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SCRIPPS INSTITUTION OF OCEANOGRAPHY
University of California, San Diego
October 14, 1988

I'd like to talk to you today about my vision for this country; about how I would set about building a better America. One part of that vision -- a very big part -- is working for a cleaner and safer environment. The mission of a President is to lead -- and I'd like to lead this country, and the other nations of the world, to a greater understanding of the threats facing our planet, and to a greater commitment to meeting and resolving them.

The other night, I flew here to southern California from Seattle. As I looked out the window, past the silvery wing of Air Force Two, I could see the sun setting over the Pacific, casting its orange, purple, and pink hues across the sky. I could see the dark, jagged mountains of the Coastal Range, draped in white mist. And in that moment, I knew once again why you in California -- with its special beauty -- have a special appreciation for the environment which surrounds you.

I have spent my life enjoying what nature has to offer, whether fishing or camping or enjoying the open sea. I've worked -- as a Congressman, and since -- to protect that natural beauty, whether by creating a national park in my home state of Texas, or pushing last year for a worldwide agreement to cut CFC production and protect the ozone layer.

So I say this from the bottom of my heart: in George Bush, you will have a President who is committed to conservation. As I've said before in this campaign, I am an environmentalist. The kind of beauty I spied through that small window on the plane the other night must be preserved.

A better America is a cleaner America.

Building a cleaner America won't always be easy. Here in California -- a state adding 680,000 new residents a year -- you know the strains which rapid growth can place on the environment. But if we don't see the need to act clearly, future generations will not only see it dramatically in retrospect, they'll have to live with the consequences of our inaction. After all it's no mistake that in Jackson, Wyoming, the second director of the National Park Service, Horace Albright, was hailed as a savior by the grandchildren of the people who hung him in effigy in the town square.

The fact is that, ultimately, the goal of a clean and healthy environment is not in conflict with the need to create jobs in a growing economy. Quite, the contrary: in the long run, successful environmental protection is a prerequisite to solid, sustainable economic growth.

There is another truth -- and that is that we Americans cannot protect our environment alone.

You at Scripps recognize that fact better than most. I read just this week of your Collaborative Research program, under which your scientists will team up to study those global processes which are contributing to a warming in the earth's climate.

The point is that many of the major environmental problems we face -- global warming, acid rain, the deterioration of the oceans, tropical deforestation -- are truly international in nature. Their solution will require a President who is adept at negotiating with friend and foe alike -- a President who is willing to lead on a global scale and who has the experience and knowledge to do so.

And that is why I have pledged that in my first year in office, I will convene a global conference on the environment, at the White House, to address global warming, acid rain, and the full range of challenge before us.

Here in southern California, perhaps the most pressing environmental concern is air quality. Your growth, not only here in San Diego but especially up in Los Angeles, has not come without a price -- a price commonly described with four letters: s-m-o-g.

I believe that we can take immediate steps to make our air healthier to breathe, beyond those we're already taking. One of the little-known successes of this Administration has been to eliminate the overwhelming majority of airborne lead. Levels of ambient lead in the air have declined by nearly 90% in the last ten years, and one of the key accomplishments of the Task Force on Regulatory Relief which I headed was to accelerate this reduction.

But now there is much more to be done, as the quality of the air this summer proved beyond doubt. The most pressing need is to reduce levels of ambient ozone, which contributes to smog and has too often made the air dangerous to breathe.

One of my priorities as Vice President has been to lead the search for alternative fuels -- so-called "clean fuels" such as methanol made from remote natural gas and ethanol made from grain -- and to promote their use. I am proud to report that progress is on the horizon.

Already, four western cities -- Los Angeles, Denver, Albuquerque, and Phoenix -- have initiated alternative fuel programs to clean up their air.

And today in Washington, President Reagan signed a bill -- the Alternative Motor Fuels Act of 1988 -- that will encourage the production of cars, trucks and buses that can run exclusively on these fuels, and of "dual-fuel" vehicles that can run on any combination of gasoline and alternative fuels.

That bill was one of the principle goals of the Task Force I mentioned; it was pushed through Congress with the strong support of Congressman Lowery and his colleagues Carlos Moorehead and Bill Dannemeyer in the House, and your own great Senator Pete Wilson; and, most important, it will help lead to cleaner air for southern California.

A "dual-fuel" car using methanol emits only half as much ozone as a regular car. The goal is to have several million clean-fuel vehicles operating in southern California by the year 2000. And that will lead to cleaner, safer air.

There is another step that's needed -- and that is reauthorization of the Clean Air Act. Frankly, I am disappointed that the Congress is now set to adjourn without passing clean air legislation in this session. So let me say today that, next January, if I am sworn in as your President, one of my first priorities will be to win passage of clean air legislation, one that will help not only with the solution to problems here in southern California, but one that will provide for reductions in those substances that contribute to acid rain. The time for action, on clean air and for acid rain, is now.

Here in San Diego, on this beautiful coast, you have another special concern, one that this Institution has taken a leadership role in addressing, and that is the protection of the ocean.

I have to confess that I've spent more hours than perhaps a hard-working man should enjoying the fruits of that ocean -- and if Izaak Walton is correct that God does not deduct from time on earth time spent fishing, I've got a long life still ahead of me.

But there are threats to that ocean, and one of my priorities as President will be to address them. One is the dumping of barely treated sewage and sludge from sewage plants into the ocean.

Here in California, we've made some progress. Our EPA has required Los Angeles, for example, to stop dumping sludge in the ocean. And San Diego is now close to agreement with EPA on a schedule to achieve secondary treatment of its sewage.

On the East Coast, the problems that arise from neglect of the ocean have been especially apparent this summer. Closed beaches. Medical waste washing up on the shores. It should serve as a warning to all of us.

I'm for taking strong steps -- immediately -- to protect our oceans. Many months ago, I called for the enactment of legislation which would ban the practice of dumping sewage sludge in the ocean. I am happy to report that the Congress has now taken action on that legislation. It has passed both houses and may be sent to the President shortly. I believe he should sign it.

But I believe we can do even more. We should work with the states to track the disposal of medical wastes, in order to prevent them from washing up on our beaches. And when someone is caught dumping such wastes illegally, we should throw the book at them.

I favor beefing up the Coast Guard, and, if need be, calling in the FBI, to help track down and crack down on those who dump illegally.

Let me say a word about my position on offshore drilling. I do believe that development of our most promising oil and gas reserves is called for, because continued domestic production of oil and gas is essential to the national security of the United States.

At the same time, I oppose drilling in those environmentally sensitive areas where the risk of damage is too great. I have said that I would delay any drilling under Lease Sale 91 in northern California pending resolution of these environmental concerns.

And let me add today that we should take a very close look at those environmentally sensitive areas which would be available for development under Lease Sale 95 here in southern California before proceeding with that sale. Senator Pete Wilson has proposed protecting Santa Monica Bay and the near shore ocean from Newport Beach to San Diego, and I agree that we must subject these areas to the most careful study before allowing any drilling. I will not allow California's golden shores, its most precious treasure, to be put at risk.

Another treasure not only for Californians but for all Americans is our national park system. I am a strong supporter of protecting our parks -- they are America's pride and joy. Ever since the first Republican President, Abraham Lincoln, granted Yosemite Valley to the state of California as a preserve back in 1864, the idea of setting aside land for national parks has been one of America's best. It is a concept that has been respected, honored, and imitated around the world.

The overwhelming success of our parks has sometimes taxed our ability to protect them, but we have tried. After adjusting for inflation, our Administration has increased the budget for the operation and maintenance of our parks by almost 30 percent. We've asked visitors to chip in their fair share, and the expanded fee program we've enacted will add some 500 million dollars to the budget for maintaining our parks over the next ten years. And volunteers have chipped in as well -- last year alone, some 42,000 Americans came forward to help us manage our parks better.

But more can be done, and I'd like to be known as a President who strengthened our park system and passed it on to the next generation of Americans in better shape than we found it.

I followed closely the work of the President's Commission on Americans Outdoors, and I support many of the recommendations it produced. I believe we should create "greenways," using such areas as abandoned railroad corridors, to connect parks in different parts of the country. I believe

we should continue the Land and Water Conservation Fund, which funds the acquisition of new parklands and wildlife refuges. I think we can reconstitute it as a National Endowment of the Environment, and, using a portion of our non-renewable oil and gas revenues, allow it to continue to give Americans the chance to enjoy our land and water resources.

There was one recommendation of the Commission which I believe was especially important -- and that was to pay greater attention to urban parks. Parks are for people, and we should take the greatest care to enhance and protect those parks which are near enough for people to enjoy.

I know that Congress has authorized further acquisitions in the Santa Monica Mountains Recreation Area, and I would like to announce today that, as President, I would pursue such acquisitions. Parks near our urban centers should be our highest priority, and this park would be one of mine.

Just last week, I talked about another idea I have for this country that can help with brushing up our parks. It's called YES -- Youth Entering Service to America. I'd like to see legions of our young people volunteer to keep our parks in shape -- the way many already do here in California.

You know, last summer, we took my oldest grandson to Grand Teton National Park. We hiked, fished, rafted, and watched wildlife. It was a marvelous experience for all of us, but especially for Barbara and me. We watched the gleam in George P.'s eye as he saw those rugged and sparkling mountains for the first time.

I'm sure that many of you have had similar experiences with your own kids -- in Yosemite, or King's Canyon, or elsewhere.

I knew then that this is one legacy which we must preserve for generations to come. So I have resolved that if I am elected President, I will undertake a program to strengthen and preserve our parks. I'll call it America the Beautiful, because that's exactly what this great country of ours is -- beautiful beyond all comprehension.

Perhaps Irving Berlin said it best in his magnificent song, "God Bless America." Remember the words? "From the mountains, to the prairies, to the oceans white with foam."

He pictured pristine and majestic mountains, clear air and a clean ocean. That's the America I want God to bless, too. And that's the America I'm committed to fighting for as your President.

* * *

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SUPERFUND ENFORCEMENT IN THE DUMPS: What's Wrong with the Superfund Enforcement Program?+

*by Richard H. Mays**

When Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or Superfund), 1/ it made a fundamental choice that the cost of cleaning up the nation's hazardous waste sites, insofar as possible, should be borne by those persons who were responsible for having created the sites rather than by the public in the form of a public works project. 2/ CERCLA reflected that choice by providing the U.S. Environmental Protection Agency (EPA) with enforcement authority to seek injunctive relief under section 106 3/ to compel potentially responsible parties (PRPs) to clean up a site if conditions there present an imminent and substantial endangerment. EPA was also given authority to enter sites to perform cleanups under section 104 4/ if the PRPs failed to do so, access to a Hazardous Substances Trust Fund 5/ financed by a tax on chemical feedstocks from which to pay for cleanups, and the right to recover those clean-up costs from PRPs under section 107. 6/

Even before CERCLA was enacted in the closing hours of the Carter Administration, hazardous waste enforcement had gotten off to a very active start at EPA. From 1979 to the end of 1980, following the publicity surrounding contamination at Love Canal, some sixty cases were brought by the government under section 7003 of the Resource Conservation and Recovery Act 7/ (the forerunner of section 106 of CERCLA). The start was too active for its own good, perhaps, attracting much attention and animosity because of the aggressive positions taken by EPA and the Department of Justice (DOJ). Since then, Superfund enforcement has been characterized by numerous slowdowns, speed-ups, stops, starts, and changes of direction.

The zeal and visibility with which those early cases were brought and prosecuted undoubtedly contributed to a backlash in the early years of the Reagan Administration, when numerous deleterious reorganizations of the Agency's enforcement personnel occurred, 8/ many key enforcement personnel either were transferred

to other duties or left the government, and enforcement activities in all programs literally ground to a halt. 9/

Since 1984, however, a relatively high level of enforcement effort has been sustained in all major programs, at least insofar as the number of administrative orders issued by EPA and judicial cases developed and referred to DOJ 10/ for filing in court may superficially indicate. 11/ However, a look behind the numbers at the *kinds* of CERCLA cases being generated by EPA provides more information about the nature of the CERCLA enforcement program and reveals a number of flaws in that program.

This article discusses some of the problems currently facing the Superfund program and suggests some possible short-term and long-term solutions.

Enforcement Cases Under CERCLA

A brief explanation of the types of CERCLA cases and how they are initiated may be helpful. Enforcement cases under CERCLA are brought under either section 106 (ordering cleanup to be performed by PRPs), section 107 (cost recovery from PRPs where EPA has performed the cleanup by use of the Fund), or a combination of both. Both sections 106 and 107 are involved where the government is seeking to recoup costs that it has incurred at a site as well as an order under section 106 requiring the PRPs to perform any remaining work there. The government may initiate cases under section 106 either by filing a complaint in federal district court or by issuing administrative orders to the PRPs. If a PRP fails to comply with an administrative order under section 106, EPA may ask DOJ to file suit to enforce the order and to recover treble damages if the PRP did not have sufficient cause for its noncompliance.

Complaints under section 106 may be filed with a consent decree that has been pre-negotiated with the PRPs. If settlement negotiations are not successful before filing suit, a section 106 case may be filed or a section 106 administrative order may be issued unilaterally by the government. In the absence of voluntary reimbursement to the Fund by the PRPs, the only means for bringing a cost recovery claim under section 107 is by judicial action, since there is no administrative order authority for cost recovery.

Current Use of Section 106 Enforcement Authorities

From October 1986 to April 1988--a period of eighteen months--seventy-nine judicial cases were referred by EPA to DOJ under CERCLA. Of that number, fifty-six were cases for cost recovery under section 107, and twenty-three were cases to be filed under either section 106 or sections 106 and 107 together. *All of the latter group were accompanied by consent decrees that had been negotiated with the PRPs prior to referral. 12/ Thus, during this eighteen month period, there were no unilateral section 106 cases referred to DOJ by EPA seeking injunctive relief to compel PRP cleanup of sites.* During that same period, EPA's regional offices issued seventy-five administrative orders under section 106. Of those, fifty-nine had been pre-negotiated with the PRPs, and only sixteen--less than one a month--were unilaterally issued by EPA. 13/

In addition, a recent study of EPA's Superfund program by the Surveys and Investigation Staff of the Appropriations Committee of the U.S. House of Representatives 14/ examined not only case referrals from EPA to DOJ, but also sites at which remedial investigations/feasibility studies (RI/FSs) and remedial designs (RDs) had been commenced since the inception of the Superfund program. That study found that *over seventy percent of the RI/FS and RD starts were Fund-financed.*

These figures demonstrate what has been evident for several years to those familiar with EPA's enforcement program: that EPA has a decided preference for cleanup of sites through use of the Fund under section 104, presumably to be followed by initiation of cost recovery proceedings under section 107, rather than for cleanup by the PRPs with their own funds through the use of a mandatory injunction or an order under section 106. 15/

The preference for reliance upon the Fund to obtain cleanups is not necessarily the result of a shortage of enforcement resources at EPA. EPA has increased its Superfund enforcement personnel by seventy-four percent--from 765 to 1027 full-time employees--within the last two years. Of those new employees, 103 are lawyers hired by EPA's offices of regional counsel for Superfund enforcement. 16/ Notwithstanding these significant increases in staff, the overall

number of Superfund judicial cases has not risen, and the number of judicial and administrative cases brought under section 106 has declined from previous years.

While additional resources may be needed by EPA to implement the Superfund program to its potential, there are other forces affecting the program that cause EPA to look to the Fund as the primary means of attaining cleanup. Those forces include: (1) a lack of clear direction from Congress on the role that it intended section 106 to play in relation to the Fund in the cleanup process; (2) the deadlines imposed upon EPA by Congress in the Superfund Amendments and Reauthorization Act (SARA) 17/ to initiate specific numbers of RI/FSs and remedial actions within certain timeframes; and (3) the authority that EPA's regional offices have had to create an *ad hoc* policy of heavy reliance upon the Fund to finance cleanups notwithstanding official EPA policy to the contrary.

What Is the Proper Role for Section 106?

It is not altogether clear how Congress intended section 106 to be used in the overall enforcement scheme when it enacted CERCLA in 1980 or when it substantially expanded EPA's enforcement authorities in SARA. There is no direct legislative history on the subject. Instead, in section 106(c) 18/, Congress directed EPA to publish guidelines for use of the imminent and substantial endangerment sections of CERCLA and other environmental statutes. 19/

One can argue that because Congress imposed a requirement that an imminent and substantial endangerment exist before an administrative order could be issued or lawsuit filed, it intended that section 106 be used only at sites presenting the greatest hazards and that priority be given to cleanup through use of the Fund. Individual members of Congress, in criticizing EPA over the amount of time required to compel PRPs to finance cleanup through use of section 106, have argued that cleanups should be pursued expeditiously through use of the Fund, with cost recovery actions to follow. However, at least one influential committee of Congress recently has expressed its opinion that the Fund and section 106 are to be used in tandem to achieve a balanced approach to Superfund enforcement and has criticized EPA's failure to achieve that balance. 20/

Considering the lack of intent, guidance, and consensus from Congress on how section 106 should be used, it seems very likely that, in enacting CERCLA, Congress merely copied similar "imminent and substantial endangerment" provisions from other statutes without any particular role in mind for section 106 in relation to the use of the Fund. If that is the case, it is an unfortunate misapplication of the imminent and substantial endangerment enforcement section as used in most of the other major environmental statutes. In those statutes, it serves an entirely different function from that needed in CERCLA. Regardless of the intent of Congress, the presence of section 106, coupled with the lack of legislative history on the role Congress intended that section to play and the mixed signals EPA has received from Congress over the years, have left EPA enforcement managers understandably confused as to the primary objective of the Superfund program.

In view of this uncertainty, it is fair to ask the fundamental question: Is the primary objective of the statute to clean up hazardous waste sites as quickly as possible (which would normally imply a bias toward Fund-financed cleanups), or is the primary objective to have PRPs assume cleanup responsibility (which would require greater use of section 106)? 21/ The answer may be both of the above. However, that question has never been clearly addressed by Congress, and until it is, EPA is making that determination for itself through an *ad hoc* policy of reliance on the Fund to achieve faster cleanups. This, in large part, is driven by the schedules for RI/FSs and remedial action starts contained in section 116 of SARA. 22/ Until Congress gives a clear answer to that question, the role of section 106 will continue to be uncertain, and EPA will continue to be "whipsawed" by various congressional committees and members whenever EPA's administration of the Superfund enforcement program meets with their disapproval.

Ironically, EPA's demonstrated preference for using the Fund to clean up sites is not stated EPA policy. Rather, this preference exists *in spite of* stated policy, 23/ which is to take a balanced approach between Fund-financed and enforcement-induced cleanups. Because of this, there have been numerous attempts by officials at EPA Headquarters to encourage personnel in

EPA's regional offices (where cases are initiated) to develop more cases under section 106. In July 1986, EPA's Assistant Administrators with jurisdiction over enforcement of the Superfund program issued a memorandum to the regional offices advocating greater use of section 106 actions to compel PRP-financed cleanups. 24/ Each region was encouraged to develop at least one unilateral case under section 106. However, the regional offices were not moved to action. 25/

"Gaming" the Superfund Site Classification System

When Superfund sites are placed on the National Priority List (NPL), EPA classifies them as either "Fund-lead" or "enforcement-lead" sites. 26/ Fund-lead sites are supposed to be those that, in all likelihood, will be cleaned up through use of the Fund because there are few, if any, financially viable PRPs, or there is a pressing need for rapid response action to protect human health or the environment. Enforcement-lead sites are supposed to be those at which there are financially viable PRPs, and environmental conditions at the site permit a period of negotiation or litigation. The site classifications are not inflexible, however, and the criteria for classification or for moving sites from one classification to the other are hazy.

The EPA Superfund enforcement practice that has evolved is that the case team in an EPA regional office will attempt to negotiate a settlement with the PRPs at an enforcement-lead site. Negotiations may take many months, or even years. However, if the PRPs indicate an initial resistance to settlement, or if a deadlock is finally reached, the EPA regional office will convert the case to a Fund-lead site, rather than issue unilaterally an administrative order under section 106 to the PRPs or file a lawsuit for injunctive relief. Cleanup will then be financed by the Fund, leaving the PRPs to await an eventual cost recovery action under section 107.

The practice of shifting enforcement-lead sites to Fund-lead sites resulted in the imposition of some restrictions by EPA Headquarters regarding changes in site classification, including Headquarters requiring written concurrence in such changes. 27/ Nevertheless, those restrictions apparently have not had a significant effect on the practice.

This policy of site reclassification serves EPA regional offices in a number of ways. First, it allows the region to control the timing of commencement of RI/FSs and remedial actions, and thereby to meet requirements that are mandated by EPA Headquarters' internal management systems and by Congress through sections 116(d) and (e) of CERCLA 28/ (which establish minimum numbers of RI/FSs and remedial actions that must be initiated within stated deadlines). Second, most of EPA's regional offices are overwhelmed with work and almost invariably look for the least time-consuming, least resource-intensive way to accomplish their work. They view section 106 cases, with the requirement that an imminent and substantial endangerment be proved, as being far more resource-intensive than a cost recovery case under section 107. 29/

The perception of the regions that section 106 cases are more resource-intensive is based upon experience with those cases in the early years of the hazardous waste enforcement program, before EPA routinely performed RI/FSs and endangerment assessments at enforcement-lead sites. 30/ The absence of such studies added considerable uncertainty to the trial of cases brought under section 106, but their present availability should make trial of these cases much easier. The addition of section 113(j) in SARA, 31/ limiting judicial review of issues concerning the adequacy of any response selected by EPA to the administrative record, should also make cases under both section 106 and section 107 easier, provided EPA develops an adequate record and the decisions in the record are not arbitrary or capricious nor otherwise contrary to law. Regardless, cost recovery cases under section 107 are potentially as difficult as cases under section 106, albeit in different ways. 32/

The Effect of EPA's Current CERCLA Enforcement Practice on PRPs

The failure of EPA to bring more cases under section 106 has resulted in a one-dimensional Superfund enforcement program. The only inducement for PRPs to enter into settlements requiring them to spend perhaps millions of dollars for cleanup of a site is the threat that, if they do not do so, EPA will perform the cleanup (presumably at a higher cost than private

enterprise could perform the same cleanup) and then make claim against the PRPs for recovery of the costs.

To many PRPs, that is no threat. Many companies would prefer to delay the expenditure of those funds as long as possible, having use of the money in the meantime. A cleanup financed by EPA frequently takes a minimum of several years. Although EPA is not required to wait until the cleanup is completed before bringing suit, 33/ it is very likely that a trial will not be held before a substantial portion of the costs have been incurred. Considering the normal delays in bringing a case to trial, the PRPs can gain several years of delay by allowing EPA to perform the cleanup.

Even after suit is eventually brought and the case has progressed to trial, the chances of settlement with the government at a substantial discount are good. Cost recovery cases are tedious, document- and data-intensive cases that no attorney enjoys trying and that many judges will actively discourage. EPA personnel, who have other responsibilities under the Agency's current organizational structure, might protest at the amount of time that they would be required to spend in case preparation and trial when acting as witnesses. Reasonableness of the costs, compliance with the National Contingency Plan, and adequacy of recordkeeping by EPA and its contractors (much of which was not done with the thought of supporting an enforcement action) are always subject to attack in a cost recovery case. All of these factors worry government attorneys, making settlement look attractive. For these reasons, it is likely that in settlement of a cost recovery case, the PRPs will have to pay no more, and very likely less, than they would have had to pay if they had agreed with EPA to clean up the site years earlier under a section 106 settlement. Furthermore, they have had the use of their money all that time. 34/

Added to these problems are the complaints of PRPs who have entered into settlements that have been negotiated in the last two years. While one might expect PRPs to grumble even under the best of circumstances, some appear to have legitimate complaints. Those PRPs agreed to pay substantial sums in partial settlement, with the impression that, after the settlement, the government would file suit against non-settling PRPs. EPA and DOJ frequently have

stated that the government would vigorously pursue non-settling parties after willing parties have settled, 35/ although the government will not commit to do so in a consent decree.

Notwithstanding such policy statements, the government has all too often failed to follow through on pursuing nonsettling PRPs for the balance of the work or costs not covered by a partial settlement, thereby rewarding recalcitrance and making the settling PRPs appear foolish for having settled. Many of those PRPs are also involved at other, yet unaddressed, sites, and they are threatening to "drop out" of the settlement process, creating even greater reliance upon the Fund to finance cleanups.

Effect of EPA's Current CERCLA Enforcement Practice on the Superfund Program

The current policy of relying almost exclusively on the Fund to achieve cleanups has potentially far-reaching consequences for the Superfund program as a whole. As PRPs become less concerned about the potential for an administrative order or lawsuit to be brought against them under section 106 of CERCLA if they fail to negotiate a settlement, there will be fewer settlements and increasingly heavy reliance upon the Fund to finance cleanups. Due to this demand, the Fund will not be sufficient to address as many sites as it otherwise might have if PRPs had financed cleanup at more sites. 36/ As a result, Congress eventually will have to extend and expand the Fund to even greater amounts. Should Congress refuse to do so, sites may not be cleaned up.

In a broader sense, EPA's current manner of handling the Superfund enforcement program is *de facto* changing what commenced as a liability based system for hazardous waste cleanups into a quasi "public-works" system, in which an increasingly large percentage of cleanups are being financed from the Fund. The solution does not seem to lie in subsequently recovering the money from the PRPs through cost-recovery. Only 2.5 percent of the almost \$2 billion spent on site cleanups has been recovered to date. Furthermore, EPA estimates that approximately two-thirds of the monies already spent by the Fund will *not* be recoverable because of bankrupt, insolvent, or unidentifiable PRPs. Additional discounts will be given to PRPs in negotiations due to litigation and other considerations. With improved

recordkeeping and procedures now in place, EPA expects eventually to recover approximately thirty-eight percent of present and future expenditures, assuming a seventy percent recovery rate in those cases where financially viable PRPs can be connected to the site. 37/ This may be an optimistic assumption.

Cogent arguments can be made that the liability-based Superfund program is unfair to the chemical industry, is not working, and should be converted into a public works program, but that is a matter for Congress to debate and determine. Nevertheless, EPA's current administration of Superfund enforcement could initiate that debate, especially if it continues until the next Superfund reauthorization, scheduled for 1991, and could provide fuel for those who would change the basic character of the program.

Getting Superfund Enforcement Out of the Dumps

There is no single, simple solution to reviving Superfund enforcement. There are, however, a number of actions that could be taken by EPA to revive enforcement and increase the number of settlements and cleanups. Some of these actions are short-term and can be implemented by EPA relatively quickly and easily if management sees fit to do so. Others are long-term, and will require major actions at EPA and in Congress.

Short-Term Actions

Some short-term actions that could be taken to bring the Superfund enforcement program out of the dumps are the following:

1. Enforce against PRPs at sites that are classified as enforcement-lead sites.

The enforcement-lead/Fund-lead site classification system is a reasonable approach to making an initial determination as to which sites, in all likelihood, will be cleaned up by using the Fund and which sites are candidates for cleanup by PRPs. The problem with the system as implemented by EPA is that sites have been reclassified from environment-lead to Fund-lead when resistance to settlement is detected, or if negotiations become protracted.

More emphasis should be placed by EPA upon the site classification system as a management tool to achieve balance in the Superfund

enforcement program. Criteria for the classification of sites should be clearly drawn, using conditions at the site and evidence linking financially viable PRPs at the site as major elements of that criteria.

