SAVING A DISAPPEARING EXEMPTION TO CERCLA LIABILITY

KURT M. RYLANDER*

INTRODUCTION

The Comprehensive Environmental Response, Compensation and Liability Act of 1980[1] (CERCLA) imposes the threat of unlimited liability on virtually every business transaction. CERCLA imposes strict liability, jointly and severally,[2] on potentially anyone who has dealt with a hazardous substance or owned property at which a hazardous substance has been present.[3]

---

* Associate, Riley & Artabane, Washington D.C. B.A., Economics, 1989, University of Washington; J.D., *cum laude*, 1994, Lewis & Clark's Northwestern School of Law. The author's practice focuses on government contracts and environmental regulation litigation. The author thanks Professor Craig Johnston for his time, comments, and advice.

1 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993).

2 *See, e.g.*, United States v. Alcan Aluminum Corp., 964 F.2d 252, 270-71 (3d Cir. 1992)(holding that joint and several liability is imposed when the harm caused by a release of hazardous substance is indivisible or is not subject to ready apportionment). *See also* Kelley v. Thomas Solvent Co., 714 F. Supp. 1439, 1448 (W.D. Mich. 1989)(holding that except where harm is divisible, liability is joint and several); United States v. Mottolo, 695 F. Supp. 615, 629-30 (D.N.H. 1988)(holding that CERCLA imposes joint and several liability); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 810 (S.D. Ohio 1983)(holding that CERCLA imposes joint and several liability).

3 42 U.S.C. § 9607 (1988). CERCLA § 107 borrows the strict liability scheme of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1988 & Supp. V 1993)(hereinafter Clean Water Act or CWA). *Chem-Dyne*, 572 F. Supp. at 810 (applying the strict liability standard of the Clean Water Act); *see also* New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985)(holding that CERCLA provides a strict liability scheme). Further, CERCLA requires only monetary damage for imposition of strict liability, not actual environmental damage. Dedham Water Co. v. Cumberland Farms Dairy, Inc., 889 F.2d 1146, 1152 (1st Cir. 1989)(holding that plaintiff need not prove actual contamination, only that release or threatened release caused incurrence of response costs). This strict liability is imposed broadly. *See Dedham Water*, 889 F.2d at 1156-57 (holding landowner liable under CERCLA for hazardous waste damage to adjoining property from waste migration); United States v. Monsanto Co., 858 F.2d 160, 168 (4th Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989)(holding lessors liable under CERCLA for hazardous waste storage of lessees); Tanglewood East Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568, 1574 (5th Cir. 1988)(holding that developers and realtors may be liable under CERCLA as interim property owners); Smith Land & Improvement Corp. v.

CERCLA's federally permitted release exemption, CERCLA section 107(j) (the Exemption), protects the holder of a federally approved permit from liability for hazardous substances that are released pursuant to the permit.[4]

The Exemption, however, is endangered. Federal courts have threatened the utility of the Exemption through holdings that have weakened the protective shield provided by a permit.[5] These decisions leave many unanswered questions concerning the Exemption's coverage. Making matters worse, the Environmental Protection Agency (EPA) utilizes an outstanding proposed rule, *Reporting Exemptions for Federally Permitted Releases of Hazardous Substances* (Official Pronouncement)[6] as its official position on the subject. EPA applies the Official Pronouncement to liability determinations, narrowly restricting the Exemption's coverage.[7] Although the Official Pronouncement is

---

Celotex Corp., 851 F.2d 86, 92 (3d Cir. 1988)(holding that successor corporation may be liable under CERCLA); *Shore Realty*, 759 F.2d at 1052-53 (2d Cir. 1985)(holding that stockholders and officers of landowner can be liable under CERCLA); United States v. Kayser-Roth Corp., 724 F. Supp. 15, 20-22 (D.R.I. 1989), *cert. denied*, 498 U.S. 1084 (1991)(holding that parent corporations may be liable under CERCLA); United States v. Sharon Steel Corp., 681 F. Supp. 1492, 1495-1500 (D. Utah 1987)(holding that dissolved corporation can be liable under CERCLA).

[4] 42 U.S.C. § 9607(j) (1988); *see* United States v. Iron Mountain Mines, Inc., 812 F. Supp. 1528, 1540-41 (E.D. Cal. 1992); Idaho v. Bunker Hill Co. 635 F. Supp. 665, 674 (D. Idaho 1986).

[5] *See, e.g., Iron Mountain Mines*, 812 F. Supp. at 1541 (holding that "response costs may be recovered for any releases that: (1) were not expressly permitted; (2) exceeded the limitations of the permit; or (3) occurred at a time when there was no permit") citing *Bunker Hill*, 635 F. Supp. at 673-74; *In re* Acushnet River, 722 F. Supp. 893, 895 n.2 (D. Mass. 1989)(Memorandum on Federally Permitted Releases)(noting that federally permitted releases may be outside the reach of CERCLA, but still punishable under the permit program); Idaho v. Hanna Mining Co., 699 F. Supp. 827 (D. Idaho 1987)(holding that a federal permit covers only those discharges specifically permitted and not all discharges which may occur in the course of the permit holder's overall operation); *Bunker Hill*, 635 F. Supp. at 674 (holding that recovery for damages may be sought under CERCLA when releases exceed limitations established by federal permits or when releases occur during a time period when there is no permit).

[6] 53 Fed. Reg. 27,268-81 (1988)(to be codified at 40 C.F.R. §§ 117.12, 302.3, 302.6, 355)(proposed July 19, 1988).

[7] *Compare id. with* 42 U.S.C. § 9601(10) (1988). Initially, EPA proposed the Official Pronouncement as a rulemaking. 53 Fed. Reg. 27,268 (1988). On May 8, 1995, however, EPA removed the proposal from its twelve month regulatory agenda. 60 Fed. Reg. 24,030 (1995). EPA stresses that the Official Pronouncement, as a proposed rule, has not been revoked or cancelled, and that it is EPA's official position on "federally permitted releases." Telephone Inter-

only an agency policy and not a rule, EPA, like many other federal agencies, frequently treats non-final rules and attendant agency policies as binding law.[8]

In addition, EPA liability determinations in CERCLA section 106 enforcement actions, known as administrative or "unilateral" orders,[9] pose an added danger to the holder of a permit because these orders cannot be judicially reviewed prior to enforcement.[10] These unilateral orders will effectively eliminate any right possessed by a permit holder to use the permit as a liability shield.

This Article recommends several options available to a permit holder facing the triple threat of inconsistent judicial deci-

---

view with Jack Arthur, Representative of Gerain H. Perry, EPA Regulatory Contact (July 6, 1995).

Indeed, EPA uses the Official Pronouncement in enforcement proceedings. *See, e.g., In Re* Mobil Oil Corp., Nos. EPCRA-91-0120, EPCRA-91-0122, EPCRA-91-0123, 1992 WL 293133 (E.P.A. Sept. 30, 1992). This is not an uncommon EPA practice. *See, e.g.*, United States v. Western Processing Co., 761 F. Supp. 713, 721 (W.D. Wash. 1991)(noting that policy documents established breadth of CERCLA's petroleum exclusion). By removing the Official Pronouncement from the regulatory agenda, but maintaining it as EPA's official position for enforcement, EPA protects its enforcement arsenal from adverse public scrutiny.

