ENVIRONMENTAL LAW

by Robert D. Daniel and Michael D. Weiss***

I. INTRODUCTION

The Fifth Circuit's environmental law decisions during the survey period implicate three subject areas: (1) the cost recovery provisions of Superfund;[1] (2) the standing of persons or entities to intervene to defend lawsuits involving the federal government's environmental decisions; and (3) the extent of judicial deference to the exercise of discretion by environmental agencies. By far the most important decision by the court during the survey period is *EPA v. Sequa Corp. (In re Bell Petroleum Services, Inc.)*,[2] which, over a vigorous dissent[3] and among other holdings, reversed an application of joint and several liability for Superfund response costs and held that the EPA's choice of interim remedy in that case—provision of an alternative water supply—was arbitrary and capricious.

II. SUPERFUND COST RECOVERY

The *Bell Petroleum* decision on joint and several liability highlights the circuit's resolution of Superfund issues during the survey period. The

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1. The authors prefer to refer to this legislation as Superfund instead of its technical title, the Comprehensive Environmental Response, Compensation, and Liability Act, or the acronym CERCLA. Superfund, as amended, is codified at 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993).

2. 3 F.3d 889 (5th Cir. Sept. 1993).

3. *Id.* at 909 (Parker, J., District Judge sitting by designation, dissenting).

holdings in *Bell Petroleum* and *In re Cropwell Leasing Corp. v. NMS, Inc.*[4] addressed other issues under Superfund: (a) the Statute's use of the phrase "all response costs" to describe the extent of a responsible party's liability for federal or state government responses; (b) the EPA settlement exception to the Statute's amended contribution allocation provision; (c) the Statute's prejudgment interest provision; and (d) the Act's savings clause.

A. Joint and Several Liability

The court's decision in *Bell Petroleum* has already provoked extensive commentary.[5] The title of an early review asked whether the opinion will "ring in a new era."[6] Another observer commented, "[a] significant exception to the nearly universal finding of joint and several liability under [Superfund] is the Fifth Circuit decision in [*Bell Petroleum*]."[7] The *Bell Petroleum* panel itself might be surprised to learn of such a conclusion about the significance of the decision. And a close examination of the decision will demonstrate that it is more directly in line with prior decisions that even its text would indicate.

The pertinent facts in *Bell Petroleum* are relatively straightforward.[8] After finding elevated levels of chromium in a drinking water source caused by releases from a chrome-plating shop, the EPA designated an extensive area in Odessa, Texas, the "Odessa Chromium I" Superfund site.[9] After study, the EPA determined that the Odessa public water supply should be extended to the designated site to make available an alternative water supply on an interim basis.[10] The EPA sued the three successive owners of the offending shop to recover its response costs under Superfund.[11] Two of the three owners settled with the EPA.[12] The third litigated.[13]

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4. 5 F.3d 899 (5th Cir. Oct. 1993); *see infra* text accompanying notes 62-68.

5. *See* John C. Nagle, *CERCLA, Causation and Responsibility*, 78 MINN. L. REV. 1493, 1520-21 (1994); Scott Deatherage, *Vanquishing EPA's CERCLA Titan in* EPA v. Sequa Corporation*: A Successful Challenge of Joint and Several Liability and EPA's Remedy Selection*, 13TH ANNUAL RCRA/CERCLA AND PRIVATE LITIGATION UPDATE, ABA SECTION ON NATURAL RESOURCES, ENERGY & ENVTL. L. 4 (Dec. 9-10, 1993); Stephen C. Jones, *Courts Skeptical on Superfund Liability*, THE NAT'L L. J., Feb. 7, 1994, at 18; Stephen C. Jones, *Courts Show Impatience on CERCLA*, THE NAT'L L. J., Feb. 14, 1994, at 20; David Sive, *Understanding Superfund's New Calculus*, THE NAT'L L. J., Feb. 21, 1994, at 16.

6. Paul Shorb & Susan Ephron, *Will* Bell Petroleum *Ring in a New Era Under CERCLA?*, 1 J. ENVTL. L. & PRAC. No. 5 at 56, 56 (1994).

7. John Byl & Brian Felton, *Allocation Under CERCLA: How It Works and How It May Change*, 1 J. ENVTL. L. & PRAC. No. 6 at 28, 35 n.2 (1994).

8. *See Bell Petroleum*, 3 F.3d at 892-93.

9. *Id.* at 892.

10. *Id.* at 893.

