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## Environmental Law

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# ENVIRONMENTAL LAW

by Jeffrey M. Gaba\*

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## I. INTRODUCTION

Although the Fifth Circuit addressed a limited number of federal environmental cases during the survey period, the court's opinions addressed extremely significant issues regarding the right of contribution under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) and the scope of Congress's authority under the Commerce Clause.<sup>1</sup> The court also issued a significant opinion relating to requirements applicable to nonattainment areas under the Clean Air Act.<sup>2</sup> Finally, the court limited the availability of citizen suits under the Clean Water Act by finding that Louisiana administrative enforcement procedures were "comparable" to federal requirements.<sup>3</sup>

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1. See discussion *infra* Parts II, III.  
2. See discussion *infra* Part IV.  
3. See discussion *infra* Part VI.

II. AVAILABILITY OF CONTRIBUTION UNDER CERCLA FOLLOWING A  
"VOLUNTARY" CLEANUP: *AVIALL SERVICES, INC. V. COOPER INDUSTRIES,  
INC.*

During the last survey period, a divided panel of the Fifth Circuit held in *Aviall Services, Inc. v. Cooper Industries, Inc.* that private parties do not have a right of contribution under the Comprehensive Environmental Response Compensation and Recovery Act unless they have been subject to a government enforcement order or judicial proceeding.<sup>4</sup> In effect, the panel's decision would have eliminated a right of cost recovery under CERCLA for most private parties who voluntarily clean up property.<sup>5</sup> The author of last year's survey quite properly described *Aviall* as one of the most significant CERCLA cases issued in recent years.<sup>6</sup>

In November 2002, however, the full Fifth Circuit, sitting en banc, reversed the panel.<sup>7</sup> The full court, in what surprisingly was an issue of first impression among federal courts of appeal, held that a right of contribution exists under CERCLA even if a plaintiff has not been subject to a prior government action.<sup>8</sup> The 10-3 opinion was authored by Judge Jones.<sup>9</sup>

The relevant facts in *Aviall* are straightforward.<sup>10</sup> Aviall Services purchased property from Cooper Industries that was contaminated with various hazardous substances.<sup>11</sup> After prodding from the then Texas Natural Resources Conservation Commission, Aviall began cleaning up the property.<sup>12</sup> The Environmental Protection Agency (EPA) never took any action regarding cleanup of the property.<sup>13</sup> After expending millions of dollars on the cleanup, Aviall brought an action seeking contribution under CERCLA<sup>14</sup> and cost

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4. 263 F.3d 134 (5th Cir. 2001), *rev'd*, 312 F.3d 677 (5th Cir. Nov. 2002).

5. *Id.*

6. Jennifer Hodgkins, *Environmental Law*, 33 TEX. TECH L. REV. 845 (2002).

7. *Aviall Servs., Inc. v. Cooper Indus., Inc.*, 312 F.3d 677 (5th Cir. Nov. 2002), *petition for cert. filed*, 71 U.S.L.W. 3552 (U.S. Feb. 12, 2003) (No. 02-1192). The author of this survey piece represented Aviall Services and was involved in drafting appellate briefs in this case.

8. *Id.* Perhaps even more surprising, the amicus brief filed by the Department of Justice at the request of the Fifth Circuit argued that CERCLA did not authorize a right of contribution in the absence of a pending or prior civil action under CERCLA. Brief for the United States as Amicus Curiae at 4-6, *Aviall Servs., Inc. v. Cooper Indus., Inc.*, 312 F.3d 677 (5th Cir. Nov. 2002), *petition for cert. filed*, 71 U.S.L.W. 3552 (U.S. Feb. 12, 2003) (No. 02-1192). Completing the surprise, the majority ignored the government's position and relegated it to a passing mention in a footnote by the dissent. *See Aviall Servs., Inc.*, 312 F.3d at 692 n.2 (Garza, J., dissenting). The Solicitor General's decision to argue for a narrow cause of action under CERCLA is, in the mind of this writer, the major, underreported environmental law position of the Bush Administration.

9. *See Aviall Servs., Inc.*, 312 F.3d at 677.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. CERCLA has two separate cost recovery provisions. *See Comprehensive Environmental Response, Compensation, and Liability Act* [hereinafter CERCLA] of 1980, 42 U.S.C. §§ 9607(a)(4)(B),

recovery under various state law theories.<sup>15</sup> The district court dismissed Aviall's CERCLA claim holding that there was no right of contribution under section 113(f) unless the plaintiff has been subject to a prior CERCLA action.<sup>16</sup> A divided panel of the Fifth Circuit affirmed.<sup>17</sup> The full panel, sitting en banc, reversed.<sup>18</sup>

The case involved the interpretation of the express right of contribution contained in section 113(f)(1) of CERCLA.<sup>19</sup> This section provides,

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) [section 107(a)] of this title, during or following any civil action under section 9606 [section 106] of this title or under section 9607(a) of this title. . . . Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.<sup>20</sup>

Acknowledging that reasonable minds could differ over the interpretation of section 113(f)(1), the majority of the en banc panel nonetheless held that the language of the section, its legislative history, the prior interpretations of the Fifth Circuit and other courts of appeal, and policy considerations all supported a construction that allowed a right of contribution in the absence of a prior civil action.<sup>21</sup>

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9613(f) (2000). When originally adopted in 1980, CERCLA had a private cost recovery cause of action in section 107(a)(4)(B). See CERCLA, Pub. L. No. 96-510, § 107(a)(4)(B), 94 Stat. 2767, 2781 (1980). In 1986, Congress added an express right of contribution in section 113(f). See CERCLA, Pub. L. No. 99-499, § 113(f), 100 Stat. 1613 (1986). The relationship between these two sections is unclear; the Supreme Court has described the two sections as "similar and somewhat overlapping." *Key Tronic Corp. v. United States*, 511 U.S. 809, 816 (1994). Aviall originally pleaded causes of action under sections 107(a)(4)(B) and 113(f) of CERCLA. *Aviall Servs., Inc. v. Cooper Indus., Inc.*, No. CIV.A.397CV1926D, 2000 WL 31730, at \*2 (N.D. Tex. Jan. 13, 2000), *rev'd*, 312 F.3d 677 (5th Cir. Nov. 2002). Aviall subsequently amended its pleadings to allege a combined section 107/113 claim. *Id.* The district court characterized Aviall's action as dropping any independent claim under section 107(a)(4)(B), but Aviall, in its briefs, disputed this characterization claiming that its case involved a combined claim brought under both 107 and 113. *Id.* at \*4. Such a combined claim is suggested by the Fifth Circuit's opinion in *Geraghty & Miller, Inc. v. Conoco, Inc.*, 234 F.3d 917 (5th Cir. 2000). The full panel in *Aviall* noted the parties' dispute over whether the suit was brought under section 107(a)(4)(B) as well as section 113(f)(1) but stated that it was "unnecessary to reach this question or to opine more concretely on the theoretical problems surrounding this 'overlap' of remedies." 312 F.3d at 685 n.15. Depending on the final resolution of the issues in *Aviall*, the question may arise regarding whether a PRP who does not have a right of contribution under section 113(f)(1) nonetheless has an independent claim under section 107(a)(4)(B) of CERCLA.

