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I. South Carolina Pollution Control Act Authorizes the Department of Health and Environmental Control to Collect Damages from Governmental Agencies That Violate Act

In *City of Rock Hill v. South Carolina Department of Health & Environmental Control*[1] the South Carolina Supreme Court held that the Department of Health and Environmental Control (DHEC) has the authority to assess penalties and damages for violations of the South Carolina Pollution Control Act.[2] Accordingly, the court held that DHEC has jurisdiction to assess, decree, and collect damages against a city.[3] This case establishes that a governmental agency may not look to the courts as a means of escaping DHEC's authority under the Pollution Control Act.

The Manchester Creek Waste Water Treatment Plant is owned and operated by the City of Rock Hill (the City) under a permit issued by DHEC. In May 1987 the plant discharged two million gallons of sludge into the Catawba River. The South Carolina Wildlife and Marine Resources Department (the Wildlife Department) estimated that 336,965 fish were killed as a result of the sludge discharge. After an administrative hearing DHEC issued an order that found the City in violation of the Pollution Control Act. DHEC ordered the City to pay the Wildlife Department $122,779.27 in damages and to pay DHEC $30,000 in civil penalties. The City then brought a declaratory judgment action and alleged that DHEC has no statutory authority to assess damages against the City for violations of the Pollution Control Act. The City asserted that the circuit courts maintain exclusive jurisdiction for the assessment of damages against any political subdivision[4] under the South Carolina Tort Claims Act.[5]

The circuit court concluded that the Pollution Control Act vests DHEC with broad powers to control pollution and that these powers include the power to assess and collect damages that result from violations of DHEC's permit requirements.[6] The circuit court also determined that the Tort Claims Act does not control whether DHEC may

1. 394 S.E.2d 327 (S.C. 1990).
2. S.C. Code Ann. §§ 48-1-10 to -350 (Law. Co-op. 1987).
3. *Rock Hill*, 394 S.E.2d at 331.
4. *Id.* at 328-29.
5. S.C. Code Ann. §§ 15-78-10 to -190 (Law. Co-op. Supp. 1990).
6. *Rock Hill*, 394 S.E.2d at 329.

administratively determine and collect damages.[7] The City appealed this order.

The supreme court first addressed whether DHEC has the statutory power under the Pollution Control Act to determine and assess damages against a violator of the Pollution Control Act. The court noted that the Pollution Control Act provides DHEC with broad authority to regulate persons who may pollute South Carolina's environment.[8] The City is a person for purposes of the Pollution Control Act because the Act "defines 'Person' to include not only any individual, but any private or public corporation, political subdivision, government agency, municipality, and legal entity."[9]

The court stated that "regulatory bodies such as DHEC possess only those powers which are specifically delineated."[10] The court emphasized, however, that by necessity "a regulatory body possesses not only the powers expressly conferred on it but also those which must be inferred or implied to effectively carry out the duties for which it is charged."[11] The court noted that when an administrative agency acts for the protection of the environment, the court will construe the delegation of authority to that agency liberally.[12] The court decided that the Pollution Control Act implicitly gives DHEC the power to assess damages that result from violations.[13]

The City argued that the Pollution Control Act gives DHEC the authority to pursue an action for damages only in a circuit court. The court responded:

> The City's construction would force DHEC, in a contested case, to first hold an administrative hearing to determine liability for failure to comply with a permit, administer penalties, obtain compliance with a permit, abate a source of pollution and then, institute a judicial proceeding in circuit court to determine liability and damages . . . .[14]

This construction, the court stated, "would violate common sense and the tenets of judicial economy."[15] The court found no basis for the City's constitutional objection to DHEC's assessment of damages because the South Carolina Administrative Procedures Act[16] provides ad-