[8] *See* McLouth Steel Prod. Corp. v. Thomas, 838 F.2d 1317, 1321 (D.C. Cir. 1988)(noting that EPA used a policy model to determine hazardous waste delisting petitions); United States v. Zimmer Paper Prods., Inc., No. IP 88-194-C, 1989 U.S. Dist. LEXIS 16586 at *10 (S.D. Ind. Dec. 5, 1989)(noting that EPA relied upon an internal memorandum to impose "new and more stringent duties on the paper coating industry than those imposed under previously promulgated regulations"); Leslie Salt Co. v. United States, 700 F. Supp. 476, 485 (N.D. Cal. 1988), *rev'd*, 896 F.2d 354 (9th Cir. 1990), *cert. denied*, 498 U.S. 1126 (1991)(noting that Army Corps of Engineers relied upon comments to a final rulemaking and a general counsel opinion to support its assertion of Clean Water Act jurisdiction); Tabb Lakes, Ltd. v. United States, 715 F. Supp. 726 (E.D. Va. 1988), *aff'd*, 885 F.2d 866 (4th Cir. 1989)(noting that Army Corps of Engineers asserted Clean Water Act jurisdiction by relying on an internal agency memorandum); *Mobil Oil* at *13 (noting that EPA relied upon its non-final federally permitted release rules and comments thereto using the *Chevron* deference doctrine in a Clean Air Act enforcement action).

[9] Unilateral orders are administrative directives to take action, issued without resort to judicial review, contrasted with, for example, a search warrant. Throughout this article, EPA's administrative cleanup orders, issued pursuant to 42 U.S.C. § 9606 (1988), will be referred to as unilateral orders. EPA may also issue unilateral orders pursuant to other statutory regimes. *See* 33 U.S.C. §§ 1319, 1321 (1988 & Supp. V 1993)(authorizing unilateral orders under the Clean Water Act); 42 U.S.C. §§ 6928, 6973 (1988)(authorizing unilateral orders under the Solid Waste Disposal Act); 42 U.S.C. §§ 7413, 7477, 7603 (1988 & Supp. V 1993)(authorizing unilateral orders under the Clean Air Act).

[10] 42 U.S.C. § 9613(h) (1988); *see* discussion *infra* part I.B.

sions, EPA's use of the Official Pronouncement, and unilateral order liability. Part I of this Article first describes the Exemption and defines its place in CERCLA's liability scheme. Part I then examines the federal court decisions that have considered the Exemption. Finally, Part I discusses EPA liability determinations in unilateral orders. Part II demonstrates how the "reasonable apportionment" argument of *United States v. Alcan Aluminum Corp.*[11] can be used to lessen or avoid CERCLA liability. Part III demonstrates that, notwithstanding the binding effect given administrative interpretations under the "*Chevron* deference"[12] doctrine, agency policies and interpretations may not be used to determine the liability of a federal permit holder. This Article concludes that, by using recent CERCLA liability decisions and decisions placing limits on administrative rulemaking power, permit holders can limit or avoid CERCLA liability.

I
FEDERALLY PERMITTED RELEASES AND CERCLA LIABILITY

Holders of federally approved permits face two different types of CERCLA liability. First, CERCLA section 107, which imposes cost recovery and natural resource damage liability,[13] can be used by either private parties or by EPA.[14]

Section 107 imposes cost recovery and natural resource damage liability for the release of a hazardous substance at a site on: (1) the current or past owners or operators of the site; (2) persons who have arranged for the transport of hazardous substances to the site; and (3) persons who have transported hazardous substances to the site.[15] Only the specific statutory defenses

---

11 964 F.2d 252 (3d Cir. 1992).

12 *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)(holding that the authority for a formal rule reasonably interpreting statutory language is implicitly delegated through statutory ambiguity); *see also* Robert A. Anthony, *Which Agency Interpretations Should Get Judicial Deference? — A Preliminary Inquiry*, 40 ADMIN. L. REV. 121, 122 (Winter 1988)("*Chevron* requires outright acceptance of the agency's interpretation, provided only that its [sic] reasonable and not against specific statutory intent. I shall call this '*Chevron* deference.'").

13 42 U.S.C. § 9607 (1988); *see supra* notes 3, 5.

14 *See* 42 U.S.C. § 9607(a) (1988).

15 *Id.*; *see, e.g.*, B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1198-1201 (2d Cir. 1992)(holding that even a municipality can be liable under CERCLA "if it

listed in subsection 107(b) may be raised.[16] Absent proof of divisibility of harm or reasonable apportionment of damages between releases, liability is joint and several.[17]

Second, Section 106 gives EPA the authority to issue unilateral orders requiring action and site cleanup by a person when there "may be an imminent and substantial endangerment" from an "actual or threatened release."[18] Notably, such orders may not be reviewed prior to undertaking compliance.[19]

The Exemption, subsection 107(j), circumvents the section 107 limitation on defenses and exempts federally permitted releases from CERCLA liability.[20] Recovery "for response costs or damages resulting from a federally permitted release shall be pursuant to existing law in lieu of [section 107]."[21] Even the U.S. government remains precluded from suing for cleanup and remediation cost recovery.[22]

The term "federally permitted release" is defined in CERCLA section 101(10).[23] Subsections 101(10)(A) through

---

arranges for" the disposal or treatment of household waste at a landfill); *see also supra* notes 3, 5.

16 Kelley v. Thomas Solvent Co., 714 F. Supp. 1439, 1451-52 (W.D. Mich. 1989)(holding that equitable defenses provide no bar to CERCLA liability); Versatile Metals, Inc. v. Union Corp., 693 F. Supp. 1563, 1571-72 (E.D. Pa. 1988)(refusing to find that equitable defenses supplement CERCLA's three statutory affirmative defenses); *but see* United States v. Marisol, Inc., 725 F. Supp. 833, 844-45 (M.D. Pa. 1989)(refusing to strike equitable defenses); United States v. Mottolo, 695 F. Supp. 615, 626-27 (D.N.H. 1988)(stating that defendant can assert equitable defenses to government under CERCLA because the statute does not explicitly restrict or refer to equity jurisdiction).

17 *Supra* note 2.

18 42 U.S.C. § 9606(a) (1988).

19 42 U.S.C. § 9613(h) (1988); *see* discussion *infra* part I.B. For complying with a unilateral order, however, the party may receive reimbursement from the Superfund if the party is not a CERCLA § 107 responsible party. 42 U.S.C. § 9606(b)(2) (1988). Further, the complying party can sue any potentially responsible party for cost recovery under subsection 113(f). 42 U.S.C. § 9613(f)(1) (1988) ("Any person may seek contribution from any other person who is liable or potentially liable under [section 107(a)]. . . ."). Declaratory judgment may be granted immediately on spending any amount on cleanup or site assessment "during or following any civil action under [section 106]." *Id.*

20 42 U.S.C. § 9607(j) (1988); *see* Idaho v. Bunker Hill Co., 635 F. Supp. 665 (D. Idaho 1986).

21 42 U.S.C. § 9607(j) (1988).

22 *Id.*

23 42 U.S.C. § 9601(10) (1988). Federally permitted releases also affect sections other than § 107. CERCLA subsection 103(a) exempts federally permitted releases from the reporting requirements of CERCLA. Even if a release is in a reportable quantity — the trigger for notification — it need not be re-

(K) list the federal permits and federally approved state permits that qualify a release as "federally permitted."[24] CERCLA approved permits include: (1) permits issued pursuant to the Federal Water Pollution Control Act of 1972 (Clean Water Act or CWA);[25] (2) permits issued pursuant to the Resource Conservation and Recovery Act of 1976 (RCRA);[26] (3) permits issued pursuant to the Clean Air Act of 1990 (CAA);[27] and (4) several other permits issued according to federal programs.[28]

The following Sections examine in detail the Exemption and its place within CERCLA's liability framework.

A. *Judicial Determinations Of Federal Permit Holder Liability*

Initially, courts recognized that a federal permit provides some defense to CERCLA liability.[29] In *Idaho v. Bunker Hill Co.*,[30] for example, the District Court of Idaho noted that a federal permit may provide a holder with liability protection.[31]

The *Bunker Hill* court faced a number of releases by the same defendant, all of which the defendant asserted were covered by a Clean Water Act National Pollution Discharge Elimi-

---

ported so long as it is within the scope of the permit. 42 U.S.C. §§ 9602, 9603(a) (1988). Further, EPA provides that federally permitted releases should not be included in the concept of "release" for purposes of section 121(d)(3) so that cleanup wastes may be transported to a facility emitting federally permitted releases. 53 Fed. Reg. 27,268 (1988).

