

5-1-1992

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Recommended Citation

Jack Pate, *The Wagner Seed Saga: Is There Any Great CERCLA Route That Potentially Responsible Parties Can Chart Between the Devil and the Deep Blue Sea?*, 6 BYU J. Pub. L. 401 (1992).

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The Wagner Seed Saga: Is There Any Great Cerca Route That Potentially Responsible Parties Can Chart Between the Devil and the Deep Blue Sea?

I. INTRODUCTION

In *Wagner Seed Co. v. Bush*,¹ the D.C. Circuit sustained the Environmental Protection Agency's (EPA) denial of reimbursement to Wagner Seed Co. (Wagner) for its costs of cleaning up a chemical spill at Wagner's warehouse, even though Wagner proved a valid "act of God" defense. The court so held, even though 1) the EPA had ordered the cleanup under threat of severe sanctions and had successfully argued that Wagner would not suffer any "non-compensable harm" if it complied and were found not liable later, 2) the Second Circuit had denied any pre-enforcement review of the EPA order on the basis that Wagner could have an adequate post hoc judicial review of its liability, and 3) the EPA later did not find Wagner liable for the spill which resulted from an "act of God," a lightning strike that caused the conflagration of the warehouse.²

The EPA argued both sides of the facts. First, the EPA claimed in the Second Circuit that Wagner was not entitled to an injunction since it would not suffer "non-compensable harm" if not liable by virtue of a valid defense.³ That is, Wagner could petition for reimbursement from the EPA if no other Potentially Responsible Party (PRP) existed from whom to seek contribution.⁴

Second, the EPA, in the D.C. Circuit, claimed that Wagner was not entitled to reimbursement since it had completed most of its cleanup prior to enactment of the Superfund Amend-

1. 946 F.2d 918 (D.C. Cir. 1991) [hereinafter *Wagner III*].

2. *Id.*

3. *Wagner Seed Co. v. Daggett*, 800 F.2d 310, 314 (2d Cir. 1986) [hereinafter *Wagner I*]. Between *Wagner I* and *Wagner III*, came *Wagner Seed Co., Inc. v. Bush*, 709 F. Supp. 249, 250 (D. D.C. 1989) [hereinafter *Wagner II*] wherein Wagner Seed unsuccessfully petitioned and then sued EPA for the costs of cleanup resulting from Wagner's compliance with the order litigated in *Wagner I*. *Wagner III* is the appeal of *Wagner II*, thus completing a "Wagner Trilogy."

4. *Wagner*, 800 F.2d at 314.

ments and Reauthorization Act of 1986 (SARA)⁵ provisions setting forth the reimbursement scheme.⁶ The EPA interpreted the language of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) section 106(b)(2)(A),⁷ to preclude reimbursement to Wagner. The court agreed.

Wagner did not advance judicial estoppel or equitable estoppel to preclude the EPA from changing its previous assertion that a remedy was available. Wagner failed to invoke CERCLA section 112,⁸ which provided a remedy prior to section 106. Wagner brought its claim under section 106, rather than under section 112.⁹ Wagner could have asserted that if it was time-barred from the procedures of the new statutory enactment, then it was certainly entitled to relief under the pre-existing procedures. Finally, the opinion never mentions estoppel issues which could have been raised by the court or by Wagner and should have been determinative.¹⁰

This paper discusses the effect of the courts' failure to consider judicial or equitable estoppel in holding the EPA to its original arguments in which it prevailed against Wagner. Section II lays out the facts, procedure and reasoning beginning in *Wagner I*¹¹ and concluding with *Wagner III*.¹² Section III explores the provisions of CERCLA on which the courts relied in this "Wagner Trilogy,"¹³ as well as the judicial estoppel doctrine on which no one relied. Section IV points out some possible flaws in the D.C. Circuit's reasoning in *Wagner III*, which should have changed the result. Section V provides suggested approaches that the courts, Potentially Responsible Parties (PRP) and the EPA should take to prevent such inequities in future actions, not just as pertaining to section 106 orders, but

5. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986), codified at 42 U.S.C. § 113 (1988) [hereinafter SARA].

6. *Wagner III*, 946 F.2d at 924.

7. See Comprehensive Environmental Response, Compensation, and Liability Act, § 106(b)(2)(A), Pub. L. 99-499, codified at 42 U.S.C. § 9606(b)(2)(A) (1988) [hereinafter CERCLA].

8. *Id.* § 112(b), 42 U.S.C. § 9612(b).

9. *Wagner III* at 920.

10. *Id.*; see Mark J. Plumer, Note, *Judicial Estoppel: The Refurbishing of a Judicial Shield*, 55 GEO. WASH. L. REV. 409 (1987); 1B JEREMY C. MOORE, *FEDERAL PRACTICE*, ¶ 0.405 [8] (1991).

11. 800 F.2d 310.

12. 946 F.2d 918.

13. See *supra* note 3.

as a general proposition.

II. FACTUAL BACKGROUND

To appreciate fully the court's ruling in *Wagner III*¹⁴ one must understand the long drama which occurred as Wagner sought equity amid a maze of regulatory and judicial limitations. Wagner vainly attempted pre-enforcement judicial review of an EPA administrative order, was rebuffed in its constitutional challenges as the courts found that due process after the fact would remedy all injustices, and then watched its promised remedy disappear as the most recent court apparently forgot or ignored the previous arguments and assurances of the EPA and the courts.

A. *Wagner I in the EPA*

Wagner Seed Company distributed animal feed and agricultural chemicals to nurseries and municipalities from its inventory in a warehouse on Long Island.¹⁵ On June 1, 1985, Wagner's warehouse burned to the ground in a fire caused by a lightning strike.¹⁶ Despite Wagner's efforts at control, under the guidance of hired experts, chemicals escaped to surrounding properties with the runoff produced as firefighters used water to fight the flames.¹⁷ Wagner immediately commenced a cleanup, supervised by the New York State Department of Environmental Conservation (DEC).¹⁸ The EPA disputed the effectiveness of the cleanup, and when meetings between the EPA and Wagner proved unsatisfactory to the EPA, it issued an administrative order under CERCLA Section 106,¹⁹ requiring prompt remedial actions, with eventual complete elimination of the contamination.²⁰ A \$5000 daily fine for noncompliance was threatened,²¹ with treble damages if government

14. *Wagner III*, 946 F.2d at 920.

