SUPERFUND AND THE PREEMPTION OF STATE HAZARDOUS WASTE CLEANUP: *EXXON CORPORATION v. HUNT*

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The growing concern over hazardous waste[1] has led many states and the federal government to enact emergency response and cleanup statutes.[2] The sources of funding for these cleanup measures include taxes, general revenues, fines, bond forfeitures, and recoveries from liable par-

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1. American industry generates approximately 57 million tons of hazardous waste annually. *See* Slap, *Generator Liability for Hazardous Wastes*, 5 A.L.I.-A.B.A. COURSE MATERIALS J. 95 (1981). There are between 32,000 and 50,000 hazardous waste sites nationwide, Note, *Superfund: Conscripting Industry Support for Environmental Cleanup*, 9 ECOLOGY L.Q. 524, 525 (1981), and more than 90% of hazardous waste is disposed of improperly. Note, *Allocating the Costs of Hazardous Waste Disposal*, 94 HARV. L. REV. 584 (1981).

Because of poor disposal and the shortage of safe disposal sites, one expert comments that "practically the entire United States population is at risk of illness or injury." S. REP. NO. 96-848, 96th Cong., 2d Sess. 6 (1980). *See* Note, *The Preemptive Scope of the Comprehensive Environmental Response, Compensation and Liability Act of 1980: Necessity for An Active State Role*, 34 U. FLA. L. REV. 635, 638 (1982) [hereinafter Note, *Preemptive Scope*].

The total cleanup bill for hazardous waste ranges from $10 billion to $40 billion. Warren, *State Hazardous Waste Superfunds and CERCLA: Conflict or Complement?*, 13 Envtl. L. Rep. (Envtl. L. Inst.) 10,348 n.3 (1983) (citing OFFICE OF TECHNOLOGY ASSESSMENT, UNITED STATES CONGRESS, TECHNOLOGIES AND MANAGEMENT STRATEGIES FOR HAZARDOUS WASTE CONTROL 6 (1983)).

2. Warren, *supra* note 1, at 10,352. Of the 36 states that have enacted such legislation, about eighteen passed their laws after CERCLA. *See infra* notes 6, 45. Other states amended their statutes to complement the CERCLA legislation.

New Jersey, the country's largest generator of hazardous waste, is familiar with the consequences of poor disposal. *See* Rollins Envtl. Services, Inc. v. Township of Logan, 199 N.J. Super. 70, 80, 488 A.2d 258, 263 (Law Div. 1984), *rev'd*, 209 N.J. Super. 556, 508 A.2d 271 (App. Div. 1986). In recent years, New Jersey's problems have included the contamination of rivers from nearby landfills, the forced closing of private wells, and the endangering of Atlantic City's principal source of drinking water. *Id.* While some experts fear an explosion at a New Jersey dump site could produce a toxic cloud endangering thousands of people in the New York metropolitan area, the state "is having difficulty finding a safe disposal site for more than 40,000 barrels of hazardous wastes." Note, *Preemptive Scope*, *supra* note 1, at 638 n.25 (citing H.R. REP. NO. 1016, 96th Cong., 2d Sess., pt. 1, at 19-20 (1980)). In recent years, however, New Jersey has made substantial strides to clean up its 300 hazardous waste sites. As of April 1981, the state had expended more than $25 million from the Spill Fund on cleanup. Lesniak v.

ties.[3] The funds are then utilized in emergency situations and in remedying general problems.[4] The New Jersey Spill Compensation and Control Act[5] (Spill Fund or SCCA) is an example of one such state statute. Under federal legislation known as the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund or CERCLA),[6] states are allowed to conduct fund raising and cleanup activities to combat hazardous waste.[7] CERCLA also, however, preempts state activities[8] and the extent of the preemption is not always clear.[9] CERCLA and SCCA both utilize a front-end tax to cover the costs of hazardous waste cleanup.[10] In *Exxon Corporation v. Hunt*[11] the United States Supreme Court examined the language and congressional intent of CERCLA's taxing provision and held that the federal statute partially preempted New Jersey's front-end tax.[12]

United States, [13 Pend. Lit.] Envtl. L. Rep. (Envtl. L. Inst.) 10,353 (D.N.J. Apr. 2, 1981) (petitioner's complaint).

3. Warren, *supra* note 1, at 10,353. Most states obtain funding through "back-end" taxes. Thirty-five states use this method, taxing transporters or generators of hazardous waste or owners and operators of disposal facilities. Some states vary the tax according to the weight or volume, the type of waste, or the disposal method. *Id.*

4. *Id.* The author observes that states have a variety of solutions to hazardous waste problems that will cause confusion for companies with facilities in more than one state. *Id.* at 10,349.

5. N.J. STAT. ANN. § 58:10-23.11 to -23.11z (West 1982 & Supp. 1986).

6. 42 U.S.C. §§ 9601-9657 (1982).

7. Warren, *supra* note 1, at 10,351. The author states that CERCLA "expressly saves certain types of state programs and expressly preempts others." *Id.*

8. 42 U.S.C. § 9614(c) (1982). See *infra* note 16 for the full text of § 9614(c). CERCLA precludes states from "imposing additional financial responsibility beyond those spelled out in § 108 of CERCLA and from allowing double recovery for claims compensable under state law or the federal fund." Warren, *supra* note 1, at 10,351.

9. *See infra* notes 50-52 and accompanying text. "[U]ncertainty pervades the issue of preemption." Note, *Preemptive Scope*, *supra* note 1, at 646.

