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Vermont Law School

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No. 89-27

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CITY OF NORTHWOOD,

Appellant,

v.

SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR
and
MULTI-CHEM CHEMICAL CO.,

Appellees.

On Appeal from the United States District Court
for the District of New Union

BRIEF FOR MULTI-CHEM CHEMICAL COMPANY, Intervenor*

Vermont Law School
Hans G. Huessy
Bradford T. Atwood
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* The winning briefs published in this issue are reprinted substantially in their original form. The editorial staff of the *Pace Environmental Law Review* made minor revisions to citation form and spelling. The outline, writing style, and use of case and statutory law remains that of each group of authors.

QUESTIONS PRESENTED

I. Was the district court correct in dismissing the City of Northwood's request for an order compelling the United States Department of the Interior to perform a natural resource damage assessment and to recover damages from the Multi-Chem Chemical Company under the Comprehensive Environmental Response, Compensation, and Liability Act?

II. Was the district court correct in granting Multi-Chem's motion to dismiss the City of Northwood's CERCLA action, where the City of Northwood is clearly excluded from maintaining such an action by the plain language and the overall purpose of the statute?

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STATEMENT OF THE CASE

Appellant, City of Northwood, (the City), brought suit in the United States District Court for the District of New Union against both the United States Department of the Interior and Multi-Chem Chemical Company (Multi-Chem). The City initiated this suit in response to Multi-Chem's alleged "hazardous substance" contamination of the groundwater and surface waters of the Northwood National Wildlife Refuge.

The City's lawsuit consists of two causes of action for natural resources damage under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) §§ 101-405, 42 U.S.C. §§ 9601-9675 (1983). The first cause of action would force the Secretary of the Interior to perform a natural resource damage assessment of the Refuge and then recover damages from Multi-Chem in the Secretary's capacity as a designated "natural resources trustee." The City's second cause of action lays claim to an independent authority to bring action on its own behalf as a trustee of natural resources.

Appellees, Multi-Chem and the Department of the Interior, filed motions to dismiss the City's first cause of action. These motions were naturally opposed by the City. Multi-Chem also filed a motion to dismiss the City's second cause of action. This motion was opposed by both the City and the Interior Department. The district court granted all motions to dismiss.

Appellant, City of Northwood, is an affluent suburb of New Union City, the capital of the State of New Union. (R.1). Settled in the early 1700's, it was a busy industrial city of factory workers and machinists until the Second World War. (R.1). However, most of the industrial companies have since relocated, in search of lower labor costs. (R.1). While the City's economy was depressed for a time, it has taken a significant upsurge in recent years. No longer a bleak municipality of high unemployment, pockmarked by abandoned industrial and factory sites, the City is today an increasingly affluent "bedroom community." (R.1) It attracts doctors, lawyers, engineers, and other professionals who commute to work in New

Union City. (R.1).

Appellee Multi-Chem Chemical Company's historical ties to the City of Northwood are quite unlike those of the majority of industrial companies once located there. Multi-Chem moved into the City as most other industries began to abandon it. In 1943, Multi-Chem built a small pesticide processing plant within Northwood to produce insecticides for American G.I.s fighting in the Pacific. (R.2). This plant continued to operate after the war, producing agricultural pesticides. (R.2). Multi-Chem's Northwood facility was never large. Before it closed in 1985, the plant employed 35 people. (R.2).

Multi-Chem has gained a reputation as one of the most progressive employers in the State of New Union, where it employs close to 16,000 persons. (R.2). Its generosity is well-known, as both an employer and a corporate citizen. Not only does Multi-Chem maintain an aggressive affirmative action plan and generous employee benefit plan for child care and elder care, but it also provides large donations to local hospitals and schools, and funding for a homeless shelter in New Union City. (R.2).

Multi-Chem's Northwood plant was located just outside the boundary of the Northwood National Wildlife Refuge. (R.2). This Refuge is owned and administered by the Appellee, United States Department of the Interior. (R.1) The Refuge is situated entirely within the City of Northwood's municipal boundaries. (R.2). The City's municipal ordinances apply within the Refuge to the same extent as elsewhere in the City. (R.2). The City provides the Refuge with such services as fire protection and trash removal. (R.2).

Despite, or perhaps because of, the fact that the Refuge is located within the heavily developed metropolitan area of New Union City, it remains an important stopover for certain migratory species of birds. (R.1). The Refuge lies along an important flyway for several species of ducks, geese, and other waterfowl. (R.1). Many thousands of these birds use the Refuge as an overnight stopping area during their biannual migration between Canada and the southern latitudes. (R.1). Interior Department biologists have concluded that the bird population would stop significantly if the Refuge were re-

placed by development. (R.1).

The Refuge is also an important aesthetic and recreational resource. (R.2). It is one of Northwood's principal attractions and undoubtedly one of the reasons for the City's newfound popularity among "affluent commuters" as a place to live. (R.1). The Refuge provides a place for the public to bike, to hike, and to watch birds. (R.2). It also serves as a visual and noise buffer for the City from the highway. (R.2).

In 1984, the City Health Department tested the drinking water wells for homes located downgradient, (i.e. downstream in the aquifer), from Multi-Chem's Northwood plant. (R.2). This shallow aquifer is thought to flow in a direction from Multi-Chem's plant, beneath the tested homes, and onward toward the Refuge. (R.2). The wetlands and marshes within the Refuge are conjectured to be hydrologically connected to this aquifer. (R.2). These wetlands and marshes are not subject to the ebb and flow of the tides and have never been navigable. (R.2).

The City Health Department's well tests revealed several chemicals in the water which meet the test for "hazardous substances" under Federal law. (R.2). These chemicals happen to be ingredients for the pesticides manufactured at the Multi-Chem pesticide plant. (R.2). The City also found levels of the pesticides present in the surface waters of the Refuge.(R.2). However, all parties agree that more complete sampling, done over several seasons of the year, is necessary to determine the full extent to which the pesticide contamination has entered the Refuge's surface waters. (R.2-3).

