Pace Environmental Law Review

Volume 13
Issue 2 *Spring 1996*
Symposium Edition

Article 30

April 1996

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

University of Baltimore School of Law

Civ. No. 95-214

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

BROWNFIELDS REDEVELOPMENT ASSOCIATES OF NEW UNION,

and

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Appellants,

v.

NEW UNION ROOFING AND DRYWALL,

Appellee

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

Brief for the Appellant, BROWNFIELDS REDEVELOPMENT ASSOCIATES OF NEW UNION*

Counsel for the Appellant
Victor E. Cretella, III
Dorothy M. Guy
Thy Christine Pham

University of Baltimore
School of Law
Baltimore, Maryland.

This brief is in a type size of ten characters per inch.

* 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. May Brownfields Redevelopment Associates of New Union (BRANU) receive restitution under the Resource Conservation and Recovery Act § 7002 from New Union Roofing and Drywall (NURD) for its disposal of the listed hazardous substance "roof acid" on the property which BRANU purchased from NURD?

II. May BRANU recover cleanup costs under the Comprehensive Environmental Response, Compensation, and Liability Act § 107 from NURD for NURD's disposal of the listed hazardous substance "roof acid" on the property which BRANU purchased from NURD?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

U.S. CONSTITUTION, STATUTES, REGULATIONS

MISCELLANEOUS

STATEMENT OF THE CASE

A. PROCEEDINGS BELOW

Appellants, Brownfields Redevelopment Associates of New Union (BRANU) and the United States Environmental Protection Agency (EPA) have appealed the decision of the district court on the issue of liability for the cost of hazardous waste clean up.

In 1993, BRANU and EPA filed separate suits against New Union Roofing and Drywall (NURD) in the United States District Court for the District of New Union. BRANU, under § 7002 of the Resource Conservation and Recovery Act (RCRA) and § 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), sought $200,000 compensation, while EPA, under § 107 of CERCLA, sought $100,000 compensation. By mutual consent, the two cases were consolidated, and EPA participated in the RCRA issues as an amicus for the defendant, NURD.

B. STATEMENT OF FACTS

NURD, owned by Andrew Petersen, is a small, locally-owned and operated construction company. It does not advertise, but gets new business through referrals from former customers. NURD has worked solely in Moll's Gardens, a residential area of Cathertown, New Union. (R. at 1). NURD purchases its supplies, most made locally except for the roof acid dry ingredients which are manufactured in Virginia, at local stores. NURD bought its truck, built in Michigan, from a local dealership. (R. at 4). The supplies which NURD uses

in its business are sold to a national market with prices set competitively by the manufacturers. (R. at 4).

BRANU, owned by Elizabeth Kates, is an environmentally-sensitive company which purchases former commercial sites in New Union, performs environmental remediation to attract new development, and then sells the sites. (R. at 2). In 1990, BRANU purchased a site in Moll's Gardens from NURD. (Nov. 3, 1995 Pace Letter at 1). NURD owned and used the site for its business operations from 1981 to 1983. (R. at 2). Unknown to BRANU at the time of purchase, (R. at 3), NURD had contaminated the site with "roof acid" which NURD dumped onto the ground on 20 to 30 different occasions from 1981 to 1983. (R. at 2).

Roof acid is manufactured in Virginia and sold in powdered form to hardware stores such as the one in Cathertown where NURD purchases it. (R. at 4). The dry roof acid is reconstituted with water for use in removing old shingles from rooftops. Although made entirely from natural ingredients, when mixed with water, roof acid is a technical grade listed hazardous waste under RCRA and has been so listed since December 31, 1980. (R. at 2). RCRA is implemented by EPA in New Union, since New Union lacks delegation of authority. (R. at 2).

NURD mixed the roof acid on site in drums, combining the dry ingredients with water. (R. at 2). Because its use fell below threshold levels, NURD was not required to obtain any permit or regulatory approval to use the roof acid. (R. at 3.) When some roof acid remained after a roofing job, NURD returned the excess to the Moll's Garden site, mixed it with fruit juices and soft drinks, then disposed of it in an on-site compost pit. (R. at 2). The compost pit, located at the rear of NURD's site, was the only source of contamination on the site. (R. at 3).

The contamination was discovered when BRANU began clearing a shed from the property in 1990 in preparation for applying for a building permit. Through an anonymous phone call from one of BRANU's neighbors, the EPA regional office learned that NURD had mixed its excess roof acid with fruit juices and soft drinks, then disposed of the mixture in

the compost pit. NURD's President admitted this practice. (R. at 3).

Later in 1990, EPA spent $100,000 to sample and analyze the soil and groundwater on BRANU's site. (R. at 3). The sampling results showed that the "soil . . . is sufficiently contaminated with roof acid to constitute a danger should the site be used as residential property or other land use in which soil contact by individuals is likely." (R. at 3). BRANU remediated the site in 1993, spending $200,000. (R. at 3). Afterward, BRANU constructed a house on the site in which a family now lives. (R. at 3).

Later in 1993, BRANU filed suit, under RCRA § 7002 and CERCLA § 107, contending that NURD is responsible to BRANU for restitution under RCRA § 7002 or, in the alternative, cost recovery under CERCLA § 107. As the EPA had also filed suit under CERCLA § 107, the two suits were consolidated with the EPA participating as amicus for NURD on the RCRA issue.

SUMMARY OF ARGUMENT

The district court correctly ruled that Congress was within its Commerce Clause authority in enacting RCRA based on a congressional finding in RCRA § 1002(a)(4), codified at 42 U.S.C. 6901(a)(4) that "problems of waste disposal" "have become a matter national in scope." In interpreting the statute in such a manner, the district court has determined congressional intent in an area where Congress had the power to regulate under the Commerce Clause, and did so. Express statutory language clearly indicates that Congress desired to regulate waste disposal rather than leave this matter to the states. Furthermore, RCRA applies to activities such as those NURD engaged in, where local economic activities substantially affect interstate commerce by virtue of their cumulative effect.

The district court determined that in enacting RCRA § 7002, Congress did not create a private cause of action for restitution even though the court acknowledged RCRA § 7003 authorizes restitution when sought by the EPA. When con-

sidering whether a statute provides for a specific remedy, a court must look to the plain language of the statute as well as its legislative history. BRANU is permitted to obtain restitution for remediating the contamination at the site it bought from NURD because the plain language of the RCRA § 7002, which provides for relief other than injunction, and unambiguous legislative history, which requires sections 7002 and 7003 to be read in the same way on both issues of liability and relief.

The district court should not have excused NURD from liability under CERCLA § 107(a) because roof acid, a listed hazardous waste under RCRA regulations, was a hazardous substance according to CERCLA 101(14). In making this determination, the court misapplied the continuing jurisdiction principle and the contained-in rule. Furthermore, the repromulgated mixture rule should have been retroactively applied to NURD's 1981-1983 disposals. Therefore, NURD is liable to BRANU for response costs under CERCLA § 107(a).

ARGUMENT I

I. BRANU SHOULD RECEIVE RESTITUTION UNDER RCRA § 7002 FROM NURD FOR NURD'S DISPOSAL OF THE LISTED HAZARDOUS SUBSTANCE "ROOF ACID" ON THE FORMER NURD PROPERTY WHICH BRANU PURCHASED.

A. *The trial court's decision is reviewable de novo.*

"For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable de novo), questions of fact (reviewable for clear error), and matters of discretion (reviewable for "abuse of discretion")." *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). The trial court's decision concerning the NURD's liability under RCRA (and CERCLA) was based on statutory interpretation and consideration of case law. (R. at 4-5). Its holding was based on questions of law and the standard of appellate review, therefore, is de novo.