15. *Aviall Servs., Inc.*, 312 F.3d at 679-80.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. CERCLA, 42 U.S.C. § 9613(f)(1) (2000).

21. *Aviall Servs., Inc.*, 312 F.3d at 677.

The majority first evaluated the history of section 113(f).<sup>22</sup> Prior to the adoption of section 113(f), courts, including the Fifth Circuit, had allowed potentially responsible parties (PRPs) to sue for cost recovery under section 107(a)(4)(B) in the absence of prior government involvement, and many federal courts had found an implied right of contribution to allow cost allocation among PRPs.<sup>23</sup> The legislative history of section 113(f) suggested that Congress intended to “clarify” and “confirm” this implied right of contribution.<sup>24</sup> The majority in *Aviall* found that the limited legislative history supported a few “general observations” regarding section 113(f).<sup>25</sup> First, the section’s avowed purpose was to give PRPs the explicit right to sue for contribution and confirm earlier decisions of federal courts.<sup>26</sup> Second, Congress intended that courts develop equitable solutions for apportioning cleanup costs.<sup>27</sup> Third, although “snippets” of legislative history indicate that Congress clearly intended that a right of contribution exist after a PRP has been sued under sections 107 or 106, the legislative history was contradictory and, in many cases, referred to different versions of section 113(f) that were not ultimately adopted.<sup>28</sup> According to the full panel, these bits of legislative history “yield no guide” to interpretation.<sup>29</sup> The court did note, however, that “it would seem odd that a legislature concerned with clarifying the right to contribution among PRPs and with facilitating the courts’ development of federal common law apportionment principles would have rather arbitrarily cut back the then-prevailing standard of contribution.”<sup>30</sup>

Next, the court evaluated the express language of section 113(f).<sup>31</sup> The problem with construction of this section is its odd syntax.<sup>32</sup> The first sentence establishes a right of contribution “during or following” certain “civil actions,” and the last sentence provides that the first sentence does not “diminish” the right of contribution in the absence of such civil actions.<sup>33</sup> The dissent would read the first sentence as exclusive and construe the last sentence as preserving rights of contribution under state law.<sup>34</sup> The majority rejected the linguistic twists necessary to support the dissent’s conclusion and held that the two sentences were, in fact, complementary.<sup>35</sup> The first sentence

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22. *Id.* at 683.

23. *Id.*

24. *Id.* at 684.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 685.

29. *Id.*

30. *Id.*

31. *Id.* at 686.

32. *Id.*

33. *See id.*

34. *Id.* at 692 (Garza, J., dissenting).

35. *Id.* at 686. In the dissent’s construction, the word “may” in the first sentence must mean

establishes a “particular” right of contribution, but the last sentence provides that nothing shall “diminish” any other contribution right available to the parties.<sup>36</sup> According to the majority, “[t]he first and last sentences of § 113(f)(1) combine to afford the maximum latitude to parties involved in the complex and costly business of hazardous waste site cleanups.”<sup>37</sup>

The majority also found its construction consistent with the prior holdings of the Fifth Circuit and other courts.<sup>38</sup> Although no court of appeals had expressly ruled on the issue, the court found that “numerous published cases decided after” adoption of section 113(f) had allowed claims for contribution where no action had previously been brought under sections 106 or 107 of CERCLA.<sup>39</sup> The majority claimed that the dissent’s construction “has thrown into uncertainty more than two decades of CERCLA practice, if the pre-CERCLA common law of contribution is included.”<sup>40</sup> Although not “inconceivable,” such a result, according to the panel, places a heavy burden on justifying a construction of section 113(f) under a “plain meaning” reading of the statute.<sup>41</sup>

Finally, the court evaluated the policy implications of its interpretation.<sup>42</sup> According to the majority, the dissent’s reading would

create substantial obstacles to achieving the purposes of CERCLA—not only by slowing the reallocation of cleanup costs from less culpable PRPs to more culpable PRPs and by discouraging the voluntary expenditure of PRP funds on cleanup activities, but by diminishing the incentives for PRPs voluntarily to report contamination to state agencies.<sup>43</sup>

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“shall,” and the word “only” must impliedly be added. *Id.* at 692 (Garza, J., dissenting). The majority, in contrast, thought “may” simply meant “may.” *Id.* at 686. Another critical problem arises from the dissent’s interpretation. Since the first sentence only allows a right of contribution during or following a “civil action,” the dissent is forced to limit the right of contribution following receipt of a unilateral administrative order issued under section 106. *Id.* at 692 (Garza, J., dissenting). The dissent expressly states that the reference to civil action in section 113(f)(1) refers only to “an action brought in federal court,” and therefore, according to the dissent, if a party receives a unilateral administrative order, a right of contribution exists only if the government files suit in federal court to enforce the order. *Id.* at 692 n.4 (Garza, J., dissenting). In other words, the dissent would eliminate a right of contribution by parties who expend money in response to a unilateral administrative order. *See id.* (Garza, J., dissenting). This, of course, would create a perverse incentive to violate a unilateral order since a right of contribution would exist only if the government were forced to sue for enforcement. *See id.* (Garza, J., dissenting). The majority found this construction unnecessary in light of its conclusion that CERCLA provides a right of contribution among PRPs at any time, including following an administrative order. *Id.* at 686-87.

36. *Id.* at 687.

37. *Id.*

38. *Id.* at 688-89.

39. *Id.* at 688.

40. *Id.* at 689.

41. *Id.*

42. *Id.* at 688-91.