15. *Wagner I*, 800 F.2d at 313.

16. *Id.*

17. *Id.*

18. *Id.*

19. CERCLA § 106(a), 42 U.S.C. § 9606(a) (1988).

20. CERCLA § 106(a), 42 U.S.C. § 9606(a) permits such orders upon a finding "that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance." *Id.*

21. CERCLA § 106(b), 42 U.S.C. § 9606(b).

resources had to be used to clean up the site.²²

B. Wagner I in the United States District Court for the Eastern District of New York

In the United States District Court for the Eastern District of New York, Wagner moved for a preliminary injunction to stop the EPA from enforcing its section 106 administrative order or imposing sanctions.²³ The EPA successfully argued that Wagner's remedy was to seek reimbursement after the cleanup, not judicial review prior to the cleanup. The EPA prevailed, arguing that Wagner would not suffer any "non-compensable harm."²⁴ The district court agreed that no unconstitutional taking would occur, since due process would be satisfied.²⁵

C. Wagner I in the Second Circuit

The Second Circuit determined that it and the district court lacked jurisdiction to conduct any pre-enforcement judicial review as to Wagner's "act of God" defense.²⁶ The court did consider the merits of Wagner's constitutional arguments that such a severe penalty without pre-enforcement review violated "due process." The court held the arguments unavailing, saying that a good faith defense must be read into the statute.²⁷

The court sustained the statute by giving it a constitutional reading in an *Ex Parte Young* analysis.²⁸ The statute would have been an unconstitutional burden, inhibiting a party from appealing any order absent some scheme to provide opportunity for testing the order without incurring debilitating or confiscatory penalties.²⁹ Wagner would thus not be liable for punitive damages or fines if a reviewing court found it to "appear and in

22. CERCLA § 107(c)(3), 42 U.S.C. § 9607(c)(3).

23. *Wagner I*, 800 F.2d at 312.

24. *Id.* at 314.

25. *Id.* at 312-313.

26. *Id.* at 315.

27. *Id.* at 316.

28. *Id.* at 316 (interpreting *Ex Parte Young*, 209 U.S. 123 (1908) (a penalty is unconstitutional if it is so severe that it intimidates a party from testing its validity in court); since a court must give a statute a constitutional reading if possible, a good faith defense must be read in to avoid unconstitutionality here).

29. *Id.* at 314 (citing *Brown & Williamson Tobacco Corp. v. Engman*, 527 F.2d 1115, 1119 (2d Cir. 1975), *cert. denied* 426 U.S. 911 (1976)).

good faith interpose defenses as a basis for noncompliance."³⁰

With unwarranted brevity, the court dispensed with the "unconstitutional taking" argument that later became the issue in *Wagner II* and *Wagner III*.³¹ Wagner had expressed doubt that it could secure reimbursement from the EPA even if it successfully proved that it was not a responsible party.³² The court referred back to the availability of the "good faith defense" as protection against imposition of a fine or other penalty.³³ The court, siding with the EPA, stated that post-enforcement judicial review would prevent any taking in violation of "due process."³⁴ Until that time, Wagner could comply, and petition for reimbursement later. Alternatively, Wagner could refuse, relying on its "good faith defense" to strike down, in some future litigation, any accrued penalties.³⁵ Wagner complied in the face of the penalties.

D. *Wagner II in the EPA*

Upon ninety eight percent completion of the cleanup to the EPA's satisfaction, Wagner petitioned the EPA for reimbursement of costs under the amended provisions of CERCLA section 106(b)(2) which had been passed during the cleanup.³⁶ The EPA denied the petition, interpreting the statute as precluding reimbursement of any cleanup activity begun prior to the passage of the act.³⁷ While Wagner's "act of God" defense could relieve Wagner of any liability for the release or costs of cleanup, the EPA said that reimbursement did not apply to a company that had completed a substantial amount of cleanup before the 1986 enactment³⁸ of the statute.³⁹

30. *Id.* at 316 (quoting *Reisman v. Caplin*, 375 U.S. 440, 447 n.6 (1964)).

31. *Id.* at 317.

32. *Id.*; see also *United States v. Reilly Tar & Chemical Corp.*, 606 F. Supp. 412, 416; (D. Minn. 1985) *Wagner Elec. Corp. v. Thomas*, 612 F. Supp. 736, 739 (D. Kan. 1985); *Aminoil, Inc. v. E.P.A.*, 599 F. Supp. 69, 73-74 (C.D. Cal. 1984) (indicating concern that reimbursement might not be available).

33. *Wagner I*, 800 F.2d at 312, 317.

34. *Id.*

35. *Id.*

36. *Wagner II*, 709 F. Supp. at 250.

37. *Id.*

38. SARA § 613, 42 U.S.C. § 113 (1988).

39. *Wagner II*, 709 F. Supp. at 252-53.

*E. Wagner II in the District Court
for the District of Columbia*

Following the EPA's denial of the petition for reimbursement, Wagner sued in the District of Columbia.⁴⁰ That court held that the EPA made a reasonable interpretation of an ambiguous statute.⁴¹ Deferring to the EPA, it held that the EPA had reasonably found the statute to be inapplicable to Wagner since Wagner had agreed to engage in cleanup prior to passage of the Act.⁴²

The EPA changed its argument from *Wagner I*, where the court found Wagner's fear of "no reimbursement" unconvincing, despite Wagner's concern over the EPA reluctance to reimburse expenses as expressed in *Aminoil, Inc. v. E.P.A.*⁴³

F. Wagner III in the District of Columbia Circuit

In *Wagner III*, the D.C. Circuit sustained the district court's ruling in favor of the EPA's denial of reimbursement to Wagner, notwithstanding that the EPA did not dispute Wagner's "act of God" defense, thereby relieving Wagner of all liability.