10. N.J. STAT. ANN. § 58:10-23.11o (West 1982 & Supp. 1986); 42 U.S.C. § 9611(a) (1982). A front-end tax is an excise tax on manufacturers or importers of raw materials. Warren, *supra* note 1, at 10,353. CERCLA § 211 amended the Internal Revenue Code to add 26 U.S.C. § 4611 (1982), which imposes a tax on crude oil and petroleum products entering the United States, and to add 26 U.S.C. § 4661 (1982), which taxes specific chemical feedstocks. Brief for Appellants at 16-17, Exxon Corp. v. Hunt, 106 S. Ct. 1103 (1986) (No. 84-978) [hereinafter Brief for Appellants]. The Spill Fund taxes major petroleum and chemical facilities on the transfer of hazardous substances or petroleum products. N.J. STAT. ANN. § 58:10-23.11h (West 1982 & Supp. 1986). *See also* Brief for the United States as Amicus Curiae at 7, Exxon Corp. v. Hunt, 106 S. Ct. 1103 (1986) (No. 84-978) [hereinafter Amicus Curiae].

11. 106 S. Ct. 1103 (1986).

12. *Id.*

New Jersey taxed both the state petroleum and chemical industries pursuant to SCCA.[13] The Exxon Corporation filed suit against New Jersey, in the United States District Court for the District of New Jersey,[14] seeking reimbursement for taxes paid between the enactment of CERCLA and the suit filing date.[15] Exxon argued that section 114(c)[16] of CERCLA precluded New Jersey from taxing the company because the state tax conflicted with the federal legislation. The district

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13. The Taxation of Major Facilities section reads in pertinent part:

> There is hereby levied upon each owner or operator of one or more major facilities a tax to insure compensation for cleanup costs and damages associated with any discharge of hazardous substances to be paid by the transferee.

N.J. STAT. ANN. §§ 58:10-23.11h (West 1982 & Supp. 1986). The Spill Compensation Fund section reads in pertinent part:

> The New Jersey Spill Compensation Fund is hereby established as a nonlapsing, revolving fund in the Department of the Treasury to carry out the purposes of this act. The fund shall be credited with all taxes and penalties related to this act. Interest received on moneys in the fund shall be credited to the fund.

N.J. STAT. ANN. §§ 58:10.23.11i (West 1982 & Supp. 1986). New Jersey enacted the Spill Fund to provide a comprehensive program for the prevention, cleanup, and removal of hazardous substances. New Jersey v. United States, [13 Pend. Lit.] Envtl. L. Rep. (Envtl. L. Inst.) 65,694 (D.D.C. Apr. 21, 1981) (petitioner's complaint).

14. [13 Pend. Lit.] Envtl. L. Rep. (Envtl. L. Inst.) 65,695 (D.N.J. 1981), *aff'd*, 683 F.2d 69 (3d Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983).

15. *Id.* at 65,695 (petitioner's complaint point 3). Exxon sought a refund of $750,000 that it had paid to the Spill Fund between December 3, 1980 (the date of CERCLA's enactment) and May 12, 1981 (the date of filing). *Id.* Compare this refund with the estimate for 1982 that the American petrochemical industry lost $350 to $400 million to sources such as Spill Fund and Superfund. DiNal & Kovall, *The Superfund Blues: CERCLA Reauthorization and A New Proposal for Funding*, 13 A.B.A. BRIEF 29, 31 (1984).

16. Section 114(b) reads in pertinent part:

> *Recovery under other State or Federal law of compensation for removal costs of damages, or payment of claims*
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> Any person who receives compensation for removal costs or damages or claims pursuant to this chapter shall be precluded from recovering compensation for the same removal costs or damages or claims pursuant to any other State or Federal law. Any person who receives compensation for removal costs or damages or claims pursuant to any other Federal or State law shall be precluded from receiving compensation for the same removal costs or damages or claims as provided in this chapter.

42 U.S.C. § 964(b) (1982). Section 114(c) reads in pertinent part:

> *Contributions to other funds*:
>
> Except as provided in this chapter, no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this subchapter. Nothing in this section shall preclude any State from using general revenues for such a fund, or from imposing a tax or fee upon any person or upon any substance in order to finance the purchase or prepositioning of hazardous substance response

court dismissed the suit on jurisdictional grounds.[17] Exxon[18] subsequently brought suit in the New Jersey Tax Court.[19] The Tax Court granted the state's motion for summary judgment,[20] holding that CERCLA did not preempt the Spill Fund.[21] The New Jersey Superior Court, Appellate Division,[22] and the New Jersey Supreme Court affirmed the Tax Court's decision.[23] The United States Supreme Court noted probable jurisdiction,[24] and subsequently affirmed in part and reversed in part.[25]

The Supremacy Clause of the United States Constitution provides that any laws that "interfere with, or are contrary to the laws of Congress . . . are invalid."[26] Thus, under this "check on state power,"[27]

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equipment or other preparation for the response to a release of hazardous substances which affects such State.

42 U.S.C. § 9614(c) (1982).

17. 11 Envtl. L. Rep. (Envtl. L. Inst.) 20,886 (1981). The Tax Injunction Act provides: "The district courts shall not enjoin, suspend, or restrain the assessment, levy, or collection of any tax under state law where a plain, speedy, and efficient remedy may be had in the courts of such state." 28 U.S.C. § 1341 (1982). The court found that the New Jersey Tax Court provided a plain, speedy, and efficient remedy. *Exxon*, 11 Envtl. L. Rep. (Envtl. L. Inst.) at 20,887.

