Supreme Court Announces New Standard for Takings Claims

Will Cook, Charleston School of Law
DEVELOPMENTS IN CASE LAW

SUPREME COURT ANNOUNCES NEW STANDARD FOR Takings Claims

In *Dolan v. City of Tigard*, the United States Supreme Court, by a 5-4 majority, reversed the Supreme Court of Oregon’s decision that the municipality had not effected a taking when it conditioned a building permit with the dedication of a greenway and public easement. In announcing a new addition to takings jurisprudence, Chief Justice Rehnquist announced that the nature and extent of the government’s exaction must bear a "rough proportionality" to the public project’s impact. Not only did the Court further shift the burden on the government to prove the nonexistence of a taking, but *Dolan* also signaled an expanded judicial deference to the special character of property ownership.

**I. Facts and Procedural History**

In March 1991, Florence Dolan applied to the City of Tigard for permission to replace her existing plumbing and electric supply store with a substantially larger facility and to pave an adjacent thirty-nine space parking lot. The city’s planning commission conditioned approval of Dolan’s application upon her consent to two exactions: (1) a dedication of land for a public greenway to minimize flooding and (2) a pedestrian or bicycle pathway to diffuse traffic congestion in the city’s business district arising from Dolan’s business expansion. Accordingly, the commission found that both designations bore a "reasonable relationship" between the city’s exactions and the anticipated effects of Dolan’s proposed development. The required dedication comprised about ten (10) percent of the total property.

---

1 114 S.Ct. 2309 (1994).

2 *Id.* at 2315.

3 Dolan v. City of Tigard, 854 P.2d 437, 439 n.3 (Or. 1993).
Dolan appealed the commission's actions to the Land Use Board of Appeals (LUBA). Dolan argued that the city's land dedication requirements did not relate to the proposed development and therefore resulted in an uncompensated "taking" violative of the Fifth Amendment. LUBA, however, found a "reasonable relationship" between the necessity of (1) a greenway to absorb storm-water runoff from the larger parking lot and (2) a pedestrian/bicycle passage designed to alleviate increased traffic from the proposed development. Both the State Court of Appeals and Supreme Court of Oregon affirmed LUBA's analysis and decision.

II. The Majority's Analysis

The Supreme Court did not dispute the state court's finding that established a "nexus" between the city's permit conditions and a legitimate public purpose. However, the Court disagreed with the Oregon court's conclusion that the city's actions did not result in an unconstitutional taking.

A. Higher Level of Scrutiny

Chief Justice Rehnquist, writing for the majority, first distinguished Dolan from the Court's recent decision in Lucas v. South Carolina Coastal Council. Lucas applied the "economically beneficial use" test to determine that the state had effected a taking of the petitioner's property. Although the petitioner would lose some economically beneficial use from Tigard's exactions, she would still derive economic benefits from continuing to operate her business on the property. As a result of this continuing use, the Court held that it could not apply the Lucas test to Dolan. In addition, Dolan, unlike Lucas, involved an adjudicative, as opposed to legislative, land regulation that required an absolute dedication of land. For these reasons, Rehnquist argued, Dolan

---

required a higher level of scrutiny than the Court had applied in previous land use decisions.\(^5\)

### B. Unconstitutional Conditions

Next, under the doctrine of "unconstitutional conditions," the majority pointed out that the government could not require Dolan to relinquish her constitutional right to compensation for a taking in exchange for a discretionary benefit where the property sought bore little correlation to the benefit.\(^6\) The Court then made clear that it would uphold the exactions only if Tigard's dedication requirements were related to the externalities Dolan's development would force upon the community.

### C. Requirement of "Nexus"

Citing the standard set forth in *Nollan v. California Coastal Commission*,\(^7\) the Supreme Court addressed whether an "essential nexus" existed between a legitimate state interest and the permit condition. First, the Court determined that preventing flooding along the creek adjacent to the Dolan property and reducing traffic congestion in the city's business district advanced legitimate public purposes. The City of Tigard reviewed these goals through a Community Development Code (CDC), consistent with the design of the state's own land management program.\(^8\) Drainage and transportation studies conducted by the city identified flooding and

\(^5\) *Id.* at 2320 (stating "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation . . . ").

\(^6\) *Id.* at 2317.

\(^7\) 483 U.S. 825, 837 (1987).

\(^8\) Beyond the proposed exaction on Dolan's property, the CDC required that all property owners in the central business district dedicate 15% of their property for open spaces and landscaping.
traffic congestion as significant problems. In response to the studies, the city sought to minimize the threat of runoff resulting from an increase in impervious paving. By preserving floodplains as greenways, the city determined that developers would minimize damage to nearby structures in case of flooding. The city argued that conditioning the building permits with the inclusion of pathways would link developments and encourage the circulation of alternate modes of transit. Therefore, given that the proposed exactions contributed to the city's land use goals, the Court concluded that the city's goals and means "had nexus."

D. "Rough Proportionality"

In spite of the Court's acceptance of Tigard's nexus argument, the city failed to clear the Court's second hurdle: requisite degree of relationship. The Court did not reach the issue in Nollan because that case lacked the necessary nexus. However, the majority in Dolan found the requisite nexus and shifted the burden to the city to establish whether the city's exactions bore the "required relationship" to the impact of the anticipated development. For the first time, the majority concluded that because the city had not established a "rough proportionality." between the permit's exactions and the adverse consequences of Dolan's proposed development, the city's actions failed to satisfy the Fifth Amendment takings clause. Although the Court did not require a proportionality showing with mathematical accuracy, the Court found that the city had failed to make an individualized determination that the required dedication was related in "nature and extent" to the proposed development's impact. That the creation of the pathway "could offset some of the traffic demand . . . and lessen the increase in traffic congestion" was not

---

9 Id. at 2317-18.
10 Id. at 2318.
11 Id. at 2319.
12 Id. at 2319-20.
sufficient. In addition, the city could not articulate an appropriate response to the Court’s inquiry into why a public greenway, as opposed to a private one, provided a better avenue for flood control. Moreover, Rehnquist noted, if Dolan were required to comply with the Tigard’s conditions, she would lose her right to exclude others, "one of the most essential sticks in the bundle of rights . . . commonly characterized as property." Finally, without more than quantitative data to suggest that Dolan’s commercial expansion would increase pedestrian and bicycle traffic, the Court rejected the city’s conclusion that Dolan’s dedication would decrease traffic congestion. Therefore, the City of Tigard’s exactions effected an unconstitutional taking of Dolan’s property.

III. Voices of Discontent

Justice Stevens dissented, joined by Justices Blackmun and Ginsburg; Justice Souter dissented separately. First, Justice Stevens cited a lack of federal or state precedent in support of the rough proportionality test. He emphasized that the Court’s new test would encourage litigation and allow the federal judiciary to micromanage state land use decisions. Second, he pointed out that the Court’s analysis viewed only a discrete segment of Dolan’s property rather than the entire parcel. Even more egregious, in the dissenters’ view, the majority had shifted the burden of

---

13 Id. at 2321-22.
14 Id. at 2320.
15 Id. at 2320 (citing Kaiser v. Aetna, 444 U.S. 164, 176 (1979)).
16 Id. at 2318.
17 Id. at 2323.
18 Id. at 2326.
19 Id. at 2324 (citing Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978), which focused on “the nature and extent of interference with rights in the parcel as a whole.”).
proof to the city in its attempt to impose a valid land use plan on a business.\(^{20}\)
Next, Justice Stevens disagreed with the majority's unprecedented application of the "unconstitutional conditions" doctrine to regulatory takings.\(^{21}\) Finally, the takings claim brought by Dolan was premature because no taking had yet occurred.\(^{22}\) In contrast, Justice Souter argued that the Court failed to apply the rough proportionality test which Justice Rehnquist articulated. Instead, the Court misapplied the nexus analysis set forth in *Nollan*.\(^{23}\) Thus, Dolan's claims did not provide the appropriate gateway through which the Court could expand the *Nollan* opinion and shift the burden completely to the municipality.\(^{24}\)

**IV. Influence on Takings Jurisprudence**

In the months following the Court's decision, nearly two dozen commentators have scrutinized the *Dolan* opinion.\(^{25}\) More significant, thirty-seven federal and state courts have cited the *Dolan* calculus to establish the existence of takings, or more broadly, to examine the nature

\(^{20}\) *Id.* at 2326.

\(^{21}\) *Id.* at 2327.

\(^{22}\) *Id.* at 2328 (citing Preseault v. ICC, 494 U.S. 1, 11-17 (1990) (finding a takings claim premature because petitioner had not sought compensation) and Hodel v. Virginia Surface Mining & Reclamation Ass'n., 452 U.S. 264 (1981) (finding no taking where petitioner could not specifically identify property allegedly taken)).

\(^{23}\) *Id.* at 2329-31.

\(^{24}\) *Id.* at 2330.