B. *The plain language of RCRA supports that Congress acted constitutionally under authority of the Commerce Clause in enacting RCRA to address nationwide problems of waste disposal.*

"In attempting to discern the intent of Congress in enacting a particular statutory section, [the court] must examine the language of the statute and, if there is ambiguity, the policy behind it. The starting point is always the plain meaning of the words used." *Philadelphia v. Stepan Chem. Co.*, 713 F. Supp. 1484, 1488 (1989). If the statute is clear and unambiguous "that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984).

"The Constitution and the laws of the United States . . . shall be the supreme law of the land." U.S. Const. art. VI, § 2. Under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, Congress shall have power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." "Congress [may] legislatively control[ ] an activity because it finds that the activity affects interstate commerce." *Hodel v. Virginia Surface Mining and Reclamation Assoc., Inc.*, 452 U.S. 264, 277 (1981).

Here, the district court properly deferred to Congress' express findings, set out in the Resource Conservation and Recovery Act itself, about the effects of waste disposal on interstate commerce. Congress specifically found in RCRA § 1002(a)(1), codified at 42 U.S.C. § 6901(a)(1), that the manufacturing, packaging and marketing of consumer products leads to generating and discarding an increasing amount of waste. In RCRA § 1002(a)(3), codified at 42 U.S.C. § 6901(a)(3), Congress also found that solid waste disposal necessitated by industrial and commercial activities located in metropolitan and urban areas poses serious technical and financial problems to populations concentrated in these areas. Finally, Congress recognized that, while collecting and disposing of solid wastes is a State and local responsibility, waste disposal had become a national matter requiring Con-

gressional attention. RCRA § 1002(a)(4), codified at 42 U.S.C. § 6901(a)(4). Thus, Congress explained in the statute the nexus between commercial activity and the ensuing generation and disposal of solid waste, expressly and rationally concluding that commercial activities and the resulting need for waste disposal affect interstate commerce. Plenary congressional authority under the Commerce Clause, therefore, was invoked properly in enacting RCRA. *United States v. Rogers*, 685 F.Supp. 201, 203 (1987).

C. *RCRA applies to the instant case since local economic activities which have a substantial effect on interstate commerce may be regulated under the Commerce Clause.*

"Where economic activity substantially affects interstate commerce, legislation regulating that activity [under authority of the Commerce Clause] will be sustained." *United States v. Lopez*, U.S. , 115 S.Ct. 1624, 1630, 131 L.Ed.2d 626 (1995). Thus, *Lopez* sets forth a two-pronged test; the activity must be "economic" in nature and it must "substantially affect" interstate commerce. NURD's activities, which involve the buying and selling of goods and services, are clearly economic. In accordance with Congress' findings expressly stated in RCRA, *supra*, NURD's construction activities, though confined to the Moll's Gardens neighborhood, (R. at 1), generate wastes which contribute to the national waste disposal problem. In determining whether a local activity will substantially affect interstate commerce, "a court must consider, not the effect of an individual act . . . , but rather the cumulative effect of all similar instances." *Lopez*, 115 S.Ct. at 1658 (Breyer, J., dissenting). "That [one's] own contribution . . . may be trivial by itself is not enough to remove [one] from the scope of federal regulation where . . . [one's] contribution, taken together with that of many others similarly situated, is far from trivial." *Wickard v. Filburn*, 317 U.S. 111, 127-128 (1942) (citing *United States v. Darby*, 312 U.S. 100, 123 (1942)). NURD's waste disposal is but a small part of a much larger national problem.

Furthermore, NURD's activities, though many are carried on locally, substantially affect interstate commerce. Although its immediate suppliers are located in New Union, NURD directly takes advantage of the channels of interstate commerce; its roof acid is shipped from a point of manufacture in Virginia and its truck from Michigan. (R. at 4). Moreover, even though NURD buys its other supplies locally, these supplies are sold to a national market with prices set competitively by their manufacturers. (R. at 4). NURD's substantial effects on interstate commerce also extend to: 1) enabling NURD's employees to obtain goods and services from out-of-state through the purchasing power of their paychecks, and 2) allowing NURD's suppliers and manufacturers' to do likewise for their employees through profits earned in part by NURD's purchases. (R. at 4-5). Thus, where the activity being regulated is clearly commercial or economic, Congress may regulate that activity, when it belongs to a class that, in the aggregate, substantially affects interstate commerce. NURD's commercial and economic activities are sufficient for RCRA to apply to the contamination caused by its method of waste disposal.

D. *The case law and legislative history of RCRA § 7002 supports BRANU's argument that it is entitled to restitution for cleaning contamination caused by NURD's dumping of hazardous wastes.*

The District Court incorrectly found that BRANU was not entitled to restitution from NURD under RCRA § 7002(a)(1)(B), codified at 42 U.S.C. § 6972(a)(1)(B) (1988). That section allows any person to commence a civil suit against "any person, . . . including any past generator . . . or past . . . owner or operator of a disposal facility, . . . who has contributed to the past disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B) (1988). The parties agree that NURD falls within the specified criteria enunciated above and that until BRANU remediated the site, it presented an imminent and substantial endangerment. (R. at 4).

The courts have clearly determined the possible remedies available to a party pursuant to this statute are injunction and attorney's fees. What is still ambiguous is whether the statute provides for restitution, the costs incurred by a party in abating the imminent and substantial endangerment created by the past generator, or past owner or operator of a disposal facility. The majority of courts which have addressed this issue have held that restitution is not available to the party which cleaned up another's solid or hazardous waste, but two courts have determined that restitution is an appropriate remedy in a citizen's suit.

RCRA § 7002(a) provides that "[t]he district court shall have jurisdiction, . . . to restrain any person who has contributed . . . to the past . . . disposal of any solid or hazardous waste referred to in paragraph(1)(B), *to order such person to take such other action as may be necessary*, or both, . . . and to apply any appropriate civil penalties." 42 U.S.C. § 6972(a)(1988)(emphasis added). By the plain language of this section, it is clear that Congress chose to invoke the full equitable power of the district court to fashion any remedy it deems appropriate and fair.

In *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), the Supreme Court interpreted the Emergency Price Control Act which provided for injunctive relief, but did not specifically authorize the district court to award restitution. The Court determined that the "or other order" language of the Act contemplated "a remedy other than that of an injunction, . . . a remedy entered in the exercise of the District Court's equitable jurisdiction." *Id.* at 399. The Court found that "the comprehensiveness of th[e] equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command." *Id.* at 398. It continued that "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Id.* The Court then recognized that "[r]estitution . . . lies within that equitable jurisdiction." *Id.* at 402. *See also United States v. Long*, 537 F.2d 1151, 1153 (1975); *United States v.*

Conservation Chem. Co., 619 F. Supp. 162, 201 (D.C.Mo. 1985).