Judge Ginsburg held that the EPA was the administering agency of CERCLA, and that the court owed deference to the EPA's interpretation of the statute if it was a "permissible interpretation" of the language.⁴⁴ The court then held that the EPA's interpretation of the reimbursement provision, that the SARA amendment did not apply to any party which received a cleanup order prior to enactment of SARA in 1986, was reasonable.⁴⁵

In his dissent, Judge Williams argued that the EPA was not "the administrative agency" charged with administration of CERCLA, so deference was misplaced. Therefore, the interpretation issue should not have been so summarily dismissed.⁴⁶

40. *Id.*

41. *Id.* at 252-53.

42. *Id.*; see also CERCLA § 106(b)(2), 42 U.S.C.A. § 9606(b)(2) (1988).

43. 599 F. Supp. 69, 73-74 (C.D. Cal. 1984) (describing methods EPA may use to pursue an action); See *Wagner I*, 800 F.2d at 314; see also *United States v. Reilly Tar & Chemical Corp.*, 606 F. Supp. 412, 416; (D. Minn. 1985); *Wagner Elec. Corp. v. Thomas*, 612 F. Supp. 736, 739 (D. Kan. 1985).

44. *Wagner III*, 946 F.2d 918, 920 (D.C. Cir. 1991).

45. *Id.* at 922-23

46. *Id.* at 925-26 (Williams, J., dissenting).

Estoppel arguments were not discussed in the opinion. Wagner did not raise them, nor did the court do so "sua sponte."⁴⁷

III. BACKGROUND OF PERTINENT CERCLA PROVISIONS

CERCLA was passed and funded in 1980.⁴⁸ In 1986, Congress passed SARA.⁴⁹ Cleanups are funded by individual parties responsible for the hazardous wastes disposed of, or by, the EPA from the Hazardous Substances Superfund⁵⁰ or "Superfund."⁵¹

Funding comes from general tax revenues, taxes on generators and manufacturers of hazardous chemicals, and from recovery actions against parties responsible for releases of hazardous wastes.⁵² The EPA can issue administrative orders under CERCLA to a Potentially Responsible Party (PRP) to conduct a cleanup.⁵³ The EPA can assess penalties for non-compliance or willful violations of the order.⁵⁴

A. *THE STATUTE: Key Provisions Regulating the EPA and Potentially Responsible Parties under CERCLA Section 106 and Related Sections*

Section 106 has several provisions of interest. These provisions include penalties, authority and administration, access to judicial review, and reimbursement schemes for parties ordered to clean up but later found not liable.

1. *Penalty Provisions*

The penalties for non-compliance with CERCLA are central to the instant case. The penalty provisions state that any per-

47. *Id.* at 919-920, 925.

48. CERCLA § 101-175, 42 U.S.C. § 9601-9675 (1988).

49. Pub. L. No. 99-499, 100 Stat. 1614 (codified at 42 U.S.C. § 9601-9675 (1988)). The amendment included mandatory cleanup schedules and detailed cleanup standards, and provided additional funds and authority to regulate Superfund sites. *Id.*

50. See CERCLA § 101(11), 42 U.S.C. § 9601(11) (1988); see also *id.* § 101, 42 U.S.C. § 9601 (definitions under CERCLA).

51. *Id.* § 107, 42 U.S.C. § 9607.

52. *Id.* § 107(a), 42 U.S.C. § 9607(a).

53. *Id.* § 106(a), 42 U.S.C. § 9606(a).

54. *Id.* §§ 107(a) and (c). A detailed discussion of these provisions is provided by Richard H. Mays, but provisions key to *Wagner III* are summarized here. See generally Richard H. Mays, *Who's Afraid Of CERCLA § 106 Administrative Orders?*, 19 ENV'T REP. CURR. DEV.(BNA) 1926 (1989).

son who, without sufficient cause, willfully violates, or fails or refuses to comply with a section 106 administrative order may be fined not more than \$25,000 per day of violation.⁵⁵ Similarly,

if a person who is liable for a release or threat of a hazardous substance fails without sufficient cause to properly provide removal or remedial action pursuant to a section 106 administrative order, such person may be liable to the United States for punitive damages in an amount at least equal to, and not more than, three times the amount of any costs incurred by the fund as a result of such failure to take proper action.⁵⁶

A Potentially Responsible Party (PRP) at a superfund site must therefore respond carefully to such an order.⁵⁷ Conceivably, other future EPA policies may have similar review and sanction provisions and analogous EPA arguments before the courts.

2. *Authority and Administration*

CERCLA provides in relevant part:

[W]hen the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat The President may also . . . take other action under this section, including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.⁵⁸

The President's authority is actually redelegated to the EPA, the judiciary, and agencies such as the United States Department of Energy (DOE) and the United States Department of Defense (DOD).⁵⁹

55. CERCLA § 106(b)(1), 42 U.S.C. § 9606(b)(1) (1988).

56. *Id.* § 107(c)(3), 42 U.S.C. § 9607(c)(3).

57. *See, e.g., id.* § 113(k)(2)(D), 42 U.S.C. § 9613(d)(2)(D) (parties which may be liable for costs of cleanup, by virtue of their responsibility for creating, disposing, etc. of the "released" hazardous material).

58. *Id.* § 106(a), 42 U.S.C. § 9606(a).

59. Some authority under § 106 has been redelegated, to the Administrator of the EPA by Executive Order No. 12580, § 4(d)(1) (Jan. 25, 1987). Nevertheless,

3. *Judicial Review*

Also central to *Wagner I* and *Wagner III* was the lack of pre-enforcement review of a section 106 order in any U.S. district court, regardless of any justification for refusal to comply.⁶⁰ CERCLA precludes federal court jurisdiction to review any order issued under section 106, except for EPA-initiated enforcement actions such as a recovery action for response costs, damages, or contribution, an enforcement action, or an action to compel remedial activities.⁶¹ However, the EPA could take years to complete cleanup, and litigate liability before any judicial review of the order occurs. The potential devastation of penalties compounding during all those years was no doubt a driving force in Wagner's decision to comply first and litigate later.⁶²

4. *Provisions for Reimbursement*

SARA⁶³ added section 106(b)(2), authorizing a simpler and more specific mechanism for a PRP to petition the EPA for reimbursement of costs of completed cleanup.⁶⁴ Under SARA, a PRP must show by a preponderance of the evidence that it is not liable for those costs.⁶⁵ Otherwise, it must demonstrate on the administrative record that the EPA's proposed response was "arbitrary, capricious, or otherwise not in accordance with law."⁶⁶ This is not the only interpretation of the statute,⁶⁷ which is fact dependent, but it may be the most widely accepted.⁶⁸

It is critical to this case that until the 1986 enactment of SARA, the procedure for claiming against Superfund was in section 112.⁶⁹ SARA merely provided a simpler procedure for

the Federal Judiciary has a leading role, as do other agencies such as the Department of Justice and the Department of Defense. CERCLA §§ 106(a), 120, 42 U.S.C. §§ 9606(a), 9620 (1988).

