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Brief for Appellant, Brownfields Redevelopment Associates of New Union: Eighth Annual Pace National Environmental Law Moot Court Competition

Southern Methodist University School of Law

Civ. No. 95-214

IN THE

UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

BROWNFIELDS REDEVELOPMENT ASSOCIATES OF NEW UNION,

Appellant

v.

NEW UNION ROOFING AND DRYWALL

Appellee

and

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Appellant

v.

NEW UNION ROOFING AND DRYWALL

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW UNION

BRIEF FOR APPELLEE*

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* This brief has been reprinted in its original form. No revisions have been made by the editorial staff of the Pace Environmental Law Review.

QUESTIONS PRESENTED:

I. WHETHER NEW UNION ROOFING AND DRYWALL IS LIABLE TO BROWNFIELDS REDEVELOPMENT ASSOCIATION OF NEW UNION UNDER RCRA § 7002 FOR SITE RESTORATION COSTS RESULTING FROM THE DISPOSAL OF "ROOF ACID"?

II. WHETHER BROWNFIELDS REDEVELOPMENT ASSOCIATION OF NEW UNION AND THE ENVIRONMENTAL PROTECTION AGENCY ARE ELIGIBLE UNDER CERCLA § 107 FOR COST RECOVERY FROM NEW UNION ROOFING AND DRYWALL'S DISPOSAL OF "ROOF ACID"?

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BRIEF FOR THE APPELLEE

OPINIONS AND JUDGMENTS BELOW

The order and opinion of the United States District Court for the District of New Union are unreported and are reproduced in the Joint Appendix, attached hereto as Appendix A.

STATEMENT OF THE CASE

A. *Statement of Facts*

New Union Roofing and Drywall (NURD) is a small 3-employee roofing business known for its careful craftsmanship, painstaking attention to detail, and ability to always meet deadlines. (J.A. 2). NURD was incorporated in 1981, and operates exclusively in the one mile square "Moll's Gardens" neighborhood of Cathertown, New Union. (J.A. 2-3). From 1981 to 1983, NURD used a vacant lot located next to its owner's home for its business operations. (J.A. 3). During this time, NURD prepared batches of "roof acid" for removing old shingles from an existing roof. (J.A. 3). Roof acid comes in a powder form and is manufactured exclusively from natural ingredients, including several vegetable extracts. (J.A. 3). Prior to application on a roof, the roof acid powder is mixed with water. (J.A. 3).

When NURD employees prepared too much roof acid for a roofing job, the employees, in good faith and without any awareness that roof acid is a listed hazardous waste under Resource Conservation and Recovery Act (RCRA), mixed the excess roof acid with leftover fruit juice and put this mixture into its compost pit. (J.A. 3). NURD composted leaves, grass clippings and food scraps, believing that the vegetable extracts and other natural ingredients in the roof acid would also add nutrients to the compost pit and enhance the soil. (J.A. 3).

After NURD moved to a different location in 1984, it sold the vacant lot to Brownfields Redevelopment Associates of New Union (BRANU). (J.A. 4). BRANU is in the business of buying industrial-type sites, performing any environmental remedial action necessary for new development, and then selling the property for a profit. (J.A. 3). At the time the va-

cant lot was sold, neither party was aware that a hazardous substance had been disposed of on the property. (J.A. 4).

When the contamination was discovered, NURD readily acknowledged that it disposed of the roof acid-fruit juice mixture in the compost pit and cooperated fully with the Environmental Protection Agency (EPA) investigation. (J.A. 4). The roof acid used was of a technical grade, and while discarded roof acid was listed hazardous waster under RCRA, neither the roof acid alone nor the mixture which resulted when mixed with soft drinks qualified as characteristic hazardous waster under RCRA. (J.A. 4). BRANU remediated the site in 1993 and a family now lives in the residence BRANU constructed on the site. (J.A. 4).

B. *Procedural History*

BRANU timely filed suit against NURD in 1993 under RCRA and under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) seeking remediation damages of $200,000.00. (J.A. 4). EPA also commenced an action against NURD, seeking recovery of its $100,000 in sampling and analysis costs of the soils and groundwater at the Molls Garden site. (J.A. 4). The two actions were consolidated, with EPA participating as amicus on the RCRA issue. (J.A. 4).

In April 1995, United States District Court Judge R. N. Remus ruled in favor of NURD on both issues. Although Judge Remus found that Congress was within its power to enact RCRA § 7002, she held that NURD was not liable because there is no private cause of action for restitution created under RCRA § 7002. (J.A. 6). On the second issue, Judge Remus agreed that the mixture rule had been vacated, and thus, NURD is not liable under CERCLA § 107. (J.A. 8). BRANU and EPA have appealed the judgement to the United States Court of Appeals for the Twelfth Circuit.

SUMMARY OF THE ARGUMENT

This Court should affirm the judgment of the District Court on both issues. NURD is not liable to BRANU, first,

because RCRA does not provide for private causes of action for damages under § 7002. Second, RCRA's authority to regulate is granted via the Commerce Clause. NURD's business activities do not "substantially" affect interstate commerce. Therefore, RCRA § 7002 cannot regulate NURD's disposal of waste. Furthermore, NURD is not liable under CERCLA or the mixture rule for restitution damages. Contrary to EPA and BRANU's argument, the mixture rule was vacated by the D.C. Circuit Court, and its repromulgation fails to apply retroactively.

The lower court properly found RCRA § 7002 authority does not extend to restitution damages for private parties when not acting as private attorneys general. The BRANU lawsuit would fail to benefit society as a whole; instead its benefit is for BRANU alone. Moreover, RCRA permits only equitable relief. Damages years after the site cleaned up is not a remedy granted in equity.

RCRA § 7002 also does not meet the criteria established by the Supreme Court necessary to grant BRANU a private cause of action in order to sue NURD for damages. Most significantly, BRANU fails to demonstrate Congress implied a private cause of action when it enacted the statute. Even so, regardless of whether Congress intended to include an implied private cause of action, NURD still escapes liability. Recovery fails under § 7002, because the Molls Garden site does not present the imminent and substantial endangerment to health and environment necessary for BRANU to prevail.

Furthermore, congressional power to enact federal legislation such as RCRA § 7002 is curtailed under the Commerce Clause of the United States Constitution. NURD's business activities do not meet the test of substantially affecting interstate commerce; therefore, as a national statute, RCRA § 7002 is not applicable to NURD.