\(^{25}\) A Westlaw search conducted February 26, 1995 in the JLR database produced 24 journal articles which discuss the implications of the *Dolan* opinion.
of property rights. Dolan's initial repercussions send a strong message
to courts, government, environmentalists, developers, and landowners of
a new judicial deference toward private property ownership. Striking an
appropriate equilibrium of "rough proportionality" between the rights of
property owners and public policy now requires a more rigorous balancing
of public and private interests, greater regard for landowner's rights, and
a stringent burden of government proof. How the Supreme Court will
judge land use regulations purporting to follow Dolan's rough
proportionality parameters remains an issue for future decisions.

William J. Cook

U.S. SUPREME COURT INVALIDATES CLARKSTOWN, NEW YORK
SOLID WASTE DISPOSAL ORDINANCE AS IMPERMISSIBLE
REGULATION OF INTERSTATE COMMERCE

In C & A Carbone, Inc. v. Town of Clarkstown, the United States
Supreme Court examined the effects of a town ordinance requiring that all
solid waste processed within the town limits be processed at the town's
transfer station. The Court held that the ordinance's effects were
interstate in reach and were therefore an impermissible regulation of
interstate commerce. Specifically, the Court held that the ordinance
discriminated against interstate commerce by "bar[r]ing the import of the
processing service."

In August 1989, the town of Clarkstown, New York entered into a
consent decree with the New York State Department of Environmental
Conservation in which the town agreed to close its landfill located on

---

26 A Westlaw search conducted February 26, 1995 in the ALLCASES
database produced 37 cases which cited the Dolan opinion for issues
related to takings, property interests, and just compensation.

1 114 S. Ct. 1677 (1994).

2 Id. at 1681-82.

3 Id. at 1683.
Route 303 and build a new solid waste transfer station on the same site. The station was to receive bulk solid waste and separate recyclable from nonrecyclable items. Recyclable waste would be baled for shipment to a recycling facility; nonrecyclable waste would be sent to an appropriate landfill or incinerator. The cost of building the transfer station was estimated at $1.4 million.

A local private contractor agreed to construct the facility and operate it for five years, after which the town would buy it for one dollar. During the five years of private operation, the town guaranteed a minimum waste flow of 120,000 tons per year, for which the contractor could charge haulers a "tipping-fee" of eighty-one ($81.00) dollars per ton, which was above the market rate. The town agreed to make up any deficit in tippage fees. To meet the yearly guarantee, the town adopted Local Laws 1990, No. 9 of the Town of Clarkstown, which required all nonhazardous solid waste within the town to be deposited at the Route 303 transfer station.

C & A Carbone, Inc. ("Carbone") operates a recycling center in Clarkstown where it receives bulk solid waste, sorts and bales the waste, and then ships it to other processing facilities. Although the ordinance permitted recyclers like Carbone to continue receiving solid waste, it required them to bring the nonrecyclable residue from that waste to the Route 303 station. In effect, the statute prohibited Carbone from shipping waste itself, and then charged Carbone a tipping fee on trash that Carbone had already sorted. In March 1991 Clarkstown officials learned that Carbone was shipping solid waste out of state in violation of the ordinance. The town sued Carbone in state court, seeking an injunction requiring Carbone to ship all nonrecyclable waste to the Route 303 transfer station. Carbone sued in United States District Court to enjoin the flow control ordinance. The court granted Carbone's injunction, finding a sufficient likelihood that the ordinance violated the Commerce

---

4 Id. at 1680.
5 Id.
6 Id. at 1681.
Clause of the United States Constitution. Four days later, the New York court, holding that the ordinance was constitutional, granted summary judgment for Clarkstown and ordered Carbone to comply with the ordinance. The federal court dissolved its injunction. The appellate division affirmed, finding that the ordinance did not discriminate against interstate commerce because it "applies evenhandedly to all solid waste processed within the Town, regardless of point of origin." Carbone appealed to the United States Supreme Court.

Writing for the majority, Justice Kennedy first established that the ordinance impermissively regulated interstate commerce. In reaching this conclusion, Kennedy rejected Clarkstown's contention that the ordinance does not regulate interstate commerce because it reaches only waste within the town's jurisdiction and is in practical effect a quarantine. Justice Kennedy called Clarkstown's definition of interstate commerce "outdated and mistaken." He reasoned that what makes "garbage" a profitable business is not the value of the substance itself, but the fact that its possessor must pay to get rid of it. Justice Kennedy further explained that the ordinance drove up solid waste processing costs for out-of-state disposers of solid waste and deprived out-of-state businesses of access to a local market.

Kennedy next considered the question of whether the ordinance was valid despite its effect on interstate commerce. This question had two subparts: 1) whether the ordinance discriminated against interstate commerce and 2) whether the ordinance imposed a burden on interstate commerce.

---

8 Id.
10 114 S. Ct. at 1681.
11 Id. at 1682.
12 Id. at 1681.
commerce that was "clearly excessive in relation to the putative local benefits." Kennedy found that the flow control ordinance discourages competition in the waste-processing service altogether, leaving no room for outside investment. Furthermore, the Court stated, "Discrimination against interstate commerce in favor of local business or investment is per se invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." Kennedy stated that Clarkstown had any number of nondiscriminatory alternatives for addressing the health and environmental problems alleged to justify this ordinance; therefore, Clarkstown's reasoning did not pass the rigorous scrutiny needed to overcome the ordinance's discrimination.

Concluding the ordinance did discriminate against interstate commerce, the Court found it unnecessary to engage in further balancing analysis. In finding the ordinance discriminatory, Kennedy rejected Clarkstown's argument that the ordinance did not discriminate because it failed to differentiate solid waste on the basis of its geographic origin. Kennedy stressed that the ordinance only allowed processing of the town's waste within the limits of the town, thus discriminating against out-of-state processors. He further pointed out that the avowed purpose of the ordinance was to attract revenue to the Route 303 facility.

Surprisingly, Kennedy opined that "[t]he ordinance is no less discriminatory because [some] in-state or in-town processors are also

\[\text{13 Id. at 1682. The Court's first test was enunciated in Philadelphia v. New Jersey, 437 U.S. 617 (1978), and its second test was set forth in Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).}\]

\[\text{14 Id. at 1683.}\]

\[\text{15 Id. (quoting Maine v. Taylor, 477 U.S. 131 (1986)).}\]

\[\text{16 Id.}\]

\[\text{17 Id. at 1682.}\]

\[\text{18 Id. at 1682-83.}\]

\[\text{19 Id. at 1684.}\]
covered by the prohibition." As pointed out by Justice O’Connor in her concurrence, in prior decisions, the Court has "consistently recognized that the fact that interests within the regulating jurisdiction are equally affected by the challenged enactment counsels against a finding of discrimination."  

Justice O’Connor based her concurrence on Pike’s balancing test because she did not agree that the ordinance discriminated against interstate commerce. Justice O’Connor would have invalidated the ordinance on the grounds that it imposed an excessive burden on interstate commerce. Although Justice O’Connor identified the significance of local interest in proper waste disposal, she reasoned "the town could ensure proper processing by setting specific standards with which all town processors must comply..." Furthermore, the interest in ensuring the financial viability of the facility could be served by imposing taxes for its support.  

The Court declined to rule on Amicus National Association of Bond Lawyers' argument that Congress, under the Resource Conservation and Recovery Act, has given the states permission to enact "flow control" ordinances and statutes such as the ordinance in question even where those ordinances and statutes run afoot of the Dormant Commerce Clause.

\footnotetext{20 Id. at 1682.}{21 Id. at 1689. See, e.g., Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 473 n.17 (1981); Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429, 444 n.18 (1978); Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981).}{22 Id.}{23 Id. at 1690.}{24 Id.}{25 42 U.S.C.A. §§ 6943(a)(5) and 6943(d)(3).}{26 114 S. Ct. at 1691-92 (O’Connor, J., concurring).}
In so doing, the Court has limited the significance of this case and cast it in the mold of *Dean Milk Co. v. Madison.*  

Sara E. Kelley

**Attorney's Fees Unavailable to Private Parties Who Bring Cost Recovery Actions Under Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)**

In *Key Tronic Corporation v. United States,* the United States Supreme Court decided whether attorney's fees are recoverable as "necessary costs of response" within the meaning of Section 107(a)(4)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). In a 6-3 ruling, the Court held: (1) litigation-related attorney's fees were not recoverable; (2) fees accrued in identifying other parties responsible for cleanup costs under CERCLA were recoverable; and (3) fees for legal services performed in connection with negotiations with the Environmental Protection Agency (EPA) to obtain a consent decree were not recoverable.

Key Tronic and other parties, including the United States Air Force (USAF), disposed of chemicals in a Washington state landfill during the 1970's. In 1980, the Washington Department of Ecology determined that the water supply in the area surrounding the landfill was contaminated by the chemicals. Key Tronic and the USAF each settled with the EPA. Key Tronic later sued the United States in a contribution claim under

---


CERCLA Section 113(f)\textsuperscript{3} and in a cost recovery claim under CERCLA Section 107(a)(4)(B).\textsuperscript{4} The cost recovery claim included attorney’s fees for three (3) types of services: (1) identification of other parties that were liable for the cleanup; (2) preparation and negotiation of Key Tronic’s agreement with the EPA; and (3) prosecution of Key Tronic’s suit against the USAF.