The City's municipal water supply has not been affected by any level of groundwater contamination. (R.3). In 1987, three years after the initial testing revealed the presence of "hazardous substances" in the water, the City ordered the contaminated wells closed. (R.3). It connected the affected homes to the pure municipal water supply at a cost of $230,000. (R.3). Multi-Chem agreed to reimburse the City for these costs without any admission of liability, and without the City's agreeing to waive any potential claims by the City against Multi-Chem. (R.3).

The City of Northwood is still concerned about the pesti-

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cide ingredients which have apparently continued to flow into the marshes and wetlands of the Refuge. (R.3). The City believes that this may pose a potential threat to the migratory birds who use the Refuge as a brief overnight resting and feeding stop. (R.1,3). The three parties involved: the City, the Interior Department, and Multi-Chem, have failed to resolve the issue after extended correspondence. (R.3). As a result, the City of Northwood brought this lawsuit in 1989.

The Department of the Interior indicated to the district court that although it would be willing to perform a natural resource damage assessment, it does not currently have the funds available to do so. (R.4). The Department stated that it may in fact perform this assessment in the future but, due to budgetary constraints, not until 1992 at the earliest. According to the Department's five-year budget plan, funding will not be available before this date. (R.4).

The estimated cost of a natural resource damage assessment for the Refuge is $1.1 million. (R.4). Congress appropriated $100 million to the Interior Department for the general operation of the entire National Wildlife Refuge System. (R.4). The Department concedes that it could legally spend some of this money for the natural resource damage assessment if it chose to do so. (R.4). However, the Department has concluded this money is already overcommitted for such basic needs as the general upkeep of the various refuges, the salaries of refuge employees, and long-planned repairs and improvements for refuge buildings throughout the national refuge system. (R.4). The Secretary of the Interior has decided, as a matter of administrative policy, that these needs are a higher priority than funding the natural resources damage assessment of the Northwood Refuge. (R.4).

In pre-litigation correspondence, the City asked the Interior Department to request extra funds to pay for the damage assessment as a line-item in its next budget submission to Congress. (R.4). The Department refused to do so. It asserted that the President's Office of Management and Budget and the relevant Congressional committees would probably deny such a line-item request. Even if they were to approve it, the Department believes that they would simply transfer the

money out of the requested general appropriation in order to maintain the overall appropriation available to the Interior Department. (R.4-5).

The Mayor of Northwood also requested that the Governor of New Union designate her as a trustee for natural resources in Northwood, but the Governor declined to do so. (R.5-6). The district court noted the officials designated by the Governor to serve as state trustees are all heads of such state departments as the Department of Natural Resources and the Department of Environmental Protection. (R.5). The designated state trustees have claimed that like the federal Interior Department, they lack sufficient funds to conduct a natural resource damage assessment of the Northwood Refuge. (R.6).

The District Court for the District of New Union granted Appellees' motions to dismiss the City of Northwood's first cause of action because the court lacked subject matter jurisdiction under CERCLA § 310, 42 U.S.C. § 9659. (R.5). The court held that the decision of whether and when to perform a natural resource damage assessment is a discretionary enforcement decision of the administrative agency in its role as trustee of natural resources. (R.5). In addition, the court held that the terms "trustee" and "trusteeship" as used within CERCLA § 107(f), 42 U.S.C. § 9607(f), are not meant to invoke the public trust doctrine. The basis of the holding is that the doctrine is too narrowly drawn for application to the factual circumstances of this case. (R.5).

The district court also granted Appellee Multi-Chem's motion to dismiss the City's second cause of action under CERCLA. The court held that the City is not a state, and its officials are not state officials within the meaning of CERCLA § 107(f), 42 U.S.C. § 9607(f). (R.5). The matter is before the United States Court of Appeals for the Twelfth Circuit on appeal.

The City of Northwood's appeal raises two questions before this court. First, whether the United States District Court for the District of New Union was correct in dismissing the City's request for an order compelling the Interior Department to perform a natural resource damage assessment and to

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recover damages from Multi-Chem under CERCLA. Second, whether the district court was correct in granting Multi-Chem's motion to dismiss the City's independent CERCLA action on the grounds that the City is clearly excluded from maintaining such an action by the plain language and purpose of the statute.

SUMMARY OF ARGUMENT

Appellant, City of Northwood, does not have the authority to compel the United States Department of the Interior, as trustee, to either perform a natural resource damage assessment or to recover for damages to natural resources under CERCLA. CERCLA does permit "persons" to commence a civil action against a natural resource trustee for failure to undertake a non-discretionary duty. However, because the decisions to perform a natural resource damage assessment or recover damages are discretionary, the Department of Interior cannot be compelled to perform either of these actions.

Congress did not authorize the promulgation of regulations which would make the performance of a damage assessment a non-discretionary duty of the trustee. Furthermore, the regulations which were eventually promulgated expressly state that the duty to perform a natural resource damage assessment is discretionary. Therefore, because the duty is discretionary, an action to compel its performance cannot be sustained under CERCLA's citizen suit provision.

The district court properly held that actions to recover for damages to natural resources are basically enforcement proceedings. The fact that it is an enforcement means that the decision of whether to commence such an action is inherently vested in the agency entrusted with the statute's enforcement. Such discretion is necessary because of the multiple factors that go into the decision of whether to proceed. Congress recognized that the respective agencies are in the best situation to balance these factors. Therefore, an action to compel the Department of the Interior to recover for damages to the natural resources cannot be sustained because it is an enforcement action committed to agency discretion.

Appellant argues that the words "trustee" and "trusteeship" employed by Congress within CERCLA § 107(f) are meant to invoke the public trust doctrine. Therefore, Appellant contends, the public trust doctrine should act as overriding authority to compel the Interior Department to perform a natural resource damage assessment and to recover damages from Multi-Chem. However, such an invocation would require an unwarranted expansion of the scope of this ancient common law doctrine and run contrary to a significant body of precedent established by the United States Supreme Court. It would also run contrary to Congress' intention that the decision to perform a natural resource damage assessment pursuant to CERCLA § 107(f)(1) is a discretionary duty vested in the statutorily designated trustee.