Similar to the Emergency Price Control Act, the citizen suit provision of RCRA allows the district court to award injunctive relief or order other action as may be necessary, and thus invokes the full scope of a district court's equitable jurisdiction. This is evident from cases finding recovery of costs incurred pursuant to RCRA activities to possibly be an appropriate form of relief under the comparable government suit provision, RCRA § 7003, codified at 42 U.S.C. § 6973 (1988). *Chemical Conservation Co.*, 619 F. Supp. 162 (D.C. Mo. 1985); *United States v. Price*, 688 F.2d 204 (3rd Cir. 1982). Because sections 7002 and 7003 are worded almost identically, and for reasons discussed *infra*, the two sections are to be interpreted exactly the same way for a citizen as they would be for the Administrator of the EPA (Administrator). In *Price*, in interpreting § 7003, the court stated that "[a] court of equity has traditionally had the power to fashion any remedy deemed necessary and appropriate to do justice in the particular case," and that "by enacting the endangerment provisions of RCRA . . . , Congress sought to invoke the broad and flexible equity powers of the federal courts." *Price*, 688 F.2d at 211. The *Chemical Conservation* court found that § 7003 invoked . . . "the full equity powers of the federal courts in the effort to protect the public health [and] the environment . . . from the pernicious effects of toxic wastes." *Chemical Conservation*, 619 F. Supp. at 201, *quoting Price*, 688 F.2d at 214. Consequently, the courts in both *Price* and *Chemical Conservation* correctly recognized that the plain meaning of the "such other action as may be necessary" language of § 7003, mirrored in § 7002, invoked the full equitable powers of the court, just as the Supreme Court had in interpreting the "or other order" language of the Emergency Price Control Act.

In the present case, as in *Porter*, there is neither clear legislative command nor statutory language which denied or restricted the district court's equitable power to award BRANU restitution for the costs it incurred in cleaning up NURD's roof acid waste. The only legislative command relating to the awarding of equitable relief under RCRA is that, as

with any equitable remedy, the courts should consider all the circumstances of the case and be cognizant of, and explore, the availability of alternative remedies. S. Rep. No. 284, 98th Cong., 1st Sess. 57, 59. This congressional command was repeated in both the citizen and government suit provisions of RCRA. *Id.* Furthermore, even though the Senate Committee believed that the courts should consider alternatives, it made clear that neither citizens nor the government need "exhaust or rely upon other resources or remedies before seeking relief" under the amendments to §§ 7002 & 7003. *Id.* The legislative history therefore neither bars nor limits the district court's full range of equitable powers to allow a citizen plaintiff restitution.

The interest at stake in the present case is a public one, namely the elimination of wastes harmful to health or the environment, and thus the district court's "equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Porter*, 328 U.S. at 398. It may be argued that the interest here is in fact private because BRANU's suit and requested relief, namely monetary restitution, benefits only itself. The monetary restitution BRANU requests will benefit BRANU, but only by restoring them to the position they would have been in had NURD not dumped its roof acid. On the other hand, not requiring NURD to compensate BRANU for its clean up costs would give NURD a windfall. There would be little incentive for persons to dispose of their wastes properly if there is no consequence to noncompliance. Thus, "[f]uture compliance may be more definitely assured if one is compelled to restore one's illegal gains." *Warner*, 328 U.S. at 400. Furthermore, the court in *Acme Printing Ink Co. v. Menard, Inc.*, 812 F. Supp. 1498 (E.D.Wis. 1992), made it clear that suits brought for one's own benefit rather than for another's are not barred by the statute. The *Menard* court did not find any "policy or language within § 6972 which prevent[ed] a party from seeking remedies which are to its benefit as well as to the benefit of others." *Id.* at 1510. BRANU is a for-profit corporation, but its business concentrates on rehabilitating industrial sites in order to reuse valuable land. In this case, BRANU's

efforts provided a new home for a family, a home which would not exist but for BRANU's efforts. Therefore, the benefit of BRANU's efforts protect both human health and the environment.

Turning to RCRA case law, a recent case which allowed plaintiffs recovery for clean up costs is *KFC Western, Inc. v. Meghrig*, 49 F.3d 518 (9th Cir. 1995). In that case, the Court of Appeals for the Ninth Circuit correctly recognized that Congress intended restitution to be awarded for remediation costs and therefore allowed the plaintiffs to bring a restitution suit. The court based its conclusion on the similarity between the relief provisions of RCRA § 7002(a) and § 7003, case law, and public policy. The statutory similarity analysis in *KFC Western* revolved around the fact that several courts have allowed the government, through the Administrator, to obtain restitution costs incurred for diagnostic surveys, abatement costs, or contaminated site remediation. *United States v. Aceto Agric. Chemicals Corp.*, 872 F.2d 1373 (8th Cir. 1989); *United States v. Price*, 688 F.2d 204 (3rd Cir. 1982); *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726 (8th Cir. 1986). The relief provisions of the statutes are identical, and authorize the district court "to restrain[,] . . . to order such person to take such other action as may be necessary, or both." 42 U.S.C. §§ 6972(a), 6973(a) (1988). The *KFC Western* court determined that because the statutes as a whole were worded "almost identically," it would interpret them similarly.

Bolstering the court's determination is the fact that Congress specifically addressed this language similarity issue. The House commented that the right to sue under the citizen suit provision was to be construed "pursuant to the standards of liability established under 7003." H.R. Rep. No. 189, 98th Cong., 2nd Sess. at 53 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5576. In addition, the Senate was emphatic that "[a]ny differences is language between these amendments and section 7003 [were] not intended to reflect a difference in such claims [for relief]." S. Rep. No. 284, 98th Cong., 1st Sess. at 57 (1983). It is therefore not arguable that the similar wording of sections 7002 and 7003 need not require similar construc-

tion; the legislative history of § 7002 makes it abundantly clear that Congress intended that the sections not only be interpreted similarly, but exactly the same.

It has been argued that Congress intended that only the liability provisions of sections 7002 and 7003 should be interpreted the same way, that is, a citizen only has the same right to sue as the Administrator does, not the same available relief. *Furrer v. Brown*, 62 F.3d 1092 (8th Cir. 1995). This argument, however, flies in the face of unambiguous legislative intent that the 1984 Amendments to the Solid Waste Act would "allow citizens exactly the same broad substantive and procedural claim for relief which is already available to the United States under section 7003." S. Rep. No. 284, 98th Cong., 1st Sess. at 57 (1983). The Senate specifically addressed the claim for relief, not just the standards of liability. Because courts have allowed the government, to recover costs incurred in addressing imminent and substantial endangerment, the legislative history of RCRA § 7002, which specifies that the two sections should be interpreted the same way, mandates the same relief be available to citizens.

The *KFC Western* court recognized that "[i]t would be unfair and poor public policy to interpret § [7002](a)(1)(B) as barring restitution actions." *KFC Western*, 49 F.3d at 523. The basis for this recognition was that innocent citizens who have a financial interest in contaminated property are the very ones who must comply with the government order to clean up the property. Thus, as in the instant case, citizens who unknowingly buy contaminated property must expend thousands of dollars to clean up the contamination which they had no part in causing or creating. To bar restitution would serve as an incentive for businesses to continue dumping their hazardous wastes because they would face no consequences for their actions. And as the *KFC Western* court noted, a citizen who is ordered to clean up the property simply does not have the time to initiate suit against the party who caused the contamination, especially if that party is nowhere to be found. *Id.*

Bayless Investment And Trading Co. v. Chevron U.S.A. Inc., 39 Env't Rep.-Cases 1429 (D.C.Ariz. 1994), mirrors this

sentiment against prohibiting the award of restitution. The court relied on its belief that the congressional intent in amending § 7002 was to invigorate citizen litigation such that barring restitution would be contrary to the result desired by Congress. *Id.* at 1432 (quoting *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1158 (9th Cir. 1989)). Although the *Bayless Investment* court did not award restitution to the plaintiff in that case because it was requested in a motion for summary judgment, the court did determine that "this remedy is also obtainable pursuant to RCRA § 7002(a)(1)(B)." *Bayless Investment*, 39 Env't Rep.-Cases at 142. The court feared that to find otherwise would create an incentive for future plaintiffs "to wait until the conclusion of a lawsuit before spending money to commence remediation." *Id.* The *Bayless Investment* court circumvented a result directly contrary to RCRA's national policy which is to eliminate the generation of hazardous wastes "as expeditiously as possible;" the court also wanted to achieve one of RCRA's objectives, "to promote the protection of health and the environment " 42 U.S.C. § 6902 (1988).