18. Exxon's co-plaintiffs were B.F. Goodrich Co., Union Carbide Corp., Monsanto Co., and Tenneco Chemicals, Inc.

19. 4 N.J. Tax 294 (1982).

20. *Id.* On cross-motions for summary judgment, Exxon argued that the state tax compensated hazardous waste sites that the Superfund might ultimately compensate. New Jersey argued that the Spill Fund, as a supplement to Superfund, provided compensation for claims not receiving Superfund coverage. 97 N.J. 526, 529, 481 A.2d 271, 272 (1984).

21. Exxon Corp. v. Hunt, 4 N.J. Tax 294 (1982).

22. 190 N.J. Super. 131, 462 A.2d 193 (App. Div. 1983). Before the superior court rendered its decision, Exxon appealed its reimbursement suit to the United States Court of Appeals for the Third Circuit. The circuit court affirmed the district court's decision. 683 F.2d 69 (3d Cir. 1982). Exxon then petitioned for certiorari in October of 1982. N.J. St. Tax Rep. (CCH) para. 201-002. The Supreme Court denied certiorari. 459 U.S. 1104 (1983).

23. 97 N.J. 526, 481 A.2d 271 (1984).

24. 105 S. Ct. 3474 (1985). On December 17, 1984, Exxon filed an appeal with the United States Supreme Court. 53 U.S.L.W. 3509 (U.S. Dec. 17, 1984) (No. 84-978). The Court invited the Solicitor General to file a brief expressing the views of the United States. 105 S. Ct. 1353 (1985). *See High Court Notes Probable Jurisdiction in "Superfund" Case*, N.J. St. Tax Rep. (CCH) Report Letter No. 423 (July 8, 1985).

25. 106 S. Ct. 1103, 1109 (1986).

26. Perez v. Campbell, 402 U.S. 637, 649 (1971) (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824)). During the Constitutional Convention, James Madison made it clear that "[a] law violating a constitution established by the people themselves

state law yields to federal law if a conflict between the two exists.[28] State law is preempted if it hinders a strong federal legislative purpose.[29]

Although the Court's preemption standards vary[30] when it applies the Supremacy Clause[31] and Congress has not explicitly preempted the field, the Court exhibits a preference for state regulatory power.[32] In

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would be considered by the Judges as null and void." THE DEBATES IN THE FEDERAL CONVENTION OF 1787, at 309 (G. Hunt & J.B. Scott eds. 1920) (Session of Monday, July 23, 1787). *See also* THE FEDERALIST NO. 44, at 126 (J. Madison) (R.P. Fairfield 2d ed. 1966).

27. *See* Comment, *State Power and Preemption in the Nuclear Energy Field: Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Commission*, 26 WASH. U.J. URB. & CONTEMP. L. 139, 141 (1984).

28. Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972) (due to the Atomic Energy Commission's exclusive authority over the construction and operation of nuclear power plants, state efforts to regulate radioactive releases are precluded); Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) (state law is void when in direct conflict with federal legislation, but state regulations stand when the Secretary of Transportation has not promulgated regulations); Jones v. Rath Packing Co., 430 U.S. 519 (1977) (state laws that are less stringent or require different information expressly preempted by federal statutory language and purpose); City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973) (the pervasive nature of the federal regulatory scheme preempts state and local control). *See also* Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) (state law preempted if Congress expressly provides federal law is exclusive authority in a particular field). *See generally* Note, *Superfund and California's Implementation: Potential Conflict*, 19 CAL. W.L. REV. 373, 389-90 (1983).

29. Hines v. Davidowitz, 312 U.S. 52 (1941) (federal statutory scheme preempted tate alien registration law). Pennsylvania v. Nelson, 350 U.S. 497 (1956) (preemption ' federal interests are so pervasive and dominant that Congress left no room for state egulation).

30. Comment, *Preemption Doctrine in the Environmental Context: A Unified Method of Analysis*, 127 U. PA. L. REV. 197 (1978). *Compare* Merrill Lynch, Pierce, 'enner & Smith, Inc. v. Ware, 414 U.S. 117 (1973) (when Congress intended active ate involvement, a strong state policy that does not conflict with federal laws will revail) *with* Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) (even though Congress id not foreclose the field, a state statute is void if it conflicts with similar federal legislaon) *and* Hines v. Davidowitz, 312 U.S. 52 (1941) (a state statute must fall if it obructs federal objectives and purposes).

31. Comment, *supra* note 27, at 146.

32. *Id.* at 145. *See, e.g.*, Pacific Gas & Electric Co. v. State Energy Resources Conrvation & Dev. Comm'n, 461 U.S. 190 (1983) (Congress preserved a dual system of gulation under which state regulations are not preempted because the federal government regulates safety and the state regulates traditional economic concerns such as generating capacity); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960) ederal inspection laws do not preempt the state's power to promote local health and

New York State Department of Social Services v. Dublino,[33] for in stance, the plaintiffs, New York public assistance recipients, were sul ject to New York's conditions for aid.[34] The plaintiffs argued that tl Federal Work Incentive Program (WIN) preempted New York's stat tory scheme.[35] The Court reasoned that because the state program c ordinates and complements the federal program the preemptic argument is less persuasive.[36]

The ability of state and federal legislation to coexist in a given area illustrated in *Merrill Lynch, Pierce, Fenner & Smith, Inc., v. Ware.* The case involved a state law that protected employees from post-er ployment forfeiture clauses.[38] The Court held that a New York Sto Exchange rule allowing such clauses did not preempt the state law a emphasized that courts should favor the reconciliation of state and fe eral schemes.[39]

Although the federal government is involved in environmental reg lation,[40] Congress has not completely preempted the field.[41] In fa many federal environmental programs are executed with the states' c operation.[42] Under these circumstances, *Dublino* and *Ware* sugg that states are free to regulate areas such as hazardous waste clean

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cleanliness). *See also* Comment, *Environmental Law: A Reevaluation of Federal P emption and the Commerce Clause*, 7 FORDHAM URB. L.J. 649 (1979).