The origins of the public trust doctrine in the United States are rooted in the common law traditions of England. There, the land beneath navigable, tidal waters was impressed with the public trust and held by the Crown for the common use and benefit of the nation. In the United States, the Supreme Court has held that navigable fresh-waters and all tidal waters and the lands beneath them are similarly impressed with such a trust. Ownership of these lands and waters vested in the states upon entry into the Union as part of their sovereign capacity to hold them subject to the public trust. The marshes and wetlands of the Northwood National Wildlife Refuge are not tidal and have never been navigable. They therefore fall beyond the scope of the public trust doctrine.

Additionally, since the decision of whether to pursue an enforcement action is discretionary under CERCLA § 107(f), Congress could not have meant for the terms "trustee" and "trusteeship" to invoke the public trust doctrine. The doctrine would require an affirmative obligation on the part of the trustee where none was intended.

Appellant maintains that where the federal government, in the exercise of its discretionary power, elects not to perform a damage assessment of, or recover damages to, a natural resource for which it is a trustee, that a municipality may bring such an action as a state under CERCLA § 107(f)(1). This contention is contrary to the plain language of the stat-

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ute, which makes specific provisions for local government and includes such entities under its definition of "person."

Appellant also cannot be considered an authorized representative of a state and therefore, may not bring an action as a trustee for the Refuge. Such trustees are to be appointed by the Governor, and the Governor of New Union has declined to designate the City of Northwood as trustee for the Refuge. Those trustees that have been appointed have also elected not to support this action.

Not only is such an action precluded by the plain language of the statute, it is also contrary to its overall purpose. The statute calls for prioritization and the exercise of discretion by the states in deciding when and where to bring enforcement actions.

When the expansive definition of "State" suggested by Appellant is applied consistently throughout the statute, it becomes evidence that such a reading of the statute is not what Congress intended. The only definition that can be applied in a consistent fashion throughout the statute without defeating the intent of Congress is the narrow one that arises from the plain language of the statute.

For all the above reasons, the judgment of the District Court of New Union should be affirmed.

ARGUMENT

I. A MUNICIPALITY DOES NOT HAVE THE STATUTORY AUTHORITY TO COMPEL THE UNITED STATES DEPARTMENT OF THE INTERIOR, AS TRUSTEE, TO PERFORM A NATURAL RESOURCE DAMAGE ASSESSMENT AND RECOVER FOR DAMAGES PURSUANT TO SECTION 107(f)(1) OF CERCLA, AND THEREFORE, AN ACTION TO COMPEL SUCH AN ASSESSMENT IS NOT SUSTAINABLE.

The Comprehensive Environmental Response, Compensation, and Liability Act, (CERCLA), was enacted in December 1980. 42 U.S.C. §§ 9601-9675 (1983 & Supp. V 1989). In general, CERCLA provides the federal government with authority to either: compel responsible parties to conduct cleanup of

hazardous waste sites, or to initiate cleanup actions and then determine who is liable for appropriate cost recovery. *Id.* Congress gave new life to CERCLA by extending, and to some extent amending, the statute's authority in 1986. The Superfund Amendments and Reauthorization Act of 1986 (SARA) was a five-year extension of the CERCLA program. *Id.* Unless otherwise specified, references to CERCLA in this brief refer to the statute as amended.

CERCLA allows any person to commence a civil action against a natural resources trustee for failure to undertake a non-discretionary duty mandated by CERCLA. 42 U.S.C. § 9659(a)(2). Specifically, the statute provides:

> Except as provided in subsections (d) and (e) of this section and in section 9613(h) of this title, any person may commence a civil action on his own behalf against the President or any other officer of the United States . . . where there is alleged a failure of the President or of such other officer to perform any act or duty under this chapter . . . which is *not discretionary* with the President or such other officer.

Id. (emphasis added).

Similar provisions permitting increased citizen involvement can be found in many of the significant federal environmental statutes.[1] Appellant invoked this provision in order to compel the United States Department of the Interior, as trustee, to perform a natural resource damage assessment and to recover damages from the Appellee, Multi-Chem Chemical Company. (R.3).

Proper application of this citizen suit provision demands that two threshold criteria be met. First, the City of Northwood must qualify as a "person" under the relevant portion of the statute. Second, the duty sought to be compelled must be non-discretionary in nature. The Appellee con-

1. *See also* Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (RCRA) § 7002, 42 U.S.C. § 6972 (1988); Federal Water Pollution Control Act (FWPCA) § 505, 33 U.S.C. § 1365 (1988); Clean Air Act § 304, 42 U.S.C. § 7604 (1988); Endangered Species Act (ESA) § 11(g), 16 U.S.C. § 300(j-8) (1988).

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cedes that the City of Northwood has met the first criterion. Under CERCLA, the term "person" means, "an individual, firm, association, partnership, consortium, joint venture, commercial entity, United States Government, State, *municipality*, commission, *political subdivision of a State*, or any interstate body." 42 U.S.C. § 9601(21) (emphasis added). Therefore, for purposes of commencing an action under section 310(a)(2) of CERCLA to compel the performance of a non-discretionary duty, the City of Northwood is a "person."

The second criterion requires an evaluation of the duty which the City seeks to compel under the citizen suit provision of CERCLA. The statute provides that only those duties which are non-discretionary may be compelled pursuant to this provision. Conversely, if a duty is solely within the discretion of the trustee, then its performance cannot be compelled.

A. *The Decision to Perform a Natural Resource Damage Assessment Pursuant to Section 107(f)(1) of CERCLA is a Discretionary Duty Vested in the Trustee.*

It is well established that the starting point for interpreting a statute is the language of the statute itself. *Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. 102 (1980). In determining the scope of a statute, a court should look first to the statute's language. If that language is unambiguous and there is an absence of clearly expressed legislative intent to the contrary, the language must ordinarily be regarded as conclusive. *United States v. Turkette*, 452 U.S. 576 (1981). The CERCLA citizen suit provision, on its face, clearly prohibits any person from commencing an action to compel a natural resource trustee to perform a discretionary duty.

