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THE PETROLEUM EXCLUSION—STRONGER THAN EVER AFTER *WILSHIRE* *WESTWOOD*

by
*James Baller**

OIL and natural gas are exempt from the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or Superfund), as amended.¹ Because of our society's widespread use of oil and natural gas, this so-called "petroleum exclusion" affects not only the oil and gas industry, but also a broad cross-section of our economy.² The Environmental Protection Agency (EPA) has observed that the petroleum exemption from the Superfund program is a major restriction on the agency's authority at toxic waste sites.³

Throughout the last decade, EPA's national office has stated repeatedly that the petroleum exclusion exists in the law and must be given effect.⁴ Similarly, virtually every court that has considered the exclusion has construed it broadly, often at EPA's own urging.⁵ Yet, while some of EPA's regional offices have applied the petroleum exclusion as written, other regional offices have either ignored the exclusion or advanced a variety of arguments to justify denying its benefits. One such argument is that even where the exclusion concededly applies, the government can still impose CERCLA-like strict, joint and several liability under other state and federal

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1. Pub. L. No. 95-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675 (1988)). CERCLA generally imposes strict, joint and several liability for the costs of responding to actual or potential releases of "hazardous substances" from a qualifying site upon past and present owners and operators of the site, upon persons who arranged for disposal of hazardous substances at the site, and upon persons who transported hazardous substances to the site. *Id.* §§ 9601(a)(14), 9604(a)(i), 9607.

2. The federal government itself has not been reluctant to invoke the petroleum exclusion. *See State of New York v. United States*, 620 F. Supp. 374, 386 (E.D.N.Y. 1985).

3. Brief for the United States as Amicus Curiae in Support of Appellees at 2, *Wilshire Westwood Assocs. v. Atlantic Richfield Corp.*, 881 F.2d 801 (9th Cir. 1989) (No. 88-5708). The brief stated that "[t]he statutory petroleum exclusion is one of the most significant restrictions on the response authority provided under the Superfund program for the cleanup of toxic waste sites." *Id.*

4. *See infra* notes 59-78 and accompanying text.

5. *See infra* notes 44-57 and accompanying text.

laws,⁶ including section 7003 of the Resource Conservation and Recovery Act (RCRA).⁷

On July 31, 1989, EPA's General Counsel addressed this problem by issuing a comprehensive internal guidance document on the scope of the petroleum exclusion.⁸ The General Counsel determined that the petroleum exclusion applies to all commercial forms of petroleum, including those that typically contain hazardous constituents, so long as the petroleum has not been adulterated or contaminated during use by extraneous hazardous substances.⁹

The General Counsel's interpretation received its first test in the courts in *Wilshire Westwood Associates, Inc. v. Atlantic Richfield Corp.*¹⁰ The *Wilshire Westwood* case involved the question of whether the petroleum exclusion applies to leaded gasoline. Upon learning of the General Counsel's interpretation, the district court reconsidered and reversed an earlier ruling that the petroleum exclusion does not apply to leaded gasoline because it contains lead, which is a "hazardous substance" under CERCLA in other contexts.¹¹

When *Wilshire Westwood* reached the Ninth Circuit, it became the first case in which litigants fully briefed and argued the merits of the petroleum exclusion to a federal court of appeals. Recognizing the case's potentially significant precedential effect, EPA filed a brief as amicus curiae in support of the defendants. EPA argued that the statutory language, legislative history, agency interpretations, and policy considerations underlying the petroleum exclusion all required affirmance of the district court's decision.¹² As a result, many interested parties, including EPA itself, hoped that the Ninth Circuit would issue a definitive interpretation of the scope of the petroleum exclusion that would have broad application elsewhere. While the Ninth Circuit ultimately found that the petroleum exclusion applied to leaded gasoline,¹³ it stopped short of issuing the definitive interpretation that many of those interested had expected. For other parties relying on the exclusion in other contexts, however, the court's opinion does, in fact, provide some valuable guidance.

6. Letter from F. Michael Thomas, Senior Assistant Regional Counsel, EPA Region I, to James Baller (May 16, 1987) (discussing Petroleum Group's proposal regarding ranking of potentially responsible parties at the Cannons Engineering Superfund sites).

7. Pub. L. No. 94-580, 90 Stat. 2826 (1976) (codified as amended at 42 U.S.C. §§ 6901-6987 (1988)).

8. Memorandum from Francis S. Blake, EPA General Counsel, to J. Winston Porter, Assistant Administrator for Solid Waste and Emergency Response, Scope of the CERCLA Petroleum Exclusion Under Sections 101(14) and 104(a)(2) (July 31, 1987) [hereinafter General Counsel's Memorandum] reprinted in 14 Chem. Waste Litig. Rep. (Computer L. Rep.) 842 (1987).

9. *Id.* at 844-47.

10. 27 Env't Rep. Cas. (BNA) 2146, 2146-47 (C.D. Cal. 1987), *rev'g on reconsideration*, 27 Env't Rep. Cas. (BNA) 1800 (C.D. Cal. 1987), *aff'd*, 881 F.2d 801 (9th Cir. 1989).

11. 27 Env't Rep. Cas (BNA) at 2146-47.

12. *See supra* note 3.

