permit issued directly by the EPA.[124] The Sierra Club argued that because the permit was issued by a federal agency, it was within the scope of the CWA section 1323(a) provision subjecting the United States to liability "for those penalties arising under Federal law."[125] The *Lujan II* court summarized the Sierra Club argument as stating that "when the government has violated a permit issued directly by EPA 'under federal law,' any confusion regarding the waiver of sovereign immunity in section 1323(a) disappears."[126]

Such an argument is possible because the Court in *United States Dep't of Energy v. Ohio* held that "Ohio's argument for treating state-penalty provisions as arising under federal law . . . fails."[127] The Court thus appeared to make a distinction between a state-issued permit and a permit issued directly by a federal agency. Such an implied distinction leaves unanswered the actual meaning of the phrase "civil penalties arising under federal law."[128] The Court speculated on possible reasons for inclusion of the phrase in the statute, but concluded its discussion by stating that the "question has no satisfactory answer."[129]

The Tenth Circuit was in a position to carve out an exception to the holding in *United States Dep't of Energy v. Ohio* by affirming the district court decision. Rather than doing so, the court read the Supreme Court's ambivalence broadly and concluded that *United States Dep't of Energy v. Ohio* stood for the proposition that "Congress did not legislate an unequivocal waiver of sovereign immunity regarding the assessment of punitive civil penalties against the United States under the Clean Water Act."[130]

While a disappointing decision for environmental groups, the court's decision nonetheless is a rather magnanimous attempt at creating uniformity and clarity on this issue. The Tenth Circuit gave no discussion of the fact that the Supreme Court decision in *United States Dep't*

121. *Lujan II*, 972 F.2d at 316 (quoting United States Dep't of Energy v. Ohio, 112 S. Ct. at 1639).
122. *Id.* at 316.
123. *United States Dept. of Energy v. Ohio*, 112 S. Ct. at 1632.
124. *Lujan II*, 972 F.2d at 316.
125. 33 U.S.C. § 1323(a)(2)(C) (1988).
126. *Lujan II*, 972 F.2d at 316.
127. *United States Dept. of Energy v. Ohio*, 112 S.Ct at 1639.
128. *Id.*
129. *Id.*
130. *Lujan II*, 972 F.2d at 316.

of Energy v. Ohio created a roadblock in the path taken by this area of law, which demanded a complete reversal of the circuit's past direction.

Sierra Club made a valid argument based on the "analytic gymnastics"[131] the Supreme Court performed to arrive at its conclusion. The Tenth Circuit indicated that a uniform approach was more important than a further fragmentation of the issue. Thus, the new direction of law on this issue appears relatively settled, even if in direct opposition to precedent. The court concluded that whether a CWA permit is issued by a state or by the EPA, "the result is the same—no waiver of sovereign immunity."[132]

Unless Congress disagrees with this new interpretation and clarifies the CWA, this new direction in the law will ultimately present federal agencies with more opportunities to use their own discretion. Under *Lujan II,* federal agencies are shielded completely from punitive fines for violations of the CWA. Fines will not accrue, and the agencies will not be threatened until a court order is actually imposed, making coercive fines a real possibility.[133] Although the Supreme Court disagreed with the argument that punitive fines were necessary deterrents, the fact remains that a significant tool capable of forcing agencies to comply with the Clean Water Act has been lost.

IV. NATIONAL ENVIRONMENTAL POLICY ACT: *HOLY CROSS WILDERNESS FUND V. MADIGAN*[134]

A. BACKGROUND

The Homestake II project is a long-term water development plan designed to provide the Colorado cities of Colorado Springs and Aurora (Cities) with additional water.[135] The project involves diverting water from Cross Creek and Fall Creek in the Holy Cross Wilderness Area to the Homestake Reservoir through a series of diversions and underground tunnels.[136] In 1982, the Cities sought a land use easement from the Forest Service, requiring it to conduct an environmental analysis.[137] The Forest Service prepared a draft Environmental Impact Statement (EIS) analyzing six project alternatives and conducted twenty public

131. *United States Dep't of Energy v. Ohio,* 112 S.Ct at 1641 (White, J., dissenting).

132. *Lujan II,* 972 F.2d at 316.

133. *United States Dept. of Energy v. Ohio,* 112 S. Ct. at 1638. Plaintiff State of Ohio argued that the purpose of punitive fines was "to encourage compliance with comprehensive, federally approved water pollution programs . . . . [F]ederal facility compliance . . . cannot be . . . accomplished without the [punitive] penalty deterrent." *Id.*

134. 960 F.2d 1515 (10th Cir. 1992).