24 42 U.S.C. § 101(10)(A)-(K) (1988).

25 33 U.S.C. §§ 1251-1387 (1988 & Supp. V 1993). *See* 42 U.S.C. § 9601(10)(A)-(D), (J) (1988).

26 42 U.S.C. §§ 6901-6992(k) (1988 & Supp. V 1993). *See* 42 U.S.C. § 9601(10)(E) (1988).

27 42 U.S.C. §§ 7401-7671(q) (1988 & Supp. V 1993). *See* 42 U.S.C. § 9601(10)(H) (1988).

28 42 U.S.C. § 9601(10)(F), (G), (I), (K) (1988). These subsections deal with permits issued under the following acts, respectively: the Marine Protection, Research, and Sanctuaries Act of 1972 (Ocean Dumping Ban Act of 1988), 33 U.S.C. §§ 1412-1445 (1988 & Supp. V 1993); the Public Health Service Act (Safe Drinking Water Act), 42 U.S.C. §§ 300f-300j-26 (1988 & Supp. V 1993); the Atomic Energy Act of 1954; and state law controlling the injection of fluids into the ground for the production of oil, 42 U.S.C. §§ 2011-2315 (1988 & Supp. V 1993).

29 *See, e.g.*, United States v. Iron Mountain Mines, Inc., 812 F. Supp. 1528, 1540-41 (E.D. Cal. 1992); *In re* Acushnet River, 722 F. Supp. 893, 901 (D. Mass. 1989)(Court Memorandum on Federally Permitted Releases); Idaho v. Hanna Mining Co., 699 F. Supp. 827, 831-32 (D. Idaho 1987); Idaho v. Bunker Hill Co., 635 F. Supp. 665, 673-74 (D. Idaho 1986).

30 *Bunker Hill*, 635 F. Supp. at 665.

31 *Id.* at 674.

nation System (NPDES) permit.[32] The defendant argued that the permit precluded recovery for natural resource damages.[33] The court rejected this argument, finding that the Exemption does not apply when hazardous substance releases: (1) are not expressly permitted; (2) exceed the limitations established in the permits; or (3) occur during a time period when there were no permits.[34] The *Bunker Hill* court denied the defendant summary judgment based on the existence of a NPDES permit because a question of fact existed as to whether the releases were within the scope of the permit.[35]

In *In re Acushnet River*,[36] the District Court of Massachusetts faced the question of how to determine liability where some releases by a party are federally permitted and some releases are not. Defendant Aerovox argued that the government had neither established that any migrating non-permitted releases, if such existed, were distinguishable from permitted releases nor that they had caused a unique, severable harm.[37] The court held that, when faced with a combination of permitted and non-permitted releases, the plaintiff must show that: (1) non-permitted releases exist; and (2) the non-permitted releases contributed to the complainant's harm.[38] The plaintiff need not prove "substantial" contribution, however.[39] The burden then shifts to the defendant to prove that the harm is divisible.[40] If the harm remains entirely attributable to the federally permitted releases, the permit-holding defendant is not liable.[41] Of course, absent a showing of divisibility, the defendant will be liable for the entire

---

[32] *Id.* at 673. NPDES permits are created and issued pursuant to 33 U.S.C. § 1342 (1988 & Supp. V 1993).

[33] *Id.*

[34] *Id.* at 674; *see also* United States v. Iron Mountain Mines, Inc., 812 F. Supp. 1528, 1540-41 (E.D. Cal. 1992).

[35] *Bunker Hill*, 635 F. Supp. at 674; *see also* Idaho v. Hanna Mining Co., 699 F. Supp. 827, 832 (D. Idaho 1987)(holding summary judgment based on Clean Water Act permit improper because a material issue of fact existed as to whether the discharge was from a point source or non-point source).

[36] *In re* Acushnet River, 722 F. Supp. 893 (D. Mass. 1989) (Memorandum on Federally Permitted Releases).

[37] *Id.* at 895-96.

[38] *Id.* at 897.

[39] *Id.* at 897 n.8 (referring to O'Neil v. Picillo, 883 F.2d 176, 179 n.4 (1st Cir. 1989)).

[40] *Id.* at 897.

[41] *Id.* at 896-98 & nn.9, 11 & 12; *see also* 42 U.S.C. § 9607(j) (1988).

harm.[42] The *Acushnet River* court also suggested a causation defense: the defendant may have a de minimis defense to liability if the non-permitted release could not have caused the harm, even without proof of divisibility.[43]

The *Acushnet River* burden of proof allocation was ignored by the District Court for the Eastern District of California in *United States v. Iron Mountain Mines, Inc.*,[44] even though the court cited *Acushnet River* as positive authority.[45] In *Iron Mountain Mines*, permits existed for some but not all of the metal mining waste.[46] The court held that evidence of "the mere existence" of non-permitted releases "is sufficient to suggest that non-permitted releases contributed to the harm."[47]

Clearly, these decisions establish two divergent bases for proving liability. According to *Acushnet River*, and to some extent *Bunker Hill*, a plaintiff must prove not only the existence of the non-permitted releases, but also that the releases contributed to the harm.[48] According to *Iron Mountain Mines*, on the other hand, a plaintiff need only show the "mere existence" of the non-permitted releases;[49] that alone is sufficient to suggest contribution.[50] Notably, none of these decisions explains the difference, suggested by the *Acushnet River* court, between contribution to harm and causation of harm.[51]

Despite the irreconcilability of these decisions, a reasoned analysis for determining liability in the face of federally permitted releases may be found. In a case not dealing with federally permitted releases, *United States v. Alcan Aluminum Corp.*,[52] the Court of Appeals for the Third Circuit outlined a method for dealing with questions of divisibility and lack of causation. The court held that the defendant could rebut the government's proof

---

[42] *Acushnet River*, 722 F. Supp. at 897; *see also* O'Neil v. Picillo, 883 F.2d 176, 179 (1st Cir. 1989)(concerning the great pig farm fire); United States v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1983)(holding that each defendant is liable for the entirety of an indivisible harm).

[43] *Acushnet River*, 722 F. Supp. at 897 n.11 (holding de minimis defense as obverse to the causation requirement).

[44] 812 F. Supp. 1528 (E.D. Cal. 1992).

[45] *Id.* at 1540-41.

[46] *Id.* at 1541.

[47] *Id.*

[48] *Acushnet River*, 722 F. Supp. at 897 n.8.

[49] *Iron Mountain Mines*, 812 F. Supp. at 1541.

[50] *Id.*

[51] *Acushnet River*, 722 F. Supp. at 897 & n.11.

[52] 964 F.2d 252 (3d Cir. 1992).

of liability by showing divisibility. Once the defendant shows divisibility, lack of causation proof can be used to decrease the amount of harm reasonably apportionable to the defendant.[53] The court stated: "Obviously, of critical importance in this analysis is whether a harm is divisible and reasonably capable of apportionment, or indivisible, thereby subjecting the tortfeasor to potentially far-reaching liability."[54] Accordingly, if a defendant can show divisibility and reasonable apportionment, the defendant may avoid liability altogether if the defendant's releases "did not or could not, *when mixed with other hazardous wastes*, contribute to the release and the resultant response costs. . . ."[55] If this is the case, the court concluded, "Alcan should not be responsible for *any* response costs."[56]

Applying the reasoning in *Alcan Aluminum* to federally permitted releases, no liability exists if non-permitted releases could not have caused the release and response costs. Only harm caused by the federally permitted release could justify the response and, as previously stated, recovery for such costs must be outside of CERCLA.[57]

B. *EPA Liability Determinations In Unilateral Orders*

EPA liability determinations in CERCLA section 106 unilateral orders remain the biggest threat to a federal permit holder. Except for a limited number of narrowly construed exceptions,[58] EPA's unilateral orders may not be reviewed prior to compliance.[59] In the words of one court, the scheme as created by

---

53 *Id.* at 271.