13. 881 F.2d at 804-05.

I. EVOLUTION OF THE PETROLEUM EXCLUSION BEFORE
WILSHIRE WESTWOOD

A. *Legislative History*

Since 1980, Congress has considered regulating releases of petroleum into the environment in several different contexts. On each occasion, Congress has expressly declined to subject responsible parties to CERCLA-like strict, joint and several liability. Congress has adopted some alternatives, and congressional leaders' explanations for these alternatives are difficult to reconcile with the notion that Congress believed CERCLA-like liability for releases of petroleum could already be imposed under section 7003 of RCRA.

When Congress enacted CERCLA in 1980, it made the term "hazardous substance" the operative term for the purposes of the response and liability provisions of the Act.¹⁴ In section 101(14),¹⁵ Congress defined the term "hazardous substance" as one specifically listed or designated as hazardous under any of several other environmental statutes identified in subsections (A) through (F) of that section.¹⁶ Because Congress did not specifically list or designate crude oil, most refined petroleum products, and natural gas, as hazardous under the named statutes, it need not have gone further to exempt oil and natural gas from CERCLA. Nonetheless, to emphasize its intent to exclude oil and natural gas from CERCLA, Congress concluded section 101(14) with a proviso that petroleum (including crude oil and any fraction of crude oil) not otherwise specifically listed or designated as hazardous was not a hazardous substance. In addition, the term "hazardous substance" did not include natural gas, natural gas liquids, liquified natural gas, or synthetic gas usable for fuel.¹⁷

14. 42 U.S.C. §§ 9603, 9604(a)(1), 9607.

15. *Id.* § 9601(14).

16. "Hazardous substance" means (A) any substance designated pursuant to section 311(b)(2)(A) of the Federal Water Pollution Control Act, (B) any element, compound, mixture, solution, or substance designated pursuant to section 102 of this Act, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act (but not including any waste the regulation of which under the Solid Waste Disposal Act has been suspended by Act of Congress), (D) any toxic pollutant listed under section 307(a) of the Federal Water Pollution Control Act, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act, and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 7 of the Toxic Substances Control Act. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

Id.

17. *Id.* Under § 104(a)(1), 42 U.S.C. § 9604(a)(1), response actions could also be triggered by releases or substantial threats of releases of any "pollutant or contaminant which may present an imminent or substantial danger to the public health or welfare . . ." In § 101(33), 42 U.S.C. § 9601(33), Congress also excluded petroleum from the definition of "pollutant or contaminant," using virtually the same language as it had used in § 101(14).

Congress did not define the terms "petroleum," "fraction," or "natural gas" in CERCLA, nor did the legislative history go into much detail. In fact, the *Wilshire Westwood* court noted that the legislative history was not helpful in determining the scope of the petroleum exclusion.¹⁸ Still, much can be learned from what Congress has done or failed to do about petroleum during the last decade, and the debates surrounding the enactment of CERCLA in 1980 are an essential starting point.

CERCLA was the product of a last-minute congressional compromise among three competing bills.¹⁹ On the House side, H.R. 7020, the Hazardous Waste Containment Act, focused on remedying pollution from chemical dumps on land and did not cover spills of petroleum. Petroleum spills were the subject of a separate, companion bill, H.R. 85, the Oil Pollution and Compensation Act. The leading bill in the Senate was S. 1480, the Environmental Emergency Response Act, which provided for "an ambit of liability significantly larger than that under H.R. 7020." This bill, however, did not cover petroleum.²⁰ The House of Representatives sent H.R. 7020 and H.R. 85 to the Senate but the latter bill died.²¹ Thus, both the House and Senate bills remaining under consideration excluded petroleum, as did the legislation Congress ultimately passed.²²

In the debates on the compromise bill, several members of Congress expressed concern about the lack of authority under the bill to respond to releases of petroleum. Typical of these responses were the comments of Representative Mikulski of Maryland. Representative Mikulski was prepared to accept Senate assurances of future consideration of an oilspill proposal in order to secure swift passage of legislation dealing with abandoned

18. *Wilshire Westwood*, 881 F.2d at 805. The court stated that "[t]here is virtually no legislative history contemporaneous with the enactment of CERCLA directly relevant to the scope of the petroleum exclusion." *Id.*

19. *Id.* at 805-06; *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986); *United States v. Mottolo*, 605 F. Supp. 898, 902-05 (D.N.H. 1985). For an extensive history of the 1980 debates on CERCLA, see Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1 (1982).

20. Grad, *supra* note 19, at 7, 22. The Senate Report accompanying S. 1480, S. REP. NO. 848, 96th Cong., 2d Sess. 29, 30-31 (1980) explained only that:

[P]etroleum, including crude oil and including fractions of crude oil which are not otherwise specifically listed or designated as hazardous substances under subparagraphs (A) through (F) of the definition, is excluded from the definition of hazardous substance. The reported bill does not cover spills or other releases strictly of oil. It is also important to note that natural gas, liquified natural gas (LNG), and high BTU synthetic gas of pipeline quality (or mixtures of natural gas and such synthetic gas) are not considered hazardous substances within the purposes of S. 1480.

