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Over the Line—Transboundary Application of CERCLA

by Gerald F. George

Cross-boundary pollution is a long-recognized reality for the United States and its neighbors, one that goes in both directions. Water pollution from Tijuana flows into the United States, fouling beaches at San Diego's Mission Bay. Air pollution from coal-fired power plants in the United States drifts into Canada, causing acid rain. These examples hardly begin to exhaust the possibilities. While there are complexities associated with attempting to do so, there is little question that the United States—or whatever affected country—could try to address these transboundary contamination issues.[1] There is, however, considerable doubt about the extent to which the U.S. Congress has authorized the U.S. Environmental Protection Agency (EPA) to do so under existing environmental law.

This is not an academic issue. Within the last two years, EPA staff has suggested in two publications that the Agency has a strong interest in transboundary enforcement. A research report published in October 2002 by the Environmental Law Institute® (ELI),[2] written with the support of legal counsel from EPA Region IX, surveyed several possibilities for government and citizen suit enforcement against cross-boundary pollution between Mexico and the United States. Addressing the possibility of use of the Superfund statute, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[3] the ELI report observed that EPA had in the past used CERCLA money to investigate Mexican sources of cross-boundary pollution. Although in that instance the United States had not sought to sue any Mexican source under CERCLA, the report expressed the opinion that CERCLA appears to provide EPA with the statutory authority for such a suit.[4] The ELI report was followed in March 2003 by an article in a trade publication, which discussed efforts by EPA Region X to address cross-boundary water pollution from Canadian sources into the Columbia River and Lake Roosevelt. In the article, EPA staff is quoted as opining that it is clear that CERCLA would have extraterritorial application.[5]

In both cases, the proponents of transboundary reach expressed at least some caution about the effect of diplomatic realities on the likelihood that the Agency would in fact choose to use an extraterritorial enforcement option under CERCLA.[6] However, the opinions expressed in the report and in the article suggest that it is a foregone conclusion that EPA could use CERCLA to sue foreign sources of contamination that reaches the United States.

The "diplomatic realities" present a genuine issue. For example, Canada publicly rejected an effort by the U.S. Department of State to obtain approval of an EPA Region X request to conduct sediment sampling along Canadian rivers in connection with its CERCLA investigation.[7] It cannot be a surprise to anyone that the threatened extraterritorial application of CERCLA, with its Draconian—and wholly retroactive[8]—liability scheme, would send a country's diplomats to the ramparts. Indeed, it would be surprising if similar threats of litigation or liability with respect to U.S. domestic facilities by Canadian or Mexican environmental regulators were met in any different way by U.S. officials.

The proponents of the transboundary application of existing U.S. environmental laws, however, appear to be overlooking a more serious barrier to any efforts at extraterritorial enforcement, in particular with respect to the proposed use of CERCLA—the absence in the statute of any indication that Congress intended such an application. This is illustrated by an analysis of the principles of extraterritorial application of U.S. law, and their application to the wording of CERCLA.

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1. *See* Restatement (Third) of Foreign Relations Law §402 (discussing the authority of a country to prescribe rules not only for conduct within its territory, but also, e.g., for conduct affecting its territory, and conduct of its nationals anywhere).
2. ELI, Strengthening U.S.-Mexico Transboundary Environmental Enforcement: Legal Strategies for Preventing the Use of the Border as a Shield Against Liability (2002), *available at* http://www.eli.org [hereinafter ELI Report]. U.S. EPA Region IX includes the states of Arizona, California, Hawaii, and Nevada.
3. CERCLA, 42 U.S.C. §§9601 et seq., ELR Stat. CERCLA §§101 et seq.
4. *See, e.g.*, ELI Report, *supra* note 2, at 40 (stating that CERCLA "does not appear to restrict liability to parties who are in the United States or who are U.S. citizens"); *id*. at 41 (concluding in discussing environmental enforcement options that "[o]ther statutory provisions, such as the Superfund provisions of CERCLA, appear to establish a strong basis for certain extraterritorial application").
5. *EPA Weighs Superfund Authority for Transboundary Contamination*, Superfund Rep., Mar. 31, 2003, at 3-4 [hereinafter Superfund Rep.]. EPA Region X includes the states of Alaska, Idaho, Oregon, and Washington.
6. The ELI report's conclusion on enforcement options emphasizes the need for cooperation between Mexico and the United States. ELI Report, *supra* note 2, at 41. In the *Superfund Report* article, which was prompted by Canada's refusal to permit EPA sampling in Canadian rivers, an EPA source comments, "Canada is not thrilled with CERCLA." Superfund Rep., *supra* note 5, at 4.
7. The January 17, 2003, letter from the Canadian Ministry of Foreign Affairs to the U.S. Embassy can be obtained through the *Superfund Report* website on the Internet at http://www.insideepa.com (last visited Jan. 23, 2004).
8. The potential for retroactive application of CERCLA to historical discharges by Canadian companies, as opposed to current discharges, was cited by Canada as a significant factor in its refusal to permit EPA sampling.