The duties of a trustee are codified in an interdependent statutory and regulatory framework which is common to many of the complex federal environmental statutes. Proper evaluation of the trustee's duties under CERCLA requires that each provision which could give rise to a duty, discretionary or non-discretionary, to perform a natural resource damage assessment be examined. The provisions which serve to deline-

ate the trustee's duties are: (1) CERCLA section 301(c)(1) which confers authority to conduct natural resource damage assessments; (2) CERCLA section 107(f)(1) which authorizes the appointment of natural resource trustees; and (3) the regulations promulgated by the agencies to effectuate these two statutory provisions. Each of these statutory provisions will be examined individually in order to more clearly establish that the decision to perform a natural resource damage assessment is entirely discretionary. As a result, the City of Northwood is without authority to compel the Department of the Interior to conduct such an assessment.

The statutory mechanisms which authorize natural resource damage assessments do not provide that the performance of such assessments is mandatory. For our purposes, the natural resource damage provisions of CERCLA can be broken down into two distinct sections: (1) section 301(c) which requires the promulgation of regulations for the assessment of natural resource damages; and (2) section 107(a) which is the liability section of CERCLA. The liability section identifies those parties which may be held liable, the scope of their liability, and the general defenses which they may claim under the statute. A proper examination of the duties which these sections place on natural resource trustees requires that we examine each individually, recognizing, however, that each is mutually dependent.

The provision of CERCLA which mandates the promulgation of regulations for the assessment of natural resource damages does not provide that the performance of such assessments shall be mandatory. The section provides, in pertinent part, that:

> [t]he President, acting through Federal officials designated by the National Contingency Plan . . . shall study and, . . . shall promulgate regulations for the assessment of damages for injury to, destruction of, or loss of natural resources resulting from a release of oil or a hazardous substance for purposes of this Act.

42 U.S.C. § 9651(c)(1) (1983 & Supp. V 1989).

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The plain language of this provision does not confer upon the President the authority to promulgate regulations that make the performance of such assessments a non-discretionary duty. Therefore, even if the regulations adopted pursuant to this provision did make the assessment process mandatory, such a regulation would be improper because Congress did not authorize the President to exercise such legislative power. Appellee, Multi-Chem, does not concede that the regulations provided any indication that the decision to perform a damage assessment is non-discretionary. Quite to the contrary, the regulations adopted pursuant to CERCLA which provide for the assessment of damages expressly state that the assessment procedures are not mandatory.

The regulations adopted pursuant to CERCLA for the assessment of damages were published in final form in August 1986. 43 C.F.R. §§ 11.10-11.93 (1987). Soon after the issuance of these regulations, Congress amended CERCLA by enacting SARA, Pub. L. No. 99-499, 100 Stat. 1613 (1986). In response, the Department of the Interior revised the regulations. 53 Fed. Reg. 5166 (1988). Despite the revision, the regulations have consistently read that the natural resource damage assessment provides:

> [A] procedure by which a natural resource trustee can determine compensation for injuries to natural resources that have not been nor are expected to be addressed by response actions conducted pursuant to the NCP. The assessment procedures set forth in this part *are not mandatory*. However, they must be used by Federal or State natural resource trustees in order to obtain the rebuttable presumption contained in section 9607(f)(2)(C) of CERCLA.

43 C.F.R. § 11.10 (emphasis added).

The plain language of this regulation dictates that the assessment procedures are mandatory only to the extent that the natural resource trustee wishes to obtain a rebuttable presumption at a subsequent trial or administrative hearing. The regulation, by expressly stating that the procedures are not mandatory, unequivocally leaves the decision of whether to

conduct an assessment to the discretion of the natural resource trustee. The Appellee would hasten to point out that this is entirely consistent with the statutory provision, discussed above, which authorized the promulgation of these regulations.

In sum, Congress did not authorize the promulgation of regulations which make the performance of a damage assessment a non-discretionary duty of the trustee. Further, the regulations which were eventually adopted to effectuate the statutory requirements expressly state that the duty is not mandatory. The conclusion follows, that the duty to perform a natural resource damage assessment is discretionary. Therefore, because the duty is discretionary, an action to compel its performance cannot be sustained under CERCLA's citizen suit provision.

The second statutory provision which Appellants may argue gives rise to a duty to perform a natural resource damage assessment is CERCLA section 107(f)(1). This section authorizes the appointment of natural resource trustees. 42 U.S.C. § 9607(f)(1). Specifically, the statute provides that the President "shall act on behalf of the public as trustee of such natural resources to recover damages." 42 U.S.C. § 9607(f)(1). Recovery includes "damages for injury to, destruction of, or loss of natural resources, including the reasonable cost of assessing such injury, destruction, or loss resulting from such a release." *Id.* at § 9607(a)(4)(C). For National Wildlife Refuges, the President has delegated this authority to the Department of the Interior. Exec. Order No. 12,580, 40 C.F.R. § 300.75 (1987) ___ U.S.C.___. Appellee concedes the fact that the Department of the Interior has a duty to act as a trustee. However, the duty to serve as trustee does not give rise to a mandatory duty to perform natural resources damage assessments.

The plain language of the regulations adopted to delineate the responsibilities of federal natural resource trustees add further credence to the Appellee Multi-Chem's contention that the duty to perform a damage assessment is discretionary. The regulation provides:

> [t]he Federal trustees for natural resources shall be re-

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> sponsible for assessing damages to the resource in accordance with regulations promulgated under section 301 of CERCLA, seeking recovery for the costs of assessment and for the losses from the person responsible or from the Fund, and devising and carrying out a plan for restoration, rehabilitation, or replacement or acquisition, of equivalent natural resources pursuant to CERCLA.

40 C.F.R. § 300.73 (1988). This statutory provision explicitly provides that the trustee shall have the responsibility for assessing damages to natural resources. This merely implies that the assessment is one tool in the trustee's arsenal against pollution under CERCLA. Further, the statute explicitly states that the assessment must be done "in accordance with the regulations promulgated under section 301 of CERCLA." 42 U.S.C. § 9651. As noted above, the regulations promulgated pursuant to section 301 of CERCLA expressly provide that natural resource damage assessments "are not mandatory." 43 C.F.R. § 11.10.