21. Grad, *supra* note 19, at 4.

22. The final compromise bill was called H.R. 7020 because the Superfund legislation was a revenue measure that had to originate in the House. *Id.* at 29. In fact, however, the bill consisted of the enacting clause of H.R. 7020 and the substance of S. 1480, as amended by the Senate. The House considered and adopted the bill under a suspension of the rules, which in this case meant that it had no opportunity to offer amendments. *Id.* at 29-30. "Faced with a complicated bill on a take-it-or-leave-it basis, the House took it, groaning all the way." *Id.* at 1.

toxic waste sites.²³

In 1984, in the course of amending and reauthorizing RCRA, Congress had another opportunity to consider legislation to address releases of petroleum.²⁴ Again, Congress declined to subject persons responsible for releases of petroleum to CERCLA-like liability. Instead, it opted for more limited remedies tailored to the specific problems before it.²⁵

One of Congress's main concerns in 1984 was leakage from underground storage tanks, particularly those containing petroleum, which Congress considered a major source of groundwater pollution.²⁶ Because of the petroleum exclusion, however, Congress believed that under the Superfund authority, the federal government could neither respond to nor cleanup a petroleum products spill.²⁷ Congress responded not by eliminating or weakening the petroleum exclusion, but by enacting a new management program for underground storage tanks under subtitle I of RCRA.²⁸

Similarly, Congress's treatment of used oil in the 1984 amendments to RCRA reflected its reluctance to impose CERCLA-like liability on persons responsible for releases of petroleum. In 1984 an EPA report had noted that used automotive and industrial oils typically contain heavy metals and nu-

23. Typical of these responses are the comments of Representative Mikulski of Maryland: The Senate bill is substantially similar to the House measure, with the exception that there is no oil title.

I realize that it is disappointing to see no oil-related provision in the bill, but we must also realize that this is our only chance to get hazardous waste dump site cleanup legislation enacted. I would note that we have had assurances from Members of the Senate that an oilspill proposal would be considered a very high legislative priority in the 97th Congress.

Moreover, there is already a mechanism in place that is designed to deal with spills in navigable waterways. There is not, however, any provision currently in our law that addresses the potentially ruinous situation of abandoned toxic waste dump sites.

I, therefore, believe that it is very imperative that we pass the Senate bill as a very important beginning in our attempt to defuse the ticking environmental time bomb of abandoned toxic waste sites.

126 CONG. REC. 31,976 (1980); *see also* 126 CONG. REC. 31,964, 31,968 (1980) (statement of Rep. Florio); *id.* at 31,969 (statement of Rep. Broyhill); *id.* at 31,970 (statement of Rep. Breaux); *id.* at 31,971-72 (statement of Rep. Biaggi); *id.* at 31,975 (statement of Rep. Snyder).

24. Hazardous and Solid Waste Amendments of 1984 (HSWA), Pub. L. No. 98-616, §§ 101-704, 98 Stat. 3221, 3224-93 (1984) (codified as amended at 42 U.S.C. §§ 6901-6991 (1988)) (amending the Resource Recovery and Conservation Act of 1976, Pub. L. No. 94-580, §§ 1001-8007, 90 Stat. 2795, 2795-841 (1976) (codified as amended at 42 U.S.C. §§ 6901-6987 (1988)) (amending the Solid Waste Disposal Act of 1965 (originally enacted as Pub. L. No. 89-272, 79 Stat. 997 (1965))).

25. *See supra* notes 28-34.

26. *See* 130 CONG. REC. § 2028 (daily ed. Feb. 29, 1984) (statement of Sen. Durenberger).

27. Senator Durenberger stated that "the Federal Government cannot under Superfund authority respond or clean up a spill if it involves petroleum products." 130 CONG. REC. § 2028, 2080 (daily ed. Feb. 29, 1984) (statement of Sen. Durenberger), quoted in *Wilshire Westwood*, 881 F.2d at 807; *see also* 130 CONG. REC. 20,826-30 (1984) (statement of Sen. Durenberger) (discussing proposed amendment to protect groundwater sources from leaking underground storage tanks); *id.* at H11,141-42 (daily ed. Oct. 3, 1984) (statement of Rep. Florio) (requesting unanimous consent to consider an amendment to RCRA); *id.* at H11,1143 (statement of Rep. Eckhart supporting Rep. Florio's amendment); *id.* at H11,144 (statement of Rep. Ritter) (supporting Rep. Florio's amendment).

28. Section 601(a) of HSWA added Subtitle I to RCRA, 42 U.S.C. §§ 6991-6991i.

merous other toxic constituents.²⁹ Concerned by this report, Congress in 1984 gave EPA one year (until November 6, 1985) to propose whether to list or identify used automobile and truck crankcase oil as hazardous wastes under RCRA, and two years (until November 8, 1986) to make a final determination whether to list or identify used automobile and truck crankcase oil and other used oils as hazardous wastes.³⁰ As EPA promptly recognized, the effect of listing used oils as hazardous wastes under RCRA would be to subject used oils to CERCLA liability for the first time.³¹ Thus, once again, instead of merely eliminating the petroleum exclusion or limiting its scope, Congress chose a cautious, narrowly-focused alternative to avoid imposing CERCLA-like liability unless absolutely necessary.