43. *Id.* at 689-90. The majority implies that parties would be discouraged from voluntarily reporting contamination to state authorities since, under the dissent’s construction, parties would have no right of contribution under CERCLA even if a PRP were to clean up property in response to an

The court concluded that its interpretation better fulfilled CERCLA's purposes.<sup>44</sup>

The three person dissent, in contrast, found that "the plain language and statutory structure of CERCLA's contribution provisions demonstrate that the contribution remedy in § 113(f)(1) requires a prior or pending § 106 or § 107 action."<sup>45</sup> In their interpretation, the first sentence of section 113(f)(1) establishes an exclusive right to contribution that exists only after a prior or pending civil action under sections 106 or 107.<sup>46</sup> The last sentence of section 113(f)(1), according to the dissent, is a "savings provision" that preserves rights of contribution under state law.<sup>47</sup> Thus, in the absence of a prior federal court action or an approved settlement with the government, PRPs have no right of contribution under CERCLA.<sup>48</sup>

The Supreme Court has, however, granted a petition for certiorari, and the jury, so to speak, is still out on the issue in *Aviall*.<sup>49</sup>

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unambiguous order from a state agency. *See id.*

44. *Id.* at 691.

45. *Id.* at 695 (Garza, J., dissenting). It is impossible not to note that in this conclusion the dissent misstates the first sentence of section 113(f)(1), which authorizes a right of contribution following a prior or pending "civil action" under sections 106 or 107. The dissent is not unaware of this issue, and as discussed above, the dissent would limit the right of contribution in section 113(f)(1) to parties who have been subject to a civil action in federal court. *See supra* note 35 and accompanying text. The dissent would not allow contribution by parties who have responded to an administrative order issued under section 106. *See supra* note 35 and accompanying text.

46. *Aviall Servs., Inc.*, 312 F.3d at 692 (Garza, J., dissenting).

47. *Id.* at 687. The dissent also says the statute of limitations applicable to claims for contribution supports its conclusion. *Id.* at 694 (Garza, J., dissenting). Under section 113(g), a claim for contribution must be brought within three years from judgment in an action under sections 106 or 107. *Id.* (Garza, J., dissenting). In contrast, a claim for cost recovery under section 107(a)(4)(B) is triggered by the dates of completion or initiation of cleanup activity. *Id.* (Garza, J., dissenting). Since most courts have held that an action for cost recovery by a PRP is a claim for contribution, courts have struggled to interpret the applicable statute of limitations for a PRP cost recovery claim in the absence of a prior judgment. In *Geraghty & Miller, Inc. v. Conoco, Inc.*, 234 F.3d 917 (5th Cir. 2000), the Fifth Circuit, when faced with this issue, had previously stated that a PRP claim for contribution brought in the absence of a prior judgment was subject to the statute of limitations applicable to section 107(a)(4)(B) claims. The dissent in *Aviall* characterized this analysis as "unnecessary." *Aviall Servs., Inc.*, 312 F.3d at 696 (Garza, J., dissenting).

48. *Aviall Servs., Inc.*, 312 F.3d at 693-94 (Garza, J., dissenting). In addition to section 113(f)(1), section 113(f)(3)(B) provides a right of contribution by parties who have entered into an administrative or judicially approved settlement with the government. *Id.* at 695 n.11 (Garza, J., dissenting). The dissent uses this provision to reach a remarkable conclusion in a footnote. *Id.* (Garza, J., dissenting). Under section 113(f)(2) of CERCLA, persons who settle with the government are entitled to protection from contribution from non-settling parties. *Id.* (Garza, J., dissenting). This has, since its adoption in 1986, been seen as a major incentive to settle. *See id.* (Garza, J., dissenting). In the dissent's view, section 113(f)(3)(B) also creates an additional and apparently unrecognized incentive to settle. *Id.* (Garza, J., dissenting). Under the dissent's interpretation, settling parties are not only provided contribution protection but nonsettling parties have no right of contribution against any party—settling or not. Allowing a nonsettling party to bring an action for contribution would, according to the dissent, "undermine these incentives" to settle. *Id.* (Garza, J., dissenting).

49. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 124 S. Ct. 981 (2004) (mem.).

## III. LIMITS OF FEDERAL JURISDICTION UNDER THE COMMERCE CLAUSE

In *United States v. Lopez*<sup>50</sup> and *United States v. Morrison*,<sup>51</sup> the Supreme Court revolutionized federal jurisprudence on the limits of federal authority under the Commerce Clause.<sup>52</sup> In these cases, the Supreme Court invalidated federal statutes based on the Court's conclusion that they exceeded Congress's authority.<sup>53</sup> In light of the Supreme Court's new jurisprudence, federal environmental requirements are increasingly being challenged as exceeding constitutional authority under the Commerce Clause.<sup>54</sup> In the last year, the Fifth Circuit considered and rejected Commerce Clause challenges to two federal requirements: asbestos removal requirements under the Clean Air Act and limitations on land development arising under the Endangered Species Act.<sup>55</sup>

A. *United States v. Ho: The Commerce Clause and the Clean Air Act Asbestos NESHAP*

*United States v. Ho* involved an appeal of a conviction for violating federal notification and workplace standards contained in the National Emission Standard for Hazardous Air Pollutants (NESHAP) for asbestos.<sup>56</sup> The defendant, Mr. Ho, was convicted in the district court after doing almost everything possible to violate the asbestos NESHAP.<sup>57</sup> Mr. Ho purchased a commercial building with knowledge that it contained asbestos.<sup>58</sup> He rejected bids for asbestos abatement by professional contractors because they were too high.<sup>59</sup> He undertook the removal without notifying the government and employed untrained workers to remove the asbestos.<sup>60</sup> After being "red

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50. 514 U.S. 549 (1995). In *Lopez*, the Court found that the federal statute limiting the possession of firearms within a certain distance from schools was beyond Congress's authority under the Commerce Clause. *Id.* at 631. Thus, was the federal "Gun-Free School Zones Act" transformed into the "Leave No Gun Behind Act"?

51. 529 U.S. 598 (2000). In *Morrison*, the Court invalidated the "Violence Against Women Act" that created a federal civil remedy for victims of gender-related violence. *Id.*

52. *Lopez*, 514 U.S. at 549; *Morrison*, 529 U.S. at 598.

53. *Lopez*, 514 U.S. at 549; *Morrison*, 529 U.S. at 598.

54. See *infra* Part III.A.

55. See *infra* Part III.A.

56. 311 F.3d 589 (5th Cir. Oct. 2002). These standards were adopted under section 112 of the Clean Air Act, which authorizes the EPA to adopt "National Emission Standards for Hazardous Air Pollutants" or NESHAPs. *Id.* at 594. Under section 114(a), the EPA has also adopted reporting requirements. *Id.* at 595. The workplace standards and reporting requirements are codified in the asbestos NESHAP. 40 C.F.R. § 61.142.

