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RCRA Coverage for Industrial Sewage Mixed with Untreated Domestic Sewage: *Comite Pro Rescate De La Salud v. Puerto Rico Aqueduct and Sewer Authority*

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I. INTRODUCTION

Laws controlling domestic sewage disposal have undergone drastic changes in the past two decades. Until recently, provisions of the Clean Water Act of 1977 (CWA)\(^1\) (also known as the Federal Water Pollution Control Act (FWPCA)), or various state codifications of this act, controlled sewage treatment and disposal pollution standards.\(^2\) In 1984, Congress\(^3\) passed an important amendment to the Solid Waste Disposal Act referred to as the Resource Conservation and Recovery Act (RCRA).\(^4\) Provisions of RCRA initially excluded domestic sewage from its definition of solid waste.\(^5\) This exclusion is commonly known as the Domestic Sewage Exception (DSE).\(^6\) Although RCRA defines many important terms, Congress never defines domestic sewage. Under RCRA, courts may construe domestic sewage so broadly that any hazardous substance mixed with domestic sewage is excluded from RCRA regulation or so narrowly that the exception covers only pure domestic sewage and nothing else. Nobody knows with certainty just what "domestic sewage" is and consequently what the extent of the RCRA regulation is.

The definition of domestic sewage is of great interest to local gov-

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1. 33 U.S.C §§ 1251-1387 (1988) (Federal Water Pollution Control Act (FWPCA) §§ 101-607)).
2. Exact provisions of the Clean Water Act (CWA) and possible state codifications of it are outside the scope of this article.
3. The Supreme Court has held that Congress has extremely broad powers under the commerce clause to regulate land and water pollution. See Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 282 (1981).
5. The Resource Conservation and Recovery Act (RCRA) defines solid waste as: [A]ny garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage . . . .
ernments and industry because of the potential liability associated with RCRA and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA). The possibility of RCRA and CERCLA regulation of sewage treatment poses an ominous threat to these entities.

In Comite Pro Rescate De La Salud v. Puerto Rico Aqueduct and Sewer Authority, the Court of Appeals for the First Circuit ruled that courts should construe the domestic sewage exception very narrowly. This decision, if followed by other circuits, may eventually mean almost any sewage treatment facility which processes industrial wastes mixed with domestic sewage may be subject to RCRA regulation. After Comite, the exact coverage of the DSE is more uncertain than ever.

This note examines the First Circuit Comite decision and the implications that this decision may have for those involved in treating and disposing of sewage in the United States. Part II examines the scope of the DSE problem, including estimates of the types and quantities of hazardous materials we dispose of in domestic sewage treatment plants. It briefly examines the United States' sewage disposal history leading up to the Comite decision. Part III looks at the specific facts of the Comite case. Part IV discusses how the First Circuit determined to adopt a narrow reading of the domestic sewage exception. Part V contains an analysis of the court's reasoning and the potential impact of its decision. Finally, part VI considers the possible future implications of including industrial waste mixed with domestic sewage in the RCRA definition of solid waste.

II. BACKGROUND

A. Sewage Treatment in the United States

Early settlers in the United States did not "treat" human waste. In cities, sewage often flowed in open gutter systems. Cities which built underground sewage systems generally dumped raw sewage into streams, rivers, lakes, or oceans. Aside from large population centers, which quickly faced problems of waste disposal, it took many years

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8. See infra part II.B.
9. 888 F.2d 180 (1st Cir. 1989), cert. denied, 110 S. Ct. 1476 (1990). "Comite Pro Rescate De La Salud" is Spanish for Committee to Rescue Health. Id. at 182. [hereinafter Comite].
10. These problems included inadequate sewage and garbage disposal systems and the associated spread of diseases.
for early Americans to notice or care that their actions were having a negative effect on the environment.

Initially, the federal government exercised negligible control over pollution in the states. Congress "passed its first important pollution control law in 1899" (the Rivers and Harbors Act of 1899), which prohibited dumping of anything except "sew[age] into navigable waters." However, this act "was almost never enforced." Although many in the 19th Century were strong and vocal advocates of environmental preservation and protection, Congress did not make environmental law a priority until the social revolution of the 1960s.

With the development of the commerce clause doctrine, Congress began exercising more and more control over environmental issues. As people experienced more negative effects of environmental pollution, the federal government and the states started to pass laws to control pollution. As early as 1966, the Fourth Circuit declared that riparian landowners had no vested right to dump pollution into navigable waterways.

