PUBLIC POLICY v. PROPERTY RIGHTS IN HAZARDOUS WASTE LAW: IS CERCLA UNCONSTITUTIONAL? REARDON V. U.S.

by Robert Lutolf

INTRODUCTION

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[1] was signed into law by President Jimmy Carter on December 11, 1980. Critics claim that it was hastily and poorly drafted,[2] and it is considered by some to have the most Draconian provisions of any federal law.[3] EPA's administration of CERCLA has been closely scrutinized by the public because of health considerations, and Congress because of political considerations. Yet amazingly enough, CERCLA has withstood all challenges to its constitutionality. That is until the 1st Circuit Court of Appeals' decision in Reardon v. U.S.[4] The 1st Circuit abandoned a series of court rulings that support the government's CERCLA activities and found CERCLA's lien provisions unconstitutional.

The Reardon decision attacks the heart of CERCLA, the government's ability to quickly mitigate public health dangers and to recover remediation costs. At issue is a balance between a public environmental policy and individual rights. Courts have consistently supported the letter and spirit of CERCLA and Reardon can be seen as not supporting that spirit. Reardon may be a case that changes the relative weight accorded public policy and private rights in hazardous waste law.

The Reardon decision attacks the heart of CERCLA.

CERCLA PROVISIONS AT ISSUE IN REARDON

CERCLA is based on two fundamental principles. First, those responsible for the contamination should pay for remediation. Second, the federal government should be able to quickly and effectively protect the public health from the dangers of inactive hazardous waste sites.[5]

These two principles are embodied in §§ 9607 and 9613. Section 9607 protects the government's ability to recover costs, § 9613 essentially bars any legal actions that might delay the government's efforts to protect the public health.

Section 9607 (l), Federal Lien, states that all CERCLA costs and damages for which a potentially responsible party (PRP) is liable shall be a lien in favor of the U.S. The lien will be on all real property that the PRP owns and is subject to or affected by a removal or remedial action.[6] The lien can arise when the U.S. first incurs costs or when the PRP is provided written notice. No pre-lien hearing is required. The lien continues until the liability is satisfied or becomes unenforceable through the statute of limitations described in § 9613.[7]

Section 9613, Litigation, Jurisdiction and Venue provides that, with certain limited exceptions, only federal district courts shall have original jurisdiction over CERCLA controversies.[8] Section 9613(h),Timing of Review, further limits jurisdiction by stating that no federal court can review any challenges to removal or remedial actions or abatement orders except in five specific situations. "An action under §9607 to recover response costs or damages or for contribution"[9] is one of these situations and is relevant to Reardon. Section § 9613 (g), Period in Which Action May be Brought, requires that an initial action to recover removal costs be brought within 3 years after completion of the removal action. An initial action for recovery of remediation costs must be brought within 6 years after construction of the remediation

alternative starts. Sections 9601 (24) and (25) define removal and remedial actions to include related enforcement actions.

THE REARDON CASE

In 1979, Paul and John Reardon purchased a 16-acre site next to a Norwood, Massachusetts electric equipment manufacturing plant. When the Reardons bought the property, they had no reason to suspect that it was contaminated. In 1983, the state of Massachusetts discovered extremely high levels of polychlorinated biphenyls (PCBs) on the manufacturing site as well as the Reardons' property and concluded that the plant owners had dumped toxic wastes on both properties. EPA initiated a CERCLA emergency action and removed all PCB concentrations known to be above the safe limit.

In 1984, the Reardons subdivided the property, sold some lots and retained ownership of the remainder. In October 1985, EPA notified the Reardons that they might be liable for remediation costs, along with 10 other present and prior owners.

When the Reardons bought the property, they had no reason to suspect that it was contaminated.

In August 1987, EPA determined that soil on the Reardons' property was still contaminated. In March 1989, EPA filed a Notice of Lien on all property owned by the Reardons at the site. The lien was for an unspecified amount and secured all costs and damages for which the Reardons were liable under § 9607(l). In July 1989, EPA notified the Reardons that current claims were $336,709. This amount was not the Reardons' total liability, because an EPA selected long-term remediation announced in September 1989 was estimated to cost $16,100,000.