To find further support for the conclusion that the damage assessment is a discretionary duty of the trustee one may also look to the "Section-by-Section" comments which accompanied the promulgation of the final regulations by the Department of the Interior. 53 Fed. Reg. 5170 (1988). There, the Department had the opportunity to respond to comments which interpreted the language of the regulation prescribing that the federal trustees "shall assess damages for injury to . . . ." The comments received by the Department of the Interior expressed an understanding that this language makes the assessment of natural resource damage by trustees a non-discretionary duty. *Id.* The Department of Interior responded that "the natural resource damage assessment rule is optional and applies only in those instances where a trustee chooses to use the process . . . to obtain a rebuttable presumption." *Id.*

It may be argued that the Department of Interior's interpretive statements are self-serving and therefore, should not be relied upon in determining the outcome of this suit. However, the United States Supreme Court has noted that "the power of an administrative agency to administer a congressio-

nally-created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (citing *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)). Further, the *Chevron* Court noted that, "[s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* The Department of the Interior's regulations are neither arbitrary, capricious, nor manifestly contrary to the statute. Therefore, these regulations should be accorded controlling weight in the disposition of this matter.

In conclusion, the decision to perform a natural resource damage assessment pursuant to section 107(f)(1) is within the sole discretion of the natural resource trustee. As such, the trustee cannot be compelled to conduct such an assessment under the citizen suit provision of CERCLA which limits the ability of a person to compel performance of non-discretionary duties by a trustee.

B. *The Decision of the United States Department of the Interior Whether to Proceed with an Enforcement Action is Discretionary.*

The City of Northwood petitioned the district court, inter alia, for an order to the Department of the Interior to recover damages from Multi-Chem Chemical Company. (R.1). The district court subsequently dismissed the City's request. (R.3). The district court characterized the recovery of damages as an enforcement action and, therefore, discretionary in nature. (R.5). Appellee, Multi-Chem, agrees that the recovery of damages is properly characterized as an enforcement action within the meaning of CERCLA. Therefore, because it is an enforcement action, the decision as to whether to pursue such action is inherently within the agency's sole discretion. As a result, an action under CERCLA's citizen suit provision to compel performance of such a duty cannot be sustained.

As noted earlier, CERCLA provides that the "President shall act on behalf of the public as trustee of such natural re-

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sources to recover . . . damages." 42 U.S.C. § 9607(f)(1). Further, CERCLA provides that "the President shall designate in the National Contingency Plan the federal officials who shall act on behalf of the public as trustees." *Id.* at § 9607(f)(2)(A). Regulations were subsequently adopted, and amended, by the Environmental Protection Agency (EPA) to reflect and to effectuate the responsibilities and powers created by CERCLA. 40 C.F.R. §§ 300.72-300.74 (1985). The EPA noted that it was prompted, in part, to make the latest changes to the regulations concerning natural resource trustees because of a concern for clarification of the roles and responsibilities of these parties. 50 Fed. Reg. 47,917 (1985). The regulations provide quite simply that:

> [t]he trustee *may*, upon notification, take the following actions *as appropriate*:
>
> . . .
>
> (3) Initiate actions against responsible parties under CERCLA section 107(a); or
>
> (4) Pursue a claim against the Fund for injury, destruction, or loss of a natural resource, as authorized by CERCLA section 111. (When this *option* is selected a plan for restoration, rehabilitation, or replacement or acquisition of equivalent natural resources must be adopted pursuant to section 111(i) of CERCLA.)

40 C.F.R. § 300.74(b)(1)-(4) (emphasis added). The plain language of this regulation dictates the conferral of discretionary power to the trustee, with which the trustee is to fashion responses to alleged violations. As the *Chevron* Court noted, such regulations "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 843. The Appellants have not challenged the regulations as adopted by the Department of Interior. Therefore, the plain language of the regulation, which confers discretionary power upon the trustee to seek damage recovery, should be accorded controlling weight by this court.

Regulatory discretion is attributable in no small part to the general unsuitability for judicial review of agency deci-

sions to refuse enforcement. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). The *Chaney* Court justified the existence of discretion in enforcement actions by explaining that an agency decision to commence an enforcement action necessarily involves a "complicated balancing of a number of factors" which are peculiarly within the expertise of the given agency. *Id.* Thus, the Court noted:

> the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if its acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all.

Id. The Court recognized that an agency is much better equipped than the courts to balance the almost endless number of variables involved in determining whether to pursue an enforcement action. *Id.* at 832.

The citizen suit provision of CERCLA, under which the Appellants initiated this action, provides that any "person may commence a civil action on his own behalf . . . where there is alleged a failure of such other officer to perform any act or duty under this chapter which is *not discretionary*." 42 U.S.C. § 9659(a)(2)(emphasis added). It is evident that the decision of whether to pursue an enforcement action is, and must continue to be, discretionary. As a result, the City of Northwood has no basis on which to sustain an action to compel the United States Department of the Interior to pursue this enforcement action. Therefore, the district court properly dismissed the City's motion to compel such action.

C. *The Statutory Language of CERCLA Section 107(f) Does Not Invoke the Public Trust Doctrine as Authority to Compel the United States Department of the Interior to Perform a Natural Resource Damage Assessment.*

Appellant contends that the statutory uses of the terms

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"trustee" and "trusteeship" within CERCLA section 107(f) are meant to invoke the seemingly omnipotent yet amorphous public trust doctrine. (R.5). The use of the term "invoke" is quite appropriate in this instance. The definition of "invoke" includes "to call on (God, a saint, the Muses, etc.), for blessing, help, inspiration, protection, etc.," "to summon (evil spirits) by incantation; to conjure," and "to ask solemnly for; to beg for; to implore; entreat." Webster's Deluxe Unabridged Dictionary 967 (2d ed. 1979).

The Appellant would ask this court to look beyond the statutorily delineated discretionary duty vested in the trustee for authority to compel the Interior Department to perform a natural resource damage assessment. This authority would apparently come from the Department's affirmative duty to honor its obligations with regard to land impressed with a trust for the public's benefit. The Appellees will show that the district court was correct in holding that the public trust doctrine is too narrow to be implicated in the expansive, sweeping manner Appellants request in the case before the bar.

Appellees acknowledge that the terms "trustee" and "trusteeship" are used freely in the language of CERCLA section 107(f). For example:

> The President, or the authorized representative of any State, shall act on behalf of the public as *trustee* of such natural resources to recover such damages. Sums recovered . . . as *trustee* . . . shall be retained by the *trustee* . . . .