135. *Id.* at 1518.

136. *Id.* The Wilderness Area is managed under the Wilderness Act, 16 U.S.C. § 1131-1136 (1988). However, due to Congressional intent, the Homestake II project is exempt from the Wilderness Act's ban on water projects. *Id.* § 1133(4).

137. *Holy Cross,* 960 F.2d at 1518. An environmental analysis is a detailed statement of environmental impact required by the National Environmental Policy Act ("NEPA") for any "major Federal actions significantly affecting the quality of the human environment . . . ." 42 U.S.C. 4332(2)(C) (1988). Environmental Impact Statements are submitted to the Council on Environmental Quality (CEQ) before regulations are promulgated. *Id.*

hearings on the water project.[138]

In 1983, the Forest Service completed its final EIS, concluding that the Homestake II project would not significantly impact wetlands or other environmental areas.[139] With this finding, the Forest Service issued its Record of Decision[140] and granted a land use easement. Once the land use easement had been obtained, the cities next sought a dredge and fill permit from the Army Corps of Engineers.[141] Rather than automatically adopting the Forest Service's final EIS, the Corps conducted an independent review of that statement.[142] The Corps concluded that the Forest Service had not adequately shown that there would be no wetlands damage.[143]

The Corps then hired an independent consultant, Aqua Resources, Inc. (ARI), to study the wetlands impact.[144] In 1984, ARI's report indicated a potential for wetlands harm.[145] ARI recommended undertaking additional studies, requiring pre- and post-construction monitoring and implementation of measures if deemed necessary by the additional studies.[146] The Environmental Protection Agency (EPA) then reviewed the ARI study and concluded that additional studies should be considered before construction of the water diversion project.[147]

Disregarding the advice of ARI as well as the EPA, the Corps chose not to conduct additional studies, nor did it prepare its own EIS.[148] Rather, it adopted the Forest Service EIS and issued a dredge and fill permit subject to specific conditions requiring the Cities design a plan that would prevent wetlands damage in the wilderness area.[149] The permit specifically stated that "the applicants shall prevent the loss of wetlands."[150]

In compliance with this permit condition, the Cities prepared a nine volume wetlands report and mitigation plan which provided for extensive, long-term monitoring as well as a detailed mitigation plan to prevent wetlands losses and concluded that no wetlands loss would

138. *Holy Cross*, 960 F.2d at 1518.

139. *Id.* at 1519.

140. *Id.*

141. *Id.* A dredge and fill permit is required "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a) (1988).

142. *Holy Cross*, 960 F.2d at 1519.

143. *Id.* Meanwhile, the United States Fish and Wildlife Service had conducted a review and concluded that there would be no detrimental impact on wetlands. *Id.*

144. *Id.*

145. *Id.* The report concluded that "[t]here is a potential for significant adverse impacts to downstream wetlands in terms of sequentially (over time) lowering the water table associated with several Cross and Fall creek wetlands." *Id.*

146. *Id.* at 1520.

147. *Holy Cross*, 960 F.2d at 1520.

148. *Id.*

149. *Id.*

150. *Id.* In the Record of Decision, the Army Corps District Engineer stated, as rationale for issuing the permit but only with the condition, "I intend that these wetlands be preserved, but I do not wish to unnecessarily prolong the permitting process or restrict the City's [sic] development of their water rights." *Id.*

occur.[151] The Corps approved this plan in 1988.[152]

The Holy Cross Wilderness Fund filed suit in 1985 to set aside the land use easement as well as the dredge and fill permit, claiming that both violated NEPA.[153] After trial, the district court concluded that the Corps did not violate NEPA or any other law. Holy Cross Wilderness Fund then appealed.[154]

B. *The Tenth Circuit Opinion*

On appeal, the Tenth Circuit agreed that there were no violations of NEPA. The Forest Service final EIS was properly adopted by the Corps and the Corps' need to seek additional information concerning the reasonably foreseeable significant adverse impacts was obviated by the Corps' decision to issue the permit with the condition that no wetlands losses occur.[155]

The court examined separately the issues of the EIS adoption and permit conditions. First, the court held that the Corps could adopt the Forest Service final EIS rather than complete another unless it found substantial doubt as to the adequacy of the final EIS.[156] Under these guidelines the court then looked to the adequacy of the original Forest Service final EIS. The court could not find that the final EIS, which addressed the impact of the water project on wetlands, lacked a "reasonable, good faith, objective presentation" of adverse environmental effects.[157] The court then decided that the lack of a *detailed* mitigation plan stemmed from the Forest Service's initial decision that the project would not adversely effect any wetlands areas.[158] The Forest Service was under no obligation to create a mitigation plan for adversities it did not anticipate.[159]