After a site is classified as an enforcement-lead site, it should not be eligible for reclassification to a Fund-lead site in the absence of a showing that (a) the information leading to its original classification was erroneous; (b) all efforts at cleanup of the site through enforcement, including issuance of administrative orders and the prosecution of a lawsuit, have failed to achieve an order of cleanup; or (c) conditions at the site have changed, requiring immediate action financed through use of the Fund and making even a preliminary injunction inappropriate. Any attempt at reclassification should be closely scrutinized and allowed only in clearly appropriate cases.

By using the site classification system as a management tool, PRPs at enforcement-lead sites would know that the consequences of failing to settle will be a lawsuit that will be very time-consuming and expensive, with virtually no chance of winning. This prospect would provide a greater incentive to settle than the not altogether certain prospect of facing a cost-recovery action in the distant future.

2. Designate specific, experienced enforcement teams for section 106 cases.

Most Superfund cases are complicated, regardless of whether they are brought under section 106 or section 107. They frequently involve complex technology, especially with the emphasis placed by the SARA amendments on treatment technologies and permanent remedies. 38/ While many of the major legal issues involved in CERCLA enforcement cases have been resolved, 39/ there still remain many legal nuances with which to contend. The cases frequently involve many PRPs and almost invariably involve many millions of dollars.

Managing cases of this magnitude with a high degree of success requires a case team composed of attorneys and technical staff with experience, not only in the Superfund program, but also in negotiations and the trial of cases. PRPs employ experienced attorneys and national engineering firms that can intimidate inexperienced government representatives.

A cardinal rule of negotiating settlements is that in order to get the best settlement possible, one must be willing to abandon settlement discussions and resort to a judicial determination of the case if a satisfactory settlement cannot be achieved. In order to achieve more and faster hazardous waste settlements, the government must be willing to, and capable of, going to trial--an alternative the PRPs will surely find less acceptable than awaiting a cost recovery action sometime in the future.

EPA and DOJ must assign its most experienced hazardous waste attorneys and technical staff to develop, negotiate, and, if necessary, litigate section 106 and major section 107 cases. EPA's regional offices prefer to maintain maximum flexibility in work assignments, but the success of the Superfund enforcement program is sufficiently important to justify this measure.

3. Settle with willing PRPs, and then sue the rest.

From the early days of Superfund enforcement, EPA and DOJ have had a policy that, if the filing of a suit is necessary, it will select a "manageable" number of PRPs in the case against which to file suit. 40/ Those included are usually the most financially solvent PRPs who can be shown to have contributed significant volumes of, or exceptionally toxic, waste to the site. The purpose of this policy is to make cases involving numerous PRPs more manageable for the government by taking advantage of the joint and several liability standard under CERCLA. Thus, the burden of bringing smaller contributors into the case is placed on the major PRPs.

That policy may be acceptable as a convenience for the government, but it is probably a disincentive to the settlement process. The policy encourages some PRPs not to participate in settlement negotiations on the chance that they will not be in the group to be sued by the government, or perhaps by anyone else. Major PRPs may, of course, bring into the case as third-party defendants those minor PRPs not named in the original action. But if that is done, nothing has been accomplished by the government's policy other than the considerable delay required to bring in the third parties. If the third parties are not brought into the case by the original defendants, the defendants are placed in the difficult position of attempting to

convince the non-defendant PRPs that they should contribute to settlement of a suit to which they are not a party. If they cannot do that, the defendant PRPs may negotiate to settle with the government for as little as possible and feel betrayed if the government fails to follow up on suing the non-settling PRPs for the balance of the costs.

EPA has ample authority to negotiate and settle with all or a portion of the PRPs at a site. All PRPs who are willing to enter into settlement should be given the opportunity to do so, including *de minimis* PRPs. 41/ If the case is suitable for mixed funding, 42/ that avenue of settlement should be considered and used. However, if the case has not been settled, or if any portion remains unsettled after a reasonable period of negotiation, suit should be filed immediately against *all* financially viable non-settling parties, regardless of the size of their waste contribution to the site. Only in this way can the Superfund enforcement program gain the credibility that it sorely needs. Only through credibility will the program be able to achieve more and better settlements from PRPs.

Long-Term Actions

There are also two very important long-term actions that should be taken—one by EPA, the other by Congress—that will remove disincentives to the bringing of section 106 cases and make it easier for EPA to develop and manage all Superfund cases. Those long-term actions are as follows:

I. Reorganize EPA's enforcement organization.

The organizational structure of EPA's enforcement programs is a holdover from the numerous reorganizations that occurred during the Anne Burford regime as Administrator at EPA. Having inherited and retained that organizational structure, the success of the Agency's enforcement programs in terms of the volume of cases processed during the Ruckelshaus and Thomas eras has been due primarily to the management systems used and the continued pressure of top-level Agency officials on the regional offices to keep the number of enforcement cases high.

Despite the ostensible success of EPA's overall enforcement program as judged by the number

of cases, the issue should not be whether the current organizational structure works. It does. *Any* organization can be made to work, given enough effort by management. Instead, the issue should be whether enforcement can be more efficient and effective, especially in view of the tight budgets and high work loads with which EPA will be faced in the future. It can. EPA's enforcement organization has been patched with a "band-aid" approach long enough. It is now badly in need of major surgery.

Simply stated, primary enforcement responsibilities at EPA for each program are divided between the "program offices" (e.g., the Office of Solid Waste and Emergency Response, the Office of Water, and their regional counterparts), which house the technical professionals, such as engineers, toxicologists, and hydrogeologists, and the offices that house the Agency's attorneys (e.g., the Office of Enforcement and Compliance Monitoring and the Office of Regional Counsel). For every case, at least two, and as many as five or more, offices might be involved, depending on the complexity of the case and on whether more than one statute is involved. The staff in each office at EPA has different program goals and performance standards and offices are frequently at odds with each other over those goals. Obtaining an affirmative decision to settle or take some action is extremely difficult, since any one of the offices involved in the process may veto or delay a decision.

EPA's enforcement programs need to be reorganized and streamlined to bring into the same organizational unit the legal and technical personnel who are essential to the development, preparation, and trial of *any* environmental case, particularly complex hazardous waste cases. 43/ By being in the same unit, those personnel would have the same program goals and performance standards and would work together as closely as legal and technical people can work to achieve common goals. The number of decision-makers would be decreased significantly, thereby clarifying the chain of command, decreasing the time required to obtain a decision, and speeding up settlements or the filing of suits. A similar enforcement organization existed at EPA prior to the reorganizations that occurred during the Burford era.

The reorganization of EPA's enforcement program would involve several thousand EPA employees. It, therefore, would be a major overhaul of the Agency and, admittedly, would be disruptive for a relatively brief period of time. There might also be considerable opposition from the managers of some program offices who would lose their enforcement components to the new enforcement office, as well as opposition from the directors of various enforcement divisions in the program offices. Nevertheless, this reorganization is believed to be necessary by many people both inside and outside EPA. If generally viewed as a positive action, the temporary disruption would be a well tolerated by most of the Agency's staff. Above all, it would be a strong signal to the regulated community that EPA is literally getting its enforcement house in order and is preparing to administer enforcement in a businesslike, efficient manner.

2. Congress should eliminate the "imminent and substantial endangerment" requirement from suits to compel PRP cleanups.

While the imminent and substantial endangerment requirement in section 106 of CERCLA is not overwhelming as interpreted by the courts, 44/ it is an additional burden that is not present in suits under section 107 for cost recovery. This requirement has long been acknowledged by EPA's regional offices to be a disincentive to the use of section 106.

It is difficult to understand why Congress imposed such a requirement in section 106. If a primary goal of the Superfund program is to require responsible parties to be a main source of funding for cleanups, why would Congress impose, as a condition precedent to compelling PRPs to clean up those sites, that EPA must first demonstrate an imminent and substantial endangerment? The condition seems inconsistent with the goal.

There are two possible answers. The first is that in enacting CERCLA, Congress intended that sites be cleaned up primarily by use of the Fund, followed by section 107 actions, and that section 106 play a secondary role as a means of compelling cleanup. While EPA has received mixed signals from various members of Congress on the role they believe that section 106 should play, the actions of various congressional committees in Superfund oversight

indicate that it is not their present belief that section 106 should be relegated to a secondary role. 45/

The second possibility is that the imminent and substantial endangerment provision was included in Superfund merely because other environmental statutes have similar provisions. However, there is no analogue between Superfund and those other statutes, which have enforcement programs based upon violations of permits (e.g., the Clean Water Act, 46/ the Resource Conservation and Recovery Act, 47/ and the Clean Air Act 48/). In those statutes the imminent and substantial endangerment provisions were included principally to cover any unforeseen situation that might not be covered by an action on a permit, a situation totally inapplicable to the Superfund program.

If, indeed, Congress wants EPA to achieve a more balanced Superfund enforcement program, it should eliminate the imminent and substantial endangerment requirement as an element in the government's case to compel PRP cleanup. This could be done simply by amending section 104 to allow EPA to issue an administrative order or to file a judicial action to compel cleanup when EPA finds that there are PRPs connected to the site who are financially capable of satisfactorily performing the cleanup. It could also be done by amending section 106 to eliminate the imminent and substantial endangerment wording.

Congress Should Stop Legislating Regulations

A final word about congressional involvement in the Superfund program. Commencing with the of Hazardous and Solid Waste Amendments of 1984 (HWSA) 49/ to the Resource Conservation and Recovery Act, 50/ and continuing through the passage of SARA, Congress has gone far beyond the traditional relationship between it and EPA in program development. Traditionally, Congress has established a general statutory framework for a program and left to EPA the job of fleshing out the framework with regulations based on the Agency's expertise in the field. Congressional oversight committees then monitor EPA's implementation of the statutory plan to ensure that EPA carries out congressional intent.

Instead, Congress has attempted in HSWA and SARA to legislate regulations by including many relatively specific requirements in the

statutes. In SARA, those requirements include clean-up standards, 51/ technology requirements, 52/ settlement procedures, 53/ minimum numbers of RI/FSSs, remedial designs, and remedial actions that must be taken, 54/ and deadlines by which those actions must be taken. 55/ If those deadlines are to be met, EPA can ill-afford to become involved in protracted litigation with PRPs in an effort to compel them to clean up sites. Those deadlines may, therefore, be disincentives to using enforcement authorities to compel PRP-financed cleanups.

Congress may have attempted to legislate regulations because it perceived inaction on the part of EPA in implementing the hazardous waste program as intended by Congress. 56/ While Congress' position may be justifiable, the point remains that Congress does not have sufficient expertise to become very specific in its environmental legislation. The legislative process does not lend itself to anticipating all of the effects that provisions such as deadlines may have on a program. 57/

Congress should revert to its more traditional role of developing statutes containing broad frameworks and direction, giving sufficient latitude to EPA to make necessary adjustments in the program from time to time to meet unanticipated problems. Congress can achieve changes in the direction of a statute after its passage through oversight hearings, which can be very persuasive to Agency officials. One hopes that the relations between Congress and the Bush Administration will be such as to allow a return to the more traditional relationship.

Conclusion

Since CERCLA was enacted, the important question of whether the primary objective of the statute is to clean up hazardous waste sites as quickly as possible or to have PRPs assume cleanup responsibility has never been squarely addressed. The answer to that question is critical in determining the role of the enforcement authorities under section 106, since section 106 can compel PRP-financed cleanups, but usually not as quickly as Fund-financed cleanups.

Mixed signals have been sent from Congress on this subject since the enactment of CERCLA. Congress has criticized EPA for the slow rate of cleanups and placed EPA under statutory deadlines in an attempt to speed up the program. In reacting to those deadlines, EPA has adopted an

ad hoc policy of increasingly heavy reliance upon the Fund to achieve cleanups, and Congress is now criticizing EPA for its failure to use section 106 authorities to compel PRP cleanups.

The responsibility for the present imbalance in the Superfund enforcement program can be laid at the doors of both Congress and EPA: Congress for not having given EPA better direction on whether it placed priority on speedy cleanups or on PRP-financed cleanups; and EPA for not having managed its Superfund enforcement system to achieve a better balance between use of the Fund and section 106. Until this issue is addressed by Congress and better direction given to EPA, there will continue to be considerable uncertainty as EPA adjusts to the views of whatever congressional committee happens to express its opinion on the issue.

In the meantime (and it may be a long time), EPA apparently will have to run the Superfund enforcement program in a way that will attempt to satisfy both goals of rapid cleanup and PRP-financed actions, to the extent that they are not incompatible. In order to do this, EPA is going to have to place greater emphasis on use of section 106 enforcement authorities and show that it is ready, willing, and able to use them. The strategy of relying upon the Fund for cleanup of sites, followed by subsequent cost recovery actions against PRPs, fails to provide an incentive to PRPs to perform cleanups. The number of PRP-financed cleanups will fall sharply unless EPA adopts a policy and procedures designed to provide greater incentives for them.

Unless the recommended changes are made, the inherent disincentive to the use of section 106 will continue to exist; EPA managers will continue to have difficulties in encouraging their regional staff to develop section 106 cases; DOJ attorneys, who are required to try EPA's cases, will continue to worry about whether the imminent and substantial standard can be met; and enforcement-lead cases will continue to be converted to Fund-lead cleanups, followed by cost recovery actions under section 107. As a result, the cleanup of the nation's hazardous waste sites will continue to become a public-works program.

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Footnotes

- 1/ The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§9601-9675 (1982 & Supp. IV 1986).
- 2/ See H.R. Rep. No. 1016, 96th Cong., 2d Sess. (1980) and Congressional Research Service, U.S. Library of Congress, *A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund)* (1983). Considering the importance of the issue, there appears to have been relatively little debate during the enactment of CERCLA regarding whether the nation's hazardous waste clean-up program should be a liability-based or a public works program.
- 3/ 42 U.S.C. §9606 (1982 & Supp. IV 1986).
- 4/ 42 U.S.C. §9604 (1982 & Supp. IV 1986).
- 5/ 42 U.S.C. §9631 (1982 & Supp. IV 1986).
- 6/ 42 U.S.C. §9607 (1982 & Supp. IV 1986).
- 7/ The Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§6901 - 6991i (1982 & Supp. IV 1986). Section 7003 is found at 42 U.S.C. §6973.
- 8/ From June 1981 through March 1982, several major reorganizations affected EPA personnel. During this period, all enforcement personnel (attorneys and technical staff), who had worked within a single unit at Headquarters and in the regional offices, were scattered among various offices. This resulted in separation of enforcement attorneys from the technical enforcement staff. A blend of skills is necessary to address efficiently and effectively the many legal and technical problems encountered in any environmental case. That blend can best be achieved through a close working relationship.
- 9/ For a review of the overall state of EPA enforcement during the Anne Burford administration, see Miller, *The Decline and Fall of EPA Enforcement*, *Envtl. Analyst*, Aug. 1983, at 3.
- 10/ Pursuant to a 1977 Memorandum of Understanding between the Administrator of EPA and the U.S. Attorney General and long-standing practice, the Department of Justice (DOJ) files EPA's cases and represents it in federal court. Cases are developed by EPA legal and technical personnel and "referred" by them to DOJ for filing and further handling.
- 11/ The traditional indicators of enforcement activity at EPA are the following: number of inspections, number of administrative orders issued, and number of judicial cases referred to DOJ. All of those numbers declined significantly (some by as much as seventy percent) from 1981 to early 1983. Increases began to occur in mid-1983 as congressional pressure for more active enforcement was brought to bear on EPA. The numbers increased significantly between January 1984 and 1986, when EPA set records in many of the enforcement activity categories. The numbers declined somewhat in 1987, but continued high in most areas.
- 12/ Source: Office of Enforcement and Compliance Monitoring, Office of Solid Waste and Emergency Response, U.S. EPA, Washington, D.C.
- 13/ *Id.* It is also instructive to note that the overall number of CERCLA section 106 administrative orders has declined from 160 in FY 1985 to 139 in FY 1986, 64 in FY 1987, and 11 for the first half of FY 1988.
- 14/ See Committee on Appropriations, U.S. House of Representatives, *Report on the Status of the Environmental Protection Agency's Superfund Program*, 100th Cong., 2d Sess. (March 1988) [hereinafter *Report on Status of Superfund Program*].
- 15/ Gene Lucero, former long-time Director of EPA's Office of Waste Programs Enforcement, who, as such, had direct responsibility for

planning, development, and oversight of the Agency's Superfund enforcement program, arrived at similar conclusions: "The bias of the [Superfund] program is to perform the work using the Trust Fund to finance the work, rather than by using the enforcement authorities to compel action." Lucero, *Son of Superfund: Can the Program Meet Expectations?*, *Env'tl Forum*, March/April 1988 at 5. See also *Report on Status of Superfund Program, supra*, which concludes that:

[T]he data demonstrates EPA's propensity to place far greater reliance on the use of the Superfund to finance cleanups rather than to vigorously pursue an enforcement program designed to have the PRPs take full responsibility for the funding and management of clean-up actions.

16/ Source: Office of Enforcement and Compliance Monitoring, U.S. EPA.

17/ Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

18/ 42 U.S.C. §9606(c) (1982 & Supp. IV 1986).

19/ See Guidelines for Using the Imminent Hazard, Enforcement, and Emergency Response Authorities of Superfund and Other Statutes, 47 Fed. Reg. 20,664 (1982) [hereinafter *Guidelines*].

20/ See, e.g., Letter of Congressmen John D. Dingell, Chairman, Norman F. Lent, and Dennis E. Eckart, Members of the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, to Lee M. Thomas, Administrator of EPA, dated February 18, 1988, expressing their concern about the lack of use of section 106 by EPA. Among other things, the letter states:

In reauthorizing the Superfund program, Congress . . . believed that a balanced approach relying on a mix of fund-financed cleanups, negotiated voluntary agreements, and litigation offered the greatest opportunity for accelerating cleanups.

Historically, the most effective incentive for privately financed response has been the potential under the standards of strict, and joint and several liability for EPA (1) to use the fund and recover its costs (section 104/107) or (2) to use

the authorities under section 106 to compel cleanup by private parties.

21/ See *Report on Status of Superfund Program, supra* note 14, at 12.

22/ 42 U.S.C. §9616 (1982 & Supp. IV 1986).

23/ EPA's major policy statement on the relationship between use of sections 106 and 107 is found in its Interim CERCLA Settlement Policy, 50 Fed. Reg. 5034 (1985), which states:

An effective program depends on a balanced approach relying on a mix of Fund-financed cleanup, voluntary agreements reached through negotiations, and litigation. Fund-financed cleanup and litigation under CERCLA will not in themselves be sufficient to assure the success of this clean-up effort. . . . A strong enforcement program is essential to encourage voluntary action by PRPs. Section 106 actions are particularly valuable mechanisms for compelling cleanups.

See also *Guidelines, supra* note 19.

24/ Memorandum from J. Winston Porter, Assistant Administrator for Office of Solid Waste and Emergency Response, and Richard Mays, Acting Assistant Administrator for Office of Enforcement and Compliance Monitoring, to Regional Administrators, dated July 8, 1986, entitled "Use of CERCLA §106 Judicial Authority - Short Term Strategy" [hereinafter *Use of CERCLA §106*].

25/ As might be expected, the letter from Congressmen Dingell, Lent, and Eckart, *supra* note 20, is reported to have prompted a recent flurry of activity at EPA on the development of strategies to encourage the use of section 106 cases. However, it is this writer's opinion that because of the change of administrations, accompanied by the inevitable departure of most of the Agency's top management, together with resignation or reassignment of many of the division director-level career personnel that has been taking place at EPA in the enforcement program, any strategy that is developed will not be effectively implemented for some time.

26/ See U.S. EPA, *Guidance for Selecting Enforcement Action or Fund-Financed Response* (July 27, 1983).

27/ Memorandum from Gene Lucero, Director, Office of Waste Programs Enforcement, and Henry Longest, Director, Office of Emergency and Remedial Response, to Waste Management Division Directors, Regions I-X, dated May 5, 1987, entitled "Site Classification Changes From Enforcement to Fund Lead" (OSWER Directive 9840.3).

28/ 42 U.S.C. §§9616(d) and (e) (1982 & Supp. IV 1986).

29/ *Use of CERCLA Section 106*, *supra* note 24.

30/ Prior to 1983, EPA attempted to require PRPs to perform an RI/FS as part of the remedy in section 106 actions. This limited EPA's ability to explain to courts the nature and extent of contamination at sites. In that year, EPA began routinely to perform an RI/FS (including an endangerment assessment to support the imminent and substantial endangerment requirement of section 106) at enforcement-lead sites.

31/ 42 U.S.C. §9613(j) (1982 & Supp. IV 1986).

32/ There are indications that some of EPA's regional enforcement staff are now expressing concerns about the potential resource intensiveness of section 107 cost recovery cases. See the summary of interviews with EPA regional enforcement personnel in *Report on Status of Superfund Program*, *supra* note 14. As indicated above, EPA's regional Superfund enforcement personnel have many duties other than Superfund enforcement, and any activity that requires a substantial commitment of their time, as do enforcement cases, will meet with their resistance.

33/ *United States v. A & F Materials Co.*, 578 F. Supp. 1249 (S.D. Ill. 1984).

34/ For a similar analysis of the effect of EPA's current policy of relying on Fund-financed cleanups as an inducement to PRPs to enter into settlements, see *Report on Status of Superfund Program*, *supra* note 14, at 18.

35/ See Section VIII, EPA's Interim CERCLA Settlement Policy, 50 Fed. Reg. 5040 (1985); and EPA Guidelines on Evaluating Mixed Funding Settlements Under CERCLA, 53 Fed. Reg. 8279 (Mar. 14, 1988).

36/ There is an excellent analysis of the financial consequences of EPA's present policy of

reliance upon the Fund for site cleanup in Lucero, *Son of Superfund: Can the Program Meet Expectations?*, *supra* note 15, at 8. See also a similar analysis in *Report on Status of Superfund Program*, *supra* note 14, which states in part:

Highlighting the need for an effective enforcement program is the projection of appropriations that may be needed to clean up the 951 National Priorities List (NPL) sites consistent with the current EPA project sponsorship level. The split between Superfund-financed and PRP-sponsored projects is at about a five to one ratio at the remedial investigation/feasibility study state. *Using average cost estimates to clean up NPL sites of \$21 to \$30 million, the current inventory of 951 sites divided on a 5:1 ratio would indicate that 793 sites require Federal funds ranging from about \$16.7 to \$23.8 billion, far in excess of the available \$8.5 billion.* (Emphasis in original.)

37/ The source for statistics in this paragraph is U.S. EPA. See also *Report on Status of Superfund Program*, *supra* note 14, at 17-18.

38/ See CERCLA section 121(b), 42 U.S.C. §9621(b) (1982 & Supp. IV 1986).

39/ For comprehensive discussions of judicial decisions on many legal issues under CERCLA, see Ledbetter and Clewett, *Outline of RCRA/CERCLA Enforcement Issues and Holdings*, 16 Chemical Waste Litigation Rep. 466 (1988); and Frank & Atkeson, *Superfund: Litigation and Cleanup*, a BNA Special Report, Bureau of National Affairs (1985).

40/ See Section VIII, EPA's Interim CERCLA Settlement Policy, *supra* note 35.

41/ For EPA's policy on settlements with *de minimis* PRPs, see Interim Guidance on Settlements with *De Minimis* Waste Contributors Under §122(g) of SARA, 52 Fed. Reg. 24,333 (1987).

42/ For EPA's policy on settlements involving mixed funding, see Evaluating Mixed Funding Settlements Under CERCLA, *supra* note 35.

43/ This conclusion was also recently reached by a Senate subcommittee chaired by Senator Frank Lautenberg. See Subcommittee on Superfund and Environmental Oversight, Report to the Committee on Environment and

Public Works, S. Rep., 100th Cong., 2d Sess. (1988). That report also contains an insightful discussion of the history of EPA's overall enforcement program and its organizational structures.

44/ "Imminent and substantial endangerment" has been defined as not requiring a showing of actual harm, but only a potential for harm. See *Reserve Mining Co. v. Environmental Protection Agency*, 514 F.2d 492 (8th Cir. 1975); *United States v. Vertac Chemical Co.*, 489 F. Supp. 870 (E.D. Ark. 1980); *United States v. Reilly Tar & Chemical Co.*, 546 F. Supp. 1100 (D. Minn. 1982); *United States v. Hardage*, No. CIV-80-1031-W (W.D. Okla. Dec. 13, 1982).

45/ See *supra* note 20.

46/ 33 U.S.C. §1251 *et seq.* (1982).

47/ 42 U.S.C. §6901 *et seq.* (1982 & Supp. IV 1986), *supra* note 7.

48/ 42 U.S.C. section 7401 *et seq.* (1982 & Supp. IV 1986).

49/ Pub.L. No. 98-616 (1984).

50/ See note 7, *supra*.

51/ SARA section 121, 42 U.S.C. §9621 (1982 & Supp. IV 1986).

52/ *Id.*

53/ SARA section 122, 42 U.S.C. §9622 (1982 & Supp. IV 1986).

54/ SARA section 116, 42 U.S.C. §9616 (1982 & Supp. IV 1986).

55/ *Id.*

56/ For one Congressman's perspective on this issue, see an article by Representative James J. Florio, one of the more environmentally oriented members of Congress and one of its most vocal critics of Reagan Administration environmental policies, entitled *Congress as Reluctant Regulator: Hazardous Waste Policy in the 1980s*, 3 Yale J. on Reg. 351 (1986). Representative Florio argues that "Congress itself has had to assume the role of regulator, making some of the detailed technical and administrative determinations typically left to the implementing agency" because "Congress is no longer confident that the Environmental Protection Agency will exercise such discretion as intended by Congress."

57/ *Id.* Congressman Florio acknowledges that while Congress has found it necessary to become involved in the regulatory process, it is a role that is fraught with problems. He states: "Complex and costly scientific and technical decisions are intricate enough when handled by a regulatory agency. When these discussions are thrown into the overtly political process of legislating, sensible decision-making becomes much more difficult."

* * *

EDITOR'S NOTE: The following disclaimer was omitted from the December 1988/January 1989 issue of the *Journal*: "The views expressed in the article written by Major E. David Hoard, "Enforcement Tools Available Against Federal Facilities Violating RCRA: Is a Bigger Hammer Needed?," are those of the author and do not reflect the official policy or legal position of the Department of the Air Force, the Department of Defense, or the United States Government."

* * *

DECISIONS

HAZARDOUS WASTE

Appeals Court Affirms that Defendants Could Not Establish Innocent Landowner Defense: *United States et al. v. South Carolina Recycling and Disposal, Inc., et al.*, Nos. 86-1261, 86-1263, 86-1265 (4th Cir. Sept. 7, 1988)

The United States Court of Appeals for the Fourth Circuit affirmed a summary judgment award to the government in this case brought under section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9607. It held that the defendants' "innocent landowner" defense could not have been established under any view of the evidence. Secondly, it affirmed the district court's ruling that the government did not need to link a generator's specific waste to a release at the site in order for summary judgment to be awarded against a defendant. Third, it affirmed that retroactive application of CERCLA was constitutional. Finally, it vacated the district court's decision not to award the government prejudgment interest, remanding the issue back to the district court for reconsideration in light of the 1986 Superfund amendments.