54 *Id.* at 269 & n.27 (noting that water pollution "is typically subject to the divisibility rule").

55 *Id.* at 270 (emphasis in original).

56 *Id.*

57 *Supra* notes 6 & 7.

58 *See* 42 U.S.C. § 9613(h)(1)-(5) (1988)(listing five exceptions to the ban on pre-enforcement review).

59 42 U.S.C § 9613(h) (1988); *see* Aminoil, Inc. v. United States EPA, 599 F. Supp. 69, 71 (C.D. Cal. 1984).

> Pre-enforcement review of [CERCLA] administrative orders . . . is not expressly prohibited by the statute. This Court finds, however, that the structure of the statute, its legislative history and cases construing it . . . demonstrate that Congress did not intend to allow judicial review of such orders prior to the commencement of either an enforcement action . . . or a recovery action. . . .

Id.

Congress requires parties to "shoot first (clean up) and ask questions (determine who bears the ultimate liability) later."[60]

For example, in *United States v. Reilly Tar & Chemical Corp.*,[61] EPA issued a unilateral order to Reilly Tar to construct and maintain a water treatment system.[62] Reilly Tar refused to comply.[63] Because punitive damages under CERCLA begin to accrue the moment a party fails to comply with a unilateral order, Reilly Tar brought an injunctive suit, challenging on due process grounds the constitutionality of CERCLA's punitive damages provision as used in conjunction with the bar on preenforcement review of unilateral orders.[64] The court upheld EPA's unilateral order and CERCLA's punitive damages provision, concluding that due process was satisfied because a defendant may avoid the imposition of punitive damages by presenting a "good faith defense."[65] Thus, a party must incur punitive damages before a good faith defense may be tested judicially.[66]

A permit holder may experience difficulty establishing a good faith defense because an approved permit may not shield the holder from CERCLA section 106 unilateral order liability. Because the Exemption provides no bar to equitable relief and

---

60 Kelley v. Envtl. Protection Agency, 15 F.3d 1100, 1106 (D.C. Cir. 1994), *reaff'd on reh'g*, 25 F.3d 1088, *cert. denied*, 115 S. Ct. 900 (parentheticals in original).

61 606 F. Supp. 412 (D. Minn. 1985).

62 *Id.* at 415.

63 *Id.*

64 *Id.* at 417.

65 *Id.* at 421; *see also* Aminoil, Inc. v. United States EPA, 599 F. Supp. 69, 73 (C.D. Cal. 1984)("This Court recognizes that the penalty provisions of § 9606(b) and § 9607(c)(3) would not apply to a party who could demonstrate that 'sufficient cause' existed for noncompliance with a § 9606(a) administrative order.").

66 On the other hand, if the party decides to comply with the order, it may seek reimbursement from the Superfund. 42 U.S.C. § 9606(b)(2)(A) (1988). Reimbursement should be easy to obtain for a party whose releases are permitted. Subsection 106(b)(2)(C) provides that reimbursement will be allowed when the party is "not liable for response costs under section [107(a)]." 42 U.S.C. § 9606(b)(2)(C) (1988). As noted earlier, subsection 107(j) expressly exempts a federal permit holder from section 107 liability. *Supra* notes 4, 20-22.

Additionally, once the party starts cleaning up the site, it can sue any potentially responsible party for contribution. 42 U.S.C. § 9613(f) (1988). This suit need not await completion of the cleanup; declaratory judgment may be granted upon the spending of any amount on cleanup or site assessment. *Id.*

because unilateral orders are equitable in nature, the fact that a permit exists for a release is irrelevant.[67]

When enacting CERCLA, however, Congress indicated that federally permitted releases are completely exempt from CERCLA's liability scheme:

> [Section 107(j)] authorizes responses to federally permitted releases but requires costs to be assessed against the permit holder under the liability provisions of other laws, not this bill. . . . The determination of exactly what liability standards . . . apply will be made . . . pursuant to regimes other than that of this bill.[68]

While section 107(j) speaks of this "section," Congress referenced the entire "bill," suggesting that federally permitted releases should not be subject to any liability under CERCLA.[69] Senator Randolph expressed the idea clearly: "'Federally permitted releases' would be excluded from the liability and notification provisions of this legislation."[70]

Further, to enforce a CERCLA section 106 unilateral order with punitive damages, EPA must invoke section 107.[71] Subsection 107(c)(3) provides the liability in punitive damages for violating section 106.[72] Because subsection 107(j) exempts a federally permitted release from liability under "this section," liability for punitive damages will not attach.[73]

II
THE OFFICIAL "FEDERALLY PERMITTED RELEASE" POLICIES

Absent judicial direction, only the policies and interpretations of EPA and the Army Corps of Engineers (the Corps) provide guidance to the federal permit holder. EPA's Official Pronouncement, as explained by the preamble, sets forth standards specific to each CERCLA section 101(10) category which,

---

[67] Michael J. Brennan, *Federally Permitted Releases and Liability under CERCLA*, 16 CHEM. WASTE LIT. REP. 172, 179 (1988).

[68] 126 CONG. REC. 30,932 (1980)(statement of Sen. Randolph).

[69] *Id.*

[70] *Id.* (emphasis in original).

[71] *See* 42 U.S.C. §§ 9606(b)(1), 9607(c)(3) (1988).

[72] *Id.* 42 U.S.C. 9607(c)(3) (1988) speaks to "a person liable." It would be strange if a court were to construe a section entitled "Liability" and then speak of liability under another section.

[73] 42 U.S.C. § 9607(j) (1988).

in many cases, limits the scope of a federal permit holder's liability coverage.[74] Notably, EPA establishes real limitations with respect to CWA section 402 NPDES permits,[75] CWA Publicly Owned Treatment Works (POTW) permits,[76] and CAA permits,[77] among others.[78] Further, the Corps, asserting its jurisdiction under CWA section 404 to grant or deny "dredge and fill" permits,[79] sets forth a policy in a Regulatory Guidance Letter that, if implemented, will destroy the Exemption with respect to wetlands permits.[80]

CERCLA provides that a CWA section 402 NPDES permit shields three classes of releases: those covered by a NPDES permit, those covered by a NPDES permit administrative record, and those covered by a NPDES permit application.[81] According to EPA, a NPDES permit administrative record, corresponding to CERCLA subsection 101(10)(B), covers only those discharges resulting from on-site spills to the permitted treatment system that were identified and considered in the issuance of the permit.[82] Further, EPA interprets discharges covered by a NPDES

---

[74] *Id.*; *see* discussion *infra* this part.

[75] *Compare* 53 Fed. Reg. 27,268, 27,271, 27,281 (1988)(to be codified at 40 C.F.R. § 302.3(1), (2), (3)) *with* 42 U.S.C. § 9601(10)(A)-(C) (1988).

[76] *Compare* 53 Fed. Reg. 27,268, 27,275-76, 27,281 (1988)(to be codified at 40 C.F.R. § 302.3(10))(proposed July 19, 1988) *with* 42 U.S.C. § 9601(10)(J) (1988).

[77] *Compare* 53 Fed. Reg. 27,268, 27,273-74, 27,281 (1988)(to be codified at 40 C.F.R. § 302.3(8)(proposed July 19, 1988) *and* Reporting and Liability Exemptions for Federally Permitted Releases of Hazardous Substances, 54 Fed. Reg. 29,306-07 (1989)(to be codified at 40 C.F.R. §§ 302, 355)(July 11, 1988)(proposing three policy options for Clean Air Act permitted releases) *with* 42 U.S.C. § 9601(10)(H) (1988).

[78] EPA, in the Official Pronouncement, also speaks on and interprets the remaining subsections of CERCLA section 101(10). *See* 53 Fed. Reg. 27,268-81 (1988)(to be codified at 40 C.F.R. § 302.3(4), (5), (6), (7), (9), (11))(proposed July 19, 1988).