The District Court was also correct in holding NURD free from liability under CERCLA § 107. The disposal of roof acid mixed in with fruit juice is not a hazardous waste under CERCLA or RCRA. EPA's mixture rule is not relevant, since the rule was vacated by the D.C. Circuit. EPA did not

repromulgate the rule retroactively, consequently, there was no valid mixture rule in place at the time of the roof acid - fruit juice disposal.

STANDARD OF REVIEW

The standard of review for the two questions presented in this appeal is de novo. The first question concerns whether the lower court correctly held that the citizens-suit provision of RCRA does not provide for private causes of action for the recovery of clean up costs. The second question is whether the lower court properly interpreted hazardous waste under CERCLA § 107. Questions of statutory interpretation are questions of law properly reviewed under the de novo standard. *Furrer v. Brown*, 62 F.3d 1092, 1093 (8th Cir. 1995).

ARGUMENT AND AUTHORITIES

I. NURD IS NOT LIABLE TO BRANU FOR SITE RESTORATION COSTS BECAUSE RCRA § 7002 DOES NOT PERMIT RESTITUTION DAMAGES IN A PRIVATE CAUSE OF ACTION, NOR DOES THE STATUTE CONSTITUTIONALLY APPLY TO A LOCAL BUSINESS SUCH AS NURD.

A. *The district court correctly ruled that RCRA lacks specific statutory authority to award monetary damages to BRANU.*

1. The citizens-suit provision of RCRA § 7002 authorizes only equitable relief.

RCRA § 7002(a)(1)(B) provides that "[t]he district court shall have jurisdiction . . . to restrain any person who has contributed or is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste . . . to order such person to take such other action as may be necessary, or both. . . ." 42 U.S.C. § 6972(a)(1)(B) (1988). BRANU, however, is not asking to restrain NURD from hazardous waste disposal. BRANU is suing to recover *site restoration* costs and to increase its net

profits. (J.A. 4). BRANU originally purchased the Molls Gardens site in 1990 as part of its business, which specializes in acquiring industrial-type sites to remediate and sell at a profit. (J.A. 3). The plain language of RCRA § 7002 simply does not allow BRANU additional business profit through recovery of clean up costs. Rather, the statute authorizes only equitable relief.[1]

BRANU's lawsuit under § 7002 for restoration costs is not an equitable remedy. Granting monetary damages makes BRANU the "direct beneficiary of substantive relief," and substantive relief cannot be characterized as equitable relief. *See Commerce Holding Co. v. Buckstone*, 749 F. Supp. 441, 445 (E.D.N.Y. 1990). Moreover, "[a] plaintiff cannot transform a claim for damages into an equitable action by asking for an injunction that orders the payment of money." *Portsmouth Redevelopment and Housing Auth. v. BMI Apartments Assocs.*, 847 F. Supp. 380, 385 (E.D. Va. 1994)(quoting *Jaffee v. United States*, 592 F.2d 712, 715 (3rd Cir. 1979)). Therefore, BRANU's request for monetary damages cannot be cloaked as a request for injunctive relief.

2. BRANU is not entitled to relief under § 7002 because it is not acting as a "private attorneys general."

The citizens-suit provision in § 7002 quoted allows private causes of action when private parties are "genuinely acting as private attorneys general rather than pursuing a private remedy." *Commerce Holding*, 749 F. Supp. at 445 (quoting *Environmental Defense Fund, Inc. v. Lamphier*, 714 F.2d 331, 337 (4th Cir. 1983)). In *Commerce Holding*, owners of a commercial property listed as a hazardous waste site

1. *Kaufman v. Unisys Corp.*, 822 F. Supp. 1468, 1477 (N.D. Cal. 1993); *Portsmouth Redevelopment and Housing Auth. v. BMI Apartments Assocs.*, 847 F. Supp. 380, 385 (E.D. Va. 1994); *Prisco v. State of N.Y.*, No. 91 CIV.3990(RLC), 1995 WL 548322, at *19 (S.D.N.Y. Sept. 13, 1995); *Furrer v. Brown*, 62 F.3d 1092, 1094 (8th Cir. 1995); *Commerce Holding Co. v. Buckstone*, 749 F. Supp. 441, 445 (E.D.N.Y. 1990); *See generally* John E. Sullivan, *Implied Private Causes of Action and the Recoverability of Damages Under the RCRA Citizen Suit Provision*, 25 Envtl. L. Rep. 10408 (1995).

brought suit against the former tenants seeking injunctive and monetary relief under CERCLA, RCRA and common law. *Id.* at 443. The tenants of the property discharged hazardous wastes and declined to remediate the site. *Id.* The owners were unable to recover because they were seeking a private remedy and not acting as private attorneys general. *Id.* at 445. Private attorneys general do not receive direct benefits from their causes of action. BRANU is allowed a private cause of action under § 7002 only if it is genuinely acting as a private attorneys general, insuring that society as a whole benefits.

In its demand for restoration damages, BRANU is clearly not acting as a private attorney general. Although the district court can presumably use the full extent of its equitable and legal powers to enforce RCRA regulations, it can only do so when private citizens are acting as private attorneys general. *Environmental Defense Fund*, 714 F.2d at 337. BRANU is pursuing a private remedy against NURD and would directly benefit from an award of monetary damages. Remediation costs are a typical business expense of BRANU, and a monetary award for such remediation costs would unjustly enrich them. Accordingly, BRANU is precluded from recovering clean up costs from NURD. Such an award is a private remedy and contrary to the purpose of the statute.

B. *RCRA § 7002 does not explicitly provide for private causes of action for damages and none should be implied absent substantial evidence of Congressional intent.*

BRANU incorrectly argues that the language "to order . . . such action as may be necessary" implicitly creates a remedy to recover remediation costs. *See* 42 U.S.C. §6972(a)(1)(B) (1988). However, this language does not provide BRANU with site restoration damages because the statute itself does not provide such a private cause of action. When analyzing whether Congress intended to create private causes of action, a court must apply the four factor test set forth by the United States Supreme court in *Cort v. Ash*: 1) the plaintiff must be within the class for whose benefit the

statute was enacted; (2) the legislative history must explicitly or implicitly show an intent to create or deny a cause of action; (3) the proposed remedy must be within the context of the statutory scheme; (4) inferring a federal remedy must not interfere with traditional matters of state law. 422 U.S. 66, 78 (1975). These factors have become the test by which implied causes of action are found in federal statutes. In order for BRANU to recover damages under RCRA § 7002, it must meet the *Cort* test.