57. 311 F.3d at 593.

58. *Id.* at 591.

59. *Id.*

60. *Id.*



tagged” and stopped by local inspectors, he resumed the removal at night.<sup>61</sup> At his orders, a worker attempted to wash down the work area by attaching hoses to what turned out to be a pressurized gas line and, in the process, blew a hole in the building.<sup>62</sup>

Mr. Ho was convicted of criminal violations of the federal NESHAP requirements.<sup>63</sup> The district court, which had dismissed several counts sought by the government, rejected certain sentence enhancement recommendations of the probation officer.<sup>64</sup> Mr. Ho appealed his conviction on several grounds, including a challenge to federal commerce clause authority, procedures for adoption of the National Ambient Air Quality Standards (NAAQS),<sup>65</sup> and certain jury instructions.<sup>66</sup> The government appealed the trial court’s rejection of sentence enhancement.<sup>67</sup>

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61. *Id.* at 592.

62. *Id.*

63. *Id.* at 593.

64. *Id.*

65. *Id.* at 594. The court rejected the procedural challenge to the 1990 promulgation of amendments to the asbestos NESHAP. *Id.* Under section 307(b)(1) of the Clean Air Act, a challenge to the rulemaking can be brought only in the Court of Appeals for the District of Columbia Circuit and must be brought within sixty days of promulgation. 42 U.S.C. § 7607(b)(1) (2000). The court stated that the Supreme Court’s opinion in *Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978) did not authorize an otherwise untimely challenge to procedural defects in a regulation. *Ho*, 311 F.3d at 607.

66. *Ho*, 311 F.3d at 604. The court rejected the defendant’s challenge to the trial court’s refusal to include an interstate commerce clause jurisdictional element in the jury instructions. *Id.* The court held that *Lopez* did not create a new jurisdictional element in all federal prosecutions. *Id.* Further, the court held that no jury instruction was required since there was no explicit statutory jurisdictional element, and unlike *Lopez* and the prior Fifth Circuit opinion in *United States v. Threadgill*, 172 F.3d 357 (5th Cir. 1999), “neither the asbestos work place standard nor the facts of this case cast doubt on Congress’ ability to regulate Ho’s conduct.” *Ho*, 311 F.3d at 605, 607.

The court also rejected a challenge to the trial court’s failure to include instructions stating that defendant must have knowledge, not only of the facts of the asbestos removal, but also of the regulatory requirements. *Id.* at 605. The court stated that it “need refer only to the venerable maxim that ‘Ignorance of the law is no defense,’ ” but then gave a more elaborate analysis of why knowledge of the regulations is not required for criminal prosecution. *Id.*

67. The government appealed the trial court’s refusal to apply a six-level sentence enhancement for an “ongoing, continuous or repetitive discharge, release or emission of a hazardous or toxic substance or pesticide into the environment” under federal sentencing guidelines. *Id.* at 608 (quoting U.S. SENTENCING GUIDELINES MANUAL § 2Q1.2(b)(1)(A) (2003)). The trial court had found that the evidence did not support a finding that asbestos had been released outside the building and thus had not entered “into the environment.” *Id.* The Fifth Circuit reversed based on its holding that the trial court “clearly erred” in its factual findings. *Id.* The court held that “[t]he government has proven an asbestos discharge by a preponderance of the evidence, which is all that is required at the sentencing phase.” *Id.* at 610.

The government also appealed the trial court’s refusal to apply a two-level sentence enhancement for the defendant’s status as “an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive.” *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 3B1.1(a) (2003)). The issue for the court involved interpretation of the phrase “otherwise extensive.” *Id.* The district court had apparently interpreted this phrase to refer to the “nature of the criminal organization” as distinguished from the number of persons involved. *Id.* Reviewing the trial court’s legal interpretation de novo, the court applied “application note 3” to the sentencing guidelines and held that a finding of “otherwise extensive” is to be based on the number of persons involved and not the nature of the criminal organization. *Id.* The court vacated and remanded for new sentencing “in light of the proper and

The defendant claimed that he was convicted under laws that exceeded Congress's authority under the Commerce Clause.<sup>68</sup> The Fifth Circuit stressed that this was not a facial challenge to the Clean Air Act but only an "as-applied challenge" to the asbestos NESHAP.<sup>69</sup> The court began with a "first principles" discussion of the rationale of the commerce clause and continued with a review of the Supreme Court's recent Commerce Clause analysis in *Lopez and Morrison*.<sup>70</sup>

The outline of the Commerce Clause analysis from *Lopez and Morrison* is now familiar.<sup>71</sup> Congress has authority under the Commerce Clause to regulate "three broad categories" of activity: (1) the use of the channels of interstate commerce, (2) activities that affect the instrumentalities of interstate commerce, and (3) those activities having a "substantial relation" to interstate commerce.<sup>72</sup> This last category, the broadest of the three, requires that the activity "substantially affect" interstate commerce.<sup>73</sup> This "substantial effect" test can reach activity that itself substantially affects interstate commerce or "intrastate commercial activity that by itself is too trivial to have a substantial effect on interstate commerce but which, when aggregated with similar and related activity, can substantially affect interstate commerce."<sup>74</sup> Four significant considerations guide an aggregation analysis: (1) the economic or commercial nature of the regulated intrastate activity, (2) a jurisdictional element in the challenged statute that might limit the statute's reach to a discrete set of activities, (3) congressional findings, and (4) the degree of attenuation between the regulated intrastate activity and the substantial effect on interstate commerce.<sup>75</sup>

In *Ho*, the court noted the government's (perhaps surprising) concession that the regulations could only be justified through a substantial effect analysis applying the "aggregation principle."<sup>76</sup> Thus, the court states that "this case presents the limited question whether the aggregation principle extends to violations of the asbestos work practice standard."<sup>77</sup>

The court found that implementation of the asbestos NESHAP was within Congress's Commerce Clause authority.<sup>78</sup> The primary justification for the court's holding was that asbestos removal services are commercial

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longstanding interpretation of that phrase." *Id.* at 611.

68. *Id.* at 594 (referring to U.S. CONST. art. I, § 8, cl. 3).

69. *Id.*

70. *Id.*

71. *Id.* at 597-98.

72. *Id.*

73. *Id.* at 598.

74. *Id.* at 599.

75. *Id.* at 599-601 (citations omitted).

76. *Id.* at 602.