42 U.S.C. § 9607 (f)(1) (emphasis added).

> Such officials shall assess damages for injury to . . . natural resources under their *trusteeship* and may . . . assess damages for those natural resources under the State's *trusteeship*.

42 U.S.C. § 9607(f)(2)(A) (emphasis added).

The public trust doctrine is simple to state: The sovereign may dispose of its proprietary rights in trust lands, the "jus privatum," but its obligation to manage trust lands in the

public interest, the "jus publicum," is inalienable. An understanding of the public trust doctrine depends on an analysis of the transfer of power or sovereignty. Prior to the American Revolution, navigable waters were under control of the King. The seminal case in this country, *Martin v. The Lessee of Waddell*, 41 U.S. (16 Pet.) 367 (1842), construed a royal patent of the present states of New York and New Jersey as passing the incidents of sovereignty as well as title to the lands conveyed by Charles II. Thus:

> [T]he land under the *navigable* waters passed to the grantee as one of the royalties incident to the powers of government and were to be held by him in the same manner and for the same purposes that the navigable waters of England, and the soils under them, are held by the crown.

Martin, 41 U.S. at 413-14 (emphasis added). The character of the public trust apparently changed upon Independence, for while the power of the King to make an exclusive grant of the soil underlying navigable waters were questionable, the *Martin* Court said that:

> [W]hen the Revolution took place the people of each State became themselves sovereign; and in that character hold the absolute right to all their *navigable* waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution of the general government.

Id. at 410 (emphasis added).

In 1845, the Supreme Court held that upon admission of the state of Alabama into the Union, the title in the lands below highwater mark of the *navigable* waters passed to the state and could not afterwards be granted away by the Congress. *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 223 (1845). This concept, the equal footing doctrine, is succinctly stated by the Court:

> The right of Alabama and every other new State to exer-

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> cise all the powers of government, which belong to and may be exercised by the original States of the Union, must be admitted, and remain unquestioned, except so far as they are, temporarily, deprived of control over the public lands.

Id. at 224. In the most recent case before the Supreme Court dealing with the public trust doctrine, the Court "reaffirm[ed] our long-standing precedents which hold that the States, upon entry into the Union, received ownership of all lands under waters *subject to the ebb and flow of the tide.*" *Phillips Petroleum Co. v. Mississippi*, 108 S. Ct. 791 (1988) (emphasis added). This line of precedent began in *Shively v. Bowlby*, 152 U.S. 1 (1894). There the Court examined its prior cases, the English common law, and various state court cases, and concluded:

> At common law, the title and dominion in lands flowed by the tide were in the King for the benefit of the nation. Upon the settlement of the Colonies, like rights passed to the grantee in the royal charters, in trust for the communities to be established. Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders, subject to the rights surrendered by the Constitution to the United States.

Id. at 57.

The Court criticized the "ebb and flow" measure of admiralty jurisdiction inherited from England in *The Propeller Genessee Chief v. Fitzhugh*, 12 How. 443, 456-57 (1852). The Court insisted that the different topography of America—in particular our "thousands of miles of public navigable water[s] . . . in which there is no tide"—required that "jurisdiction [be] made to depend upon the navigable character of the water, and not upon the ebb and flow of the tide." *Id.* at 457. In *Barney v. Keokuk*, 94 U.S. 324, 328 (1877), it was recognized as the "settled law of this country" that the lands under this nation's navigable freshwater lakes and rivers were within the public trust given to the new states under the

equal footing doctrine. The *Phillips Petroleum* Court emphatically stated:

> This Court's decisions in *The Genesee Chief* and *Barney v. Keokuk* extended admiralty jurisdiction and public trust doctrine to navigable fresh-waters and the lands beneath them. But we do not read those cases as simultaneously withdrawing from public trust coverage those lands which had been consistently recognized in this Court's cases as being within that doctrine's scope; *all* lands beneath waters influenced by the ebb and flow of the tide.

Phillips Petroleum, 108 S. Ct. at 797 (emphasis in original).

Ownership of *tidal* property was thus vested in the states as they joined the Union and simultaneously, expressed in the public trust doctrine. Ownership of fresh-water *navigable* waters and the lands beneath them was similarly vested in the States. The public trust doctrine encompasses these waters and submerged lands, too. Ownership of all lands influenced by the tides and all lands underlying navigable waters was vested in the states *because* these lands are subject to the public trust. The states hold these trust lands in their sovereign capacity for the benefit and use of all citizens.

The case before the bar involves marshes and wetlands which are *non-tidal* and have *never been navigable.* (R.2). Although *Phillips Petroleum* involved non-navigable submerged lands subject to tidal influence, the implications of the public trust doctrine on non-navigable, non-tidal waters and submerged lands can be gleaned from this case. If the waters and submerged lands are not subject to the ebb and flow of the tides, the test to delineate public trust lands must therefore be traditional navigability in fact at the time of statehood. The marshes and wetlands of the Northwood Refuge were not navigable at that time, nor are they navigable today. Therefore, they fall beyond the scope of the public trust doctrine. *See* Huffman, *Phillips Petroleum Co. v. Mississippi: A Hidden Victory for Private Property*?, 19 Envtl. L. Rep. 10051 (Feb. 1989).

The court should not construe the terms "trustee" and "trusteeship" as used in CERCLA section 107(f) to invoke the

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public trust doctrine. Since Congress intended that the trustee's decision of whether to perform a natural resource damage assessment and then to pursue an enforcement action is discretionary, it could not have meant for these words to do so. The public trust doctrine would require a mandatory affirmative obligation on the part of the trustee which is contrary to congressional intent. Such invocation in this case would also require an unwarranted expansion of the scope of the doctrine and run contrary to a significant body of precedent established by the Supreme Court. Therefore, the public trust doctrine is clearly an inappropriate means for compelling the Department of the Interior to perform a natural resource damage assessment and to recover damages from Multi-Chem.

II. THE DISTRICT COURT WAS CORRECT IN GRANTING MULTI-CHEM'S MOTION TO DISMISS THE CITY OF NORTHWOOD'S CERCLA ACTION BECAUSE THE CITY IS CLEARLY PROHIBITED FROM BRINGING SUCH AN ACTION BY THE PLAIN LANGUAGE AND PURPOSE OF THE STATUTE.