The district court dismissed the contribution claim against the USAF, but determined that Key Tronic was entitled to recover attorney’s fees for all three types of services in its cost recovery claim.\textsuperscript{5} The court of appeals reversed, holding that the district court lacked authority to award attorney’s fees for any of the services "[b]ecause Congress has not explicitly authorized private litigants to recover their legal expenses incurred in a private cost recovery action."\textsuperscript{6} The Supreme Court granted certiorari\textsuperscript{7} to resolve the conflict among federal courts concerning the extent to which attorney’s fees are a "necessary cost of response" under CERCLA.

The Court made clear that attorney’s fees are usually not a recoverable cost of litigation "absent explicit congressional authorization."\textsuperscript{8} Attorney’s fees are not expressly mentioned in Section 107 of CERCLA. However, the Court emphasized that "[t]he absence of specific reference to attorney’s fees is not dispositive if the statute otherwise evinces an intent to provide for such fees."\textsuperscript{9}

The Court found that attorney’s fees accrued in the cost recovery action against the USAF were not available to Key Tronic. It determined

\textsuperscript{6} Key Tronic v. United States, 984 F.2d 1025, 1028 (9th Cir. 1993).
\textsuperscript{7} Key Tronic v. United States, 114 S. Ct. 633 (1993).
\textsuperscript{9} Id. at 1965.
that Section 101's definition of "response" does not "encompass a private party's action to recover cleanup costs from other potentially responsible parties such that the attorney's fees associated with that action are then 'necessary costs' of response within § [96]07(a)(4)(B) [aka Section 107]."\textsuperscript{10} Key Tronic pointed to Section 101, which defines "response" as including enforcement activity, and argued that Section 107 allows a private cause of action including the award of attorney's fees in its suit against the USAF.\textsuperscript{11}

The Court was unpersuaded, and defeated Key Tronic's argument on three grounds. First, it characterized Section 107 as only impliedly authorizing a private cause of action. The Court reasoned that an implied cause of action does not provide for attorney's fees with the necessary explicitness to allow a court to award them. Second, the Court read the absence of explicit language authorizing attorney fees in Section 107, in light of other explicit statutory authorizations,\textsuperscript{12} as strong evidence of a deliberate decision to not allow the recovery of attorney fees. Third, the Court did not construe the term "enforcement activities" to be broad enough to allow a private cost recovery action.\textsuperscript{13}

The Court validated the award of attorney's fees associated with identifying other parties who were potentially responsible for cleanup costs under Section 107. The Court distinguished these fees from litigation expenses by pointing out that some of the work performed by the lawyer was not litigation-related at all but was closely tied to the cleanup and thus constituted a necessary cost of response in and of itself. Furthermore, the Court observed that these services did not have to be performed by lawyers, but could have been done by engineers, private investigators, or other non-lawyer professionals.\textsuperscript{14}

\textsuperscript{10} \textit{Id.}

\textsuperscript{11} \textit{Id.} at 1966.


\textsuperscript{13} \textit{Key Tronic}, 114 S. Ct. at 1966-67.

\textsuperscript{14} \textit{Id.} at 1967.
Additionally, the Court did not allow Key Tronic to recover attorney's fees expended in negotiations with the EPA that led to the consent decree between the EPA and Key Tronic. The Court viewed these expenses "as primarily protecting Key Tronic's interests as a defendant in the proceedings that established the extent of its liability."\textsuperscript{15} Those expenses, the Court determined, were not recoverable as "necessary costs of response" under CERCLA.

Justice Scalia, writing for the dissent in which Justices Blackmun and Thomas joined, argued that attorney's fees should be awarded to Key Tronic for all three types of expenses. He maintained that under the relevant provisions of CERCLA,\textsuperscript{16} a private litigant is entitled to the costs associated with bringing a cost recovery action, and that attorney's fees will be the major portion of the action's costs.\textsuperscript{17}

Justice Scalia rejected the majority's contention that the private right of action under § 9607(a)(4)(B) is implied. He emphasized that because Congress has explicitly authorized recovery of costs of enforcement activities, a natural part of which are attorney's fees, the explicit authorization from Congress necessary to collect attorney's fees is present.\textsuperscript{18}

The Court refrained from commenting on the practice of allowing the government to collect attorney's fees in actions brought by the government,\textsuperscript{19} thus leaving untouched judicial decisions which allowed the government to collect attorney's fees in Section 107 actions.\textsuperscript{20} Under current law, however, a private party who brings a cost recovery action under Section 107 of CERCLA (aka 42 U.S.C. § 9607) should not expect

\textsuperscript{15} Id. at 1968.


\textsuperscript{17} Key Tronic, 114 S. Ct. at 1968 (Scalia, J., dissenting).

\textsuperscript{18} Id. at 1969 (Scalia, J., dissenting).

\textsuperscript{19} Id. at 1967.

\textsuperscript{20} See id. at 1966 n.9.
to be awarded any attorney’s fees other than those spent to locate other potentially responsible parties.

Robert deRosset

COURT ESTABLISHES STATE’S RIGHT TO CONDITION A SECTION 401 CERTIFICATION ON MINIMUM STREAM FLOW REQUIREMENTS

In *Pud No. 1 of Jefferson County v. Washington Department of Ecology*,¹ the United States Supreme Court affirmed the Washington State Supreme Court’s holding that a state could condition a Clean Water Act (CWA) section 401² certification on minimum stream flow requirements in an effort to enforce compliance with state water quality standards.³ The Court first held that section 401 grants a state the authority to condition certifications on "appropriate requirements of state law."⁴ Second, they ruled that minimum stream flow requirements are an "appropriate requirement of state law."⁵ Third, the Court observed that imposing a minimum stream flow requirement on certification in no way interferes with the licensing authority of the Federal Energy Regulatory Commission (FERC) under the Federal Power Act (FPA).⁶

Petitioners, a city and local utility district of Washington State, proposed to build a hydroelectric plant on the Dosewallips River in the Olympic National Forest of Washington State. The Dosewallips River is classified as "extraordinary" under the State’s designated use classification

¹ 114 S. Ct. 1900 (1994).
³ 114 S. Ct. at 1914.
⁴ *Id.* at 1908.
⁵ *Id.* at 1914.
⁶ *Id.*
scheme, partly because it is "home" to two species of salmon and the steelhead trout.\textsuperscript{7} After applying to the State for a certification under section 401 of the Federal Water Pollution Control Act\textsuperscript{8}, commonly known as the Clean Water Act, the petitioner was displeased with the state-imposed minimum stream flow condition required merely to maintain the Dosewallips' integrity as a fishery.\textsuperscript{9}

Petitioners appealed the certification condition to a state administrative appeals board, which found that the condition exceeded the State's authority under the CWA.\textsuperscript{10} On appeal, the superior court reversed the Appeals Board and the Washington Supreme Court affirmed, adding that the antidegradation provisions of the State's water quality standards under section 401(d) of the CWA require the imposition of minimum stream flows.\textsuperscript{11} The United States Supreme Court granted certiorari to resolve the issue of whether the imposition of minimum stream flow requirements as a condition for section 401 certification is within the state's authority under the CWA to protect the integrity of the river as a fishery.\textsuperscript{12}

Writing for the majority, Justice O'Connor began her analysis by ruling that the State has the authority to condition a section 401 certification on requirements not specifically related to a "discharge,"

\begin{itemize}
\item \textsuperscript{7} \textit{Id.} at 1906.
\item \textsuperscript{8} 33 U.S.C.A. § 1341 (1993); 114 S.Ct. at 1907, n.2(providing that a § 401 certification is a prerequisite to a FERC license where the project will result in a "discharge" into the waters of the United States).
\item \textsuperscript{9} 114 S. Ct. at 1907-08. In its current condition, water flow in the Dosewallips ranges seasonally between 149 and 738 cubic feet per second (cfs). As originally proposed, the project would temporarily divert approximately 75% of the River's water leaving a minimum flow of between 65 and 155 cfs. The state certification required a minimum stream flow of between 100 and 200 cfs depending on the season.
\item \textsuperscript{10} \textit{Id.} at 1908.
\item \textsuperscript{11} 849 P.2d 646 (Wash. 1993).
\item \textsuperscript{12} 114 S. Ct. at 1908.
\end{itemize}
though relevant to "water quality." Petitioners acknowledged that they were required to acquire a state certification to proceed with the project; however, they argued that the minimum stream flow requirements were unrelated to the "discharge" as required by section 401(a)(1), and therefore, the State lacked the authority to impose the condition.

Rejecting petitioner's assertion, the Court stated that section 401(a) must be read in conjunction with section 401(d), which authorizes the state to mandate conditions or limitations to meet state water quality standards once the threshold condition, the existence of a section 401(a) discharge, is satisfied. Thus, the certification limitations become a condition to the Federal permit or license. In determining which conditions are authorized and intended by Congress under the general language of "applicable state laws," the Court looked to the goals of the CWA, the authorizing language of section 303, the applicable EPA regulations, and the Congressional Reports.