11. *Id.*

12. *Id.*

13. *Id.*

The district court found that all three owners caused the contamination and were thus liable for the response costs.[14] The court held that the nonsettling owner had not demonstrated that the implementation of an alternative water supply was arbitrary and capricious and, accordingly, that the government could recover the cost of that response.[15] After finding that the nonsettling owner had not established that the harm caused by the shop was divisible, the court held that each of the owners would be jointly and severally liable for response costs.[16] The court further determined on equitable grounds that the costs should be borne by the three owners in nearly equal percentages.[17]

The nonsettling owner appealed, *inter alia*, the determination of joint and several liability.[18] After a review of the extant case law,[19] a majority of the Fifth Circuit panel purported to discern "three distinct, although closely-related, approaches to the issue of joint and several liability."[20] The majority called the first the "*Chem-Dyne* approach,"[21] named for the first significant district court decision addressing the issue.[22] The majority referred to the second as the "*Alcan* approach,"[23] named for decisions of the Second and Third Circuits involving Alcan Aluminum Corporation as the named party.[24] Last, the majority referred to the "moderate approach"[25] taken by another district court.[26] Purportedly synthesizing these three different approaches, the majority gleaned "certain basic principles."[27]

First, "joint and several liability is not mandated under [Superfund]; Congress intended that the federal courts impose joint and several liability only in appropriate cases, applying common-law principles."[28] Second, "all of the cases rely on the [joint and several liability provisions of the] *Restatement" of Torts*.[29] Third, "defendants are allowed an opportunity to attempt to prove that there is a reasonable basis for apportionment [i.e., that the harm is "divisible" within the meaning of the *Restatement*]

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14. *Id.*
15. *Id.*
16. *Id.* at 894.
17. *See id.* at 893-94.
18. *Id.* at 897.
19. *Id.* at 897-901.
20. *Id.* at 901.
21. *Id.*
22. United States v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1983).
23. *Bell Petroleum*, 3 F.3d at 901.
24. United States v. Alcan Aluminum Corp., 990 F.2d 711 (2d Cir. 1993); United States v. Alcan Aluminum Corp., 964 F.2d 252 (3d Cir. 1992).
25. *Bell Petroleum*, 3 F.3d at 901.
26. United States v. A&F Materials Co., 578 F. Supp. 1249 (S.D. Ill. 1984).
27. *Bell Petroleum*, 3 F.3d at 901.
28. *Id.*
29. *Id.*

(although they rarely succeed);'' if this proof is successful, joint and several liability will not be imposed, but response costs will be assessed severally on the basis for apportionment so proved.[30]

The majority further noted that while ''an early resolution'' of the joint and several liability ''divisibility'' issue ''is preferable,'' it agreed ''with the Second Circuit . . . that this [timing issue] is a matter best left to the sound discretion of the district court.''[31] The majority also held that equitable factors ''are more appropriately considered in actions for contribution'' under the express provisions of the statute, rather than in assessing whether to impose joint and several liability.[32] The majority thus concluded that in resolving the joint and several liability issue, ''*Restatement* principles must be adapted, where necessary, to implement congressional intent.''[33]

Addressing the actual facts of the case, the majority acknowledged that it was reaching a unique result:

> [M]ost [Superfund] cost-recovery actions involve numerous commingled hazardous substances with synergistic effects and unknown toxicity. In contrast, this case involves only one hazardous substance—chromium—and no synergistic effects. The chromium entered the groundwater as the result of similar operations by three parties who operated at mutually exclusive times. Here, it is reasonable to assume that the respective harm done by each of the defendants is proportionate to the volume of chromium-contaminated water each discharged into the environment.[34]

The majority, in effect, reasoned that the unavailability of complete records to establish precise volumes for a volumetric apportionment should be a factor to consider in apportionment, but would not preclude apportionment, because the known facts established that a volumetric apportionment would be reasonable.[35] Concluding that the nonsettling party had ''met its burden of proving that, as a matter of law, there is a reasonable basis for apportionment,'' the majority remanded the case to the district court for a volumetric apportionment.[36]

Judge Parker dissented, primarily on the premise that the district court's judgment was based on fact findings that should not be disturbed. He contended that while the majority found ''that the single chromium harm suffered . . . [was] the sort theoretically *capable* of apportionment'' and ''while [the nonsettling owner] met its *legal* burden of establishing that the type of harm . . . [was] capable of apportionment, it failed to meet its

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30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* at 902.
34. *Id.* at 903.
35. *Id.* at 902-04.
36. *Id.* at 904.

factual burden relative to apportionment."[37] Judge Parker went on to describe what he called the "legal fallacy" underpinning the majority decision: namely, the notion that "because the evidence . . . [was] clear that [the nonsettlor] did not cause 100% of the harm," the nonsettlor was entitled to apportionment.[38] Therefore, Judge Parker would have upheld the district court's imposition of joint and several liability and eventual equitable appointment as a finding of fact that was not clearly erroneous.[39]

On this point, the dissent appears to make the weaker case. The majority opinion fairly clearly states that the facts proved by the nonsettlor established that the chromium harm was "divisible" within the meaning of the *Restatement* as a matter of law. The *Restatement* plainly treats the divisibility question as a matter of law.[40] Contrary to the reasoning of the dissent, therefore, the district court's imposition of joint and several liability was appropriately treated as an error of law. The majority was therefore entitled—at least on the basis of its own legal analysis—to reverse this district court ruling. The supposed fallacy identified in the dissent is simply a correct application of the *Restatement.* If the harm is ruled "divisible" on some reasonable basis, the *Restatement* then permits the defendant to prove as a factual matter the harm it caused, and thus obtain several apportionment of damages premised on that reasonable basis for division.[41] Accordingly, the district court clearly erred as a matter of law in imposing equitable allocation of response costs, rather than the reasonable volumetric apportionment sought by the nonsettlor. Such an error of law cannot be salvaged by the clearly erroneous standard of review for fact findings. Again, the majority's reversal was entirely consistent with its adaptation of the *Restatement's* allocations of legal and factual issues and burdens of proof to the Superfund issue.