1. BRANU fails to establish the four *Cort* factors relevant to find an implied private cause of action.

    a. BRANU is not in the class for whose benefit § 7002 was enacted.

In refusing to find an implied private cause of action under § 7002, the Eighth Circuit held that the "benefit" of RCRA is for all citizens of the United States. *Furrer*, 62 F.3d at 1095. In *Furrer*, the plaintiffs were ordered to remediate acquired property which was contaminated with petroleum. *Id.* at 1093. After remediation, the plaintiffs sued to recover their costs from the former owners and tenants. *Id.* The court held that RCRA § 7002 is not for the "special benefit" of landowners who pay for clean up costs of their property even if they did not participate in the disposal of hazardous waste. *Id.* at 1095. Likewise, RCRA is not for the "special benefit" of BRANU. Congressional intent for a private cause of action may be implied if ". . . the language of the statutes indicates that they were enacted for the benefit of a class of which [the plaintiff] is a member." *Id.* (quoting *Northwest Airlines, Inc. v. Transport Workers Union of Am., AFL-CIO*, 451 U.S. 77, 91-92 (1981)). BRANU is not only a landowner, it is also a for-profit business seeking a private remedy. BRANU's cause of action for the recovery of damages would not benefit all the citizens of the United States since the site has already been remediated. (J.A. 4). Because BRANU is a for-profit business and would specially benefit by a damage award, it falls outside the class for whose benefit § 7002 was enacted.

b. Congress did not intend to create a private cause of action under § 7002.

When deciding to imply a private cause of action for damages, the most important consideration is whether the Legislature intended explicitly or implicitly to create such a cause of action. *Middlessex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981). Express provisions for private causes of action are conspicuously missing from § 7002; therefore, if such a remedy exists, it must be implied.

In fact, if Congress intended to create a private cause of action for damages under § 7002, it could have written the statute to include the remedy. *Furrer*, 62 F.3d at 1096. In comparison to RCRA, CERCLA does specifically include private causes of action for damages. 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993). Congress' failure to include a similar provision in § 7002 indicates a conscious decision not to provide the same remedy as CERCLA. Since "Congress knows how to define a right to contribution" in federal environmental law, Congress "deliberately" did not include private causes of action for the recovery of damages in § 7002. *See Furrer*, 62 F.3d at 1096 (quoting *Texas Indus., Inc. v. Ratliff Materials, Inc.*, 451 U.S. 630, 640 n.11 (1981)); *but see KFC W., Inc. v. Meghrig*, 49 F.3d 518 (9th Cir.) *cert. granted* 116 S. Ct 41 (1995). Congress' specific inclusion of a private cause of action in CERCLA strongly suggests there is no equivalent *implied* remedy under RCRA.

Moreover, § 7002 expressly includes both prohibitory and mandatory injunctive relief to stop the generation of hazardous waste or force compliance with regulations. *Furrer*, 62 F.3d at 1097. The Supreme Court has been hesitant to imply private causes of action in the area of federal environmental law. "[W]here a statute provides a particular remedy or remedies, a court must be chary of reading others into it."[2] Three

2. *National Sea Clammers*, 453 U.S. at 14-15 (holding no implied private cause of action under the Federal Water and Pollution Control Act and Marine Protection, Research and Sanctuaries Act); *See also California v. Sierra Club*, 451 U.S. 287 (1981) (no implied private cause of action under the rivers and Harbors Appropriations Act).

types of suits are available under § 7002. A citizen may sue: (1) persons in violation of any "permit, regulation, condition, requirement, prohibition, or order"; (2) persons who have "contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal or any solid or hazardous waste which may present an imminent or substantial endangerment to health or the environment"; and (3) the EPA Administrator for not performing a discretionary duty. 42 U.S.C. §§ 6972(a)(1)(A) - 6972(a)(2) (1988). The "comprehensive character of the remedial scheme expressly fashioned by Congress strongly evidences an intent not to authorize additional remedies." *Furrer* 62 F.3d at 1097 (quoting *Northwest Airlines*, 451 U.S. at 93-94). Thus, Congress' enactment of express remedies in § 7002 demonstrates there was no intent to *imply* a private cause of action.

Only the Ninth Circuit has held that RCRA affords a private cause of action. *KFC*, 49 F.3d at 523. In *KFC*, the Ninth Circuit erroneously adopted what they believed was the Eighth Circuit's interpretation of a completely different section of the RCRA, § 7003. *See Id.* RCRA § 7003 provides injunctive remedies for the EPA Administrator. *See generally* John E. Sullivan, *Implied Private Causes of Action and the Recoverability of Damages Under the RCRA Citizen Suit Provision*, 25 Envtl. L. Rep. 10408 (1995). The court concluded that § 7003 and § 7002 are similarly worded, and Congress intended that citizens-suits should be governed by the same standards of liability as governmental actions; so the relief of the two provisions should be similar. *KFC*, 49 F.3d at 521-522. This reasoning has been characterized as "a non sequitur that the remedies available to the respective plaintiffs must be the same." *Furrer*, 62 F.3d at 1100. Moreover, the EPA, as amicus in this case, disagrees with the Ninth Circuit's reasoning. (J.A. 1). The Ninth Circuit has clearly misinterpreted the statute by finding a private cause of action for damages under RCRA § 7002.

In *KFC*, the court misconstrued two Eighth Circuit decisions which did not address the issue of subject matter jurisdiction. *Id.* at 1101. Addressing the issue of subject matter

jurisdiction, § 7002 simply does not provide for a monetary remedy to recover cleanup costs. *Id.* Because the Ninth Circuit erroneously relied on decisions not addressing the issue of subject matter jurisdiction, *KFC* is not controlling.

Furthermore, *KFC* mistakingly relied on legislative history stating that the 1984 amendment to § 7002 "confers on citizens a limited right . . . to sue to abate an imminent and substantial endangerment pursuant to the standards of liability established under [§ 6973]." *Id.* at 1100. A plain reading of the language indicates that citizens have the right to "sue to abate." It does not say private citizens have the right to sue for cleanup costs. *Id.* Legislative history also fails to demonstrate that remedies available to private citizens are the same as the remedies available to the EPA under § 7003. *Id.* at 1101. Divining the legislative intent behind a federal statute is difficult at best. Even *KFC* agreed the legislative history "cut both ways." *Furrer,* 62 F.3d at 1101 (quoting *KFC*, 49 F.3d at 522 n.3).