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7. *Id.*
8. *Id.* at 329-30.
9. *Id.* at 330 n.1 (citing S.C. CODE ANN. § 48-1-10(1) (Law. Co-op. 1987)).
10. *Id.* at 330 (citing City of Columbia v. Board of Health & Envtl. Control, 292 S.C. 199, 355 S.E.2d 536 (1987)).
11. *Id.* (citing *Board of Health*, 292 S.C. at 202, 355 S.E.2d at 538).
12. *Id.* (citing *Board of Health*, 292 S.C. at 202, 355 S.E.2d at 538).
13. *Id.*
14. *Id.*
15. *Id.*
16. S.C. CODE ANN. §§ 1-23-310 to -400 (Law. Co-op. 1986).

equate fact-finding procedures and the Pollution Control Act provides adequate judicial review[17] for DHEC decisions.[18]

The court also considered whether DHEC has jurisdiction to assess, decree, and collect damages against a governmental entity such as the City.[19] The City argued that even if DHEC could assess and collect damages for the fish kill, "the exclusive remedy for the negligent discharge of pollutants by a governmental entity is under the Tort Claims Act."[20] The City supported its argument by noting that the Tort Claims Act states that "[t]his chapter constitutes the exclusive remedy for any tort committed by an employee of a governmental entity."[21]

In determining that the Tort Claims Act did not control jurisdiction in the case, the court first noted the strict liability aspect of the Pollution Control Act.[22] The Pollution Control Act does not require that an entity commit a tort to be found liable under the Act.[23]

Second, the court noted that certain provisions of the Pollution Control Act would be repealed by implication if the court held that the Tort Claims Act provides the exclusive remedy for plaintiffs pursuing claims against governmental entities under the Pollution Control Act.[24] The court stated:

> Repeals by implication are not favored by courts and to repeal a statute on account of an asserted conflict or repugnancy with another, 'the repugnancy must not only be plain, but the provisions of the two statutes must be incapable of any reasonable reconcilement; for if they can be construed so that both can stand, the Court will so construe them.'[25]

In addition, the court noted the general rule of statutory construction:

> [S]tatutes of a specific nature, such as those contained in the Pollution Control Act are not to be considered as repealed in whole or in part by later general statutes such as those included in [the] Tort Claims Act, unless there is a direct reference to the former statute or the intent of the legislature to repeal is explicitly implied therein.[26]

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17. *Id.* § 48-1-200 (Law. Co-op. 1987).

18. *Rock Hill*, 394 S.E.2d at 331.

19. *Id.*

20. *Id.*

21. S.C. CODE ANN. § 15-78-70(a) (Law. Co-op. Supp. 1990), *quoted in Rock Hill*, 394 S.E.2d at 331.

22. *Rock Hill*, 394 S.E.2d at 331.

23. *Id.* (citing Carolina Chems., Inc. v. South Carolina Dep't of Health & Envtl. Control, 290 S.C. 498, 351 S.E.2d 575 (Ct. App. 1986)).

24. *Id.*

25. *Id.* (quoting Pearson v. Mills Mfg. Co., 82 S.C. 506, 509, 64 S.E. 407, 409 (1909)).

26. *Id.* (citing Sharpe v. South Carolina Dep't of Mental Health, 281 S.C. 242, 315

The court found that the Tort Claims Act and the Pollution Control Act are reconcilable.[27] The court refused to disturb the comprehensive regulatory scheme of the Pollution Control Act. The court found that the Pollution Control Act is more specific and therefore the controlling statute.[28]

The court applied general principles of administrative law in reaching its decision. An administrative agency is a tribunal of limited authority, and the extent of its authority depends on the terms of the statute that reposes power in the agency.[29] Determinative or adjudicatory powers may be conferred upon an administrative agency if there is an opportunity to be heard and an opportunity for judicial review.[30] The court concluded that the Pollution Control Act vests DHEC with the powers to determine and assess damages and the Administrative Procedures Act insures that DHEC hearings will contain fair and reasonable fact-finding procedures.[31] The court simply construed the Pollution Control Act and the Tort Claims Act in a manner that maintains the vitality of the Pollution Control Act.