77. *Id.*

78. *Id.*

activities in today's economy.<sup>79</sup> The court noted that state and federal governments license asbestos removal businesses and that most removal is for commercial purpose.<sup>80</sup> The court stated that the defendant's activities were driven by commercial considerations because asbestos removal was required if he wanted to use the building for commercial purposes.<sup>81</sup> The court concluded that "[w]e can say with confidence, then, that asbestos removal in this case, unlike gun possession in a school zone or sex-based violence, is a commercial activity."<sup>82</sup>

The court stated that the relationship between asbestos removal and interstate commerce is "not attenuated, but direct and apparent."<sup>83</sup> By violating the standards, the defendant gained a competitive advantage over other licensed companies.<sup>84</sup> The court also found that the defendant's activities, if aggregated with others, would pose a threat to the interstate commercial real estate market by reducing the number of companies providing asbestos removal services.<sup>85</sup>

The court concluded by observing two important limiting principles of its holding.<sup>86</sup> "First, it applie[d] only to commercial activities. Second, the presence of a national market in the regulated activity" served to limit the scope of the court's analysis.<sup>87</sup>

The court's analysis is somewhat puzzling. The court comes close to saying that any intrastate commercial activity, at least a commercial activity in which there is a national market, is subject to regulation by Congress under the Commerce Clause. The court, however, ignores the consequences that follow if the regulation itself creates the commercial market. In other words, the court never addressed the significance of the fact that the federal NESHAP requirements themselves may have contributed to creating the national market in asbestos removal services that serves to justify federal regulatory authority. The court's constitutional analysis, thus, has something of a bootstrap quality to it.

*B. GDF Realty Investments v. Norton: The Commerce Clause  
and the Endangered Species Act*

Five months after issuing its opinion in *Ho*, the Fifth Circuit in *GDF Realty Investments, Ltd. v. Norton* considered a Commerce Clause challenge

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79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 603.

84. *Id.*

85. *Id.* at 604.

86. *Id.*

87. *Id.*

to application of the federal Endangered Species Act (ESA).<sup>88</sup> The relevant facts in *GDF Realty* were undisputed.<sup>89</sup> After some considerable procedural wrangling, the plaintiffs were advised that their planned development activities would constitute a “take” of endangered species that is prohibited under section 9 of the Endangered Species Act.<sup>90</sup> The defendant Fish and Wildlife Service also denied an “incidental take” permit that would have authorized some development.<sup>91</sup> The endangered species at issue were six species of subterranean invertebrates (the “Cave Species”) that were located solely within Texas.<sup>92</sup> Plaintiffs filed suit claiming that the ESA take provision, as applied to the Cave Species, was an unconstitutional application of federal authority under the Commerce Clause.<sup>93</sup>

The court relied on its analysis in *Ho* for a basic discussion of the parameters of a Commerce Clause challenge.<sup>94</sup> This case, however, raised critical issues that were not addressed in *Ho*.<sup>95</sup> The first issue involved identification of the “regulated activity” for purposes of a Commerce Clause analysis: Was it limited to the defendant’s actions that resulted in the Cave Species takes or was it the defendant’s overall proposed commercial development?<sup>96</sup> The Fifth Circuit concluded that “the scope of inquiry is primarily whether the *expressly regulated activity* substantially affects interstate commerce, *i.e.*, whether takes, be they of the Cave Species or of all endangered species in the aggregate, have the substantial effect.”<sup>97</sup>

To do otherwise, the court stated, would result in “no limit to Congress’ authority to regulate intrastate activities, so long as those subjected to the regulation were entities which had an otherwise substantial connection to interstate commerce.”<sup>98</sup> The court stated that this conclusion was consistent with its opinion in *Ho* and with at least some of the logic in opinions in the D.C. and Ninth Circuits that had previously upheld application of the ESA in

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88. 326 F.3d 622 (5th Cir. Mar. 2003).

89. *Id.* at 627.

90. *Id.* at 626; 16 U.S.C. § 1538(a)(1)(B) (2000). Under section 1538(a)(1)(B), it is unlawful to “take” an endangered species. § 1538(a)(1)(B). Under the statute, “take” means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect.” *Id.* § 1532(19). The Fish and Wildlife Service has, by regulation, defined “harm” to include “significant habitat modification or degradation” that actually kills or injures wildlife. 50 C.F.R. § 17.3. The Supreme Court had previously upheld the validity of this regulation. *Babbitt v. Sweet Home Chapter of Cmty. for a Greater Or.*, 515 U.S. 687 (1995).

91. *Norton*, 326 F.3d at 626.

92. *Id.* at 625.

93. *Id.* In a separate action, the plaintiffs also claimed that the government’s action constituted a Fifth Amendment taking of private property for public use without just compensation. *Id.* at 626-27. That action was stayed pending the resolution of this case. *Id.* at 627.

94. *Id.* at 627-28.

95. *Id.* at 633.

96. *Id.*

97. *Id.*

98. *Id.* at 634.

the face of Commerce Clause challenges.<sup>99</sup> Thus, the court focused solely on the developers' impact on endangered species rather than their broader commercial development activity in evaluating the legitimacy of federal regulation under the Commerce Clause.<sup>100</sup>

In its resulting Commerce Clause analysis, the court first rejected an argument that scientific and commercial interest in the Cave Species themselves justified regulation.<sup>101</sup> Acknowledging that some connection existed between the study of the Cave Species and interstate commerce, the court held that this connection was negligible and did not satisfy the substantial effects test.<sup>102</sup> The court also held that any possibility of future economic benefits arising from these particular endangered species was "too hypothetical and attenuated" to justify regulation under the Commerce Clause.<sup>103</sup>

The court nonetheless found that regulation under the ESA was justified under the Commerce Clause.<sup>104</sup> The justification was based on the substantial effect, not on the loss of the particular Cave Species, but of all endangered species.<sup>105</sup> In other words, the Commerce Clause justified federal regulation to protect all endangered species even if the protection of any single species might not be an adequate justification.<sup>106</sup> This holding was based on the court's view of the ESA as a comprehensive regulatory program designed to protect against the economic impacts associated with an overall loss of endangered species.<sup>107</sup> The court further found that this link was not attenuated.<sup>108</sup> The court concluded that the "ESA is an economic regulatory scheme; the regulation of intrastate takes of the Cave Species is an essential part of it. Therefore, Cave Species takes may be aggregated with all other ESA takes."<sup>109</sup> Thus, Congress apparently has authority under the Commerce Clause to protect a single endangered species based on the consequence of losing many endangered species.<sup>110</sup>

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99. *Id.* at 635-36; see *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000), *cert. denied sub. nom.*, *Gibbs v. Norton*, 531 U.S. 1145 (2001); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998) (a pre-*Morrison* decision).