60. See CERCLA § 113(h), 42 U.S.C. § 9613(h) (1988).

61. *Id.*

62. See *Wagner I*, 800 F.2d 310, 315 (2d Cir. 1986).

63. Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified at 42 U.S.C. § 9613 (1988)).

64. CERCLA § 106(b)(2), 42 U.S.C. § 9606(b)(2).

65. *Id.* § 106(b)(2)(C), 42 U.S.C. § 9606(b)(2)(C).

66. *Id.* § 106(b)(2)(D), 42 U.S.C. § 9606(b)(2)(D).

67. See *Wagner III*, 946 F.2d 918 (D.C. Cir. 1991) (Williams, J., dissenting).

68. See, e.g., Mays, *supra* note 54, at 1927.

69. See CERCLA § 112, 94 Stat. 2792-95, (codified as amended by SARA, §§

those under section 106 administrative orders, including a civil action, with a lower "preponderance of the evidence" standard of proof.⁷⁰

*B. On "the Horns of a Dilemma" "Between the Devil and the Deep Blue Sea"*⁷¹

Like the court's metaphors, mixed above, the litany of provisions relating to section 106 orders demonstrates the potential difficulty for a PRP that believes itself to have a meritorious defense to liability.⁷² Punitive damages are discretionary with a reviewing court, up to triple the cost to the Fund.⁷³ Likewise, fines up to \$25,000 per day of willful violation give a PRP pause.⁷⁴ Thus, if the EPA orders an improper remedial action, a PRP comes face to face with debilitating penalties and treble damages. These costs accrue from the deadline for compliance, specified in the order, until after judicial review of the order and the PRP's defenses, years later.

C. Making A Good Faith Argument For the "Good Faith Defense"

One key to a PRP's "compliance decision" under an order is the "sufficient cause" language of the penalty provisions.⁷⁵ The meaning of "sufficient cause," according to Senator Robert Stafford, sponsor of the legislation, should

encompass defenses . . . that the person who was the subject of the order was not the party responsible under the act for the release of the hazardous substance. It would certainly be unfair to assess punitive damages against a party who for good reason believed himself not to be the responsible party. For example, if there were, at the time of the order, substantial facts in question, or if the party subject to the order was *not a substantial contributor* to the release or threatened release, punitive damages should either not be assessed or should be reduced *in the interest of equity*.

109(a)(3), 112, 100 Stat. 1633, 1646-47, at 42 U.S.C. § 9612 (1988)) (laying out a reimbursement claims procedure).

70. *Id.* § 106 (b)(2)(C), 42 U.S.C. § 9606(b)(2)(C)

71. *Wagner I*, 800 F.2d 311, 312 (2d Cir. 1986).

72. *See* CERCLA § 107(c)(3), 42 U.S.C. § 9607(c)(3) (1988).

73. *Id.*

74. *Id.* § 106(b)(1), 42 U.S.C. § 9606(b)(1).

75. *Id.*; § 107(c)(3), 42 U.S.C. §§ 9606(b)(1), 9607(c)(3).

...
We also intend that the [EPA's] orders . . . must have been *valid*. In particular, . . . not be inconsistent with the national contingency plan. [We] expect the courts to examine . . . orders or expenditures . . . given the standards of the act and of the national contingency plan. If the orders or expenditures were not proper, then certainly no punitive damages should be assessed or they should be proportionate to the demands of *equity*.⁷⁶

Several defenses that might be "sufficient cause" are treated in the literature and cases, but are not pertinent here.⁷⁷ Invalidity of the order, on the other hand could arguably apply to *Wagner*, as it includes a failure to follow prescribed procedures⁷⁸ or to comply with standards set forth in the statute or in the National Contingency Plan.⁷⁹ Moreover, the remedy selected by the EPA must be the most cost-effective⁸⁰ and could be subject to attack on those grounds.⁸¹

D. Judicial Estoppel: Powerful, but Distinct from Equitable Estoppel and Collateral Estoppel

Judicial estoppel⁸² is a doctrine forbidding inconsistent positions, usually as to facts, which operates independently of equitable estoppel.⁸³ Judicial estoppel is also distinct from collateral estoppel. Collateral estoppel precludes relitigation of an issue that has been actually litigated and was essential to the judgment.⁸⁴ Equitable estoppel precludes a change of position by an opposing party if one has detrimentally relied on the

76. 126 CONG. REC. at 30986 (Nov. 24, 1980) (emphasis added).

77. See, e.g., Randy M. Mott, *Surviving the Superfund Nuclear Weapon: Defense of Administrative Orders*, COPING WITH ENVIRONMENTAL ENFORCEMENT AND COMPLIANCE UNDER THE NEW ADMINISTRATION: A SATELLITE PROGRAM (1989); Mays, *supra*, note 54.

78. However, an error in remedial action selected must be so central that the action would have been significantly changed absent such error. See SARA § 113(j)(4); 42 U.S.C. § 9613(j)(4) (1988).

79. See 40 C.F.R. Part 300 (1991).

80. See CERCLA § 121(b), 42 U.S.C. § 9621(b) (1988); 40 C.F.R. § 300.68 (1991) (National Contingency Plan).

81. See, e.g., *Colorado v. Idarado Mining Co.*, 707 F. Supp. 1227 (D. Colo. 1989).

82. See Plumer, *supra* note 10; MOORE, *supra*, note 10 at ¶ 0.405[8].

83. *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1178 (D. S.C. 1975).