Because both the *KFC Western* and *Bayless Investment* court opinions are based in part on cases allowing recovery of costs incurred by the government pursuant to § 7003, a brief discussion of the case which first so found may be helpful to better understand the argument for the availability of restitution in citizens suits.

Prior to the 1984 Amendments to the Hazardous and Solid Waste Act, the court in *United States v. Price*, 688 F.2d 204 (3rd Cir. 1982), determined that § 7003 invoked the broad equitable powers of a court of equity, and thus the request for funds for the diagnostic study of the contaminated site was appropriate. *Id.* at 212-213. Although the court concluded that the district court did not err in denying preliminary injunctive relief, it concluded that "prompt preventive action was the most important consideration" and thereafter reimbursement could "be directed against parties ultimately found to be liable." *Id.* at 214. The importance and correctness of this case is highlighted by the fact that the Senate approvingly cited it for the proposition that RCRA § 7003 is

indeed "intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risks posed by toxic wastes." S. Rep. No. 284, 98th Cong., 1st Sess. at 59 (1983) *quoting United States v. Price*, 688 F.2d 204, 213-214 (3rd Cir. 1982). The fact that the Senate not only cited *Price*, but cited it specifically at the pages discussing availability of restitution shows that the legislature was aware and approved of this possible remedy pursuant to § 7003.

Subsequent to the 1984 amendments, several cases have followed *Price* and the legislative intent in finding restitution to be appropriate pursuant to § 7003. *See United States v. Aceto Agric. Chemicals Corp.*, 872 F.2d 1373 (8th Cir. 1989) (recognizing that § 7003 does not require the EPA to file and prosecute its action while the endangerment exists and that it would be an absurd and unnecessary requirement to do so); *United States v. Conservation Chem. Co.*, 619 F. Supp 162 (D.Mo. 1985) (concluding that recovery of costs incurred by the United states pursuant to its activities under RCRA may be an appropriate form of relief); *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 727 (8th Cir. 1985) (concluding that on remand, district court, as a matter of equitable discretion, could grant the government recovery of abatement costs incurred); *United States v. Vertec Chem. Corp.*, 671 F. Supp. 595 (E.D.Ark. 1987) (finding equitable right of government to seek reimbursement costs incurred in response to conditions of imminent and substantial endangerment).

It is abundantly evident from the previous discussion of the case law, legislative history and plain language of RCRA § 7002 as amended in 1984, the district court erred in refusing BRANU restitution for the costs it incurred while cleaning up the contamination NURD created by dumping a listed hazardous waste into the ground.

E. *The case law which supports NURD's argument that RCRA § 7002 does not allow restitution for private citizens is not applicable to the present case.*

The district court in the present case was incorrect in refusing to award BRANU restitution, although it was following the lead of the majority of cases which have addressed the issue of availability of restitution for citizens suits. These cases, however, are not applicable to the instant case in that they are distinguishable from the present case, have been analyzed incorrectly, or have wrongly followed other cases.

In *Environmental Defense Fund, Inc. v. Lamphier*, 714 F.2d 331 (4th Cir. 1983), the court determined that according to RCRA § 7002(a), the citizen plaintiffs could obtain injunctive relief because they were "acting as private attorneys general rather than pursuing a private remedy" of damages. *Id.* at 337. This language has been extensively quoted as prohibiting the awarding of restitution to citizens pursuant to RCRA § 7002(a)(1)(B). Acting as a "private attorney general" has been taken to mean that the plaintiff could not receive any monetary relief because that would be inconsistent with the term. Even a government attorney general, however, is funded through some source. He does not expend his own pocket money without expectation of reimbursement by the government. More importantly, *Lamphier* was decided prior to the 1984 Amendments to the Hazardous and Solid Waste Act, and thus is not applicable to the present case.

Although the *Lamphier* court distinguished *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981), which interpreted the citizen suit provision of the Federal Water Pollution Control Act (FWPCA), 35 U.S.C. § 1365(a), its discussion of that case is relevant because it has been relied upon many times by other courts to prohibit restitution under RCRA § 7002.

In *Middlesex*, the Supreme Court, by considering the plain language and legislative history of FWPCA § 1365(a), held that it specifically provided for injunctive relief, and therefore the statute did not authorize an implied private right of action for damages. *Id.* at 13-18. The court in *Walls*

v. Waste Resource Corp., 761 F.2d 311, 316 (6th Cir. 1985), interpreted this holding to prohibit a private action for damages under RCRA 7002(a)(1)(B). As discussed below, because of the rationale of the Supreme Court in *Middlesex*, and the differences in language between FWPCA 505(a) and RCRA 7002(a)(1)(B), it is evident that the *Walls* court erred in its interpretation of *Middlesex*.

Looking at the statutory language of FWPCA § 505(a), which stated that the citizen's remedy is "to enforce such an effluent standard or limitation, or such order," the Court determined that it authorized only injunction, and no additional implied judicial remedies. *Middlesex*, 453 U.S. at 13-14. Turning to the legislative history, the Court found nothing to support a contrary conclusion, instead found there was specific language supporting the fact that FWPCA was intended to be limited to injunctive relief. *Id.* at 17-18 (quoting 116 Cong. Rec. at 33,102 "bill is limited to seeking abatement . . . and expressly excludes damage actions").

Conversely, RCRA § 7002(a)(1)(B) does expressly provide for other judicial relief because it not only authorizes the district court "to restrain" but also "to order other such action as may be necessary, or both." 42 U.S.C. § 6972(a) (1988). The plain language contemplates both injunctive relief and other judicial orders. As for legislative history, although the House report states that the citizen suit provision "confers . . . a limited right . . . to sue to abate an imminent and substantial endangerment," that right is pursuant to the standards of liability" of RCRA 7003, which allows the government to obtain restitution damages. H.R. Rep. No. 189, 98th Cong., 2d Sess., pt. 1 at 53. Moreover, the Senate committee states that § 7002 "authorize[s] citizens to seek relief, including abatement" which contemplates remedies other than injunction are available. S. Rep. No. 284, 98th Cong., 1st Sess. at 55. The limitations to the citizen suit recognized by both the House and the Senate are not aimed towards limiting relief available, but towards assuring that the right of the Administrator to sue is not restricted. H.R. Rep. No. 189, 98th Cong., 2d Sess., pt. 1 at 53; S. Rep. No. 284, 98th Cong., 1st Sess. at

56. Because the Administrator did not initiate action[1] in the instant case, BRANU is not limited in its right to sue or obtain an appropriate remedy.

Consequently, the plain language as well as the legislative history of RCRA § 7002 clearly contemplates restitution as an appropriate equitable remedy to be awarded by the district court. The Supreme Court's interpretation of FWPCA § 505(a) has no applicability to RCRA § 7002(a)(1)(B). As *Walls* incorrectly interpreted *Middlesex* to prohibit the district court from granting such relief, its decision does not bar BRANU's request for restitution.