To the uninitiated, the legal conclusions of the majority opinion might appear subject to different criticism: namely, that the majority followed a district court decision—*Chem-Dyne*—rather than more recent circuit authority—the *Alcan* decisions. The real shortcoming in the opinion, however, lies elsewhere. The majority failed to acknowledge the true extent of uniformity in the circuit court holdings on the legal basis and structure for imposing joint and several liability under Superfund. The three "basic principles" identified in *Bell Petroleum* can in fact be traced directly to a decision by the Fourth Circuit.[42] Those basic principles have been

37. *Id.* at 909 (Parker, J., District Judge sitting by designation, dissenting).

38. *Id.*

39. *See id.* at 910-11.

40. *Id.* at 896 (citing RESTATEMENT (SECOND) OF TORTS § 434(1)(b) (1965)).

41. *Id.* (citing RESTATEMENT (SECOND) OF TORTS §§ 434(2)(b), 433(B)(2) (1965)).

42. United States v. Monsanto Co., 858 F.2d 160, 171-72 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989).

adopted, with express citation to the Fourth Circuit decision, by decisions (in chronological order) of the First,[43] Fifth (an earlier panel),[44] Sixth,[45] Third,[46] and Second[47] Circuits. This line of circuit authority, moreover, establishes no principles different from those announced in *Chem-Dyne*, but does explicitly reject the so-called "moderate" approach discussed in *Bell Petroleum*.[48] Accordingly, contrary to *Bell Petroleum*, there do not appear to be three separate legitimate approaches to joint and several liability in the case law; there is instead one virtually unbroken line of circuit cases establishing general legal principles—in the end, the principles ultimately stated in the *Bell Petroleum* majority opinion.[49]

Beyond this point, *Bell Petroleum* is probably a fair and legitimate representative of the circumstances in which faithful application of the principles expounded consistently in this established line of authority might lead to an appropriate rejection of joint and several liability for Superfund response costs. The decision in *Bell Petroleum* should therefore be properly viewed as reflecting a relatively unique set of Superfund facts, not a new or novel approach to the issue of joint and several liability.[50] Below, the authors discuss their own critical, and perhaps iconoclastic, views about the established line of authority itself.[51]

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43. O'Neil v. Picillo, 883 F.2d 176, 178 (1st Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990). An ALI/ABA publication suggested that *O'Neil* might resolve many joint and several liability issues. Bradford F. Whitman, SUPERFUND LAW AND PRACTICE § 4.103(d), at 118-20 (1991).

44. Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 672 (5th Cir. 1989). Notably, the *Amoco* decision makes no reference to the *Restatement* and does not clearly indicate that the defendant sought a factual determination on divisibility.

45. United States v. R.W. Meyer, Inc., 889 F.2d 1497, 1507 (6th Cir. 1989), *cert. denied*, 494 U.S. 1057 (1990).

46. United States v. Alcan Aluminum Corp., 964 F.2d 252, 267-71 (3d Cir. 1992).

47. United States v. Alcan Aluminum Corp., 990 F.2d 711, 721-23 (2d Cir. 1993).

48. *Alcan*, 964 F.2d at 270 n.29 (3d Cir.); *Monsanto*, 858 F.2d at 171 n.22. The majority in *Bell Petroleum* does appear to concede that this line of authority probably precludes the "moderate" approach. *See Bell Petroleum*, 3 F.3d at 900-01.

49. *Bell Petroleum*, 3 F.3d at 900-01.

50. On the other hand, the prior case involving the closest set of facts is *Amoco Oil Co. v. Borden, Inc.*, a Fifth Circuit opinion which involved successive owners of a single property, the operations on which released a single hazardous substance—radionuclides. 889 F.2d 664, 666 (5th Cir. 1989). In *Amoco*, the Fifth Circuit appeared to hold that such harm was *indivisible* as a matter of law. *Id.* at 672. The direct conflict with *Bell Petroleum* on this issue is probably best explained as the consequence of an apparent tactical decision by the *Amoco* defendant to argue other bases for avoiding liability rather than to challenge the joint and several ruling. *See id.*

51. Several aspects of the development of the law on Superfund joint and several liability in the circuits are curious. With all due respect to the *Chem-Dyne* opinion, it is amazing that the analysis of legislative history conducted by a district court should be accepted so uncritically by all circuit courts, almost without exception. This is especially so when several potential avenues of departure appear evident.