33. 413 U.S. 405 (1973).

34. *Id.* at 422-23.

35. *Id.* at 411. *Dublino* involved the Federal Work Incentive Program (W amendment of 1967 to the Social Security Act. 42 U.S.C. § 607 (1982). Under W employable aid recipients were to register with the state for manpower services, tr ing, and employment as a condition of assistance. New York had a similar requirem for state granted aid. 413 U.S. at 407 n.1.

36. 413 U.S. at 421. The Court held that Congress did not intend to preempt s work programs, but remanded for a determination of whether specific provision New York's law conflicted with the Social Security Act. *Id.* at 422-23.

37. 414 U.S. 117 (1973).

38. In particular, the statute invalidated employment contracts that restraine person from engaging in a related post-employment business. *Id.* at 121.

39. *Id.* at 127.

40. Comment, *supra* note 30, at 208-10.

41. Warren, *supra* note 1, at 10,351. "[U]nlike other environmental legislation has been held to preempt state laws, CERCLA expressly preserves them." *Id.*

42. *Id.* For example, the National Environmental Policy Act of 1969 (NEPA) U.S.C. §§ 4321-4347 (1982), relies on state and local cooperation with the federal ernment. 42 U.S.C. § 4331(a). The Clean Air Act, 42 U.S.C. § 1857 (1982), requ cooperative efforts for the prevention and control of air pollution. 42 U.S.C. § 740 The Coastal Zone Management Act of 1972, 33 U.S.C. §§ 1451-1464 (1982), prov

and removal.[43]

To regulate waste production, Congress enacted the Resource Conservation and Recovery Act of 1976 (RCRA).[44] Because RCRA, however, did not adequately deal with the problems of hazardous waste,[45] Congress enacted CERCLA to amend RCRA.[46] CERCLA created a trust fund to finance joint state-federal cleanup operations.[47] Congress funded the 1.6 billion dollar fund through taxes imposed on both the petrochemical and oil industries and from general appropriations.[48] In spite of criticism of its poor construction and confusing language,[49] the

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federal financial incentives to states in order to develop programs preserving coastal areas.

43. Note, *supra* note 28, at 390-95.

44. 42 U.S.C. §§ 6901-6987 (1982). RCRA "established a 'cradle to grave' regulatory system" for hazardous waste. Note, *Overcoming Local Opposition to Hazardous Waste Facilities: The Massachusetts Approach*, 6 HARV. ENVTL. L. REV. 265, 308 (1982).

45. Note, *supra* note 28, at 3768 n.23. The Act was prospective and did not deal with the cleanup of older sites. Another reason further legislation was necessary was the EPA's lax enforcement of RCRA. *Id.*

46. 1A F. GRAD, TREATISE ON ENVIRONMENTAL LAW §§ 4A.04[1]-[2], at 4A-105 to -150 (1985). Superfund is "logically connected and continuous with the regulation of hazardous waste disposal sites under Subtitle C of RCRA." *Id.* Congress enacted CERCLA after considering more than twenty bills on the subject. Note, *Preemptive Scope*, *supra* note 1, at 643. Senate Bill 1480 reported out of the Senate Committee on Finance on November 18, 1980. 1A F. GRAD, *supra*, at 4A-126 to -127. Before the Senate considered Senate Bill 1480 on November 24, 1980, a bipartisan group of senators quickly negotiated and wrote an entirely new bill. *Id.* at 4A-136 to -137. The bill passed in the Senate and, under a suspension of the rules that barred any amendments, was introduced as an amendment to House Resolution 7020 and passed with limited debate. *Id.* at 4A-123. Because of the method in which this bill passed, Superfund "has virtually no legislative history at all." *See* United States v. Price, 577 F. Supp. 1103, 1109 (D.N.J. 1983). *See also* Annotation, *Governmental Recovery of Cost of Hazardous Waste Removal Under Comprehensive Environmental Response, Compensation, and Liability Act*, 70 A.L.R. FED. 329 (1984), for a general discussion of CERCLA.

47. Note, *supra* note 28, at 374. This is a "cost sharing scheme requiring state participation." The Superfund provides "liability, compensation, cleanup, and emergency response for hazardous substances released into the environment" and the cleanup of inactive waste disposal sites. *Id.*

48. 26 U.S.C. §§ 4611, 4661 (1982). *See* Warren, *supra* note 1, at 10,350. Of this amount, $1.38 billion came from "taxes on crude oil, certain petroleum products, and 42 chemical feedstocks with the remainder coming from appropriations." *Id.*

49. 1A F. GRAD, *supra* note 46, at 4A-150. Some of the confusion derives from CERCLA's reliance on and cross-reference to other laws. *Id.* at 4A-106. Opponents pointed out that the bill was flawed and contained many "substantive defects." Congressman Broyhill gave Congress a "three-page list of various defects and technical errors." 126 CONG. REC. H31,969 (1980). Courts reviewing the legislative history to

legislation passed into law.