100. *Norton*, 326 F.3d at 636-40.

101. *Id.* at 637-38.

102. *Id.* at 637.

103. *Id.* at 638.

104. *Id.* at 640-41.

105. *Id.*

106. See *id.* at 638-41.

107. *Id.* at 640.

108. *Id.*

109. *Id.*

110. See *id.* at 640-41.

IV. FEDERAL APPROVAL OF STATE IMPLEMENTATION PLANS UNDER THE  
CLEAN AIR ACT: *SIERRA CLUB V. EPA*

*Sierra Club v. EPA* involved a challenge brought by several environmental organizations to the EPA's approval of the Texas State Implementation Plan (SIP) for the Beaumont-Port Arthur area.<sup>111</sup> In this case, the court addressed two significant issues associated with the EPA's approval of SIPs under the Clean Air Act: the validity of an EPA extension of an applicable statutory compliance date and the criteria for assessment of "reasonably available control measures" (RACMs) in a nonattainment SIP.<sup>112</sup>

A. *Extension of the Nonattainment Compliance Date*

Under the Clean Air Act Amendments of 1990, areas that had not met the NAAQS for ozone were divided into a variety of subcategories ranging from marginal to extreme.<sup>113</sup> The Amendments established statutory compliance dates for each subcategory.<sup>114</sup> Among other potential consequences, an area that fails to meet its attainment deadline may be "bumped up" to the next more stringent classification.<sup>115</sup>

In March 1999, the EPA issued a "notice of interpretation" of the Clean Air Act that established a policy of extending the otherwise applicable statutory compliance date for "moderate" and "serious" ozone nonattainment areas.<sup>116</sup> The policy generally applied if these areas' failure to attain compliance resulted from emissions from "upwind" nonattainment areas that have a later compliance date.<sup>117</sup> Rather than accelerate the upwind region's compliance date, the policy generally allowed an extension of the downwind region's compliance date to the later compliance date of the upwind region.<sup>118</sup>

The Beaumont-Port Arthur area at issue in this case was categorized as a moderate ozone nonattainment area and thus had a statutory compliance date of November 15, 1996.<sup>119</sup> The area, however, was affected by emissions from

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111. 314 F.3d 735 (5th Cir. Dec. 2002).

112. *Id.* at 737.

113. *Id.*; see 42 U.S.C. § 7511a(a)-(e) (2000).

114. *Sierra Club*, 314 F.3d at 737-38; see 42 U.S.C. § 7511(a)(1).

115. *Sierra Club*, 314 F.3d at 738; see § 7511(b)(2).

116. *Sierra Club*, 314 F.3d at 738; see Extension of Attainment Dates for Downwind Transport Areas, 64 Fed. Reg. 14,441 (Mar. 25, 1999).

117. *Sierra Club*, 314 F.3d at 738. The policy required that the downwind "moderate" or "serious" area (1) be "identified as a downwind area 'affected by transport from either an upwind area in the same State with a later attainment date or an upwind area in another State that significantly contributes to downwind nonattainment'" and (2) submit a SIP that generally demonstrates compliance by the required attainment date for the upwind area. *Id.* This includes adoption and implementation of all necessary local pollution control measures necessary to attain compliance by that date. *Id.* (citing 64 Fed. Reg. 14,443 (Mar. 25, 1999) (quotations omitted)).

118. See *Sierra Club*, 314 F.3d at 738.

119. *Id.* at 739.

the Houston/Galveston “severe-17” nonattainment area.<sup>120</sup> As a severe-17 area, Houston/Galveston is not required to attain compliance under the statute until November 15, 2007.<sup>121</sup> Applying its 1999 policy, the EPA extended the compliance date for the Beaumont-Port Arthur area to November 15, 2007.<sup>122</sup>

Notwithstanding its application of *Chevron* deference to the EPA’s interpretation of the Clean Air Act, the court held that the plain terms of the Clean Air Act precluded the EPA’s extension of the statutory compliance date.<sup>123</sup> The court essentially relied on two lines of argument.<sup>124</sup> First, the Clean Air Act contains a number of specific provisions that address the problem of upwind emissions that jeopardize compliance by the downwind area; none of these provisions, however, generally provide an extension for regions affected by transport from an upwind region as provided in the EPA’s extension policy.<sup>125</sup> Thus, the court inferred that the absence of a comparable statutory extension was a deliberate act on the part of Congress.<sup>126</sup> Second, the court distinguished an earlier case in which the D.C. Circuit had authorized extensions from certain statutory deadlines in the Clean Air Act.<sup>127</sup> This other case involved problems stemming from the “EPA’s own action or inaction, which could not have been foreseen by Congress.”<sup>128</sup> The problems faced by downwind areas such as Beaumont-Port Arthur were presumably foreseeable by Congress, and the court held that the EPA had no authority to extend the established compliance dates under these circumstances.<sup>129</sup>

### *B. Required Reasonably Available Control Measures*

Under the Clean Air Act, nonattainment SIPS must implement reasonably available control measures as expeditiously as possible.<sup>130</sup> RACMs are not defined in the statute but may include a variety of control techniques including “transportation control measures” (TCMs).<sup>131</sup> The petitioners claimed that the EPA failed to require the Beaumont-Port Arthur SIP to include additional available control measures that constituted RACMs.<sup>132</sup>

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120. *Id.* at 737, 739.

121. *Id.* at 739.

122. *Id.*

123. *Id.* at 741.

124. *Id.* at 741-43.

125. *Id.* at 741.

126. *Id.*

127. *Id.* at 741-43.

128. *Id.* at 742.

129. *Id.* at 742-43.

130. *Id.* at 743; Clean Air Act of 1955, § 173, 42 U.S.C. § 7502(c)(1) (2000).

131. *See Sierra Club*, 314 F.3d at 743.

132. *Id.* at 737.