The special treatment of petroleum under the 1984 amendments to RCRA is even more significant when seen in the light of Congress's simultaneous revision of section 7003(a) of RCRA.³² By this revision, Congress clarified that the government had authority under that provision to impose CERCLA-like liability upon non-negligent off-site generators of hazardous wastes.³³ Had Congress believed that section 7003, from its inception, retroactively imposed strict, joint and several liability on persons responsible for releases of petroleum, then Congress would have had no need to enact a comprehensive new management program in 1984 for underground storage tanks containing petroleum. Moreover, several key members of Congress would not have sought to justify that program as being necessary to fill a gap created by the petroleum exclusion.³⁴ Likewise, Congress would not have needed to require EPA to go to great lengths to determine whether listing used oils as hazardous wastes under RCRA was necessary as a first step toward imposing strict, joint and several liability under CERCLA.

Two years later, in the Superfund Amendment and Reauthorization Act

29. EPA, Listing of Waste Oil as Hazardous Waste 43-70 (Jan. 1981) (cited in 17 Chem. Waste Litig. Rep. 3 (Computer L. Rep.) (1988)).

30. A new § 3014(b) of RCRA, 42 U.S.C. § 6935(b), which was added by § 242 of HSWA, contained these requirements and deadlines.

31. In response to § 3014(b), EPA solicited public comments on listing used oil as a hazardous waste and stated, "used oil will become a hazardous substance under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) as a result of today's [proposed] listing . . ." 50 Fed. Reg. 49,258, 49,258 (proposed Nov. 29, 1985).

32. See H.R. CONF. REP. NO. 1133, 98th Cong., 2d Sess. 119 (1984), reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 5649, 5690; see also *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 732-33 (8th Cir. 1986) (discussing congressional intent for retroactive application of CERCLA), *cert denied*, 484 U.S. 848 (1987).

33. H.R. CONF. REP. NO. 1133, 98th Cong., 2d Sess. 119 (1984).

34. In the debates on the new Subtitle I of RCRA, Senator Durenberger noted: [T]ank storage of one of the most common groundwater contaminants—gasoline—is unregulated because it is not waste product (*and thus not under the authority of the Resource Conservation and Recovery Act*), and spills of the fuel cannot be cleaned up under the Superfund law because it is a petroleum product.

130 CONG. REC. 3834 (1984) (emphasis added). Senator Durenberger apparently did not understand that releases of petroleum from underground storage tanks could be remedied by § 7003 of RCRA, and no other member of Congress suggested otherwise.

of 1986 (SARA),³⁵ Congress forcefully underscored its strong support for the petroleum exclusion by re-enacting the exclusion without change. To understand the full import of this action, it is useful to consider the evolution of Congress's thinking about the problem of leaks from underground storage tanks.

By 1986, Congress had concluded that a new management program under subtitle I of RCRA could not adequately address the problem of leaks of petroleum from underground storage tanks.³⁶ Nevertheless, Congress still believed that the petroleum exclusion denied the government authority to address such leaks.³⁷ As in 1984, Congress responded by dealing directly with the problem before it, while leaving the petroleum exclusion intact.

In the floor debates leading to the enactment of SARA, Senator Simpson³⁸ advised his colleagues that the bill would not reduce the reach of the petroleum exclusion,³⁹ which applied to a wide variety of petroleum-related products.⁴⁰ In the House, Representative Hall similarly explained the bill.⁴¹ With this knowledge, both houses of Congress reaffirmed the exclusion as it had previously been in effect. To address the problem of leaks from underground storage tanks, Congress added a new response program to subtitle I of RCRA, supported by a \$500 million Underground Storage Trust Fund.⁴²

B. Court Decisions

Before the Ninth Circuit decided *Wilshire Westwood*, the petroleum exclusion had been the subject of district court decisions in a variety of factual settings.⁴³ While none of these district courts had the benefit of a full record and the extensive briefing that the parties submitted to the Ninth Circuit in *Wilshire Westwood*, virtually all reached the same conclusion as the *Wilshire Westwood* court: Congress intended the courts to apply the broad statutory language of the petroleum exclusion as written.

For example, in *Eagle-Picher Industries v. United States EPA*⁴⁴ the court accepted EPA's argument that if Congress had wanted to carve out a "broad" and "general" exception from CERCLA for mining wastes and fly

35. Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended at 42 U.S.C. §§ 9601-9675 (1988)).

36. 132 CONG. REC. 9599 (1986) (statement of Rep. Roe); *id.* at H9572 (statement of Rep. Strangeland); *id.* at 9625 (statement of Rep. Ekhart).

37. *Id.*

38. Senator Simpson was ranking member of the committee that prepared the Senate bill. Grad, *supra* note 19, at 7-8.

39. 132 CONG. REC. S14,932 (daily ed. Oct. 3, 1986) (statement of Sen. Simpson). Senator Simpson stated that the bill would "not diminish the scope of the present petroleum exclusion." *Id.*

40. *Id.* Senator Simpson explained that the exclusion applied to "all types of petroleum, including crude oil, crude oil tank bottoms, refined fractions of crude oil, and tank bottoms of such which are not specifically listed or designated as such under the other subparagraphs of that provision [section 101(14)]." *Id.*

41. *Id.* at H9605 (statement of Rep. Hall).