Although CERCLA preempts certain state activities,[50] it expressly requires states to pay at least ten percent of the expenditures[51] for joint operations. Section 114(c) specifies the uses to which a state can apply its taxes under CERCLA's scheme.[52] In determining whether a federal statute preempts a state statutory scheme, courts typically apply the ordinary meaning of the statute's language, assuming that it expresses legislative intent.[53] CERCLA's statutory language suggests broad federal preemption.[54] Section 114(c) states that "*no person* may be required to contribute to *any fund* . . . which *may be compensated* under this subchapter."[55] The Act fails to indicate, however, how to interpret the phrase "may be compensated."[56] Whether compensation is discretionary under the ordinary meaning of the phrase or mandatory under a narrower interpretation[57] turns on the legislative intent,[58] th

discover congressional intent have commented that the legislative history is "unusuall riddled [with] self-serving and contradictory statements," United States v. Wade, 577 F. Supp. 1326, 1331 (E.D. Pa. 1983), and both the statute itself and its legislative histor are vague. City of Philadelphia v. Stepan Chem. Co., 544 F. Supp. 1135, 1142 (E.D. P 1982). Congress also did not provide a committee report clarifying the scope of tl legislation. United States v. Price, 577 F. Supp. 1103, 1109 (D.N.J. 1983).

50. Note, *supra* note 44, at 310. *But see* Warren, *supra* note 1, at 10,351. "The on apparent limitation on state programs in the federal Act is preemption of certain sta hazardous waste cleanup tax-financed funds. . . ." *Id.*

51. 1A F. GRAD, *supra* note 46, § 4A-109. CERCLA also requires the states to p for subsequent maintenance of the targeted site. *Id. See* 42 U.S.C. § 9604(c)(3)((1982).

52. Note, *supra* note 28, at 383. Statements during debate indicated that CERCI complements other environmental laws, 126 CONG. REC. S30,993 (1980) (remarks Senator Randolph), that preemption of state funds occurs only when the Superfu actually pays for the operations, 126 CONG. REC. S14,981 (1980) (dialogue betwe Senator Randolph and Senator Bradley), and that states could impose a tax to pay the states' initial response costs. 126 CONG. REC. S14,981 (1980) (remarks of Sena Randolph).

53. Metropolitan Life Ins. Co. v. Massachusetts, 105 S. Ct. 2380, 2388 (1985). T Court also noted it must presume Congress "did not intend to preempt areas of tra tional state regulation." *Id.* (citing Jones v. Rath Packing Co., 430 U.S. 519, (1977)). *But see* Aloha Airlines v. Director of Taxation, 464 U.S. 7 (1983) (whe federal statute unambiguously forbids certain types of state actions, the courts "n not look beyond the plain language of the federal statute to determine whether a st statute . . . is pre-empted").

54. Note, *supra* note 28, at 388-89 n.122. "The language of the federal ac broader than the legislative intent to prevent double taxation." *Id.*

55. *See supra* note 16.

56. Note, *supra* note 44, at 321.

57. Farmers' & Merchants' Bank v. Federal Reserve Bank, 262 U.S. 649, 66

statutory context,[59] and the subject matter[60] of the dispute.

In an attempt to clarify the ambiguity of section 114(c), New Jersey initiated two suits against the federal government.[61] In *New Jersey v. United States*[62] the court noted that the federal government "genuinely took no position" on whether CERCLA preempted state law.[63] *Lesniak v. United States*[64] was also part of New Jersey's effort to prove that CERCLA did not preempt the state taxing provision.[65] This suit

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(1923); Kraft v. Board of Educ., 247 F. Supp. 21, 24-25 (D.C.C. 1965), *cert. denied*, 386 U.S. 958 (1967) (interpretation based on the legislative intent as shown by the statute and legislative history). If, however, "may" and "shall" appear in the same sentence, or the words are close juxtaposition in different places of the same statute, the courts apply the words' ordinary meaning. Hecht Co. v. Bowles, 321 U.S. 321, 326-27 (1944) (the use of "may" and "shall" in the same sentence implies the purposeful use of each); United States v. Tapor-Ideal Dairy Co., 175 F. Supp. 678, 682 (N.D. Ohio 1959) (citing Federal Land Bank of Springfield v. Hansen, 113 F.2d 82 (2d Cir. 1940)) (the general rule is that "may" is permissive and grants discretion, especially when juxtaposed with "shall"). In Jensen v. Lehigh Valley R. Co., 255 F. 795 (S.D.N.Y. 1919), Judge Learned Hand analyzed the use of "may" and "shall" in the first and third paragraphs of the statute. He stated that "may" sometimes means "shall," but "hardly when the two words are in such immediate contrast." *Id.* at 796.

58. *Kraft*, 247 F. Supp. at 24-25. New Jersey argued that according to the legislative history, the phrase "may be compensated" strictly limits federal preemption of state taxation to items under Superfund coverage. Thus, the state can use Spill Fund monies when Superfund financing is inadequate or unavailable. Brief for Appellees at 9-11, Exxon Corp. v. Hunt, 106 S. Ct. 1103 (1986) (No. 84-978) [hereinafter Brief for Appellees]. Exxon argued that the plain meaning of "may be compensated" means eligibility for compensation and not actual payment. Brief for Appellants, *supra* note 10, at 24. Exxon also argued that CERCLA's legislative history supports this interpretation. *Id.* at 40-41 (Senator Magnuson's formulation of "may be compensated" prohibited duplicative funds).

59. United States v. Cook, 432 F.2d 1093, 1098 (7th Cir. 1970), *cert. denied*, 401 U.S. 996 (1971).

60. *Farmers' & Merchants' Bank*, 262 U.S. at 662.

61. *See infra* notes 62-67 and accompanying text.