In October 1989, the Reardons filed a complaint and a Motion for Preliminary Injunction in the United States District Court for the District of Massachusetts. The Reardons claimed that they were not subject to CERCLA and attacked the constitutionality of CERCLA's lien provisions. The district court in Reardon[10] found that the "plain language and legislative history"[11] of CERCLA clearly showed that Congress intended to bar **all** preenforcement challenges, whether statutory or constitutional. The court also found that placing a lien was clearly a preenforcement action. The court then considered whether Congress had authority to restrict jurisdiction and concluded that it did not. The court reasoned that, if EPA chose not to institute a cost recovery action, the statute of limitations would run, the lien would be lifted and the Reardons would never have an opportunity to challenge the lien in court. The court believed that this was not an appropriate restriction. However, the court found that the EPA's lien had not deprived the Reardons' of a significant property interest. The district court therefore denied the Motion for a Preliminary Injunction and dismissed the complaint.

On appeal, a 1st Circuit Court of Appeals panel ruled for the Reardons on statutory grounds believing that § 9613(h) permitted statutory challenges to the lien. EPA requested a hearing by the full court; the court agreed and the panel's decision was withdrawn.

The critical issues facing the en banc 1st Circuit Court were: (1) Did § 9613(h) divest the court of jurisdiction over the Reardons' claims? and (2) Did the EPA's imposition of a § 9607(l) lien, constitute a deprivation of property and a violation of the Reardons' rights to procedural due process as guaranteed by the Fifth Amendment to the U.S. Constitution?

LEGISLATIVE HISTORY AND PRIOR HAZARDOUS WASTE LAW

Courts have consistently affirmed that CERCLA only confers jurisdiction in the specific instances described in § 9613. However, the courts have been divided on whether CERCLA restricts review of constitutional claims. This issue was litigated over the period 1980 to 1986. Although a minority of the courts found that they had jurisdiction, they ruled that

the particular provisions being attacked were constitutional. In 1986, Congress reauthorized CERCLA in The Superfund Amendment and Reauthorization Act (SARA).[12] The legislative history shows that, at least some, members of Congress believed that they were resolving the issue in favor of limited jurisdiction by adding § 9613(h). Senator Stafford, the floor manager, stated that:

"When the essence of a lawsuit involves contesting the liability of the plaintiff for cleanup costs, the courts are to apply the provisions of section 113(h), delaying such challenges until the government has filed a suit."[13]

Senator Stafford cited Lone Pine Steering Committee v. EPA,[14] one of the leading cases on CERCLA jurisdiction. Lone Pine disallowed both statutory and constitutional challenges against CERCLA until EPA started an enforcement action. Not all courts had agreed with Lone Pine, but Senator Stafford seemed to be saying that the Senate did.[15] The courts, however, have been divided on the legislative history's meaning.

Two cases representative of existing hazardous waste law were Barmet Aluminum Corp. v. Reilly[16] and South Macomb Disposal Authority v. EPA.[17] Barmet and South Macomb were similar in their rulings and rationales. Both courts thought that CERCLA's plain language was that § 9613(h) prohibited constitutional and statutory challenges until the time prescribed by the statute. The courts were particularly persuaded by the words that federal courts did not have jurisdiction over "*any* challenges."[18] South Macomb cited the Lone Pine holding that preenforcement review was not available. The courts also looked to the legislative history and cited the SARA hearing testimony of congressmen, EPA officials and Justice Department officials.

THE REARDON DECISION

The en banc appellate court found that § 9613(h) barred only certain types of constitutional challenges. The appellate court's plain language reading was that § 9613(h) only referred to "removal" and "remediation action" as described in § 9604. In other words, challenges were only barred to the EPA's administration of CERCLA, not to CERCLA itself. The court believed the Reardons' claim was a challenge to CERCLA, not to EPA's administration. The 1st Circuit Court was the first to distinguish between constitutional challenges to the statute and to the statute's administration.