Appellant maintains that when the federal government in the exercise of its discretionary power, elects not to perform a damage assessment of, or recover damages for, a natural resource under CERCLA section 107(f)(1), that Appellant may bring such an action. Appellant maintains that according to section 101(27) it is a "State." Under CERCLA, any party causing an injury to a natural resource within a state may be held liable to that state under section 108(f)(1). For this to be true, Appellant must not only be considered a "State" under the statute, a proposition which Appellee will hereunder disprove, but Appellant must also be determined to qualify as an "authorized representative of a State" under sections 107(f)(1) and 107(f)(2)(B). Appellee will show why such an interpretation of sections 101(27) and 107(f)(2)(B) is inconsistent with the plain language and the overall purpose of the statute.

A. *The City of Northwood Is Not a State as Defined by Section 101(27) of CERCLA and Therefore, a Person Accused of Damaging a Natural Resource Is Not Liable to It Under Section 107(f)(1).*

The plain language of the statute clearly excludes a political subdivision of a state from bringing an action as a state. Section 101(27) provides, in pertinent part, that the term "state" includes "the several states of the United States, the District of Columbia, . . . and any other territory or possession over which the United States has jurisdiction." 42 U.S.C. § 9601(27). Under section 101(21), the "term person means [a] . . . municipality, [or] a political subdivision of a State . . . ." 42 U.S.C. § 9601(21). "When we find the terms of a statute unambiguous, judicial inquiry is complete." *Rubin v. United States*, 449 U.S. 424, 430 (1981). It is clear that for the purposes of the statute that a municipality is a person and not a "State."

Two recent district court cases approaching this issue held that a municipality was a "State" under CERCLA 101(27): *Mayor of Boonton v. Drew Chemical Corp.*, 621 F. Supp. 633 (D.C.N.J. 1985); *City of New York v. Exxon Corp.*, 697 F. Supp. 677 (S.D.N.Y. 1988) (cases involving the definition of state under CERCLA § 101(27)). Both courts proposed that, by using the word "includes," as opposed to using the word "means," in section 101(27), Congress intended that the definition encompassed other entities not specifically enumerated. *Exxon Corp.*, 697 F. Supp. at 684. While it is possible that the definition was meant to be non-exclusive, it does not necessarily follow that Congress intended it to include municipalities. This is further demonstrated by express provisions for municipalities in other provisions under CERCLA, including, for example, sections 101(21), 104(d), and 123. 42 U.S.C. §§ 9601(21), 9604(d), 9623.

A more valid interpretation of "State" is that its definition includes other territories or possessions over which the United States has jurisdiction, but which were not specifically enumerated in section 101(27). Section 107(f)(2)(B) further supports this understanding of section 101(27). It reads "[t]he

Governor of each State shall designate State officials . . . ." 42 U.S.C. § 9607(f)(2)(B). This would indicate that a municipality was not a "State" for the purposes of the statute because it provides that a governor, and not a mayor or board of aldermen, shall designate "State" officials. This provision is clearly intended to include those political entities subject only to the federal government, and not those that are political subdivisions of a sovereign entity, which are subject to an additional layer of governmental authority. Congress used the word "means" in section 101(21) because there was no consistent pattern among the entities included as persons, as there is among the included entities in section 101(27), and therefore Congress felt it had to limit the class.

The reasoning used by the *Drew Chemical* court in expanding the definition of "State" to include municipalities was that such a definition "was consistent with the remedial intent of the Act." *Drew Chemical*, 621 F. Supp. at 666. In *Drew Chemical*, the town sought to recover damages for injuries to a natural resource under CERCLA section 107(a)(4)(C). Defendants challenged the suit on the grounds that the town was not a "State" for purposes of recovery under section 107(a)(4)(C). *Id.* The court opined that because section 107 provided liability for natural resources related to either federal, state, or local government, it would be "anomalous" to allow a state to bring an action for damage to natural resources owned by the state and not allow a city to do so for a natural resource it owns. *Id.* Appellee posits that a more reasonable interpretation of the Act is that the inclusion of natural resources owned by municipalities in section 101(16) was intended not to allow a city to bring an action for damages to its natural resources, but rather so a state could bring such an action on behalf of a municipality within its borders. This would mean that a valuable natural resource would not be excluded from protection under the statute merely because it was owned by local government. The municipality could request that the designated state official, serving as natural resource trustee for the state, bring an action, even though the natural resource in question was not owned by the state.

The *Drew Chemical* court also considered that under nu-

merous other statutes, a municipality has been treated as a state. None of the statutes mentioned by the *Drew Chemical* court are environmental statutes. *Drew Chemical*, 621 F. Supp. at 667. In addition, there are statutes where such a definition has been construed to not include municipalities. *Ohio Mfrs. Ass'n v. City of Akron*, 801 F.2d 824 (6th Cir. 1986) (case involving an interpretation of OSHA's definition of "State," 29 U.S.C. § 652 (1983), which is identical to that of CERCLA's, and where the statute had made express provisions for political subdivisions of states elsewhere in the statute). Because none of the statutes listed by the court in *Drew Chemical* are environmental statutes, and because other statutes containing similar language have been construed differently than those listed by the *Drew Chemical* court, this line of reasoning is at best inconclusive. Furthermore, where a clear understanding of the statute can be derived without going outside of its plain language and overall purpose, such comparisons are of little value.

Appellee finds support for its position in *City of Philadelphia v. Stepan Chem. Co.*, 713 F. Supp. 1484 (E.D. Pa. 1989) (case involving an attempt by a municipality to bring an action as a "State" under CERCLA). The court in *Stepan Chemical* found that the language of section 101(27) was unambiguous and that there was no support in the legislative history of the Act for the proposition that Congress intended a municipality to be considered a "State" under CERCLA. *Id.* at 1489. The court concluded that where "there is no clearly expressed legislative intent to the contrary, [the court] must regard the language used as conclusive." *Id.*

Under CERCLA section 107(f)(1), a party who has damaged a natural resource is liable to the United States Government or a "State." There is no basis for giving the statute's definition of "State" so broad an interpretation as to include municipalities in either the plain language of the statute, or the legislative history of the Act. Therefore, Appellant lacks the standing to bring an action under section 107(f)(1), and the holding of the district court should be affirmed.