One of the first major pieces of environmental legislation which the United States enforced was the National Environmental Policy Act of 1969 (NEPA). To date, Congress has passed dozens of comprehensive environmental bills regulating everything from the upper atmo-

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12. Id.
13. Strong and vocal advocates included Henry David Thoreau, Charles Darwin, and others.
14. Not until the relatively recent explosion of Congressional authority under the broad interpretation of the commerce clause has Congress possessed the power, let alone the desire, to regulate pollution. For a more complete view of the growth in federal regulation based on expanded authority under the commerce clause, see G. Gunther, Constitutional Law 121-68 (1985). During the past few decades, "[a] number of courts have recognized that discharge of pollutants into the nation's waters ... has the potential for exerting substantial effects on interstate commerce." Brief of Amici Curiae State of California at 15, United States v. Riverside Bayview Homes, 729 F.2d 391 (6th Cir. 1984) [hereinafter Brief]. This brief points out that pollution can affect fish, Utah v. Marsh, 740 F.2d 799, 803 (10th Cir. 1984), can affect the scenery of lakes and streams which tourists use, United States v. Byrd, 609 F.2d 1204, 1210 (7th Cir. 1979), and can degrade agriculture sold in interstate commerce, United States v. Earth Sciences, Inc., 599 F.2d 368, 375 (10th Cir 1979). Brief at 15 n.10.
15. United States v. 531.13 Acres of Land, 366 F.2d 915, 918 (4th Cir. 1966). In this case, a riparian landowner sought compensation for an eminent domain taking and for the requirement that he treat wastes generated in his textile plant. Each of these issues resulted from the establishment of the United States Hartwell Dam and Reservoir Project which changed the South Carolina pollution rating for a portion of his land due to its being covered by water. South Carolina required him to construct pollution control facilities. The U.S. Government compensated the landowner for the taking of the land, but the court held that he had lost no rights by losing his authority to pollute the river at will. Pollution was no longer classified as a reasonable use of a stream by riparian landowners. Id. at 915, 917-19.
17. Some of these environmental bills include the Federal Insecticide, Fungicide, and Roden-
sphere to the earth's subsurface and from the sea surface to the ocean floor.

B. CWA, RCRA, and CERCLA

The courts have recognized that Congress has broad powers to regulate pollution. Courts have generally construed these regulations in a way which gives them maximum effect.

The focus of the CWA is to control pollution in navigable waters. The RCRA focuses on the problems associated with the huge amounts of hazardous materials we generate each year. Its provisions regulate the generation, transportation, storage, and disposal of hazardous substances. Congress intended RCRA to be a comprehensive “cradle to grave” regulation for hazardous wastes. The statute requires the EPA to administer RCRA programs and provides for federal enforcement of the RCRA provisions. But it also allows states to...


   [the] establishment of effluent standards for treatment plants as well as pretreatment standards for discharges into sewers that lead to treatment plants. The rationale for pretreatment standards is two fold: first, some substances are incompatible with the design of the treatment plant and interfere with the plant's treatment of other wastes; and second, some substances are not affected by the treatment plant and pass directly through it into tributaries or navigable waters.

19. The RCRA storage and disposal regulations are applicable for both the short and long term.


achieve “primacy” and run their own programs with EPA authority.22

Although the RCRA definition of solid waste excludes domestic sewage, there is no RCRA definition of domestic sewage. Congress left the implementing tasks of writing RCRA regulations and definitions to the EPA.23 One definition of domestic sewage is found in the EPA's introduction section to a request for comments. It states: “[T]he EPA has, therefore, decided that a waste falls within the domestic sewage exception when it first enters a sewer system that will mix it with sanitary wastes prior to storage or treatment by a Publicly Owned Treatment Work [POTW].”24

Domestic sewage frequently contains varying quantities of RCRA defined hazardous substances. In fact, “[a]bout eighty percent of the nation’s sewage comes from industrial sources.”25 Some scholars believe it is time to eliminate the “RCRA-DSE loophole” along with other RCRA loopholes,26 which amount to excluding some 40 million metric

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23. The RCRA statute provides:
The Administrator [of the Environmental Protection Agency] shall integrate all provisions of this chapter for purposes of administration and enforcement and shall avoid duplication, to the maximum extent practicable, with appropriate provisions of the Clean Air Act, the Federal Water Pollution Control Act, the Federal Insecticide, Fungicide, and Rodenticide Act, the Safe Drinking Water Act, the Marine Protection, Research and Sanctuaries Act of 1972, and such other Acts of Congress as grant regulatory authority to the Administrator. Such integration shall be effected only to the extent that it can be done in a manner consistent with the goals and policies expressed in this chapter and in the other acts referred to in this subsection. 42 U.S.C. § 6905(b)(1) (1988) (citations omitted).
24. Comite, 693 F. Supp. at 1328 (citing 45 Fed. Reg. 33084, 33097 (1980)) (emphasis in original). Publicly owned treatment works [POTWs] include: “[A]ny device or system used in the treatment . . . of municipal sewage or industrial wastes of a liquid nature which is owned by a “State” or “Municipality . . . . This definition includes sewers, pipes or other conveyances only if they convey waste water to a POTW providing treatment.” 40 C.F.R. § 122.1 (1990) (citations omitted) (emphasis added).
26. Another loophole is the “small quantity generators” loophole, 42 U.S.C. § 6921(d) (1988). This exception applies to generators who produce under 100 kilograms per month of hazardous wastes, while those that produce between 100 and 1,000 kg/month have intermediate standards. Robse & Gulley, The Hazardous and Solid Waste Amendments of 1984: A Dramatic Overhaul of the Way America Manages its Hazardous Wastes, 14 Envtl. L. Rep. 10458 (1984). In addition, there is the “household waste exclusion” loophole. This exclusion reads:
A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter, if—
(1) such facility
(A) receives and burns only—
(i) household waste (from single and multiple dwellings, hotels, motels, and other residential sources), and
(ii) solid waste from commercial or industrial sources that does not contain hazardous waste . . . . under this section, and
tons of hazardous substances per year from RCRA regulation.\textsuperscript{27} These loopholes, however, are practical necessities. They allow us to dispose of huge volumes of wastes a little at a time outside RCRA control. These excluded wastes include accumulations of small quantities of hazardous materials, which households and businesses routinely dispose of. The EPA simply does not have the resources to regulate these discharges from millions of dwellings and businesses. Clearly, Congress and the EPA had to draw the line somewhere.