62. In New Jersey v. United States, 16 Env't Rep. Cas. (BNA) 1846 (D.D.C. 1981), the state sought a declaratory judgment in the United States District Court for the District of Columbia that CERCLA did not preempt the taxing and funding provisions of the New Jersey Spill Compensation and Control Act.

63. [12 Curr. Dev.] Env't Rep. (BNA) 933 (Nov. 27, 1981). The court dismissed the complaint as not ripe for review, stating that New Jersey is not "in apprehension of imminent federal action threatening its program." *Id.*

64. Lesniak v. United States, 17 Env't Rep. Cas. (BNA) 1455 (D.N.J. 1982). A New Jersey state legislator brought this suit. [12 Curr. Dev.] Env't Rep. (BNA) 1393 (Mar. 5, 1982).

65. Lesniak v. United States, [13 Pend. Lit.] Envtl. L. Rep. (Envtl. L. Inst.) 65,695 (D.N.J. Apr. 2, 1981) (petitioner's complaint). The plaintiff sought a ruling that CERCLA violates the United States Constitution or, in the alternative, a declaratory judg-

ended when the Environmental Protection Agency agreed that CERCLA did not preclude New Jersey from using the state's Spill Fund to respond to hazardous wastes.[66] These two suits constituted New Jersey's attempts to clarify existing law so that the state could efficiently operate its cleanup and removal programs.[67]

In *Exxon Corporation v. Hunt*[68] the United States Supreme Court reviewed the New Jersey Supreme Court decision[69] and reversed in part the New Jersey Tax Court's grant of summary judgment.[70] The Tax Court relied on Superfund's legislative history as well as its scope and purpose[71] to conclude that "even if § 114(c) of [Superfund] is construed to preempt part of the [S]pill [F]und, the . . . nonpreempted areas are more than sufficient to sustain the Fund's continued validity."[72]

The Court noted that because *Exxon* was an express preemption case,[73] the Court need only look to the statutory language to determine the extent of federal preemption.[74] The Court acknowledged but rejected the Solicitor General's amicus curiae reading of the phrase "costs of response or damages or claims."[75] The majority found sup

ment interpreting § 144(c) narrowly. Plaintiff stated the "ambiguity of § 114(c) [whether it is interpreted broadly or narrowly] has created confusion . . . and has rendered immobile legislative efforts to refine, improve, and expand efforts to clean up chemical dumps within the state." *Id.*

66. [12 Curr. Dev.] Env't Rep. (BNA) at 1393. The settlement allows New Jersey to use its tax funds for all expenditures not actually compensated by CERCLA. Warren, *supra* note 1, at 10,352.

67. *Id.* at 10,352. *See supra* note 65.

68. 106 S. Ct. 1103 (1986).

69. 97 N.J. 526, 481 A.2d 271 (1984).

70. 106 S. Ct. at 1109.

71. 97 N.J. at 529, 481 A.2d at 272.

72. *Id.* at 530, 481 A.2d at 273 (quoting 4 N.J. Tax 294, 320 (1982)). The T Court would also have upheld the tax scheme "because the statute contained an expr severability clause." Warren, *supra* note 1, at 10,352. "The court found it could, the fore, sever uses of the fund that potentially duplicated CERCLA but uphold the scheme itself." *Id.*

73. 106 S. Ct. at 1119 (citing Aloha Airlines v. Director of Taxation, 464 U.S. 7, (1983)). *See supra* note 53.

74. 106 S. Ct. at 1109. The New Jersey Supreme Court argued that "[a]lthoug may be true that many of the purposes to which Superfund moneys are put overlap w the purposes of Spill Fund, this fact alone does not require a conclusion of preemptio 97 N.J. at 536, 481 A.2d at 276.

75. 106 S. Ct. at 1111. The Court analyzed the Solicitor General's opinion beca its logical force helped in understanding Exxon's and New Jersey's arguments. *Id.*

port for its rejection of the narrow amicus interpretation of the preemption provision in CERCLA's legislative history,[76] the wording of section 114(b),[77] and the saving provision of section 114(c).[78] Upon comparing section 114(b) with section 114(c)[79] the Court noted that the New Jersey Supreme Court's ruling made the first sentence of section 114(c) redundant[80] and violated the plain meaning of the phrase "may be compensated."[81] Rejecting New Jersey's argument that section 114(c) applies only when Superfund pays a claim or would have paid a claim,[82] the Court stated that New Jersey failed to consider other congressional policy choices,[83] distorted the "language and logic" of section 114(c),[84] and lacked sufficient support for its view in CERCLA's spare legislative history.[85]

Solicitor General argued that Superfund preempts only one of the five uses of Spill Fund monies (i.e., the payment of other parties' damages and cleanup costs) and may preempt the entire tax on non-severability grounds. 106 S. Ct. at 1110-13. *See* Amicus Curiae, *supra* note 10, at 20. *See also* N.J. STAT. ANN. §§ 58:10-23.11o(2), -23.11q (West 1982). The Solicitor General further argued that § 114(c) prohibits funds that "pay compensation for claims of any costs of response or damages . . . [or] claims which may be compensated under [the] subchapter." Amicus Curiae, *supra* note 10, at 16. The Solicitor General interpreted "claim" narrowly as a private party's demand for reimbursement for cleanup expenses from a state fund or Superfund. 106 S. Ct. at 1110.

76. *Id.* at 1111-12. The Court examined the similarities between § 110 of H.R. 85 and § 114(c) and determined that congressional intent regarding pre-emption did not change when § 114(c) became law. *Id.*

77. *Id.* at 1112-13. *See supra* note 16.