Most important are certain technical tenets of statutory construction related to the uses of legislative history. The Fifth Circuit has itself noted in general the "indefinite, if not contradictory, legislative history" of Superfund. *Amoco*, 889 F.2d at 667 (quoting United States v. Mottolo, 605 F.2d 898, 902 (D. N.H. 1985)). It is usually conceded, moreover, that a legislature's failure to pass a particular

provision is not a necessarily strong guide to the meaning of the legislation that is passed. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 382 n. 11 (1969). It is possible, for example, that omitted measures were considered unnecessary, not that they were substantively rejected by a majority. Indeed, the *Chem-Dyne* decision expressly concluded that the "deletion was not intended as a rejection of joint and several liability." *Chem-Dyne*, 572 F. Supp. at 808. The court's ultimate analysis, nevertheless, relied heavily on the decisions by the Senate and House to remove express joint and several liability provisions from their respective bills and concluded that the development of the law related to joint and several liability should be left to common law development under the *Restatement*. *Chem-Dyne*, 572 F. Supp. at 804-10. The Supreme Court issued a significant decision limiting the use of federal common law to resolve environmental disputes after Superfund was passed, but before the *Chem-Dyne* decision. City of Milwaukee v. Illinois, 451 U.S. 304, 317 (1981). Any supposed congressional understanding of the meaning of the omission of an express joint and several provision is, therefore, premised on an apparent error of law.

The court in *Chem-Dyne*, moreover, acknowledged that in contrast to the legislative history, the text of the Superfund liability provisions was for all practical purposes identical to the oil spill liability provisions of the Clean Water Act, and those provisions had already been interpreted as requiring the imposition of joint and several liability. *See Chem-Dyne*, 572 F. Supp. at 809-10. The court had relied on this resemblance to hold that Superfund required strict liability, but refused to extend that analysis to joint and several liability. *Chem-Dyne*, 572 F. Supp. at 805, 810.

The *Chem-Dyne* opinion contains other remarkable points. The decision states that the provisions of the Superfund statute are ambiguous, but in doing so neither quotes any relevant statutory text nor describes why it might be ambiguous. *Chem-Dyne*, 572 F. Supp. at 805. The statute, after all, states plainly that each responsible party shall be liable for all enumerated response costs, subject only to specified statutory defenses. 42 U.S.C. § 9607(a)(4)(A). At least one circuit has been honest enough to acknowledge that the "divisibility" inquiry engrafts a "common law" defense into the statute by implication, in apparent contravention of the express (and unambiguous) words of the statute. *See Alcan*, 990 F.2d at 721 (2d Cir.).

Statements about the reasons for a legislative omission that themselves contain apparent errors of law should be particularly suspect as a guide for discerning the legislative will, especially if those statements lead inexorably to an interpretation in contravention of the language of the statute itself. Yet that is precisely the dispositive analysis of *Chem-Dyne* that has been uncritically adopted by the Fifth Circuit in *Bell Petroleum* and in other circuit court decisions.

Similarly, it has since become accepted wisdom that in enacting Superfund reform, Congress affirmed the validity of the *Chem-Dyne* decision. Read closely, however, the applicable legislative report merely states that Congress did not intend that the reform measures adopted should change the developing law on the subject of liability begun in *Chem-Dyne*. *See* United States v. R.W. Meyer, Inc., 889 F.2d 1497, 1507 n.19 (6th Cir. 1989), *cert. denied*, 494 U.S. 1057 (1990). This "double negative" is less than a ringing endorsement. It is a general principle of statutory construction, moreover, that the actions of a subsequent legislature are in any event a poor guide to the meaning of the acts of the earlier legislature. Consumer Prod. Safety Comm'n v. GTE Sylvania, 447 U.S. 102, 116-17 (1980).

Finally, the *Bell Petroleum* majority acknowledged in a backhanded way that contribution makes no sense unless joint and several liability has already been imposed. *See Bell Petroleum*, 3 F.3d at 898 n.10 (citing Environmental Transp. Sys., Inc. v. Ensco, Inc., 969 F.2d 503, 508 (7th Cir. 1992)). Yet the Superfund reform enacted an express contribution provision without condition. 42 U.S.C. § 9613. If anything, therefore, the actual text of the reform amendments permitting contribution as well as the original Superfund contribution provision, 42 U.S.C. § 9607(e), would indicate an understanding by Congress that, in the end, joint and several liability would indeed be imposed on those responsible parties who would be eligible for contribution.

To conclude, it is easy to contemplate an alternative construction of the liability provisions of Superfund which would hold that the express and unambiguous language of the statute—"shall be liable for . . . all costs," 42 U.S.C. § 9607(a)(4)(A)—effectuates a system of joint and several liability without the need to provide so explicitly. Given the rare occasion on which a responsible party has succeeded in avoiding joint liability, the government has probably seen little reason to press such an alternative construction in the face of the long line of authority following the construction in *Chem-Dyne*.