As late as 1986, the EPA defended the DSE and said that domestic waste should continue to be excluded from the definition of solid waste.\textsuperscript{28} In addition to the RCRA exclusions, CERCLA also excludes certain "federally permitted releases" of hazardous materials when they occur under the CWA, the RCRA, the Clean Air Act (CAA), or the Atomic Energy Act of 1954 (AEA).\textsuperscript{29}

Even though the CWA regulates domestic sewage discharges, many RCRA hazardous substances are not on the CWA hazardous substance list. This CWA generosity means that many tons of RCRA hazardous substances exit POTWs each year. The EPA, in a recent study, estimated "that 178,000 metric tons of wastes considered hazardous under RCRA are discharged into the nation's sewer systems each year."\textsuperscript{30} Of these, only "92,000 tons are considered hazardous under the [Clean] Water Act."\textsuperscript{31} Although the EPA has a good idea what happens to the CWA "priority pollutants" which pass through POTWs, they are not clear on what happens to the 64,000 metric tons of non-priority hazardous wastes passing through sewage systems annually.\textsuperscript{32} However, the EPA expects that the volume of some hazardous

\textsuperscript{(2) the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.}

SWDA, § 3001(i), 42 U.S.C. § 6921(i).

CERCLA also excludes natural gas and certain petroleum products. "The term [hazardous substance] does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance . . . and the term does not include natural gas . . . or synthetic gas useable for fuel." CERCLA, § 101(14), 42 U.S.C. § 9601(14). These exceptions, coupled with the DSE, mean that every year millions of tons of hazardous materials remain outside EPA control.


\textsuperscript{29. 42 U.S.C. § 2011 (1988).}

\textsuperscript{30. EPA Says, supra note 28, at A-9.}

\textsuperscript{31. Id.}

\textsuperscript{32. "Little is known about what becomes of the 64,000 metric tons of hazardous waste not classified as priority pollutants under the [Clean] Water Act." Id.}
substances used to manufacture organic chemicals and dyes, which eventually enter sewer systems, should decline when companies meet EPA pretreatment standards.33

It would be an understatement to say that sewage treatment plants would generally prefer to be excluded from the RCRA and CERCLA provisions. Enforcement provisions of the RCRA allow governments or private individuals to seek injunctive relief to prevent or clean up hazards whenever they can demonstrate that any hazardous or solid waste "present[s] an imminent and substantial endangerment to health or the environment."34 Triggering RCRA also requires those who generate, store, transport, or dispose of hazardous wastes to comply with extensive EPA registration and permit requirements.35

These provisions, combined with the CERCLA provisions, could subject parties who deal with contaminated domestic sewage to strict36 joint and several liability for clean up or accidents.37 CERCLA liability provides for either the federal government, the states, or private parties to clean up sites where wastes have been determined to be hazardous to persons or the environment and to collect clean-up costs from responsible parties.38 CERCLA also requires that "[a]ny person in charge of a . . . facility shall, as soon as he has [a] knowledge of any release (other than a federally permitted release) of a hazardous substance from such . . . facility in [certain quantities]39 . . . immediately notify the Na-

33. Id.
35. RCRA permit requirements are found at 42 U.S.C. § 6925 (1988) (SWDA, § 3005). These requirements are expensive and burdensome and come under serious criticism. See, e.g., Freder, Failures of the Current Waste Management Policy, 18 ENVTL. L. 671 (1988).
37. See 42 U.S.C. § 9604 (1988). This section allows the President, or his designated representative, to take remedial action any time there is a release, or imminent threat of release, of hazardous materials into the environment and to seek reimbursement for the clean-up expenses from the responsible parties. Responsible parties are held jointly and severally liable as a matter of federal common law, unless they make special arrangements or qualify for certain very narrow exceptions. See, e.g., United States v. Price, 523 F. Supp. 1055 (D.N.J. 1981), aff'd, 688 F.2d 204 (3d Cir. 1982) (RCRA applies to prior owners, operators, or generators of hazardous waste disposal or storage sites if the materials continue to leak after the effective date of the act. The post-effective date leaking is an RCRA violation); United States v. Wade, 577 F. Supp 1326 (E.D. Pa. 1983) (CERCLA, § 107(a), permits joint and several liability relying on federal common law principles).
39. These quantities are established by the EPA under authority of 42 U.S.C. § 9602 (1988). For any substance not given a different quantity under the article, the amount requiring reporting
tional Response Center . . . of such release.”

Furthermore, SARA provisions “create[e] strong new incentives for private parties to begin active participation” in clean up activities. The potential for added costs for transporting, storing, and disposing of sewage or effluent as a hazardous waste has great importance for cities, districts, counties, or other government or private entities involved in sewage treatment and disposal.