In 1986, Congress reauthorized CERCLA in The Superfund Amendment and Reauthorization Act (SARA).

The court cited Supreme Court philosophy that a congressional attempt to bar constitutional challenges must be clearly stated,[19] and saw § 9607(h)'s bar to "*any* challenges" as not clearly including challenges to the statute. The court discounted Barmet and South Macomb as decisions related to claims against the administration of CERCLA rather than challenges to the statute. The court discounted the 1986 legislative history in the same manner believing that Senator Stafford's citation of Lone Pine was only as an example of cases that limited review of administrative actions and not as a statement that federal courts should have limited jurisdiction over CERCLA challenges.

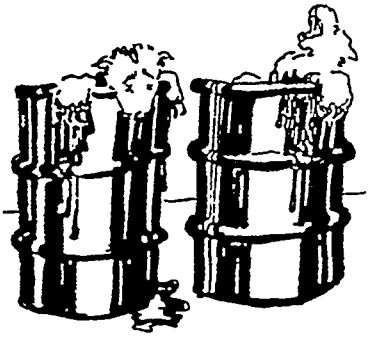
Having discounted or minimized prior hazardous waste law and legislative history, the 1st Circuit Court utilized two cases decided by the 1991 Rehnquist Supreme Court, McNary v. Haitian Refugee Center Inc.[20] and Connecticut v. Doehr.[21] In McNary, a refugee disputed a government ruling on his status and challenged the constitutionality of The Immigration and Nationality Act. The Act contained provisions similar to CERCLA in that individuals could not challenge a ruling under the act until the government initiated a second independent proceeding. The Supreme Court found that the Act did not preclude review of unconstitutional practices. The 1st Circuit used McNary as the basis for its decision that CERCLA could be constitutionally challenged.

The court found that there was a risk of an erroneous property taking because there were undecided factual issues.

Doehr concerned an attachment lien that the state of Connecticut placed on property in anticipation of winning a lawsuit against Doehr. The state wanted to ensure that there would be assets to secure an award. The Supreme Court found that the lien was a deprivation of a significant property interest, holding that the lien impaired the ability to sell the property, tainted the credit rating and might put the mortgage in technical default. The 1st circuit relied quite substantially on Doehr for its finding that CERCLA's lien provisions were unconstitutional. Doehr was decided after the appellate court heard the Reardon case and was not considered by the district court or the appellate court panel.

The court used the Supreme Court's two-part analysis[22] to determine if due process protection was required. The first part requires that there be a deprivation of a significant property interest. The district court had relied on Speilman-Fond Inc. v. Hanson's Inc.[23] to determine that a significant property interest was not involved. However the Supreme Court, in Doehr, reversed its previous summary affirmance of Speilman-Fond and found that Connecticut's attachment lien deprived Doehr of a significant property interest. Analogously, the appellate court found that EPA's lien deprived the Reardons of a significant property interest.

The appellate court next used the Supreme Court's three factor analysis[24] to determine if CERCLA could result in an erroneous property taking and, if so, whether there were appropriate protections. The court found that there was a risk of an erroneous property taking because there were undecided factual issues. The court further found that CERCLA had none of several common protections against erroneous taking. These protections include pre-action notice and a hearing. The court also ruled that the government's interest in the property was not clear because it had not been decided whether the property was owned by persons liable to the U.S. for CERCLA cleanup costs or was "subjected to or affected by a removal or remediation action."[25] The absence of protections may be justified by exigent circumstances. However, the court believed that EPA had not shown exigent circumstances existed. For instance, EPA had not alleged that the Reardons intended to diminish the government's position and there was no indication that the Reardons were about to sell the property.



The court then looked at the additional burden to the government for providing safeguards. The court found that there would be a additional burden but it would be minimal. The EPA would be required to file a Notice of Lien and provide a hearing. The court felt that this could provide protection even if the EPA only had a minimal burden at the hearing.