Finally, *KFC* concludes that it would be unfair and against public policy not to allow a private cause of action for damages under RCRA. *KFC*, 49 F.3d at 523. The court was concerned that "innocent citizens" who had no part in creating the endangerment would be forced by the government to remediate the site quickly. *Id.* Such a quick response would not allow sufficient time to sue for the equitable relief expressly provided. *Id.* In a sharp dissent, Judge Brunetti cautioned that even if private citizens may not have time to bring enforcement injunctions, that alone should not precipitate a legislative determination absent convincing evidence of legislative intent. *Id.* at 527 (Brunetti, J., dissenting). Regardless, since BRANU was not required by the EPA to immediately remediate the site, BRANU had ample time to seek an injunction. (J.A. 4). Therefore, the public policy concerns of the *KFC* court do not apply to BRANU.

More importantly, *KFC* emphasized that CERCLA did not provide a private remedy because petroleum is not a hazardous substance included in the statute. Therefore, it any remedy was available for petroleum contamination, it must be implied under RCRA. However, in the instant case, there

was no petroleum contamination. BRANU can seek a private remedy under CERCLA and common law principles including nuisance, negligence or trespass. A cause of action under federal law should not be implied when based on tort principles. *See Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979). BRANU is not entitled to an implied cause of action under RCRA § 7002 because it does not meet the public policy argument set forth in *KFC*, nor is it precluded from a private tort remedy.

c. A private cause of action for damages under § 7002 is not "necessary to make effective the congressional purpose" of the statute.

The third *Cort* factor determines whether the remedy sought is "consistent with the underlying purposes of the legislative scheme" of the statute. 422 U.S. at 78. Congress enacted § 7002 "to promote the protection of health and the environment and to conserve valuable material and energy resources." 42 U.S.C. § 6902(a) (1988).

The purpose of the act has also been held "to prevent the creation of hazardous waste in the first place, rather than promote the cleanup of existing sites." *Furrer*, 62 F.3d at 1098. RCRA discourages citizens-suits, and "when compliance is at hand," may not be commenced if the EPA or the state is "diligently prosecuting" an enforcement suit. *Id.* The statute provides citizens-suits "to abate" violations of the regulations. This phrase, "to abate" is included in the legislative history, signifying that § 7002 was not intended to include private remedies for damage recovery. *See Id.*

d. An implied private cause of action under § 7002 would frustrate the purpose behind RCRA.

Finally, the last *Cort* factor concerns the relationship between federal law and state law. If the cause of action is "traditionally relegated to state law," no implied federal cause of action should be found. *Cort*, 422 U.S. at 78. However, remediation of environmental hazards may not be strictly an

area of state concern. *Furrer*, 62 F.3d at 1099. The litigation of pendant state claims brought with RCRA citizens-suits was believed to potentially frustrate the prompt abatement of imminent hazards. *Id.* RCRA contains a savings clause preserving state law claims; therefore the *Cort* factor is neutral and does not support the implication of a private cause of action. *Id.* But because the first two Cort factors do not indicate any congressional intent, the last two *Cort* factors are not relevant here. *See California v. Sierra Club*, 451 U.S. 287, 298 (1981).

BRANU cannot maintain a private cause of action for the recovery of cleanup costs under RCRA § 7002 because the statute does not provide for such a remedy. Moreover, a private remedy should not be implied because there is no congressional intent supporting a private cause of action within the language of the statute. Additionally, the *Cort* factors used to determine whether congressional intent exists fail to support implying a private cause of action. Other remedies under common law exist under which BRANU may seek to recover its cleanup costs. Therefore, the district court was correct in holding RCRA does not provide private causes of action for the recovery of damages. In fact, the recognition of a private cause of action for damages would increase litigation in federal courts, ultimately frustrating the prompt prevention of the generation of environmental endangerments.

2. Even if a private cause of action is implied, NURD is not liable under RCRA § 7002 because the Molls Garden site no longer presents an imminent and substantial endangerment.

To prevail under the citizens-suit provision of § 7002, BRANU must show that the waste disposed and stored at the site "may present an imminent and substantial endangerment to health or the environment." *See Murray v. Bath Iron Works Corp.*, 867 F. Supp. 33, 41 (D. Me. 1994). Actual harm or risk of threatened or potential harm will suffice to maintain a cause of action. *Id.* BRANU's inability to demonstrate imminent or substantial endangerment, or any risk of harm

at the Molls Garden site precludes it from prevailing under § 7002.

NURD last disposed of waste in 1983, and BRANU has stipulated that the site was remediated in 1993. (J.A. 4). A RCRA violation exists only "so long as the waste has not been cleaned up and the environmental damage has not been sufficiently remedied." *Prisco*, 1995 WL 548322 at *19. Because the site has been remediated and a family is currently living on it, BRANU fails to establish that an "imminent and substantial danger" exists. Since "only injunctive relief is available, wholly past violations of RCRA cannot be subject to citizens-suits under § 7002 of the RCRA." *Id.* Therefore, NURD cannot be liable to BRANU for any past violations under § 7002.

C. *NURD is not liable to BRANU because RCRA does not apply to a local, intrastate business.*

1. Congress' authority to enact RCRA only extends to legislation that affects interstate commerce.

The Commerce Clause set forth in the United States Constitution grants Congress power to "regulate Commerce with foreign Nations, and among the several States." U.S. CONST. art. I, § 8, cl. 3. The goal under the Commerce Clause is to regulate interstate commerce, or commerce between states. It does not "comprehend . . . commerce, which is completely internal. . . and which does not extend to or affect other states." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194 (1824). "The completely internal commerce of the State, then, may be considered reserved for the State itself." *Perez v. United States*, 402 U.S. 146, 150 (1971) (quoting *Gibbons*, 22 U.S. (9 Wheat.) at 195). NURD's local roofing company is not the type of economic activity affecting interstate commerce. For example, large multi-state roofing company would qualify as working in interstate commerce. NURD is a local business operating in a very small area of one town. In other words, NURD operates completely within the internal commerce of the State of New Union. Congressional power to enact fed-

eral legislation does not extend to regulating NURD's local intrastate business.

Over time, the commerce clause has been interpreted to apply federal legislation regulating an activity which "substantially affects" interstate commerce. *See United States v. Lopez*, 115 S. Ct. 1624, 1630 (1995). Congress is granted the power to regulate intrastate activities that "have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937). Therefore, Congress does not have the authority to regulate an intrastate business such as NURD, whose business activity does not substantially affect commerce between the states.