The Court recognized that state comprehensive water quality standards must consist of designated uses and water quality criteria, as well as an "antidegradation policy" which focuses on the maintenance of existing beneficial uses of the water and prevention of further degradation. Additionally, because the state is ultimately responsible for enforcing water quality standards on all waters within its boundaries, it is authorized to develop standards that are more stringent than mandated. The Court

---

13 Id. at 1910.

14 Id. at 1908-9.

15 Id. at 1909.

16 33 U.S.C.A. § 1341 (providing that a requirement of state law stated as a certification provision "shall become a condition on any Federal license or permit subject to the provisions of this section").

17 Id.

18 Id. at 1906.

19 Id. at 1912.

20 Id. at 1906.
found that Washington's comprehensive water quality standards satisfied all of these standards.\textsuperscript{21}

The Court then addressed a barrage of arguments resulting in a determination that minimum stream flow requirements are an authorized condition under section 401.\textsuperscript{22} Petitioners first argued that CWA section 303 requires the state to protect designated uses solely through administration of specific numerical "criteria." The Court rejected this argument, providing that any certification requirement that compels an applicant to meet both section 303 designated uses and the water quality criteria is an "appropriate limitation" under state law.\textsuperscript{23} Further, the Court recognized that numerical criteria cover an entire class of waters and should not be so strictly read as to constitute an exhaustive or objective list.\textsuperscript{24}

Petitioners then argued that enforcing water quality standards through use designations renders the subsequent standard of water quality criteria irrelevant.\textsuperscript{25} The Court curtly responded to petitioner's narrow statutory interpretation by condoning the use of numerical limitations as a convenient mechanism for identifying general minimum water conditions which apply to an entire class and are intended to achieve the requisite water quality.\textsuperscript{26} The Court explained that by designating the use of the Dosewallips, and by establishing water quality standards for such a designation, the State deserved latitude in conditioning the section 401 certification on the maintenance of a designated use.\textsuperscript{27} Furthermore, the

\textsuperscript{21} \textit{Id.} at 1907. Additionally, Washington's antidegradation regulations were reviewed and approved by the EPA in 42 Fed. Reg. 56,792 (1977).

\textsuperscript{22} \textit{Id.} at 1910.

\textsuperscript{23} \textit{Id.} at 1910-11.

\textsuperscript{24} \textit{Id.} at 1911. The Court uses Washington's water quality standard of "aesthetics" as a typical open-ended criteria.

\textsuperscript{25} \textit{Id.}

\textsuperscript{26} \textit{Id.} at 1912.

\textsuperscript{27} \textit{Id.} at 1911-12.
Court emphasized that the petitioner’s narrow reading would impose much too heavy a regulatory burden on the states.\textsuperscript{28} The Court also found support for minimum stream flow requirements in the "antidegradation policy" of the CWA.\textsuperscript{29} The antidegradation policy mandates that a state maintain and protect the existing uses of its waters. The Court found that Washington’s antidegradation policy was consistent with the federal mandate, and in turn that the State’s determination that a project would have adverse effects on water quality should be given deference.\textsuperscript{30}

Petitioners then argued that the regulation of water "quality" does not include water "quantity."\textsuperscript{31} The Court decided the proffered dissimilarity was an "artificial distinction" because the CWA was concerned with both. The quantity of water directly affects the quality because quantity, or lack thereof, can be a form of pollution.\textsuperscript{32} Petitioners also argued that the regulation of water quantity is exempted from coverage under the CWA by sections 101(g) and 510(2).\textsuperscript{33} The Court read these provisions narrowly, merely preserving the authority of the State to allocate water quantity between users. Relying on \textit{California v. FERC}\textsuperscript{34} and the legislative history of the provisions at issue, the Court dismissed the

\textsuperscript{28} \textit{Id.}.

\textsuperscript{29} \textit{Id.} at 1912.

\textsuperscript{30} \textit{Id.}

\textsuperscript{31} \textit{Id.} at 1912.

\textsuperscript{32} \textit{Id.} at 1913.

\textsuperscript{33} \textit{Id.}

\textsuperscript{34} 495 U.S. 490 (1990) (explaining that "minimum stream flow requirements neither reflect nor establish 'proprietary rights'" to water, the Court found that the state certification does not determine petitioners’ proprietary right to the water but merely determines the nature of the use of the water under the CWA).
argument and found that water quantity was certainly an issue in a section 401 certification.  

Finally, the petitioners contended that the minimum flow requirements imposed by the State were inconsistent with the authority of the FERC to license hydroelectric projects. The Court dismissed this argument by concluding there was no conflict between the authority of the FERC and the State based on the fact that the FERC had not yet acted on petitioner’s application for a permit.

Furthermore, as the Court pointed out, the petitioner had not proven that the FERC would not come to a different conclusion as to minimum stream flow for the preservation of the fishery. The Court distinguished its holding in California v. FERC because the minimum stream flow requirements in that case were imposed after the FERC license was issued. In this case, an application had been filed but no action had been taken to license the facility. Additionally, the Court was unwilling to limit the scope of section 401 for FERC licensing and not for all other federal licenses and permits for activities within the CWA.

The Pud No. 1 of Jefferson County case is significant because it expands the state’s authority under the CWA to regulate its water quality and effectively condition any federal permit that requires state certification on relevant water quality standards. The opinion upholds the use of minimum stream flow requirements that are more strict than imposed by the FERC or CWA as a condition for a section 401 certification. In a brief concurrence, Justice Stevens stated that the Court’s holding could be

---

35 Id at 1913.

36 Id. at 1914.

37 The FPA also requires FERC to consider a project’s effect on fish and wildlife.


39 114 S.Ct. at 1914.
based solely on the State’s expressed authority to regulate the quality of water within its borders more stringently than federal law requires.\textsuperscript{40}

\textit{John D. Rinehart, Jr.}

\textbf{CITY OF CHICAGO v. ENVIRONMENTAL DEFENSE FUND}

\textit{In City of Chicago v. Environmental Defense Fund}\textsuperscript{1}, the Supreme Court was asked to decide whether the ash generated by a resource recovery facility’s incineration of municipal solid waste was exempt from regulation as a hazardous waste under Subtitle C of the Resources Conservation and Recovery Act of 1976 (RCRA)\textsuperscript{2}. Pursuant to Subtitle C, RCRA gives the Environmental Protection Agency the power to regulate hazardous wastes.

The dispute concerned Chicago’s municipal incinerator which left a residue of municipal waste combustion (MWC) ash when the incinerator burned solid waste to recover energy. The city disposed of the combustion residue at landfills which were unlicensed to accept hazardous wastes. In 1988, the Environmental Defense Fund sued petitioners, the city of Chicago and its Mayor, for violating provisions of RCRA and of implementing EPA regulations. Petitioners argued that the MWC ash was excluded from Subtitle C’s requirements as to hazardous waste, pursuant to section 6921(i).

The district court agreed and granted the petitioners’ motion for summary judgment. The court of appeals reversed, reasoning that the MWC ash was subject to Subtitle C’s regulation. The city of Chicago then petitioned for a writ of certiorari. The Supreme Court granted the petition, vacated the decision, and remanded the case after the Administrator of EPA issued a memorandum instructing EPA Regional Administrators to treat MWC ash as exempt from hazardous waste

\textsuperscript{40} \textit{Id.} at 1914-15.

\textsuperscript{1} 114 S. Ct. 1588 (1994).

regulation under Subtitle C of RCRA. On remand, the court of appeals held that the EPA memorandum did not change the court’s decision because the statute’s plain language was dispositive. The appeals court reinstated its previous opinion that the ash was subject to Subtitle C’s regulation. The city of Chicago then petitioned for and was granted another petition for writ of certiorari.

The Court first examined RCRA and noted that Subtitle C of RCRA specifically governs hazardous waste generators and transporters, and owners and operators of hazardous waste treatment, storage, and disposal facilities.\(^3\) However, RCRA does not define which wastes are hazardous and subject to Subtitle C regulation, but leaves that designation to the EPA.\(^4\) To determine what constitutes a hazardous waste, the Court referred to EPA’s 1980 hazardous waste designations for solid wastes.\(^5\) These regulations exempted household waste\(^6\) from regulation and declared it a nonhazardous waste.\(^7\) This exemption included household waste which had been collected, transported, stored, treated, disposed, recovered, or reused. The Court recognized that the 1980 regulations did not, however, exempt MWC ash from Subtitle C regulation if the incinerator that produced the ash burned anything in addition to household wastes, such as the nonhazardous industrial waste petitioner’s facility burned.\(^8\) The Court then concluded that petitioner’s incinerator would

\(^3\) *City of Chicago*, 114 S. Ct. at 1590.

\(^4\) *Id.*

\(^5\) *Id.*


\(^7\) *City of Chicago*, 114 S. Ct. at 1590; *See* 45 Fed. Reg. 33084 (1980).