There was a dissenting opinion on the lien provision's constitutionality. The dissent believed that CERCLA § 9607(l) and § 9613(h) did not violate the Fifth Amendment and further believed that a prompt post-deprivation hearing would provide adequate protection. Hooper v. California[26] requires that a court must find that every reasonable constitutional interpretation has failed, before finding a statute unconstitutional. The majority had not done that. The dissent argued that liens were not CERCLA "enforcement activities." In fact, they were not activities at all, and therefore not covered by § 9613(h). If liens were not considered an enforcement activity, a review procedure could be established, CERCLA would be internally consistent and constitutional.

The dissent, therefore, concluded that there was a constitutional interpretation that provided PRPs protection and that did not impact the EPA mission.

HOW MUCH OF CERCLA DOES REARDON TAKE?

There are two levels at which the lien issue can be viewed. At a micro-level we see landowners who may have been erroneously deprived of a property interest. At a macro-view, we see a conflict between public environmental policy and individual property rights. The need to balance these two considerations is not unique to environmental policy. It is, however, part of most environmental actions. Reardon, like Lucas v. South Carolina Coastal Commission[27], is a test of where the balance should be struck. Reardon considers whether it is more important for the government to aggressively enforce CERCLA or to protect PRPs against potentially erroneous property takings.

The 1st Circuit found that EPA's lien deprived the Reardons of a significant property interest.

Courts have generally found, as the district court, that Congress did mean to delay any legal or administrative proceeding that would impact EPA's hazardous waste responsibilities. They did believe that the balance should be struck in favor of public policy and did recognize that CERCLA's mandates required the statute to be broadly construed.[28] Reardon appears to subvert the drafter's intent and has taken a view counter to prior hazardous waste law. Reardon is important for what the court said but more important for the basis of the decision. The appellate court heavily relied on decisions from the current Supreme Court that reflected a strong interest in protecting personal and property rights and were not based on hazardous waste law.

The appellate court found that there was a significant property interest taken. However, it could be argued that, the Reardons' property interests were so significantly diminished by the presence and proximity of hazardous waste, that the imposition of a lien did not significantly impact their remaining property interests. The 1st Circuit also appears to stretch Doehr to fit Reardon. There was a significant difference between the two cases. In Doehr, the state had no interest until it prevailed in a lawsuit against Doehr. In Reardon, the government had already invested over $360,000 in the property, was planning on investing some part of $16,100,000 and was trying to protect that interest.

There was no need to find that CERCLA violated the Fifth Amendment. The Reardons' specific lien issue can be construed as other then a removal action, a remedial action or an enforcement activity. Therefore, a prompt post-lien hearing would provide appropriate protection.

Is the court's decision significant as a matter of law? The appellate court seems to think that it is not. They point out that their finding was only for challenges to the statute, not to EPA's administration. They believe that there will only be a small number of possible challenges to the statute. But the court's decision is significant. Prior to Reardon, courts that have entertained challenges to the statute have ruled in favor of CERCLA. The appellate court has gone a step further. It has changed the relative weights given public policy and private property rights. The appellate court's decision is legally significant in other ways. It could cause litigation of the same issues that were litigated pre-SARA. PRPs, who wish to delay EPA action, can frame a challenge in terms of a "challenge to the statute" rather than EPA's administration. Now that the court has found that there was a significant interest taken, can the Reardons request compensation? Also, a court could next find that the factual issues of "innocent landowner" and "overly broad" lien should be litigated prior to a cost recovery action. PRPs might argue that property interests are impaired until a ruling on an "innocent landowner" claim. Any commercial activities are certainly affected by whether a PRP is liable for some part of a $16,000,000 cleanup. Can a delayed hearing adequately compensate the PRP for that? If Reardon is extended to these types of actions, the government would be subject to the piecemeal litigation that Congress wished to avoid. Some believe that Reardon will have a

Some believe that Reardon will have a domino effect.

domino effect and result in challenges to state environmental liens which are often more stringent than CERCLA liens.[29]

Is Reardon significant as a matter of administrative policy? The appellate court sees it as having minimal impact. Although the appellate court cites some stringent requirements in Doehr, they conclude that a minimal pre-lien hearing, might suffice. Granted, a judicial action on this point would not delay EPA's cleanup. However, it could impact their ability to collect damages and costs.