Second, the court examined the Fund's argument that the Corps erred in deciding not to supplement the final EIS after learning from ARI that additional data were needed.[160] Because experts disagreed on this issue, the court felt it best to defer to the discretion of the agency.[161] Thus, the court refused to second-guess the agency and

151. *Id.*
152. *Id.*
153. *Id.* at 1521.
154. *Id.*
155. *Id.* at 1526.
156. *Id.* An agency may adopt a Federal draft or final environmental impact statement or portion thereof provided that the statement or portion thereof meets the standards for an adequate statement under these regulations. *Id.* at 1522; 40 C.F.R. § 1506.3(a) (1992).
157. *Holy Cross*, 960 F.2d at 1526 (quoting Johnston v. Davis, 698 F.2d 1088, 1091 (10th Cir. 1983)). Judicial examination is "performed for the limited purpose of ensuring that the document is a good faith, objective, and reasonable explanation of environmental consequences that responds to the five topics of NEPA's concern." *Johnston*, 698 F.2d at 1091.
158. *Holy Cross*, 960 F.2d at 1526-27.
159. *Id.*
160. *Id.* at 1526. The court also addressed the Fund's arguments under the CWA. *See id.* at 1524-25 & 1527-29.
161. *Id.* at 1527. The Madigan court cited Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1988), which stated that when "specialists express conflicting views,

could find no basis for holding that the Corps' decision lacked a reasoned evaluation of the new information.[162] The court found this especially true in light of the fact that the Corps issued the permit with the stipulation that no wetlands losses occur.[163] This condition apparently obviated the need for the Corps to prepare a supplemental EIS.[164]

C. *Analysis*

NEPA requires that a federal agency considering a major action prepare an EIS.[165] Under these guidelines the agency is required to discuss ways to mitigate adverse environmental consequences.[166] However, "it is 'well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.' "[167] *Robertson v. Methow Valley Citizens Council*[168] discussed the fact that as long as the agency adequately identified and evaluated the adverse effects of an action, it may decide that other values outweigh the environmental effects.[169] However, the Court did not minimize the significance of the discussion of mitigation measures. The Court labeled them an "important ingredient of an EIS."[170]

The Tenth Circuit in *Holy Cross* dealt with a slightly more refined issue than did the Supreme Court in *Robertson*. The Fund argued that the Corps erred in adopting the Forest Service final EIS which did not contain a detailed mitigation plan. Under a strict application of *Robertson*, this appears to be a compelling argument. However, the *Holy Cross* court distinguished *Robertson* by showing Forest Service's initial conclusion that there would be no adverse effect on wetlands obviated the

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an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Id.*

162. *Id.*

163. *Id.*

164. Section 4332 of NEPA provides:

> [T]o the fullest extent possible . . . (2) all agencies of the Federal Government shall . . .
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on —
> (i) the environmental impact of the proposed action,
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
> (iii) alternatives to the proposed action,
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented . . . .

42 U.S.C. § 4332 (1988).

165. *Id.* § 4332(c) (1988).

166. *Id.*

167. *Holy Cross*, 960 F.2d at 1522 (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989)).

168. 490 U.S. 332 (1989).

169. *Id.* at 350.

170. *Id.* at 351. The Court proceeded to state that an "omission of a reasonably complete discussion of possible mitigation measures would undermine the 'action-forcing' function of NEPA." *Id.* at 352.

need to prepare a detailed mitigation plan.[171]

This conclusion presents a potentially large problem in challenging agency actions under NEPA. While agencies are under no obligation to adopt a mitigation plan, a discussion of such plans in the EIS is required.[172] The Tenth Circuit avoided a reversal of the Forest Service and Corps actions due to the lack of a detailed mitigation discussion in the Forest Service final EIS in two ways. First, the court deferred to the agency's judgment because of the conflicting opinions of experts.[173] Second, and most significantly, the court pointed to the fact that the Corps issued the dredge and fill permit with the stipulation that no wetlands loss occur.[174] The court concluded that, due to this stipulation, "the Corps no longer needed to evaluate 'reasonably foreseeable significant adverse impacts' on wetlands, because [the Corps] *assumed* such impacts [would occur] and essentially guaranteed that the Cities mitigate those impacts."[175] Under this analysis, the court held that there were no NEPA violations.[176]