42. Section 205 of SARA added the new subsection 9003(h), 42 U.S.C. § 6991b(h), to Subsection I of RCRA.

43. *See infra* notes 44-57.

44. 759 F.2d 922 (D.C. Cir. 1985).

ash, it could have done so explicitly, as it had for petroleum.⁴⁵ Similarly, in *United States v. Metate Asbestos Corp.*⁴⁶ the court found that if Congress had wanted to exclude asbestos wastes completely from CERCLA, then Congress would have incorporated the exclusion into the petroleum and natural gas exclusion.⁴⁷

In *The Marmon Group, Inc. v. Rexnord, Inc.*⁴⁸ the court applied the petroleum exclusion to "waste cutting oil" used in the manufacture of gears.⁴⁹ The *Marmon Group* court held that cutting oil fell within the petroleum exclusion and thus was excluded specifically from CERCLA section 9601(4)'s definition of the term hazardous substance.⁵⁰ In *City of Philadelphia v. Stephan Chemical Co.*,⁵¹ the court broadly applied the exclusion to "petroleum products," and in *United States v. Alexander*⁵² the court dismissed a third-party action and denied various discovery requests against a defendant whose contribution to a Superfund site consisted solely of crude oil-tank bottoms.

In *United States v. Wade*⁵³ the court observed that it would be inconsistent to define hazardous substance in such a way as to exclude fuel oil and then treat fuel oil as hazardous because it contained hazardous constituents. In *New York v. United States*⁵⁴ the Justice Department argued on behalf of the Secretaries of Defense and the Air Force that jet fuel was exempt from CERCLA even though it contained small amounts of CERCLA hazardous substances such as benzene, toluene, and xylene. The court found the argument appealing, but did not reach the issue.⁵⁵ Similarly, in the more recent decision of *City of Philadelphia v. Stepan Chemical Co.*⁵⁶ the court, relying upon the EPA General Counsel's Memorandum of July 31, 1987, accepted as true for the purpose of a motion for summary judgment that oil, grease, phenol, and benzene produced from the distillation of petroleum fall entirely within the petroleum exclusion.⁵⁷

45. *Id.* at 927, 932; see also *United States v. Union Gas Co.*, 586 F. Supp. 1522, 1524 (E.D. Pa. 1984) (if Congress had intended subsection C of § 101(14) to exclude mining waste and fly from CERCLA, "it would have placed the subsection (C) limitation in the separate sentence concerning the general exclusion for petroleum and gas").

46. 584 F. Supp. 1143 (D. Ariz. 1984).

47. *Id.* at 1147.

48. No. 85-C-7838 (N.D. Ill. June 16, 1986).

49. *Id.*, slip op. at 2.

50. *Id.* On appeal, the Seventh Circuit reversed on other grounds, but noted and let stand the portion of the district court's opinion dismissing the CERCLA count on the basis of the petroleum exclusion. *The Marmon Group, Inc. v. Rexnord, Inc.*, 822 F.2d 31, 33 (7th Cir. 1987).

51. No. 81-0851, slip op. at 1 (E.D. Pa. Aug. 11, 1982) (unpublished).

52. C.A. No. G-86-267 (S.D. Tex. Sept. 16, 1987) (unpublished).

53. 14 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,440-41 (E.D. Pa. Apr. 27, 1984).

54. 620 F. Supp. 374 (E.D.N.Y. 1985).

55. *Id.* at 386.

56. No. 81-0851, slip op. at 2 (E.D. Pa. Dec. 9, 1988).

57. In one other case, *State v. Time Oil Co.*, 687 F. Supp. 529, 531-33 (W.D. Wash. 1988), the court held, without discussing the petroleum exclusion, that waste automotive crankcase oil contaminated with lead, cadmium, and chromium was a "hazardous substance" under CERCLA.

C. EPA Interpretations

During the last decade, EPA has interpreted the petroleum exclusion expansively in numerous public notices and interpretations.⁵⁸ For example, in a *Federal Register* notice announcing CERCLA notification requirements, EPA stated that irrespective of their status under RCRA, "waste oils" did not come within the definition of Superfund.⁵⁹ In a subsequent notice announcing changes to these notification requirements, EPA said that the exclusion would apply to crude oil, petroleum feedstocks, and refined petroleum products. Moreover, EPA stated that the exclusion would still apply despite the presence of a specifically listed substance in such products.⁶⁰

Again, in a proposal made in November 1985 to list certain used oils as hazardous wastes under RCRA, EPA recognized that such used oils, which it believed to be highly toxic, had not previously been subject to CERCLA.⁶¹ In a further notice soliciting additional comments on its proposal to list used oil as a hazardous waste under RCRA, the agency retreated somewhat and suggested that CERCLA may already apply to used oils. The EPA stated, however, that CERCLA would apply only to oils with levels of hazardous substances in excess of those typically found in petroleum.⁶² More recently, when EPA proposed regulations to implement the underground storage tank program, it stated that the release of petroleum from underground storage tanks or other sources was not subject to CERCLA.⁶³

Similarly, EPA's office of General Counsel has read the petroleum exclusion liberally in three internal guidance documents. In the first, the General Counsel used language strikingly similar to that of the *Wade* court in holding that denying the benefits of the petroleum exclusion to diesel fuel, because it commonly contains benzene and toluene, would vitiate the petroleum exclusion and defeat legislative intent.⁶⁴ Instead, the General Counsel found that CERCLA must not be applied to hazardous substances inherent in petroleum fractions, but should be applied only to those hazardous substances that are combined later with the petroleum product by way of adding or

58. See *infra* notes 59-63.

59. 45 Fed. Reg. 22,145 (Apr. 3, 1980).