\(^8\) *Id.*
qualify as a Subtitle C hazardous waste generator if the MWC ash produced was sufficiently toxic.\(^9\)

The Court next examined section 3001(i) of the Hazardous and Solid Waste Amendments of 1984\(^10\) to determine whether the MWC ash generated by the facility was subject to regulation as a hazardous waste under Subtitle C.\(^11\) The Court determined that the statute’s plain meaning indicated that as long as a facility recovered energy by incineration of the appropriate wastes, the facility would be exempt from Subtitle C regulation as a facility that treated, stored, disposed of, or managed hazardous waste.\(^12\) However, the Court noted that the provision clearly did not exclude from regulation the ash produced from incineration.\(^13\)

Petitioners next argued that the ash was exempt by virtue of the facility’s exemption from regulation.\(^14\) They argued that if the facility was not deemed to be treating, storing, or disposing of hazardous waste, then the ash that it treated, stored, or disposed of must itself be considered nonhazardous.\(^15\) First, the Court made clear that the only exemption provided by the terms of the statute was for the facility, not the ash.\(^16\) The Court emphasized that section 3001(i) does not explicitly exempt MWC ash generated by a resource recovery facility from regulation as a hazardous waste.\(^17\) The Court then acknowledged that it could not interpret the statute as permitting sufficiently toxic MWC ash to qualify as

\(^9\) Id. at 1591.


\(^11\) City of Chicago, 114 S. Ct. at 1591.

\(^12\) Id.

\(^13\) Id.

\(^14\) Id. at 1592.

\(^15\) Id.

\(^16\) Id.

\(^17\) Id.
hazardous waste which would be disposed of in ordinary landfills. 18

Moreover, the Court pointed out that the statutory language did not even exempt the facility in its capacity as a generator of hazardous waste. 19 The Court recognized that RCRA defines generation as "the act or process of producing hazardous wastes." 20 The Court further asserted that the creation of ash through the incineration of municipal waste constitutes "generation" of hazardous waste. 21 Although section 3001(i) states that the exempted facility "shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes," this section significantly omits the word "generating" from this list. 22 The specific terms used in section 3001(i)--"treating," "storing," "disposing of," and "otherwise managing"-- are separately defined by RCRA, and none cover the production of hazardous waste. 23 Referring to the carefully constructed text of section 3001(i), the Court concluded that while a resource recovery facility's management activities were excluded from Subtitle C regulation, its generation of toxic ash was not. 24

Petitioners next directed the Court's attention to the legislative history of section 3001(i), particularly a statement in the Senate Committee Report that excluded the generation of waste from regulation. 25 The Court dismissed this argument by emphasizing that it was the statute, and not the committee report, that was the authoritative expression of the law, and the statute prominently omitted reference to "generation." 26

18 Id.

19 Id.


21 City of Chicago, 114 S. Ct. at 1592.

22 Id.

23 Id.

24 Id.


26 City of Chicago, 114 S. Ct. at 1593.
Congress had intended to exclude toxic ash from regulation, the Court concluded that Congress would have done so.\textsuperscript{27}

This case is most significant because the United States Supreme Court held that the ash generated by a resource recovery facility's incineration of municipal solid waste was considered a hazardous waste. Thus, ash generated in this manner is no longer exempt from regulation under Subtitle C of RCRA.

\textit{Caroline Horlbeck}

\textbf{Government Contractors Are Shielded From Liability Against Landowners When Acting Under the Direction of an Agency}

In \textit{Richland-Lexington Airport District v. Atlas Properties, Inc.}\textsuperscript{1} the Federal District Court for the District of South Carolina held that correspondence between a landowner and the Environmental Protection Agency (EPA) was insufficient under Section 2675(a) of the Federal Tort Claims Act (FCTA)\textsuperscript{2} to establish a valid claim against the government when the landowner failed to file sufficient notice in writing that the landowner was suing the United States\textsuperscript{3}. The court also found that a hazardous waste clean-up company failed to comply with the Contract Disputes Act (CDA)\textsuperscript{4} by not exhausting its administrative remedies before bringing the action in federal district court.\textsuperscript{5} Additionally, the court ruled that a government contractor was relieved of liability by the landowner

\textsuperscript{27} Id.

\textsuperscript{1} 854 F. Supp. 400 (D.S.C. 1993).

\textsuperscript{2} 28 U.S.C.A. 2675(a) (West 1994).

\textsuperscript{3} \textit{Richland-Lexington}, 854 F. Supp. at 413.


\textsuperscript{5} \textit{Richland-Lexington}, 854 F. Supp. at 417.
when the contractor merely executed the instructions of the EPA in cleaning up the site.\(^6\)

Atlas Properties, Incorporated, doing business as Carolina Chemicals (Carolina), owned and operated a pesticide manufacturing plant adjacent to property owned by Richland-Lexington Airport District (RLAD).\(^7\) Due to the contamination on Carolina's property, the EPA initiated clean-up activity on the property.\(^8\) The EPA employed Westinghouse Remediation Services, Incorporated (WRS) to remove the contaminated soil from Carolina’s property.\(^9\) RLAD maintains that WRS stockpiled contaminated soil on RLAD’s property.\(^10\) As a result, RLAD’s property became contaminated.\(^11\)

On February 16, 1990, RLAD notified the EPA by letter that contaminated soil was situated on RLAD’s property.\(^12\) RLAD did not state in the letter that it was pursuing a claim against the United States or that it sought a sum certain in damages. The EPA responded by stating that RLAD’s property was contaminated prior to the incident. The EPA also indicated that RLAD may be responsible for the contamination.\(^13\)

The EPA and RLAD continued to correspond in an effort to resolve the matter.\(^14\) However, RLAD never mentioned that it was pursuing a claim against the United States nor did it allege a sum certain in damages.

---

\(^6\) Id. at 424.
\(^7\) Id. at 405.
\(^8\) Id. at 406.
\(^9\) Id.
\(^10\) Id.
\(^11\) Id.
\(^12\) Id.
\(^13\) Id.
\(^14\) Id.
from the contamination. Eventually, RLAD initiated this proceeding against the EPA.\footnote{Id.}

RLAD asserted common law claims of trespass, private nuisance, negligence, strict liability, and a state statutory claim for violation of the South Carolina Pollution Control Act,\footnote{S.C. Code Ann. §§ 48-1-10 to 48-1-350 (Law Co-op 1976 & Supp. 1994).} against the EPA pursuant to the FTCA.\footnote{Richland-Lexington, 854 F. Supp. at 405.} The EPA moved to dismiss this claim pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure arguing that this court lacked subject matter jurisdiction to hear this claim.\footnote{Id.} RLAD brought an additional claim against the EPA, pursuant to Section 9607(a) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA),\footnote{42 U.S.C.A. §§ 9601-9657 (West 1983 & Supp. 1994).} alleging that the EPA was a controlling entity that caused the release of hazardous substances.\footnote{Richland-Lexington, 854 F. Supp. at 414.} WRS and Carolina also brought an indemnification cross-claim against the EPA with respect to any claims that RLAD asserted against them pursuant to CERCLA.\footnote{Id. at 405.} The EPA moved to dismiss RLAD's CERCLA claim as well as the WRS and Carolina cross-claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure (FRCP), arguing that RLAD, WRS, and Carolina failed to state a cause of action upon which relief could be granted.\footnote{Id.} WRS also brought a breach of contract claim against the EPA.\footnote{Id.} The EPA moved to dismiss the breach of contract claim pursuant to Rule 12(b)(1) of the FRCP, arguing that the court lacked subject matter jurisdiction.
jurisdiction to entertain the claim.\textsuperscript{24} WRS also filed a motion for summary judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure against RLAD's claims.\textsuperscript{25}

The court granted the EPA's motion to dismiss RLAD's FTCA claim for lack of subject matter jurisdiction.\textsuperscript{26} Under FTCA Section 2675(a), the claimant must give notice of his claim to a federal agency or the claim will be dismissed.\textsuperscript{27} The court in \textit{Richland-Lexington} relied on the language in \textit{Farmers State Sav. Bank v. Farmers Home Admin.},\textsuperscript{28} which found that the notice requirement is met "if he provides in writing (1) sufficient information for the agency to investigate the claims, and (2) the amount of the damages sought."\textsuperscript{29} Finally, the court applied the ruling of the Fourth Circuit in \textit{College v. United States}\textsuperscript{30} that a letter does not provide sufficient notice if it fails to provide a sum certain.\textsuperscript{31}

In \textit{Richland-Lexington}, the court emphasized that the agency must be informed of the amount of damages so that the agency can "avoid unnecessary . . . litigation . . . and determine the potentiality of settling the claim."\textsuperscript{32} The RLAD letters to the EPA never specified a sum certain for the alleged damage. Therefore, the court ruled that the claim