Background

The landowners in this case orally leased their four-acre tract of land in South Carolina to a chemical manufacturing corporation in 1972. At first, the company stored raw materials and finished products in a warehouse on the site. Later, the land was used as a waste storage and disposal facility. A new corporation was formed to assume the original company's waste-handling business and the site owners began accepting lease payments from the new company.

By 1977, the site owners became aware that hazardous waste disposal activities were taking place on their property. They maintained that they had never inspected the site prior to that time. U.S. EPA inspected the site after two serious incidents occurred there in 1980. It determined that the facility was filled well beyond its capacity with chemical waste and that the site posed a major fire hazard.

The government filed suit under the Resource Conservation and Recovery Act, 42 U.S.C. 6973, against the site owners and the corporation, requesting injunctive relief. After the enactment of CERCLA, the government notified a number of waste generators of their potential liability. Twelve off-site producers settled.

Using funds generated from the settlements, EPA contracted for a partial cleanup of the site. During that process, drums bearing the labels or markings of each of the three generator defendants in this case were found. Subsequently, the government filed an amended complaint against those three generator defendants and the original defendants, adding claims under section 107(a) of CERCLA.

The district court awarded summary judgment to the government, rejecting the site-owners' "innocent landowner" defense. The district court similarly rejected the generator defendants' allegation that they had an affirmative defense under section 107(b). Furthermore, the district court held that the environmental harm was "indivisible" and that all of the defendants were jointly and severally liable for response costs incurred by EPA and South Carolina. It refused, however, to award prejudgment interest to the plaintiffs.

The defendants filed an appeal, contesting retroactive imposition of CERCLA liability and challenging the propriety of summary judgment. Similarly, the plaintiffs appealed the refusal of prejudgment interest.

Holding

In discussing the constitutionality of the retroactive application of CERCLA, the appeals court noted the district court's finding that CERCLA satisfies the dictates of due process because its liability scheme is rationally related to a valid legislative holding. The appellate court agreed, finding no merit to the defendants' *ex post facto* and bill of attainder arguments. The court cited the Eighth Circuit's opinion in *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 734 (9th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987), to support its holding that retroactive application of CERCLA does not violate due process.

The court further pointed out that CERCLA creates a reimbursement obligation for any person who is judicially determined to be

responsible under the statute and that the restitution exacted does not operate as a criminal penalty or a punitive deterrent. The imposition of strict, joint and several liability does not convert CERCLA into a bill of attainder or an *ex post facto* law, according to the opinion.

Turning to the issue of the liability of the site-owners, the court noted that the plain language of section 107(a)(2) holds liable *any* person who owned a facility where hazardous substances were deposited for costs of removal once a release or threatened release is proven. The landowners, however, had asserted a defense under section 107(b)(3) that has two elements of proof: (1) that the release and resulting damages were caused solely by a "third party other than . . . one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly with the defendant . . . ; and (2) that the defendant "took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions." The court agreed with the lower court that "under no view of the evidence could site-owners satisfy either of these proof requirements."

First, there was certainly an admitted contractual relationship with both corporations that had used the site. Secondly, there was no proffered evidence showing that the owners took any precautionary action against the foreseeable conduct of the lessees. The landowners maintained they never inspected the site prior to 1977 and were completely unaware of all waste disposal activities until that time. The court stated: "In our view, the statute does not sanction such willful or negligent blindness on the part of absentee owners."

The generator defendants objected to the district court's holding they were liable under CERCLA if hazardous substances like those contained in the generator defendants' waste were found at the site. They claimed that the plaintiffs had to prove that the specific substances they had generated and sent to the site were present at the facility at the time of release.

The appeals court disagreed, affirming the holding of the district court. It held that CERCLA provides *only* the defenses set forth in section 107(b), placing on the defendant the

burden of disproving causation. Absent proof that a generator defendant's specific waste remained at a facility at the time of release, the court stated, a showing of chemical similarity between hazardous substances is sufficient.

Finally, the generator defendants had challenged the district court's imposition of joint and several liability for the governments' response costs. The opinion noted that CERCLA does not mandate joint and several liability, but that the court must consider traditional and evolving principles of federal common law to determine the appropriateness of imposing such liability. The court cited Restatement (Second) of Torts 433(A) (1965) as representing the correct and uniform federal rules applicable to CERCLA cases: "When such persons cause a single and indivisible harm . . . they are held liable jointly and severally for the entire harm."

The court rejected the defendants' notion that the court could have reasonably apportioned the harm by dividing the total volume of all hazardous substances disposed there by the volume deposited by each generator defendant. There was no evidence, said the court, that showed a relationship between waste volume, the release of hazardous substances, and the harm at the site. Furthermore, there would have to be some evidence disclosing the individual and interactive qualities of the substances deposited there. Such evidence was not proffered.

Finally, the court remanded the case to the district court for reconsideration of the pre-interest judgment question in light of the recent addition of language to section 107(a) of CERCLA that specifically includes pre-judgment interest among the amounts recoverable in actions under section 107. To determine the principles controlling application of later-enacted amendments to previously accrued statutory liability, the court looked to the decision in *Bradley v. Richmond School Board*, 416 U.S. 696 (1974).

The *Bradley* court held that, when Congress amends a law while a case is pending on direct appeal, the general rule is that the appellate court should "apply the law as amended unless so doing would result in manifest injustice or would contravene statutory direction or legislative history to the contrary." Here, the court

said, nothing in the language or legislative history of the 1986 amendments reveals congressional intent to delay its application. Furthermore, the defendants have not demonstrated any "manifest injustice" that would result from its imposition in this case.

Although the award of interest is not mandatory, the court held that the amendment generally establishes interest as an element of recovery, absent a convincing argument to the contrary. Therefore, the case was remanded to the district court for reconsideration of the interest question.

CERCLA Permits Imposition of Liability on Successor Corporation: *United States v. Russell Martin Bliss et al.*, No. 84-2086C(1) (E.D. Mo. Sept. 27, 1988)

In this order disposing of the motions of the United States and the state of Missouri for partial summary judgment, the court held that the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, permits imposition of liability on corporation for the actions of its unincorporated predecessor.

Background

From the late 1960s to the mid-1970s, Russell Martin Bliss, doing business as Bliss Waste Oil Company, arranged with certain generator defendants to dispose of drums of industrial waste from facilities owned or operated by those defendants. Bliss then hired an individual to transport and dispose of the drummed industrial wastes. The wastes were disposed of at two locations in Missouri: the Callahan site and the Rosalie site. In 1980, EPA undertook removal actions at the Callahan site that included excavation and disposal of over 1,200 drums of hazardous waste. In 1981, the Missouri Department of Natural Resources removed approximately 150 drums of hazardous waste from the Rosalie site. This site also required remedial action including removal and offsite disposal of contaminated soil.

In 1978, Jerry-Russell Bliss, Inc., was incorporated. It took over the unincorporated waste disposal business formerly conducted by Russell Martin Bliss.

Successor Corporate Liability Under CERCLA

Among other issues raised by the defendants was the liability of Jerry-Russell Bliss, Inc., not in existence at the time the hazardous waste was transported and disposed of. The plaintiffs argued that CERCLA permits the imposition of liability on successor corporations. Furthermore, they invoked the doctrine of collateral estoppel in determining the successor corporate status of Jerry-Russell Bliss, Inc.

In examining CERCLA, the court determined that it was the intent of Congress for courts to apply federal common law principles to fill in the gaps of the Act's statutory scheme. In fashioning the appropriate federal common law rule, guidance may be obtained from state common law so long as it is compatible with the purpose of the federal statute.

The court held that imposition of successor liability under the circumstances permitted under Missouri law would further CERCLA's policy of placing the burden of response costs upon responsible parties rather than on the public at large. Missouri common law provides that liability may attach under four circumstances: (1) when the purchasing corporation expressly or impliedly agrees to assume the seller's debts, (2) when the transaction amounts to a consolidation or merger of the corporations, (3) when the purchasing corporation is merely a continuation of the selling corporation, or (4) when the transaction is entered into fraudulently to escape liability.

Having determined the appropriateness of successor corporate liability under CERCLA, the court turned to the plaintiffs' collateral estoppel argument. In *Jerry-Russell, Inc. v. Hazardous Waste Management Comm'n*, 702 S.W.2d 77 (Mo. 1986), the Supreme Court of Missouri was faced with the same issue of successor liability. The court ruled that Jerry-Russell Bliss, Inc., was merely a continuation of the former unincorporated Bliss Waste Oil company owned and operated by Russell Martin Bliss. Thus, it was responsible for the actions of the predecessor company, its principals, and its employees.

Bliss argued that the supreme court's ruling in that case could not be binding in this action because the adjudication concerned an application for a hazardous waste transporter's license, not CERCLA liability. For collateral estoppel

to apply, the court noted, the case relied upon does not have to concern the same underlying cause of action as the instant case. The court determined that the decision of the Missouri Supreme Court represented a final adjudication of the successor liability issue, on the merits, after a full and fair opportunity to litigate the issue. Therefore, the court held that Jerry-Russell Bliss, Inc. is liable as a successor to the business of Russell Martin Bliss in this action.

District Court Grants EPA Access to Property: *United States v. Town of Moreau, New York, and General Electric Company*, No. 88-CV-934 (N.D.N.Y. Sept. 16, 1988)

The United States District Court for the Northern District of New York recently issued an order under section 104(e)(3) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), granting EPA and its representatives access to property related to a site referred to as the "GE/Moreau site." The United States had sought the order after the town of Moreau refused to allow construction of a water distribution system on town property without local permits. In granting the order on September 16, 1988, the court held that the Agency and its designees were not required to obtain any prior approval or authorization from the town.

The Agency issued its Record of Decision for the former industrial landfill in July 1987. The selected remedy included, *inter alia*, consolidation and capping of contaminated soils behind a slurry wall at the site. It also called for the provision of an alternate water supply for the affected homes in the area.

EPA subsequently authorized General Electric (GE), the potentially responsible party in the case, to undertake the necessary construction for the water distribution system. The town objected to the water supply selected by the Agency, claiming that it does not have sufficient capacity. In August 1988, the town denied GE access to town roads near the site. EPA subsequently sought relief from the court.

PESTICIDES

EPA's Denial of Citizens' Rulemaking Petition Under FDCA May Not Be Directly Appealed to Circuit Court: *Ralph Nader et al. v. United States Environmental Protection Agency*, No. 87-7103 (9th Cir. Oct. 14, 1988)

The petitioners in this case alleged that, pursuant to 21 U.S.C. 346(a)(i) and 348(g) of the Federal Food, Drug, and Cosmetic Act (FDCA), the circuit court of appeals had jurisdiction to review U.S. EPA's denial of their rulemaking petition. The circuit court held, however, that the petitioners had failed to comply with the procedural prerequisites for review under section 348(g) and that there was no appealable order for the purposes of section 346(a)(i). Therefore, the case was dismissed for want of jurisdiction.

Statutory Framework

Pesticides are regulated by EPA under two separate statutes, the FDCA and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). A pesticide must be registered under FIFRA in order to be sold or distributed in the United States. Registration, in turn, is dependent upon weighing the benefits of a pesticide against its risks. Section 346 of the FDCA mandates that no residue of a pesticide that is not generally recognized as safe may be present on a raw agricultural commodity unless the Agency has established a tolerance or has exempted that pesticide from the tolerance requirement. Section 348(d) of the FDCA mandates that tolerances for pesticide residues in processed foods must also be set. The "Delaney Clause" of section 348 dictates that "no additive shall be deemed to be safe if it is found to induce cancer when ingested by man or animal. . . ." 21 U.S.C. 348(c)(3)(A). Both sections 346 and 348 permit persons outside EPA to request the Agency to set tolerances.

Factual Background

The pesticide at issue in this case is daminozide, a plant growth regulator principally used on apple trees. It is marketed under the name "Alar." Among other benefits, daminozide reduces crop losses and lowers harvesting costs by preventing the fruit from dropping prior to harvest. However, there is also evidence to suggest that daminozide may be an animal carcinogen.

In June 1984, EPA began the process of reviewing Alar's registration. Ultimately, the Agency submitted its underlying data in support of cancelling daminozide for food use to the Scientific Advisory Panel. EPA also referred its position document to the U.S. Department of Agriculture (USDA). The Panel issued its written findings in October 1985, concluding that the data that EPA had submitted were "inadequate to perform a qualitative risk assessment." USDA responded that EPA had underestimated the benefits of daminozide in its preliminary assessment.

EPA thereupon proposed a rule in April 1986 to lower the tolerance for daminozide, instead of eliminating the tolerance completely. In July, while the proposed rule was still pending, the petitioners filed a petition to revoke completely the tolerance for daminozide. These petitions were denied in January 1987. Ten days after the denial, EPA published a final rule that lowered the tolerances. Sixty days after the denial of their petitions, the petitioners brought suit in the circuit court.

Jurisdiction

The court turned to the language of the statutes to determine whether it had jurisdiction. Section 348, which permits any person to file a petition proposing regulations for the use of food additives, requires that the Administrator must either establish a regulation or deny the petition. Within thirty days of that decision, objections must be filed to the Administrator's decision. An examination of that section of the statute convinced the court that the thirty-day requirement for filing objections is a prerequisite to obtaining judicial review. By its plain terms, the court stated, section 348(g) grants jurisdiction to the court only concerning administrative objections, *not* concerning the granting or denial of the petition in the first instance.

An alternative ground for jurisdiction that the petitioners noted was section 346(a)(1), which grants the courts of appeal jurisdiction to review the validity of any *order* under section 346(a)(e). Section 346(a)(e) provides that, upon the request of any interested person, the Administrator *may*, at any time, propose the issuance of a regulation establishing a tolerance. The Administrator is clearly given considerable discretion in this section; not only is there

freedom to deny the requested regulation, there is no requirement even to propose it.

Section 346(a)(e) designates only one act of the Administrator as an order: the publishing of a regulation. The statute does not require anything of the Administrator if the decision is simply to deny a petition. The court found further support for its interpretation of the language of the statute in the legislative history of this section.

Finally, the court concluded that to grant review of the denial of the petition would not advance the statutory goals of the FDCA. The cases that the petitioners relied on did not involve the more restrictive language of the FDCA. Furthermore, since the petitioners did not file objections, there is no administrative record for the court to review. To attempt to analyze the record in light of the petitioners' concerns, according to the court, would place the court in the position of performing EPA's work. Therefore, the court dismissed the case for lack of jurisdiction.

TSCA

TSCA Administrative Search Warrant Authority Upheld in Case of First Impression: *Boliden Metech, Inc. v. United States*, No. 88-0081 (D.R.I. Sept. 20, 1988)

On September 20, the United States District Court for the District of Rhode Island issued a decision supporting U.S. EPA's authority to obtain administrative search warrants under the Toxic Substances Control Act (TSCA) and potentially other environmental statutes that give the agency authority to inspect. The opinion applies the reasoning of the United States Supreme Court in an aerial surveillance case involving the Clean Air Act, *Dow Chemical Co. v. United States*, __U.S.__, 106 S. Ct. 1819 (1986). The district court held that because EPA has the *explicit* authority to enter facilities to make inspections under TSCA, the agency also has the *implied* authority to seek an administrative search warrant to carry out the purposes of the statute.

In July 1987, EPA Region I issued an administrative complaint against Boliden Metech, a precious metal salvage company. The company, located on the Providence River in Rhode Island, has stored shredded computer waste in large uncovered piles. Because the waste

contains polychlorinated biphenyls (PCBs), Boliden is allegedly in violation of TSCA's rules and regulations governing PCB storage and disposal. EPA is concerned about the amount of PCBs that tests show to be present in the shredded metal. An administrative hearing seeking a civil penalty was held in March 1988 and a decision is pending. (*In re: Boliden Metech*, TSCA-I-87-1097)

To develop additional data on the extent of PCB contamination at the site and to document PCB releases, EPA attempted to inspect the site in January 1988. Boliden refused to allow the inspection. Subsequently, EPA obtained an administrative search warrant to inspect. Boliden then sought an injunction in the District Court of Rhode Island, asking the court to declare that the search warrant was illegal and to direct EPA to return all of the samples obtained during the inspections. The company also asked the District Court to declare that EPA lacks the authority to obtain administrative search warrants under TSCA because the statute does not explicitly state such authority. EPA and DOJ vigorously contested Boliden's position.

Boliden also challenged EPA's use of the *ex parte* warrant, stating that to allow the agency to obtain such a warrant infringed upon Boliden's Fourth Amendment rights. The company asserted that it should have had an opportunity to express its position before the warrant was issued so it could have asked the court to determine the type of investigative procedures that EPA was authorized to use.

The court denied Boliden's argument stating that such an adversarial proceeding would "deny the EPA the element of surprise" and force a presiding magistrate to make "determinations outside his field of expertise." It stated that such a "pre-hearing, fullblown adversarial proceeding" would cause delay that would frustrate the "public purpose underlying TSCA."

This decision squarely addressed the question of whether TSCA, and by inference other environmental statutes, gives the agency the authority to use an *ex parte* administrative search warrant. "The ability to obtain search warrants furthers the policy of TSCA and follows from its language," the court wrote. "It seems logical to believe that Congress intended to authorize the EPA to take reasonable steps,

such as obtaining a warrant, to fulfill its inspection obligations." Citing *Dow*, the court stated, "When Congress invests an agency with enforcement and investigatory authority, it is not necessary to identify explicitly each and every technique that may be used in the course of executing the statutory mission."

Collection Action Summary Judgment Order Finds ALJ Default Order Res Judicata: *United States v. Holloway* (M.D. Fla.)

U.S. EPA's Region IV had filed an administrative enforcement action against Holloway in May 1985, charging the company with numerous violations involving polychlorinated biphenyls (PCBs). When the company failed to submit a pre-hearing exchange as ordered by an administrative law judge (ALJ), a default order was entered that imposed a \$26,000 penalty. In January 1988, EPA filed an action in federal district court for collection of the unpaid penalty and for a permanent injunction to compel compliance with the PCB regulations.

In moving for summary judgment, EPA argued that judgment must be awarded as a *matter of law* because of the legal principle of *res judicata*. The agency argued that further litigation of the issues raised in its complaint was unnecessary and should be barred because the ALJ had already rendered a decision on the same facts. The court agreed, ruling that section 16(a)(4) of TSCA *prohibits* reconsideration of an administrative law judge's penalty assessment in the context of a penalty collection action filed in federal district court. The court noted that under section 16(a)(3), Holloway could have filed a petition for judicial review of the administrative penalty assessment within thirty days of the final assessment. Having failed to act within that period of time, Holloway forfeited its right to challenge that assessment.

The court also ruled that the ALJ's default order was to be considered a decision "on the merits." Because the regulatory requirements with which EPA sought compliance by Holloway in its Motion for Injunction were the same provisions that the company had been charged with violating in the original administrative action, the court ruled that the principle of *res judicata* applied. Therefore, Holloway was precluded from raising any defenses to the complaint presented by EPA in the action in federal district court.

CIVIL PROCEEDINGS**New Filings****HAZARDOUS WASTE**

Illinois v. Robert J. Brandis d/b/a Brandis Aircraft, No. 88-L-60 (Christian County Cir. Ct. Dec. 19, 1988)

Nature of Proceeding: Civil action for injunctive relief and penalties.

Background: The defendant, Robert Brandis, operates an aircraft painting and maintenance facility at the Taylorville Airport in Christian County, Illinois. Highly corrosive chemicals used to remove old paint before repainting airplanes are collected in underground process tanks on the property. The complaint alleges that Brandis allowed these hazardous wastes to overflow into an open man-made trough and then feed into the Sangamon River. The state is seeking an order to require the firm to handle and dispose of all hazardous chemicals in accordance with state environmental regulations and is requesting a fine of \$10,000 for each of the three offenses of improper disposal of hazardous wastes. For continuing violations, the state is seeking an additional fine of \$1,000 to \$25,000 per day.

Ohio ex rel. Anthony J. Celebrezze Jr., Attorney General v. Chemequip Sales, Inc., d/b/a R&R Engine & Machine Co., Production Engine Rebuilders, and Leland H. Menke, No. CV-89-1-23 (C.P. Summit County Jan. 4, 1989)

Nature of Proceeding: Action for injunctive relief and civil penalties under Ohio Revised Code Chapters 3734 and 6111 and the rules and regulations adopted thereunder.

Background: Chemequip Sales operates a facility in Akron, Ohio, where it rebuilds and repairs large gasoline and diesel engines. A second facility in Akron is used for general truck maintenance and repair activities. The complaint alleges that the defendant produced chemical-laden rinse waters, oily sludges, and caustic rinse waters at these facilities, all of which are defined as hazardous under Ohio law. The defendant Leland Menke is president of Chemequip Sales.

In its ten-count complaint, the state alleges that the defendant has not obtained a hazardous waste facility operation permit, that the

company has caused pollution to Ohio waters, and that it has not obtained approval of plans for disposal of waste nor developed a ground-water monitoring program. In its prayer for relief, the plaintiff requests that the court permanently enjoin the defendants from further violations of the law and order compliance with the law. A civil penalty of \$500 to \$10,000 a day for each violation is also requested.

Ohio ex rel. Anthony J. Celebrezze Jr., Attorney General v. Chevron U.S.A., Inc., No. A-89-0003 (C.P. Hamilton County Jan. 3 1989)

Nature of Action: Action under Ohio Revised Code Chapter 3734 and the rules and regulations promulgated thereunder, requesting civil penalties and injunctive relief.

Background: Chevron owns 5.5 acres of land known as the Landfarm in Hamilton County, Ohio. This acreage is about one-quarter mile northwest of its refinery. In 1981, the Director of Ohio EPA exempted the Landfarm from the permit requirements of the Revised Code for hazardous waste facility installation and operation. Instead, the Director granted Chevron permission to construct and operate the site exclusively for the disposal, by land application, of 150,000 gallons of separator sludge and similar waste as was specifically authorized in writing. This exemption was granted subject to the condition that all other applicable requirements of Chapter 3734 of the Revised Code and the hazardous waste rules adopted thereunder would be followed at the Landfarm. No exemption was given from groundwater monitoring requirements.

This six-count complaint alleges that Chevron has failed to implement an appropriate ground-water monitoring program at the Landfarm, that monitoring wells are not cased in a manner that maintains the integrity of the monitoring well bore holes, that there has been no semiannual collection and analysis of the monitoring wells as required by law, and that other required plans and reports were not submitted. A civil penalty of \$10,000 per day per violation is requested as well as injunctive relief enjoining Chevron from further violations and requiring it to comply with all requirements of the law in this regard.

United States v. Hoechst Celanese Corporation, No. SH-C-88-212 (W.D.N.C. Aug. 24, 1988)

Nature of Proceeding: Civil action under sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9606, 9607, seeking injunctive relief.

Background: Hoechst Celanese Corporation operates an active polyester raw-material production facility at a site in North Carolina. The complaint alleges that the defendant generated and disposed of hazardous substances at the site. Releases of these substances have occurred, contaminating surface and subsurface soils and surface water and groundwater there.

U.S. EPA has entered a Record of Decision, determining that certain response actions are necessary to abate the release or threatened release. Therefore, the government requests that the court enjoin the defendant to abate and remedy the endangerment presented by the groundwater contamination and to perform the remedy selected by EPA in the Record of Decision. The government is also requesting the payment of \$37,337.93 in response costs.

United States v. Village of Endicott, New York, and Town of Union, New York, No. 88-CV-1067 (N.D.N.Y. Oct. 15, 1988)

Nature of Proceeding: Civil action under sections 106(a), 107(a), and 133(g)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9606(a), 9607(a), and 9633(g)(2), seeking injunctive relief and response costs.

Background: The village of Endicott and the town of Union own a portion of the Wellfield site, where hazardous substances have been dumped. A Record of Decision with a partial remedy has been issued for the site. The United States is requesting that the court order the defendants to take the following actions: (1) install a groundwater treatment facility near the well, (2) operate a purge well used for intercepting and removing some of the contaminants flowing toward the well, and (3) continue the monitoring of water at the well for the presence of volatile organic compounds. The government also requests the award of any response costs that it might spend in connection with implementing the remedy outlined.

United States v. Zinc Corporation of America, No. 88-1888 (M.D. Pa. Oct. 13, 1988)

Nature of Proceeding: Civil action instituted pursuant to sections 104, 106(a), 107(a), and 133(g)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9604, 9606(a), 9607(a), and 9633(g)(2), and section 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. 6973, for equitable relief and for recovery of response costs.

Background: The Blue Mountain Site comprises approximately 1,500 acres of defoliated land on Blue Mountain in Carbon County, Pennsylvania. The defoliation is a result of soil contaminated with very high levels of lead, cadmium, and zinc. According to the complaint, this site has been used for zinc smelting for over ninety years and is presently owned and operated by the defendant. During the smelting process, oxides of sulfur, cadmium, lead, and zinc have been and are emitted to the surrounding environment, polluting the soil. Both groundwater and surface water also have been affected by the contamination. The complaint alleges that 7,000 residents of nearby Palmerton are at risk as well as the animal populations in the vicinity.

U.S. EPA has selected a remedial action that involves the revegetation of Blue Mountain using a mixture of wastewater treatment sludge and ash in order to reduce the volume of runoff that carries heavy metals to the groundwater and surface water at the base of the mountain. As of March 1988, the government had spent \$179,849.03 on response costs at the site. The court is asked to order the defendant to perform the remedial action requested and to reimburse the government for costs incurred to date.

WATER

United States v. City of St. George and the State of Utah, No. 88-C-910G (D. Utah Oct. 4, 1988)

Nature of Proceeding: Civil action pursuant to sections 309(b) and (d) of the Clean Water Act, 33 U.S.C. 1319(b) and (d), seeking injunctive relief and assessment of civil penalties.

Background: The city of St. George operates a sewage treatment facility under a National Pollutant Discharge Elimination System (NPDES) permit. This permit authorizes the city to

discharge pollutants from one outfall of the facility into an unnamed ditch that flows directly into the Virgin River, a navigable water. Both interim and final effluent limitations are established for a number of pollutants in the permit. The complaint alleges that from August 1983 to the present, the city has exceeded the limitations established in its NPDES permit. Furthermore, the city has failed to adhere to the compliance schedules set forth in its permit for planning and constructing a new wastewater treatment facility.

United States v. Robert Duffield, No. 88-1367 (N.D. Okla. Oct. 4, 1988)

Nature of Proceeding: Civil action pursuant to sections 1423(a)(2) and (b) of the Safe Drinking Water Act (SDWA), 42 U.S.C. 300h-2(a)(2) and (b), for injunctive relief and assessment of civil penalties.

Background: The defendant, Robert Duffield, is engaged in the oil and gas production business. According to the complaint, he owns and operates two saltwater disposal wells. These wells are on the Osage Mineral Reserve in Osage, Oklahoma, the tribal home of the Osage Indians. U.S. EPA promulgated an underground injection control (UIC) program for the Osage Mineral Reserve to prevent underground injection that would endanger drinking water sources at the Reserve. Owners and operators of injection wells located in Oklahoma must comply with this program.