60. 50 Fed. Reg. 13,460 (1985). The agency observed, however, that the petroleum exclusion would not apply to waste oil "to which listed CERCLA substances have been added." *Id.*

61. 50 Fed. Reg. 49,258, 49,267 (proposed Nov. 29, 1985). When the agency ultimately decided against listing used oil because of the "stigma" associated with listing, 51 Fed. Reg. 41,900, 49,101 (Nov. 19, 1986), it left used oil outside the scope of CERCLA. Now, however, the District of Columbia Circuit Court of Appeals has ordered EPA to determine whether to list used oil solely under RCRA's technical criteria for listing. *Hazardous Waste Treatment Council v. U.S. Env'tl. Protection Agency*, 861 F.2d 270, 277 (D.C. Cir. 1988). For a discussion of this case and its potential consequences, see Baller, *Opinion*, 17 Chem. Waste Litig. Rep. (Computer L. Rep.) 1 (1988).

62. 51 Fed. Reg. 8206 (1986).

63. 52 Fed. Reg. 12,760 (1987).

64. Memorandum from Robert M. Perry, EPA Associate Administrator and General Counsel, to Dick Whittington, Regional Administrator, Region VI, Applicability of CERCLA to Contamination of Ground Water By Diesel Oil 2-3 (Dec. 2, 1982).

mixing.⁶⁵ Even then, he added, CERCLA would not apply to the petroleum itself unless the extraneous contaminant was inseparably commingled with the petroleum product.⁶⁶

In the second interpretation, EPA's Acting General Counsel applied the same rationale in determining that motor gasoline was covered by the petroleum exclusion even though it typically contains benzene.⁶⁷ The Acting General Counsel reasoned that to apply the petroleum exclusion only to substances such as raw gasoline that do not contain benzene would, in effect, nullify the exclusion.⁶⁸ In the General Counsel's view, the EPA should not interpret a statute in such a way as to emasculate it.⁶⁹

The EPA's General Counsel on July 31, 1987, issued the most comprehensive interpretation of the petroleum exclusion to date. This interpretation responded to the "critical and recurring" questions that had arisen in the agency's enforcement of the exclusion.⁷⁰ After an extensive review of the language and legislative history of CERCLA and of prior agency pronouncements concerning the scope of the petroleum exclusion, the memorandum set forth a three-part definition of petroleum.⁷¹

First, the General Counsel stated that in order to give meaning to the petroleum exclusion, the term "petroleum" must be read to include all hazardous substances such as benzene that are "indigenous" to petroleum substances.⁷² Second, the term "petroleum" must also be read to include hazardous substances that are "normally mixed with or added to crude oil or crude oil fractions during the refining process."⁷³ The General Counsel reasoned that because such substances normally are added to petroleum during oil separation and processing in order to produce petroleum, then such substances should be included within the term "petroleum."⁷⁴

Third, the General Counsel stated that the term "petroleum" does *not* include hazardous substances "which are added to petroleum or which increase in concentration solely as a result of contamination of petroleum dur-

65. *Id.* at 3.

66. *Id.*

67. Memorandum from A. James Barnes, EPA Acting General Counsel, to Sheldon-Novick, Regional Counsel, Region III, Applicability of the CERCLA Petroleum Exemption to Gasoline Spills 4 (Aug. 12, 1988).

68. *Id.* The Acting General Counsel stated that under such an interpretation "the exemption would become a virtual nullity." *Id.*

69. *Id.* ("[a]n interpretation which emasculates a provision of a statute is not to be preferred").

70. General Counsel's Memorandum, *supra* note 8, at 842.

71. *Id.* at 842-44.

72. *Id.* at 844.

73. *Id.*

74. *Id.* In *Wilshire Westwood* the agency went further; it recognized that lead may be added to gasoline, not just at a refinery, but also at a local distribution station, and it concluded that

it makes no sense to have CERCLA jurisdiction turn on whether lead was added at a refinery or at another processing point. EPA's position that unadulterated leaded gasoline should fall within the petroleum exclusion is in keeping with congressional intent as to the statute's language and the policy behind the exclusion.

Brief for the United States as Amicus Curiae in Support of Appellees, *supra* note 3, at 20 n.17.

ing use." Under this interpretation the General Counsel said that EPA has authority to deal with releases of only the added substance, but may not respond to releases of the oil itself.⁷⁵ Elsewhere in the memorandum, the General Counsel indicated that "spills or releases of gasoline remain excluded from CERCLA under the petroleum exclusion," as do "spills of crude or refined petroleum."⁷⁶ Some used oils would also remain covered by the exclusion because such used oils do not necessarily contain hazardous substances that are either nonindigenous or at elevated levels.⁷⁷ Moreover, even the contaminants in used oils would not necessarily be subject to CERCLA because those particular contaminants may not fall within CERCLA's definition of hazardous substances.⁷⁸

II. THE *WILSHIRE WESTWOOD* CASE

In *Wilshire Westwood* the plaintiffs, who had purchased allegedly contaminated property for development, sued the defendants for the costs of cleaning up the property.⁷⁹ The plaintiffs believed that gasoline leaks from underground storage tanks had contaminated the property. The plaintiffs alleged that leaking tanks on the site contained additives including benzene, toluene, xylene, ethyl-benzene and lead, all of which were hazardous substances within the meaning of CERCLA.