\textsuperscript{24} \textit{Id.} at 414.
\textsuperscript{25} \textit{Id.} at 418.
\textsuperscript{26} \textit{Id.} at 405.
\textsuperscript{27} \textit{Id.} at 409.
\textsuperscript{28} 886 F.2d 276 (8th Cir. 1989).
\textsuperscript{29} \textit{Richland-Lexington}, 854 F. Supp. at 409 (quoting \textit{Farmers}, 866 F.2d 276, 277).
\textsuperscript{30} 572 F.2d 453 (4th Cir. 1978).
\textsuperscript{31} \textit{Richland-Lexington}, 854 F. Supp. at 413.
\textsuperscript{32} \textit{Id.} (quoting \textit{Le Grand v. Lincoln}, 818 F. Supp. 112, 115 (E.D.Pa. 1993)).
should be dismissed because the letters did not provide sufficient notice to the EPA.\textsuperscript{33}

The court granted the EPA's motion to dismiss RLAD's CERCLA claim against the EPA for releasing hazardous substances.\textsuperscript{34} The EPA argued that the CERCLA claim had to be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure because there was no specific waiver of sovereign immunity under CERCLA for this particular claim. The court ruled that under CERCLA Section 9620(a), an agency of the government can be held liable if the agency acts as an owner, operator, generator, or transporter of hazardous materials.\textsuperscript{35} However, the court noted that other jurisdictions have not found this subsection to read as a waiver of sovereign immunity.\textsuperscript{36} Thus, the CERCLA claim against the EPA was dismissed.

WRS and Carolina also filed indemnification cross-claims against the EPA regarding any CERCLA claims that could be asserted against them by RLAD.\textsuperscript{37} The court granted the EPA's motion to dismiss the cross-claims for failing to state a claim upon which relief could be granted. The court ruled that "for the same reason [RLAD] cannot assert its CERCLA claim against the EPA, neither can [WRS] assert its indemnification cross-claim."\textsuperscript{38} Since a waiver of sovereign immunity did not occur, the court granted the EPA's motion to dismiss the CERCLA claim.\textsuperscript{39}

In addition, the court granted the EPA's motion to dismiss the WRS indemnification cross-claim against the EPA for breach of contract.\textsuperscript{40} The EPA argued that the indemnification cross-claim for breach of contract fell

\textsuperscript{33} Id. at 413.

\textsuperscript{34} Id. at 414.

\textsuperscript{35} Id.

\textsuperscript{36} Id.

\textsuperscript{37} Id.

\textsuperscript{38} Id.

\textsuperscript{39} Id.

\textsuperscript{40} Id. at 405.
under the Contract Disputes Act (CDA) which required WRS to exhaust its administrative remedies. WRS must first present the cross-claim to a contracting officer and appeal the decision of the contracting officer to the board of contract appeals. Alternatively, instead of appealing the decision of the contracting officer, WRS could file a claim in the United States Court of Federal Claims.

The court ruled that WRS failed to comply with the CDA because it did not exhaust its administrative remedies. The court found that CDA Section 602(a) applies to contracts by an agency for the procurement of services. The court noted that the use of administrative remedies under the CDA is binding upon WRS since the contract between the EPA and WRS relates to the procurement of clean-up services. Since WRS failed to meet with a contracting officer before filing suit in federal district court, the administrative procedures were not satisfied.

The court also concluded that it lacked jurisdiction to hear the WRS contract claim because 28 U.S.C.A. § 1346(a)(2) deprives the district courts of jurisdiction of contract disputes covered by the CDA and provides the Court of Federal Claims with exclusive jurisdiction. The court relied on § 1346(a)(2) which provides that the "district courts shall not have jurisdiction of any civil action or claim against the United States . . . for damages in cases . . . [under] the Contract Disputes Act." Therefore, the court did not have jurisdiction over the claim.

---

43 Id.
44 Id.
45 Id. at 405.
46 Id. at 415.
47 Id.
48 Id. at 416.
49 Id. (quoting 28 U.S.C.A. § 1346(a)(2)).
The court granted WRS's motion for summary judgement. RLAD made claims against WRS for trespass, private nuisance, negligence, and strict liability. WRS raised the government contractor defense. WRS argued that it was relieved of liability because it merely carried out the orders of the EPA.

The court applied a three-prong test from Boyle v. United Technologies Corporation. Although Boyle involved a defense contractor, the court in Richland-Lexington ruled that the test could be used in non-military contracts because the test attempts to protect the United States' ability to contract and supervise the actions of its agents. The United States has this same need in both military and non-military contracts.

In order to apply the test, the court ruled that the discretionary function exception must first be satisfied. Under this exception, an agency is not liable "if the challenged governmental action involved an element of judgement or choice and if the challenged government action is based on considerations of public policy." The court found that CERCLA granted the EPA discretion with respect to clean-up of contaminated sites and that the EPA's stockpiling of contaminated soil involved considerations of public policy. Therefore, the court concluded that the discretionary function exception had been satisfied and the three-prong test could be applied.

---

50 Id. at 405.
51 Id. at 418.
52 Id.
55 Id.
56 Id. at 423.
58 Id. at 423.
59 Id.
Under the test from Boyle, a contractor is not liable if (1) the United States approved reasonably precise specifications, (2) the equipment conformed to those specifications, and (3) the supplier warned the United States of any known dangers. The Court ruled that the EPA made all the decisions regarding the clean-up of the site, including decisions relating to the location of the stockpile and maintaining the stockpile. The court ruled that WRS satisfied the second prong of the test because it performed the clean-up according to the specifications of the EPA. The court then found that no evidence existed tending to show that WRS knew of any dangers associated with the clean-up. The court concluded that since the EPA's function was discretionary and WRS satisfied the three-prong test, WRS's motion for summary judgment should be granted.

In summary, the court failed to allow a claim to proceed because the landowner failed to provide sufficient notice of a suit to the agency. The court also ruled that a government contractor must exhaust its administrative remedies before filing suit in federal court. Lastly, the court provided liability protection to government contractors who only execute the orders of government agencies.

David C. Slough

JAMES CITY COUNTY V. EPA

On October 3, 1994, the United States Supreme Court refused to review a decision in which the Fourth Circuit Court of Appeals ruled that "the Environmental Protection Agency [EPA] was not required to consider the lack of practicable alternatives to water supply projects before vetoing

---

60 Id. at 421.
61 Id. at 423.
62 Id.
63 Id. at 424.
64 Id.
Clean Water Act [the Act] dredge and fill permits."\(^1\) In *James City County v. EPA,\(^2\)* the United States Court of Appeals for the Fourth Circuit held that the EPA could base its veto of a dam permit solely on environmental harms without considering the community's need for a reliable water supply. Thus, the court allowed the EPA to abandon its long-standing practice of reviewing a wide range of factors, including the social, economic, and environmental benefits of a proposed project, in determining whether a project is "unacceptable" within the meaning of Section 404(c) of the Act.\(^3\) Additionally, the court concluded that EPA action under Section 404 of the Act\(^4\) is reviewable under the "arbitrary and capricious" standard, not the "substantial evidence" test.\(^5\)

Since the late 1970's, James City County, Virginia (the County) has sought solutions to its looming water supply shortage. After extensive studies by federal, state, and private authorities, the County concluded that constructing a dam and reservoir on Ware Creek, located within the County, was the only practical long-term solution. However, before construction could begin, the County had to first obtain a permit to place fill for the dam. Therefore, in 1984, the County formally applied to the Army Corps of Engineers (the Corps) for a fill permit.\(^6\)

---

\(^1\) *No Supreme Court Review for EPA Permit Veto*, 25 ENV'T REP. (BNA) 1166 (Oct. 7, 1994); see *James City County v. EPA*, 12 F.3d 1330 (4th Cir. 1993), *cert. denied*, 115 S. Ct. 87 (Mem) (1994).


\(^5\) *James City County*, 12 F.3d at 1338 n.4.

\(^6\) *See James City County v. EPA*, 758 F.Supp. 348 (E.D. Va. 1990), *aff'd in part and remanded by*, 955 F.2d 254 (4th Cir. 1992), No.
On July 11, 1988, after receiving state certification that the project would not violate state water quality standards, the Corps approved the project and issued a permit in accordance with Section 404(a) of the Act. 7 Nevertheless, after ten years of supposed cooperation, dozens of experts, countless water studies and a bevy of mitigation proposals, the EPA, on November 18, 1988, vetoed the Corps’ overwhelming ratification of the proposed placement of fill. 8 Therefore, the Corps was estopped from issuing the permit.

On November 6, 1990, after the County challenged the denial of the permit, the United States District Court for the Eastern District of Virginia held that the EPA could not presume the County had "practicable alternatives" to the proposed project and ordered the Corps to issue the permit. 9 On appeal, the Fourth Circuit approved the district court’s conclusion that no practicable alternatives to the project exist. 10 However, the Court of Appeals remanded the case and gave the EPA sixty (60) days to consider whether, in the absence of alternatives, the project’s environmental effects alone justified a veto. 11 On remand, the EPA again vetoed the Section 404(b) 12 permit--basing its veto solely on environmental considerations. Thereafter, the County again brought an action in the district court which again overturned the EPA’s veto and ordered issuance of the permit. 13 Once again, the EPA appealed to the


7 Id.; 33 U.S.C.A. § 1344(a) (West 1986).


9 Id. at 348.

10 See James City County v. EPA, 955 F.2d 254 (4th Cir. 1992).

11 Id.

12 33 U.S.C.A. § 1344(b) (West 1986).