Extraterritorial Application of U.S. Statutes

The ELI report presents a thoughtful analysis of the principles underlying the extraterritorial application of U.S. laws, with particular attention to the limited number of instances in which the courts have addressed that issue in the context of environmental statutes.[9] The report recognizes that the issue is one of statutory interpretation, and that there is long-standing precedent in the courts for a presumption against extraterritorial application of any statute, absent what the U.S. Supreme Court has characterized variously as a "clear statement,"[10] "clear evidence,"[11] or "affirmative evidence"[12] that Congress intended application of the statute beyond the national borders.[13] It also acknowledges that the courts have traditionally been much more willing to find the intent required to overcome the presumption in cases involving economic regulation such as securities or antitrust law, than in other areas, like environmental law.

Courts and commentators have offered several rationales for the long-standing presumption against extraterritorial application of U.S. statutes. In *Equal Employment Opportunity Commission v. Arabian American Oil Company* (*ARAMCO*),[14] Chief Justice William H. Rehnquist noted that the presumption "serves to protect against unintended clashes between our laws and those of other nations that could result in international discord" and that it recognizes that Congress "is primarily concerned with domestic conditions."[15] Commentators have suggested that the presumption provides a guideline for legislators attempting to divine how courts may interpret a statute,[16] and that the correct rationale for the presumption should be that the policy implications of the application of federal legislation abroad are too sensitive and difficult for the courts to determine without clear direction from Congress.[17]

Whatever the rationale, the presumption places on the plaintiff the burden of establishing congressional intent that a statute be given extraterritorial application. That evidence can come in the form of the language of the statute, or the language accompanied by the nature of the overall statutory scheme.[18] Where that language is not clear, the courts have examined other evidence. However, in searching for such evidence, the Court has not found persuasive the fact that Congress used broad jurisdictional language in the statute, even in some cases language that included reference to foreign countries.[19]

Many of the cases in which courts have approved extraterritorial application of a statute have involved economic regulation, such as application of the securities and antitrust law. In searching for evidence of congressional intent, the courts have been quick in such cases to find evidence sufficient to overcome the traditional presumption. In other areas, the courts have held more firmly to the requirement that there be, if not a clear statement in the statute itself, at least clear evidence that Congress intended such application.[20] In the instance of environmental regulation, the ELI report recognizes that EPA has never sought to bring such a case under CERCLA, but also demonstrates in its discussion the nearly complete dearth of instances in the environmental cases cited where such congressional intent was found, under any environmental statute.[21]

Despite these indications from the case law that a plaintiff seeking extraterritorial application of CERCLA might face a difficult challenge in court, neither the ELI report nor the comments of EPA staff in the *Superfund Report* article provide any significant analysis of the text of CERCLA, let alone case law, supporting a congressional intent to extend the application of CERCLA to sources beyond U.S. borders. Rather, the comments go no further than general statements that, while Congress intended to limit CERCLA to addressing impacts on the environment of the United States, it did not expressly exclude CERCLA's application to foreign sources of contamination. To the extent that statutory language is referred to, the reference is to general jurisdictional terms of the type found unpersuasive by the Court in *ARAMCO*.[22]