In an opinion issued on October 15, 1987, the district court initially denied a motion to dismiss on the basis of the petroleum exclusion.⁸⁰ While finding that the petroleum exclusion applied to unleaded gasoline, despite the presence of hazardous constituents, the court rejected the defendants' argument that the exclusion similarly applied to leaded gasoline. The court reasoned that lead was not petroleum but a gasoline additive, that lead was listed under CERCLA as a hazardous substance, and that to treat lead differently if released from gasoline than if released in other forms was unjustified.⁸¹

Shortly after the district court issued its opinion, the defendants moved for reconsideration. This motion was in response to new evidence, the General Counsel's memorandum of July 31, 1987.⁸² Because of the memorandum a new round of briefing ensued and the court tersely determined that

75. General Counsel's Memorandum, *supra* note 8, at 842-44. This statement suggested that, under some conditions, a petroleum product may still be within the scope of the exclusion even if CERCLA substances contaminated that product, and, in such a case, only the contaminants themselves would be subject to CERCLA response and liability.

76. *Id.* at 846.

77. *Id.*

78. *Id.*

79. *Wilshire Westwood Assocs. v. Atlantic Richfield Corp.*, 881 F.2d 801 (9th Cir.), *cert denied*, 109 S. Ct. 3157, 104 L. Ed. 2d 1020 (1989).

80. *Wilshire Westwood Assocs. v. Atlantic Richfield Corp.*, 27 Env't Rep. Cas. (BNA) 1800, 1800 (1987).

81. *Id.*

82. See General Counsel's Memorandum, *supra* note 8. In their briefs, the defendants stated that they had first become aware of the General Counsel's interpretation when the Chemical Waste Litigation Reporter published the memorandum and a follow-up article analyzing it. See Baller, *Opinion*, 14 Chem. Waste Litig. Rep. (Computer L. Rep.) 858 (1987).

leaded gasoline was included in CERCLA's petroleum exclusion.⁸³

On appeal, the Ninth Circuit received extensive briefing and argument on the statutory language, legislative history, agency interpretations, and policy considerations surrounding the petroleum exclusion. Notably, the briefing included a forty-seven page brief filed by EPA (nominally the United States) as *amicus curiae* in support of the defendants.

In its brief, EPA argued that affirmance of the district court's decision was required by the "ordinary, contemporary, [and] common meaning" of the term "petroleum" in CERCLA⁸⁴ as well as by the legislative history of CERCLA and subsequent congressional actions addressing petroleum.⁸⁵ EPA also urged the court to defer to the General Counsel's memorandum of July 31, 1987, as a reasonable agency interpretation that was consistent with a long line of other agency interpretations.⁸⁶ EPA further urged the court to adopt a "middle ground" interpretation of the petroleum exclusion that would neither expose all releases of petroleum to CERCLA liability nor disable EPA from responding to any such releases.⁸⁷ Specifically, EPA asked the court to define petroleum as all commercial forms of petroleum, including those containing indigenous hazardous constituents or hazardous substances that are normally mixed with or added to petroleum in the refining process.⁸⁸

In its opinion, the Ninth Circuit found it unnecessary to go beyond the "plain language" of the statute to determine that the petroleum exclusion applied to leaded gasoline.⁸⁹ First, the court addressed the plaintiffs' contention that, under the canon of statutory construction known as the "doctrine of the last antecedent," the phrase "which is not otherwise specifically listed or designated as a hazardous substance under Section 9601(A)-(F)" in section 101(14) must be read to qualify the entire preceding phrase "[t]he term [hazardous substance] does not include petroleum, including crude oil or any fraction thereof."⁹⁰ The plaintiffs argued that the qualifying phrase reached back to the word "petroleum," and therefore, the petroleum exclusion must be understood not to apply to any substances, such as lead, contained within petroleum that were specifically listed as hazardous under section 9601(A)-(F). The court rejected this interpretation, finding that the last antecedent to the qualifying phrase was the term "any fraction." Thus the Court found that the only forms of petroleum not covered by the petroleum exclusion are "fractions"—which do not include gasoline—that have been listed or designated as hazardous under Section 9601(A)-(F).⁹¹

83. *Wilshire Westwood*, 21 Env't Rep. Cas. (BNA) at 2146-47.

84. Brief for the United States as *Amicus Curiae* in Support of Appellees, *supra* note 3, at 15-20.

85. *Id.* at 20-37.

86. *Id.* at 37-39.

87. *Id.* at 12-13, 39-46.

88. *Id.*

89. *Wilshire Westwood*, 881 F.2d at 803-05.