Fourth Circuit Court of Appeals, which reversed the district court and held that the EPA could base its veto solely on environmental harms without considering the County's need for water.\textsuperscript{14} Despite all the issues raised in this litigation, on October 3, 1994, the United States Supreme Court denied review without comment.\textsuperscript{15}

The primary issue involved in the second appeal was whether the EPA had the authority under Section 404(c) of the Act\textsuperscript{16} to justify its veto solely on the basis that the proposed project would cause "unacceptable adverse effects" on the environment.\textsuperscript{17} Section 404(c) states in pertinent part that:

\begin{quote}
The Administrator [of the EPA] is authorized to prohibit . . . deny or restrict the use of any defined area for specification . . . as a disposal site, whenever he determines, after notice and opportunity for public hearing, that the discharge of such materials into such area will have an \textit{unacceptable adverse effect} on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.\textsuperscript{18}
\end{quote}

In this case, the County argued that the EPA must consider a wide range of factors in determining whether a project is "unacceptable" under Section 404(c)\textsuperscript{19} of the Act.\textsuperscript{20} Specifically, the County forcefully contended that the EPA was required to consider the County's need for water.\textsuperscript{21} In reply, although the EPA acknowledged that it had a long-

\textsuperscript{14} See James City County v. EPA, 12 F.3d 1330 (4th Cir. 1993).
\textsuperscript{15} See James City County v. EPA, 115 S. Ct. 87 (Mem) (1994).
\textsuperscript{16} 33 U.S.C.A. § 1344(c) (West 1986).
\textsuperscript{17} James City County, 12 F.3d at 1335.
\textsuperscript{18} 33 U.S.C.A. § 1344(c) (West 1986) (emphasis added).
\textsuperscript{19} Id.
\textsuperscript{20} James City County, 12 F.3d at 1335.
\textsuperscript{21} Id.
standing policy of considering other relevant factors, the agency argued that the only requirement placed on it by Congress was to consider the proposed project's potential adverse effects on the environment. After reviewing the legislative history, the statutory language of Section 404, and the regulations promulgated thereunder, the court concluded that the EPA has the authority to justify its veto solely on environmental concerns without considering the County's need for water.

After deciding the EPA could base its veto solely on environmental considerations, the court reviewed the district court's alternate holding that the EPA's conclusion that the project would cause unacceptable adverse effects on the environment was not supported by the record. The EPA based its veto on several factors, including harm to existing fish and wildlife species, damage to the ecosystem, destruction of wetlands, and inadequate mitigation. Therefore, after reviewing the administrative record, the court concluded that the EPA's position was supported by the evidence.

Additionally, in a footnote, although it held differently in a prior appeal, the court concluded that EPA action under Section 404 of the Act is reviewable under the "arbitrary and capricious" standard, not the "substantial evidence" test. Under the arbitrary and capricious standard, the scope of review is narrow, and the court cannot substitute its judgment for that of the agency. An agency ruling will only be arbitrary and capricious if:

---

22 Id.
23 Id. at 1336.
24 Id.
25 Id. at 1339.
26 Id.
28 James City County, 12 F.3d at 1338 n.4.
29 Id. (citations omitted).
the agency has [1] relied on factors which Congress has not intended it to consider, [2] entirely failed to consider an important aspect of the problem, [3] offered an explanation for this decision that runs counter to the evidence before the agency, or [4] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.\textsuperscript{30}

On the other hand, under the substantial evidence test, an agency ruling will only be upheld if there is "substantial evidence" to support it.\textsuperscript{31} "Substantial evidence" is evidence that a reasonable mind can accept as adequate to support a conclusion.\textsuperscript{32} Thus, the court's holding lowers the standard for reviewing EPA action under section 404 of the Act. This case is significant because it allows the EPA to base its veto of a Section 404 permit solely on environmental harms without considering other relevant information. Furthermore, the court's acceptance of the "arbitrary and capricious" standard weakens the district court's ability to second guess EPA action under Section 404. In conclusion, the case strengthens the EPA's authority to veto dredge and fill permits under Section 404(c) because the agency only needs to show some "unacceptable adverse effect" on the environment, and the agency is not required to consider other relevant factors.

\textit{Todd Thigpen}

\textsuperscript{30} \textit{Id.}

\textsuperscript{31} \textit{Id.}

\textsuperscript{32} \textit{Id.}
SUIT TO REVIEW COURT HOLDS THAT ENFORCEMENT OF WETLANDS REGULATIONS BY THE ARMY CORPS OF ENGINEERS IS BARRED UNLESS FINAL, ENFORCEABLE AGENCY ACTION

In Commissioners of Public Works v. United States, the United States Court of Appeals for the Fourth Circuit held that the federal courts may not entertain a suit challenging the enforcement of wetlands regulation by the Army Corps of Engineers where no final enforcement orders exist.

In 1986, Greenville Bees Ferry purchased a 65 acre tract of land known as Shadowmoss Plantation. In 1989, the Commissioners of Public Works of the City of Charleston ("CPW") purchased a 12 acre portion of the tract and planned to construct a storage complex and maintenance facility.

CPW believed no wetlands were present on the land it purchased and sought assurances to this effect from the Army Corps of Engineers, the government entity charged with determining the presence of wetlands on a particular site. CPW's belief that no wetlands were present on the land was premised on a 1986 plat created by Greenville Bees Ferry, then owners of the property. The plat was signed by a Corps official.

In response to CPW's inquiry, the Corps indicated that the 1986 plat did not cover the portion of the land now owned by CPW. Further, the Corps informed CPW that it believed wetlands were in fact present on the property and urged a formal delineation of the property for a proper determination of the matter.

Unable to resolve the dispute after additional discussions, CPW, along with Greenville Bees Ferry, sued the Corps in United States District Court for the District of South Carolina. The parties sought a ruling that the 1986 plat covered the property in question. In addition, the suit alleged

---

that the Corps' failure to honor the 1986 plat constituted a Fifth Amendment due process violation.

CPW and Greenville Bees Ferry asserted that the district court had jurisdiction to hear the matter pursuant to the Administrative Procedures Act ("APA"). The APA allows judicial review if the challenged activity is final agency action and there is no other adequate remedy at law.

The district court recognized that a three-part analysis would be helpful in its resolution of the dispute. First, the court determined whether the challenged activity was in fact a final agency action. The purpose of the finality requirement is to avoid premature judicial intervention in an administrative decision until such decision has been formalized and concretely felt by the challenging party. Second, the court looked to see if judicial review was precluded by any statute. Third, the court considered whether the issue was ripe for review.

The controlling statute in the case is the Clean Water Act, which prohibits the discharge of pollutants into the waters of the United States,
unless a permit issued by the Corps authorizes such discharge.\textsuperscript{11} Wetland habitats are included in the term "waters of the United States."\textsuperscript{12}

A formal determination by the Corps regarding the applicability of the CWA to activities or tracts of land constitutes final agency action.\textsuperscript{13} Permit challenges by any party are barred until a formal determination is made by the Corps.\textsuperscript{14}

Instead of reaching a concrete determination on whether the Corps’ activity constituted final agency action, the district court disposed of the matter by concluding that the CWA prohibited pre-enforcement review under the APA. Relying on Southern Pines Assocs. v. United States,\textsuperscript{15} holding that federal courts lack subject matter jurisdiction to review compliance orders prior to further enforcement action, the district court concluded that review would be premature since CPW and Greenville Bees Ferry could apply for a permit and the Corps’ action was not a final determination regarding CPW’s construction project.

Thus, the district court dismissed the suit for lack of subject matter jurisdiction based on the fact that the Corps’ statutory authority to regulate wetlands comes from the Clean Water Act ("CWA") and the CWA specifically prohibits pre-enforcement review of the Corps’ activity.

On appeal, CPW and Greenville Bees Ferry argued that the district court erred in its application of Southern Pines Assocs. v. United States\textsuperscript{16} since the Corps’ refusal to honor the 1986 plat did create a controversy that the court could properly review.