Commerce Holding Co. v. Buckstone, 749 F. Supp 441 (E.D.N.Y. 1990), also denied recovery for costs of remediation basing its decision on *Lamphier*, *Walls*, and *Middlesex*, which as discussed above, are inapplicable to the present case. *Commerce Holding*, 749 F. Supp. at 445. Furthermore, the *Commerce Holding* court mistakenly suggests that a citizen plaintiff may not be awarded relief under § 7002 if he "would be the direct beneficiary of the substantive relief." *Commerce Holding*, 749 F. Supp. at 445. This suggestion is incorrect as courts have determined that "there is 'no language in [42 U.S.C.] § 6972 which prevents a party from seeking remedies which are to its benefit as well as to the benefit of others.'" *Bayless Investment*, 39 Env't Rep.-Cases at 1434 (quoting *Acme Printing*, 812 F.Supp 1498, 1510 (E.D.Wis. 1992). *Commerce Holding* provides no bar to BRANU's claim for restitution.

The decisions in *Gache v. City of Harrison, N.Y.*, 812 F.Supp. 1037 (S.D.N.Y. 1993) (relying on *Commerce Holding* and *Lamphier*, making no analysis of its own, to grant summary judgment against the plaintiff on its claim for costs of remediation); *Kaufman And Broad-South Bay v. Unisys Corp.*, 822 F.Supp. 1468 (N.D.Cal. 1993) (following *Walls* and *Commerce Holding* to deny the plaintiff restitution), and *Prisco v. New York*, 1995 WL 548322 (S.D.N.Y. 1995) (follow-

1. Whether the Administrator has "commenced and is diligently prosecuting" an action is a case-by-case determination, but for purposes of the citizen suit, this language means that the Administrator has actually filed suit or issued an administrative order.

ing *Gache* to deny plaintiffs restitution), are also inapposite to BRANU's claim for remediation costs as they too rely on inapplicable cases.

Fallowfield Dev. Corp. v. Strunk, 1993 WL 157723 (E.D.Pa. 1993) (following *Commerce Holding*), and *Portsmouth Redev. and Hous. Auth. v. BMI Apts. Assoc.*, 847 F.Supp. 380 (E.D.Va. 1994) (following *Commerce Holding*, *Lamphier*, *Walls*, and *Kaufman*) not only relied inapplicable decisions, but relied on an entirely incorrect premise in denying the plaintiffs restitution. Both *Fallowfield* and *Portsmouth* presumed that because CERCLA expressly provides for remedial and response costs, there is no such relief available under RCRA. *Fallowfield* at 15; *Portsmouth* at 385. The legislative history of RCRA § 7002, however, clearly states that "[j]ust as the United States need not utilize its resources available to it under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 . . . or similar authorities, citizens need not exhaust or rely upon other resources or remedies, before seeking relief under these [1984] amendments." S. Rep. No. 284, 98th Cong., 1st Sess. at 57. Thus, the exhaustion of remedy premise relied on in *Fallowfield* and *Portsmouth* directly contradicts unambiguous legislative language. As both cases followed wrongly decided case law and the exhaustion of remedy premise, neither case is considered to prohibit BRANU from recovering the $ 200,000 it spent on remediating NURD's former site.

Perhaps the most important case to distinguish is *Furrer v. Brown*, 62 F.3d 1092 (8th Cir. 1995) because it is from the same circuit court which decided *Aceto*. In *Furrer*, the court refused to allow plaintiffs any restitution by refuting *KFC Western* and finding that *Aceto* was inapplicable because the question of recovering costs was never before the court. The *Furrer* court criticized the *KFC Western* court for basing its decision on "an arguably faulty premise," and then misconstruing "two Eighth Circuit opinions involving governmental plaintiffs" to arrive at its holding. *Furrer*, 62 F.3d at 1100. The *Furrer* decision, however, is the one whose analysis is flawed. Contrary to the *Furrer* court's criticism, the *KFC Western* premise—that the legislative history of 7002 and

7003 suggests the two sections are intended to parallel one another—is not only correct, but required by the legislative intent as discussed above. Furthermore, the *Furrer* court suggests that the legislative history of the two sections meant only the standards of liability to be similar, not the relief available. Reading the Senate report on this issue requires the opposite conclusion, that the parallel between the sections extends to the substantive relief available.

As to the misconstruction of the Eighth Circuit cases, the *Furrer* court is incorrect. In *KFC Western*, the court stated that the Eighth Circuit "recognized the Administrator's right to sue under [7002] for restitution of costs incurred," which it did by stating that the "'imminent and substantial endangerment' language does not require the EPA to file and prosecute its RCRA action while the endangerment exists." *KFC Western*, 49 F.3d at 522; *Aceto*, 872 F.2d at 383. Simply because the Eighth Circuit failed to raise the subject matter jurisdiction issue but assumed it does not make the Ninth Circuit's reliance on the decision a misconstruction of the opinion. Because the Eighth Circuit opinion serves only as persuasive authority, and is of no precedential value, for the sister circuits, whether dicta or holding is relied upon is of little consequence. Of course, the Eighth Circuit has no obligation to follow the decision of its sister court, but it is incorrect in labelling the Ninth Circuit's opinion a misconstruction of the Ninth Circuit's opinions. Whatever meritorious analysis the *Furrer* court made, the court was incorrect in following the cases distinguished above. *Furrer*, 62 F.3d at 1101. For the foregoing reasons, *Furrer* does not present a bar to BRANU's recovery of costs it incurred in cleaning up NURD's contamination of the site.

ARGUMENT II

II. NURD IS LIABLE UNDER CERCLA § 107 FOR NURD'S DISPOSAL OF ROOF ACID WHICH, BECAUSE IT IS A LISTED HAZARDOUS WASTE UNDER RCRA, IS ALSO A HAZARDOUS SUBSTANCE UNDER CERCLA § 101(14).

BRANU has established that the roof acid and fruit juice mixture which NURD disposed at its cite in Moll's Gardens between 1981 and 1983 was a hazardous substance for CERCLA purposes. Roof acid, a listed hazardous waste, may not escape RCRA management simply by being mixed with a nonhazardous waste without first completing the delisting procedure. Furthermore, under RCRA regulations, mixtures of listed hazardous wastes and solid wastes retain their hazardous waste status no matter how low the concentration of the hazardous waste in the mixture. Therefore, because hazardous substances under CERCLA include listed hazardous wastes under RCRA, roof acid mixed with fruit juice is a hazardous substance under CERCLA. Accordingly, BRANU has established NURD's liability for response costs pursuant to CERCLA § 107, and the district court's order must be reversed.

A. *NURD may not evade liability for its wrongful disposal of a listed waste by asserting that it can delist its waste by simply mixing it with fruit juice without going through a formal exclusion procedure with the EPA.*

Once NURD's roof acid satisfied the criteria for identification as a listed hazardous waste, it remained a hazardous waste despite later being mixed with nonhazardous material. Although a waste must be pure or technical grade to be listed as a hazardous waste, there is no requirement that it maintain its technical grade. To the contrary, the continuing jurisdiction principle provides that a properly identified listed hazardous waste may only exit subchapter c requirements upon a formal exclusion ruling by the EPA. Furthermore, a

listed waste "contained-in" a non-solid waste medium remains a hazardous waste while in this diluted form. Therefore, because NURD's roof acid me[ ]t the listing description set forth in subpart D," and never was delisted, it remained a hazardous waste.

1. NURD's technical grade roof acid, which was stored before disposal, satisfied the prerequisites for identification as a listed waste under §261.3(a) (2)(ii).

Before a material may proceed into the RCRA management system as a listed waste, the material must: (1) be a solid waste, and (2) meet the listing description set forth in subpart d. 40 C.F.R. § 261.3(a)(2)(ii). NURD's roof acid satisfied both the prerequisites for listing as a hazardous waste, and thus, was subject to RCRA requirements.