The complaint states that, pursuant to federal regulations incorporated in the UIC, each existing Class II well must have mechanical integrity. The government claims that one of defendant's wells is a Class II well that has failed its mechanical integrity test. The other well has been abandoned without being properly plugged and closed. The government also claims that the defendant has failed to monitor the working well's injection pressure and rate and has failed to submit reports as required by statute and pertinent regulations.

Civil Penalties and Injunctive Relief

HAZARDOUS WASTE

Ohio v. Alchem-Tron, Inc., Succeeded by GSX Chemical Services of Ohio, Inc., No. 98877 (C.P. Cuyahoga County)

Amount: \$41,300

Context: Revised Consent Decree

Background: This revised consent decree was triggered by alleged violations of an earlier consent decree and alleged violations of the Ohio Hazardous Waste Statute and rules. Among the allegations in a complaint filed with the proposed decree is that the defendant failed to complete closure activities for one of the drying beds at its hazardous waste facility located in Cleveland. Additionally, the state complained that the defendant failed to install and maintain a fire suppression system as required by the earlier consent decree. In the revised consent decree, the plaintiff and defendant have agreed to appoint experts to re-evaluate the fire suppression system and to change it if necessary. The defendant has also agreed to change its waste analysis procedures and to pay a civil penalty of \$41,300.

Wisconsin v. Wastainer, Inc., and Francis O. Van Winkle, No. 86-CV-1246 (Waukesha County Cir. Ct. Nov. 18, 1988)

Amount: \$103,500

Context: Judicial Decision

Background: In October 1985, the defendant unlawfully disposed of approximately five barrels of paint waste by burying them in a fill area adjacent to its facility for manufacturing refuse containers. Notified about the illegal disposal by two former employees of the defendant corporation, the state exhumed the barrels and discovered that at least some of the drums had ruptured and released hazardous substances, primarily lead, into the adjoining soils and groundwater. The court found that the violations were wilful and motivated by a desire to avoid the costs of proper disposal. The court ordered the corporate defendant to pay the sum of \$55,000 pursuant to section 144.74 of the Wisconsin Statutes and a fifteen percent penalty assessment as mandated by section 165.87(2) of the Statutes. Van Winkle was

ordered to pay a forfeiture of \$35,000 and a fifteen percent penalty assessment for his conduct.

United States v. Chevron Chemical Co. Inc., et al. (Operating Industries, Inc., Site), No. 88-28766 (C.D. Cal. Dec. 13, 1988)

Amount: \$66,000,000

Context: Consent Decree

Background: A proposed partial consent decree has been filed that obligates 115 companies to participate in an interim clean-up plan designed to stabilize a 190-acre hazardous waste site known as Operating Industries, Inc. The site adjoins housing developments in the Los Angeles suburb of Monterey Park. The clean-up is valued at \$66 million.

The site was primarily a landfill facility that had been developed in an old quarry. A variety of hazardous wastes from companies and municipal waste from local communities were placed in the facility. The waste mass, at its highest point, is about two hundred feet above sea level. The complaint alleges that hazardous wastes, such as vinyl chloride, methylene chloride, arsenic, chromium, ammonia, benzene, carbon tetrachloride, and toluene, have been released from the site by liquids leaching from the wastes, gas rising into the air, and wastes entering the groundwater.

The 115 settling companies are divided into two groups. Sixty firms comprise the Steering Committee that has obligated its members to pay thirty-four million dollars for the cost of two operable units that will perform a variety of interim clean-up work until a final clean-up remedy is selected. The remaining fifty-five firms will make cash settlements based on their respective shares of wastes at the site. In the decree, the government has reserved the right to bring suit against any of the settling or non-settling companies for costs of the final clean-up remedy.

United States v. Grand Trunk Western Railroad Company, No. K-86-167 (W.D. Mich. Oct. 17, 1988)

Amount: \$5,313,167

Context: Partial Consent Decree

Background: Grand Trunk Western Railroad Company, a subsidiary of the Canadian National Railway, has agreed to reimburse the

federal government \$4,705,677 for the partial cost of cleaning up hazardous wastes that contaminated the public drinking water supply of Battle Creek, Michigan. The terms of the decree allow the government to seek additional reimbursement from the defendant for clean-up work that remains to be done at the Verona Well Field, a system of water wells that supplied Battle Creek before they were closed because of contamination. The decree also requires Grand Trunk to reimburse the state of Michigan \$607,490 for state response costs at the site.

United States v. Metropolitan Dade County, Florida, No. 88-1814 (S.D. Fla. Sept. 29, 1988)

Amount: \$80,021.26

Context: Consent Decree

Background: A complaint filed against Metropolitan Dade County, Florida, by the United States pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act has been settled by the filing of this consent decree. Under it, the county agreed to pay the government \$80,021.26 for costs it has incurred in connection with cleanup at the county-owned landfill. The county has also agreed to finance, design, and implement a remedy at the site in accordance with the Record of Decision attached to the consent decree.

WATER (Water Rights)

Nevada et al. v. Peter Morros et al., No. 18105 (Nev. Dec. 21, 1988)

Context: Judicial Decree

Background: In a unanimous decision, the Nevada Supreme Court recently upheld the Nevada State Engineer's grant of water rights to the Bureau of Land Management. Interveners in the lawsuit included the Nevada Wildlife Federation and the Sierra Club.

The court rejected the state Attorney General's claim that no water right may be obtained under Nevada law without a diversion. Instead, it ruled that an instream flow water right to protect a fishery known as Blue Lakes in the mountains of northwest Nevada could be obtained by the Bureau of Land Management. Secondly, the court ruled that the Bureau may obtain water rights for stock watering and wildlife watering on federal lands. The Attorney General had argued unsuccessfully that the

water rights should go to the owners of the cattle, the grazing permittees, not to the Bureau, and that wildlife watering is not a beneficial use.

WATER

United States and State of Indiana v. City of Greensburg, Indiana, No. 1P87-C (S.D. Ind. June 28, 1988)

Amount: \$50,000

Context: Consent Decree

Background: The city of Greensburg has agreed to pay \$50,000 in satisfaction of the governments' claims for alleged violations of the Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, and the city's National Pollutant Discharge Elimination System permit. In addition, the defendant will continue its program to attain and, thereafter, maintain compliance with the CWA and will complete its compliance program by November 30, 1990, in accordance with a schedule set out in the consent decree.

United States v. Koppers Company, Inc., No. C-87-7218 (N.D. Ohio Oct. 12, 1988)

Amount: \$950,000

Context: Consent Decree

Background: Violations of the Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, were alleged against Koppers Company, Inc., in litigation commenced by the federal government in August 1987. Specifically, the government had alleged that Koppers violated the CWA's pre-treatment requirements at its plant in Toledo by discharging excessive amounts of ammonia, cyanide, and phenol into the publicly owned sewage treatment system. The penalty of \$950,000 recoups both the economic benefit that the defendant may have enjoyed through noncompliance and also includes an additional amount based on the gravity of the alleged violation. Similar charges against Toledo Coke Corporation, which purchased the Toledo factory from Koppers in 1987, are awaiting trial.

United States v. A. Regina, No. 85-1674 (D.P.R. Dec. 9, 1988)

Amount: \$4,033,000

Context: Consent Decree

Background: The government has requested that the court approve a proposed consent

decree that has been filed requiring the insurer of a wrecked ferry to pay more than four million dollars for the removal of the vessel from a coral reef. This reef, just off Mona Island in Puerto Rican waters, is an important part of the habitat of Hawksbill sea turtles, an endangered species.

The 3,568-ton ferry ran aground on the reef in February 1985. The complaint charged violations of both the Endangered Species Act and the Rivers and Harbors Appropriation Act of 1899 because the hull obstructs navigation and is a source of pollution. The hull, according to the complaint, has carved a deep trench into the reef, killing living coral, while fuel oil and debris have damaged the reef, seabed, and beaches. The insurance company has already contracted for removal of the ferry from the reef, as required by the proposed consent decree. Out of the \$4 million fine, \$641,000 will go to the Commonwealth of Puerto Rico for damages to its natural resources, clean-up costs, and future costs related to the removal project. The remaining funds will be used for removal of the ferry from the reef and cleanup of the debris.

CRIMINAL PROSECUTIONS

[Except where noted, the following information was provided by the Environmental Crimes Section of the U.S. Department of Justice.]

Convictions and Pleas

AIR (Asbestos)

United States v. DAR Construction, Inc., and Maurice Dieyette, 88 Cr. 65 (S.D.N.Y.)

On December 22, 1988, Maurice Dieyette, a foreman of DAR Construction, Inc., was found guilty on three counts of violating the Clean Air Act (CAA) for allowing the emission of asbestos into the environment, failing to wet the asbestos adequately before removal, and failing to keep the asbestos wet during removal. He was acquitted on three remaining counts, including two charges of obstruction of justice and one violation of the Comprehensive Environmental Response, Compensation, and Liability Act for failure to report the release of a hazardous substance into the environment.

DAR Construction, Inc., had pled guilty on December 5 to three violations of emissions

standards under the CAA for knowingly and willfully failing to wet down asbestos materials adequately before removal.

The case stems from asbestos abatement work conducted by DAR under Dieyette's supervision at a New York City Department of Sanitation garage used for dispatching and garaging city sanitation trucks in Manhattan. The indictment alleged that when DAR workers removed dry asbestos from pipes and dropped it approximately twenty-five feet to the ground below, clouds of asbestos were generated. Health and safety officers and other government officials were summoned to the garage to halt further asbestos work and to evacuate personnel.

The indictment also alleged that Dieyette directed the workers to sweep up the dry asbestos and place it into plastic bags. The plastic bags were then inserted into empty asbestos disposal bags that were turned inside out, concealing the warning labels, and dumped in a private dumpster outside an apartment building.

Dieyette faces the maximum sentence of three years' imprisonment and a \$25,000 fine for each day of violation. DAR faces the maximum fine of \$25,000 per day for each violation.

This was the first federal asbestos prosecution in the nation to go to trial and was also the first asbestos case to be brought in U.S. EPA's Region II, which includes New York and New Jersey.

HAZARDOUS WASTE

Pennsylvania v. Robert A. McCoy (C.P. Venango County)

A Warren County man pled guilty on December 15, 1988, to charges that he dumped several hundred gallons of gasoline into a Venango County trout stream, according to former Attorney General LeRoy S. Zimmerman. The August 8 dumping killed more than 19,000 fish in an area of the Cherry Run Stream extending about one and a half miles. The dumping also prompted the evacuation of several persons living in homes along the stream.

Robert A. McCoy pled guilty in Venango County Common Pleas Court to a felony

violation of the Pennsylvania Solid Waste Management Act and to one count of risking a catastrophe.

Under a plea agreement, the state is dismissing three other counts of violating the act and recommending that McCoy be sentenced to the following: a prison term of 11.5 to 23 months and eligibility for the county's work-release program; five years' probation following completion of the prison term; a \$7,500 fine and \$7,400 restitution to the Pennsylvania Fish Commission; and fifty hours of community service on a Department of Environmental Resources conservation project.

At the time of the dumping, McCoy was a truck driver employed by Pennzoil Co. and assigned to the company's Cherry Run terminal near Rouseville. A complaint filed on October 13 charged that, for unknown reasons, McCoy unloaded several hundred gallons of gasoline from his truck into Cherry Run Stream from behind the Cherry Run terminal on August 8.

Ohio v. Y.E. I., Inc. (C.P. Harrison County)

Y.E.I., Inc., an oil and gas development corporation, pled guilty on November 22, 1988, to a charge of illegal disposal of hazardous waste. This charge resulted from indictments filed by Attorney General Anthony J. Celebrezze Jr. in the Harrison County Court of Common Pleas. Y.E.I., Inc., will pay a fine of \$25,000, the maximum penalty allowed, with \$10,000 going directly to the Ohio EPA's hazardous waste cleanup account.

An investigation resulted in charges that hazardous waste was transported from Y.E.I.'s facility in Stark County to Harrison County where it was illegally buried. Following a citizen's complaint, a search warrant was obtained and fourteen drums were found, some containing toluene, a liquid hazardous waste.

A Harrison County Grand Jury had indicted Y.E.I., Inc.; former vice-president Douglas Gray; and Ed Lyons Tractor Service on November 27, 1987. Douglas Gray was found guilty of illegal disposal and transportation of hazardous waste in May 1988 and Ed Lyons Tractor Service was convicted in July for conspiring to transport hazardous waste illegally.

United States v. Delbert Messer, Cr-2:88-00228 (S.D. W. Va.)

On December 16, 1988, Delbert Messer pled guilty to one count of illegal disposal of hazardous waste in violation of the Resource Conservation and Recovery Act. Messer, a salvager of mining goods and machinery, had disposed of corrosive, hazardous waste from a cleaning process used at his business directly onto the ground at the site of his operations.

WATER***United States v. Sam Jenkins Jr. and Sea Port Bark Supply, Inc., Cr. 88-56-TB (W.D. Wash.)***

Sea Port Bark Supply, Inc., and its president, Sam Jenkins Jr., pled guilty on December 16, 1988, to one count of willfully and negligently discharging pollutants from Sea Port's mulch manufacturing process, in violation of the Clean Water Act (CWA).

Sea Port Bark produces a mulch by processing wood wastes generated in log yards in the Tacoma area. As part of the process, the wood waste is washed to remove rock, dirt, and dust. Among other things, this rinse water contains extremely high levels of arsenic, lead, and zinc. The rinse water was discharged by Sea Port Bark Supply through a series of lagoons and pipes into Commencement Bay.

This is the first prosecution in which an individual has been charged as a repeat offender under the CWA. On July 25, 1986, Jenkins and Sea Port each pled guilty to a similar violation.

United States v. Ocean Spray Cranberries, Inc., Cr. 88-13-N (D. Mass.)

Ocean Spray Cranberries, Inc., pled guilty on December 20, 1988, to twenty-one counts under the Clean Water Act (CWA) for the illegal discharge of highly acidic wastewater from its cranberry processing plant into the public sewer system. The plant is located in Middleboro, Massachusetts. Discharge from the plant contaminated nearby wetlands of the Nemasket River. The illegal discharges occurred repeatedly over a five-year period from February 1983 through January 1987.

According to the plea agreement, Ocean Spray will pay a criminal fine of \$400,000 and

purchase a sludge press for Middleboro's sewage treatment facility as restitution for the harm caused by Ocean Spray's pollutants. The press will cost approximately \$100,000. This is the first environmental criminal sentence to include restitution payment to a municipality damaged by illegal pollution.

The government had charged that Ocean Spray consistently discharged wastewater with an impermissibly low pH level after the company was notified by town representatives on several occasions that the wastewater was causing operational problems at the public sewage treatment works. In addition, Ocean Spray occasionally discharged highly acidic wastewater directly into the neighboring Nemasket River and its adjoining wetlands.

Ocean Spray, a cooperative of about 800 growers, is the nation's largest maker of cranberry products. John S. Llewellyn Jr., president of Ocean Spray, said the company expects to spend about \$3.2 million to upgrade its Middleboro plant and about \$2 million on its plants in Texas, Wisconsin, Florida, Washington, and New Jersey to insure better wastewater control.

United States v. The Bill L. Walters Companies, 88 Cr. 375 (D. Colo.)

The Bill L. Walters Companies (BLWC), a commercial real estate development firm, pled guilty on December 22, 1988, to a one-count information under the Clean Water Act (CWA) for the unpermitted fill of a three-acre wetland area. The wetland area is on the site of a proposed shopping center in Denver.

The information alleged that the violation occurred in November 1985 at the site of the proposed Galleria Project, a retail shopping, office, and hotel complex on a 100-acre tract in Denver. Acting without a permit from the federal government, the BLWC illegally discharged pollutants into a three-acre wetlands area by filling it with 20,000 cubic yards of fill material using earth movers, bulldozers, and other pieces of heavy machinery.

The government will recommend the \$25,000 maximum penalty that can be imposed under the CWA provisions in effect in 1985. The 1987 amendments to the Act made it a felony to knowingly fill in wetlands without a permit and provided stronger potential penalties: for an individual, three years of imprisonment and a

\$50,000 fine for each day of violation; for a company, a \$50,000 fine per day.

The Department of Justice is seeking a fine and wetlands restoration work in a pending civil suit against BLWC and CCSD Associates, Ltd. (a related limited partnership).

Sentences

AIR (Asbestos)

United States v. Joseph Grossi, Cr. 88-580 (C.D. Cal.)

Joseph Grossi, a supervisor for the Cuyahoga Wrecking Co., was sentenced on December 19, 1988, to two years of probation and 250 hours of community service after pleading guilty to a violation of the Clean Air Act (CAA). Grossi had pled guilty to a one-count information under the CAA for the improper removal of asbestos in connection with the demolition of the Kaiser Steel Plant, which took place between 1983 and 1986 in Fontana, California.

On December 5, 1988, Cuyahoga Wrecking Company of Great Neck, New York, and four company supervisors were given various sentences as a result of their guilty pleas under the CAA for the improper handling of asbestos. The four supervisory employees are project superintendents James Abbajay, Leonard Capizzi, and Chester Reiss, and demolition supervisor Robert Torok.

For their guilty pleas to one count each of conspiracy and violations of the CAA and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), Capizzi was sentenced to eighteen months' imprisonment, Reiss and Torok to six months' imprisonment, and Abbajay to two months' imprisonment.

Pursuant to a guilty plea to seven counts, including conspiracy, making false statements, and CAA and CERCLA violations, the Cuyahoga Wrecking Company was sentenced to a fine of \$250,000. The fine is payable to the government as a general unsecured creditor of the corporation, which is in bankruptcy.

The defendants were charged in an eight-count federal grand jury indictment on June 14, 1988, with participation in environmental crimes at the Kaiser plant site. The indictment alleged

that Cuyahoga workers, often working without respirators or protective clothing, stripped asbestos from pipes by pulling it off with their bare hands or knocking it off with their feet, shovels, or torches. No attempt was made to wet the asbestos during removal. The fallen asbestos remained on the ground where Cuyahoga laborers worked daily. Workers were falsely assured that the asbestos was not dangerous to their health, and those who complained about safety practices were threatened with termination.

The indictment followed a lengthy investigation by U.S. EPA's National Enforcement Investigations Center and the FBI.

HAZARDOUS WASTE

United States v. Chorine Kasema MacKenzie Nzau, aka Kasema MacKenzie, Cr. 88-277C (W.D. Wash.)

On December 16, 1988, in Seattle, Washington, Chorine Kasema MacKenzie Nazau (MacKenzie) was sentenced as a result of his guilty plea to one count of illegal storage of hazardous wastes in violation of the Resource Conservation and Recovery Act.

MacKenzie, a Kenyan national, has been incarcerated since his arrest on August 26, 1988. He was sentenced to three years of imprisonment (all but six months suspended with credit for time served) and five years of probation. He was also ordered to pay restitution to the state of Washington in the amount of \$100,000. Once MacKenzie has finished serving his federal sentence, he will be turned over to the state on an outstanding felony warrant relating to a hit and run incident.

MacKenzie had been charged on September 21, 1988, in a twelve count indictment with the knowing transportation of hazardous wastes to an unpermitted facility, storage at the facility, and false statements in violation of 18 U.S.C. 1001.

The indictment alleged that on at least four occasions, MacKenzie transported and stored drums of ignitable and corrosive hazardous wastes at the Shurgard Mini-storage warehouse. Shurgard, a storage rental facility in Bellevue, Washington, does not have a permit under RCRA for the storage of hazardous wastes. The drums were discovered when the owner of the

facility cut the lock on the storage units after MacKenzie had failed to pay rent for over four months.

The indictment further alleged that on at least six occasions MacKenzie forged signatures or had signatures forged of purported employees of Sol-Pro Lilyblad (a facility located in Tacoma authorized to receive hazardous wastes) on Uniform Hazardous Waste Manifests.

The Washington State Department of Ecology, which assessed the situation at Shurgard as posing an imminent danger, arranged for the removal of over 300 drums. Labels on some of the drums showed that they contained ignitable wastes and extremely corrosive materials. The indictment also alleged that some of the drums had been stored at the Shurgard facility for over a year.

United States v. David Carr, 88 Cr. 0036 (N.D.N.Y.)

David Carr, a civilian employed as a range foreman at the U.S. Army Installation, Fort Drum, was sentenced on December 16, 1988, following his conviction by a jury. The jury convicted Carr of two violations of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) after he twice failed to report a spill of hazardous substances into the environment. On each count, imposition of a prison sentence was suspended, and Carr was given one year of probation to run concurrently. Carr also was fined \$100 on each count, totaling \$200, and a \$100 special assessment was imposed.

Carr had been charged in a forty-three-count indictment with thirty-seven counts of illegal discharge of pollutants without a National Pollutant Discharge Elimination System permit in violation of the Clean Water Act, four counts of illegal disposal of hazardous wastes in violation of the Resource Conservation Recovery Act, and the two CERCLA counts for which he was convicted. The jury acquitted him on the remaining counts.

The indictment charged Carr with the supervision and direction of other civilian employees in the disposal of approximately 100 to 150 five-gallon cans of paint into a pond located on the base.

WATER

United States v. Odfjell Westfal-Larsen (USA), Inc., Baytank (Houston), Inc., et al. (S.D. Tex.)

According to U.S. EPA's Office of Criminal Enforcement Counsel, on November 18, 1988, a jury sitting in Houston, Texas, found the following parties guilty of violating various environmental laws: Baytank (Houston), Inc.; Haavar Nordberg, executive vice president of the Norwegian company that owns Baytank; Roy Johnson, operations manager of Baytank; and Donald X. Gore, the employee responsible for environmental matters at Baytank.

Specifically, Baytank, Nordberg, and Johnsen were found guilty of knowingly storing hazardous wastes in drums at the Baytank facility without interim status or a permit, a felony violation of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6928(d)(2)(A). These defendants were also found guilty of willfully discharging, on 187 different occasions, pollutants from a point source into navigable waters, a misdemeanor violation of the Clean Water Act (CWA), 33 U.S.C. 1319(c)(1), at the time of offense.

Baytank, Nordberg, Johnson, and Gore were found guilty of negligently discharging, on twenty-five different occasions, pollutants from a point source into navigable waters, a misdemeanor violation of the CWA, 33 U.S.C. 1319(c)(1). Baytank, Nordberg, Johnsen, and Gore were also found guilty of violating a condition of their National Pollutant Discharge Elimination System permit by failing to file Discharge Monitoring Reports with U.S. EPA, a misdemeanor violation of the CWA, 33 U.S.C. 1319(c)(1), at the time of offense.

Gore was found guilty of negligently discharging, on sixty-four different occasions, pollutants from a point source into navigable waters, a misdemeanor violation of the CWA, 33 U.S.C. 1319(c)(1). Finally, Baytank and Johnsen were convicted of failing to notify immediately the National Response Center of a release of a reportable quantity of a hazardous substance, a misdemeanor violation of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9603(b)(3), at the time of the offense. All other charges resulted in either a dismissal or an acquittal.

On January 13, 1989, a hearing on a routine motion for judgment of acquittal and a motion for a new trial by defense counsel made pursuant to Rule 29 of the Federal Rule of Criminal Procedures was held. These motions were opposed by attorneys representing the U.S. Department of Justice (DOJ). The trial judge, Federal District Court Judge L. Hughes, ruled that an order of acquittal be entered for the individual defendants regarding the two RCRA counts, and a new trial be ordered concerning the CWA and CERCLA counts. Thus, the two RCRA counts against Baytank are the only remaining convictions in this case.

On January 23, Judge Hughes sentenced Baytank to a \$50,000 fine, and five years of community service, the type of which is to be approved by the court.

Baytank, Inc., is a bulk storage terminal with more than forty chemical storage tanks that have a total capacity in excess of 400,000 barrels. The company stores different organic and inorganic chemicals, which are then transferred by rail, truck, ship, and barge for various customers.

The indictment alleged that since 1982, the defendants conspired to circumvent regulations under RCRA and the CWA. One procedure allegedly used by the defendants was the transportation of hazardous wastes upon seven ships of the Odfjell Westfal-Larsen line for ultimate disposal at sea. In addition, operational procedures at the facility allowed the repeated discharge of wastewater contaminated with hazardous wastes and other pollutants to enter the waters of the Bayport Turning Basin near Houston from August 1983 until January 1987.

One-half mile from Baytank, across the Bayport Turning Basin, is the residential subdivision of Shore Acres. Texas has designated these waters to be used for "noncontact recreational and high quality aquatic habitat."

BRIEF BANK

[Following are summaries of issues and arguments from briefs recently filed in court. To obtain copies of the briefs or briefs highlighted in previous *Journal* issues, phone (202) 628-0435.]

Twenty-eight States Join as Amici in Brief Arguing that a Federal Agency Must Give Detailed Analysis of Mitigation Measures in EIS under NEPA: *F. Dale Robertson et al. v. Methow Valley Citizens Council et al.*; *John O. Marsh Jr. v. Oregon Natural Resources Council et al.*, cert. granted, ___U.S.L.W.___ (U.S. June 27, 1988) (Nos. 87-1703, 87-1704)

In a brief filed before the U.S. Supreme Court during its October 1988 term, twenty-eight states filed as amici curiae urging the Court to affirm the Ninth Circuit opinion in these matters. They argued that the National Environmental Policy Act (NEPA) requires that mitigation measures be fully discussed and evaluated in an Environmental Impact Statement (EIS). The brief also contends that the proper standard of review of an agency's compliance with NEPA's requirements is the "rule of reason" rather than the more deferential "arbitrary and capricious" standard. Finally, the brief urges that federal agencies have a continuing obligation to disclose the risks and potential consequences of proceeding in the face of uncertainty and to fully analyze these risks.

Background

Two cases have been consolidated for review by the Court in this proceeding. In the first, the U.S. Forest Service allocated public lands for the construction of a major destination ski resort. The EIS prepared for the project provided a *list* of mitigation opportunities that *could* be implemented by state and county governments or private landowners. There was no estimate of the costs of any of the opportunities listed, nor any analysis of their effectiveness. Nor was there an assurance that any of these mitigation opportunities would, in fact, be carried out.

The second case involves the Elk Creek dam project for which the U.S. Army Corps of Engineers prepared an EIS in 1971. The project was then postponed for ten years because of water quality and fishery impact problems. In 1980, a supplemental EIS (SEIS) was prepared

based on new information on impacts to wildlife and water quality. A decision to proceed with the project was then made without any consideration of an Oregon Department of Fish and Wildlife study conducted in 1985. This study projected a thirty to forty-five percent decrease in the salmon fry survival rate upon closure of the Elk Creek dam. It also projected impacts on the Rogue River fishery at the closure of the Elk Creek dam that could be significant. The Corps, instead, prepared a Supplemental Information Report (SIR) three months *after* litigation had commenced. The Corps also expressly postponed any study of the costs or effectiveness of mitigation measures of the project's destruction of 1,290 acres of wildlife habitat until after the final decision to build the dam was carried out.

Another study by the U.S. Soil Conservation Service (SCS) in 1982 found that the type and texture of soil in the Elk Creek area was different from that assumed in the 1980 SEIS. The SCS study indicated that the turbidity would be greatly increased over that indicated in the 1980 SEIS. This study has not been considered by the Corps, which continues to rely exclusively on the models used in its 1980 SEIS.