90. *Id.*

91. *Id.* The court also observed that the qualifying phrase would have used a plural verb rather than a singular verb if Congress had intended that it modify the term "petroleum"—

Second, the court disposed of the plaintiffs' argument based on various cases in which common constituents of petroleum had been treated as hazardous substances under CERCLA in other contexts.⁹² The plaintiffs also argued that Congress could not have intended that these substances be treated differently when released from underground gasoline storage tanks.⁹³ The plaintiffs' reliance on these cases was misplaced, the court found, because these cases did not involve a specific statutory exclusion such as the petroleum exclusion.⁹⁴

Third, the court observed that the plaintiffs' construction of the statute must also be rejected because it would render the petroleum exclusion a nullity.⁹⁵ Since all of the substances of which the plaintiffs had complained were indigenous to petroleum, any test that turned on whether these substances had been added to petroleum would be "nonsensical."⁹⁶

Next, the court explored at length the history of CERCLA, the amendments to RCRA in 1984, and the reauthorization of CERCLA in 1986. While finding it unnecessary to rely upon these sources, the court nevertheless believed that its interpretation followed legislative history.⁹⁷ Focusing particularly upon the 1984 and 1986 amendments, the court cautioned that the views of subsequent Congresses do not necessarily furnish a sound basis for inferring the intent of earlier ones, but concluded that "the very specificity of these amendments to cover leaking gasoline, when conjoined with the unchanged wording of the petroleum exclusion, cannot be disregarded in fathoming the legislative intent in 1980."⁹⁸

Finally, the court turned to the General Counsel's memorandum of July 31, 1987, interpreting the scope of the petroleum exclusion. Although the court also found it unnecessary to base its decision on that document, it observed that the General Counsel's interpretation was consistent with a plain-meaning construction and legislative history.⁹⁹ Moreover the court noted that the General Counsel's opinion lent further support to its own

and thus cover all substances included within it—rather than merely modify the term "any fraction." *Id.* at 804-05.

92. *Id.* at 805.

93. *Id.* The cases upon which the plaintiffs relied were: *United States v. Conservation Chemical Co.*, 619 F. Supp. 162, 182-83 (W.D. Mo. 1985) (lead, benzene, ethyl-benzene, and toluene are hazardous substances when released as part of chemical wastes); *United States v. Union Gas Co.*, 586 F. Supp. 1522, 1523 (E.D. Pa. 1984) (ethyl-benzene and xylene are hazardous substances when released as constituents of coal tar); *United States v. Carolawn Co.*, 21 E.R.C. 2124, 2125-26 (D.S.C. 1984) (lead is a hazardous substance when released as part of water-based paint).

94. *Wilshire Westwood*, 881 F.2d at 805.

95. *Id.*

96. *Id.*

97. The court was "persuaded that the legislative history supports [its] plain meaning construction." *Id.* The court also observed that Congress had not acted upon a bill introduced in 1985 that would have subjected petroleum to liability under CERCLA if any of its components were listed or designated. *Id.* at 806 (referring to H.R. 1881, 99th Cong., 1st Sess. (1985)).

98. *Id.* at 808.

99. *Id.*

interpretation.¹⁰⁰ "We conclude that EPA's interpretation should be afforded considerable deference," the court continued, "as consideration has been very thorough and consistent over time."¹⁰¹

III. CONCLUSION

While the Ninth Circuit may not have gone as far as some interested parties would have liked, including EPA, the court's decision undoubtedly will be a valuable asset to those relying upon the petroleum exclusion in negotiations or litigation with the government or other potentially responsible parties at Superfund sites. At the very least, the decision should lay to rest, once and for all, the objection that the petroleum exclusion should not be applied because petroleum is just as hazardous as other CERCLA substances. Whatever the truth of the matter,¹⁰² *Wilshire Westwood* establishes that Congress intended that the petroleum exclusion be applied as written. Beyond that, by firmly endorsing, although not finding necessary to its opinion, the legislative history and the General Counsel's interpretation of the petroleum exclusion, *Wilshire Westwood* has strengthened the hands of parties in cases in which the statute itself may not so clearly furnish the rule of decision.

100. *Id.*

101. *Id.* at 810. In a footnote, the court recounted the policy considerations that had led EPA to seek a "middle ground" interpretation of the petroleum exclusion, but it found that addressing these concerns was "not necessary to resolution of this appeal." *Id.* at 805 n.5.

102. As EPA noted at the time it published final regulations under Subpart I of RCRA, 53 Fed. Reg. 37,082, 37,188-89 (1988) (to be codified at 40 C.F.R. 280), petroleum-contaminated soils are neither EPA-listed hazardous wastes, nor are they likely to meet RCRA's current tests for hazardous waste characteristics. Even with respect to lead, "[t]he extremely high absorption coefficient of lead . . . indicates that such soils are unlikely to ever exhibit the characteristic of EP toxicity." *Id.* at 37,189. Were RCRA's test for toxicity amended so as to treat as toxic all substances containing organic material such as benzene, toluene, and xylene—a draft final rule to do this is currently under review at the Office of Management and Budget—then virtually all petroleum products would be considered toxic by characteristic. Nevertheless, the petroleum exclusion would still apply unless and until petroleum was also "listed or designated" as hazardous.