2. NURD's roofing business is so local in nature that it does not affect interstate commerce, nor is it an intrastate economic activity that "substantially" affects interstate commerce.

The Supreme Court recently clarified that congressional power to enact statutes under the commerce clause extends to three broad categories of activity:

> First, Congress may regulate the use of channels of interstate commerce. . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. . . . Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce.

Lopez, 115 S. Ct. at 1629-1630. In considering all three categories, it becomes clear that NURD's business is not governed by RCRA.

First, while RCRA § 7002 can be considered in many instances as regulating the channels of interstate commerce, it clearly is not with respect to NURD. RCRA governs the "handling, storage, treatment, transportation, or disposal" of hazardous waste. 42 U.S.C. § 6972 (a)(1)(B) (1988). Of course,

transportation is critical in the use of the channels of interstate commerce. This has been demonstrated numerous times with a variety of cases where the commerce clause has been invoked to strike down restrictive state statutes limiting the transportation of RCRA "hazardous waste" across state lines. *See, e.g., City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). And since navigable waterways have long been considered essential to the channels of interstate commerce, if NURD had disposed of a RCRA hazardous waste in a river or stream, then NURD certainly would be subject to the RCRA regulation. *See generally Gibbons*, 27 U.S. (9 Wheat.) 1. However, NURD does not use any channels of interstate commerce such as transportation across state lines, or navigable waterways, for its business or for disposal of hazardous waste. As such, NURD's business activity is not subject to the first commerce clause category.

The second category empowers Congress to regulate instrumentalities of interstate commerce, such as aircraft or vehicles used in interstate commerce. RCRA applies to hazardous waste, not to an instrumentality of interstate commerce. The statute is not attempting to regulate instrumentalities of interstate commerce and is not applicable in the instant case.

Hence, the only way NURD would be subject to RCRA is if its activities in any way have a substantial relation to interstate commerce. But NURD is strictly a local industry. All parties stipulate that NURD does not have any direct impact on interstate commerce. (J.A. 5). Nor does NURD's business have a sufficient relationship to interstate commerce. While the roof acid was manufactured in another state, this alone is not sufficient to put NURD into interstate commerce. In fact, the roof acid is analogous to the gun in *Lopez*. A gun, although manufactured elsewhere and then transported across state lines, is still not sufficient interstate commerce to allow Congress to regulate its activity in a local school yard. *See Lopez*, 115 S. Ct. 1624. Accordingly, the purchase of roof acid, regardless of where it is manufactured, is not sufficient to qualify as interstate commerce for a local roofing company.

Even further removed from the "substantial" requirement is NURD's payroll to its employees. Indeed, if an employee paycheck was sufficient to qualify as interstate commerce, than almost any law would be federal in nature and not regulated by the states. It would be difficult, if not impossible, to locate a business or a person who does not use or buy items manufactured solely in its own state. In fact, in today's market it is a challenge just to locate items manufactured within the United States. More significantly, if a paycheck or a manufactured item qualified as substantial interstate commerce, then the Supreme Court would most certainly have upheld the gun law in *Lopez*. Schools employ and pay numerous individuals, and purchase numerous items such as textbooks, supplies, athletic equipment and furniture. The Supreme Court's refusal in *Lopez* to recognize employee paychecks, or a manufactured item as "substantially relating" to interstate commerce as sufficient to uphold a federal law, demands a similar outcome with respect to the case at hand.

This Court's recognition that RCRA § 7002 does not apply to NURD will not require overturning the statute. Unlike the regulation in *Lopez*, NURD is not advocating a reversal of RCRA. The difference between the Gun-Free School Zones Act and RCRA is while all school districts are local in nature, not all businesses using roof acid are necessarily local in nature. RCRA does legitimately apply through the commerce clause to numerous businesses which are engaged in interstate commerce. However, the statute's authority to regulate must be determined on a case by case basis. "Whether or not particular action does affect commerce in such a close and intimate fashion as to be subject to federal control, and hence to lie within the authority conferred . . . is left by the statute to be determined as individual cases arise." *Jones & Laughlin Steel*, 301 U.S. at 32. Since NURD's business activities and its actions in disposing of roof acid in the compost pit are local, RCRA is constitutionally precluded from applying to NURD.

II. BRANU AND EPA CANNOT RECOVER UNDER CERCLA FOR NURD'S DISPOSAL OF ITS ROOF ACID MIXTURE.

All parties stipulate that the roof acid - fruit juice mixture is not a characteristic waste under RCRA or CERCLA. (J.A. 4). In addition, while a roof acid-water mixture is listed as a hazardous waste under RCRA, the mixture of roof acid, water, and fruit juice is not a listed hazardous waste either under CERCLA or RCRA. The only way this dilution of an otherwise hazardous waste could be legally classified as an actionable hazardous waste would be under EPA's "mixture rule." This mixture rule states that a mixture of a solid waste with a listed hazardous waste qualifies as an actionable hazardous waste. 40 C.F.R. § 261.3(a)(2)(iv) (1995). However, NURD cannot be liable under the mixture rule because it has been binding only since 1992, nine years after NURD last disposed of its roof acid mixture at the site in question. (J.A. 3).

A. *The D.C. Circuit Court of Appeals clearly vacated the mixture rule retroactively.*

The D.C. Court of Appeals retroactively vacated the EPA mixture rule in 1991, with the order officially taking effect in 1992.[3] In *Shell*, the petitioners challenged several EPA provisions under § 553 of the Administrative Procedure Act (APA). *Id.* The court held that since EPA did not follow the APA's notice and comment procedure when it first promulgated the mixture rule, the rule was invalid as a matter of law. More specifically, the mixture rule was not an implicit intention or "logical outgrowth" of EPA's proposed RCRA regulations concerning hazardous waste. *Id.* at 752. This holding itself is enough to decide the issue, because the United States Supreme court stated in *Chrysler Corp. v. Brown* that a rule improperly promulgated through notice and comment

3. *See Shell Oil Co. v. EPA*, 950 F.2d 741 (1991) (Appellants may try to argue NURD's disposed waste is a hazardous waste under EPA's derived-from rule. The derived-from rule was also struck down in *Shell* for the same reasons as the mixture rule, and was repromulgated by EPA along with the mixture rule. Any procedural argument about the mixture rule applies equally to the derived from rule, and so the two will be analyzed together.).

procedure has "no force or effect of law" and is void *ab initio.* 441 U.S. 281, 313 (1979). There is only one caveat to this principle; as the D.C. Circuit acknowledged in *Fertilizer Institute v. EPA* (an opinion issued shortly before *Shell*), "when equity demands, an unlawfully promulgated regulation can be left in place while the agency provides the proper procedural remedy." 935 F.2d 1303, 1312 (D.C. Cir. 1991). However, a closer examination of the *Shell* opinion reveals the D.C. Circuit did no such thing in the mixture rule context. Thus, the rule has been binding only since 1992, when EPA properly repromulgated it. 57 Fed. Reg. 7628 (1992).