78. 106 S. Ct. at 1113. The saving provision, or the second sentence of § 114(c), allows the state to impose a tax "to finance the purchase or prepositioning of hazardous substance response equipment" or otherwise prepare for the release of hazardous substances. 42 U.S.C. § 9614(c) (1982). The Court concluded that the Solicitor General's interpretation made the saving provision redundant. 106 S. Ct. at 1113.

79. *Id.* The Court made this comparison in order to determine the meaning of § 114(c)'s phrase "which may be compensated under this subchapter." *Id.*

80. *Id.* By reading "may be compensated" to mean "is compensated," § 114(c) became redundant because Congress banned double compensation under § 114(b). *Id.*

81. *Id.*

82. *Id.* at 1114-15.

83. *Id.* at 1114. Congress was also concerned, the court stated, with the adverse effects of overtaxation on the petrochemical industry. *Id.* See *also* H.R. REP. NO. 172, 96th Cong., 1st Sess., pt. 1, at 22 (1979); DiNal & Kovall, *supra* note 15 for a general discussion of congressional policy choices.

84. 106 S. Ct. at 1114.

85. *Id.* at 1115. Although the debate between Senators Bradley and Randolph, see 126 CONG. REC. S30,949 (1980), supports New Jersey's stance, the majority, because of ambiguities, inaccuracies, and the truncated consideration of the bill, declined to give the statements much weight. 106 S. Ct. at 1115. *See supra* notes 49-52. The New

Finally, the Court defined the category of expenses that "may be compensated" by Superfund[86] and compared this category with the Spill Fund scheme in order to determine the extent of federal preemption.[87] According to the Court, the National Contingency Plan (NCP)[88] provides criteria such as the annual National Priorities List[89] for determining what expenses at which sites are eligible for federal money.[90] Although the Court did not accept Exxon's total preemption argument,[91] it held that section 114(c) preempted Spill Fund expenditures beyond the required ten percent state contribution[92] for both costs incurred to remedy sites on the National Priorities List[93] and removal costs eligible for compensation under NCP criteria.[94] Justice Stevens dissented,[95] concluding *inter alia* that the New Jersey tax was not subject to federal preemption because the Spill Fund had purposes

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Jersey Supreme Court also relied on various statements made by Congressman Randolph, particularly his remark that the language of § 144(c) "is a prohibition against double taxation for the same purposes. . . . In summary, . . . this preemption provision is narrow in scope and limited to the particular purpose of preventing double taxation." 126 CONG. REC. S30,993 (1980). *See also* Brief for Appellees, *supra* note 58, at 19. New Jersey argued that the presumption against preemption is particularly strong when a traditional function of state government, such as taxing, is involved. Metropolitan Life Ins. Co. v. Massachusetts, 105 S. Ct. 2380, 2389-90 (1985); Brief for Appellees, *supra* note 58, at 19.

86. 106 S. Ct. at 1115-16.

87. *Id.* at 1116.

88. 42 U.S.C. § 9605(8)(A), (B) (1982). The National Contingency Plan (NCP) "delineates appropriate federal, state, and local responsibilities and encourages state authorities to undertake response actions." Note, *Preemptive Scope*, *supra* note 1, at 650.

89. 42 U.S.C. § 9605(8)(B) (1982). The NCP list includes about 400 high priority facilities as determined by the Administrator of the Environmental Protection Agency. *Id.* *See also* 40 C.F.R. § 300 app. B (1986).

90. 106 S. Ct. at 1115-16. *See* 40 C.F.R. § 300.65 (1986) (Superfund will finance removal or immediate cleanup only in emergency situations); 40 C.F.R. § 300.68(a) (1986) (sites listed on the National Priorities List are exclusively eligible for remedial financing); 50 Fed. Reg. 9593 (1985) (Environmental Protection Agency criteria for using Superfund monies for national resource claims).

91. 106 S. Ct. at 1116. *See also* Brief for Appellants, *supra* note 10, at 19-20. Exxon argued that because states cannot duplicate Superfund uses, they cannot duplicate Superfund taxes, thus invalidating the New Jersey tax. *Id.* Total preemption, however, would render the "may be compensated under this subchapter" language meaningless. 106 S. Ct. at 1116.

92. *Id.* *See supra* note 51 and accompanying text.

93. *Id.*

94. *Id.*

95. 106 S. Ct. at 1117-21.

other than compensating valid claims made against the Superfund.[96]

New Jersey's response to federal inaction in the cleanup of hazardous waste[97] was to continue its own taxing and cleanup efforts.[98] Although CERCLA requires active state involvement in the Superfund legislative scheme,[99] the preemption issue turns on whether section 114(c) is narrowly or broadly interpreted.[100] A broad reading of the preemption provision discourages state efforts to clean up and control hazardous wastes[101] and severely limits a state's ability to raise needed funds for the cleanup and removal of toxic wastes.[102] On the other hand, a narrow interpretation of the preemption provision flouts congressional policies and intent and violates the plain meaning of "may be compensated."[103] The Court's compromise between Exxon's total preemption standard and New Jersey's "all or nothing" preemption standard[104] invalidates particular parts of New Jersey's taxing scheme[105] yet leaves the severability issue to the New Jersey courts.[106]

Although the Court recognized that both houses of Congress had

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96. *Id.* at 1118. Justice Stevens also argued that Congress knew of the New Jersey Spill Fund if Congress had intended to preempt the Spill Fund it would have done so in less ambiguous language. *Id.* at 1119.