No material can be a hazardous waste without first being a solid waste. 40 C.F.R. § 261.3(a) (1995); Hazardous Waste Management System: Identification and Listing of Hazardous Waste, 45 Fed. Reg. 33084, 33090 (1980) (preamble to the final rule to be codified at 40 C.F.R. 261.2). The regulatory solid waste framework is predicated on the premise that "a solid waste is any discarded material." 40 C.F.R. § 261.2(a)(1) (1995). The EPA expounded on the definition of discarded material to include "material which is abandoned by disposal." 40 C.F.R. §§ 261.2(a)(2), (b)(1)-(2) (1995).

By placing its excess roof acid in a compost pit, NURD obviously disposed of the roof acid consistent with the regulatory definition of disposal. 40 C.F.R. § 260.10(2) (1995) "Disposal means the . . . deposit, . . . dumping . . . or placing of any [material] into or on any land or water so that such solid waste . . . may enter the environment." *Id.* However, abandonment of a material also occurs when a waste is stored or accumulated before disposal. 40 C.F.R. § 261.2(b)(3). Therefore, the roof acid became a solid waste when NURD finished using it for its intended purpose as a delaminator, and collected it for transportation to its Moll's Gardens property, where it would be disposed. *Id.*

A solid waste "becomes a [listed] hazardous waste . . . when the waste first meets the description set forth in subpart d." 40 C.F.R. § 261.3(b)(1) (1995)(subpart d lists the individual solid wastes which are subject to individual listings). Roof acid is included as a listed hazardous waste. (R. 2). Under most circumstances, a waste conforms to its listing description when it is pure or technical grade. 40 C.F.R. § 261.33 (1995); *United States v. Bethlehem Steel Corp.*, 38 F.3d 862, 869-70 (7th Cir. 1994); *United States v. Recticel Foam Corp.*, 858 F. Supp. 726, 731, 735 (E.D. Tenn. 1993). *But cf.* 40 C.F.R. § 261.31(a) (1995)(providing that the F001 to F005 descriptions apply to mixtures and blends of these wastes). NURD's roof acid powder, as mixed with water, was a technical grade hazardous waste listed under subpart d. (R. 2, 3). That NURD eventually mixed the roof acid with fruit juice does not matter, since the roof acid already satisfied both hazardous waste criteria.

2. According to the continuing jurisdiction principle, a properly identified listed waste may only be delisted under the authority of the EPA.

After NURD's roof acid entered the subtitle C hazardous waste management system as a listed hazardous waste, it continued to be hazardous, notwithstanding subsequent mixture with another solid waste. 40 C.F.R. § 261.3(c)(1) (1995)(continuing jurisdiction principle). The continuing jurisdiction principle is an essential component of the regulatory scheme the EPA developed under RCRA which "directs the EPA to establish a comprehensive 'cradle to grave' system regulating the generation, transport, storage, treatment and disposal of hazardous wastes." *Chemical Waste Management, Inc v. Hunt*, 504 U.S. 334 (1992); 45 Fed. Reg. at 33085 (1980)(preamble to final rules); To effectuate the full scope of their authority, the EPA provided that (1) a listed "hazardous waste will remain a hazardous waste" until delisted; and (2) the delisting procedure was the exclusive procedure for ex-

cluding a listed waste from the RCRA regulatory system. § 261.3(c)(1).[2]

While the delisting procedure "has been criticized for its slowness, difficulty, and expense," 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); *see also* Hazardous Waste Management System: Identification and Listing of Hazardous Waste, 45 Fed. Reg. 33095 (1980)(final rules for 40 C.F.R. part 261); Lori Caramanian, *Hazardous Waste Management After Shell Oil*, 11 Pace Envtl. L. Rev. 265, n33 (1993), EPA is justified for retaining sole authority for excluding low concentration wastes from the lists in subpart D. James E. Satterfield, *EPA's Continuing Jurisdiction Regulation: A Response to The Mixture Rule and the Environmental Code*, 25 Envtl. L. Rep. 10262, 10263 (1995). In contrast to characteristic waste which are capable of being reasonably measured or detected, 40 C.F.R. § 261.10(a)(2), there are no such procedures readily available for detecting and measuring the hazardous attributes of a listed waste. Hazardous Waste Management System: Identification and Listing of Hazardous Waste, 45 Fed. Reg. 33084, 33105 (1980). Hence, the EPA could not entrust generators and disposers with the authority to make the determination that a listed waste no longer poses a danger to health and environment. *Id.*

Furthermore, The *Recticel Foam Corp.* decision does not preclude application of the continuing jurisdiction principle in the case *sub judice*. 858 F. Supp. 726. In *Recticel Foam Corp.*, Judge Murrian held that he could not apply continuing jurisdiction to the listed waste because there never was original jurisdiction. 858 F. Supp. at 736-39; *see also Bethlehem Steel*, 38 F.3d 862, 871 (7th Cir. 1994)(misinterpreting the

2. While § 261.3(c)(1) has been subject to some judicial review, the continuing jurisdiction principle has never been fully addressed. *Steel Mfrs. Ass'n v. EPA*, 27 F.3d 642, 644 (D.C. Cir. 1994); *Chemical Waste Management, Inc.*, 869 F.2d 1539 (D.C. Cir. 1989)(finding that 261.3(c)(1) supported the contained-in rule, a corollary to continuing jurisdiction); *United States v. Recticel Foam Corp.*, 858 F. Supp. 726, 737 (E.D. Tenn. 1993)(examining continuing jurisdiction but holding it inapplicable to the facts of that case).

continuing jurisdiction principle by applying the contained in rule instead). The listed waste in that case was first used "to purge the mixing head of remaining foam ingredients" and then drained into a box or barrel under the foaming unit where it was combined with nonhazardous waste streams and stored before disposal. *Recticel Foam*, 858 F. Supp. at 729. According to these facts, the listed material became a solid waste when it was stored in the barrel with other waste streams. § 261.2(b)(3). However, this solid waste amalgamation could not satisfy the criteria for becoming a listed waste because it was not pure or technical grade. *Bethlehem Steel Corp.*, 38 F.3d at 869-70. Therefore, as the solid waste could not "meet the listing description set forth in subpart d," § 261.3(b)(1), and the mixture rule could not be applied because it was vacated, *Shell Oil Co.*, 950 F.2d 741, 752 (D.C.Cir. 1991), the solid waste evaded identification as a hazardous waste and the ramifications of the continuing jurisdiction principle. *Recticel Foam Corp.*, 858 F. Supp. at 729, 736-39.

Conversely, Judge Remus did have original jurisdiction to apply to NURD's roof acid mixture. When NURD finished a particular job with excess roof acid, it collected the roof acid for transport back to Moll's Gardens and disposal. (R. 2) Because this would constitute an accumulation and storage before disposal, § 261.2(b)(3), NURD's roof acid was an unmixed, technical grade listed waste which continuing jurisdiction could attach. §§ 261.3(a)(2)(ii), (b)(1), (c)(1). Therefore, When NURD later mixed the roof acid with fruit juice it had no effect on the roof acid's previous identification, and the roof acid remained a hazardous waste. (R. 2)

Moreover, the continuing jurisdiction principle would not render the mixture rule nugatory. The mixture rule provides that a mixture of solid waste and one or more hazardous wastes is a hazardous waste. § 261.3(a)(2)(iv). NURD asserts that if a listed waste remains a hazardous waste after commingling it with non hazardous wastes, then there would have been no major loophole to close under the 1978 proposed rules and the mixture rule would have been unnecessary. Hazardous Waste Management System: Identification and

Listing of Hazardous Waste, 45 Fed. Reg. at 33095 (1980)(preamble to part 261 final rules). As demonstrated by *Recticel Foam Corp.*, however, there still was a major loophole to close under the hazardous waste listing provisions even with a continuing jurisdiction principle. A material which is mixed before becoming a solid waste cannot be identified as a listed hazardous waste because it never was pure or technical grade. § 261.3(a). Therefore, because there was never original jurisdiction for continuing jurisdiction to attach, the mixture rule would still play an essential role in the hazardous waste identification procedures.