C. The Current Sewage Disposal Problem

Sewage disposal systems process vast quantities of materials each year. Although raw sewage contains very little solid material, it does contain “substantial quantities of suspended solids, bacteria and other microorganisms, toxic metals and synthetic organic compounds.” Sewage treatment tends to concentrate heavy metals in the sludge. Sludge “deplet[e] dissolved oxygen” causing serious problems for marine life.

POTWs use a variety of methods to treat domestic sewage and dispose of the effluent and sludges. These include either dumping the materials in open lagoons and allowing bacterial action to break it down or using a two or three step chemical and mechanical treatment process. Because the treatment processes involve maintaining a proper chemical balance, some industrial pollution can interfere with or disrupt the chemical reactions involved in the operation of a POTW. Industrial sources “may discharge wastes in concentrations or volumes that cannot be adequately treated by the receiving POTW.” In Ar-

is one pound. 42 U.S.C. § 9602(b) (1988) (CERCLA, § 102(b)).
40. 42 U.S.C. § 9603(a) (1988) (CERCLA, § 102(a)).
41. The SARA provisions are the 1986 amendments to CERCLA.
43. Effluent is the semi-clear liquid result of sewage treatment. “Most sewage eventually flows into lakes, oceans, rivers or streams” as effluent. M. Bowman, supra note 25, at 327.
44. On average, “[i]t contains about a tenth of 1 per cent [sic] solid matter.” Id.
46. Lahey, Ocean Dumping of Sewage Sludge: The Tide Turns from Protection to Management, 6 HARV. ENVTL. L. REV., 395, 397 (1982). These metals include “cadmium, lead, zinc, and mercury” as well as “synthetic organics, such as polychlorinated biphenyls (PCBs).” Id.
47. Kindt, supra note 45, at 42.
48. See M. Bowman, supra note 25, at 328-29.
49. Arkansas Poultry Fed’n v. United States Envtl. Protection Agency, 852 F.2d 324, 326 (8th Cir. 1988). In this case, Arkansas Poultry “discharged biological wastes into municipal sewage systems [or POTWs].” Id at 326. Petitioners sought “review of the Administrator [of the EPA’s] actions in promulgating” definitions of “interference” and “pass through” under the National Pretreatment Standards (NPS). Id at 325. The NPS definitions are found at 40 C.F.R. §§
Kansas Poultry Federation v. United States Environmental Protection Agency, the Eighth Circuit wrote:

Industrial users' discharges can inhibit or disrupt a POTW and thereby cause POTW noncompliance (with its NPDES permit limits) by physically disrupting the flow of wastewater through the POTW's system, by chemically or physically inhibiting the treatment processes, or by hydraulically overloading the plant so that proper settlement does not occur or wastes are retained for too short a time to receive adequate treatment before discharge. Pollutants discharged by industrial users (which cannot by [sic] treated by the POTW may pass through the POTW in amounts or concentrations that exceed the POTW's NPDES permit limits and) may also contaminate sewage sludge that is a by-product of the POTW's treatment processes and thereby prevent the POTW from complying with requirements governing its chosen sewage sludge use of [sic] disposal practices.

The fact that the owners and operators of the POTW are governmental agencies does not immunize them from civil or criminal liability under RCRA or CERCLA. With our continued population growth, there is a continuing potential for greater problems with sewage disposal in the future.

403.3(i), (n) (1990).
50. 852 F.2d 324 (8th Cir. 1988).
51. NPDES refers to the National Pollutant Discharge Elimination System. This system sets standards for POTW discharges into navigable waters of the United States. POTWs get permits specifying the conditions and standards that their sewer system discharges must meet. See 33 U.S.C. § 1342 (1988).
52. Arkansas, 852 F.2d at 326 (citing General Pretreatment Regulations, 52 Fed. Reg. 1,586, 1,590 (1987)).
53. See, e.g., United States v. Dee, 912 F.2d 741 (4th Cir. 1990). Here, the Fourth Circuit held that federal employees operating a United States Government facility were subject to criminal penalties for illegal discharges of hazardous materials under RCRA. Id. at 748-49.
54. The RCRA statute provides:

If an executive agency . . . of the Federal Government has jurisdiction over any real property or facility . . . involve[d] in solid waste management activities, or such agency enters into a contract . . . involving solid waste management activities, then such agency shall ensure compliance with the guidelines recommended under [RCRA] . . . in the operation or administration of such property or facility or the performance of such contract . . .