84. *Blonder-Tongue Labs. v. University of Illinois Found.*, 402 U.S. 313 (1971).

opposition's earlier position on which it prevailed.⁸⁵ By contrast, in certain circumstances a party may be precluded as a matter of law from adopting a legal position in conflict with one earlier taken in the same or related litigation.⁸⁶ Though not confined to situations where the party asserting the earlier contrary position prevailed there, it is considered more appropriate in that situation.⁸⁷

Thus, judicial estoppel operates regardless of whether the prior inconsistent position was successfully maintained and irrespective of reliance by, or prejudice to, the party invoking it.⁸⁸ So, likewise, strangers, as well as parties to the proceeding in which the prior inconsistent position was taken, may take advantage of the preclusion.⁸⁹ The requirement that the position be successfully asserted simply means that a party must have been successful in getting some earlier court to accept the position.⁹⁰

The rationale for the rule is that "it is sufficiently important to the integrity of the federal courts that their processes not be lent to this plain example of 'intentional self-contradiction . . . as a means of obtaining unfair advantage.'"⁹¹ The general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings justify the rule.⁹² Courts hold that use of inconsistent positions would flagrantly exemplify that playing "fast and loose with the courts" which has been recognized as an evil that the courts should not tolerate.⁹³

Thus, judicial estoppel protects interests different from those protected by equitable estoppel.⁹⁴ Equitable estoppel is designed to protect any adversary who may be prejudiced by the attempted change of position.⁹⁵ On the other hand, judi-

85. *Scarano v. Central New Jersey Ry.*, 203 F.2d 510, 512-513 (3d Cir. 1953)

86. *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1167 (4th Cir. 1982).

87. *Id.*; see also *United States v. Webber*, 396 F.2d 381 (3d Cir. 1968).

88. *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146 (D. S.C. 1975).

89. *Id.*

90. *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir. 1982).

91. *Id.* at 1167-1168; see also *Scarano v. Central New Jersey Ry.*, 203 F.2d 510, 513 (3d Cir. 1953).

92. *Arizona v. Shamrock Foods Co.*, 729 F.2d 1208, 1215 (9th Cir. 1984) (quoting 1B JEREMY C. MOORE, FEDERAL PRACTICE ¶ .405[8] at 767 (1991)).

93. *Id.*

94. *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1177 (D.S.C. 1975).

95. *Id.*

cial estoppel, or preclusion against inconsistent positions, is designed to protect the integrity of the courts and the judicial process.⁹⁶ Its purpose is to prevent

a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society [T]he public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.⁹⁷

The effect of judicial estoppel is to bar advancement of truly inconsistent positions.⁹⁸ A party who has obtained relief from an adversary by asserting and offering proof to support one position may not be heard later to contradict himself in an effort to establish against the same adversary a second claim inconsistent with his earlier contention.⁹⁹ There is no unfairness nor conflict in the rule since it is not a denial of pleading in the alternative.¹⁰⁰ Some courts have actually extended the rule, where identity of parties and a single transaction encompass two separate actions, to bind a party making any allegation to that allegation in both causes of action.¹⁰¹

The importance of judicial estoppel in the instant case is that the *Wagner III* court states that the EPA had applied its interpretation of the law consistently.¹⁰² That ignores, however, the totally inconsistent approach of the EPA during *Wagner I*, where the EPA argued that PRPs had a reimbursement remedy if not liable for a release which they cleaned up, and thus would suffer no "non-compensable harm."¹⁰³

IV. ANALYSIS OF THE *Wagner III* COURT'S REASONING

The *Wagner III* court, was deferential, arguably to the point of abdication. In dissent, Judge Williams pointed out that the EPA is not "the agency" charged with administration of CERCLA, so deference is misplaced, and thus the interpreta-

96. *Id.*

97. *Id.* at 1179.

98. *Arizona v. Shamrock Foods Co.*, 729 F.2d 1208, 1215 (9th Cir. 1984).

99. *Id.*

100. *Id.* at 1215; see also FED. R. CIV. P. 8(e)(2).

101. *In re Double D Dredging Co.*, 467 F.2d 468,469 (5th Cir. 1972).

102. *Wagner III*, 946 F.2d 918, 922 (D.C. Cir. 1991) (citing 918 F.2d 1323 (7th Cir. 1990)).

103. *Wagner I*, 800 F.2d 310, 314 (2d Cir. 1986).

tion issue should not have been so summarily dismissed.¹⁰⁴ Had the court focused on interpretation, Wagner might have won on the merits; however, estoppel arguments should have precluded the EPA's interpretation entirely.

A. *The EPA Is Not Necessarily the Delegated Agency to Administer CERCLA*

Various agencies and courts are given responsibilities in CERCLA. Since the EPA is not the "administering agency" of CERCLA section 106(b)(2), it is entitled to no deference in interpretation.¹⁰⁵ This fact is critical since the standard of review can determine the outcome here. The court cited the statute giving the EPA authority to pay claims to avoid suits as if it were sufficient to make the EPA the administering agency.¹⁰⁶ It then cited the *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,¹⁰⁷ rule that "when a court is presented with an interpretation of a statute by an agency that administers it, and the statute is silent or ambiguous with respect to the specific issue, then the court must defer to that interpretation if it is reasonable."¹⁰⁸ The court's entire analysis hangs on this assignment.¹⁰⁹

The EPA is clearly neither the delegated agency to interpret nor to administer all of CERCLA.¹¹⁰ How much of the statute must the EPA administer in order to have interpretive omnipotence? *Chevron* indicates deference as to a specific sec-

104. *Wagner III*, at 925-926 (Williams, J., dissenting).

105. See CERCLA § 106(b)(2), 42 U.S.C. § 9606(b)(2) (1988).

106. See Exec. Order No. 12480, § 4(d)(1), reprinted in 42 U.S.C.A. foll. § 9615; see also CERCLA § 106(b)(2)(A), 42 U.S.C. § 9606(b)(2)(A) (1988); *Wagner III*, 946 F.2d at 920 (citing *Eagle Picher-Indus. v. EPA*, 759 F.2d 905, 909 n.9, 920 (D.C. Cir. 1985) as the only precedent for this proposition).

107. 467 U.S. 837 (1984).

108. *Wagner III*, 946 F.2d at 920.