The EPA acknowledged the availability of additional control measures but declined to require them for several reasons.<sup>133</sup> First, the EPA applied its long-standing policy that states need only consider those items as RACMs that contribute to attainment “ ‘as expeditiously as practicable.’ ”<sup>134</sup> Under this policy, measures that would reduce the frequency or severity of violations would not be required if their use would not advance the actual date of compliance.<sup>135</sup> The court upheld this policy based on provisions in the 1990 Amendments in which Congress expressly preserved existing EPA guidance.<sup>136</sup> The court also relied on a Ninth Circuit decision that had previously upheld the policy.<sup>137</sup>

The court also upheld the EPA’s ability to engage some form of cost/benefit analysis in identifying RACMs.<sup>138</sup> According to the court, “the EPA properly concluded that [m]easures requiring intensive and costly implementation were not RACMs because they could not be readily implemented due to excessive administrative burden or local conditions such as high costs.”<sup>139</sup> Although the court concluded that the statute did not preclude the EPA from using such a cost/benefit analysis, the court did state that the EPA had an affirmative duty to demonstrate that it has evaluated available data and to satisfactorily explain its rejection of proposed RACMs.<sup>140</sup>

#### V. MUNICIPAL STORM WATER PERMIT REQUIREMENTS UNDER THE CLEAN WATER ACT: *CITY OF ABILENE V. EPA*

In *City of Abilene v. EPA*, the Fifth Circuit considered challenges to conditions contained in federally issued National Pollutant Discharge Elimination System (NPDES) storm water permits.<sup>141</sup> The permits, issued to the Cities of Abilene and Irving, contained conditions to limit discharges from Municipal Separate Storm Sewer Systems (MS4s).<sup>142</sup> Among other things, the permits required the cities to develop and implement programs to limit the storm water pollution from a variety of sources and to implement a public education program.<sup>143</sup> “The [c]ities challenge[d] their permits on both statutory and constitutional grounds.”<sup>144</sup>

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133. *Id.* at 743.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 744; see *Ober v. Whitman*, 243 F.3d 1190 (9th Cir. 2001).

138. *Sierra Club*, 314 F.3d at 744.

139. *Id.*

140. *Id.* at 745.

141. 325 F.3d 657, 659 (5th Cir. Apr. 2003).

142. *Id.*

143. *Id.*

144. *Id.*



The permits were required under section 402(p) of the Clean Water Act that requires MS4s discharge permits to include a variety of limitations including “such other provisions” that the EPA “determines [are] appropriate for the control” of pollutants in storm water.<sup>145</sup> The court held that this provision conferred authority on the EPA to adopt the types of conditions contained in the cities’ permits.<sup>146</sup>

The court also rejected a claim that by requiring the cities to establish public education programs, the EPA was violating the Tenth Amendment by requiring the cities to regulate third parties.<sup>147</sup> The Tenth Amendment reserves powers to the States that are not delegated to the United States.<sup>148</sup> Under Supreme Court analysis, the Tenth Amendment limits the ability of the federal government to compel states to implement a federal regulatory program.<sup>149</sup> The court noted, however, that the Tenth Amendment does not prohibit the federal government from “persuading” localities to adopt federal programs “so long as the choice of whether or not to comply lies with the residents of the State or locality acting through their respective governments.”<sup>150</sup> Thus, the federal government can condition discretionary grants on compliance with a federal program or otherwise give states alternative choices as long as both choices do not involve unconstitutional action.<sup>151</sup>

The court had little problem in upholding the permit conditions. The cities had been given the option of specific, numeric effluent limitations applicable to their storm water discharges as an alternative to the contested storm water conditions.<sup>152</sup> According to the court, the numeric effluent limitations “would have regulated them in the same manner as other dischargers of pollutants.”<sup>153</sup> By voluntarily choosing the management conditions, “the [c]ities [were not being] compelled to implement a federal regulatory scheme.”<sup>154</sup> The court also rejected a First Amendment challenge to the required public information program.<sup>155</sup> The court noted that the cities not only chose, but actually proposed, the program and were thus not being compelled to express the federal government’s views.<sup>156</sup>

The cities also raised an odd challenge claiming that the permits were “arbitrary and capricious because they authorize[d] the discharge of some, but

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145. Federal Water Pollution Control Act Amendments of 1972, § 402(p)(3)(B), 33 U.S.C. § 1342(p)(3)(B)(iii) (2000).

146. *Sierra Club*, 325 F.3d at 661.

147. *Id.* at 663.

148. *Id.* at 661.

149. *Id.*

150. *Id.* at 662.

151. *Id.*

152. *Id.*

153. *Id.* at 663.

154. *Id.*

155. *Id.* at 664.

156. *Id.*

not all, pollutants.”<sup>157</sup> Apparently, the cities were arguing that they would be liable for third-party discharges into the municipal storm sewers.<sup>158</sup> The court in this case noted that the EPA’s Environmental Appeals Board had concluded that “the [c]ities’ permits expressly provide that [the] liability [of] third-party dischargers [was] not transferred” to the cities, and thus, presumably, the permit conditions were appropriate.<sup>159</sup>

VI. PRECLUSION OF CITIZEN SUITS UNDER THE CLEAN WATER ACT:  
*LOCKETT V. EPA*

In *Lockett v. EPA*, the court construed provisions of the Clean Water Act (CWA) that limit the availability of citizen suits.<sup>160</sup> Under section 505(a)(1) of the CWA, private parties may bring “citizen suits” against persons alleged, among other things, to be in violation of a National Pollutant Discharge Elimination System (NPDES) permit.<sup>161</sup> The CWA, however, establishes several jurisdictional barriers to such citizen suits.<sup>162</sup> First, section 505(b)(1)(A) requires that plaintiffs provide notice of their intent to file a citizen suit at least sixty days prior to filing a complaint.<sup>163</sup>

Second, under section 309(g)(6), such suits are barred if the state has commenced and is diligently prosecuting an administrative action under a comparable state law.<sup>164</sup> This second barrier does not apply, however, if notice was given prior to commencement of the state action *and* the citizen suit is filed within 120 days of providing notice.<sup>165</sup> In *Lockett*, the court construed the meaning of comparable state law and certain timing and notice issues.<sup>166</sup>

The relevant facts in *Lockett* were undisputed.<sup>167</sup> The suit was brought by landowners who alleged violations of an NPDES permit for a sewage treatment plant operated by the Village of Folsom, Louisiana.<sup>168</sup> Some of the plaintiffs sent a first notice letter alleging violations of the permit on August

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157. *Id.*

158. *See id.*

159. *Id.*

160. 319 F.3d 678, 682 (5th Cir. Jan. 2003).

161. Federal Water Pollution Control Act of 1948, § 505, 33 U.S.C. § 1365(a)(1) (2000).

162. *See* Federal Water Pollution Control Act Amendments of 1972, § 309(g)(6)(B), 33 U.S.C. § 1319(g)(6)(B).