Duty to Analyze Mitigation Measures in an EIS

The first point raised in the amici's brief is that federal agencies cannot avoid NEPA's requirement of a detailed statement by simply listing mitigation "opportunities" in an EIS. Nor can they postpone analysis of mitigation measures until after a project has been approved. In both cases, the brief points out, the EIS's were prepared without discussion or analysis of mitigation measures. According to the brief, NEPA was designed to minimize harm to the environment, and the thrust of the requirement of an EIS is to ensure that environmental concerns be integrated into the very process of agency decisionmaking.

The regulations issued by the Council on Environmental Quality (CEQ), the agency that promulgated the regulations implementing NEPA for federal agencies, emphasize meaningful disclosure in the EIS. Federal agencies are directed to "identify and assess reasonable alternatives to proposed actions that will avoid or minimize adverse effects . . . upon the quality of the human environment." 40 C.F.R.

1500.2(3)(1987). CEQ's regulations require that mitigation measures be discussed at three separate points in the NEPA process: (1) in defining the scope of an EIS, (2) in the body of the EIS, and (3) in the agency record of decision. The regulations state that, along with other alternatives to the proposed project, an agency must "rigorously explore and objectively evaluate" mitigation measures. 40 C.F.R. 1502.14(1) (1987). The amici state that the CEQ regulations clearly envision that an EIS would contain a thorough discussion of mitigation measures, including whether or not these measures will actually reduce a project's harmful impacts.

The brief notes that the Court has adopted a "hard look" standard. This requires that an agency's study is sufficient to satisfy NEPA's two aims: first, of providing the agency with sufficient information about every significant aspect of the environmental impact of a proposed action to insure a "fully informed and well considered decision"; second, of ensuring that the agency will inform the public that it has considered environmental concerns in its decisionmaking process. The brief contends that mitigation measures are a mandatory component of an EIS and must be fully described and evaluated to satisfy the "hard look" standard.

The brief concludes discussion of its first point by emphasizing that simply listing mitigation measures in an EIS is meaningless and does not meet the "hard look" standard. That mitigation measures may be theoretically possible does not inform the agency or the public about costs, time, degree of possible success, and how much such measures might compensate for a project's adverse impacts. Similarly, postponing analysis of mitigation measures until after a project has been approved violates NEPA. If one defers studying mitigation until after a project is underway, the basic premise underlying NEPA is violated--that decisionmakers must act with *full knowledge* of the environmental consequences of federal activities.

The "Rule of Reason"

The brief's second point is that NEPA requires agencies to act reasonably in their application of NEPA's procedural requirements. Pointing out that only three courts of appeal still apply the "arbitrary and capricious" standard of review to NEPA regulation compliance, the

amici declare that such a standard directly contradicts CEQ's adoption of the "rule of reason." The brief agrees that agencies retain a broader discretion when they make substantive policy decisions; however, agencies, according to the brief, must meet "NEPA's command for strict procedural compliance in the execution of the NEPA duties." The mandatory nature of the command for procedural compliance dictates a review of "reasonable" implementations.

The brief alleges that the Corps of Engineers acted unreasonably in failing to consider new information before its final decision to build Elk Creek dam. The attempt by the Corps at post hoc rationalization of its decision by the preparation of a SIR is in compliance with neither impact statement procedures "to the fullest extent possible," as required by the CEQ regulations, nor a process that is also implicit in the "rule of reason," the brief states.

Uncertain Future Consequences

The brief agrees that NEPA does not hinder an agency's ability to proceed in the face of uncertainty. However, it does require federal agencies to disclose the risks and potential consequences of doing so. The brief urges that the Court affirm the CEQ determination that agencies have a continuing obligation to disclose the risks and potential consequences of proceeding in the face of uncertainty. The amici urge a return to the "hard look" standard and ask the Court to adopt it as the one agencies must use in weighing the risks of proceeding when certain facts are unknown and certain outcomes are uncertain. The agency must weigh the costs of proceeding without more and better information, according to this argument. The CEQ requirements speak in terms of a "worst case analysis." The brief says that the label attached to the process is unimportant; what is mandatory, however, is that federal agencies must disclose and analyze such uncertainty *before* deciding to proceed with a project.

FEDERAL/STATE REPORT

William K. Reilly Confirmed as U.S. EPA Administrator

William K. Reilly was confirmed by the Senate as Administrator of U.S. EPA on February 2 following a hearing two days earlier before the Senate Committee on Environment and Public Works. At the hearing, Reilly promised a new era in environmental regulation and pledged to be a strong advocate for the environment. Strengthening air pollution legislation will be the first item on his agenda, according to Reilly. Reilly also noted that he will work closely with the U.S. Department of Justice to strengthen enforcement of environmental laws.

Reilly has been president of the Conservation Foundation since 1973 and president of the World Wildlife Fund-U.S. (WWF) since October 1985, when the two organizations joined in a formal affiliation. WWF has supported about 1,350 projects in 103 countries to protect endangered wildlife and habitat. During Reilly's fifteen-year presidency, the Conservation Foundation has continued a long-standing interest in land, including park and forest policy, as well as initiating new programs in environmental dispute resolution, water, toxic substances control, urban conservation, and energy. In 1976, Reilly began a program advocating direct cooperation between business leaders and conservationists in addressing polarizing issues in resource and environmental policy.

Reilly holds a B.A. from Yale University, a J.D. from Harvard Law School, and an M.S. in Urban Planning from Columbia University.

National Environmental Enforcement Council Update

Pretreatment and solid waste disposal issues were the themes of the winter meeting of the National Environmental Enforcement Council (NEEC) held on January 12-13 in Washington, D.C. Speakers from federal, state, and local government presented information on these topics to the Council, which is composed of state Attorneys General, district attorneys, U.S. Attorneys, representatives of state regulatory agencies, and officials from the U.S. Department of Justice and U.S. EPA.

NEEC was established in 1985 to promote communication and coordination of environmental enforcement policy and practices among enforcement officials and program staffs nationwide. NEEC meetings, which are held three times each year, provide a forum for frank discussion among members as well as an opportunity for presentations on selected topics.

At the January meeting, R. Lewis Shaw assumed the position of NEEC Chair for 1989-1990. Shaw is Deputy Commissioner for Environmental Quality Control (EQC) in the South Carolina Department of Health and Environmental Control. The EQC is charged with protecting the public and environment from the hazards of air and water pollution and improper waste disposal. Shaw previously served as vice chair of NEEC.

Past chairmen include F. Henry Habicht II, then U.S. Justice Department Assistant Attorney General for Land and Natural Resources; Duane Woodard, Colorado Attorney General; and, most recently, Thomas Adams Jr., EPA Assistant Administrator for Enforcement and Compliance Monitoring.

In February, Mr. Adams will leave EPA to join the Washington office of the law firm of Dechert, Price, and Rhodes. NAAG would like to take this opportunity to thank him for his support of the Council and commitment to protection of the environment. Mr. Adams has been Assistant Administrator for Enforcement and Compliance Monitoring since 1986. He has served EPA with distinction and worked hard to forge a more effective working relationship between EPA and the states.

EPA/State Enforcement Sets New Record

Enforcement of the nation's environmental laws by both U.S. EPA and its state counterparts proceeded at a record pace in fiscal year (FY) 1988, according to EPA. During the fiscal year that ended on September 30, 1988, EPA referred 372 civil cases addressing violations of environmental regulations to the U.S. Department of Justice (DOJ) for prosecution. The previous record number of cases referred to DOJ was 342 in FY 1986.

EPA's criminal enforcement program also set a record. Fifty-nine new criminal cases were referred to DOJ for prosecution, a number that surpasses the previous high of forty-one cases

referred in both FY 1986 and FY 1987. Since the inception of the program in the early 1980s, individuals committing environmental crimes have received prison sentences totaling ninety-one years, of which forty-five years have been, or will be, served. Probation terms totalling over 450 years have also been imposed.

State environmental agencies shoulder a significant share of the nation's environmental enforcement workload. In FY 1988, the states referred 904 civil cases to state Attorneys General and issued 9,363 administrative actions to violating facilities. Both of these totals represent increases over the FY 1987 performance levels.

In 1984, EPA had over 200 judicial consent decrees in place, directing violating facilities to comply with environmental regulations. At the end of FY 1988, the Agency reported that over 450 judicial consent decrees were in place and being monitored to ensure compliance with the provisions of those decrees. Where non-compliance with the terms and conditions of the decrees is found, EPA may initiate proceedings with the court to compel the facility to adhere to its agreement. EPA initiated twenty-six such actions during FY 1988.

Preliminary statistics indicate that federal enforcement efforts have resulted in an all-time record total for civil penalty assessments. In June, EPA filed a consent decree entered into with Texas Eastern Gas Pipeline Co. The decree called for a penalty of \$15 million--the largest civil penalty assessed to date under an environmental statute. In addition to penalty assessments, EPA has been making greater use of its administrative enforcement authorities under the Clean Air Act and Clean Water Act to insure that the federal government does not award contracts, grants, or loans to facilities that have demonstrated a pattern of noncompliance with the regulations promulgated under those two statutes. Until FY 1986, this contractor-listing tool was sparingly used. In that year, new regulations governing the program were issued and a separate office dedicated to carrying out the program was created within EPA's Office of Enforcement and Compliance Monitoring. In January 1986, there were three facilities on the contractor list; at the end of FY 1988, the list included seventeen facilities. For a copy of EPA's information packet on enforcement statistics, call (202) 628-0435.

EPA Issues Premium Payments Guidance

On November 17, 1988, U.S. EPA issued its "Guidance on Premium Payments in CERCLA Settlements." A premium payment is a risk apportionment device under which the risk taken by the government for providing PRPs with a broader release from liability than is normally available is offset by a payment in excess of the cost projected to complete the remedy at the site. The guidance describes the key features of a premium payment settlement, addresses the appropriate timing for such a settlement, and outlines the factors to be considered in deciding whether a premium payment should be used, and, if so, in what amount. The EPA contact person for this guidance is Janice Linett of the Office of Enforcement and Compliance Monitoring, Waste Enforcement Division, who may be reached at (202) 382-3077.

REQUEST FOR INFORMATION

The Environmental Protection Division of the Massachusetts Attorney General's Office would like to know how other states are regulating the emission of stratospheric ozone-depleting substances such as chlorofluorocarbons (CFCs). Applicable state laws and regulations and administrative and judicial enforcement actions that relate to the emission of CFCs, carbon tetrachloride, and methylchloroform are of particular interest.

Please call Reed Zars, Assistant Attorney General, (617) 727-2200, extension 2556, if you can assist with this research.

ANNOUNCEMENTS

EPA Offers Training on BEN and ABEL Computer Models

U.S. EPA is offering free training on its two user-friendly penalty calculation computer models, BEN and ABEL. BEN calculates a violator's economic gain from violating the law. This model is frequently employed in Resource Conservation and Recovery Act and Clean Water Act cases. The ABEL model evaluates a violator's claim that it cannot afford to pay a civil penalty. This model is keyed to corporate income tax returns and can be used to evaluate both environmental and non-environmental cases.

The course is designed to provide practical guidance on how to operate these models, and it also allows trainees hands-on experience in running them. The target audience is all environmental enforcement personnel. Following are some of the topics covered: introduction to the models, theory underlying the models, how to characterize data inputs correctly, effective use of the models in negotiation, issues that arise in the course of negotiation/litigation, and understanding the models' outputs.

The course will be given at the following locations: EPA Region 10 in Seattle on March 6-7, for information, call Dianne Ruthruff at (206) 442-5139; Region 8 in Denver on March 8-9, for information contact Debbie Dalrymple at (303) 293-1611; Region 9 in San Francisco on March 15-16, for information contact Jack Powelson at (415) 974-8980. State and local government personnel who wish to take the course will be given priority for the first hands-on session.

EPA Offers Negotiation Skills Course

A two-day Negotiation Skills Course will be conducted by the staff of U.S. EPA's Office of Enforcement and Compliance Monitoring. Attendees will be able to practice skills and techniques in a simulated enforcement case settlement negotiation. The course will cover planning for negotiations, understanding the roles and responsibilities of government participants in negotiations, and using tactics to expedite negotiations.

The objectives of the course are threefold: to review basic negotiation concepts, to increase technical skills for effectively negotiating Agency settlement agreements, and to review EPA's position on issues commonly encountered in enforcement settlement negotiations. States are invited to attend courses in their regions. For further information persons interested should contact the Deputy Regional Counsel or the Regional Training Officer in their region.

The course will be held in the following regions: Region II on March 20-21, Region VIII on April 11-13, Region III on May 17-18, Region V on June 7-8, Region I on July 11-13, Region X on September 13-14, Headquarters Enforcement on October 11-12, Region VI on October 18-19, Region VII on November 7-9, and Region IX on December 8-9.

CALENDAR

[If you are interested in listing information about an upcoming conference in the *Journal*, please send that information to Cindy Evans, National Association of Attorneys General, 444 North Capitol Street, Suite 403, Washington, D.C. 20001. Please include the title of your conference, date, location, sponsoring organization, and telephone number. All information must be received two months prior to the date of your conference.]

March 1-2, Boston, Massachusetts: CERCLA Compliance With Other Laws (Region 1), sponsored by U.S. EPA's Office of Emergency and Remedial Response. For information call EPA's Region 1 Superfund Office.

March 14-15, Dallas, Texas: RCRA Regulations Course, sponsored by Government Institutes, Inc. For information call (301) 251-2950.

March 22-23, Washington, D.C., April 12-13, Los Angeles, California: Used Oil Management and Compliance, sponsored by Government Institutes, Inc. For information call (301) 251-9250.

March 28-29, Washington, D.C.: 1989 RCRA Update Course, sponsored by Government Institutes, Inc. For information call (301) 251-9250.

April 6, Montgomery, Alabama: Southern Environmental Enforcement Network meeting. For information call Geary Allen at (205) 261-7406.

April 6-7, Madison, Wisconsin: Noncomplying Municipal Wastewater Treatment Plants. For information call (800) 262-6243.

April 10-12, Williamsburg, Virginia: Environmental Regulatory Inspectors Training Course, sponsored by the Northeast Hazardous Waste Project. For information call (609) 292-0987.

April 11-13, Lake County, Indiana: Plating Industry Investigators Training Course, sponsored by the Midwest Environmental Enforcement Association. For information call Susan Sylvester at (312) 742-1249.

April 24-May 5, Glynnco, Georgia: Hazardous Waste Investigations Training Program, sponsored by U.S. EPA's National Enforcement Investigations Center at the Federal Law Enforcement Training Center. For information call Philip Andrew at (912) 267-2726.

May 8-10, Madison, Wisconsin: Risk, Regulation and Bioremediation of Halogenated Aromatic Compounds, PCBs, Dioxins, co-sponsored by the University of Wisconsin's Department of Engineering Professional Development, the Environmental Toxicology Center, and the Biotechnology Center. For information call Patrick Egan at (800) 262-6243 (in Wisconsin call (800) 363-3020 and ask for Engineering Information).

May 25, Fifty Cities: The Effect of Environmental Regulations on Commercial Transactions, an ALI-ABA Video Law Review. For information call (800) CLE-NEWS.

May 25-27, Washington, D.C.: Air and Water Pollution, co-sponsored by ALI-ABA and the Environmental Law Institute. For information call (800) CLE-NEWS.

June 1-2, Washington, D.C.: Minimizing Liability for Hazardous Waste Management, sponsored by ALI-ABA. For information call (800) CLE-NEWS.

June 7-9, Annapolis, Maryland: Northeast Hazardous Waste project periodic conference. For information call (609) 292-0987.

June 21-23, Toronto, Canada: Midwest Environmental Enforcement Association periodic conference and seminar on transportation of hazardous materials. For information call Susan Sylvester at (312) 742-1249.

June 26-30, Boulder, Colorado: Environmental Litigation, co-sponsored by ALI-ABA and the University of Colorado School of Law. For information call (800) CLE-NEWS.

July 24-27, Boston, Massachusetts: Basic Hazardous Waste Investigative Training Course, sponsored by the Northeast Hazardous Waste Project. For information call (609) 292-0987.

September 21-22, San Francisco, California: The Impact of Environmental Law on Real Estate and Other Commercial Transactions, sponsored by ALI-ABA. For information call (800) CLE-NEWS.

ATTORNEYS GENERAL

As chief legal officers of the states, commonwealths, and territories, the Attorneys General serve as counselors for state government agencies, the legislature, and as the "People's Lawyer" for all citizens. The origins of the office go back to 14th century England. Extensive common law powers have developed over the last six centuries, as well as numerous constitutional and statutory duties and responsibilities.

Typical powers include the authority to institute civil suits, challenge the constitutionality of legislative or administrative actions, intervene in public utility rate cases, proceed against other public officers, revoke corporate charters, enforce antitrust prohibitions against monopolistic enterprises, prevent air and water pollution, enforce the provisions of charitable trusts, intervene in will contests, and represent state agencies.

Attorneys General are popularly elected in 43 states, appointed in six states and five jurisdictions, and selected by the state legislature in Maine.

Attorneys General occupy the intersection of law and public policy, from child abuse to nuclear safety. In 1986-87, state Attorney General offices argued 58 out of 156 cases before the U.S. Supreme Court and launched major consumer protection initiatives to protect the public from telemarketing frauds, false advertising, and scams aimed at the elderly.

SELECTED PUBLICATIONS

A-G Report covers litigation that affects the powers and duties of state Attorneys General, federal legislation, and activities of the Association. A regular listing of all seminars and meetings of the Association is included. Published 10 times per year; subscription: \$55.

Antitrust and Commerce Report focuses on state and federal antitrust enforcement as well as key litigation issues in tax, insurance, securities regulation, and utility rate making. Published 10 times per year; subscription: \$145.

Consumer Protection Report covers enforcement actions and other proceedings under the 50 state consumer protection laws. It is also the Association's vehicle for reporting on state charitable solicitations laws and state laws regulating charitable trusts. Published 10 times per year; subscription: \$145.

National Environmental Enforcement Journal is published in cooperation with the U.S. Environmental Protection Agency and reports on recent developments in environmental enforcement at the federal and state levels. Published 11 times per year; subscription: \$95 for government, library, and nonprofit organizations, and \$195 for others.

For subscription requests or a full list of publications, please write to NAAG Controller or call 202/628-0435.

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Christine T. Milliken, Executive Director and General Counsel, 444 North Capitol Street, Suite 400, Washington, DC 20001-2000, 202/628-0435

The National Association of Attorneys General



GENERAL
INFORMATION
BROCHURE

MEMBERSHIP

The Association has a membership of 55 Attorneys General representing each of the fifty states as well as American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands. The United States Attorney General is an honorary member.

Officers—The Association has four officers elected in June to a one-year term: a president, president-elect, vice president, and immediate past president.

Committees—An Executive Committee is in charge of the management of the Association. There are six standing committees in the areas of Antitrust, Consumer Protection, Criminal Law, Environment, Insurance, and Supreme Court. Several special committees and working groups exist as well.

Committees study all substantive matters within their jurisdiction and make recommendations to the Association for policy positions and action by the Association.

Meetings—The Association holds three full membership meetings each year in March, June, and December.

"A common bond of service to the states and their citizens."

PURPOSE

Founded in 1907, the Association provides a forum for the exchange of information and experience among the chief legal officers of the fifty states and five other jurisdictions; fosters interstate cooperation on legal and law enforcement issues; conducts policy research and analysis of issues pertaining to the states and territories; and facilitates communication between the states' chief legal officers and all levels of government.

GOALS

- Enhance knowledge of the constitutional, statutory, and traditional common law powers and duties of the Office of Attorney General, as well as management and operational methods and procedures.
- Develop working relationships among the Attorneys General.
- Develop staff attorney knowledge of legal developments and emerging trends in the states.
- Foster wider public awareness of the accomplishments of state law enforcement.
- Influence development of national legal policy.

ASSOCIATION SERVICES

Legal Assistance—The Association employs a staff of attorneys expert in Supreme Court practice, state antitrust and consumer protection laws, environment issues (both civil and criminal), and Medicaid fraud.

Multistate Coordination—The Association facilitates the development of coordinated approaches and actions to major legal problems. Recent efforts include the simultaneous filing by 12 states of 37 telemarketing fraud cases; coordination of state interests in the oil overcharge cases that have returned over \$900 million to the states so far; promulgation of horizontal merger and vertical resale price maintenance guidelines in the antitrust field; and a joint federal-state investigation of health care fraud.

Supreme Court Project—This project provides assistance to state Attorneys General in oral argument preparation, amicus coordination, and timely clearing-house services related to the U.S. Supreme Court. Senior state litigators are eligible for the Association's Fellows program which provides "hands-on" experience with the activities of the Supreme Court.

Seminars—The Association provides 10 to 15 continuing legal education (CLE) seminars annually for Attorneys General and their staffs in antitrust, consumer protection, environment, insurance, Supreme Court advocacy, and other substantive legal areas. The Association seeks to comply with the CLE accreditation requirements of the various states.

Federal Relations—The Association pursues Congressional initiatives adopted by the membership, coordinates testimony, and provides a channel whereby an exchange of views with the federal government can be maintained.

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

HALL OF THE STATES
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CHRISTINE T. MILLIKEN
Executive Director
General Counsel

March 3, 1989

PRESIDENT
ROBERT ABRAMS
Attorney General of New York

PRESIDENT-ELECT
TOM MILLER
Attorney General of Iowa

VICE PRESIDENT
MARY SUE TERRY
Attorney General of Virginia

IMMEDIATE PAST PRESIDENT
DAVE FROHNMYER
Attorney General of Oregon

By messenger

Yvonne Cauntee
Environmental Protection Agency
401 M Street
A-100
Room 1200
West Tower
Washington, D.C. 20460

Dear Ms. Cauntee:

Attached are some background materials for the March 13 meeting of the Attorneys General with President Bush and William Reilly. These materials include a brochure on the Association; policy resolutions adopted by the Association on a broad range of matters; a list of those issues, projects, and activities that are an element of NAAG's relationship with EPA and of key interest to the Attorneys General; and a NAAG Committee membership list. While not exhaustive, this list highlights many of the areas where the Attorneys General and EPA are working cooperatively or could in the future and also signals a few controversial issues that could come up.

In addition, I enclose two recently issued reports: *Environmental Protection in the 1990s: Recommendations for the New Administration*; and *Blueprint to End Ocean Pollution*.

By March 9, I will provide you with a list of Attorneys General who will attend the meeting as well as their biographies, which are contained in our 1989 *Handbook: A Guide to the Chief Legal Officers of the States and Other Jurisdictions*, which is currently at the printers.

Meanwhile, please feel free to call if there is any further information you need. With best personal regards, and

Sincerely,


Christine T. Milliken

CTM:sld
Enclosures

cc: Attorney General Jeff Amestoy of Vermont
Chair, NAAG Environment Committee

Attorney General Robert Abrams of New York
President, NAAG

Steve Gibson
Office of Intergovernmental Affairs

February 1989

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL
POLICY POSITIONS

The National Association of Attorneys General (NAAG) decides what, if any, actions it will take on legislative and other issues through policy positions that are considered and voted on at its three yearly meetings. Where an interim position is necessary, the Executive Committee may take action. In addition, issues may be raised, discussed, and studied at seminars and other Committee and Subcommittee meetings and may be referred to the Executive Committee and the full Association for formal consideration. The NAAG staff provides any follow-through authorized by resolution and directed by vote of the members. The autonomy of each Attorney General is carefully protected, and the influence of the Attorneys General working together within the Association is targeted at those issues on which there is unanimous or nearly unanimous support.

The Association has adopted the following policy positions, including the resolutions from the 1988 NAAG winter meeting. The resolutions are organized according to the NAAG Committee with jurisdiction over the substantive area; the year that NAAG adopted the resolution is listed. Those resolutions which do not fall within the substantive scope of a NAAG Committee are included in the miscellaneous section. Copies of the full text of the resolutions are available from the NAAG staff.

AGRICULTURE AND RURAL LEGAL AFFAIRS

Supporting H.R. 4329 Permitting States to Require Participation in State Grain Indemnity Funds by Federal Warehouse Licenses

The Association urges the Congress and the President to support H.R. 4329, which would allow states with established grain indemnity funds to require all warehouses, whether state or federally funded, to participate in those indemnity funds. (1988)

Urging Congress to Appropriate Funds for Matching Grants to State Agricultural Loan Mediation Programs

The Association calls on the Congress to enact the appropriations for fiscal years 1988 and 1989 to provide matching grants to qualifying states for operation of agricultural loan mediation programs, as authorized by the Agricultural Credit Act of 1987. (1988)

Farm Crisis

The Association supports federal legislation, including provisions that would: establish borrowers' rights provisions in the statutes governing the Federal Deposit Insurance Corporation; require the FHA to make lease-back home-stead retention and debt settlement more widely available and workable; require the FHA to continue to make available direct operating and real estate loans; require the Farm Credit Capital Corporation to restructure, rather than merely liquidate loans; maintain the integrity of state agricultural laws, particularly where federal agencies and instrumentalities claim exemption from those laws under the doctrine of preemption; and continue to support free legal assistance to farmers through the Legal Services Corporation. (1985, 1986)

ANTITRUST

Adopting Model Antitrust Legislation

In 1986, the Association first adopted model antitrust legislation, the State Attorneys General Antitrust Improvements Act, which set forth its antitrust legislative policy positions. The intent was to amend the model legislation as necessary from time to time to reflect additional policy positions endorsed by the Association. Following are the Association's positions on antitrust issues that have been adopted to date.

Illinois Brick

The Association supports legislation that would reverse the Supreme Court's decision in *Illinois Brick v. Illinois*, 431 U.S. 720 (1977), which limited recovery of antitrust damages to direct purchasers. (1978, 1979, 1983, 1984, 1987) The Association also urges both political parties to support such legislation as part of their party platforms. (1988)

Insurance Industry's Exemption from the Antitrust Laws

The Association reaffirms its commitment to the historic right of states to regulate and to tax insurance and to the importance of the antitrust laws to maintain free and competitive markets. The Association urges Congress to repeal the special immunity from the antitrust laws granted under the

McCarran Ferguson Act to the insurance industry and to subject insurance companies to the rules of the competitive marketplace applicable to other firms. (two resolutions, 1986)

Standard of Proof in Resale Price Maintenance Cases

The Association supports federal legislation that will create a rebuttable presumption of an agreement in violation of Section 1 of the Sherman Act upon presentation of evidence of coercion of a reseller to follow the pricing practices of a seller through the seller's cancellation of supplies, threats of termination, or other coercive acts; or complaints by a competing reseller concerning price competition followed by termination of the reseller or coercion of the reseller by a seller. (1985)

Access to Hart-Scott-Rodino Act Pre-Merger Documents and Pre-Merger Notification Time Periods

The Association supports federal legislation to provide Attorneys General access to documents submitted pursuant to the Hart-Scott-Rodino Antitrust Act; require that any hold separate order entered by the Federal Trade Commission not be terminated until all required divestitures have been reviewed and approved by the FTC after public comment; permit the federal antitrust authorities to extend the review period for significant acquisitions up to an additional 60 days; and require federal antitrust authorities to consider the adverse effects on the rights of employees of any federally required divestiture. (1984)

Supporting Legislation that Protects the Public's Interest in Scrutinizing Voluntary Dispositions of Antitrust Enforcement Actions Brought by the U. S. Department Justice.