In taking that approach, the proponents of extraterritorial application of CERCLA appear to have focused on an approach to extraterritorial application of statutes offered by a judge on the U.S. Court of Appeals for the District of Columbia Circuit in *Environmental Defense Fund v. Massey*.[23] That approach, which was dicta, and which was offered in a case involving the application of the National Environmental Policy Act (NEPA),[24] not CERCLA, suggests that the presumption against extraterritorial application does not apply where there is domestic harm from an extraterritorial act. One commentator has noted that the court's statement in *Massey* would not be accepted in several of the federal courts of appeals.[25] However, more significant for purposes

9. ELI Report, *supra* note 2, at 35-41.
10. Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co. (ARAMCO), 499 U.S. 244, 258 (1991).
11. Smith v. United States, 507 U.S. 197, 204 (1993).
12. Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 176 (1993).
13. There is an extended discussion of the decisions and the rationale or mixture of rationales found in lower court decisions, as well as the expressions of intent found sufficient in lower courts, in William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 Berkeley J. Int'l L. 85 (1998).
14. 499 U.S. 244 (1991).
15. *Id*. at 248.
16. Dodge, *supra* note 13 (citing William Eskridge, Dynamic Statutory Interpretation 277 (1994)).
17. *See* Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 Va. J. Int'l L. 505, 553 (1997).
18. Foley Bros., Inc. v. Fiardo, 336 U.S. 281 (1949).
19. *See ARAMCO*, 499 U.S. at 251 (rejecting reliance on the statute's broad definition of "commerce"). *See also* Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668, 22 ELR 20235 (S.D.N.Y. 1991) (reliance on the Resource Conservation and Recovery Act's use of "any person" in citizen suit provision unavailing without more, especially where other portions of provision reflect a domestic focus). *Cf.* the concurring opinion of Justice John Paul Stevens in Lujan v. Defenders of Wildlife, 504 U.S. 555, 22 ELR 20913 (1992) (concluding that the presumption would bar extraterritorial application of the Endangered Species Act, finding general language in §7 of the Act inconclusive on question of intent) *id*. at 586-88.
20. *See* Jonathan Turley, *When in Rome: Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 Nw. U. L. Rev. 598 (1990). Turley suggests that the difference may be the result of a conceptual bias in the courts favoring protection of "market" interests.
21. ELI Report, *supra* note 2, at 37-40.
22. *See supra* note 19. *Cf.* ELI Report, *supra* note 2, at 40, which simply states that CERCLA "does not appear to restrict liability to parties who are in the United States or who are U.S. citizens," citing the definition of "person" in 42 U.S.C. §9607(21), rather than pointing to any provision of CERCLA affirmatively supporting extraterritorial application.
23. 986 F.2d 528, 21 ELR 21512 (D.C. Cir. 1993).
24. 42 U.S.C. §§4321-4347, ELR Stat. NEPA §§2-209.
25. Dodge, *supra* note 13, at 110.

of CERCLA, that approach ignores the first step in any analysis of extraterritorial application. As the U.S. Court of Appeals for the Ninth Circuit has stated:

> In construing a statute to ascertain Congress' territorial intent, we begin with the presumption that "the legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States. With that presumption in mind, we analyze intent by first examining the language of the act for indications of intent regarding extraterritorial application. If Congressional intent concerning extraterritorial application cannot be divined, then courts will examine additional factors [referring to the *Massey* dictum] to determine whether the traditional presumption against extraterritorial application should be disregarded in a particular case.[26]

Accordingly, any analysis of the extraterritorial application of CERCLA must begin with the text of the statute itself.

Did Congress Intend Extraterritorial Application of CERCLA?

The Text of CERCLA

There is no need at this juncture to debate whether Congress has the authority to regulate extraterritorial conduct. The issue for exploration by the courts is whether, in a particular instance, there is evidence that Congress has chosen to do so.

While CERCLA, as the courts have often noted, is not a model of drafting precision, the text of the statute is not silent regarding extraterritorial application. Thus, a party defending against extraterritorial application of CERCLA would not be relying simply on the vagaries of court interpretation of the "presumption." Congress has indicated a clear intent to limit CERCLA's focus to the domestic environment, and to owners and operators of domestic facilities from which releases of hazardous substances have occurred.