3. Because fruit juice cannot properly be considered a solid waste, its mixture with roof acid is subject to the contained-in rule.

The contained-in rule applies to mixtures of hazardous wastes and nonsolid wastes, which would ordinarily evade hazardous waste identification. First, such a mixture could not meet the description set forth in subpart D, because it would be impure or nontechnical grade. *Recticel Foam Corp.*, 858 F. Supp. at 731, 735. Second, the mixture rule would be inapplicable because it can only be applied to mixtures of listed wastes and solid wastes. § 261.3(a)(2)(iv). Because fruit juice should be considered a nonsolid waste, the contained-in rule will prevent NURD's roof acid and fruit juice mixture from evading RCRA regulations.

As adopted in *Chemical Waste Management*, the contained-in rule provides that a "hazardous waste cannot be presumed to change character when it is combined with an environmental medium, and the hazardous waste restrictions therefore continue to apply to waste which is contained in soil or ground water." 869 F.2d ___, 1539 (D.C.Cir. 1989). An environmental medium is not a solid waste because it cannot be properly considered abandoned. *Chemical Waste Management*, 869 F.2d at 538-40.

While the contained-in rule was originally applied to groundwater, the contained-in rule has been expanded to

cover water in general. *United States v. Johnson*, 886 F. Supp. 1067 (W.D.N.Y. 1995).

> Water is not a "solid waste" for purposes of the regulations implementing RCRA, since its definition does not encompass a non-hazardous substance like water, nor does it fall within the terms of the applicable regulations. Consequently, a "mixture" of a listed hazardous waste—spent solvents—and water is not a hazardous waste under the regulations' so-called "mixture" rule. Rather the substance is a listed waste in an altered form.

Id. at 1067 (adopting a contained-in policy). Fruit juice should also be included in this expanded environmental media definition because it is primarily water.

Furthermore, the fruit juice was never abandoned, and therefore cannot be considered a solid waste. NURD composted the fruit juice, presumably to use the resulting material as fertilizer. (R. 2) Because NURD would gain a benefit from this material, it was not abandoning it according to the requirements of the solid waste definition. § 261.2(b)(1) Moreover, Congress did not intend fertilizers which did not exhibit hazardous attributes to be considered a discarded material. H.R. Rep. No. 1491, 94th Cong., 2nd Sess. (1976) *reprinted in* 1976 U.S.C.C.A.N. 6238. *But See* 45 Fed. Reg. 33084, 33091 (1980)(positing that "chemical-bearing sludges used as fertilizers" may regulated). Therefore, fertilizer should be considered an environmental medium similar to the earth it is intended to augment. While NURD also thought that the roof acid "would enhance the soil" (R. 2), roof acid actually poses a danger to the environment and cannot be considered fertilizer. § 261.3 (a)(2)(ii). Furthermore, because suits pursuant to CERCLA § 107(a) are strict liability, mistake is not a defense. *See Northeastern Pharmaceutical Chemical Co.*, 810 F.2d 726 at 743 (8th Cir. 1987).

B. *The repromulgated mixture rule, which is incorporated into CERCLA through § 101(14) for the purposes of suits pursuant to CERCLA § 107(a), may be applied to disposals which occurred before 1992, because § 107(a) is retroactive*

Liability may also be imposed under the mixture rule notwithstanding its recent invalidation. *Shell Oil Co. v. EPA*, 950 F.2d 741, 752 (D.C. Cir. 1991). Although the vacatur of the mixture rule in *Shell Oil* is indisputable, the validity of RCRA regulations may only be challenged in the D.C. Court of Appeals. 42 U.S.C. § 6976(a)(1). Because the mixture rule was repromulgated, it may be applied in the instant case. Hazardous Waste Management System; Definition of Hazardous Waste; "Mixture" and "Derived-From" Rules, 57 Fed. Reg. 7628 (1992) (repromulgating an interim final mixture rule). Furthermore, liability may be imposed upon NURD under CERCLA § 107 despite the fact that this would entail a retroactive application of § 107.

A statute operates retroactively if it imposes "new legal consequences to events completed before it enactment." *Langraf v. USI Film Products*, __ U.S. __, 114 S. Ct. 1483, 128 L. Ed. 229 (1994). CERCLA § 107(a) imposes liability on persons who owned property at the time hazardous substances were disposed on it. 42 U.S.C. § 9607(a). Therefore, because CERCLA § 107 applies to past owners of land, one interpretation of this provision would be that it imposes liability to pre-enactment activity. A legislative enactment may be applied retroactively if Congress expressly conveys such an intent. § 107(a)(2). Furthermore, retroactive legislation, criminal prosecutions aside, does not encroach on due process if the retroactive "liability scheme is rationally related to a valid legislative purpose." *United States v Monsanto Co.*, 858 F.2d 160, 173 (4th Cir. 1988).

The majority of courts examining retroactivity have held that Congress intended CERCLA § 107 to be applied to pre-enactment disposals. *E.g. United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726 (8th Cir. 1985); *United States v. Shell Oil Co.*, 841 F. Supp. 962 (D. Cal.

1993). Congressional intent on whether the statute should be applied retroactively is shown primarily in statutory language. *Langraf*, __ U.S. __, 114 S. Ct. at 1500, 128 L. Ed. at ; *United States v. Shell Oil Co.*, 605 F. Supp. 1064, 1073 (D. Colo. 1985); *Ohio v. Georgeoff*, 562 F. Supp. 1300, 1309 (N.D. Ohio 1983). The relevant language provides that "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of . . . shall be liable for . . . any . . . necessary costs of response incurred by any . . . person consistent with the national contingency plan." 42 U.S.C. § 9607(a)(2), (a)(4)(B). Because the *actus reus* of CERCLA § 107(a)(1) is expressed in the past tense—owned, operated, disposed, incurred—a retrospective application is evident in the plain language. *C.f. Northeastern Pharmaceutical*, 810 F.2d at 735; *Shell Oil Co.*, 605 F. Supp at 1073; *Georgeoff*, 562 F. Supp. at 1310 (holding that the use of accepts or accepted in the alternative did not evince a congressional intent to regulate pre- and post-enactment conduct). Furthermore, a retroactive liability scheme is necessary to give the CERCLA § 107(a)(2) effect. Because present owners of waste sites are already subject to liability under CERCLA § 107(a)(1), a non-retroactive application of CERCLA § 107(a)(2) would render this subsection nugatory.

NURD incorrectly argues that "shall" shows an ambiguity in Congress' intent to retroactively apply this statute. *Northeastern Pharmaceutical*, 810 F.2d at 735; *Shell Oil Co.*, 605 F. Supp. at 1073. "Shall" does not apply to the *actus reus* or conduct of the actor, but provides a court the power to impose mandatory liability. Although liability may be incurred by an actor for past actions, it is impossible for a court to actually impose the liability at any time except in the present. Therefore, "shall" does not detract from the patent retrospective congressional intent of CERCLA § 107.