The Association supports federal legislation that would make clear that the Tunney Act applies to voluntary dismissals and stipulated modifications of judgments entered to terminate civil actions, as well as settlements of antitrust suits brought by the U.S. Department of Justice. (1982)

Standing for Injunctive Relief

The Association supports federal legislative proposals which would address the Supreme Court's 1986 decision in *Cargill v. Monfort Colorado, Inc.*, 479 U.S. 104, which made it more difficult for private parties to enjoin unlawful mergers; and would clarify the antitrust laws to establish that private parties and Attorneys General have standing to obtain injunctive relief, including divestiture, after illegal mergers have been consummated. (1988)

Repeal of the Antitrust Exemption for Soft Drink Bottlers

The Association supports federal legislation that would repeal the Soft Drink Interbrand Competition Act (P.L. 93-608), which provides a partial antitrust immunity for exclusive territorial licenses to manufacture, distribute, and sell trademarked soft drink products. (1988)

To Amend the Vertical Restraint Guidelines of 1985.

The Association adopts several amendments to the NAAG Vertical Restraints Guidelines in order to conform with the law as defined in the U. S. Supreme Court decision in *Business Electronics v. Sharp Electronics, Inc.* 108 S. Ct. 1515 (1988).

Contribution and Claims Reduction

The Association opposes federal legislation that would authorize contribution or claims reduction among defendants in antitrust cases. The Association believes that such legislation diminishes the deterrent effect of treble damages. If Congress does approve such legislation, the Association strongly believes that it should not be made applicable to pending cases. (1981, 1982)

Horizontal Merger Guidelines

The Association adopts the NAAG Horizontal Merger Guidelines as a reaction to the 1984 U.S. Department of Justice Merger Guidelines, which deviate from the Congressional purposes of section 7 of the Clayton Act as amended by the Celler-Kefauver Act. The Association's Guidelines are intended, subject to variations in individual state or common law, to be a statement of the general enforcement policy of the Attorneys General which reflects the market reality approach as opposed to economic theory. (1987)

Adopting a Model State Hart-Scott-Rodino Act

The Association endorses the concepts in the model state Hart-Scott-Rodino Act that will provide state Attorneys General with Hart-Scott-Rodino materials. (1987)

Adopting the NAAG Pre-Merger Disclosure Compact Resolution

The Association declares that the NAAG Pre-Merger Disclosure Compact is effective as of March 15, 1988 and directs the Executive Director to maintain a current list of adherents to the Compact. (1987)

Opposing the Extension of the State Attorneys General Statutory Antitrust *Parens Patriae* Standing to Federal Enforcement Agencies

The Association strongly opposes § 2 of S 1407 or any other provision which would weaken the current *parens patriae* provisions of 15 USC § 15c by extending it to other government officials. (1987)

Supporting Consumer Access to and Competitive Pricing of Over-the-Counter Medicines and Opposing a Restrictive Third Class of Drugs

The Association supports the current two-class system of prescription and over the counter drug distribution to continue consumer access to and competitive pricing of over-the-counter medicines and opposes the establishment of a restrictive "third class of drugs." (1986)

Support of Treble Damage Remedy in Antitrust Actions

The Association supports the treble damage remedy provided for in private antitrust actions; and opposes any federal legislation that would eliminate the treble damage remedy in any antitrust situation where it now applies. (1985)

CONSUMER PROTECTION

The scope of the Association's Consumer Protection Committee includes the All-Terrain Vehicle Subcommittee, Ambulance Safety Subcommittee, Car Rental Task Force, Charitable Trusts and Solicitations Subcommittee, Elderly and the Law Subcommittee, Federal Trade Commission Working Group, and Liaison Committee to the Airline Industry.

Calling for State Attorney General Representation on the Internal Revenue Service Commissioner's Exempt Organizations Advisory Group

The Association requests the Commissioner of Internal Revenue to appoint a representative of the Attorneys General to the Commissioner's Exempt Organization Advisory Group, with which he consults on matters pertaining to organizations exempt from federal income tax, charitable organizations, and other areas of concern to Attorneys General. (1988)

Improvement of State and Federal Supervision of Charitable Trusts Through the Amendment of the Internal Revenue Code

The Association urges the federal government to retain the statutory excise tax assessment on the investment income of private foundations for the purpose of funding the supervision of all charitable trusts, including private foundations and public charities. The Association also supports amending the Internal Revenue Code to grant private foundations a federal excise tax credit for periodic fees paid to state government, if the proceeds from such fees are dedicated by state law to the supervision of charitable trusts, and if the state requires charitable trusts to file a copy of their federal information return or other periodic financial report with a state official who is mandated to make such records available to the general public. (1987)

Health Claims in Food Labelling

The Association calls upon the Food and Drug Administration to withdraw its proposal to permit food products to be labelled with disease-specific health claims (52 Federal Register 28843) and to resume its former practice of prohibiting all such claims in food labelling. (1988)

In Support of Food Advertising/Labelling Disclosure Legislation

The Association supports the establishment of national standards for food labelling and advertising which would require the disclosure of truthful and complete health and nutrition information, so long as the states were not preempted from enforcing those standards or the states' unfair or deceptive practices acts. (1988)

Bankruptcy

The Association supports a change to the Bankruptcy Act of 1978 that would require the bankruptcy court to recognize the validity of state court judgments for deceptive sales and unfair trade practices, and thereby exempt these from discharge. (1982, 1986)

Enforcement of FTC Act by State Attorneys General

The Association urges Congress to grant Attorneys General the authority to bring suit in federal district court to enforce Section 5(a)(1) of the FTC Act, 42 U.S.C. § 45(a)(1), with respect to unfair or deceptive acts and practices, as well as to rules issued and orders obtained thereunder. (1985)

WATS-Line Hustlers

The Association encourages officials of each state to cooperate with the efforts of other states to stop "WATS-Line Hustlers" through joint investigative and enforcement actions and encourages all levels of the federal government responsible for the enforcement of 18 U.S.C. § 1343 to increase the law enforcement efforts committed to this national problem. The Association furthermore encourages Congress to amend 18 U.S.C. § 1343 to provide for increased penalties for habitual offenders and to provide a consumer education program on the interstate use of telephone communications involving false representations to parallel the program adopted for mail fraud. (1984)

Federal Court Jurisdiction for State Attorneys General Over Fraudulent Telemarketers

The Association supports the creation of a federal statute which would enable the Attorneys General to proceed in federal court, as well as in state court, to stop fraudulent telemarketing operations. (1988)

Federal Simultaneous Oil and Gas Lottery System

The Association supports legislation to abolish the Federal Simultaneous Oil and Gas Lottery System and to replace it with a competitive bid system. (1984)

Preemption of State Lemon Laws

The Association opposes any legislation on the adoption or modification of any existing Federal Trade Commission rule issued under any federal law, including the Magnuson-Moss Warranty Act, which would preempt state law or rules issued under state law relating to consumer rights and remedies with respect to defective automobiles or other consumer products, as consumer protection is an area historically regulated by the states. (1987)

Opposing Preemption of State Jurisdiction Over Unfair or Deceptive Acts or Practices by the Airline Industry

The Association supports federal legislation that would strengthen federal enforcement, concurrent with state enforcement, directed at unfair or deceptive practices by airlines. The Association established a task force to study the air travel industry to determine the extent and nature of unfair or deceptive acts or practices. (1987)

Adopting The Air Travel Industry Enforcement Guidelines

The Association adopts the Air Travel Industry Enforcement Guidelines as a statement of the general enforcement policy of the Attorneys General with respect to unfair or deceptive acts or practices by members of the airline industry. The Task Force on the Air Travel Industry is directed to receive and examine comments on the guidelines from the industry, the federal government and other interested parties. (1987)

The Association adopted and incorporated into the guidelines the staff analysis of the commentary received from the industry, the federal government and other parties. Also, a Task Force of four Attorneys General was appointed to continue evaluation of the Guidelines' effectiveness and to continue discussions with the industry, the federal government, and other interested parties. (1988)

Unfair and Deceptive Practices by the Car Rental Industry

A Task Force was established to study the car rental industry and the extent of possibly unfair or deceptive acts or practices by members of that industry and to report its findings at the 1988 Winter Meeting. The Task Force was also directed to circulate for comment its Preliminary Report and to receive and evaluate these comments as part of its continuing study. (1988)

Preliminary Approval of the NAAG Car Rental Task Force Report

The Association preliminarily approves the NAAG Car Rental Task Force Report on the Car Rental Industry, which is designed to correct deceptive advertising and business practices in the industry. The Task Force is also directed to continue to receive and review comments from interested parties as part of an on-going, open dialogue and to present its final report, including any proposed modifications, for final consideration by the Association in March, 1989. (1988)

Adopting the NAAG ATV Task Force Report

The Association endorses the Report of the NAAG All-Terrain Vehicle Task Force and adopts it as the Report and Recommendations of the National Association of Attorneys General. (1988)

Product Liability

The Association opposes product liability legislation that would have the effect of preempting state laws and civil actions against manufacturers and sellers and would thus diminish consumer rights. (1987)

CRIMINAL LAW

The scope of the Association's Criminal Law Committee includes the Corrections Subcommittee, RICO Subcommittee, Crime Victims Advisory Panel, and the National Drug Panel Advisory Subcommittee.

Urging Restoration of Funds in the Coast Guard's Budget

The Association urges the Congress to restore the operating funds in excess of \$90 million in FY 88 which were deleted from the Coast Guard's budget. The resolution notes the vital mission of the Coast Guard in stopping the flow of illegal drugs into this country. (1988)

Attorney's Fees

The Association supports legislation that would amend 42 U.S.C. § 1983 and 1988 to alleviate the serious fiscal liability that confronts state and local governments due to awards of attorney's fees against them. The Association has issued a Report which outlines in depth the views of the Association on this subject and contains recommendations for legislative enactment. (1981, 1982, 1983, 1987)

Habeas Corpus

The Association supports modifications in federal habeas corpus proceedings that would require a district judge, rather than a magistrate, to conduct any evidentiary hearing in a habeas corpus proceeding involving a prisoner held in state custody; codify the decision of *Wainwright v. Sykes*, 433 U.S. 72 (1977), which recognized the legitimacy of the "contemporaneous objection rule," and bars litigation of issues not properly raised unless "cause and prejudice" is shown; establish a time limit within which a state prisoner must institute a federal habeas corpus action that challenges a state court conviction; and require a habeas corpus court to accept a state court's finding of fact where there is an evidentiary basis for that finding if the petitioner was accorded a full and fair hearing on the factual issue. (1976, 1978, 1980, 1981, 1983)

Reduction in Federal Funding for Medicaid Fraud Control Units

The Association opposes reduction in the federal matching rate for the Medicaid Fraud Control Units and urges Congress to reject proposals to cut the federal matching rate. The Association urges Congress, if necessary, to enact legislation that would continue the Inspector General's administrative responsibility over the Medicaid Fraud Control Units. (1986)

To Encourage States to Enact Legislation to Deal with Patient and Resident Abuse in Health Care Facilities

The Association encourages each state to enact specific patient abuse legislation to help protect the residents in health care institutions and to use the patient abuse guidelines developed by the Association and the National Association of Medicaid Fraud Control Units when considering such legislation. (1988)

To Oppose the Use by the Office of Inspector General of the U. S. Department of Health and Human Services of Prosecutorial Quotas and Other Inappropriate Numerical Output Measures in their Oversight and Recertification of State Medicaid Fraud Control Units.

The Association opposes steps being taken by the Office of Inspector General (OIG) to improve numerical performance indicators or any other productivity quotas and urges both the OIG and the Department of Health and Human Services to withdraw them immediately and return to the past practice of evaluating Medicaid Fraud Control Unit performance on an individual basis. (1988)

Urging Adoption of the Omnibus Anti-Drug Abuse Act of 1988

The Association urges the adoption of the Omnibus Anti-Drug Abuse Act of 1988, which provides for a comprehensive program to attack the drug crisis, including measures dealing with law enforcement, treatment, rehabilitation, and education. (1988)

In Support of Federal Funding for Drug Crime-Related Research

The Association supports federal funding to continue and expand research on drugs and crime by the National Institute of Justice and requests that the Anti-Drug Abuse Act of 1988 or any similar legislation specifically allocate funds for such research. (1988)

Federal Fraud Statutes

The Association supports federal legislation that would overturn the Supreme Court's 1987 decision in *McNally v. United States*, 107 S. Ct. 2875, and restore to federal fraud law the "intangible right" doctrine, which recognized that fiduciaries owe to their principals honesty and loyalty and that principals ought to be protected from breeches of that fiduciary responsibility. (1988)

Federal Cause of Action for Interstate Child Abduction

The Association urges the Congress to reaffirm its commitment to the deterrence of parental kidnapping and to amend the Parental Kidnapping Prevention Act to establish a federal cause of action limited to the resolution of competing state claims in child custody jurisdiction under that Act. (1988)

Forfeiture

The Association supports legislation that would facilitate the ability of prosecutors to recover money from drug traffickers through criminal forfeiture; and allow property and proceeds from the liquidation of assets seized in drug enforcement cases to be transferred to state and local law enforcement agencies that participate in those cases. (1981, 1982, 1983)

Gambling on Indian Reservations

The Association urges the Department of Interior to immediately cease and desist from authorizing or approving gambling activities on Indian reservations where such gambling activities violate existing state and federal laws; urges the President and the Departments of Justice and Interior to support the states in their litigation in the federal courts to assert state jurisdiction over Indian gambling; and urges Congress to enact legislation to recognize specifically the states' jurisdiction over gambling operations on Indian land. (1985, 1987)

Racketeer Influenced and Corrupt Organization Statute (RICO)

The Association supports efforts by states to enact legislation patterned after the Racketeer Influenced and Corrupt Organizations provisions (Title IX) of the Organized Crime Control Act, particularly in their application of public and private civil sanctions in the area of fraud against the government and opposes efforts to repeal or modify these provisions. The Association urges Congress to amend the provisions of the RICO statute by adding language that would add knowing violation of hazardous waste management and disposal laws to the list of RICO predicate offenses, two violations of which would trigger application of the RICO statute's deterrent sanctions. (1984, 1987)

The Association reaffirms its support for Title IX of the Organized Crime Control Act; and opposes efforts in Congress to repeal or weaken those provisions. The Association authorizes the NAAG RICO Subcommittee to draft proposed RICO reform legislation embodying the principles of the Association regarding Title IX. (1988)

Assistance to States for Drug Enforcement Activities

The Association urges Congress to enact a comprehensive program of assistance to states for drug enforcement activities. (1985)

Military Interdiction of Narcotics in Cooperation with Drug Enforcement Officers

The Association supports legislation that would allow the military to participate in drug enforcement operations and to transmit the information to state and local drug enforcement officials only upon request of the civilian federal enforcement agency with jurisdiction over the operation; upon determination that the assistance will not adversely affect the military preparedness of the United States; upon a determination by the Attorney General that the drug enforcement operation may not succeed without the requested military assistance; and on the condition that the civilian drug enforcement officials maintain ultimate control over the activities and direction of the operation. (1981, 1987)

Uniform Controlled Substances Act

The Association authorizes a Subcommittee appointed by the Criminal Law Committee to assist in drafting a new Uniform Controlled Substances Act containing provisions designed to enable law enforcement to accomplish the following: aggressive seizure and forfeiture of drug traffickers' assets, detection of money laundering and swift asset tracing, use of civil RICO investigative tools, and increased civil and criminal penalties for facilitating the distribution of illegal drugs. The NAAG staff was authorized to accept the invitation of the National Conference of Commissioners on Uniform State Laws to work with the Conference, in order to ensure that the final model act includes the essential law enforcement tools and authority now generally recognized and endorsed by state, local, and federal prosecutors. (1988)

In Support of the National Blueprint for State and Local Control Strategies

The Association endorses the overall strategies contained in the National Blueprint for State and Local Drug Control Strategies and encourages state and local law enforcement agencies to adopt and implement those specific policies which are appropriate for their jurisdictions. (1988)

Supporting Reauthorization of the Victims of Crime Act of 1984

The Association urges Congress to act expeditiously to reauthorize the Victims of Crime Act of 1984 for another four-year period, and in so doing, to take steps to assure that the compensation and assistance programs supported by the Act recognize the needs of all victims of criminal violence, including federal victims. (1988)

In Support of Law Enforcement Coordinating Committees

The Association supports the concept of Law Enforcement Coordinating Committees (LECCs) that bring together all levels of law enforcement agencies to coordinate their investigative and prosecutorial activities, and urges the participation of state and local law enforcement agencies. (1988)

ENVIRONMENTAL CONTROL

The scope of the Environmental Control Committee includes the Environmental Protection Agency Advisory Committee, Ocean Pollution Subcommittee, and High-Level Nuclear Waste Subcommittee.

In Support of the Potential Plan Against Ocean Pollution

The Association urges the states and the federal government to review the recommendations and positions contained in the Association's report, *Blueprint to End Ocean Pollution*, and to engage in a dialogue with state Attorneys General in an effort to develop a more effective partnership between the federal and state governments in addressing these environmental problems. (1988)

The Environmental Agenda for the New Administration

The Association urges the new Administration to review the recommendations contained in its Report, *Environmental Protection in the 1990s: Recommendations for the New Administration*, and to enter into a dialogue with state Attorneys General in an effort to coordinate a more effective partnership between the state and federal governments. (1988)

Allocation of Environmental Funds for Attorney General Environmental Enforcement

The Association supports the undertaking of negotiations with appropriate federal officials and specifically EPA to secure the reallocation of funds and create a program of direct grants to the offices of Attorneys General for the purpose of environmental enforcement, information expertise, and personnel loans; and to secure whatever amendments to federal regulations as are required to accomplish this goal. (1976, 1977, 1978)

Federal Facilities Enforcement In Environmental Cleanup

The Association supports the creation of a Subcommittee which will monitor issues in Congress and federal agencies that may affect federal facilities enforcement; share briefs, case decisions, and other resources among affected states; and develop recommendations on policy positions related to federal facilities for presentation to the Association's membership. (1987)

The Association supports federal legislation that would strengthen and clarify the enforcement authority of EPA and the states over hazardous waste activities at federal facilities; and urges EPA to exercise its oversight and enforcement authority over federal facilities and to delegate to the states oversight and enforcement authority over federal facilities pursuant to CERCLA, SARA and RCRA. (1987)

Clean Air Act Reauthorization

The Association supports reauthorization of a strong Clean Air Act, including new provisions to address the problem of acid rain. (1977, 1981)

Nuclear Waste Policy

The Association objects to the construction of an MRS facility until such time as the Nuclear Waste Policy Act is amended to require an Environmental Impact Statement assessing the transportation risks to corridor and affected states resulting from such an MRS facility; to grant assistance to the affected states to enable them to conduct such an assessment; and to provide financial assistance to corridor and affected states to enable them to respond to transportation impacts resulting from the MRS proposal. The Association supports the participation of corridor states in any nuclear shipments, including but not limited to prenotification to the affected state of such shipments, as well as a state safety escort. (1985)

National Resource Damage Assessments

The Association urges the U.S. Environmental Protection Agency to adopt a policy that assures that Superfund monies will be used to fund federal and state enforcement actions to satisfy natural resource damage claims, provided that federal and state trustees agree to reimburse the Superfund for monies successfully recovered for such enforcement costs. In the event that the EPA Administrator does not resolve this problem, the Association urges the Congress to amend Section 111(c)(1) of CERCLA by adding the language, "and of enforcing a claim to recover for such injury, destruction, or loss." (1987)

Citizen Suit Provision of RCRA

The Association urges Congress to amend section 7002(b)(2)(c) of RCRA, 42 U.S.C. §9672 (b)(2)(c) (1984) to clarify Congressional intent. (1987)

Application of Midwest Hazardous Waste Association for EPA Grant Funding

The Association supports the application pending before EPA of the Midwestern Hazardous Waste Association for grant funding to undertake regional projects similar to the Northeast Hazardous Project and the Western States Hazardous Waste Project. (1987)

Law Enforcement Powers for U.S. EPA Special Agents

The Association encourages the U.S. EPA to continue to seek passage of legislation providing law enforcement powers for special agents assigned to the U.S. EPA's National Enforcement Investigations Center and urges the Congress to enact such legislation. (1987)

To Encourage the Creation of State Environmental Criminal Enforcement Programs

The Association encourages each state to establish an effective environmental criminal enforcement program utilizing investigative, technical, and legal resources at the state and local level and to review its environmental laws to determine what revisions are necessary to establish an effective deterrence by their enforcement. The Association further encourages the states to develop mechanisms for coordinating enforcement in this area with the federal government. (1987)

Concerning the Reauthorization of the Federal Insecticide, Fungicide, and Rodenticide Act

The Association urges Congress to reauthorize FIFRA and opposes any preemption of state regulation of pesticides, including rules related to pesticide use, state enforcement of pesticide rules, and state limits on pesticide residues in or on food. (1987)

Preservation of the Revenue Distribution Formula in Section 35 of the Mineral Leasing Act of 1920

The Association supports preservation of the statutory dedication in section 35 of the Mineral Leasing Act of 90 percent of federal mining leasing revenues from public domain lands to the states in which they are located and opposes all efforts to reduce that percentage. (1987)

The Association opposes any effort to amend the revenue sharing formula of the Mineral Leasing Act, which presently guarantees to the states 50 percent of the mineral royalties from public lands within their borders. (1983)

Price-Anderson Act

The Association urges the Congress to enact legislation defining the liability of the United States Department of Energy in connection with the high-level radioactive waste, spent nuclear fuel, and transuranic waste program authorized by the Nuclear Waste Policy Act during its consideration of amendments to the Price-Anderson Act.

The Association further urges Congress not to adopt any amendment to the Price-Anderson Act which in any way limit or remove the right of states to provide for punitive damages relief to victims of those who handle radioactive materials in a wantonly reckless manner. (1986)

MISCELLANEOUS

Urging the U.S. Department of Justice to Implement a Federalism Policy for Litigation

The Association strongly urges the U.S. Department of Justice to adopt a federalism policy regarding litigation, which would comply with the objectives of the Executive Order on Federalism, No. 12612; solicit the Attorneys General views on cases having federal-state implications; and establish the position of "federalism ombudsman," which would be recruited from the offices of Attorneys General and charged with participation in the implementation of the federalism policy at the Department. (1988)

In Support of Federal Legislation to Direct that Abandoned Property Held by the Federal Government be Identified and Transmitted to the States

The Association calls on the Congress to adopt legislation encompassing the concept, such as that embodied in S. 4612 and H.R. 4298, that the federal government establish a mechanism to ensure that property held by the federal government and subject to escheat by the states be transferred on a regular basis to the states. Further, the Association calls upon the federal government to return all property it holds as a stakeholder to the custody of the states. (1988)

In Opposition to the Federal Efforts to Override State Escheat Laws

The Association vigorously opposes legislation which seeks to override state escheat laws and calls on the federal government to return unclaimed tax refunds, and any other property it holds as a stakeholder, to the custody of the states. (1987)

Regarding State/Tribal Relations

The Association recognizes the sovereign status of tribal governments and supports the policy of Indian self-government by recognized tribes in Indian Country. In addition, the Association expresses its commitment to assisting state, local, federal and tribal governments with resolving problems relating to Indian affairs without needless litigation. (1988)

Consent Decree Policies and Practices of the U.S. Department of Justice

The Association urges the U.S. Department of Justice to revise its policy on consent decrees to recognize expressly the unique nature of litigation between the United States and sovereign states and to permit the flexible use of appropriate consent decrees to resolve such litigation on terms and conditions that recognize and respect the sovereignty of state parties. The Association further pledges its support to work with the Department of Justice in developing workable guidelines to govern the use of consent decrees in state-federal litigation. (1986)

State Justice Institute

The Association urges the Congress to reauthorize the State Justice Institute for four years and to appropriate sufficient funds to ensure that the Institute can continue to fulfill its mission under Public Law 98-620 (42 U.S.C. 10701 *et seq.*). (1987, 1988)

Preserving the States' Traditional Role in Corporate Governance

The Association reaffirms its support for the states' historic role in regulating internal corporate governance to protect shareholders and to ensure fair procedures. The Association opposes federal legislation or rulemaking which would have the effect of preempting state regulatory authority. The NAAG Securities Working Group, in consultation with the President, is authorized to represent the Association's views on this matter. (1983, 1987)

Continuing the NAAG Exchange with Soviet Legal Officials

The Association recognizes the value of exchanges between NAAG and legal officials of the Soviet Union and affirms its willingness to continue the exchange. The President of the Association is authorized to appoint a committee of Attorneys General to develop the logistical and financial details of further exchanges between the Association and legal officials of the U.S.S.R. (1987)

Seeking a Federal Rule of Civil Procedure to Give the State 60 Days to Respond to Pleading in Federal Actions

The Association requests the Supreme Court of the United States to prescribe a rule of civil procedure giving the states 60 days in which to answer complaints and cross-claims and reply to counterclaims against the states in actions in the U. S. District Courts. (1987)

Veterans' Right to Judicial Review and Legal Representation

The Association supports judicial review of final decisions by the Veterans Administration, as well as the right of legal representation before that Agency. (1987)

In Opposition to Federal Legislation that Adversely Affects Asbestos Litigation

The Association opposes the Federal Asbestos Information Act of 1987, H.R. 2693, in that it would impose undue burdens upon asbestos property damage plaintiffs and would impair their ability to develop factual and legal bases for their claims.

The Association also opposes the proposed amendment to the Uniform Product Safety Act of 1987, H.R. 1115, in that the Act codifies both the state of the art defense and the government specifications defenses in product liability actions. The Act sets a "clear and convincing" standard for imposition of punitive damages in product liability actions, requires that a plaintiff establish that a manufacturer "manifested a conscious and flagrant indifference to the safety of those persons who might be harmed by the products in such action," and imposes a two year statute of limitations in all civil actions. (1988)

Urging Enactment of the Abandoned Shipwreck Act, S. 858

The Association supports federal legislative affirmation of the authority and traditional role of the states in preserving, protecting, and managing shipwrecks and other items of historical significance within their waters, and urges the House of Representatives to pass S 858. (1988)

NAAG Model Construction Documents

This resolution supports publication of the Association's document on model construction contracts, which were drafted from the perspective of the public owner. (1988)

Admitting the Office of Corporation Counsel of the District of Columbia as a Regular Member of NAAG

The Association approves the application of the Office of the Corporation Counsel for the District of Columbia for NAAG membership as a regular voting member of NAAG and a member of the Eastern Regional Conference and adopts a corresponding amendment to the NAAG Constitution. (1988)

Approving South Dakota's Request to Move to the Western Region

The Association approves South Dakota's request to move from the Midwestern Regional Conference and adopts a corresponding amendment to the NAAG Constitution. (1988)

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

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CHRISTINE T. MILLIKEN
Executive Director
General Counsel

February 6, 1989

PRESIDENT
ROBERT ABRAMS
Attorney General of New York

PRESIDENT-ELECT
TOM MILLER
Attorney General of Iowa

VICE PRESIDENT
MARY SUE TERRY
Attorney General of Virginia

IMMEDIATE PAST PRESIDENT
DAVE FROHNMAYER
Attorney General of Oregon

By messenger

Mr. Lanny Griffith
Office of Intergovernmental Affairs
Room 160
Old Executive Office Building
17th Street and Pennsylvania Avenue, N.W.
Washington, DC 20500

Dear Lanny:

This letter is in follow up to our conversation this morning concerning a meeting with President Bush during the March 12-14 meeting of the Association in Washington, D.C.