B. All Costs

This article will discuss in a later section the majority decision in *Bell Petroleum* that the EPA's interim response measure was arbitrary and capricious. On a separate issue, the nonsettling defendant in *Bell Petroleum* challenged the EPA's reading of Superfund 42 U.S.C. § 9607(a)(4)(A),[52] which provides that responsible parties are liable for "all costs of removal or remedial action incurred by the United States Government . . . not inconsistent with the national contingency plan."[53] In direct reliance on this language, the EPA contended that to avoid liability, the responsible party must demonstrate that the costs were inconsistent with the national contingency plan ("NCP") or pay. Noting that the EPA position would preclude judicial review for reasonableness, the majority expressed serious "doubt that Congress intended to give the EPA such unrestrained spending discretion."[54] The majority, following an earlier Tenth Circuit decision,[55] went on to hold that in any event, the EPA could not recover costs for responses found arbitrary and capricious, on the ground that arbitrary and capricious actions could not be consistent with the NCP.[56]

C. Settlement

The amended contribution provisions of Superfund state that any person who settles with the United States "shall not be liable for claims for contribution," but that the settlement "reduces the potential liability of [other responsible parties] by the amount of the settlement."[57] Sensibly reasoning that the contribution provisions did not make sense if joint and several liability was not imposed, the *Bell Petroleum* majority concluded that it "need not address this issue."[58] While the result that settlements do not reduce several liability must be correct, the overall issue cannot be so readily avoided. If the statute makes no sense in the absence of joint and several liability, how can joint and several liability under the statute be legitimately avoided?[59]

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52. *Bell Petroleum*, 3 F.3d at 906.
53. 42 U.S.C. § 9607(a)(4)(A).
54. *Bell Petroleum*, 3 F.3d at 907.
55. United States v. Hardage, 982 F.2d 1436, 1442 (10th Cir. 1992).
56. *Bell Petroleum*, 3 F.3d at 907-08.
57. 42 U.S.C. § 9613(f)(2).
58. *Bell Petroleum*, 3 F.3d at 908.
59. *See Alcan*, 964 F.2d at 269-71 (3d Cir.). Judge Parker's dissent addressed this issue at some length. Having concluded that joint and several liability was appropriate, he argued that the nonsettlor, after filing a claim for contribution under 42 U.S.C. § 9613(f)(1) before the United States settled with the other parties, should be entitled to a limitation of its liability appropriate under section 9613(f)(2) and should not be left to pay all costs less the amount of the settlement in accordance with section 9613(f)(1). *Bell Petroleum*, 3 F.3d at 913-14. It is doubtful that there is sufficient room for such an "equitable"

D. Prejudgment Interest

The full panel in *Bell Petroleum* held that neither the EPA's notices to potentially responsible parties, nor its formal Record of Decision to extend the public water supply as an interim response at the site, constituted sufficient notice of the EPA's claim against the nonsettlor to satisfy the written demand requirement of Superfund's prejudgment interest accrual provision, 42 U.S.C. § 9607(a)(4).[60] The court did hold that the government's federal court complaint satisfied the demand requirement.[61]

E. Savings Clause

In a per curiam decision in *In re Cropwell Leasing Corp. v. NMS, Inc.*, the court separately construed the Superfund savings clause, 42 U.S.C. § 9652(d).[62] There, the U.S. Government had asserted a claim under Superfund, the Clean Water Act, and general maritime law for natural resource damage and cleanup response costs in an admiralty limitation of liability proceeding involving a barge collision.[63] After the barge owner prevailed on the Superfund claim, the Government dismissed its Clean Water Act claim.[64] The district court then dismissed the general maritime law claim because it was not mentioned specifically in the Superfund savings clause.[65] The Government appealed solely this final action.[66] In straightforward reliance on the language of the Superfund savings clause, which unambiguously preserves the Government's claims "under other federal or state law including common law," the Fifth Circuit vacated the final dismissal, concluding that the Government's general maritime law claim for environmental response costs established under federal law had in fact been preserved.[67]

F. Conclusion

Cropwell Leasing is a blunt demonstration that federal district courts can and do make what most observers would consider simple errors of statutory construction. The presence of *Cropwell Leasing* in the same survey period with *Bell Petroleum* emphasizes the anomaly of the nearly

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approach under the explicit terms of section 9613.