This construction of Subsection (a) is supported by the legislative history of CERCLA. H.R. Rep. No. 172, 96th Cong., 1st Sess., Pt. 1, *reprinted in* 1980 U.S.C.C.A.N. 6119. The purpose of CERCLA was to "amend the Solid Waste Disposal Act to provide for a national inventory of inactive haz-

ardous waste sites and to establish a program for appropriate environmental response action to protect public health and the environment from the dangers posed by such sites." *Id.* at 1, 1980 U.S.C.C.A.N. at 6119. The inactive waste cites which Congress intended to remediate included existing cites where the disposal occurred before CERCLA was enacted. In 1979, EPA estimated that of the 30,000 to 50,000 inactive sites then in existence, 1,200-2,000 presented a serious risk to public health. Complementing this purpose, was Congress' intent to compel those responsible for the disposal to bear the cost of the clean up. *Georgeoff*, 562 F. Supp at 1312; *see also Northeastern Pharmaceutical*, 810 F.2d at 734. There was "an unequivocal Congressional intent to effect the complete clean up of the existing hazardous waste facilities." *Georgeoff*, 562 F. Supp. at 1311-12. Therefore, to give teeth to Congress' intent, CERCLA § 107 must apply retroactively to disposals which occurred before its enactment.[3] CERCLA § 107(f) also shows Congress' intent to apply the § 107(a) retroactively. *Northeastern Pharmaceutical*, 810 F.2d at 736; *Shell Oil Co.*, 605 F. Supp. at 1075; *Georgeoff*, 562 F. Supp. at 1311. Subparagraph (C) § 107(a) imposes liability for injury to natural resources. Subsection f of § 107 which provides that "[t]here shall be no recovery under the authority of subparagraph (C) (natural resources section) of subsection (a) of this section where such damages and the release of a hazardous substance from which such damages result have occurred wholly before December 11, 1980," evinces two important points regarding CERCLA 107(a) retroactivity. First, this shows Congress' intent to allow for recovery for pre-enactment disposals under § 107(a)(4)(C) if the damages did not occur before 1980. More importantly, by limiting retroactive application under § 107(a)(4)(C), this section "implicitly authorizes retroactive application of § 107(a)(4)(A)-(B). *Northeastern Pharmaceutical*, 810 F.2d at 736.

3. In fact most courts analyzing this issue have had no trouble imposing this retroactive liability. Many courts have even allowed recovery for response courts which occurred before enactment. *E.g. Northeastern Pharmaceutical*, 810 F.2d at 734.

The legislative history of CERCLA § 107(f) is also consistent with the retroactive construction of CERCLA. This section was originally found in section 4(n) of Senate Bill 1480. S. Rep. No. 848, 96th Cong., 2nd Sess. (1980). Section 4(n) limited the recovery for certain damages, including damages to real property, personal property, natural resources, loss of income, and medical expenses, where both the damages and the release occurred before enactment of CERCLA. But subsection (n) did not limit removal costs for releases which occurred prior to CERCLA's enactment. Furthermore, the Committee Report stated that "section 4(n) specifies how claims for certain damages occurring before enactment will be handled under S. 1480. Costs of removal (cleanup and containment) are not affected by this provision, nor are any damages associated with continuing releases." (need cite). Congress therefore expressed its intent to impose liability for actions that occurred before CERCLA was enacted. Therefore, because liability may be imposed for conduct occurring before CERCLA was enacted, when new substance become subject to CERCLA § 107(a) liability, it can be done retroactively.

A retroactive application of CERCLA is rationally related to its purpose and therefore satisfies due process. *Monsanto*, 858 F.2d at 173; *Northeastern Pharmaceutical*, 810 F.2d at 734. CERCLA's primary purpose is to clean up inactive disposal sites and impose liability on the party responsible for the contamination. As discussed *supra*, environmental protection is a valid use of Congress' authority under the Commerce Clause.

Appellees argument that *Goodner Bros.* precludes the retroactive application of the mixture rule to conduct before its repromulgation is inapposite. 966 F.2d 380 (8th Cir. 1992). *Goodner Bros.*, which vacated the mixture rule retroactively, concerned a criminal suit by EPA pursuant to RCRA section 6928(d)(2)(A). *Goodner Bros.*, 966 F.2d at 383.

The government argued in *Goodner* that even though the court in Shell Oil invalidated the mixture rule, the invalidation was only to be given prospective affect. 966 F.2d at 384-85. The government interpreted Shell this way because the

court proposed to the EPA to repromulgate the rules on an interim basis under the good cause exemption of the A.P.A to avoid a "discontinuity in the regulation of hazardous waste." *Shell Oil Co.*, 950 F.2d at 752.

The court in *Goodner* refused to accept such an interpretation. While "an unlawfully promulgated regulation can be left in place while the agency provides the proper procedural remedy," the *Goodner Bros.* court held that the *Shell Oil* opinion did not overcome the burden that an unlawfully promulgated regulation has no force or effect of law. 966 F.2d at 384-85. The court made this interpretation because the *Shell Oil* opinion used the word vacate. *Id.* To vacate a law is to deprive it of force of law. *Id.*

Even if the *Goodner Bros.* court's interpretation of *Shell Oil* is correct, it is not applicable to the argument that the repromulgated mixture rule is retroactive in this case. The *Goodner Bros.* court never analyzed whether the reenacted mixture rule could be retroactively applied.[4] Such an argument would have been futile because a conviction of a person under a statute for actions which occurred before the enactment of the statute would be a violation of the rule against ex post facto prohibitions.

But this is a suit pursuant to CERCLA § 107. CERCLA § 107 concerns remediation and clean up of hazardous substances and does not impose any criminal sanctions. As long as the roof acid and fruit juice mixture was a hazardous substance at the time of BRANU's response action in 1993, the CERCLA § 107 claim is sufficient for Due process concerns.

The last retroactivity issue is whether the mixture rule, as an agency rule, can be applied retroactively. NURD contends that while Congress' power to enact retroactive statutes is not very limited, an agency's power to promulgate retroactive rules is proscribed by the A.P.A. *See Bowen v. Georgetown University Hospital*, 488 U.S. 204, 214 (1988)(J.

4. The government argued that vacatur of the original rule should only be given prospective effect, and that the government could rely on the Arkansas mixture rule to replace the invalidated federal one. *Goodner Bros.*, 966 F.2d 384-85.

Scalia concurring). First, the majority did not adopt this view. *Id.* at 208 (allowing agencies to promulgate retroactively when Congress expressly permits). Second, even if the A.P.A. limits an agencies power to promulgate retroactive rules, the A.P.A. does not limit the mixture rule in this case. The mixture rule is incorporated into CERCLA as a substantive provision of CERCLA. CERCLA § 101(14), codified at 42 U.S.C. § 9601 (14) (1988) (incorporating RCRA hazardous wastes into CERCLA), and would not be subject to the limits placed on agencies.

CONCLUSION

For the foregoing reasons, Brownfields Redevelopment Associates of New Union respectfully requests this court to: 1) affirm the findings of the district court that Congress was within its Commerce Clause authority in enacting RCRA, 2) reverse the findings of the district court that no private cause of action for restitution was created under RCRA § 7002 and that NURD is not liable to BRANU under RCRA § 7002, and 3) reverse the findings of the district court that the "roof acid" mixture was not a hazardous waste at the time of its disposal and that NURD is not liable to BRANU under CERCLA § 107.

Respectfully submitted,
Counsel for the Appellant