Enclosed is a copy of General Abram's invitation to the President last December. Our meeting might provide an excellent opportunity to showcase federalism early in the term. As the chief legal officers of the states, the Attorneys General serve as the federalism linchpin. Their law enforcement efforts cover such priority issues as environmental enforcement and developing effective drug control strategies as well as work in the field of consumer protection and antitrust. I have enclosed a copy of the drug control report which the Association played a major role in developing cooperatively with the law enforcement community.

In past years the Association's members have met on several occasions with President Reagan, and President Carter before him. Please feel free to call me if you have any questions or if I can provide any additional information. In keeping with what I can well understand is information overload, I am enclosing just a few items: a desk book on Attorneys General, their powers and duties; a brochure about the Association; a current list of Attorneys General; our Spring Meeting memorandum; and a sample of our newsletters.

Best wishes with your new position. I will call early next week to follow up.

Sincerely,



Christine T. Milliken

CTM:mb
Enclosures

WILLIAM K. REILLY *91/281*

Professional Environmentalist Known as 'the Great Includer'

By Michael Weisskopf
Washington Post Staff Writer

When Bill Reilly convened a forum in July 1987 on the national wetlands crisis, he filled a room with 25 people who normally would have difficulty agreeing on a place for dinner. There were environmentalists, developers and industrialists who were squaring off against each other in various courts at the time. And there were state and federal regulators who were being sued by all sides.

Sixteen months later, the warring parties had put aside their differences and called collectively for "no net loss" of wetlands, plus 100 other reforms that went much farther in addressing the controversial issue than anyone had expected.

The one exception: William K. Reilly, who was selected yesterday by President-elect George Bush to head the Environmental Protection Agency. Reilly, 48, trained as a lawyer and land planner, has made a career of building bridges. A skilled craftsman of consensus—fellow environmentalist Frank Loy calls him "the great includer"—Reilly knows how to find the common ground and how to persuade uncommon interests to meet there.

Reilly displayed his diplomatic skills in merging two very different groups of which he is now president, the Conservation Foundation,

a small environmental policy think tank, and the U.S. affiliate of the World Wildlife Fund (WWF), a sprawling, activist organization out to save the natural resources of developing nations.

He is responsible not only for brokering the wetlands study but the innovative "debt-for-nature swap" in which the WWF arranges with U.S. banks to assume the debt of Third World nations in return for protection of endangered resources.

Although this ken for consensus was reflected in the enthusiastic support of his selection yesterday by the industrial as well as the environmental community, some environmental activists questioned whether Reilly is too accustomed to compromising with polluters to effectively wield regulatory controls.

"It will be a challenge for Reilly to stop accommodating polluters and get tough with them," said Dan Becker of Environmental Action.

Reilly, if confirmed by the Senate, will be the first professional environmentalist to head the EPA. He would take over an agency rocked by political scandal in the early years of the Reagan administration and withered by White House disinterest throughout the past eight years. His Conservation Foundation broke with its nonpolitical tradition in 1982 to criticize

the administration as threatening to increase pollution.

A moderate Republican who is a protege of former EPA administrator Russell E. Train, Reilly will work for a president who calls himself an environmentalist but antagonized environmental professionals as vice president.

Reilly will enter the post at a time of intensified environmental problems, dramatized by the past summer's heat wave, beach pollution and smog. It is too early to tell how his prescriptions for the environment will sit with Bush, who is known to dislike tough regulation of industry.

Loy, chairman of the Environmen-

tal Defense Fund and president of the German Marshall Fund, noted the obstacles Reilly may encounter with a tight-fisted, antiregulatory president. But, unlike past administrators willing to bend to political constraints, Reilly "has the word 'quit' in his vocabulary," Loy said.

Reilly served as a senior staff member of the President's Council on Environmental Quality and executive director of a land use task force before becoming president of the Conservation Foundation in 1973.

A native of Decatur, Ill., Reilly graduated from Yale University and Harvard Law School and received a masters of science in urban planning from Columbia University.

National Journal

The Defense Issue
Why Dukakis Tumbled

THE WEEKLY ON POLITICS AND GOVERNMENT

OCT. 29, 1988/NO. 44



Inside a Bush White House

IN PERSON

William K. Reilly

By Rochelle L. Stanfield

William K. Reilly, the president of the Conservation Foundation for the past 15 years, is often described as the man in the middle on environmental issues. "It has seemed to me for a long time," he said, "that an important part of responding to our environmental problems is a responsible understanding of the social and economic context in which decisions about the environment are made."

For that reason, "it was no accident," Reilly said, that he was attracted to the foundation, an organization he characterizes as "a highly regarded spokesman for what I like to think of as the inclusive view of conservation."

The Conservation Foundation's inclusivity sets it apart from most other environmental organizations, which typically file lawsuits or take extreme positions on legislation. The foundation tries to get all sides in a room and negotiate a consensus.

Reilly believes strongly in the need for balance, although he recognizes that as a consequence, he is often considered outside the environmental club. "If you are sensitive to economics and if you see one of your functions as bridging the various interests and making sure they are involved in something that will affect them, then you are seen as a moderate or conservative, and that is what happened to us," he said. "I would argue from the environmental view that if you don't do that, you won't develop enduring policies and laws. We simply cannot effect environmental improvements without the cooperation of business."

Reilly and his group draw mixed reviews. David K. Baker, political director of Friends of the Earth Inc., sees the Conservation Foundation's approach as elitist. "In the end, it is non-inclusive because it leaves important people out—the people who don't have a lot of money," he said. "The people taking the adversarial approach are closer to the relative have-nots."

Others disagree. "Bill Reilly and his institution fill a wide moderate, middle-of-the-road niche," said Brock Evans, the National Audubon Society's vice president for national issues.

Environmental Protection Agency administrator Lee M. Thomas is such a fan of both Reilly and the foundation



Richard A. Blumenthal

An Environmental Leader Who'd Prefer to Negotiate

that he has gone to Reilly for help in convening meetings. "He does exactly the kind of bringing people together, sitting around the table and talking things through that I think is needed," Thomas said.

Reilly, 48, was attracted to the environmental movement because of "my feeling for the land," he said, which dates back to weekends at a family farm in downstate Illinois, not far from his childhood home in Decatur. He graduated from Yale University and Harvard Law School, where he wrote a thesis on land reform in Chile. Years later, he took a master's degree in urban planning from Columbia University.

"Bill Reilly, without question, is the brightest of the CEOs of any conservation organization and has the most personal knowledge of the substance of issues of any of the CEOs," said T. Destry Jarvis, vice president for conservation policy of the National Parks and Conservation Association.

At the White House Council on Environmental Quality from 1970-72, Reilly specialized in such issues as coastal zone management and mineral leasing. In 1972-73, he was executive director of the Task Force on Land Use and Urban Growth.

Land use remains a high priority for Reilly and his organization. Sensing the forthcoming importance of inter-

national environmental issues, Reilly in 1985 arranged a merger between the Conservation Foundation and the World Wildlife Fund, an international organization that works in developing countries to preserve wildlife. "I see the centrality of land and decisions about land conservation in the developing world," he said. "The economic context [of actions helping or hindering the environment] is an even more fundamental, more unavoidable imperative in the developing world."

Reilly made changes in the Conservation Foundation when he took over, "really emphasizing the interdisciplinary character of the institution and deepening its capacity to do the research that has served as a basis for a lot of our policy analysis," he said. Now he intends to do the same with the World Wildlife Fund, which has had a low profile in Congress. "I don't think we'll become activist in the sense of bringing lawsuits and engaging in confrontation," he said. "But we are increasing our congressional representation for both institutions."

Reilly says he is optimistic about the next Administration's leadership in this area. "I hope the next President will have an expert on the environment close to hand, as previous Presidents have had," he said. And he added: "I am not interested in a job. This is a very satisfying place." □

New Faces for 4 Cabinet Posts and the Top Environmental Job

William Kane Reilly

Environmental Protection Agency Administrator

By PHILIP SHABECOFF

Special to The New York Times

WASHINGTON, Dec. 22 — With the selection of William K. Reilly to be Administrator of the Environmental Protection Agency, President-elect Bush has found a man likely to seek consensus and use negotiation to achieve tough environmental goals.

Mr. Reilly is a career environmentalist. He is president of the Conservation Foundation and the World Wildlife Fund, two leading conservation organizations.

Russell Train, Administrator of the environmental agency in the Ford Administration and long a friend and mentor to Mr. Reilly, said Mr. Reilly "is totally committed to conservation and protection of the environment. He will bring long experience in the field together with an understanding of the need for balance in combining environmental protection and development goals."

Soft-Spoken But Articulate

The agency he has been picked to head administers and enforces a variety of environmental statutes, among them the Clean Air and Water Acts and laws controlling pesticides and other toxic substances and hazardous wastes.

Mr. Reilly, soft-spoken but articulate, is known as a pragmatic problem solver and conciliator. He eschews the confrontation that has characterized much of the debate over environmental issues and has sought instead to reach negotiated settlements favorable to the environment.

Under his leadership, the Conservation Foundation has worked with

He is known as a pragmatic problem-solver and conciliator.

Government, industry and environmental leaders to develop solutions to such problems as dealing with toxic waste and protecting the nation's underground water supplies.

He has been especially concerned with finding ways to link conservation to human needs in developing countries. As part of that program, Mr. Reilly was traveling in Zambia last summer and traveled early one morning to a local village to meet with the governor of a province.

As related by one of his companions on that trip, Mr. Reilly found the whole village assembled. He sat next to the governor through a series of speeches by local officials and dances. Then the governor leaned over and said to Mr. Reilly: "I suppose you are wondering why all these people were here. Well, they were expecting the President of Zambia." He then handed Mr. Reilly the microphone and said, "You'll have to fill in."

Mr. Reilly simply got up and made his speech about the conservation program without batting an eye, his companion recalled.

Largely because of his nonconfrontational style and balanced approach



The New York Times

William K. Reilly, who was nominated to head the Environmental Protection Agency.

to issues, Mr. Reilly's appointment was praised today by spokesmen for business and industry.

'Focusing on Solutions'

Jeffery C. Van, spokesman for the Chemical Manufacturers Association, said the Conservation Foundation had "a well-deserved reputation for focusing on solutions to environmental problems not on polemics."

Many environmental leaders also cheered today's appointment.

Frederic D. Krupp, executive director of the Environmental Defense Fund, called it a "bold appointment by Bush" and said that the environmental community now "has reason to be very optimistic that this administration will take great strides to solve these problems."

But some members of the environmental community were less enthusiastic.

"The challenge for Bill Reilly now is to stop negotiating with polluters and make them obey the law," said Daniel F. Becker, legislative director of Environmental Action Foundation.

Other environmentalists said the appointment by Mr. Bush was a brilliant stroke because it would be hard for environmentalists to attack the actions of one of their own.

Degree in Urban Planning

William Kane Reilly was born on Jan. 28, 1940, in Decatur, Ill. He has a bachelor's degree from Yale University, a law degree from Harvard Law School and a master's degree in urban planning from Columbia University.

He was a captain in the United States Army, a lawyer in Chicago, executive director of the Rockefeller Task Force on Land Use and a senior staff member of the President's Council on Environmental Quality before becoming head of the Conservation Foundation.

In his rare spare time, he likes to relax at his old country house in rural Virginia and to sing Mozart duets with his wife Elizabeth, a gifted singer. They have two daughters.

He is regarded by colleagues as one of the more intellectual members of the environmental community.

"Bill Reilly is a world class environmental leader," said Jay D. Hair, president of the National Wildlife Federation.

THE WHITE HOUSE
WASHINGTON

3/8/89

Mark -

I spoke with Steve Gibson
in Intergovernmental Affairs, and
the schedule for the AG briefing
is as follows:

Arrive President and Reilly,
Administrator for EPA

Speech to 40-45 AGs (I'd say
approx 17 min.)

Depart President

Reilly stays and addresses the
group for 12 min - followed

by a Q. & A. session Kristen
Bleum's # is x. 6697 for more details

ATTORNEYS GENERAL

TP or

5 MIN

high remarks (5-6 min)
[1-1 1/2 pp. S.S.]

Bush & Reilly

10-12 min.

& yes, environ.

DRUGS & ENV

the report you adopted a year winter
meeting: Env. Prote. in the 1990s
your key players in environmental enforcement

Reilly going to talk w/ you on environ;
before he does, want to submit...

esp. cite Gary Edwards, former Commissioner
President Robert Abrams

recog. that a major challenge in 1990s
will be to define the appropriate role of state & fed. govt, in a way that
allows a coord. approach.
applies limited resources in

- great cities held hostage to...
... and schools in a state of siege

The budget I presented to Congress last month -- which
is the first not from D.O.A. -- was on drugs
an important asked for inc. of \$1 billion -- to nearly \$6 in 1990.

& areas -- educ, front; interdict & enforce

you've urged adoption of
this comprehensive program, in Omaha
Anti-Drug Abuse Act (1988).
chief legal officers

your role
70% of entire budget

drug offenders are never "victimless" crimes

THE WHITE HOUSE
WASHINGTON

February 13, 1989
KBK

MEMORANDUM

TO: Andrew Card/Lanny Griffith
FROM: JOSEPH W. HAGIN
SUBJECT: APPROVED PRESIDENTIAL ACTIVITY

EVENT: Attend Briefing for National Association
of Attorneys General

DATE: March 13, 1989

TIME: 10:00 a.m.

DURATION: 15 Minutes

LOCATION: TBD

ATTIRE: Business Suit

REMARKS REQUIRED: Yes

MEDIA COVERAGE: Pool

FIRST LADY

PARTICIPATION: No

ADDITIONAL
INFORMATION:

CONTACT: _____

TELEPHONE: OFFICE _____ HOME _____

NOTE: PROJECT OFFICER, SEE ATTACHED CHECKLIST

Ed Rogers

James Cicconi

Fred McClure

Susan Porter Rose

Patty Presock

Speechwriting Office

Laurie Firestone

Robert Guttman

Marlin Fitzwater

David Demarest

Jean Lamb

Steve Studdert

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Operations - Executive Residence

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NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

HALL OF THE STATES
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PRESIDENT
ROBERT ABRAMS
Attorney General of New York

December 20, 1988

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Attorney General of Virginia

IMMEDIATE PAST PRESIDENT
DAVE FROHNMAYER
Attorney General of Oregon

By Messenger

Mr. Andrew Card
Office of the President-Elect
1825 Connecticut Avenue, NW
Washington, DC 20270

Dear Andy:

Many thanks for including NAAG in the meeting with the President-Elect. General Abrams was quite pleased with the session. He had the opportunity to chat briefly with the Vice President concerning **meeting with the Attorneys General when they are in Washington for our spring meeting in March**. The Vice President indicated he would be interested in meeting with us. While Bob will send a note down directly, I would appreciate any help you could provide in this matter. I know it was a subject Dave Frohnmayer mentioned to you a few weeks back.

The NAAG spring meeting convenes at mid-day on Sunday, **March 12** and ends mid-day on Tuesday, **March 14**. At this juncture, we have a Monday appointment at 5:00 p.m. with Justice White and a Supreme Court Reception which follows at 5:30 p.m. We are talking to General Thornburgh about a Monday afternoon meeting (3:00 - 4:30 p.m.) at Justice. Otherwise the program is open -- obviously a meeting with the President would take precedence over other business. Please let me know what might be the correct way to proceed.

As to transition materials, NAAG approved three reports at its recent meeting which may be of interest. *Toward a Drug-Free America: A National Blueprint for State and Local Drug Control Strategies* is a product produced by NAAG, NDAA, and the major police groups. It was meant to be a complement to the National Strategy which many felt was really a federal strategy. Attorney General Cary Edwards presented the report last week to a Subcommittee of the National Drug Policy Board, chaired by Francis Keating. The Committee has sent it out to lead agencies for comment by January 18, 1989, and expects to take full Board action on January 25, 1989. Two copies of the report are enclosed. ✓

Environmental Protection in the 1990's is a second report adopted by NAAG at the winter meeting. It is a set of recommendations for the new Administration on issues where federal-state interaction is frequent and essential to achieving the goals of environmental protection. The last report, *Blueprint to End Ocean Pollution*, seeks to break down this difficult subject into 19 separate issues -- twelve we believe are items where federal policy and efforts are dominant and nine where state and local government responses are needed. We hope to discuss these reports with the new EPA Administrator at our March meeting. Clearly, the environment is an area where cooperative federalism must be a reality. Attorney General Jeff Amestoy is this year's chair of our Environment Committee and he, as well as NAAG, is eager to work with the new Administration. Copies of both reports are enclosed. ✓

1988

It was good to see you. I hope you will feel free to call on me or NAAG if we can be of any assistance. We will change your address on our Friends of NAAG list so that you will continue to receive our announcements and meeting notices. Our summer meeting is being hosted by Attorney General Bill Webster in Lake of the Ozarks, Missouri, July 9-12, 1989. I know the group would love to see you at that meeting and/or in March. Congratulations on your new assignment and best wishes for a Merry Christmas.

Sincerely,



Christine T. Milliken
Executive Director and
General Counsel

CTM:mb
Enclosures



WILLIAM F. GARY
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

Justice Building
Salem, Oregon 97310
Telephone: (503) 378-4400

*Do a Rand
note*

December 28, 1988

The Honorable C. Boyden Gray
Legal Counsel to the President-Elect
1825 Constitution Avenue, N.W., Suite 910-C
Washington, D.C. 20270

Dear Mr. Gray:

This is a most sincere letter of congratulations to you on your designation as legal counsel to President-Elect Bush. Although you would have no particular occasion to remember it, our paths crossed some years ago when I met with you in conjunction with your work for the Vice President on regulatory reform.

As you may know, I am the immediate past-president of the National Association of Attorneys General. We have often worked closely with the White House, and we particularly hope that opportunities for developing a close working relationship would develop early in the Bush Administration. We are hopeful that when our executive committee next meets in Washington, D.C. on March 12-14 that we would be able to schedule a brief meeting with President-Elect Bush.

In the meantime, if there are any issues on which you may wish assistance from our association, please do not hesitate to contact me.

With congratulations and best personal regards,

Sincerely,

Dave Frohnmayr

DAVE FROHNMAYER
Attorney General

DF:tg
4611a



STATE OF NEW YORK
DEPARTMENT OF LAW
120 BROADWAY
NEW YORK, N. Y. 10271

ROBERT ABRAMS
ATTORNEY GENERAL

December 21, 1988

Honorable George Bush
Vice President of the
United States
The White House
Washington, D.C. 20501

Dear Mr. Vice President:

I very much appreciated the opportunity to meet with you this week. Your willingness to take time during an especially intense and busy period sends an early positive signal to those of us in state and local government. As the chief legal officers of the states, our work has through the years brought us into frequent contact with the White House and a number of Federal agencies, principally the Departments of Justice and Interior, the EPA and the FTC. We believe in cooperative federalism and look forward to the opportunity to work closely with your Administration. Your desire to hear our concerns holds out the promise of a genuine partnership with state and local governments.

I also appreciate your willingness to continue the tradition of the President meeting with State Attorneys General during our Spring Meeting in Washington. We will convene at mid-day on Sunday, March 12, and conclude at mid-day on Tuesday, March 14. We have an appointment with Justice White at 5:00 p.m. on Monday and a reception immediately following at the Supreme Court, but our schedule can be adjusted to accommodate whatever time you might have available. I know my colleagues want very much the opportunity to meet with you to discuss further some of the subjects which we touched upon on Monday and to benefit from your views.

Honorable George Bush
Vice President

December 21, 1988
Page 2

Thank you again for the courtesy you showed us this week and best wishes for success and good fortune in the extraordinary challenges awaiting you as President.

Sincerely,



Robert Abrams

**NATIONAL ASSOCIATION OF ATTORNEYS GENERAL
COMMITTEE APPOINTMENTS AND MEMBERSHIP TO DATE
1988 - 1989**

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Counsel, NAAG: 202/628-0449

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Staff Contact: Barbara Stephenson, Senior Counsel,
NAAG: 202/628-0452

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John K. Van de Kamp, California

Staff Contact:

Elena Boisvert, Business Regulation
Counsel, NAAG: 202/628-0449

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Marc Racicot, Montana
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Staff Contact:

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General, Washington: 206/753-4556

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Staff Contact:

Skip Capone, North Carolina
Special Deputy Attorney General
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William L. Webster, Missouri

Staff Contact:

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NAAG, 202/628-0435

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Staff Contact:

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Deputy Attorney General, Virginia
804/786-7584

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Staff Contact

Douglas Ross, Supreme Court Counsel
NAAG: 202/628-0435

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Staff Contact: Janie Hipp,
Assistant Attorney General, Oklahoma
405/521-3921

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Mary Sue Terry, Virginia

Civil RICO Grant Criteria Committee

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Computer Capabilities Project

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Site Selection Committee

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WORKING GROUPS

DOJ National Environment Enforcement Council

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Don Siegelman, Alabama
James M. Shannon, Massachusetts

Executive Working Group on Prosecutorial Relations

Steve Clark, Arkansas
Robert K. Corbin, Arizona
William J. Guste Jr., Louisiana
John K. Van de Kamp, California
James E. O'Neil, Rhode Island
Don Hanaway, Wisconsin
Ernest D. Preate, Jr., Pennsylvania (Alternate)
Michael C. Moore, Mississippi (Alternate)

Securities Working Group

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Frank J. Kelley, Michigan
Charles M. Oberly, III, Delaware

Escheat

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Members: Jim Mattox, Texas
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Lacy Thornburg, North Carolina

High Level Nuclear Waste Subcommittee

Chair: Brian McKay, Nevada

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Don Hanaway, Wisconsin
Robert Henry, Oklahoma
Brian McKay, Nevada
Nicholas Spaeth, North Dakota
Jim Tierney, Maine
John K. Van de Kamp, California

Subgroups (*indicates convenor)

Gambling

*John K. Van de Kamp, California
Brian McKay, Nevada
Robert K. Corbin, Arizona

Indian Affairs Working Group -- Subgroups (continued)

Environment

*Duane Woodard, Colorado
Robert Butterworth, Florida
Kenneth O. Eikenberry, Washington

Taxation

*Joseph Meyer, Wyoming
Roger Tellinghuisen, South Dakota

Scope/Applicability of Indian Civil Rights Act

*Dave Frohnmayer, Oregon
Don Hanaway, Wisconsin
Nicholas Spaeth, North Dakota

Water

*Jim Jones, Idaho
Roger Tellinghuisen, South Dakota
Lacy Thornburg, North Carolina

OTHER APPOINTMENTS

ABA

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Alternate

Neil F. Hartigan, Illinois
Frank J. Kelley, Michigan

Administrative Law Liaison

Dave Frohnmayer, Oregon

Commission on the FTC

William L. Webster, Missouri

Liaison to the Criminal Law Committee

Hector Rivera-Cruz, Puerto Rico

**Representative to the Advisory Board of the National
Resource Center for Child Advocacy and Protection**

Don Hanaway

**State Department Advisory Committee on Private International
Law**

Robert T. Stephan, Kansas

Council of State Governments

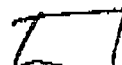
Representatives to Executive Committee

*Representatives to Intergovernmental
Committee*

William L. Webster, Missouri
Don Siegelman, Alabama

Representatives to Suggested State Legislation Committee

Michael J. Bowers, Georgia
Anthony J. Celebrezze, Jr., Ohio
Frank J. Kelley, Michigan
Travis Medlock, South Carolina

 = tentative Attorney General (AG)

zi97.msc

March 1989

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Honorable Robert Abrams
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Honorable Alexandro C. Castro
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of the Interior. I know he's going to be a very valuable member of my Cabinet. So, it is my pleasure to see him now take the oath of office as Secretary of the Interior. Justice Scalia, would you do the honors please, sir?

[At this point, Secretary of the Interior Lujan was sworn in.]

Secretary of the Interior Lujan. Mr. President, Justice Scalia, Father Haddad, Members of Congress, Jean, my family and friends and fellow Interior employees, I'm deeply honored and, of course, humbled by the opportunity to serve you, Mr. President, and the American people as the 46th Secretary of Interior.

I wasn't going to say anything, but since you mentioned that you didn't want any special treatment on your fishing trips, you should have told us that before you went down to the Everglades National Park—[laughter]—and we made arrangements for you to catch that 13-pound bonefish. [Laughter] We won't do it again, I promise.

Mr. President, I grew up in New Mexico, where love of the land, if not inbred, is one of the earliest lessons of life. One thing that a native of any Western State also learns very early is that the Department of Interior has vast power over much of the land and its resources. Never did I dream back then that I would someday have the opportunities and the responsibilities for stewardship of such treasures. And as you have stated, Mr. President, how well we carry out our stewardship responsibilities today will determine how well people will live in the future. You have emphasized, Mr. President, our goals for stewardship cannot be accomplished without teamwork between those of us in your administration and the career professionals. In meeting with my new Interior family, I have shared with them the commitment and the goals that you and I share for this Department. Each employee received this brochure which outlines the 10-point Stewardship program you and I agreed upon. As you can see, it's not chiseled in stone, but we are referring to it as the "Ten Commandments." [Laughter]

You should feel quite at home here, Mr. President, as I do, because within this audience are people who have devoted their careers and their lives to the environmental ethic represented in these 10 points. All of

us share your love and your reverence for our great natural heritage. Your words have touched our hearts. Your vision of America has inspired our spirits. We will put both our heart and our spirit into the task before us.

Thank you for this magnificent opportunity to serve you and this country. Thank you very much, Mr. President.

Note: The President spoke at 10:15 a.m. in the Department of the Interior auditorium. In his opening remarks, the Secretary referred to his wife, Jean, and to Rev. Norman Haddad, O.P., who delivered the invocation.

**Remarks at the Swearing-In Ceremony
for William Kane Reilly as
Administrator of the Environmental
Protection Agency
February 8, 1989**

The President. Well, I'm told that this is the first time that a President has visited the EPA. Well, not exactly the EPA, but all the stores underneath the EPA. [Laughter] And I think I should, at the outset of these brief remarks, just express my appreciation to the merchants and to the others who have this vibrant mall in their custody—[laughter]—thanking them for the opportunity to have this ceremony here so we could meet with as many of the EPA employees as possible.

I'm delighted to be here. And in my search for a new, first-rate EPA Administrator, one of my top priorities was to find someone with strong credentials as a leader in the environmental community, and that man is our new Administrator, William Reilly. He's got big shoes to fill, though. I know that, and I have great respect for those that have preceded him. Lee Thomas did an outstanding job here, and I want those who worked with him to know how strongly I feel about that. I want to salute the members of the diplomatic corps who were nice enough to be with us today. I think that puts appropriate emphasis on the fact that many of the problems that we face in the environment are global problems,

Feb. 8 / Administration of George Bush, 1989

and I'm delighted that they're with us here today. Pleased to see Senator Chafee and other Members of the United States Senate and Members of the House with us as well.

I hope it is plain to everyone in this room and around the country that among my first items on my personal agenda is the protection of America's environment. I am pledged to improving the quality of life: for improving the quality of the air we breathe and the water we drink and the land that, as Father O'Reilly said, God has entrusted to us.