60. *Bell Petroleum*, 3 F.3d at 908.
61. *Id.*
62. 5 F.3d 899 (5th Cir. Oct. 1993).
63. *Id.* at 900-01.
64. *Id.* at 901.
65. *Id.*
66. *Id.*
67. *Id.* at 901-02.

uniform circuit court obeisance to the statutory analysis of Superfund by the district court in *Chem-Dyne*.[68]

III. DEFENSIVE INTERVENTION

The court issued two superficially conflicting decisions on the right of parties to intervene to defend a government decision against attack under the environmental laws, reversing a denial of intervention as of right in *Sierra Club v. Espy*,[69] while dismissing an appeal pursued by intervenors in *Sierra Club v. Babbitt*.[70]

In *Espy*, a lengthy and ongoing case challenging logging practices, environmental groups successfully obtained a preliminary injunction blocking scheduled timber sales in Texas national forests.[71] When the Forest Service advised potential timber purchasers about the preliminary injunction and announced its decision to obey the injunction and, further, to stop all future timber sales, two purchaser trade associations sought to intervene in the litigation.[72] The district court denied their intervention motions.[73] The Fifth Circuit reversed, holding that the associations were entitled to intervene under Rule 24(a) of the Federal Rules of Civil Procedure because the associations met all four tests for intervention as of right.[74] With respect to the four-part test for timeliness under Rule 24(a), the court held first that even though intervention was sought years into the ongoing litigation, the intervention could be considered timely because the associations acted soon after they "actually knew or reasonably should have known of [their] interest in the case."[75] Then, noting that the second timeliness test—prejudice to opposing parties—"must be measured by the delay in seeking intervention, not the inconvenience to the existing parties of allowing the intervenor to participate in the litigation," the court concluded that the short interval between notice to the associations of their interest in the case and their motion to intervene created "no prejudice" to the existing litigants.[76] On the third timeliness element, the court concluded that the prejudice to the associations of denial of intervention was not obviated by their ability to appeal the preliminary injunction itself, especially since they had direct economic interests to protect and the decision of the district court might, under the principle of stare decisis,

68. *See Chem-Dyne*, 572 F. Supp. at 809-11.
69. 18 F.3d 1202 (5th Cir. Mar. 1994).
70. 995 F.2d 571 (5th Cir. July 1993).
71. *See* Sierra Club v. Espy, 822 F. Supp. 356 (E.D. Tex. 1993).
72. *Espy*, 18 F.3d at 1206.
73. *Id.* at 1203.
74. *Id.*
75. *Id.* at 1206.
76. *Id.*

influence decisions in other venues.[77] In ultimately concluding that the interventions were timely for purposes of Rule 24, the court found that no unusual circumstances favored one result over another.[78] Noting that existing timber contracts were "threatened by the potential bar on" past Forest Service practices, the court further concluded that the associations had a sufficiently "direct, substantial and legally protectable" interest in the litigation to support intervention.[79] The court then held that the association's ability to protect those interests would be impeded by the litigation because of "the *stare decisis* effect of the district court's judgment."[80] Last, the court concluded that the Forest Service's decision to expand the timber sale ban beyond the strict terms of the preliminary injunction established that the government was not adequately protecting the interests of the associations.[81] After concluding that the associations had established each of the four elements of intervention as of right under Rule 24, the court reversed the order denying intervention.[82]

In *Babbitt*, environmental groups sought a mandatory injunction requiring the Fish and Wildlife Service ("FWS") to undertake and implement plans to protect endangered species living in San Marcos and Comal Springs in Texas.[83] The district court allowed other associations and parties to intervene, both as plaintiffs and defendants, and after trial, enjoined the FWS "to generate and disseminate information about springflows necessary to protect endangered species" at the springs.[84] The FWS initially appealed, but upon change of administration, withdrew its appeal; certain intervenor defendants sought to continue the appeal.[85] At oral argument, attorneys for the plaintiffs stipulated that the judgment would have no preclusive effect in future litigation involving the defendant intervenors.[86]

On the basis of that stipulation and the principle that its own ruling on preclusion would be binding on other courts, the Fifth Circuit held that the intervenors did not have sufficient standing to continue the appeal because the intervenors would suffer no injury as a result of the district court's judgment; the judgment required the intervenors to do nothing and would not have a preclusive effect or other practical impact on future litigation

77. *Id.* at 1206-07.
78. *Id.* at 1207.
79. *Id.*
80. *Id.*
81. *Id.* at 1207-08.
82. *Id.* at 1208.
83. *Babbitt*, 995 F.2d at 573.
84. *Id.*
85. *Id.*
86. *Id.*

involving the intervenors.[87] By implication, of course, this analysis presumes that the stare decisis effect of the judgment on technical endangered species issues was not sufficient to give the intervenors standing to continue the appeal.

It would be easy to distinguish these two cases on the different procedural posture in the two cases; after all, the associations precluded from continuing the appeal in *Babbitt*[88] had been allowed to intervene before the district court.[89] On the other hand, why should the procedural tests for the different levels of litigation achieve fundamentally different results? The cases are indeed better distinguished by the difference in the character of the injury suffered by the intervening associations in the respective cases. Unlike the logging case, the springflow case did not result in revocation of existing contracts, but only in a requirement that the FWS conduct studies that would not be binding in future litigation.[90] In this context, the stare decisis effects of the decisions, while technically identical, did not portend the same practical consequences for the two sets of intervening associations. The practical difference in injury actually or potentially suffered by the respective associations, more than any technical difference in the tests for district court intervention and intervenor appellate standing, should explain why stare decisis effects counted in the timber sale case but not the springflow case.