[79] 33 U.S.C. § 1344 (1988).

[80] *Compare* Army Corps of Engineers Regulatory Guidance Letter, 89-03 (Aug. 29, 1989 to Dec. 31, 1991), 56 Fed. Reg. 2408-9 (1991)(proposed Jan. 22, 1991) *with* 42 U.S.C. § 101(10)(D) (1988).

[81] CERCLA §§ 9601(10)(A) through (C) give rise to these types of federally permitted releases, respectively. 42 U.S.C. § 9601(10)(A)-(C) (1988). These subsections are almost identical to §§ 33 U.S.C. 1321(a)(2)(A)-(C) of the CWA, which deal with oil and hazardous substance spills. EPA states that its interpretation of the CERCLA subsections will generally be the interpretations it has promulgated for the CWA subsections. 53 Fed. Reg. 27,268, 27,271 (1988)(clarifications of proposed 40 C.F.R. § 117.12)(proposed July 19, 1988).

[82] 53 Fed. Reg. 27,268, 27,271, 27,280-81 (1988)(to be codified at 40 C.F.R. § 117.12)(proposed July 19, 1988). These discharges must flow into a waste

permit application, corresponding to CERCLA subsection 101(10)(C), to be limited to those identified in a permit or permit application and caused by events occurring within the scope of the relevant operating or treatment system.[83]

A Clean Water Act POTW permit, according to CERCLA, shields a permit holder from liability for releases as soon as the pretreatment program is "submitted . . . for Federal approval."[84] EPA's Official Pronouncement, however, uses the language "an approved" pretreatment program rather than "submitted . . . for Federal approval."[85] Thus, a POTW permit holder has no liability protection until the pretreatment program is approved, even though the statute clearly vests liability protection upon application submission, not approval.[86]

The Official Pronouncement significantly narrows the coverage of a CAA permit for purposes of CERCLA liability.[87] CERCLA section 101(10)(H) provides that "any emission into the air subject to a permit or control regulation" is a federally permitted release.[88] EPA modifies this language to require that the air release not only be "subject to" a permit but also be "in compliance" with the CAA.[89]

---

water treatment system that is designed to treat the discharge. *Id.* The treatment system must be capable of eliminating or abating the maximum potential discharge from the identified source. *Id.* A discharge resulting from an on-site spill larger and more concentrated than that discussed in the public record will not be a federally permitted release. *Id.*

[83] *Id.* The discharge must not be a spill or an episodic event. *Id.*

[84] 42 U.S.C. § 9601(10)(J) (1988).

[85] 53 Fed. Reg. 27,275-76, 27,280 (1988)(to be codified at 40 C.F.R. § 302.3(10))(proposed July 19, 1988).

[86] *Compare* 53 Fed. Reg. 27,268, 27,275-76, 27,280 (1988)(to be codified at 40 C.F.R. § 302.3(10))(proposed July 19, 1988)("an approved . . . program") *with* 42 U.S.C. § 9601(10)(J) (1988)("for Federal approval").

[87] *Compare* 53 Fed. Reg. 27, 268, 27,273-74, 27,280 (1988)(to be codified at 40 C.F.R. § 302.3(8))(proposed July 19, 1988) *and* Supplemental Notice of Proposed Rule, 54 Fed. Reg. 29,306-07 (1989) *with* 42 U.S.C. § 9601(10)(H)(1988).

[88] *Id.*

[89] 53 Fed. Reg. 27,268, 27,273-74, 27,281 (1988)(to be codified at 40 C.F.R. § 302.3(8))(proposed July 19, 1988). Furthermore, EPA is considering three policy options with respect to the types of pollutants covered by the proposed modification of CERCLA subsection 9601(10)(H) to limit a permit holder's protection. *Id.*; Supplemental Notice of Proposed Rule, 54 Fed. Reg. 29,306-07 (1989). Under the first option, releases of particulates and VOCs (volatile organic compounds) will not be covered and would be subject to CERCLA's liability provisions. *Id.* The second option allows constituents, notably particulate matter, but not VOCs, to be considered federally permitted. *Id.*

Finally, the Corps—the agency in charge of implementing the wetlands permit process[90]—attempts to eliminate the Exemption with respect to CWA section 404 wetlands permits. While CERCLA excludes wetlands releases from liability if made pursuant to a section 404 permit,[91] the Corps, in a 1989 Regulatory Guidance Letter, directed its personnel to require applicants for wetlands permits to accept as a condition of receiving a permit any potential liability for the permitted activity that would arise under CERCLA but for the shielding effect of the permit.[92]

III
AVOIDING THE RESTRICTIVE AGENCY PRONOUNCEMENTS

Considering the strict, joint and several liability imposed by CERCLA section 107, and the unreviewability of EPA's unilateral orders, both EPA's Official Pronouncement and the Corps' Regulatory Guidance Letter seriously threaten federal permit holders. If left unchecked, EPA and the Corps may attempt to use their powers to determine liability.

As the following sections demonstrate, however, EPA and the Corps may not use their policies and interpretations to determine liability. These documents deserve no more persuasive weight than established under the "*Skidmore* analysis."[93] Under *Skidmore*, a court determining the liability of a federal permit holder for its releases should not give any weight to EPA's pronouncements because EPA plays an enforcement role in CERCLA liability actions.[94] The Corps' policy also deserves no consideration by a court and remains void through correct application of the Administrative Procedure Act (APA).[95]

---

90 33 U.S.C. § 1344 (1988).

91 42 U.S.C. § 9601(10)(D) (1988).

92 Army Corps of Engineers Regulatory Guidance Letter 89-03 (Aug. 29, 1989 to Dec. 31, 1991), 56 Fed. Reg. 2,408-09 (1991).

93 Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)(setting forth the analysis for determining the weight of non-legislative administrative documents).

94 *See* discussion *infra* part III.A.1.

95 5 U.S.C. §§ 551-559, 701-706 (1988).

A. *EPA's Official Pronouncement Cannot Bind*

EPA may not use its Official Pronouncement to determine CERCLA liability because it was not promulgated as a rule.[96] Furthermore, EPA lacks the delegated authority to make rules that bear on liability with respect to federally permitted releases.[97] Thus, EPA's Official Pronouncement must be classified as a policy statement, rather than a legislative pronouncement, because EPA has not formally promulgated it.[98]

1. Chevron *Deference Is Inappropriate*

EPA may assert that courts must defer to its Pronouncement[99] pursuant to *Chevron, U.S.A. v. Natural Resources Defense*

---

96 *See supra* note 7.

97 Adams Fruit Co. v. Barrett, 494 U.S. 638, 649 (1990)(holding that the authority to make rules with the force and effect of law must be delegated to the rulemaking agency); American Fed'n of Labor & Congress of Indus. Orgs. v. Donovan, 757 F.2d 330, 341 (D.C. Cir. 1985); *see also* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like — Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1312-13 (1992)("An agency may not make binding law except in accordance with the authorities and procedures established by Congress [in the Administrative Procedure Act]. To make binding law through actions in the nature of rulemaking, the agency must use legislative rules."). While Congress delegated the general power to make "necessary" rules with respect to CERCLA to the President in CERCLA § 115, 42 U.S.C. § 9615 (1988), a general delegation to make "necessary" rules does not provide a "carte blanche." *AFL-CIO*, 757 F.2d at 342 (stating that bare necessity of interpreting rules does not confer authority to treat interpretations as rules). Congress must first expressly delegate authority. Linemaster Switch Corp. v. EPA, 938 F.2d 1299, 1303 (D.C. Cir. 1991); *see also Adams Fruit*, 494 U.S. at 649 ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority."). Mere statutory ambiguity or silence, without indication of intent to delegate, does not create authority. *Adams Fruit*, 494 U.S. at 649 ("[W]e reject petitioner's view that AWPA's failure to speak directly to the pre-emption of state exclusivity provisions creates a statutory 'gap' within the meaning of *Chevron, U.S.A. . . .*"); *Linemaster Switch*, 938 F.2d at 1302-03 ("We cannot agree with EPA's suggestion that we resolve this statutory ambiguity through resort to *Chevron* deference.").