109. Under CERCLA § 106(b)(2), 42 U.S.C. § 9606(b)(2) (1988), any "person who receives and complies" with an abatement order under § 106(a) may petition the President for reimbursement. The court identified this as the key issue. The EPA has been delegated the authority to settle such cases if possible, but a complainant must sue the President if denied. *Wagner III* at 921. Here the EPA was interpreted to be the delegatee of the President's authority, and then given such deference in its interpretation as arguably to nullify any appeal of that interpretation. *Id.* at 921-923. Had the court instead sent *Wagner* back to a procedure under § 112, the issue should have gone to arbitration, as discussed below.

110. See *United States v. Ottati & Goss, Inc.*, 900 F.2d 429, 434 (1st Cir. 1990) (refusing to give the EPA interpretation of remedies any deference); see also *Wagner III* 946 F.2d 918 (Williams, J., dissenting).

tion for which an agency is responsible.¹¹¹ The EPA had authority to interpret the meaning of "receives and complies" in section 106(b)(2) as the President's agent to pay rather than litigate.¹¹² However, under section 106(b)(1) and 106(b)(2)(B), the courts enforce rights of all parties, so the EPA deserves no deference where it merely acts as the President's "prosecutor."¹¹³

This concept is not unique.¹¹⁴ Certainly in administering its own affairs, an agency like the EPA makes operational interpretations of many statutes for which it is not responsible.¹¹⁵ The EPA could not assay to claim that such an interpretation is binding on the IRS, for example, the agency responsible for administering the tax code. One is hard pressed to

111. See *Chevron*, 467 U.S. 837 (1984) (deference only for agency's construction of a statute which it administers); see also *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990). The Court unanimously refused to defer to the Department of Labor on a federal private right of action under 29 U.S.C. § 1801-72 (1988). The Secretary of Labor administered the act generally, and set safety standards under 29 U.S.C. § 1841(b)(2) (1988) and made rules under § 1861, but under § 1854, the Court stopped. It stated that "Congress has expressly established the Judiciary and not the Department of Labor as the adjudicator of private rights of action arising under the statute," so the agency could not "bootstrap" its § 1841 authority over standards into an area in which it had "no jurisdiction." *Adams Fruit*, 494 U.S. at 647.

112. CERCLA § 106(b)(2)(A), 42 U.S.C. § 9606(b)(2)(A) (1988). A non-labile PRP can petition the President for reimbursement after it "receives and complies with the terms of any order." *Id.*

113. In *Adams Fruit*, 494 U.S. 638 (1990), the Secretary of Agriculture was held to have no administrative oversight over § 1854 rights of action in the Migrant and Seasonal Agricultural Worker Protection Act, only power to set safety standards under 29 U.S.C. § 1841(b)(2). See also *United States v. Western Electric Co.*, 900 F.2d 283, 297 (D.C. Cir. 1990) (no deference to agency acting in "prosecutorial role").

114. See *Wagner III*, 946 F.2d 918 (Williams, J., dissenting); see also *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990) (Secretary of Agriculture has no administrative oversight over § 1854 rights); *United States v. Ottati & Goss, Inc.*, 900 F.2d 429, 434 (1st Cir. 1990) (refusing to give the EPA interpretation of remedies any deference); see, e.g. *United States v. Kayser-Roth Corp.*, 910 F.2d 24, 26-27 (1st Cir. 1990) (definition of "owner or operator" in CERCLA § 107(a)); *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1554-60 (11th Cir. 1990) ("owner/operator" as well as "secured creditor exemption"); *United States v. Monsanto Co.*, 858 F.2d 160, 168-70 (4th Cir. 1988) (affirmative defense definition under § 107(b)(3) and waste generator's responsibility under § 107(a)(3)); *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 743-44 (8th Cir. 1986) (individual liability under § 107(a)(3)). Even in *Wagner I*, a good faith defense against the EPA's threatened fines and penalties was reviewed de novo. *Wagner I*, 800 F.2d at 316.

115. For example, the EPA may make operational interpretations of Title 26 of the U.S. Code which deals with taxation.

distinguish the court's actions in the instant case from such a situation, however. Absent language giving the EPA administrative authority, it had none over CERCLA administration in general. At least, the EPA had no more than the Department of Defense (DOD), the Department of Energy (DOE) or any agency assigned enforcement and administration of other CERCLA sections.¹¹⁶

B. The Court Improperly Focused on the Process of Section 106(b)(2), Rather Than Wagner's Right to a Remedy Under Section 112

Properly viewed, Section 106(b)(2) simply provides a new procedural means for reimbursement from the Superfund. Congress provided the original Section 111(a)(2) for any claim for response costs required of non-government persons and approved by the responsible federal official.¹¹⁷

Section 106(b)(2) simply added an alternative procedure and standard of review.¹¹⁸ A PRP can now sue in a civil action in which the tribunal is a federal district court under a "preponderance of the evidence" standard for non-liability.¹¹⁹ Certainly, a civil action yields a more even playing field than an EPA administrative proceeding.

Moreover, the EPA never asserted to the court that Wagner was liable for the release in question, and no other owner operator existed from whom to seek contribution.¹²⁰ The least that the *Wagner III* court should have done was to send Wagner back to arbitration under the old rule to seek its remedy. If Wagner could not fit under the new rule, the EPA could at least be estopped from saying that Wagner could not fit under the pre-existing one.

The court claimed that the issue was not liability, but rather the definition of one who "receives and complies" with

116. Courts and agencies with roles include the Federal Judiciary and the Department of Justice as well as the Department of Defense, CERCLA §§ 106(a), 120, 42 U.S.C. §§ 9606(a), 9620 (1988). See also Executive Order No. 12580, §§ 2(a), 2(c), 2(d), 5(a), 7(b)(2) and 4(d)(1) (Jan. 25, 1987) (delegating authority to the Public Health Service, Federal Emergency Management Agency, Department of Defense, Department of Energy, Department of Transportation, and Coast Guard).

117. See CERCLA §§ 111(a)(2), 112(b), 42 U.S.C. §§ 9611(a)(2), 9612(b); cf. *id.* § 106(b)(2), 42 U.S.C. § 9606(b)(2).

118. See *id.* § 112(a)-(b), 42 U.S.C. § 9612(a)-(b).

119. *Id.*; § 106(b)(2), 42 U.S.C. § 9606(b)(2).