IV. DEFERENCE TO AGENCY DISCRETION

Perhaps more of a real conflict can be discerned by comparing the court's decision to reject the EPA's chosen Superfund remedy in *Bell Petroleum* with the court's decision in *Harris v. United States* upholding a decision by the Farmers Home Administration ("FmHA") to impose wetlands easements on foreclosed property.[91]

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87. *Id.* at 575.

88. *See id.* at 573.

89. *Espy*, 18 F.3d at 1202.

90. *See Babbitt*, 995 F.2d at 575.

91. 19 F.3d 1090, 1090-91 (5th Cir. May 1994).

The continuing influence and impact of Executive Order No. 11990 was also evidenced by the decision in *Harris*. A bank had foreclosed on farmland owned by the plaintiff, Harris. *Id.* at 1092. The FmHA, a junior lienholder on the property, acquired the land at the foreclosure sale. *Id.* The FmHA then requested the Fish & Wildlife Service of the Department of Interior to conduct a wetlands assessment on the property and imposed an easement on the acreage determined by the FWS to be wetlands. *Id.* When the FmHA sold the property back to Harris with the wetlands easement, Harris sought a declaratory judgment that the easement was unlawful and a declaration that the property did not contain wetlands in any event. *Id.* Harris agreed that Executive Order No. 11990, issued by President Carter pursuant to the National Environmental Policy Act, had the force and effect of law, and provided that federal agencies could "attach other appropriate restrictions to the uses of property" that it may sell, "except where prohibited by law." *Id.* at 1093. Harris contended that the wetlands easements were indeed prohibited by provisions of the Food Security Act of 1985, 7 U.S.C. § 1985(e) (1988 & Supp.

To assess the validity of the wetlands determination in *Harris*, the court invoked the typical litany of principles governing review of agency decisions under the "arbitrary and capricious" standard of review, noting that this form of review was "very narrow" and was limited to determining whether the agency considered all relevant factors in connection with its decision.[92] The *Bell Petroleum* majority, noting that the arbitrary and capricious standard of limited review is expressly drafted into the Superfund statute, likewise quoted from the Supreme Court's *Motor Vehicle Manufacturers*[93] decision as a prelude to its assessment of the validity of the EPA's decision to require an alternative public water supply as an interim response to the chromium contamination pending final remedial action.[94]

The landowner in *Harris* raised four detailed challenges to the wetlands determination made by the FmHA,[95] which had adopted the determination of a FWS biologist without change.[96] The Fifth Circuit rejected each of Harris' challenges.[97] The *Harris* court noted that while the biologist had not referred to accepted methodology in his written report, he was experienced with wetlands assessments and did testify at trial that he had followed the accepted FWS approach.[98] Next, the court determined that generalized data about the wetlands characteristics of the applicable property was sufficient to support the biologist's determination even in the absence

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V 1993), and/or provisions of the Agricultural Credit Act of 1987, 7 U.S.C. § 2002 (1988). The *Harris* court rejected all of these arguments. Harris first argued that since Congress had expressly authorized the FmHA to impose conservation easements in the Food Security Act, it had by implication rejected authority to impose wetlands easements. *Id.* The court held that the "more plausible" interpretation "of Congress' inaction [was] that Congress felt no need to codify the FmHA's power to impose wetland easements because Executive Order 11990 already obliged the FmHA to do so." *Id.* at 1094. The court further held that inferences of any contrary legislative intent could not be drawn from the provision of the Food Security Act authorizing the FmHA to acquire conservation easements from delinquent borrowers, *see* 7 U.S.C. § 1997(e) (1988 & Supp. V 1993) (since Mr. Harris had borrowed his money from a private bank), from the provision of the Agricultural Credit Act authorizing the FmHA to transfer property to other governmental agencies when private rights had expired, *see* 7 U.S.C. § 2000 (1988 & Supp. V 1993), or from the subsequent enactment of express authority to impose wetlands easements, *see* 7 U.S.C. § 1985(g) (Supp. V 1993). The bottom line was that Harris was unable to point to any provision of law that effectively "prohibited" imposition of the wetlands easement within the meaning of the Executive Order. *Harris*, 19 F.3d 1093-95.

For the future, the "later enacted" provisions of 7 U.S.C. § 1985(g) should make clear the FmHA's authority to impose wetlands easements. With respect to any other action by a federal agency to protect the environment that does not have a clear statutory base, the *Harris* decision illustrates the continued influence of Executive Order No. 11990.

92. *Harris*, 19 F.3d at 1096.

93. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); *see Harris*, 19 F.3d at 1096.

94. *Bell Petroleum*, 3 F.3d at 904-05.

95. *Harris*, 19 F.3d at 1097-98.

96. *Id.* at 1097.