163. *Id.* § 1319(g)(6)(B). A comparable limitation applies if the state or federal government has commenced and is diligently prosecuting an action in federal court. *Id.* § 1365(b)(1)(B). Since Louisiana had undertaken administrative enforcement, the relevant limitation on citizen suits was contained in § 309(g). *Id.* § 1319(g)(6).

164. *Id.*

165. *Id.*

166. *Lockett v. EPA*, 319 F.3d 678, 678 (5th Cir. Jan. 2003).

167. *Id.* at 681.

168. *Id.*

12, 1999.<sup>169</sup> A compliance order was issued by the Louisiana Department of Environmental Quality (DEQ) on November 4, 1999 against the Village for various violations in operation of the facility.<sup>170</sup> On December 7, 1999, the plaintiffs sent a second citizen suit notice letter that restated the first alleged violations and "referenced ongoing violations."<sup>171</sup> The citizen suit was then filed on March 31, 2000.<sup>172</sup> The district court dismissed the complaint finding that (1) the state had commenced an action under a comparable state law and (2) the plaintiffs had not filed their complaint within 120 days of a notice sent prior to commencement of the state action.<sup>173</sup>

The Court of Appeals affirmed.<sup>174</sup> The court, in a matter of first impression in the Fifth Circuit, held that the Louisiana procedures for administrative enforcement were comparable to the relevant federal requirements found in section 309(g) of the Clean Water Act.<sup>175</sup> The court "[a]t the outset" noted the primary role of the states in enforcement and stated that "the requirement that a state law be 'comparable' to the federal statute should be read broadly to permit states flexibility in deciding how to enforce anti-pollution laws."<sup>176</sup>

The plaintiffs argued the Louisiana procedures were not comparable since they lacked notice and comment procedures.<sup>177</sup> The court appeared to view the issue of comparability as involving an assessment of whether the state procedures provided "a meaningful opportunity to participate at significant stages in the decision-making process."<sup>178</sup> The court found that the Louisiana procedures satisfied this standard.<sup>179</sup> The Louisiana procedures, among other things, provided private parties a limited right to participate in

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169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 681-82.

174. *Id.* at 690. The court rejected appellant's argument that the plaintiffs had no "standing" to appeal the district court opinion since they had been provided an opportunity to participate in the state proceeding. *Id.* at 682. The court stated that this argument misconstrued the constitutional standing inquiry. *Id.* It was undisputed that plaintiffs satisfied the standing elements of "injury, cause and redressability." *Id.* Since the plaintiffs were challenging the district court's legal determination of comparability and not asserting they were injured by the lack of notice or opportunity to participate in the state action, the issue of receipt of notice was, according to the court, irrelevant to the standing issue. *Id.*

The court also rejected appellant's arguments, raised for the first time on appeal, that certain plaintiff-intervenors were not proper parties since they had not filed a notice of intent to sue. *Id.* at 683. Although the court acknowledged that the requirement to provide notice was a matter of subject matter jurisdiction, the court held that the notice requirement was "not jurisdictional 'in the strict sense of the term'" and the issue of proper notice was therefore waived since not raised prior to appeal. *Id.* at 682.

175. *Id.* at 690.

176. *Id.* at 684.

177. *Id.*

178. *Id.* (citing *Ark. Wildlife Fed'n v. ICI Ams., Inc.*, 29 F.3d 376, 381 (8th Cir. 1994)).

179. *Id.* at 685.

state adjudicatory hearings on state enforcement orders or settlements.<sup>180</sup> “Aggrieved parties” have the opportunity to intervene in an adjudicatory hearing requested by a respondent on a proposed state enforcement order and may themselves request an adjudicatory hearing on a proposed state settlement or uncontested order.<sup>181</sup> The State, however, has discretion to deny intervention, and the State is required to grant an aggrieved party’s request for a hearing only “when equity and justice require [one].”<sup>182</sup> Notwithstanding the State’s considerable discretion to deny rights of public participation, the court held that this discretion “is reasonably constructed to prevent abuse of the process and is subject to judicial review.”<sup>183</sup> The court concluded that the Louisiana administrative enforcement mechanism was therefore comparable to the Clean Water Act requirements.<sup>184</sup>

The court also found that the citizen suit was barred by the timing provisions of the Clean Water Act.<sup>185</sup> Because the State had commenced and was diligently prosecuting an enforcement proceeding under comparable state law, the citizen suit could only proceed if notice had been provided prior to commencement of the state proceeding *and* the citizen suit was commenced within 120 days of the notice.<sup>186</sup> It was undisputed that the citizen complaint was filed more than 120 days after their first notice letter.<sup>187</sup> It was also undisputed that the second notice letter was sent after commencement of the state proceeding.<sup>188</sup> Therefore, the plaintiffs could rely on neither the first nor second notice letter to justify a citizen suit for violations addressed in the state proceeding.<sup>189</sup> To avoid this problem, the plaintiffs claimed that their second notice letter, which addressed “ongoing violations,” alleged violations not covered in the state proceeding.<sup>190</sup> The court, however, held that the state

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180. See *id.* at 685-86 (explaining LA. REV. STAT. ANN. 30 § 2050.1 (West 2002)). Under the Louisiana procedures, the public is not notified of a compliance order or proposed penalty prior to issuance; but according to the court, the State keeps a list of notices of violations, compliance orders, and penalty assessments that are available to the public. *Id.* at 686. After issuance of an order, the respondent may request an adjudicatory hearing and the public has rights to comment and, in some cases, intervene. *Id.* at 685. If the respondent agrees to a settlement following an order, public notice of the proposed settlement is given and comments are accepted. *Id.* at 680. If a respondent elects to comply with an order without an adjudicatory hearing or settlement, an “aggrieved party” may request an adjudicatory hearing that may be granted “when equity and justice [so] require.” *Id.* at 685-86. Although, the State has considerable discretion in whether to allow a citizen to intervene in an adjudicatory hearing or to grant a citizen’s request for an adjudicatory hearing. See *id.* at 686.

181. *Id.*

182. *Id.* at 686 (explaining LA. REV. STAT. ANN. 30 § 2050.4.B).

183. *Id.* at 687.

184. *Id.*

185. *Id.* at 688-89.

186. *Id.* at 688.

187. *Id.* at 687-88.

188. *Id.*

189. See *id.* at 688-89.

190. *Id.* at 688.

compliance order covered future as well as past violations and therefore addressed the same issues as the second notice.<sup>191</sup>

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191. *Id.* at 689-90.