\textsuperscript{12} 33 C.F.R. § 328.3 (1994); 40 C.F.R. § 230.3 (1994).
\textsuperscript{13} 33 C.F.R. § 320.1(a)(6)(1994).
\textsuperscript{15} 912 F.2d 713 (4th Cir. 1990).
\textsuperscript{16} Id.
The Court of Appeals disagreed with CPW and Greenville Bees Ferry and stated that Southern Pines recognized that for government agencies to enforce the CWA without becoming entangled in litigation, the agency action must be final.\textsuperscript{17} Thus, the court affirmed the district court’s ruling and held that judicial review under the CWA is limited to opportunities where the agency enforcement proceeding has become a final, enforceable order.\textsuperscript{18}

The Court of Appeals determined that the Corps’ response to CPW’s request merely indicated that the Corps believed that wetlands were present on the property and that no definite, final determination was made by the Corps.\textsuperscript{19} The court noted that the Corps urged a formal delineation of the property because of the uncertainty of the wetlands determination. The court determined that a suit against the Corps was simply premature at this stage since CPW was free to seek a permit from the Corps allowing the construction to go forward.\textsuperscript{20} Further, the Corps did not make a final determination regarding the existence of wetlands at the site or the suitability of CPW’s proposed construction.\textsuperscript{21} The court determined that the Corps’ activity was only advisory in nature and the district court properly applied Southern Pines since that case restricts review of preliminary agency action.\textsuperscript{22}

This case is significant for several reasons. First, it appears that correspondence from the Corps and a plat actually signed by a Corps official may in fact constitute final agency action. However, despite the finality of the Corps’ administrative action regarding the CWA and a wetlands determination, such action does not give rise to judicial review.

\textsuperscript{17} Id. at 716.

\textsuperscript{18} Id. at 715-716.


\textsuperscript{20} Id. at *2.

\textsuperscript{21} Id. at *2.

\textsuperscript{22} Id. at *2.
unles the Corps has sought enforcement of one of its compliance orders. This virtually means that a property owner may think that he or she has a final determination regarding the presence of wetlands on his or her property and the property owner may then seek to commence construction of a particular project. The Corps could halt the construction project and claim that the property owner needs to file for the proper permit to continue construction or even commence construction. If the property owner sought judicial review of the Corps' decision, the suit would be premature since the Corps would not be attempting to enforce an administrative compliance order, but rather, advising the property owner of proper permit procedures.

For any property owner, this delay in commencing or continuing a project could be quite significant due to the inherent delay in applying for a permit once construction plans are in progress. If the permit is denied after the land has been purchased for a particular project, the property owner will have suffered a great financial loss.

Irma R. Pringle

South Carolina Environmental Law Journal Vol. III

FOURTH CIRCUIT HOLDS THAT HAZARDOUS BYPRODUCTS NOT IMMEDIATELY RECYCLED FOR USE IN THE SAME INDUSTRY CAN CONSTITUTE SOLID WASTE UNDER RCRA

In Owen Elec. Steel Co. v. Browner,¹ the Fourth Circuit Court of Appeals denied Owen Electric Steel Company's (Owen) petition for review of an Environmental Protection Agency (EPA) order which determined that Owen's "slag processing area" (SPA) was a solid waste management unit (SWMU) under the Resource Conservation and Recovery Act (RCRA)². In order to determine whether the EPA properly classified

---

¹ 37 F.3d 146 (4th Cir. 1994).
the SPA as an SWMU, the court looked to the legislative history behind RCRA, the relevant case law, and the facts of this particular case.³

Owen was in the steel-production business.⁴ Part of the production process took place in an electric arc furnace. During the production process, certain non-ferrous constituents were removed while the metal was in a molten state. This removal was accomplished by adding crushed limestone (calcium carbonate) to the metal. The non-ferrous constituents bound with the limestone to create slag: a combination of limestone, dolomite (magnesium carbonate), and trace amounts of metallic oxides. The slag then floated to the surface and was removed.⁵

A third-party contractor continuously processed slag at Owen’s Cayce facility. When that process was complete, the slag then went through a curing process.⁶ Owen cured the slag by placing it in holding bays "where the slag lies on the bare soil for tempering and weathering."⁷ The slag then became "dimensionally stable and . . . amenable for use as a construction aggregate."⁸ The curing process took approximately six months. Owen sold the resulting product "to the construction industry for use as a road base material or for other commercial purposes."⁹

Owen was the operator of a TSDF, a facility that treats, stores, or disposes of hazardous wastes. As the operator of a TSDF, Owen was required to comply with various requirements set forth in the RCRA.¹⁰ Pursuant to one of these requirements, Owen applied for an EPA permit. Owen received a proposed permit which listed conditions pursuant to which the permit was issued, and specific areas of the Cayce site to which

³ 37 F.3d at 147-50.
⁴ Id. at 147.
⁵ Id.
⁶ Id.
⁷ Id.
⁸ Id.
⁹ Id.
¹⁰ Id.
the permit applied.\textsuperscript{11} In addition, the permit identified the SPA as an SWMU.\textsuperscript{12} Because Owen opposed this EPA label, he filed several administrative challenges to the EPA decision. When the EPA adhered to its original determination, Owen brought the present action and claimed that the SPA was not an SWMU.\textsuperscript{13}

First, the court laid out the analysis for determining whether the EPA properly classified the SPA as a SWMU.\textsuperscript{14} The court stated that, in determining the criteria according to which a particular area is classified as an SWMU, the EPA, justifiably, looks to the legislative priority underlying RCRA § 3004(u), which unequivocally [sic] states: "[T]he term ‘Solid Waste Management Unit’ [in amended RCRA § 3004] is used to reaffirm the Administrator’s responsibility to examine all units of a [TSDF] from which hazardous constituents might immigrate, irrespective of whether the units were intended for the management of solid and/or hazardous waste."\textsuperscript{15}

The court then emphasized that, in order to conclude that the SPA was an SWMU, the EPA needed only to find that Owen’s slag was a solid waste.\textsuperscript{16}

The court referred to RCRA § 1004 to determine what constitutes a solid waste. Solid waste is "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control

\textsuperscript{11} Id.

\textsuperscript{12} Id. at 148.

\textsuperscript{13} Id.

\textsuperscript{14} Id.


\textsuperscript{16} Id.
facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities . . . ."¹⁷ The court indicated that the issue was whether Owen's slag constituted "other discarded material." In an attempt to prove that the slag was not a discarded material, Owen argued that the slag was "ultimately recycled and used in roadbeds."¹⁸ The EPA responded by arguing that, "because the slag lies dormant, exposed, on the ground for six months before such use, it is discarded even if it is later 'picked up' and used in another capacity."¹⁹

In evaluating the competing arguments, the court relied on Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.²⁰ "Pursuant to Chevron, the court must first ask whether Congress has spoken directly to the issue in question. If it has, then Congress' directive displaces any contrary agency interpretation."²¹ However, if Congress has not spoken directly to an issue, the court "will not invalidate the agency interpretation so long as it is reasonable and permissible."²² Because Congress has not spoken directly on the interpretation of the phrase "solid waste," the court accorded substantial deference to the EPA interpretation of the statutory definition of the term.

Next, the court turned to the meaning of the phrase "discarded material." In finding that the slag was discarded, the court discussed case law from other jurisdictions. First, in American Mining Congress v. United States EPA²³ ("AMC II"), the D.C. Circuit Court of Appeals

¹⁷ Id. at 148 (emphasis added) (citing 42 U.S.C.A. § 6903 (27) (West 1988)).
¹⁸ Id.
¹⁹ Id.
²¹ Id. at 148
²² Id.
²³ 907 F.2d 1179 (D.C. Cir. 1990).
interpreted the 1987 case, *American Mining Congress v. United States EPA*\(^{24}\) ("AMC I"), in a way unfavorable to Owen. Where *AMC I* could be read to define discarded to mean "only materials that are 'disposed of' or 'abandoned'...," *AMC II* stated that *AMC I* only exempts "materials that are 'destined for immediate reuse in another phase of the industry's ongoing production process.'\(^{25}\)

Additionally, the court referred to *United States v. ILCO, Inc.* ("ILCO").\(^{26}\) In *ILCO*, a battery recycler argued that the spent batteries it purchased and recycled were never discarded; therefore, they could not be classified as solid waste. However, the Eleventh Circuit ruled that the dispositive issue was not that the batteries were ultimately recycled, but that the batteries became part of the waste disposal problem as soon as the various owners of the batteries discarded them. That court held that once the batteries were discarded, they became classified as solid waste. Also, ILCO's subsequent recycling of the batteries was irrelevant.

After reviewing the relevant case law from the other circuits, the Fourth Circuit fashioned a test to determine what constitutes "discarded material." The court held that "the fundamental inquiry in determining whether a byproduct has been 'discarded' is whether the byproduct is immediately recycled for use in the same industry."\(^{27}\)

In conclusion, because the slag produced at Owen’s Cayce plant was not immediately recycled for use in the same industry, the court concluded that the slag was part of the waste disposal problem and was, therefore, a solid waste. Thus, the court held that the EPA correctly determined that the SPA was an SWMU.\(^{28}\)

*Christopher B. Staubes III*

\(^{24}\) 824 F.2d 1177 (D.C. Cir. 1987).

\(^{25}\) *Owen*, 37 F.3d at 149 (citing *American Mining Congress*, 824 F.2d at 1185-86) (emphasis in original).

\(^{26}\) 996 F.2d 1126 (11th Cir. 1993).

\(^{27}\) *Id.* at 150.

\(^{28}\) *Id.*