97. Chamberlain, *Superfund Cleanup A Question of Pace*, St. Louis Post-Dispatch, Aug. 31, 1985, at 3B. As of August 31, 1985, the EPA had cleaned only ten sites. *Id.* *See supra* notes 64-67 and accompanying text.

98. *See supra* note 2.

99. 42 U.S.C. § 9604(c)(3)(C), (d)(1) (1982).

100. *See supra* notes 55-60 and accompanying text.

101. Note, *Preemptive Scope*, *supra* note 1, at 655. A narrow reading encourages more state involvement and "provide[s] states with greater flexibility in meeting their matching grant and other obligations under CERCLA." Warren, *supra* note 1, at 10,352. "Courts should not impede these state efforts [to clean up hazardous waste] by an overly broad interpretation of CERCLA's preemption clause." Note, *supra* note 44, at 337.

102. *Id.* at 320. The preemption provision "casts doubt on the status of these state programs [taxes, fines, or fees on generators or disposal facilities]." *Id.* This puts states in a "double bind." The states "may not be permitted to raise funds such as under the New Jersey Spill Act. Yet they are required to contribute ten percent. . . . As a result, states may not receive the monies necessary to clean up and abate a hazardous waste spill." Note, *supra* note 28, at 388 n.121.

103. *See supra* notes 80-85 and accompanying text.

104. *See supra* notes 91-94 and accompanying text. *See also* 97 N.J. at 536, 481 A.2d at 276.

105. 106 S. Ct. at 1116. *See supra* note 36. *See also* New York State Dep't of Social Servs. v. Dublino, 413 U.S. 405 (1973).

106. 106 S. Ct. at 1116.

recently passed bills repealing section 114(c),[107] it did not address the Environmental Protection Agency's interpretation of that section.[108] The EPA's position is that section 114(c) does not apply to state spending that the Superfund could, but does not, reimburse.[109] Congressional committees have also interpreted section 114(c) narrowly.[110] The New Jersey Supreme Court relied on CERCLA's legislative history to support a narrow reading of section 114(c), and interpreted "may" to mean "shall."[111] The Court, however, dismissed the legislative history as ambiguous and inaccurate[112] and properly interpreted the phrase "may be compensated."[113]

New Jersey was the only state using a front-end tax to finance haz· ardous waste cleanup measures.[114] The Court invalidated this schem€ because of the preempted expenditures[115] and articulated a preemptior standard that utilizes National Contingency Plan criteria.[116] As a re

107. *Id.* at 1109 n.6 (citing S. 51, 99th Cong., 1st Sess. (1985) and H.R. 2817, 99t Cong., 1st Sess. (1985), inserted into H.R. 2005, 99th Cong., 1st Sess. (1985)). Earlie the Senate defeated the Superfund reauthorization bill, H.R. 5640. *Congress in 1984: Mixed Bag*, 14 Envtl. L. Rep. (Envtl. L. Inst.) 10,449, 10,450 (1984). "Senate Republ cans advocated waiting until 1985 to reauthorize the Act." *Id.* at 10,451. Th Superfund expired on September 30, 1985. Chamberlain, *supra* note 97. As of the en of June, 1984, Congress had not yet reauthorized Superfund. *Washington Wire*, Wa St. J., June 27, 1986, at 1.

108. OFFICE OF EMERGENCY & REMEDIAL RESPONSE, U.S. ENVIRONMENTA PROTECTION AGENCY, GUIDANCE: COOPERATIVE AGREEMENTS AND CONTRAC WITH STATES UNDER THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPE SATION, AND LIABILITY ACT OF 1980, PUB. L. NO. 96-510, ix-x (Mar. 1982).

109. *Id. See also* 97 N.J. at 541, 481 A.2d at 279.

110. *Id.* at 540, 481 A.2d at 279. The Committee on Energy and Commerce stat its belief that "the proper interpretation of current law is that its preemption provisi was intended only to preclude states from imposing taxes or otherwise requiring cont butions to funds which would be actually compensated by Superfund." *Id.* Cit views of a later Congress, however, is a dangerous basis for inferring prior intent. C sumer Prod. Safety Comm'n v. GTE Sylvania, 447 U.S. 102, 117 (1980). *See a* United States v. Price, 361 U.S. 304, 313 (1960).

111. 97 N.J. at 534-39, 481 A.2d at 275-78.

112. 106 S. Ct. at 1115. *See supra* note 49 and accompanying text.

113. Jensen v. Lehigh Valley R. Co., 255 F. 795 (S.D.N.Y. 1919). *See supra* not and accompanying text. "May" and "shall" are both used in § 114(c). *See supra* r 16. Each word should carry its proper meaning, especially when the two words ap in the same statute.

114. *See supra* note 10 and accompanying text.

115. *See supra* notes 87-94, 106 and accompanying texts.

116. 42 U.S.C. § 9605(8)(A), (B) (1982). *See supra* notes 87-94 and accompan text. This criteria gives states a certain degree of flexibility because of their abilit recommend priority sites within the state. 42 U.S.C. § 9605(8)(B) (1982).

sult, the Court's holding reduces the potential financial burden on the petrochemical and petroleum industries[117] and is in step with congressional policy to save domestic jobs and help these industries remain competitive with imports.[118]

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117. Chamberlain, *supra* note 97. Currently, only twelve corporations pay almost)% of Superfund taxes. Environmental Protection Agency data on materials found at :9 National Priority List sites, which showed the petroleum refining industry identifi- le at only 5% of these sites, demonstrates that the industry burden is already out of oportion with liability. DiNal & Kovall, *supra* note 15, at 31.

118. *See supra* note 83.