I have just come from the swearing-in of Manuel Lujan, our new Secretary of the Interior. EPA and Interior have got to work as partners, keeping our land and our air and our water clean—public land secure. And I'm sure all of you know by now Bill Reilly's incredible background in environmental protection: president of the Conservation Foundation, one of the Nation's outstanding environmental think tanks; president of World Wildlife Fund, U.S. And I'm pleased that my friend Russell Train is still talking to me, having moved in on that cozy arrangement that served the private sector so well.

Mr. Reilly began his career in this field as a senior staff member of the President's Council on Environmental Quality, the CEQ, in the early seventies and then as executive director of the Task Force on Land Use and Urban Growth. A leader in one of the other major environmental organizations has said of Bill that he has, and I'm quoting now, "without question the most personal knowledge of the substance of issues of any of the CEOs of any of the conservation organizations." And that gives you an idea of why we are very lucky to have him here and why I selected him.

I thought I'd tell you a story that will tell you something more about why I picked him. About a year and a half ago, he convened a forum on the wetlands crisis. He brought together 25 people who, as the Washington Post put it, would normally have difficulty agreeing even on a place for dinner. Environmentalists, developers, industrialists, State and Federal regulators all were there. And the result: Well, by the time he was through with them, which took more than a year, they put aside differences

and called for a no net loss of wetlands, and they agreed on 100 reforms to achieve that goal.

I spoke the other day about wanting to broaden the consensus for defense, but that's not the only consensus that I would like to broaden. I want to broaden the consensus for a clean environment, and I believe doing that requires finding ways to clean up the environment without stifling the economy. During the campaign I noted that environmental action has too often been marked by confrontation among competing interests. Well, the fact is that more often than not there is common ground if the parties will make an effort to find it. Our great common desire is a better life for all Americans. And I believe that economic growth and a clean environment are both part of what all Americans understand a better life to mean. I also believe that the American people are impatient for results. They won't accept excuses anymore. And they won't accept finger pointing. They want us to get all the sides together and find a way to achieve both their goals.

By the way, the other day I got a little lesson in how impatient the American people are. In the morning mail—this marvelous mail that comes in to the President of the United States—I found letters from seventh graders at a church school in California. I thought I'd share one with you. It was dated Inauguration Day, January 20th; and it said—and remember this was just on the day that I was taking office—"Dear Mr. President, Would you please do something about pollution. I'm not saying you're doing a bad job, but could you put a little more effort into it." [Laughter]

Well, with William Reilly at the helm here, we're going to put a hell of a lot more effort into it. And now, Bill, let's do the honors.

[At this point, Administrator Reilly was sworn in.]

Administrator Reilly. Mr. President, on behalf of all 15,000 of my closest and most valued new colleagues, welcome to EPA. And great thanks to all of you who worked so hard to make this event possible this morning. We had to reschedule the opening of Black History Month. I'm pleased to say

that that has been rescheduled. We appreciate all the effort that has gone into accommodating this event in these halls. We chose the place that would accommodate the very largest number of the EPA staff, and this is the place. And we put nice blue bunting in front of the lingerie store—[laughter]—and Roy Rogers. And we're grateful, as the President said, to everybody who worked to make this come off so well.

Well, it's just great to have you here, Mr. President. Several Senators asked me during last week's confirmation hearings about EPA's access to the White House, and that, of course, is a very crucial question. But I would add just one reassurance to my answer: Mr. President, you will always have complete access to us here at EPA. [Laughter] So, feel free to drop by any time. [Laughter] Our door will always be wide open to you, won't it, my friends? It will also be wide open to you, my friends in the Congress—Senator Burdick, Senator Chafee, Senator Wilson, Senator Baucus.

We, as the President said, are beginning, I think, on a great note. We've had great cooperation through the confirmation period, and I appreciate that very much.

Well, it is clearly a very great honor to serve as Administrator of the Environmental Protection Agency. I thank you for your confidence in me, for nominating me, Mr. President. I thank you, Chairman Burdick, Senator Chafee, members of the Environment and Public Works Committee, for the great many courtesies that were extended to me over the past weeks in the course of the confirmation. I feel equally honored to be able to serve, to look forward to working with this very fine EPA staff. I wish all of them could be here today. I have got to say, I've been enormously impressed with the capabilities of the dozens or so of people who have come into contact with me in the course of the last several weeks. I can honestly say that EPA professionals began showing me up and bailing me out a full month before my confirmation, and now is no time to stop. [Laughter] I will need all the help that I can get. I should say I owe a special debt of gratitude to those hard-working souls who assisted me in handling the written questions that followed our hearing on the Hill. We were pleased to be able to move the confirmation very fast.

But in the course of doing that, we were given some 315 written questions, the answers to which were due 24 hours later, and many of you stayed up through the night. I was able to tap off the answers to 305 or so of these, of course, with no difficulty. [Laughter] But those last ten—I really did appreciate your help, and we met that deadline.

Well, for the staff here today, let me reassure you: You are not dreaming. This is the President of the United States. [Laughter] He is standing here at the headquarters, or as close as we could get him to it, of the Environmental Protection Agency. And he's not up for reelection for another 4 years. [Laughter] I think, as a matter of fact, he's probably smiling for all three of those reasons. [Laughter] The President is here for a very simple reason: He cares. He cares urgently about protecting the environment. He said so during his campaign. And his commitment came through to me in my very first meeting with him, and it has since been reinforced in countless ways, only one of which is the fact that he's here with us today.

This powerful statement, this important symbol of the President's interest in the environment, may not, in fact, make our jobs here any easier. If anything, I think our work will be judged by even higher expectations than ever before. But isn't it encouraging to have an environmentalist in the White House who comes here to signal his close and public commitment to the work of the Environmental Protection Agency? Mr. President, I know that you appreciate—as I do and as Russ Train was saying in his remarks before you arrived—that life is not easy on the front line of environmental protection. Probably no other Federal agency touches so many lives as EPA touches. Probably no other Federal agency faces so many complex and fiercely controversial decisions.

Looking out over this group, you can almost see the powder burns. I don't think it's simply that it's Ash Wednesday today. [Laughter] By the way, I don't know if there's any symbolism in this, but we are taking office on the very first day of Lent. [Laughter] So, to my friends and colleagues here at EPA, let me say simply this:

Through the end of the century and on into the next, the quality of human life and of the environment will be very powerfully influenced by your energies, your imagination, and your dedication. The public demand for a safe, clean environment has probably never been firmer. And so, the demands that you face, that we face, have probably never been greater.

In the confirmation hearing, there were two themes that were sounded again and again from across the political spector [spectrum]: "The Environmental Protection Agency should be an advocate for the environment," the Senator said. "EPA should enforce the laws of the land," we heard. And so we shall.

I think, as I stand here, about the extraordinary sweep of the responsibilities we here at EPA exercise. I think of so many places in America that have touched me and my family in a very special way, as I was growing up with my parents and my sister, who I'm proud to say are here today, and later on with my wife and children and friends, many of whom are also here today, Lake Michigan, the Rio Grande and the Gulf of Mexico, Narragansett Bay, Cape Cod, and the Chesapeake—these we lived on or near. And it's personally stirring for me to have some responsibility for them now, for them and for other resources of air, water, and land in a country where the real crown jewels are the wonders of nature. And now even the stratosphere is receiving our attention. And we're called upon to offer the ideas and experiences of the United States to other nations in a search for environmental policies that may be crucial to keeping this planet habitable. The cause of the environment is so vital and so personal that working in this vineyard is its own reward.

One of the hallmarks, I think, of this agency is that many of the people who work here are very powerfully motivated: motivated to help the environment. The idealism and the commitment to a better environment makes you EPA's employees very, very special, and it makes the prospect of working with you here for me a very, very happy one. So, I could not be more pleased or more proud to have the opportunity to work for the environment, to work for President Bush, and to work

with you, my EPA colleagues. I think that we are going to do great things together.

Thank you very much.

Note: The President spoke at 10:43 a.m. at Waterside Mall. In his remarks, he referred to Lee M. Thomas and Russell Train, former Administrators of the Environmental Protection Agency. Rev. William H. O'Reilly delivered the invocation.

Remarks and a Question-and-Answer Session With Reporters Prior to a Meeting With National Drug Control Policy Director-Designate William J. Bennett

February 8, 1989

The President. Let me say this. This is not what we call a normal photo op. It's somewhere in between a press conference and what we call a press availability. We'll try to define that for you later on. But the purpose of this meeting is to visit with our new czar, the antinarcotic czar who has come in here, I'm told, with a million ideas, which is typical of him and what I want him to do as we start spelling out how this administration is going to do what this country wants; and that is to fight against and win the fight against narcotics.

And Bill Bennett has a big assignment—a big one. And a lot of it is coordinative. The law is very unclear on how we use his imagination and ability to bring together all agencies of this government in this fight. So, that's what the meeting is about; that's what we're about to start on.

And I'd like to just take this opportunity to say that this isn't a question of whether the law spells out specifically how he does the job. Can't get bothered with those details. He is shoulder to shoulder with the President as the top official charged with this responsibility. And we're going to figure out a way to live under the drug czar law—and to make it work. And so, we've got a big job ahead. But that's what this little meeting is all about.

Now I'd be glad to take a couple of questions. Then we've got to get on with that.

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The White House

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Yvonne Countee

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NOTE TO STEPHANIE BLESSY/RESEARCH OFFICE/THE WHITE HOUSE

FROM: Yvonne Countee (382-4700)

Attached is the revised version of Mr. Reilly's speech, which incorporates his comments. Please discard the earlier version of his presentation.

Thanks.

Attachment

REVISED DRAFT II
Reilly/EPA

March 9, 1989

WKR SPEECH TO NAAG

O I want to join with the President in welcoming you here today--and I want to join with you in thanking the President for inviting us

--I've only been the Administrator of EPA for a few weeks, so my enthusiasm for the job remains undiminished

--I still get excited when I'm invited to visit the White House

--People around town are still being very nice to me

--But, I have to admit, I'm beginning to suspect their motives

--When President Bush nominated me for the job as EPA Administrator, then-Administrator Lee Thomas was extremely kind and thoughtful

--He invited me up to his office, he spent hours explaining the pitfalls of the job, and he offered to help with any problems I might have in the future

--He seemed to genuinely appreciate my presence, and I was flattered

--Now I know why

--The other day I learned that as Lee Thomas walked out of the building on his last day, he reminded EPA's General Counsel to substitute my name for his on the 500 or so lawsuits pending against EPA

O I am extremely proud--and honored--to meet in the White House today with the nation's top law enforcement officers

--Because of the nature of our respective jobs, our paths tend to cross a lot, and not always in pleasant circumstances

--Both EPA and the Attorneys General are responsible for enforcing environmental laws, and--from what I hear--we don't always agree on the best way to do that

REVISED DRAFT II
Reilly/EPA

-2-

~~C-But~~ we're meeting today in the first few months of a new Administration, and on the threshold of a new decade

--Despite the daunting array of environmental problems we face, I feel a strong sense of hope for the future

--I want to share with you some of the reasons for my optimism

O First of all, I'm hopeful for the future because of the President

--President Bush has said in public many times, and he's told me privately many times, that he wants things to happen at EPA, and he wants them to happen quickly

--He wants me to vigorously enforce environmental laws already on the books

--He wants me to help build national consensus for new legislation the President will propose

--He wants me to reexert American leadership in the international arena

--President Bush personally called me to express support for a total phase-out of CFCs, a position I explained in London last week, and he gave me a personal message for Prime Minister Thatcher expressing his strong support for international cooperation on the environment

O I am also very hopeful for the future because, with the President's support and encouragement, EPA WILL do a better job enforcing environmental laws

--That is not an idle promise, because EPA's past performance is much better than some reports would have you believe

--For example, 1988 was a record enforcement year for the Agency

--372 civil cases were referred to the Department of Justice, the highest in history and an 18 percent increase over 1987

--59 criminal cases were referred to DOJ last year, a 44 percent increase

REVISED DRAFT II
Reilly/EPA

.-3-

--A record \$35 million in civil penalties were assessed, and over 3,000 administrative orders were issued, second highest in history

--In fact, EPA's total enforcement actions over the past four years surpass the total actions taken over its entire previous history

--Yet I am convinced we can do even better

--I intend to build on that past effort in a number of ways

--I will meet very soon with the Attorney General to make sure that our mutual enforcement efforts are well coordinated

--The President will soon name a highly respected attorney as EPA's Assistant Administrator for Enforcement

--We are going to gear up our use of the administrative penalties included in several recent environmental statutes

--Given the range of facilities and pollutants that have to be controlled to protect the environment, we cannot rely on judicial enforcement alone

--We are also going to continue expansion of our criminal enforcement program

--In some cases, fouling the environment is simply careless or irresponsible, but in some cases it's criminal

--In those cases EPA is going to treat polluters like criminals, even if they are corporate officials

--That may be the most effective pollution control technique of all

--The people of this country are demanding tough penalties

--A public opinion survey a few years ago concluded that the American people view environmental crimes as more serious than either skyjacking or armed robbery!

--More recent polls have confirmed that the public continues to put a very high priority on environmental protection

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REVISED DRAFT II
Reilly/EPA

--EPA will not flinch from using criminal authorities to enforce compliance with environmental laws

--For example, civilian managers at the Aberdeen Testing Facility were recently convicted of numerous RCRA violations

--Three owners of asbestos removal companies were recently convicted of bribing environmental officials, and they were given hefty fines and prison terms of up to 3 1/2 years

--You can expect more of that in the future

--In a sense, the advent of felony and misdemeanor sanctions has brought EPA's "Age of Innocence" to an end

--Now we think about "Mean Streets" as much as "Ecotopia"

--Last year, in fact, a little-noted section of the Medical Waste Tracking Act gave EPA Special Agents permanent statutory authority to carry firearms and to obtain and execute warrants

--The nation's Attorneys General were instrumental in helping us gain those authorities, and I'm grateful

--I intend to use those authorities, and all the other enforcement tools available to the Agency, to ensure that everyone complies with existing environmental laws

O Finally, I'm hopeful for the future because of the extraordinary skills and capabilities that States have developed to help protect the environment

--One of the main arguments supporting the enactment of strong Federal environmental legislation during the 1970s was the weakness and inconsistency of State laws

--That is the case no longer

--Many states have passed environmental legislation that is more stringent and comprehensive than Federal law

REVISED DRAFT II
Reilly/EPA

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- States have also developed very strong law enforcement capabilities, and in the years ahead I hope we can find more and better ways of coordinating our respective Federal and State enforcement efforts
- I can think of three specific areas where I'd like to see our related enforcement efforts improve
 - First, in programs like Superfund, where we have closely interrelated roles
 - The Superfund program has taken a lot of heat in the press lately
 - The President has directed me to reinvigorate this program, emphasizing strong enforcement
 - One of the first things I did after being sworn in at EPA was to initiate a 90-day management review of Superfund
 - One of my goals is to ensure more aggressive enforcement against potentially responsible parties
 - I want to use every tool at my disposal either to convince or force PRPs to clean up their hazardous waste sites
 - Strong State enforcement is essential to the success of the Superfund program
 - You have demonstrated a willingness to take on a more aggressive role, and I encourage you to do so
 - But I have no illusions: given the complexity and cost of Superfund clean-ups, we'll find plenty of opportunity for disagreements
 - I appreciate the recommendations you've made for improving Superfund in the 1990s, and I am committed to a better working relationship between the States and the Federal government

REVISED DRAFT II
Reilly/EPA

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--Second, in programs that protect wetlands, where we have supportive but somewhat separate roles

--President Bush strongly supports the idea of no net loss of wetlands, and I am pleased to note that the National Governors Association voiced their support two weeks ago

--EPA is committed to an active 404 enforcement program, and we are taking more enforcement actions--including criminal enforcement--against illegal dischargers

--But Federal laws, by themselves, will not preserve our precious wetlands, no matter how well we enforce them

--Because wetlands and the threats against them differ so much from place to place, State or local laws tailored to individual circumstances are especially effective

--In fact, some of the most innovative and effective actions to protect wetlands have been crafted by State and local governments

--Therefore, strong enforcement of State wetland protection laws is essential

--I applaud the efforts you've already made in this regard, and I urge the toughest possible enforcement stance in the future

--Third, in areas like Federal facilities clean-up, where the Federal and State governments sometimes are legal adversaries

--I realize that this is a very sensitive area

--Federal facility compliance with Federal and State environmental laws has been less than adequate

--But the American public is demanding that the worst facilities be cleaned up, and that is one of my highest priorities

--We are moving in the right direction

--EPA recently signed eight Federal facility clean-up agreements, and State governments and other Federal agencies were parties to those agreements

REVISED DRAFT II
Reilly/EPA

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--I hope to see similar agreements signed in the months ahead

--Last month EPA joined with Washington State in signing a letter of intent to clean up the nuclear facility at Hanford, Washington

--Our chances for success will be improved if we can work together to reach comprehensive settlements and then jointly oversee compliance with those agreements

O We face an enormous challenge in the months ahead, especially with respect to Federal facilities clean-up

--No doubt we will continue to argue about our different roles and responsibilities, the applicability of State laws, and the strength of Federal enforcement authorities

--But we always have to remember that we share a common goal: the protection of public health and welfare

--You have my pledge of good faith, so let's get on with the task of cleaning up and protecting the environment



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Reilly/EPA

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DRAFT

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--President Bush personally called me to express support for a total phase-out of CFCs, a position I explained in London last week

O I am also very hopeful for the future because, with the President's support and encouragement, EPA WILL do a better job enforcing environmental laws

--That is not an idle promise, because EPA's past performance is much better than some reports would have you believe

--For example, 1988 was a record enforcement year for the Agency

--372 civil cases were referred to the Department of Justice, the highest in history and an 18 percent increase over 1987

--59 criminal cases were referred to DOJ last year, a 44 percent increase

DRAFT

Reilly/EPA

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- A record \$35 million in civil penalties were assessed, and over 3,000 administrative orders were issued, second highest in history
- In fact, EPA's total enforcement actions over the past four years surpass the total actions taken over its entire previous history
- Yet I am convinced we can do even better
- I intend to build on that past effort in a number of ways
 - I will meet very soon with the Attorney General to make sure that our mutual enforcement efforts are well coordinated
 - I intend to name _____ as EPA's Assistant Administrator for enforcement
 - We are going to gear up our use of the administrative penalties included in several recent environmental statutes
 - Given the range of facilities and pollutants that have to be controlled to protect the environment, we cannot rely on judicial enforcement alone
 - We are also going to continue expansion of our criminal enforcement program
 - In some cases, fouling the environment is simply careless or irresponsible, but in some cases it's criminal
 - In those cases EPA is going to treat polluters like criminals, even if they are corporate officials
 - That may be the most effective pollution control technique of all
 - The people of this country are demanding tough penalties
 - A public opinion survey a few years ago concluded that the American people view environmental crimes as more serious than either skyjacking or armed robbery!
 - More recent polls have confirmed that the public continues to put a very high priority on environmental protection

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--EPA will not flinch from using criminal authorities to enforce compliance with environmental laws

--For example, civilian managers at the Aberdeen Testing Facility were recently convicted of numerous RCRA violations

--Three owners of asbestos removal companies were recently convicted of bribing environmental officials, and they were given hefty fines and prison terms of up to 3 1/2 years

--You can expect more of that in the future

--In a sense, the advent of felony and misdemeanor sanctions has brought EPA's "Age of Innocence" to an end

--Now we think about "Mean Streets" as much as "Ecotopia"

--Last year, in fact, a little-noted section of the Medical Waste Tracking Act gave EPA Special Agents permanent statutory authority to carry firearms and to obtain and execute warrants

--The nation's Attorneys General were instrumental in helping us gain those authorities, and I'm grateful

--I intend to use those authorities, and all the other enforcement tools available to the Agency, to ensure that everyone complies with existing environmental laws

O Finally, I'm hopeful for the future because of the extraordinary skills and capabilities that States have developed to help protect the environment

--One of the main arguments supporting the enactment of strong Federal environmental legislation during the 1970s was the weakness and inconsistency of State laws

--That is the case no longer

--Many states have passed environmental legislation that is more stringent and comprehensive than Federal law

DRAFT

Reilly/EPA

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- States have also developed very strong law enforcement capabilities, and in the years ahead I hope we can find more and better ways of coordinating our respective Federal and State enforcement efforts
- I can think of three specific areas where I'd like to see our related enforcement efforts improve
 - First, in programs like Superfund, where we have closely interrelated roles
 - The Superfund program has taken a lot of heat in the press lately
 - One of the first things I did after being sworn in at EPA was to initiate a 90-day management review of Superfund
 - One of my goals is to ensure more aggressive enforcement against potentially responsible parties
 - I want to use every tool at my disposal to either convince or force PRPs to clean up their hazardous waste sites
 - Strong State enforcement is essential to the success of the Superfund program
 - You have demonstrated a willingness to take on a more aggressive role, and I encourage you to do so
 - But I have no illusions; given the complexity and cost of Superfund clean-ups, we'll find plenty of opportunity for disagreements
 - I appreciate the recommendations you've made for improving Superfund in the 1990s, and I am committed to a better working relationship between the States and the Federal government
 - Second, in programs that protect wetlands, where we have supportive but somewhat separate roles
 - President Bush strongly supports the idea of no net loss of wetlands, and I am pleased to note that the National Governors Association voiced their support two weeks ago

Reilly/EPA

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- EPA is committed to an active 404 enforcement program, and we are taking more enforcement actions--including criminal enforcement--against illegal dischargers
- But Federal laws, by themselves, will not preserve our precious wetlands, no matter how well we enforce them
 - Because wetlands and the threats against them differ so much from place to place, State or local laws tailored to individual circumstances are especially effective
 - In fact, some of the most innovative and effective actions to protect wetlands have been crafted by State and local governments
- Therefore, strong enforcement of State wetland protection laws is essential
 - I applaud the efforts you've already made in this regard, and I urge the toughest possible enforcement stance in the future
- Third, in areas like Federal facilities clean-up, where the Federal and State governments sometimes are legal adversaries
 - I realize that this is a very sensitive area
 - Federal facility compliance with Federal and State environmental laws has been less than adequate
 - But the American public is demanding that the worst facilities be cleaned up, and that is one of my highest priorities
 - We are moving in the right direction
 - EPA recently signed eight Federal facility clean-up agreements, and State governments and other Federal agencies were parties to those agreements
 - I hope to see similar agreements signed in the months ahead
 - Last month EPA joined with Washington State in signing a letter of intent to clean up the nuclear facility at Hanford, Washington

Reilly/EPA

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--Our chances for success will be improved if we can work together to reach comprehensive settlements and then jointly oversee compliance with those agreements

O We face an enormous challenge in the months ahead, especially with respect to Federal facilities clean-up

--No doubt we will continue to argue about our different roles and responsibilities, the applicability of State laws, and the strength of Federal enforcement authorities

--But we always have to remember that we share a common goal: the protection of public health and welfare

--You have my pledge of good faith, so let's get on with the task of cleaning up and protecting the environment

Shuffled
draft

(Lange/Blessey)
March 9, 1989
4:00 p.m.

PRESIDENTIAL REMARKS: BRIEFING FOR NATIONAL ASSOCIATION
OF ATTORNEYS GENERAL
MARCH 13, 1989

"News" -- President Enlists Attorneys General
in Fight for Environment, War on Drugs

Thank you... I'm very happy to be here.

Judging from the kind of work this association has been
doing lately, I know I'm among kindred spirits.

The two outstanding reports you adopted this winter -- on
environmental protection, and on drug control strategies -- put
you out front on two issues that are central to my agenda for the
future.

The approaches you've taken reinforce my conviction that,
together -- on every front where we have shared concerns -- we're
going to find solutions. We're going to define state and federal
roles that work. And we're going to apply limited resources in a
coordinated manner.

At the federal level, on many environmental issues, I think
the time for debate has passed. So I'm proposing legislation to
reauthorize the Clean Air Act. I want to work with Congress on a
comprehensive acid rain program. And I intend to throw the book
at those who engage in illegal ocean dumping.

Where dumping of medical waste is concerned, you may remember my pledge to end the era of the needle on the beach. Well, we just took the first step. EPA has just established a medical waste tracking system, to ensure that waste goes to proper disposal facilities.

This pilot program will apply to medical facilities of all sizes. Some nine states have already agreed to participate. Those of you who haven't, yet -- let me encourage you to contact E.P.A. this month, and get on board in this important effort.

Over the last decade, the states have taken on a leadership role in protecting our environment -- and that's good news.

This government will work closely with you, on those environmental questions that only have shared answers. We need to step up the Superfund clean-up process, and improve enforcement. Together, we must assure compliance with hazardous waste laws, and encourage strict enforcement of pesticide use.

And where enforcement of all of the laws that protect our environment are concerned, I'd like you to think about those cases where we must move beyond civil penalties, toward criminal enforcement -- both as a sanction, and as a deterrent.

In a few minutes, Bill Reilly will give you his thinking on the environment. You will certainly find him -- today, and over the course of this Administration -- to be an outstanding ally.

But before I hand over the podium, I want to turn your attention -- and enlist your support -- on another pervasive problem: the war on drugs.

While I'm President, great cities will not be held hostage by crack dealers. And our schools will not be locked in a state of siege.

No. Together we are going to ban this chemical weaponry. It breeds the most insidious form of domestic terrorism. And it will be stopped.

In the budget I presented to Congress last month -- a budget, by the way, that was the first Executive budget in quite a while not pronounced "d.o.a." on Capitol Hill -- I've pushed for an increase of \$1 billion for our anti-drug program. That's a 47 percent increase over 1988, for a total of \$6 billion.

Most of that money -- 70 percent of it -- will go toward grants to state and local law enforcement agencies, to beef up federal enforcement, and to build up our prosecution, detention, and intelligence-gathering strength.

As chief legal officers, you understand enforcement. You know how vital it is -- and as my budget makes clear, I want to devote unprecedented resources to enforcement.

But we must do more. This war won't be won by police work alone. Where there is demand, supply will always rise to meet it. Where there is no demand, supply is useless.

That's why I was glad to see that your "Blueprint for Drug Control Strategies" looks beyond enforcement, to strategies for cutting the drug problem off at the knees -- beyond effects, to causes.

Drug education, treatment, and prevention provide our best hope for a long-term solution -- especially with our kids. Yes, we need to tell them to "say no." But we must also give them the wisdom to know why -- and the skills to know how -- to say no.

Let me encourage you to continue looking closely at drug enforcement programs. Consider how they can help reduce demand for drugs. To the extent you can do that, you can make your jobs -- my job -- and those of everyone involved in law enforcement -- a whole lot easier.

Our resources may be limited -- but our resolve is not.

Our task is to win the hearts and minds of every child, teacher, and parent; every community group, religious institution, and tenant association; and every business and professional organization in this country.

Together, we can build a culture of zero-tolerance.

We can send a message, loud and clear, to those who take drugs -- and take our leniency -- for granted: The party... is over.

Let me now turn this party over to Bill Reilly -- Administrator of the E.P.A. He is a great builder of bridges between people -- he's even been called "The Great Includer."

He has devoted his career to protecting our land, air, and water -- and he has my complete confidence.

Thank you all very much. And God bless you.

1/54 draft before starting

(Lange/Blessey)
March 9, 1989
11:30 a.m.

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5/11/77
J. Edgar Hoover

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