55. In fact, in RCRA, Congress specifically found "that the continuing concentration of our population in expanding metropolitan and other urban areas has presented these communities with serious financial, management, intergovernmental, and technical problems in the disposal of solid wastes resulting from the industrial, commercial, domestic, and other activities carried on in such areas." 42 U.S.C. § 6901(a)(3) (1988) (SWDA, § 1002(a)(3)).
The Comite Pro Rescate de la Salud (Comite) filed the initial action in the United States District Court for the District of Puerto Rico. Although the suit also alleged violations of the CAA and the CWA, this note examines only the RCRA claims. The complaint alleged that the corporate defendants had improperly discharged hazardous chemicals into the sewer system at the Barrio Guanajibo Industrial Park, Puerto Rico, in violation of RCRA. The sewage lines led to the Puerto Rico Aqueduct and Sewer Authority (PRASA) treatment facility, a POTW. The complaint also alleged that PRASA and Puerto Rico Industrial Development Company (PRIDCO) were violating RCRA by transporting, storing, and disposing of hazardous wastes. “Most of the defendants moved to dismiss the complaint for failure to state a claim . . . or lack of subject matter jurisdiction.” Plaintiffs argued that although the CWA did apply to industrial wastes mixed with sewage, it was intended to control only those hazardous substances which either passed through or interfered with the treatment process. However, the particular sewer system in question leaked so badly that much of the material either leaked into the ground or evaporated, thus never reaching the POTW. Additionally, plaintiffs argued that to give RCRA its full effect, it needed broad interpretation with narrow interpretation of any possible exceptions. They argued that the DSE intended CWA coverage of hazardous substances mixed with domestic sewage with the expectation that those materials would end up at a POTW. In this case, however, the hazardous materials leaked out of the system before it ever reached the POTW; therefore, they could not be regulated by the CWA.

Plaintiffs also tried to distinguish pure domestic sewage from industrial

57. Id. at 1326.
59. Id. at 1326-27. The court never mentions which types of hazardous materials the companies were dumping into the sewers.
61. Id. at 1327.
62. Id. at 1326 (citations omitted).
63. Id. at 1329.
64. Id.
65. Id.
66. Id.
67. Id.
sewage. 68

Reasoning that Congress could not have intended that industrial wastes mixed with domestic sewage should be controlled under both the RCRA and the CWA, 69 the district court dismissed the RCRA actions for failure to state a claim upon which relief could be granted. 70 The district court held that the DSE applied to all hazardous materials entering sewers "destined for POTW, from the first entry of the chemicals into the sewer system." 71 The court declined to find otherwise unless Congress changed the statute. 72 Plaintiffs appealed to the First Circuit. 73

IV. THE FIRST CIRCUIT'S HOLDING AND REASONING

The first problem that the First Circuit faced was to define domestic sewage. Domestic sewage was not defined in the statutes, and the EPA had written several different definitions for domestic sewage in their regulations and guidelines. The court held that the more restrictive definition, construing domestic sewage narrowly, most closely satisfied congressional intent. 74

Even though the court resolved the ambiguity surrounding the meaning of "domestic sewage," a change in the facts 75 caused the scope of the word "in" as it is used in the DSE to potentially become the controlling issue in the case. The court wrote that "defendants' sewage now appears to mix with 'domestic sewage' in the public line. Conse-

68. Id. at 1330. "Industrial waste which mixes with sanitary waste from on-site sanitary facilities for employees does not necessarily fall under the domestic sewage exemption, the industrial waste must also mix in the municipal sewer system with untreated sanitary wastes from non-industrial sources." Id. at 1330 n.10 (quoting EPA Document, Guidance for Implementing Permit-By-Rule Requirements at POTWs, at 6 (Apr. 15, 1988) (emphasis added).

69. Comite, 693 F. Supp. at 1328. "The parties agree that Congress enacted the DSE with the intention that the excluded wastes would be regulated by the Clean Water Act." Id. The district court concluded that Congress intended CWA to be the only statute governing industrial wastes mixed with domestic sewage "not only because such a system avoids double regulation but also because the system provides industry, government, and the public with more efficient and predictable bases for making important waste-disposal decisions." Id.

70. Id. at 1333.

71. Id. The decision concluded that Congress did not consider the problems of leakage or vaporization when it wrote the RCRA and that "[r]ewriting RCRA [was] the sole prerogative of Congress". Id.

72. Id.


74. See supra note 69 and accompanying text.

75. Namely, the industrial park's sewage had previously run from the park to a "POTW which did not receive sewage from residences." Comite, 888 F.2d at 187-88. But "[i]n December 1987, ... the Park's sewage has been treated at another POTW which also receives sewage from residences outside the Park." Id. at 188.
quently, the district court, in working with the words ‘in domestic sewage,’ may have to define the scope of the word ‘in.’” 76 Since the district court had not yet ruled on the meaning of the word “in,” the First Circuit remanded the case to the district court to determine what “in” meant. 77

V. ANALYSIS AND POTENTIAL IMPACT

A. The Court’s Deference to the EPA

Recent court history in interpreting environmental law statutes shows a pattern of great deference to Congress and the EPA in virtually every environmental matter. The court found that this case was particularly suited to “accord ‘considerable weight’ to an ‘executive department’s construction’ of a statute.” 78 The court’s deference to the EPA for these highly technical matters is underscored by the First Circuit dicta at the end of the Comite decision: “In our view, it will be helpful if EPA continues to participate in this case, indicating its views, where appropriate, to the district court, as it continues to work with this highly complex statute.” 79

1. Defining domestic sewage

The court found it very difficult to determine the possible meanings of domestic sewage, as they are neither finite nor discrete. Rather, the bounds of the meaning of domestic sewage lie along a continuum. At one end of the continuum is the most restrictive definition; that is, domestic sewage is only that waste which originates in domiciles or homes. The other end of the continuum would include any waste mixed with waste from homes or bathrooms, so long as it ended up at a POTW.