1. The D.C. Circuit clearly intended to vacate the mixture rule retroactively, not prospectively.

The *Shell* court stated "because the EPA failed to provide adequate notice and opportunity for comment with regard to the mixture and derived-from rules . . . we vacate these rules and remand them to the Agency." 950 F.2d at 765. The key point here is the D.C. Circuit's use of the word "vacate": "'vacate', as the parties should well know, means 'to annul; to cancel or rescind; to declare, to make, or to render, void; to defeat; to deprive of force; to make of no authority or validity; to set aside.'" *Action on Smoking & Health v. Civil Aeronautics Board*, 713 F.2d 795, 797 (D.C. Cir. 1983). Certainly an administrative rule deprived of all force, authority, and validity does not have retroactive effect; indeed, it never was the law. This is especially true because an incorrectly promulgated statute or rule is illegal to begin with and cannot be used to impose sanctions on those who "violate" it. *See Chrysler*, 441 U.S. at 313. In fact, the D.C. Circuit denied EPA's subsequent motion to define the *Shell* ruling as voiding the mixture rule only prospectively. *Shell Oil Co. v. EPA*, No. 80-1532, et al. (D.C. Cir. March 5, 1992)(order denying motion for clarification).

Since the D.C. Circuit had already defined 'vacate' as meaning retroactive invalidation of a regulation, there is no evidence to indicate they meant anything else when they choose to use that word in *Shell*. The Eighth Circuit pointed this out when they held that the D.C. Circuit had retroac-

tively vacated the mixture rule. *United States v. Goodner Bros. Aircraft Inc.*, 966 F.2d 380, 385 (8th Cir.) ("consistent with the meaning of the word 'vacate', we find that invalidation of the mixture rule [in *Shell*] applies retroactively") *cert. denied*, 113 U.S. 967 (1993). The *Shell* court did recommend that EPA consider repromulgating the mixture rule: "In light of the dangers that may be posed by a discontinuity in the regulation of hazardous wastes, however, the agency may wish to reconsider reenacting the [mixture and derived-from] rules . . . ." 950 F.2d at 752. Taken out of context, this "discontinuity" language could perhaps be read to mean the mixture rule was in effect until the D.C. Circuit "discontinued" it; i.e., that the court set aside the rule on a merely prospective basis. However, this interpretation is inconsistent with the court's own use and definition of the word "vacate" as describing a retroactive ruling. *See Action on Smoking*, 713 F.2d at 797. Furthermore, since the court said its invalidation of the mixture rule would cause a discontinuity in the regulation of hazardous waste, it clearly did not use the *Fertilizer Institute* equity doctrine to maintain the mixture rule until it was properly repromulgated. A rule kept in place would not cause a discontinuity in the law. Thus, *Chrysler's* holding governs an improperly promulgated rule, demanding the mixture rule to be void *ab initio*.

More significantly, the court declared "we vacate [the mixture rule] on procedural grounds". *Shell*, 950 F.2d at 752. In other words, the court expressed no opinion as to the substantive merits. Because the rule under *Chrysler* was void *ab initio*, substantive arguments were moot. In light of this evidence, reading the 'discontinuity' language as describing a prospective ruling is an unreasonable interpretation insufficient to defeat this case. *See Goodner Bros.*, 966 F.2d at 384-385.

The court expressed no problem with the concept of the mixture rule; the problem was EPA's illegal promulgation of it. *Shell*, 950 F.2d at 752. The D.C. Circuit obviously intended to preserve the integrity of the APA rulemaking procedures. Otherwise, *Shell* would have maintained the mixture rule in equity while giving EPA the opportunity to

remedy its procedural mistakes. In fact, the D.C. Circuit only one year earlier had endorsed this approach for cases when equity demands retention of the defective rule or statute. *Fertilizer Inst.*, 935 F.2d at 1312. Therefore, the decision to vacate the mixture rule clearly shows that its fatal procedural defects outweighed any reason to recognize the rule as ever having been binding law. The court had no intention of allowing the improperly promulgated rule to have any legal effect; the rule was void from the beginning.

2. Supreme Court authority supports the D.C. Circuit's retroactive approach.

Supreme Court authority decisively supports the D.C. Circuit's clear decision to vacate the mixture rule retroactively. The Court has unequivocally held that agency rules not properly subjected to notice and comment are void *ab initio*. *Chrysler*, 441 U.S. 281 (1979). Thus, the Supreme Court has endorsed and indeed required retroactivity in the same procedural context that faced the D.C. Circuit in *Shell*.

Appellants may argue for the proposition that judicial decisions can be applied prospectively. *See Chevron Oil v. Huson*, 404 U.S. 97 (1971). However, the Court in subsequent decisions has clearly precluded the use of *Chevron Oil* to justify selective prospectivity. "[W]e have never employed *Chevron Oil* to the end of modified civil prospectivity." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 538 (1991). "[S]elective prospectivity also breaches the principle that litigants in similar situations should be treated the same, a fundamental component of stare decisis and the rule of law generally . . . selective prospectivity appears never to have been endorsed in the civil context." *Id.* at 537-538.

In addition, the Court specifically said a court's retroactive decision cannot be made prospective by another court. "[T]he question is whether it is error to refuse to apply a rule of federal law retroactively after the case announcing the rule has done so. We hold that it is, principles of equality and stare decisis here prevailing over any claim based on a *Chevron Oil* analysis." *Id.* at 540; *See also Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510 (1993). Therefore the mix-

ture rule was invalidated retroactively and not in effect when NURD discarded its roof acid mixture. As a result, NURD cannot be held liable under it.