98 "A policy statement is an agency statement of substantive law or policy, of general or particular applicability and future effect, that was not issued legislatively and is not an interpretive rule." Anthony, *supra* note 97, at 1325 (footnotes omitted). Agencies are not authorized to make such statements binding. Anthony, *supra* note 97, at 1315. *See also* 5 U.S.C. § 551(4) (1988)(noting APA definition of "rule").

99 EPA frequently uses documents that have not endured the APA's rulemaking procedure to bind the public. *See, e.g.*, McLouth Steel Prod. Corp. v. Thomas, 838 F.2d 1317 (D.C. Cir. 1988)(reviewing EPA's use of a policy model to determine hazardous waste delisting petitions); *In Re* Mobil Oil Corp., Nos. EPCRA-91-0120, EPCRA-91-0122, EPCRA-91-0123, 1992 WL 293133

Council, Inc.[100] *Chevron* requires courts to defer to an agency interpretation whenever the term to be interpreted is ambiguous,[101] the agency's interpretation is a reasonable construction of that term,[102] and evidence exists that Congress intended to delegate gap-filling authority.[103] EPA, however, fails to satisfy these requirements with respect to the Official Pronouncement.

Congress did not delegate to EPA any interpretive authority with respect to "federally permitted releases." Instead, Congress delegated the authority to make reportable quantity rules.[104]

(E.P.A. Sept. 30, 1992)(noting that EPA relied upon the Rule, even though not final, and accompanying explanations in a CAA enforcement action); United States v. Zimmer Paper Prod., Inc., No. IP 88-194-C, 1989 U.S. Dist. LEXIS 16586, at *10 (S.D. Ind. Dec. 5, 1989)(noting that EPA relied upon an internal memorandum to impose more stringent rules than previously required). In *Mobil Oil*, EPA successfully asserted the Official Pronouncement to impose a significant monetary penalty against Mobil Oil Corp.

100 467 U.S. 837 (1984). "We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. . . ." *Id.* at 844 (footnotes omitted).

101 "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Id.* at n.9.

102 "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. . . ."*Id.* at 843. "[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* EPA's Official Pronouncement may well be considered an unreasonable construction of the phrase "federally permitted release." For example, the Official Pronouncement changes the language of the POTW permit exemption from "for Federal approval" to "an approved" pretreatment program. *Compare* 42 U.S.C. § 9601(10)(J) (1988) *with* Reporting Exemptions for Federally Permitted Releases of Hazardous Substances, 53 Fed. Reg. 27,268, 27,275-76, 27,281 (1988)(to be codified at 40 C.F.R. § 302.3(10))(proposed July 19, 1988). The statute clearly vests federally permitted release protection upon application submission, not approval.

103 Adams Fruit Co. v. Barrett, 494 U.S. 638, 649 (1990)("A precondition to deference under *Chevron* is a congressional delegation of administrative authority."); Linemaster Switch Corp. v. EPA, 938 F.2d 1299, 1303 (D.C. Cir. 1991)("Before we may defer to an agency's construction of a statute, we must find either explicit or implicit evidence of Congressional intent to delegate interpretive authority."); American Fed'n of Labor & Congress of Indus. Orgs. v. Donovan, 757 F.2d 330, 341 (D.C. Cir. 1985)(finding delegated authority to determine prevailing wage in a locality, but not to define locality).

104 42 U.S.C. § 9602(a)(1988) contains a direct delegation to the Administrator of EPA to promulgate regulations with respect to reportable quantities of hazardous substances. Reportable quantity regulations provide guidance as to which releases, and in what amount, because of their hazardous propensities, must be reported to the National Response Center. 42 U.S.C. §§ 9602, 9603

This delegation does not support EPA's Official Pronouncement[105] because Congress did not delegate to EPA any regulatory authority with respect to liability.[106] Therefore, the power to make CERCLA liability determinations is vested solely in the judiciary.[107] A court may not defer to EPA policies and regulations to the extent that they bear on determinations of liability.[108]

In *Kelley v. Environmental Protection Agency*,[109] the Court of Appeals for the District of Columbia Circuit vacated EPA's lender liability safe harbor rules because EPA lacked rulemaking authority.[110] EPA sought to give certainty and protection to the financial community by formally interpreting CERCLA section 101(20)—the secured creditor exemption.[111] After determining that EPA lacked authority pursuant to either CERCLA sections 105, 106, or 115 to determine section 107 liability, the court vacated the rule.[112]

(1988). Congress, however, determined that federally permitted releases do not warrant reporting. CERCLA § 9603(a) provides: "Any person in charge of a vessel or an offshore or an onshore facility shall, as soon as he has knowledge of any release (other than a federally permitted release) of a hazardous substance from such vessel or facility . . . immediately notify the National Response Center. . . ." 42 U.S.C. § 9603(a)(1988).

105 The amount of a federally permitted release is excluded from reportable quantity determinations. 42 U.S.C. § 9603(a) (1988).

106 *See* 42 U.S.C. § 9603(a)-(h) (1988); *see also* Kelley v. EPA, 15 F.3d 1100 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 900 (1995).

107 *See* 42 U.S.C. § 9613(a)-(h) (1988); *see also, e.g.*, Wagner Seed Co., v. Bush, 946 F.2d 918, 922 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 970 (1992)(noting that a challenge to a particular decision by EPA respecting liability "would have real force" and that an agency's reluctance to admit a mistake in the area of liability "may well be why the Congress provided for *de novo* judicial review"). "Indeed, the courts appear generally to have accorded EPA no deference even in its interpretations of the liability provisions of CERCLA § 107." *Id.* at 926; *see also Kelley*, 15 F.3d at 1105.

108 "The deference normally accorded to the administrative agency's interpretation of its own statute is simply inapplicable when the statutory provision is not one directed to the agency's administration of the law." Tucson Medical Ctr. v. Sullivan, 947 F.2d 971, 981 (D.C. Cir. 1991)(noting that statutory section is "expressly directed to the judiciary"). The "delegation [to promulgate standards implementing the act] . . . does not empower the Secretary to regulate the scope of the judicial power vested by the statute." Adams Fruit Co. v. Barrett, 494 U.S. 638, 650 (1990); *see also* Crandon v. United States, 494 U.S. 152, 177 (1990)(Scalia, J., concurring)(allowing no *Chevron* defense if law "is not administered by any agency but by the courts").

109 15 F.3d 1100 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 900 (1995).

110 *Id.* at 1109.

111 *Id.* at 1104.

112 *Id.* at 1105-09.

The court in *Kelley*, bound by the Supreme Court's decision in *Adams Fruit Co. v. Barrett*,[113] held that Congress "designated the courts and not EPA as the adjudicator of the scope of CERCLA liability. And Congress did so quite deliberately."[114] The court found EPA's claim of formal authority or, in the alternative, interpretative authority, to be irrelevant.[115] Noting that in the preamble to EPA's rule, EPA "attempted to straddle two horses" through its claims to authority, the court stated, "[i]f Congress meant the judiciary, not EPA, to determine liability issues—and we believe Congress did—EPA's view of statutory liability may not be given deference."[116]

In addition, EPA plays an enforcement role in CERCLA liability litigation.[117] Courts are reluctant to defer to an agency interpretation of a statute when the agency has an enforcement role,[118] particularly when Congress has withheld formal interpretative authority and instead has authorized the agency to act as a prosecutor.[119] Because EPA actively engages in CERCLA liability litigation, a properly informed court will refuse to give *Chevron* deference to EPA's Official Pronouncement regarding determinations of liability.

---

113 494 U.S. 638 (1990).

114 *Kelley*, 15 F.3d at 1107-08 ("It is intended that issues of liability not resolved by this act, if any, shall be governed by traditional and evolving principles of common law.")(quoting 126 CONG. REC. 30,932 (1980)(Statement of Sen. Randolph)).