Reardon is a good candidate for review by the Supreme Court. CERCLA is a high profile, high cost program. EPA has been under fire for not delivering results and the EPA is likely to appeal any ruling that hinders their ability to do so. However, a Supreme Court ruling may not be what the EPA wants. An appeal would provide the court with the opportunity to directly apply it's property rights philosophy to hazardous waste law. If Reardon stands, the 1st Circuit may have taken more from CERCLA than CERCLA took from the Reardons.

Robert Lutolf is a second year student in the Graduate School of Management at U.C. Davis. He is majoring in Environmental and Natural Resource Management. He is also President of Gensa Corporation, a developer of computer systems for environmental applications.

ENDNOTES

[1]42 U.S.C. §9600 *et. seq.*

[2]Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response Compensation and Liability('Superfund ') Act of 1980**, 8 Columbia Journal of Environmental Law 1 (1982).

[3]Reardon v. U.S., 947 F.2d 1509, 1523 (1st Cir. 1991).

[4]*Id.*

[5]Lewis M. Barr, *CERCLA Made Simple: Analysis of the Cases Under the Comprehensive Environmental Response, Compensation and Liability Act of 1980*, 45 The Business Lawyer 925 (May 1990).

[6]42 U.S.C. § 9607(l)(1).

[7]42 U.S.C. § 9607(l)(2).

[8]42 U.S.C. § 9613(b)7.

[9]42 U.S.C. § 9613(h)(1).

[10]Reardon v. United States, 731 F. Supp. 558 (D. Mass. 1990).

[11]Reardon, supra, at 568.

[12]Public Law 99-499, December 1986.

[13]Congressional Record-Senate, S14898 (daily ed. Oct. 3, 1986).

[14]600 F. Supp. 1487 (D. N.J. 1978)

[15]Congressional Record, supra, S14898.

[16]927 F.2d. 289, 293 (6th Cir. 1991).

[17]681 F. Supp. 1244, 1251 (E.D. Mich. 1988).

[18]42 U.S.C. § 9613(h).

[19]Webster v. Doe, 486 U.S. 592, 603 (1988).

[20]_U.S._ 111 S. Ct. 888 (1991).

[21]_U.S._ 111 S. Ct. 2105 (1991).

[22]Fuentes v. Shevin 407 U.S. 67, 86 (1983).

[23]369 F. Supp. 997 (D. Ariz. 1973). The court said that a mechanics lien was not a significant property taking. They found that a CERCLA lien on real property could be considered a mechanics lien for remediation work . The U.S. Supreme Court subsequently affirmed Speilman-Fond in Illinois State Board of Elections v. Socialist Worker's Party, 440 U.S. 173, at 182-183.

[24]Mathews v. Eldridge 424 U.S. 319, 335 (1976).

[25]42 U.S.C. § 9607(l).

[26]155 U.S. 648, 657 (1895).

[27]404 S.E. 2d 895 (1991). South Carolina's Beachfront Management Act of 1988, enacted after Lucas purchased his $1,200,000 beachfront property, forbids him from building on the lots. The main purpose of this statute is to protect the health and welfare of the state's citizens. Lucas claims that the state has taken his property without compensation and is requesting full remuneration. The U.S. Supreme Court heard oral arguments in this case earlier this year and a decision is expected by summer of 1992.

[28]George Rodenhausen, *Environmental Legislation*, 40 Journal of the Air and Waste Management Association 1412 (October 1990).

[29]*Focus Cites*, 5 Hazardous Materials Control 14, (March/April 1992).