B. *The City of Northwood Is Not an Authorized Representative of the State and Consequently May Not Bring an Action Under Section 107(f)(1).*

No evidence can be derived from the record, even when viewed in the light most favorable to the Appellant, to support the proposition that the Appellant is an "authorized representative of a State." 42 U.S.C. § 9607(f)(1). Section 107(f)(1) states that, where there has been damage to a natural resource "[t]he President or the authorized representative of any State, shall act on behalf of the public as trustee of such natural resources to recover for such damages." 42 U.S.C. § 9607(f)(1). Section 107(f)(2)(B) provides that such trustees are to be designated by the governor of each "State." 42 U.S.C. § 9607(f)(2)(B). In *Drew Chemical* the court found evidence that supported a finding that the State of New Jersey had authorized the Town of Boonton to bring an action under section 107(f)(1). *Drew Chemical*, 621 F. Supp. at 667. Costs had been incurred by the town while acting under the direction of the New Jersey Department of Environmental Protection. *Id.* at 668. In *Exxon Corp.*, there was also evidence in the record to support a contention that the State of Pennsylvania authorized the action by the city. *Exxon Corp.*, 697 F. Supp. at 686. Appellant has requested that the Governor of New Union designate the City of Northwood as a trustee for the wildlife refuge. The Governor has declined to do so. Those individuals that have been named by the Governor to serve as trustees have chosen not to join the City of Northwood in bringing this action. Therefore, Appellant is not an authorized representative of a state and may not bring an action under section 107(f)(1).

The court in *Drew Chemical* held that a municipality could proceed under section 107(f)(1) if the statute's definition of state was interpreted expansively, or alternatively, if a municipality was an authorized representative of the state. *Drew Chemical*, 621 F. Supp. at 667. Appellee disagrees with this interpretation of section 107(f)(1). These two conditions—qualifying as a "State" under section 101(27), and as an "authorized representative of a State" under 107(f)(1)—are

presented in a conjunctive fashion. Where there is liability to a state, an authorized representative of the state, designated by the governor of the state, shall act as trustee and bring such action as the circumstances require. 42 U.S.C. § 9607(f)(1). Therefore, Appellant may be allowed to proceed only if it is a state and, as such, has the power to designate itself as trustee for the wildlife refuge. This is directly contrary to the language of section 107(f)(2)(B), which provides that such trustees shall be appointed by the Governor. Appellant is neither a "State" nor an "authorized representative of a State" and therefore, the District Court of New Union's decision to grant Appellee's motion to dismiss should be affirmed.

C. *Allowing Municipalities to Bring Actions Under Section 107 Would Defeat the Overall Purpose of CERCLA.*

Appellant argues that precluding a municipality from acting as a trustee under section 107(f)(1) would contravene the overall purpose of the statute. CERCLA was drafted to protect and preserve the public health and the environment. *Exxon Corp.*, 697 F. Supp. at 685. However, Congress was aware that there are limited resources available for pursuing these ends, both in terms of finances and trained personnel. If municipalities were allowed to bring actions under section 107(f)(1), the federal courts might be subject to a flood of litigation. Even if the courts were able to handle the additional litigation, it is doubtful that there currently exists either enough trained expert personnel to successfully carry out the clean-up process, or more importantly, the money to pay for it. This is why the statute provides the states with the discretion to decide when and where to bring such actions. The state is allowed to consider what actions should be given priority.

CERCLA is built upon a system of prioritization, as evidenced by the National Priorities List and the Hazard Ranking System. 42 U.S.C. § 9605(c), 9605(g)(2), 9618. Section 105(a)(8)(B) illustrates an additional example of how CER-

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CLA is built around a system of prioritization by both federal and state governments. It provides that each "State" shall submit to the federal government a list of priorities for remedial actions. This list should be developed with respect to the criteria set forth in section 105(a)(8)(A). Those criteria include relative risk or danger to the public health or welfare and the environment. This process obviously requires that a state exercise its discretion in selecting a top priority, and rating other targets of action under CERCLA in order of potential risk to the public health and welfare.

In the instant action, the State of New Union has not chosen to pursue the matter. Whether the State made its decision because its resources were committed to other CERCLA actions or because it did not perceive the threat to the wildlife refuge to be significant is immaterial. What is material is that under the statute, a "State" has the discretion to make such a determination and that discretionary power is consistent with the overall purpose of CERCLA. Therefore, a finding that a municipality may not proceed under section 107(f)(1) would be consistent with, and further the overall purpose of the statute.

D. *There Can Be Only One Definition of State Under the Statute and the Only One that Can Be Rationally Applied to All Sections of the Statute Is the Narrow One that Arises from the Plain Language of Section 101 (27).*

To find that a municipality is a "State" for the purposes of section 107 would mean that it would also have to be considered a state under other sections of CERCLA. Otherwise, there would have to be two different meanings given to the word "State" in the same statute. Section 105(a)(8)(B) of CERCLA sets a goal of including "the top priority among known response targets" from each "State" in a list of the top one hundred targets nationally. 42 U.S.C. § 9605(a)(8)(B). It would be incongruous to propose that Congress intended for every city and town in the United States and its territories to submit a highest priority target to the President under section

105(a)(8)(B). This section clearly demonstrates the inapplicability of an overly expansive definition of "State" under CERCLA. To include the number one priority site from every city and town in a list of one hundred sites would obviously be impossible. Such a list would have to include thousands, if not hundreds of thousands, of such sites.

When one takes the expansive definition of "State" posited by Appellant and applies it to other equally important sections of the statute it is clear that such a definition was not intended by Congress. Because whatever definition chosen must be applied consistently throughout the statute, the only possible definition of "State" under CERCLA is the narrow one that arises from the plain language of section 101(27). Therefore, Appellant is not a "State" as defined by section 101(27), and the decision of the District Court for the District of New Union granting Appellee's motion to dismiss should be affirmed.

CONCLUSION

For the foregoing reasons the judgment of the United States District Court for the District of New Union should be affirmed.

Respectfully submitted,

_____

Attorney for
Appellee Multi-Chemical Co.

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