115 *Id.*

116 *Id.*

117 "As the EPA simply acts as prosecutor in [CERCLA § 107] cases, the courts accord its judgment no more deference than they would a United States Attorney's decision to seek an indictment." Wagner Seed Co. v. Bush, 946 F.2d 918, 926 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 970 (1992).

118 *Id.*; *see also* Crandon v. United States, 494 U.S. 152, 177 (1990) ("[W]e have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference.").

119 "Where Congress does not give an agency authority to determine (usually formally) the interpretation of a statute in the first instance and instead gives the agency authority only to bring the question to a federal court as the 'prosecutor,' deference to the agency's interpretation is inappropriate." *Kelley*, 15 F.3d at 1108.

2. *Policy Statements Cannot Bind*

The Official Pronouncement cannot bind permit holders because it is a collection of policy statements.[120] Policy statements, by definition, are nonbinding:

> A general statement of policy . . . does not establish a "binding norm." It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy. A policy statement announces the agency's tentative intentions for the future.[121]

Accordingly, if EPA attempts to use the Official Pronouncement in a CERCLA section 106 enforcement action or in a CERCLA section 107 cost recovery action, the permit holder may bring suit to enjoin EPA's use of the policy statements.[122]

For example, in *American Bus Ass'n v. United States*,[123] the Court of Appeals for the District of Columbia Circuit halted enforcement of an Interstate Commerce Commission policy on application approval guidelines.[124] The court applied a two prong test to determine whether the Interstate Commerce Commission impermissibly used its policy as a binding norm: "First, courts have said that, unless a pronouncement acts prospectively, it is a binding norm. . . . The second criterion is whether a purported policy statement genuinely leaves the agency and its decision-

120 *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); Batterton v. Marshall, 648 F.2d 694, 702 (D.C. Cir. 1980); American Bus Ass'n v. United States, 627 F.2d 525, 529-35 (D.C. Cir. 1980).

121 Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974)(quoting Parker, *The Administrative Procedure Act: A Study in Overestimation*, 60 YALE L.J. 581, 598 (1951)).

122 5 U.S.C. §§ 701-706 (1988)(authorizing injunction suits against an agency by one aggrieved by agency action); *see also* McLouth Steel Prod. Corp. v. Thomas, 838 F.2d 1317, 1325 (D.C. Cir. 1988)(holding that EPA improperly used a policy model to determine hazardous waste delisting petitions in violation of the Administrative Procedure Act); United States v. Zimmer Paper Prods., Inc., No. IP 88-194-C, 1989 U.S. Dist. LEXIS 16586 at *26 (S.D. Ind. Dec. 5, 1989)(holding that EPA improperly used an internal memorandum, which EPA itself classified as a policy statement, to legislate tighter and more stringent air emission standards than provided in the regulations); Tabb Lakes, Ltd. v. United States, 715 F. Supp. 726 (E.D. Va. 1988)(holding that Army Corps of Engineers improperly asserted jurisdiction by relying on an internal memorandum), *aff'd*, 885 F.2d 866 (4th Cir. 1989).

123 627 F.2d 525 (D.C. Cir. 1980).

124 *Id.* at 526.

makers free to exercise discretion."[125] The court found that the policy at issue did establish "in reality a flat rule of eligibility."[126] Similarly, should EPA, based on the Official Pronouncement, disregard a CERCLA approved permit in a unilateral order action or a cost recovery action, it may be precluded from enforcing its policy.

Indeed, EPA's Official Pronouncement may only receive persuasive, rather than controlling, weight according to the Supreme Court's decision in *Skidmore v. Swift & Co.*[127] In *Skidmore*, the Supreme Court explained the proper weight due to policy statements:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade, if lacking power to control.[128]

Under this analysis, it is uncertain how a reviewing court will react to EPA's policy that: (1) a CWA NPDES permit administrative record covers only on-site spills;[129] (2) a CWA NPDES permit application does not cover spills and episodic events;[130] (3) a CWA POTW permit is not effective as a liability shield until the program issuing the permit is approved, rather than submitted "for approval" as the statute says;[131] (4) releases into the air

---

125 *Id.* at 529.

126 *Id.* at 531-32 (quoting from United States *ex rel.* Parco v. Morris, 426 F. Supp. 976, 984 (E.D. Pa. 1977)).

127 Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)(setting the analysis for reviewing and deferring to policy statements).

128 *Id.*

129 *Compare* Reporting, Exemptions for Federally Permitted Releases of Hazardous Substances, 53 Fed. Reg. 27,268, 27,281 (1988)(to be codified at 40 C.F.R. § 302.3(2))(proposed July 19, 1988) *with* 42 U.S.C. §§ 9601(10)(B) (1988)("The term 'federally permitted release' means . . . discharges resulting from circumstances identified and reviewed and made part of the public record with respect to a [Clean Water Act permit] and subject to a condition of such permit. . . .").

130 *Compare* 53 Fed. Reg. 27,268, 27,271 (1988)(to be codified at 40 C.F.R. § 302.3(2)) *with* 42 U.S.C. § 9601(10)(C) (1988).

131 *Supra* notes 84-86.

be not only "subject to" a CAA permit, but also "in compliance;"[132] or (5) a CWA permit does not cover either particulates, VOCs (volatile organic compounds), or both.[133]

Irrespective of a reviewing court's determination of these policies under the *Skidmore* analysis, if EPA asserts these policies to determine liability, they should be given no weight at all. As discussed above, EPA has an enforcement role that precludes judicial deference in CERCLA liability litigation.[134]

B. *The Corps' Regulatory Guidance Letter Is Void*

The policy announced by the Corps in its Regulatory Guidance Letter should not be enforced.[135] The Corps is mandated under the CWA to make wetlands permit rules and policies.[136] Its Regulatory Guidance Letter goes beyond the CWA and into CERCLA's liability scheme.[137] Implementation of the Regulatory Guidance Letter will undermine the wetlands permit exemption to CERCLA liability. Under the APA, the Corps' policy would be binding only if it were promulgated legislatively.[138] Since the Corps has no authority to make rules with respect to

---

132 *Supra* note 89. One tribunal, EPA's Environmental Appeals Board, has already examined the Official Pronouncement requirement that a release into the air be "subject to and in compliance with" a Clean Air Act regulatory program. *See In Re* Mobil Oil Corp., Nos. EPCRA-91-0120, EPCRA-91-0122, EPCRA-91-0123, 1992 WL 293133 at *8 (E.P.A. Sept. 30, 1992), where the Administrative law judge found the term "subject to" inherently ambiguous. While noting that *Chevron* deference remains inappropriate for a non-final interpretation, the judge nevertheless followed the interpretation, holding that the agency's construction was entitled to substantial weight under the *Skidmore* analysis. *Id.* at *13, *17.

133 *Compare* 53 Fed. Reg. 27,268, 27,273 (1988)(to be codified at 40 C.F.R. § 302.3(2)) *and* Supplemental Notice of Proposed Rule, 54 Fed. Reg. 29,306 (1989) *with* 42 U.S.C. § 9601(10)(H) (1988).

134 *See supra* discussion in Part III.A.1.

135 *See supra* notes 91-93.

136 *See* 33 U.S.C. § 1344(b) (1988).

137 Army Corps of Engineers Guidance Letter, 89-03 (Aug. 29, 1989 to Dec. 31, 1991), 56 Fed. Reg. 2408 (1991).

138 5 U.S.C. § 553 (1988); *see also American Bus Ass'n*, 627 F.2d 525 (D.C. Cir. 1980). Robert A. Anthony points out in his article that "when it does not merely interpret, but sets forth into new substantive ground through a rule that it will make binding, the agency must observe the legal procedures laid down by Congress." Anthony, *supra* note 97, at 1314. To determine if the promulgation is binding, Mr. Anthony suggests the following test: "Did the agency intend the document to bind? Has the agency given it binding effect? If the answer to either of these questions is 'yes,' the document should have been issued as a legislative [rule]." *Id.* at 1327.