Susan E. Rowell

II. Prior Government Approval of Waste Removal Plan Is Not Necessary to Recover in a Private Action for Response Costs Under CERCLA and a Contract Cannot Insulate a Party from CERCLA Liability

In *Richland-Lexington Airport District v. Atlas Properties, Inc.*[32] the United States Court of Appeals for the Fourth Circuit considered whether prior government approval of a hazardous waste removal plan is necessary to recover in a private action for response costs under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA).[33] The court held that prior government approval is not a prerequisite to private recovery for cleanup costs under subsections (a)(2), (a)(3) or (a)(4)(B) of CERCLA section 9607.[34] This holding is consistent with decisions in a majority of federal jurisdictions that

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S.E.2d 112 (1984)).

27. *Id.*
28. *Id.*
29. 2 Am. Jur. 2d *Administrative Law* § 328 (1962).
30. 1 Am. Jur. 2d *Administrative Law* § 154 (1962).
31. *Rock Hill*, 394 S.E.2d at 331.
32. 901 F.2d 1206 (4th Cir. 1990).
33. 42 U.S.C. §§ 9601-9675 (1988).
34. *Atlas Properties*, 901 F.2d at 1208-09.

have considered the issue.[35] However, new revisions to the Environmental Protection Agency's (EPA) regulations cast considerable doubt on the continued validity of the Fourth Circuit's holding.[36] The court also considered whether a contract between two parties, both potentially liable for CERCLA violations, serves to allocate the risk of liability to the recipient of the waste under the contract and therefore bars the recipient from recovering under CERCLA any share of the response costs from the other party. Relying on the plain language of the statute, the Fourth Circuit held that a party cannot insulate itself from liability by contracting to dispose of waste in a manner contrary to CERCLA.[37]

Richland-Lexington Airport District (RLAD), a political subdivision of the State of South Carolina, operates the Columbia Metropolitan Airport near Columbia, South Carolina. Atlas Properties, Inc., otherwise known as Carolina Chemicals, operated a pesticide formulation business on property adjacent to the airport. RLAD and Carolina Chemicals entered into an agreement whereby RLAD permitted Carolina Chemicals to dispose of pesticide containers in a private dump that RLAD operated on its property. RLAD charged Carolina Chemicals a twenty-five dollar monthly fee. Carolina Chemicals used the dump until 1962.[38]

Eventually the containers disposed of by Carolina Chemicals deteriorated and the chemical residues that remained leached into the surrounding soil and groundwater. In July 1981 the South Carolina Department of Health and Environmental Control (DHEC), the state agency charged with enforcement of CERCLA, cited RLAD and Carolina Chemicals for violations of section 48-1-90 of the South Carolina Pollution Control Act,[39] which prohibits discharge of wastes into the environment except in compliance with a permit authorized by

35. *See* Tanglewood E. Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568 (5th Cir. 1988); Cadillac Fairview/Cal., Inc. v. Dow Chem. Co., 840 F.2d 691 (9th Cir. 1988); Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887 (9th Cir. 1986); Rockwell Int'l Corp. v. IU Int'l Corp., 702 F. Supp. 1384 (N.D. Ill. 1988); New York v. Shore Realty Corp., 648 F. Supp. 255 (E.D.N.Y. 1986); City of New York v. Exxon Corp., 633 F. Supp. 609 (S.D.N.Y. 1986); Pinole Point Properties, Inc. v. Bethlehem Steel Corp., 596 F. Supp. 283 (N.D. Cal. 1984). *But see* Artesian Water Co. v. Government of New Castle County, 605 F. Supp. 1348 (D. Del. 1985); Bulk Distribution Centers, Inc. v. Monsanto Co., 589 F. Supp. 1437 (S.D. Fla. 1984).

36. The Fourth Circuit decided *Atlas Properties* on the basis of the regulations in place at the time of decision. This survey focuses on the soundness of the Fourth Circuit's decision under the regulations then governing and the effect of the revised regulations on the value of the decision as precedent.

37. *Atlas Properties*, 901 F.2d at 1209 & n.6.

38. *Id.* at 1207.