97. *Id.* at 1097-99.

98. *Id.* at 1097.

of soil samples.[99] The court then held that the designation of wetlands buffer areas as part of the wetlands easements was neither arbitrary nor capricious because of the possibility that those areas might flood as part of management of the "actual" wetlands areas and because of the administrative difficulty of limiting the easements to the precise wetlands areas.[100] Finally, the panel criticized the biologist's failure to keep most of his field notes, but upheld the district court's conclusion that "a wealth of institutional knowledge" about the property supported the wetlands determination recommended by the FWS.[101]

In general, the ruling in *Harris* illustrates the difficulty of challenging any technical determination by the government's environmental professionals.[102] The ruling further demonstrates that presenting a strong expert witness in favor of a private party at trial can be a two-edged sword.[103] Whereas some expert testimony may appear necessary to mount a persuasive challenge to the conclusions of a government professional, once the private party extends review beyond the confines of the agency's administrative record by offering such expert testimony, the government may well be permitted to go beyond the administrative record to explain apparent deficiencies in that record and thus bolster the evidentiary basis for its decision under the narrow arbitrary and capricious standard of review.[104]

The nonsettling former owner in *Bell Petroleum* also raised at least four objections to the EPA's decision to require an interim alternative water supply.[105] The nonsettling former owner contended that the EPA ignored the standard for imposition of an alternative water supply under the national contingency plan;[106] that the EPA did not analyze the health risk of chromium contamination at the site; that the Safe Drinking Water standards for chromium assumed a seventy-year exposure, whereas the alternative water supply was planned by the EPA for ten to fifteen years; and that the EPA failed to analyze whether contaminated water would in fact be ingested.[107] The Fifth Circuit majority characterized the EPA's defense of its decision as "singularly weak."[108] The majority found nothing in the administrative record to support the idea that anyone was drinking contaminated water.[109] Indeed, the only chromium-contaminated wells were all

99. *Id.* at 1097-98.
100. *Id.* at 1098.
101. *Id.* at 1098-99.
102. *Id.* at 1090.
103. *See id.*
104. *See id.*
105. *Bell Petroleum*, 3 F.3d at 905.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*

commercial wells that were not permitted to attach to the alternative water supply, and residential well owners were not required to attach to the alternative water supply.[110] The majority concluded that "[n]o technical expertise is necessary to discern that the EPA's implementation of the alternate water system was arbitrary and capricious, as well as a waste of money."[111] Judge Parker dissented from this holding, contending that the EPA's decision was a "reasonable policy choice" properly left to the agency's discretionary interpretation of its operative legislation under the Supreme Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[112] Judge Parker further argued that the court should not "second-guess the scientific judgments of the EPA,"[113] which, in these kinds of cases, may be based on "suspected, but not completely substantiated, relationships between facts, from trends among facts, from theoretical projections from imperfect data, from probative preliminary data not yet certifiable as 'fact,' and the like."[114]

On the surface, the differences between the majority and the dissent seem to flow from mere modifications of emphasis in assuring the narrowness of arbitrary and capricious review; however, the real underlying issue raised by this dispute in *Bell Petroleum* may be the extent of the power of the EPA under Superfund. Anyone familiar with a Superfund case from the government's perspective knows that as soon as a site is placed on the Superfund list and the site contains *any* risk of groundwater pollution, there will be a public demand from residential users of groundwater—well owners—for an alternative water supply long before the EPA has any chance to assess the real public health risks at the site. Is it arbitrary for an appropriately concerned agency to choose an alternative water supply to ease public fears while tests are being conducted, when the public can be persuaded that the groundwater is or is not safe only when the tests are final and conclusive? This question is one that may be resolved as a matter of law without regard to the evidence contained in a particular Superfund administrative record. Viewed this way, the issue dividing the majority and the dissent in *Bell Petroleum* can be recast as follows: Did Congress, in fashioning an interim solution under Superfund consistent with the national contingency plan, intend to allow the EPA to expend Superfund monies on a temporary alternative water supply to obviate potential or perceived risks associated with pollution at a Superfund site while the true nature and extent

110. *Id.* at 905-06.

111. *Id.* at 906.

112. *Id.* at 914 (quoting Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-45 (1984)).

113. *Id.*

114. *Id.* at 914-15 (citing Ethyl Corp. v. EPA, 541 F.2d 1, 28 (D.C. Cir.) (en banc), *cert. denied*, 426 U.S. 941 (1976)).

of those risks are being assessed for purposes of a final remedial action at the site? Judge Parker would quite clearly answer the question yes.[115] It is not clear that the *Bell Petroleum* majority ever contemplated the issue in this precise way.

V. CONCLUSION

It is fitting that this article begin and end with a discussion of *Bell Petroleum*. The Supreme Court has seen fit to leave resolution of difficult Superfund issues to the courts of appeals, and the *Bell Petroleum* panel struggled responsibly to apply an uncertain system of law to a largely unique set of facts.

115. *Id.*