Under the broad definition, companies can exempt industrial waste from RCRA coverage by mixing industrial wastes (including

76. Id. (emphasis added). “[T]he scope of [the word ‘in’] may vary, depending upon, for example, 1) whether a householder has poured down the cellar sink a caustic waste that will mix with ‘sanitary waste’ after a mere thirty foot pipeline voyage on its own, or 2) whether a plant pours down an industrial sink a caustic waste that will eventually mix, in a city sewer system, with residential ‘sanitary waste’ after a three hundred foot pipeline voyage on its own.” Id.

77. Id. It seems somewhat odd that the court would consider the length of the pipe that the substance travels through as an important factor to consider when determining whether the industrial waste is “in” domestic sewage. This may mean that the court is focusing on the source of the hazardous waste when applying the DSE and not on whether the waste is later mixed with domestic sewage.

78. Id. at 186 (quoting Chevron v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984)).

79. Id. at 188.
RCRA solid and hazardous wastes) with small amounts of sewage from homes so long as the wastes go to a POTW. This definition narrows the scope and application of RCRA. Under the narrow definition, sewage from homes loses its exempt status the minute that industrial solid or hazardous waste enters into the sewage system. This would cause the entire system to be subject to RCRA regulations. Of course, this definition would greatly broaden RCRA’s scope. Weighing the consequences, the court determined that a narrow reading of domestic sewage was appropriate.80

a. Possible meanings of domestic sewage. The court began its examination of the definition of domestic sewage by considering two ways to think about domestic sewage. The court pointed out that one way to define domestic sewage is to think of it as a “type” of sewage. The other way to define it is to examine its “source” to determine whether or not it is domestic.81

b. Five articulated arguments in favor of a narrow definition. The court decided to side with the plaintiffs and an EPA amicus brief and adopt a narrow definition of domestic sewage.82 The court gave five reasons for this decision.83

First, the word “domestic” comes from the Latin “domus” which means house. The court wrote that “we assume ... the legislative purpose is expressed by the ordinary meaning of the words used.”84 Therefore, domestic sewage should be defined as sewage from a house.

Second, the words “domestic” and “sewage” seem to refer both to source and to type of discharges. Had Congress intended otherwise, they could have used a term like “sanitary waste” to specify only a type, not a source.85

Third, a broad definition of domestic sewage may frustrate the Congressional purpose for the DSE. Most industrial plants have installed toilets for their workers. The court recognized that the small amounts of sewage from these toilets could mix with industrial wastes in pipes under the buildings. If this mixture of industrial waste and small amounts of sewage material were excluded from RCRA, it would frustrate the Congressional purpose for including a means for injunctive relief within RCRA.86

Fourth, the legislative history suggests that Congress intended

80. Id. at 184.
81. See id. at 181-82.
82. Id.
83. Id. at 184-85.
84. Id. at 184 (quoting United States v. James, 478 U.S. 597, 604 (1986)).
85. Id. at 185.
86. Id.
broad RCRA injunctive powers. The "amendments 'clearly provide that anyone who has contributed or is contributing to the creation, existence, or maintenance of an imminent and substantial endangerment is subject to [RCRA] . . . .'" However, this case may be most narrowly read to limit RCRA coverage to only those instances where plaintiffs seek injunctive relief against an industrial pollution source. That was the nature of the case before the court. But it would not take a great leap of logic, once the door has been opened, for the courts to apply all of the RCRA and CERCLA provisions beyond requests for injunctive relief. It seems likely that if RCRA applies at all—that is, if the court can get over the DSE hurdle—RCRA will apply completely.

Finally, Congress granted the EPA great power to fix and define terms under RCRA. The court viewed the RCRA regulations as part of a large Congressional plan to make a clean environment. The court determined that Congress gave the EPA authority to interpret the language of the statute.

2. Defense arguments against a narrow definition

The defense's principle argument was that the EPA had not defined domestic sewage uniformly in implementing other parts of the RCRA. Notably, there was an instance in which the EPA wrote that "'Domestic sewage' means untreated sanitary wastes that pass through a sewer system." The court rejected this reasoning for two reasons. First, the EPA denied that the domestic sewage definition above "include[d] sanitary wastes originating in factories." Second, the court found that Congress gave the EPA broad powers to interpret the statute, and the "EPA's reading of [the] regulation [was] not totally unreasonable . . . so the] argument [was] dispositive."

88. "The [domestic sewage exception language] constitutes a small part of a comprehensive regulatory scheme that Congress entrusted the EPA to administer, sensibly and in conjunction with other, related environmental regulatory schemes designed to secure clean water, clean air, and a safe environment." Id. (emphasis added).
89. "[W]e interpret the statute as reflecting a congressional intent to give EPA considerable authority itself to interpret language like 'domestic sewage' and thereby fix, at the boundaries, the precise scope of the exception." Id.
90. Id. at 186 (quoting 40 C.F.R. § 261.4).
91. Id. at 187.
92. Id. Though the use of the "not totally unreasonable" standard for accepting an agency's definition of an ambiguous term is somewhat dubious, the ruling stands.
3. Additional arguments for the narrow definition of domestic sewage

The court's decision to include sewage containing industrial waste under RCRA was proper when one considers the court's stated rationale, along with arguments the court apparently did not consider. Besides the court's articulated arguments, other arguments exist which support a narrow definition of domestic sewage for RCRA purposes.

a. Public policy. The following congressional finding underscores the primary purpose for which Congress adopted environmental legislation.