39. S.C. CODE ANN. § 48-1-90 (Law. Co-op. 1987).

DHEC.[40] DHEC subsequently issued an administrative order that required both parties to fund a study of the extent of the pollution. Carolina Chemicals contested its liability under the Pollution Control Act in state court, and the South Carolina Court of Appeals ultimately held that Carolina Chemicals had committed no violation.[41]

While the state case was pending, RLAD spent $352,787.40 to investigate the extent of the contamination and remove the pesticide containers from its property.[42] It then filed an action in the United States District Court for the District of South Carolina that sought to hold Carolina Chemicals liable for the costs of the cleanup under CERCLA as well as under several state-law theories. The jury returned a general verdict in favor of RLAD for $293,064.00. The trial judge granted the defendant's motion for judgment notwithstanding the verdict. The trial judge found that RLAD did not have prior government approval of the cleanup operation and that CERCLA required such approval as a prerequisite to the prosecution of a private suit. Moreover, the court held that the contract between RLAD and Carolina Chemicals barred recovery by RLAD. RLAD appealed.[43]

The Fourth Circuit's analysis centered around the language of CERCLA. The court found no language in the statute that requires prior government approval of a cleanup plan as a prerequisite to the initiation of a suit for response costs.[44] The court acknowledged recent decisions which have held that the 1982 National Contingency Plan (NCP)[45] implies this requirement.[46] Despite these decisions the court gave dispositive weight to the EPA's 1985 revision of the NCP which, the court concluded, "made it 'absolutely clear' that the [government] does not have to evaluate and approve a response action for cleanup costs under . . . CERCLA."[47] Relying on *Wickland Oil Terminals v.*

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40. *Id.* § 48-1-90(a).

41. Carolina Chems., Inc. v. South Carolina Dep't of Health & Envtl. Control, 290 S.C. 498, 351 S.E.2d 575 (Ct. App. 1986).

42. Brief of Appellant at 4.

43. *Atlas Properties*, 901 F.2d at 1208.

44. *Id.*

45. 40 C.F.R. § 300 (1983).

46. *Atlas Properties*, 901 F.2d at 1208 (citing Artesian Water Co. v. Government of New Castle County, 605 F. Supp. 1348 (D. Del. 1985); Bulk Distribution Centers, Inc. v. Monsanto Co., 589 F. Supp. 1437 (S.D. Fla. 1984)). CERCLA specifically refers to the NCP and requires that costs must be incurred "consistent with the national contingency plan" to be recoverable. 42 U.S.C. § 9607(a)(4)(B) (1988). The argument Carolina Chemicals asserted, as supported by *Artesian Water* and *Bulk Distribution Centers*, is that this consistency requirement implies that prior government approval of the cleanup plan is a prerequisite to recovery of costs incurred under the plan. Brief of Appellee at 3-4.

47. *Atlas Properties*, 901 F.2d at 1208 (quoting EPA National Contingency Plan, 50 Fed. Reg. 47,934 (1985) (to be codified at 40 C.F.R. § 300.71)).

Asarco, Inc.[48] for support, the court decided that prior government approval is not a prerequisite to private recovery of costs under subsections (a)(2), (a)(3), or (a)(4)(B) of CERCLA section 9607.[49]

The court struck down the district court's ruling that the contractual relationship between RLAD and Carolina Chemicals for the disposal of the containers barred RLAD's recovery under CERCLA. The court noted that "[t]he very terms of CERCLA expressly make 'any person who *by contract, agreement*, or otherwise arranged for disposal . . . of hazardous substances' liable for response costs 'incurred by any other person consistent with the national contingency plan.' "[50] The court stated, "We are of the opinion that dumping under the contractual agreement which allowed Carolina Chemicals to dump its waste on [RLAD] property for $25 a month was within the explicit terms of 42 U.S.C. §§ 9607(a)(3) and (4)(B) of CERCLA and was not excused . . . ."[51] Accordingly, the court vacated the district court's judgment and remanded the case for reinstatement of the jury's verdict.[52]

The Fourth Circuit's analysis is a sound interpretation of the regulatory scheme in place at the time of the decision[53] and is in accordance with the majority of other jurisdictions facing the issue.[54] However, the most recent revisions to the NCP clearly contemplate some governmental involvement in the selection of a remedy. The new regulation specifically defines what will be considered "consistent with the

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48. 792 F.2d 887 (9th Cir. 1986).