Leaving aside the court's deference to the agencies, the court's acceptance of the Corps' permit stipulation presents two problems. In this instance the agency concluded that its actions presented no threat of loss to wetlands and yet also *assumed* that some adverse impacts were inevitable. With this type of awkward logic, it seems clear under the ruling in *Robertson* that a detailed mitigation discussion is required in a final EIS.[177] Also, the court overlooked the fact that *Robertson* does not require a mitigation plan merely for environmental loss, but focuses instead on "adverse environmental effects."[178]

Second, this reasoning leaves open the question of what agencies must do in similar future cases. The court's language suggests that a

171. *Holy Cross*, 960 F.2d at 1526.

172. *Robertson*, 490 U.S. at 351. *See, e.g.*, Kleppe v. Sierra Club, 427 U.S. 390, 410-11 (1976); Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 838 (D.C. Cir. 1972).

173. *Holy Cross*, 960 F.2d at 1527.

174. *Id.* at 1526.

175. *Id.* (emphasis in original).

176. *Id.*

177. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351 (1989). *Robertson* held that "[i]mplicit in NEPA's demand that an agency prepare a detailed statement on 'any adverse environmental effects which cannot be avoided should the proposal be implemented' . . . is an understanding that the EIS will discuss the extent to which adverse effects can be avoided." This rationale is supported by the CEQ implementing regulations which define mitigation to include:

> (a) Avoiding the impact altogether by not taking a certain action or parts of an action.
> (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
> (c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
> (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
> (e) Compensating for the impact by replacing or providing substitute resources or environments.

40 C.F.R. § 1508.20 (1992).

178. *Robertson*, 490 U.S. at 351.

stipulation attached to a permit will substitute for an adequate mitigation discussion in the agency's final EIS. This reasoning seems contrary to the goals of NEPA and the accepted interpretation of those goals as enunciated through cases such as *Robertson*.

The decision further constricts an already narrow standard of judicial review for finding an agency action "arbitrary and capricious."[179] The Tenth Circuit showed it was willing to defer to an agency decision with little inquiry into that agency's rationale. While the arbitrary and capricious standard is narrow, the court should not automatically defer as a general rule.[180] The facts showed that the Forest Service found there would be no wetlands loss, while independent experts and the Corps' District Engineer in his Record of Decision found a significant possibility for such adverse impacts.[181] While the court clearly may not substitute its judgment for that of an agency,[182] the court must undergo a review of the agency's decision. Such an inquiry was clearly lacking in *Holy Cross*. Such lack of evaluation leaves unclear whether the agency use of permit stipulations may substitute for EIS mitigation discussions in the future.

V. CONCLUSION

In *Holy Cross*,[183] the Tenth Circuit again showed itself to be extremely willing to defer to federal agencies under the *Chevron* rule.[184] The Supreme Court reinforced this deference in *United States Department of Energy v. Ohio*,[185] which compelled the Tenth Circuit to reconsider its earlier holding in *Lujan I*.[186] The *Lujan II* court reversed *Lujan I*, refusing to carve out an exception. By so doing, the court further extended substantial judicial deference to federal agency decisions. *Holy Cross* portrayed the court as willing to defer to the agency without undergoing a proper analysis of the federal agency's reasoning. This lack of inquiry seems inconsistent with the Supreme Court's ruling that the courts should make an independent inquiry into the agency's interpretations to ensure that the agency's decision was reasonable. In *Daigle*,[187] the court solidified the direction of lower courts on the issue of medical response costs. The *Daigle* holding strengthens the emerging trend that CERCLA

179. *See* Chevron, USA Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984).

180. The court should not automatically defer to the agency's express reliance without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision. Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989).

181. *Holy Cross*, 960 F.2d at 1527.

182. *See Marsh*, 490 U.S. at 378.

183. *Holy Cross*, 960 F.2d at 1515.

184. Chevron USA Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). *See* Robert D. Comer et al., Note, *Recent Developments in Environmental and Natural Resources Law*, 69 DENV. U. L. REV. 997, 1017 (1992).

185. 112 S. Ct. 1627 (1992). *See supra* text accompanying notes 98-109.

186. 931 F.2d 1421 (10th Cir. 1991). *See supra* text accompanying notes 76-97.

187. Daigle v. Shell Oil Co., 972 F.2d 1527 (10th Cir. 1992).

response costs do not extend to medical monitoring for past exposure to hazardous materials.

Christopher L. Cook