As a result of the Clean Air Act, the Water Pollution Control Act, and other Federal and State laws respecting public health and the environment, greater amounts of solid waste (in the form of sludge and other pollution treatment residues) have been created. Similarly, inadequate and environmentally unsound practices for the disposal or use of solid waste have created greater amounts of air and water pollution and other problems for the environment and for health.93

The EPA's difficulty in regulating the millions of households and other small producers of hazardous waste was mentioned above. Even though these wastes are small individually, they aggregate at the POTWs. To let these accumulations remain outside of RCRA control, while identical amounts of accumulated wastes (equally hazardous to the environment) are covered by RCRA, is flatly inconsistent with the stated congressional purposes. The POTW is a logical candidate for RCRA coverage, precisely because they do transport, store, or dispose of what would otherwise constitute RCRA listed or characteristic materials.94 If these hazardous substances are inherently dangerous when covered by RCRA, they are inherently dangerous even though excluded from RCRA. The damage to the environment is the same whether RCRA covered the discharges or not.

Including industrial wastes mixed with domestic sewage under RCRA would at least ensure that final disposal of these accumulated hazardous materials would be consistent with their toxicity. Congress has already given the EPA the mandate that RCRA (and arguably CERCLA) should be fully integrated with other environmental legislation to ensure proper protection of the environment.

94. Listed materials include those substances identified by the EPA under authority of 42 U.S.C. § 6921 (1988). Characteristic substances are those which the EPA has determined to have the characteristics of hazardous wastes but which are not formally identified on EPA hazardous materials lists. These materials are considered non-hazardous when they lose the hazardous characteristics. See 42 U.S.C. § 6921(h).
b. Benefits of diffused liability. Both CERCLA and RCRA allow the EPA, states, and other parties to seek contribution towards the costs of cleaning up hazardous wastes. Certainly, POTWs face paying these costs if the Comite decision opens the door for RCRA and CERCLA regulation of domestic sewage; but, from a public policy standpoint, applying these costs to the POTWs and industries who pollute the environment with RCRA wastes may be a very good thing. Theoretically, these “permitted” discharges are not being accounted for in the current economy. If the new decision required POTWs and industries to comply with RCRA and CERCLA, they would undoubtedly pass some or most of the compliance costs on to the consumers or users of the facilities. This passing on of costs would place the economic burden of compliance and clean-up on the parties who all marginally contribute to the hazard by day-to-day living. Otherwise, the economic costs of our pollution are theoretically deferred to future generations. Thus, CERCLA and RCRA liability would enforce economic reality for the environmental damage we all cause through our domestic sewer systems.

4. Possible arguments against a narrow definition

a. Complexity of the law and duplication of effort. One major argument against RCRA coverage is the confusion and conflict which may result from CWA and RCRA coverage of the same activity. Certainly, provisions of the CWA and RCRA are significantly different. RCRA coverage would require thousands of POTWs to file permit applications as generators, transporters, storers, or disposers of hazardous wastes. This would also require reconsideration of the terms “generation,” “transportation,”96 “storage,”96 “treatment,”97 and “disposal.”98


96. Storage, under RCRA, means “the containement of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal of such hazardous waste.” 42 U.S.C. § 6903(33) (1988) (SWDA, § 1004(33)).

97. Treatment, under RCRA, means:

any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous . . . . Such term includes any activity or processing designed to change the physical form or chemical composition of hazardous waste so as to render it nonhazardous. 42 U.S.C. § 6903(34) (1988) (SWDA, § 1004(34)).

98. Disposal means:

the discharge, deposit, injection, sumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.
At least, this new RCRA coverage may require new ways of thinking about those terms.

For example, when should the hazardous material be considered hazardous if domestic sewage is included under RCRA? Life is too short to require each home owner or small business to obtain permits for "generating" hazardous materials simply because they dump Draino down a sink. Should we consider the POTW to be a "transporter" for the time that the material is in the sewer pipe? When should the material cease to be the responsibility of the generator and be turned over to the POTW? These are only a few of the many questions which the EPA and the courts must answer if we include domestic sewage mixed with industrial waste under RCRA.

b. Problems of liability. RCRA and CERCLA liability would certainly have economic effects on local governments and industries who would potentially face joint and several liability for clean up of sites to which they contributed hazardous waste. They would also face all of the other actual and potential RCRA and CERCLA compliance costs.