CERCLA,[139] the Corps cannot promulgate the policy legislatively.[140]

Further, the Corps cannot use its wetlands permit authority to promulgate the rule as a permitting guideline. According to *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*,[141] (hereinafter *NRDC*) an agency must adopt regulations that comport with the will of Congress as stated in the statute.[142] In *NRDC*, the Court of Appeals for the District of Columbia Circuit invalidated EPA's "construction ban" as impermissible rulemaking.[143] The court ruled that EPA could not ignore the language of the CWA in order to comply with the National Environmental Policy Act.[144]

The Corps has even less authority to promulgate the policy announced in its Regulatory Guidance Letter than EPA had in *NRDC*. Because EPA administers the CWA sections it ignored in *NRDC*,[145] its "construction ban" would normally have received considerable deference.[146] The Corps, however, administers the wetlands permit program, not CERCLA, the statute it ignores.[147]

The *NRDC* court stated that EPA has authority over permitting, not construction, and that it was "the permitting, not the construction, which EPA has power to restrain . . . ."[148] Likewise, the Corps has authority over permitting, not CERCLA liability.[149] Therefore, it is the power to withhold a permit that the Corps may exercise, not the power to impose CERCLA liability.

---

139 *See* Exec. Order No. 12,580, 3 C.F.R. 193 (1988), *reprinted as amended in* 42 U.S.C. § 9615 (1988)(transferring the authority vested in the President with respect to the National Contingency Plan in CERCLA sections 105(a), (b), (c), and (g), 107(f)(2)(A), 118(p), 125, and 301(f), to agency heads such as the Administrator of the EPA and the Secretaries of Defense, Interior, Agriculture, Commerce, and Energy).

140 5 U.S.C. § 706(2)(C) (1988); *see supra* note 97.

141 822 F.2d 104 (D.C. Cir. 1987).

142 *Id.* at 131.

143 *Id.*

144 *Id.*

145 33 U.S.C. § 1361(a) (1988).

146 *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984)("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. . . .").

147 33 U.S.C. § 1344 (1988).

148 *NRDC*, 822 F.2d at 131.

149 *Compare* 33 U.S.C. § 1344 (1995)(giving the Corps jurisdiction over wetlands permit applications) *with* 42 U.S.C. § 9613(f) (1988)(vesting CERCLA liability decisions in the judiciary).

Indeed, while the Corps may withhold a permit in accordance with section 404 of the CWA,[150] it may not deny the permit based on a prospective permittee's refusal to assume CERCLA liability. Such action would give practical binding effect to the policy of denying permits based on refusal to assume CERCLA liability.[151] When an agency gives a policy practical binding effect, it has engaged in improper rulemaking in violation of the APA.[152]

The Corps considers the policy to be only a guideline for approving wetlands permits does not render the policy any less binding.[153] Regular application of this policy proves the Corps' intent to bind.[154] If the Corps treats the liability assumption requirement as binding, and if a private party reasonably believes that it will suffer by noncompliance, courts will consider the policy to have a practical binding effect.[155]

A private party will certainly believe that it will suffer by noncompliance. If it accepts the condition of the permit, it will be stuck with whatever CERCLA liability arises—liability from which it should be exempt.[156] Because Congress did not intend for a federal agency to require a private individual to waive a congressional exemption, the Corps' regulatory guidance letter

---

150 33 U.S.C. § 1344 (1988).

151 *See* discussion *infra* this part.

152 *See* McLouth Steel Prod. Corp. v. Thomas, 838 F.2d 1317, 1325 (D.C. Cir. 1988)(holding that EPA improperly used a policy model to determine hazardous waste delisting petitions in violation of the Administrative Procedure Act); United States v. Zimmer Paper Prods., Inc., No. IP 88-194-C, 1989 U.S. Dist. LEXIS 16586 at *26 (S.D. Ind. Dec. 5, 1989)(holding that EPA improperly used an internal memorandum, which EPA itself classified as a policy statement, to legislate tighter and more stringent air emission standards than provided in the regulations); Tabb Lakes, Ltd. v. United States, 715 F. Supp. 726 (E.D. Va. 1988) *aff'd*, 885 F.2d 866 (4th Cir. 1989)(holding that Army Corps of Engineers improperly asserted jurisdiction by relying on an internal memorandum).

153 *See supra* note 152 and accompanying text; Anthony, *supra* note 97, at 1328 ("[A] nonlegislative document is binding as a practical matter if the agency treats it the same way it treats a legislative rule. . . .").

154 *See* Anthony, *supra* note 97, at 1328 ("[I]n the setting of agency actions that pass upon applications for approvals [of] permits. . .*regular application of the standards* set forth in the document evidences both an intent to bind and a practical binding effect.")(emphasis added).

155 *See supra* note 8.

156 If the party does not comply (i.e., does not assume CERCLA liability): (1) the Corps may be able to enforce assumption through specific performance of the condition under 33 U.S.C. § 1344(s); or (2) the non-assumption itself may be noncompliance, invalidating the exemptive effect of the permit.

should not be followed.[157] Congress intended for the Exemption to extend to wetlands permits.[158] Thus, the Exemption should be given effect because: "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."[159]

Accordingly, a court may invalidate the Corps' imposed permit condition through application of the APA.[160] Section 706 of that Act allows a reviewing court to invalidate an agency rule "otherwise not in accordance with law"[161] or "in excess of statutory jurisdiction, authority . . . or short of statutory right. . . ." [162] The Regulatory Guidance Letter fits within one, or both, of these provisions.

CONCLUSION

The Exemption available to a federal permit holder for its hazardous substance releases is a potentially powerful tool for escaping CERCLA liability. The Exemption is disappearing, however. Court decisions concerning the Exemption are inconsistent and leave many questions unanswered. The power of the Exemption to give protection from EPA's unilateral orders is unexplored. Permit holders have little opportunity to challenge an improper EPA order. EPA and the Corps have proposed policies that would seriously limit, or erase, the Exemption.[163]

---

157 *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 845 (1984)(quoting from *United States v. Shimer*, 367 U.S. 374, 382-83 (1961), for the proposition that an administering agency's accommodation between conflicting statutory policy should not be disturbed, "unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned").

158 42 U.S.C. § 9601(10)(D) (1995); *see also* discussion *supra* Part II.

159 *Chevron*, 467 U.S. at 843 n.9.

160 5 U.S.C. § 706(2) (1988).

161 5 U.S.C. § 706(2)(A) (1988).

162 5 U.S.C. § 706(2)(C) (1988).

163 This is not to say that a permit holder cannot rely on the agency rules when it is to the holder's benefit. "It is black letter law that an agency must follow its own rule and this doctrine applies whether the rule is legislative or nonlegislative." CHARLES H. KOCH, JR., ADMINISTRATIVE PRACTICE AND PROCEDURE 602 (2d ed. 1991); *see also* Morton v. Ruiz, 415 U.S. 199, 235 (1974)("Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are more rigorous than otherwise would be required.").

Despite a seemingly unwinnable situation, a federal permit holder faced with EPA or Corps assertions of liability can successfully raise the Exemption as a defense. In a CERCLA section 107 cost recovery action, the federal permit holder can raise the de minimis defense suggested in *Acushnet River* and the reasonable apportionment theory used in *Alcan Aluminum*. In an EPA unilateral order enforcement action, the federal permit holder, although unable to challenge the order itself, may sue for declaratory judgment, challenging the liability determinations upon which EPA bases its order. When faced with an assumption of liability pursuant to the Corps' Regulatory Guidance Letter, the prospective permit holder may challenge a permit denial if the denial is based on a refusal by the permittee to assume liability.

Unless a federal permit holder challenges liability determinations that permit holder will remain at the mercy of the administrative agencies and a hesitant judiciary.