Affirming that the mixture rule was void *ab initio* until its 1992 repromulgation will cause no relitigation problems. *Shell*'s retroactive invalidation would not lead to cases settled under the mixture rule prior to 1992 being reopened. "Of course, retroactivity in civil cases must be limited by the need for finality . . . once suit is barred by res judicata or by statutes of limitation or repose, a new rule cannot reopen the door already closed." *Beam*, 501 U.S. at 541 (relying on *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940)). In other words, no adjudicated cases can be reopened, thus preserving finality of judgment. Unlitigated cases arising from pre-1992 incidents will not be subject to the improperly promulgated mixture rule, thereby preserving the D.C. Circuit's holding in *Shell*.

3. EPA did not appeal the *Shell* decision and therefore EPA and BRANU are barred from arguing that *Shell* was a prospective ruling.

EPA did not appeal the D.C. Circuit's decision in the *Shell*. Instead, it simply repromulgated the rule the same day the decision took effect. 57 Fed. Reg. 7628, 7630 (1992). EPA's failure to appeal now collaterally estops both EPA and BRANU from challenging the court's retroactive invalidation of the mixture rule.

Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision is dispositive in subsequent litigation involving a party or its privies to the prior proceeding. *Montana v. United States*, 440 U.S. 147, 153 (1979). Generally, courts apply a four-part test to see if collateral estoppel applies to a particular issue: (1) the issue sought to be precluded is the same as that in the prior action, (2) the issue was actually litigated in the prior action, (3) deciding the issue was essential to the judgment in the prior case, and (4) the party to be estopped was fully represented in the prior action. *Levinson v. United States*, 969 F.2d 260, 264 (7th Cir.), *cert. denied*, 113 S. Ct. 505 (1992).

All four requirements are satisfied here: (1) the issue here, as in *Shell*, is the validity of the mixture rule before 1991, (2) clearly all parties in *Shell* litigated that issue, (3) since the D.C. Circuit invalidated the mixture rule retroactively, whether or not the rule had retroactive effect was certainly essential to the outcome of that case, and (4) EPA had full opportunity to litigate the rule's validity. In fact, EPA even requested the D.C. Circuit to clarify its decision as being prospective only. *Shell Oil v. EPA*, No. 80-1532, et al. (D.C. Cir. March 5, 1992)(order denying motion for clarification). Since the collateral estoppel test is fully satisfied, EPA is barred from arguing in this case that the *Shell* decision was prospective.

BRANU is similarly barred due to EPA's failure to appeal *Shell*. "[I]nterests [of collateral estoppel] are similarly implicated when nonparties assume control over litigation in which they have a direct financial or proprietary risk and then seek to redetermine issues previously resolved." *Montana*, 404 U.S. at 154. Nonparties do not have to be 'privies' in a strict legal sense in order to be subject to collateral estoppel. *Id.* at 155 n.5. Although BRANU was not involved in the *Shell* litigation, it certainly had a financial interest in its outcome. When the court declared the mixture rule void *ab initio*, BRANU lost all rights to damages under that rule for NURD's actions between 1981 and 1983. BRANU is now collaterally estopped from contesting the court's disposition of the retroactivity issue.

One subsequent Supreme Court decision, *United States v. Mendoza*, did limit the use of collateral estoppel against the government in cases where only one party was involved in the prior litigation. 464 U.S. 154, 162-163 (1984). However, this holding applied only to the use of offensive collateral estoppel against the government. *Id.* NURD seeks here to use collateral estoppel only in a defensive manner; courts have been much more receptive to this approach. Therefore, *Mendoza* does not apply here and the *Montana* and *Levinson* analyses estop EPA and BRANU from challenging *Shell*. As a result, the mixture rule was unquestionably void *ab initio*

until 1992, too late to apply to NURD's disposal of roof acid in this case.

B. *EPA did not repromulgate the mixture rule retroactively.*

1. Supreme Court authority says there is a strong judicial presumption against statutory retroactivity.

Appellants contend that even if *Shell* struck down the mixture rule *ab initio*, EPA repromulgated it in 1992 with full retroactive effect dating back to its original promulgation in 1980. However, recent Supreme Court decisions seriously call this assumption into question. "[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their expectations accordingly." *Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1497 (1994).

2. This presumption is supported by the structure of the Constitution.

The *Landgraf* Court cited a structuralist argument for this presumption of prospectivity. The Court pointed out that the Constitution has several provisions limiting or prohibiting the issuance of retroactive statutes and rules. *Landgraf*, 114 S. Ct. at 1497. For example, the Ex Post Facto Clause unequivocally prohibits retroactive penal legislation. U.S. CONST. art. I, §§ 9-10. No Bills of Attainder are allowed for retroactive punishment of disfavored persons or groups. *Id.* The Takings Clause protects vested property rights. U.S. CONST. amend. V. These provisions support a strong presumption against statutory retroactivity in civil cases.

3. The repromulgation language of the mixture rule does not support giving it retroactive effect.

Under *Landgraf* (in accord with its presumption against statutory retroactivity), "congressional enactments and ad-

ministrative rules will not be construed to have retroactive effect unless their language requires this result." 114 S. Ct. at 1496 (quoting *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1981)). The language of the repromulgated mixture rule does not require this result.

EPA's repromulgation states "today's decision to reinstate the 'mixture' rule . . . maintains without interruption the legal framework for the regulation of hazardous waste originally established under RCRA in 1980." 57 Fed. Reg. 7628, 7630 (1992). However, this assumption rests entirely on the immediately preceding sentence: "[T]he Agency believes that the Shell Oil decision is not intended to be retroactive. As a result, today's decision to reinstate . . .(followed by previous quote)." *Id.* Therefore, EPA thought its repromulgation was retroactive only because it interpreted the *Shell* decision as prospective. Since *Shell* was clearly a retroactive decision, and since EPA is now estopped from challenging that point, the repromulgation language certainly does not meet the *Landgraf* standard of "requiring" retroactive application of the mixture rule.

4. Public policy and judicial concerns dictate against applying the repromulgated mixture rule retroactively.

The Supreme Court has acknowledged an exception to its prospective presumption. If retroactive application of a statute would support an important social policy, such application may be proper. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 14-20 (1976). Certainly regulation of hazardous wastes is a valid policy concern. However, it is not enough to justify retroactive application of the mixture rule for several reasons.