49. *Atlas Properties*, 901 F.2d at 1208-09.

50. *Id.* at 1209 (emphasis added by court) (quoting 42 U.S.C. § 9607(a)(3), (a)(4)(B) (1988)).

51. *Id.*

52. *Id.*

53. However, one consideration is absent from the Fourth Circuit's opinion: the critical difference between removal and remedial actions. The court in Artesian Water Co. v. Government of New Castle County, 605 F. Supp. 1348 (D. Del 1985), explained the distinction. The court characterized removal actions as "those response actions which are taken on an emergency or short term basis in order to prevent immediate harm to the public health or environment." *Id.* at 1358. On the other hand, remedial actions are " 'those actions consistent with [a] permanent remedy . . . to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment.' " *Id.* at 1359 (quoting 40 C.F.R. § 300.6 (1984)). The distinction is critical because both the 1985 regulations and the former regulations require the development of alternative plans for remedial actions. *Compare* 40 C.F.R. § 300.68(g) (1984) *with* 40 C.F.R. § 300.71(a)(2)(ii)(A) (1989). Carolina Chemicals argued that the "case clearly involves a remedial action," Brief of Appellee at 7, and, therefore, RLAD had no cause of action because RLAD had neglected to develop and present alternative remedial proposals, *id.* at 9. The problem with this argument is that there was no showing that the action taken by RLAD was remedial in nature. The court apparently rejected Carolina Chemicals' conclusory characterization of RLAD's response action.

54. *See supra* note 35 and accompanying text.

NCP" when cleanup action is taken by a private party. "A private party response action will be considered 'consistent with the NCP' if the action, when evaluated as a whole, is in substantial compliance with the applicable requirements in paragraphs (c)(5) and (6) of this section, and results in a CERCLA-quality cleanup . . . ."[55] Subsection (c)(5) states that private parties contemplating cleanup must "potentially" comply with the same requirements that are applicable to all other parties regarding both removal and remedial action.[56] It is unclear what triggers the application of these "potentially applicable" provisions. Subsection (6) provides, however, even more convincing evidence that the new regulations require something more of a private party than the 1985 revisions required. This subsection announces that "[p]rivate parties undertaking response actions should provide an opportunity for public comment concerning the selection of the response action."[57] This requirement also is only "potentially applicable,"[58] and no triggering mechanism appears to guide the private party in making a determination of when it should comply.

The ambiguities in the new regulatory scheme are varied and extensive. A party that contemplates undertaking response action without first obtaining government approval is taking a tremendous risk that any action brought to recover response costs will be barred. The precedential value of cases like *Atlas Properties* is significantly diminished by the extensive revision of the NCP. Until the issue of the necessity of prior governmental approval of response action under the 1990 revisions to the NCP is litigated and case law interpreting the regulations "potential" applicability to private parties is available, a party that contemplates response action should not rely on *Atlas Properties* as precedent. A party in that situation should protect itself by treating the requirements of the recent revisions to the NCP as applicable in all situations, regardless of the statements that relate to "potential" applicability.[59]

The nature of environmental law requires that attorneys be aware of both state and federal law when drafting contracts for the disposal of waste. Companies should not be counseled to believe that by con-

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55. 40 C.F.R. § 300.700(c)(3)(i) (1990).

56. *See id.* § 300.700(c)(5).

57. *Id.* § 300.700(c)(6).

58. *Id.*

59. The new regulations do not affect the validity of the court's ruling that the contract between RLAD and Carolina Chemicals did not bar RLAD from recovering under CERCLA.

tracting with another for the disposal of hazardous waste they are sheltered from liability after the waste leaves their possession.

John P. Hutchins