120. *Wagner I*, 800 F.2d 310, 312 (2d Cir. 1986).

an the EPA order.¹²¹ With this little semantic twist, the court completely sidestepped the real issue of whether Wagner was entitled to a remedy. If Wagner was not liable for cleanup, then Wagner had paid \$2.3 million for which it was not liable, and any liable party, or EPA which ordered the cleanup, owed restitution to Wagner, a "remedy" to return Wagner to its "rightful position."¹²² Section 112 and section 106, as discussed, each provided a remedy to Wagner, each in its own procedural way.

The court was arguing the interpretation of semantic nuances as used to define procedures and forgot to do equity for those who do equity. Wagner, a non-labile PRP, funded an erroneous order and was entitled to a remedy. This court should have asked whether Wagner was entitled to a remedy, and whether the court was empowered to grant the remedy. The court almost acknowledged the real issue when it stated that "[i]t is fortuitous that this question arises as a potential bar to recovery by Wagner and, apparently, a few other parties whose notice and compliance straddled enactment of SARA."¹²³ It defaulted in its role as a court of equity, merely waving the wand of "precedent" (of which there was sufficient contrary on these facts¹²⁴) as it mouthed the "due deference" incantations, arriving at an unjust result.

C. The Cursory Treatment of EPA's Conflict of Interest Defeat The "Due Process" Relied Upon in Wagner I

The court mentioned that the EPA may have erred in issuing its original order, and might not want to admit it.¹²⁵ The court said that this was "surely too slight a gain, however, for the court to consider the agency an interested party whose interpretation is therefore not to be accorded the deference ordinarily due to the agency with responsibility for administering the law."¹²⁶ The court thus dismissed \$2.3 million in liability, which would certainly be a faux pas of some significance, even on a Superfund scale. It would be pure conjecture to estimate how large a claim is required before the EPA becomes a

121. *Wagner III*, 946 F.2d at 920.

122. *See Wagner I*, 800 F.2d at 316-17; *see also* DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES* 14 et. seq. (1985).

123. *Wagner III*, 946 F.2d at 922.

124. *See supra* note 114 and accompanying text.

125. *Wagner III*, 946 F.2d at 922.

126. *Id.*

party interested in the outcome. However, is it not likewise conjecture for the court to say that a \$2.3 million error, and the loss of a section 106 liability suit, to a good faith PRP advancing an "act of God" defense was insufficient to bias the EPA in administering justice?

D. Judicial Estoppel Should Have Precluded the EPA's Assertion in Wagner III that Wagner Had No Remedy

The court stated that "when a statute, viewed in light of its legislative history and the traditional tools of statutory construction, is ambiguous, then the administering agency is entitled to make reasonable policy choices in deciding how to interpret it,"¹²⁷ so Wagner had no right to trial de novo on issues of law.¹²⁸ The EPA's decision against reimbursement of Wagner was characterized as a non-retrospective construction of the law,¹²⁹ with the crux of the dispute being whether Congress intended the term "receives" to apply retrospectively or prospectively from the date the statute was adopted.¹³⁰ It rejected the EPA's claim of "ownership of the plain meaning of the language."¹³¹ No criticism is due that part of the decision. However, the court still erred by citing *Bethlehem Steel Corp. v. Bush*,¹³² to show the EPA's interpretation to be consistent.

By invoking either the "equitable" or "judicial" estoppel theory, one can argue that the EPA had already made an interpretation of the availability of a remedy. In *Wagner I* its position was that Wagner would suffer no "non-compensable harm," that Wagner could have judicial review of its claim to reimbursement after compliance and not before.¹³³ It knew that Wagner was using the "act of God" defense and never found Wagner liable for the cleanup costs.¹³⁴ To say later that the reimbursement remedy was not available, was contrary to the interpretation of the statute on which the court relied.¹³⁵ The EPA and the courts were ignoring the section 112 provi-

127. *Id.* at 920 (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)).

128. *Id.* at 920-921.

129. *Id.* at 922-933.

130. *Id.* at 919-920.

131. *Id.* at 924.

132. 918 F.2d 1323 (7th Cir. 1990).

133. *Wagner I*, 800 F.2d 310, 314 (2d Cir. 1986).

134. *See id.* at 312.

135. *Id.* at 316-317.

sions for remedy under a slightly different procedure. Even if one is willing to give the EPA credit for a supportable construction of the statute in *Wagner III*, the EPA contradicts the interpretation it advanced in *Wagner I*. The error is particularly egregious when one considers that in *Wagner III*, the EPA argued that section 112 remedies were only applicable if a PRP had "permission" in advance to do a cleanup.¹³⁶ What is an "administrative order" if not permission? Even equitable estoppel would have applied since Wagner relied to its detriment on the prevailing EPA argument in *Wagner I*. Wagner decided to clean up first and apply for reimbursement later. Under judicial estoppel, the mere advancement by the EPA of the argument in *Wagner I* (that post hoc judicial review of a claim for reimbursement was Wagner's remedy) was sufficient to estop the EPA from advancing its position *Wagner III* of the non-availability of the reimbursement remedy.¹³⁷ Wagner should have raised this defense, and further, the court should have raised it *sua sponte* since the doctrine exists to protect the integrity of the judicial process.¹³⁸

D. The EPA Policy in Wagner III May Promote PRP Foot-Dragging

Wagner chose to cooperate, probably to better contain the cost of cleanup and as a hedge against their "good faith" defense to the EPA's penalties. After litigation, Wagner was worse off than if it had waited until the EPA brought an action to compel, and then defended against the action. Assessing the cost of a gamble is difficult with penalties as steep as those threatened in *Wagner I*,¹³⁹ but how could Wagner possibly have been worse off? Litigants similarly situated, not necessarily on section 106 orders like *Bethlehem*¹⁴⁰ and *Wagner III*,¹⁴¹ but under similar EPA postures, might use *Wagner III* as a precedent to argue that they are resisting "in good faith,"

136. See *Wagner III*, 946 F.2d 918, (D.C. Cir. 1991) (the EPA read § 111(a)(2) as requiring advance authorization, but then argued that their order was not an authorization).