First, the mixture rule is not necessary for EPA to effectively regulate hazardous wastes. The rule applies to any mixture that contains some portion of a listed hazardous waste, whether the mixture itself displays any hazardous characteristics or not. 40 C.F.R. § 261.3(a)(2)(iv)(1995). The EPA has conceded that it can use this rule to prosecute the disposal of a mixture without even proving that the mixture

is actually harmful. 57 Fed. Reg. 7628, 7629 (1992) ("The Agency has acknowledged that, in some cases, these [mixed] wastes may present little risk".). On the other hand, any substance, even if a mixture, can be actionable by EPA if it does exhibit characteristics of a hazardous waste. 40 C.F.R. § 261.3(a)(2)(iii) (1995). It follows that EPA can regulate any substance proven to have hazardous characteristics, even if it is disposed of before 1992, and does not need the mixture rule to be able to do so. In addition, all parties in this case have stipulated that NURD's roof acid-fruit juice mixture is not a characteristic waste. (J.A. 4).

Furthermore, retroactive application of the mixture rule would also render the APA meaningless. An agency could reinstitute a rule the same day it is officially struck down (as EPA did in this case), and the APA would have had no effect. The APA must invalidate illegally issued rules in order to protect traditional notions of due process. Agencies that do not follow prescribed notice and comment should not be allowed to have their resulting rules stand. Invalidating improperly promulgated agency rules gives agencies the incentive to follow due process and to allow all potentially affected parties the right to be heard through the notice and comment process before the rules become final.

There is also a separation of powers concern here. EPA should not be allowed to repromulgate its mixture rule retroactively because that would completely invalidate the D.C. Circuit's holding in *Shell* and thus its authority to enforce the APA. Holding EPA to a prospective repromulgation would preserve and respect the authority of both the courts and the APA itself. These concerns outweigh the minimal effect that vacating the mixture rule could have on the enforcement of hazardous waste disposal.

C. *Without a statutory mixture rule, NURD's disposed mixture cannot be classified as an actionable hazardous waste.*

1. A mixed waste is not inherently a hazardous waste.

Some commentators have urged that a mixture of solid waste and hazardous waste should be treated as a hazardous waste, regardless of whether there is a written, binding mixture rule. *See generally* James E. Satterfield, *EPA's Mixture Rule: Why the Fuss?*, 24 Envtl. L. Rep. 10712 (1994); Jeffrey M. Gaba, *The Mixture and Derived-From Rules Under RCRA: Once a Hazardous Waste Always a Hazardous Waste?*, 21 Envtl. L. Rep. 10033 (1991). However, this argument overlooks EPA's past comments about the rule itself.

If listed hazardous wastes diluted by mixture are still actionable hazardous wastes, EPA would never have had to issue the mixture rule in the first place. Its promulgation in 1980 and repromulgation in 1992 clearly show that EPA was filling a gap in its regulations. In fact, EPA's explanatory preamble to the 1980 mixture rule promulgation says "[w]ithout a 'mixture rule', generators of hazardous waste could evade Subtitle C [hazardous disposal] requirements simply by commingling listed wastes with nonhazardous solid waste". 45 Fed. Reg. 33084, 33095 (1980). EPA then made the same point in its 1992 repromulgation: "[w]ithout a 'mixture' rule, generators of hazardous waste could potentially evade regulatory requirements by mixing listed hazardous waste with nonhazardous solid waste" 57 Fed. Reg. 7628 (1992). It is entirely inconsistent for EPA to now argue that the mixture rule was never necessary, and that mixtures have always been subject to hazardous waste classification.

2. The majority of courts have refused to equitably enforce the vacated mixture rule.

It should be argued that EPA's comments envisioned only a possible loophole and that it was not conceding the nonexistence of an implied mixture rule are also unpersuasive. The majority of current case law has refused to imply a mixture rule. The D.C. Circuit recognized that its vacation of

the mixture rule would lead to a "discontinuity" in the law regarding hazardous waste disposal. *Shell*, 950 F.2d at 752. There would be no such discontinuity if the mixture rule had existed all along as an enforceable, unwritten rule. In addition, the Seventh and Eighth Circuits have refused to enforce the mixture rule absent its legal, written presence in EPA's regulations. *United States v. Bethlehem Steel Corp.*, 38 F.3d 862, 871 (7th Cir. 1994)("we must reject the notion that the policy of the mixture rule is 'embodied' as a general principle within the definition and that such a principle may operate to reach wastes that would have been covered by the mixture rule, but for its invalidation."); *Goodner Bros.*, 966 F.2d at 380.

One standing decision has gone the other way. *United States v. Marine Shale Processors, Inc.*, No. CIV.A.90-1240, 1994 WL 419910 (W.D. La. Aug. 1, 1994). The district judge held that "EPA promulgated the mixture rule out of an abundance of caution in order to clarify that the regulatory scheme . . . encompassed listed wastes which were combined with other solid wastes. . . . I interpret the statute and regulations as including such wastes even absent the mixture rule". *Id.* at *3. However, one unreported decision has little or no persuasive value, especially when it has been contradicted by three United States appellate circuit courts. Therefore, case law has overwhelmingly held that the mixture rule's only binding existence is as a properly promulgated, written rule. In other words, the mixture rule is binding only on actions taking place since 1992.

3. Policy concerns counsel against enforcing an unwritten mixture rule.

The same policy concerns that weigh against a retroactive reading of the mixture rule also counsel against enforcing an unwritten mixture rule. First, since all characteristic wastes, whether mixed or not, can still be regulated under RCRA, very few if any truly dangerous waste mixtures would go unregulated in the absence of a mixture rule. Also, enforcing unwritten "regulations" would set a dangerous precedent for avoiding the APA. The APA exists as a due process check

on the enormous discretion Congress and the courts have given to federal agencies like EPA. That is why such safeguards as the required notice and comment procedures are in place. If agencies were allowed to somehow enforce unwritten rules without penalties, then the parties who stand to be affected would have no recourse for participating in and voicing their concerns through the rule implementation process. Finally, unwritten rules would violate traditional due process by not providing adequate notice to those who could be penalized both civilly and criminally for not following them. In short, the costs to society far outweigh any possible benefits from implying and enforcing an unwritten mixture rule.

CONCLUSION

For the foregoing reasons, Appellee New Union Roofing and Drywall respectfully requests this Court to uphold the District Court's decision disallowing a private cause of action for restitution under RCRA § 7002, and the District Court's holding that the mixture rule was vacated and therefore the roof acid - fruit juice mixture was not a hazardous waste. Appellee also requests this Court reverse the District Court's holding that the Congress was within its Commerce Clause authority in enacting RCRA § 7002.