Although some major cities with healthy economies might withstand the increased economic burdens, most would not. RCRA and CERCLA liability would be particularly devastating to small towns, counties, and special sewer districts who are already facing serious budget problems. Clean up costs can easily exceed hundreds of millions of dollars per site. If any one of these became responsible for cleanup under CERCLA and faced joint and several liability as it now stands under RCRA, they could find that court costs and liability costs would completely destroy them.

c. EPA inability to control the work load. Even if the EPA gains the authority and responsibility to enforce RCRA and CERCLA provisions over domestic sewage systems which are now excluded, it is unclear whether the EPA could enforce them. We currently face massive environmental problems, and the EPA has a limited budget. Without enforcement, the rules might as well not exist. However, the EPA has the mandate to implement environmental legislation. If we want RCRA regulation of hazardous materials in domestic sewage, the answer is not to abandon the cause because the EPA cannot handle the new responsibility without more help but to increase the size and budget of the EPA.

d. Tougher CWA standards are possible. Another possible argument against RCRA coverage for domestic sewage mixed with industrial wastes is the option of improving the CWA standards. Congress

could either toughen the sewage pretreatment standards, or write new,
tougher legislation. Industry and POTWs are already familiar with the
CWA and may be able to adjust to tighter regulations with less disrup-
tion of their operations and with a lower cost than if they had to com-
ply with RCRA. This would have the economic advantages of keeping
the thousands of POTWs out of CERCLA and RCRA regulation
while potentially accomplishing the same result. If industries more ade-
quately controlled their discharges, the POTWs would not have to treat
industrial hazardous wastes.

VI. FUTURE IMPLICATIONS OF THE DECISION

One of the most serious problems with any significant policy
change is that we cannot accurately determine what the implications of
the policy decisions will be. However, some impacts might reasonably
be expected.

A. Economic Impacts

Ultimately, the taxpayers would have to bear the increased costs in
several areas. They would have to pay higher taxes to staff the EPA
and adjust EPA regulations to the new DSE. They would also pay
higher prices for sewer treatment. Finally, they would probably also
pay higher prices for goods produced by industries which were required
to pass on the higher cost of RCRA regulation to consumers.

Even though these costs may affect taxpayers and industries, if
they are necessary to clean up our environment, we will have to pay for
them now, or we will certainly pay for the consequences later. One of
the sad legacies our forefathers left us is the cost of cleaning up the
mess they left by their poor industrial waste disposal practices. We
should not continue putting off the burden of these costs to be paid by
unborn generations.

B. Effects on the Environment

Theoretically, bringing domestic sewage mixed with RCRA haz-
ardous wastes under RCRA would improve the total environment.
Currently, we dump millions of tons of hazardous materials each year
down our sewage systems. These now excluded hazardous materials
have the same negative impact on the environment as other identical
hazardous materials dumped in violation of RCRA. But with any regu-
latory policy changes, there are always unforseen externalities. It is im-
possible to accurately predict what they will be.

In a perfect world, we might expect that a limited DSE might
make a better, cleaner world. But the reality of business tells us otherwise. One way POTWs may respond to a new DSE is that POTWs may cut off industrial service if it could mean freedom from RCRA liability. These industries, if POTWs cut them off, would have three choices. They would be forced to either close down, dump the materials illegally, or provide alternative disposal methods. Those companies and industries who could not afford RCRA compliance may also simply go bankrupt. If they did go bankrupt without cleaning up their wastes, they could leave behind serious contamination which would have otherwise been treated at a POTW. Then the taxpayers or other responsible parties would have to pay for the clean-up. These abandoned production sites and their related contamination may make the environment much worse than it would have been under a broader DSE. In fact, a combination of illegal dumping and abandoned sites could seriously degrade environmental quality.

However, if a company or industry is unable to produce and market their products without including the actual economic and environmental costs, then they should not be in business anyway. If past environmental excesses have taught us anything, it is the folly of ignoring environmental costs in producing goods and services.

C. Where the District Court Should Draw the New Line

The district court should adopt a narrow definition for the word "in" in the DSE. Domestic sewage should be subject to RCRA and CERCLA whenever it is contaminated by quantities of industrially-discharged RCRA listed or characteristic hazardous materials which would trigger RCRA coverage if the waste was outside a domestic sewer. The DSE should be limited to sewage from houses. Industry should be subject to the same RCRA standards for discharges or dumping of hazardous materials whether they dispose of them on site, off site, or through the sewer system. Treating sewer line discharges the same as any other discharge under RCRA would provide a uniform standard for industry to cope with and the EPA to manage with the least additional burden.

VII. Conclusion

The First Circuit decision to open the door to CERCLA and RCRA liability for industrial wastes mixed with domestic sewage provides the potential for great improvement in environmental quality. In-

99. Even though the contamination may have been treated at a POTW, the treatment method may not have been completely effective.
industrially-produced RCRA listed or characteristic wastes pose serious environmental hazards, whether or not they are dumped into domestic sewer systems or disposed of under RCRA. The economic and administrative costs of limiting the DSE by including industrial wastes mixed with domestic sewage under RCRA are very uncertain, although they are certain to be very high.

RCRA and CERCLA liability for domestic sewage mixed with industrial waste have the potential for providing a fair mechanism for distributing economic and environmental costs on those who contribute these wastes. Without RCRA coverage, we are placing these costs on future generations by default.

The district court should interpret "in" so that hazardous discharges into domestic sewers bound for POTW's are treated like any other hazardous discharges under RCRA.

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