137. See *id.* at 921.

138. *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1177 (D. S.C. 1975).

139. *Wagner I*, 800 F.2d at 313 (2d Cir. 1986).

140. *Bethlehem Steel Corp. v. Bush*, 918 F.2d 1323 (7th Cir. 1990)

141. *Wagner III*, 946 F.2d 918; *Wagner II*, 709 F. Supp. 249; *Wagner I*, 800 F.2d 310 (2d Cir. 1986).

unable to rely on the assertions of the EPA as to remedies and future actions. *Wagner III* stands for recalcitrance rather than cooperation; reliance on the EPA assurances of "no non-compensable harm" results in "no compensation" for having cooperated too readily.

E. Summary

In summary, the EPA is not the "administering agency" of CERCLA. It is a "prosecutor" entitled to no deference for purposes of interpreting section 106(b)(2). It is an agent to screen claims and payments under section 106(a). Because of *Wagner's* poor pleading and the EPA's improper arguments, the court failed to focus on whether a remedy existed, and whether the court could provide it. The court focused instead on the ambiguous wording of the section 106(b)(2) reimbursement process. With "undue deference"¹⁴² to the EPA's inconsistent interpretations, it gave *Wagner* no remedy even under section 112. By failing to judicially estop the EPA, the court fell victim to its own shallow review of the facts in an odyssey between "the devil and the deep blue sea." Perhaps the EPA will wonder why PRPs are reluctant to cooperate with and rely upon it.

V. RECOMMENDATION

The courts still can, and should, look to their ability to do equity, not abdicating to agencies with incantations of "due deference" absent "due process." Even with complexity and ambiguities in statutes, they should not follow precedent from sister jurisdictions without analyzing for themselves what can be done in equity. Detailed analyses, like that of Judge Breyer,¹⁴³ are available, so a court need not lose sight of equity, and consider itself bound, when it is not. Courts have a duty to "rein in" the EPA actions which over-reach to accomplish Congressional objectives. "Deference" should not get such high billing that courts stretch until any "process," regardless of how burdensome and inequitable, is "due process."

PRPs should not sit idly by, bemoaning this state of affairs in the federal judiciary. They might avoid the *Wagner* trap by initiating remedial actions first and reasonably, to meet the

142. See *Wagner III*, 946 F.2d at 923, 925; cf. *id.* at 925-927 (Williams, J., dissenting).

143. See *United States v. Ottati & Goss, Inc.*, 900 F.2d 429 (1st Cir. 1990).

objectives of the law. If the EPA then goes too far, they can safely "wait it out," forcing the EPA to bring an action first. This gives the PRP access to judicial review. PRPs must document their own good-faith actions in the administrative record to secure the good faith exception if the EPA becomes intransigent.

Moreover, no PRP should wait for the court to fashion a remedy in equity. It can find the substantive flaws in precedent which may be subject to attack as overly deferential, illogical, or not squarely on point with facts. This is hard, but Judge Breyer and Judge Williams looked beyond misapplied repetitive rhetoric, to analyze law, fact, and equity.¹⁴⁴

Finally, to assure that the EPA does not affront the dignity of the judicial process, PRPs should assert the judicial estoppel defense. This defense might be successfully used to keep the EPA from "playing fast and loose" with the courts, "arguing out of both sides of its mouth" as to the operative facts. Even where courts are less receptive to judicial estoppel, equitable estoppel is still recognized and an excellent alternative where a PRP has acted in reliance on an EPA position.

The EPA likewise is not without a duty to deal equitably. No industrial corporation would commit the public relations "faux pas" that the EPA made, arguing first that Wagner had a remedy, and then later that no, that remedy was not available. If it wants more than "malicious obedience," the EPA must be a regulatory agency which develops predictable policies followed by cooperative industries who seek advice, and take it in good faith.

VI. CONCLUSION

Wagner Seed Company's warehouse was destroyed by fire from a lightning strike, an "act of God" under the CERCLA statute, and a complete defense to liability for the subsequent chemical spill. Wagner received an administrative order from the EPA to clean up the site at its own expense or face Draconian penalties. *Wagner I* held that pre-enforcement judicial review on the merits of the administrative order was not avail-

144. See *Wagner III*, 946 F.2d at 926, 929-930 (Williams, J., dissenting) (EPA not entitled to "arbitrary and capricious" standard when acting as President's prosecutor); *Ottati & Goss*, at 434, 435-436 (EPA not entitled to deference in its choice of remedy, and SARA does not divest equity jurisdiction from courts in favor of EPA).

able. Wagner had to comply first and seek post-cleanup reimbursement, subject to judicial review, if it proved to be not liable. Otherwise Wagner had to risk its existence, due to accumulated penalties over years of non-compliance, on the chance that a court would find that it relied on the rarely granted "act of God" defense "in good faith." Unfortunately, Wagner petitioned under the new section 106(b)(2) reimbursement provision rather than under section 112. It found that its defense was not disputed by the EPA, but the EPA interpreted section 106(b)(2) as not allowing reimbursement to Wagner. Ironically, it was Wagner's early compliance on which the EPA based its disqualification of Wagner for the remedy. The interpretation of "non-availability" of reimbursement was directly contrary to the EPA's position adopted by the court in *Wagner I*.

The court which last reviewed this case, in *Wagner III*, erred in four ways. First, the court erred by designating the EPA as the "administering agency" for CERCLA with no supporting language in the statute. Second, the court focused on the procedure of section 106(b)(2) instead of on the issue of whether a remedy was available at all, such as under section 112. Third, the court gave undue deference to the EPA's interpretation of the statute. Fourth, the court failed to estop the EPA, judicially or equitably, from changing its position on the availability of reimbursement. The court probably let its equitable processes be abused. The analysis of the court was lengthy but deferred excessively to the EPA. The ruling robbed Wagner of the "due process" which the *Wagner I* court and the EPA had assured Wagner it could have after compliance. This inequitable result, produced by the EPA's playing "fast and loose" with the courts, seems to say that any process at all, no matter how late and regardless of equity is somehow "due process." Such a travesty is probably a tragedy for all.

Jack Pate