

or intend the discharge of pollution, a question of fact was present which was inappropriate for summary judgment.

Aetna further argued that the court should reject a decision of the Georgia Court of Appeals which allowed, as "damages" within the meaning of a liability policy, coverage for the costs that an insured incurs in undertaking remedial pollution measures as mandated by EPA. The court refused to reject the Georgia Court of Appeals' determination and followed the precedent.

Because the Georgia Supreme Court had clarified the issues on which Aetna had based its defense in refusing to pay Clausen's claims and had no good faith defense to justify its refusal, the court allowed Clausen to amend his complaint against Aetna.

DAVID M. LOPER

*Fertilizer Institute v. United States EPA*, 935 F.2d 1303 (D.C. Cir. 1991)

In response to an EPA rule which established the reportable quantities (RQ) for radionuclides, two groups of petitioners filed suit. The first set of petitioners and intervenors challenged EPA's interpretation of the Comprehensive Environmental Response, Compensation and Liability Act of 1980's (CERCLA) reporting requirement as set forth in the preamble to the final rule. The second set of petitioners challenged the administrative exemptions created by EPA as well as the RQ established for radon-222. The court rejected petitioners' contention that EPA's preamble ran counter to the Administrative Procedure Act (APA), however it vacated that portion of the final rule which interpreted CERCLA as requiring parties to report the placement of an RQ of a hazardous substance into an enclosed containment structure. The court also held that EPA provided inadequate notice and comment regarding the creation of administrative exemptions to CERCLA's reporting requirement. The court allowed these exemptions to stay in place pending further notice and comment. Finally, the court declined to address the issue of whether the RQ set for radon-222 was arbitrary because of the petitioners' failure to raise the issue before the agency.

In the preamble to the final rule, EPA set out in detail its interpretation of what constitutes a "release" of hazardous sub-

stances into the environment, thereby triggering the requirement to notify EPA. The consolidated petitioners argued that this interpretation of release constituted a "legislative" rule. This being the case, EPA's promulgation of the regulation was faulty due to the fact that it failed to provide an opportunity for a notice and comment period. The court held that petitioners had a fundamental misunderstanding of the distinction made by section 4(a) of the APA. Section 4(a) of the APA exempts from its notice and comment requirements those rules which are "interpretive" and not "legislative." 5 U.S.C. § 553(b)(3)(A). The court reasoned that, as a general rule, an agency can declare its understanding of what a statute requires without providing notice and comment, but an agency cannot go beyond the text of a statute and exercise its delegated powers without first providing adequate notice and comment. Thus, even where an agency's action has the effect of creating new duties it is not deemed to be a "legislative" action under section 4(a). This distinction is reserved for those instances when the agency *intends* to create new duties.

Notwithstanding the court's conclusion that EPA promulgated its interpretation of CERCLA's reporting requirement properly, the rule was vacated because: (1) EPA's interpretation of CERCLA's reporting requirement could not be reconciled with CERCLA's express terms, and (2) EPA failed to provide adequate notice and comment regarding the creation of administrative exemptions to CERCLA's reporting requirement.

The court held that when the various *in pari materia* provisions of CERCLA are read together, the Act clearly requires reporting whenever a hazardous substance is released from a facility into the environment. EPA, in the preamble to the final rule, interpreted CERCLA to require notification whenever a hazardous substance is placed into an "unenclosed containment structure." The court found that the EPA rule was overbroad in that it defined an enclosed structure as any holding device that exposes the contained materials directly to the ambient environment. This interpretation was faulty due to the fact that it defined release as the placement of a substance into a facility that is exposed to the environment rather than defining a release as the movement of a substance from a facility into the environment as CERCLA does.

Finally, the court held that EPA had failed to act in accordance with the provisions of the APA when creating administra-

tive exemptions to the reporting requirements for radionuclides. The court reasoned that although an agency has flexibility and need not provide a new round of notice and comment every time it modifies a rule, this is true only so long as the final rule is the logical outgrowth of the proposed rule. As the administrative exemptions contained in the final rule could not be considered a logical outgrowth of the proposed rule, the court found that EPA acted improperly in not affording interested parties an opportunity to comment. However, because the removal of the exemptions may affect EPA's ability to respond adequately to serious safety hazards, the court allowed the regulations to stay in place until EPA conducts a new round of notice and comment.

RIK TOZZI

*Joslyn Manufacturing Co. v. T.L. James & Co.*, 893 F.2d 80 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1017 (1991)

Joslyn Manufacturing Company (Joslyn), after being ordered to clean up an old creosoting plant under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1988), appealed a summary judgment by the United States District Court for the Western District of Louisiana in favor of T.L. James & Co. (T.L. James), a parent company. Raw creosoting chemicals had dripped into a sump pit; some chemicals were subsequently discharged into a ditch and later flowed into a slough. The chemicals were then washed away by rain into surrounding land and waterways.

Joslyn claimed that T.L. James was liable for the cleanup under 42 U.S.C. § 9607(a)(2) as an "owner or operator" of the site. Alternatively, Joslyn contended that the corporate veil should be pierced, thereby imposing liability on the parent company, T.L. James. Joslyn urged the court to interpret CERCLA's definition of "owner or operator" to include parent corporations of subsidiaries found liable under the statute. Joslyn argued that such an interpretation has been adopted by other courts, including the Second Circuit. The court examined the language of CERCLA and determined that Joslyn's reading of the statute was overly broad. Instead, the court held that CERCLA did not include parent companies of offending wholly-