Some of the evidence supporting this position might be characterized as only suggestive of congressional intent.[27] That alone ought to be enough, given that it would be EPA's burden to demonstrate clear evidence that extraterritorial application was in fact Congress' intent, not just to present a plausible or possible argument for such application.[28] However, there are other statutory provisions where the intent of Congress to address only domestic sources is even more clear.

The Definition of Owner

The basic liability provision in CERCLA is at §107(a), which makes liable any *person* who is a current and/or past *owner and/or operator* of a *facility* from which there have been releases of hazardous substances to the *environment*. The definition of *environment* is not extraterritorial; it is expressly limited to the land, water, and air within or under the jurisdiction of the United States.[29]

In addressing the sources of releases and liable parties, the statute defines *person* and *facility* broadly, with no geographic or citizenship limitation. However, the definition of "person," which would be relied upon by EPA in making an argument for extraterritorial application, does not include any term that by itself suggests application to foreign sources, and contains the term "[s]tate," which, like other definitions in CERCLA, is defined in a way applicable only to U.S. entities.[30] The definition of *owner and operator*, i.e., the status that gives a person liability, provides that "[t]he term 'owner or operator' means . . . in the case of an *onshore facility or an offshore facility*, [the owner or operator of] such [a] facility."[31] *Onshore facility* and *offshore facility* are also separately defined terms in CERCLA; both of them, like the term "environment," are broadly defined, except that each is subject to the express limitation that the facility be in or subject to the jurisdiction of the United States.[32]

From the above, one can see that Congress did not choose the most felicitous phrasing in defining "owner or operator," one of the key terms in CERCLA. One appellate court has noted that the provision's use of the expression "onshore facility or offshore facility" could leave one to speculate about what other type of facilities might exist.[33] However, that court concluded that, whatever the difficulty of the phrasing, the definition at least implied that if one is not an owner or operator of an onshore or offshore facility, one is not liable as an owner/operator under CERCLA.[34] Indeed, it would be an extremely idiosyncratic reading to find that a provision in which Congress has expressly defined "owner"

26. In re Simon, 153 F.3d 991 (9th Cir. 1998) (citations omitted). *See also* Subafilms Ltd. v. MGM-Pathe Communications Co., 24 F.3d 1088, 1096-97 (9th Cir. 1994) (en banc) (in each of the statutory schemes discussed by *Massey*, the ultimate touchstone of extraterritoriality consisted of an ascertainment of congressional intent).

27. *E.g.*, CERCLA, in 42 U.S.C. §9601, sets out statutory definitions and provisions regarding the availability of certain defenses. These provisions make no reference to foreign entities, either governmental or private. However, they make frequent reference to terms that are uniquely oriented to U.S. institutions, such as references to "[s]tate," "[s]tate or local government," "political subdivision of a [s]tate," "interstate body," and "Indian tribe," with "[s]tate" expressly defined to include the "several [s]tates of the United States" and other possessions or territories of the United States, and "Indian tribe" expressly defined as a tribe recognized by the United States.

28. *See ARAMCO*, 499 U.S. at 253 (given the presumption, the court need not choose among competing plausible interpretations, where neither is more persuasive than that).

29. The legislative history of CERCLA suggests that this limitation was added at the behest of the U.S. Department of State, which expressed concern that without the limitation, the statute would provide "authority to assert jurisdiction over foreign vessels and foreign nationals in a manner inconsistent with general principles of international law and specific U.S. treaty obligations." Comments of Sen. Howard W. Cannon (D-Nev.), 126 Cong. Rec. 26056 (Sept. 18, 1980). The congressional response to that expression of concern about conflict with the laws of other nations, obviously does not suggest that Congress intended, without anywhere making reference to such effect, to extend liability under CERCLA to areas outside the United States.

30. *See* the examples in *supra* note 27.

31. 42 U.S.C. §9601(20)(A)(ii) (emphasis added).

32. "Offshore facility" is "any facility of any kind located in, on, or under, any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a public vessel." *Id*. §9601(17). "Onshore facility" is defined as "any facility . . . of any kind located in, on, or under, any land or nonnavigable waters within the United States." *Id*. §9601(18). "[O]therwise subject to the jurisdiction of the United States" is defined to mean "subject to the jurisdiction of the United States by virtue of United States citizenship, United States vessel documentation or numbering, or [pursuant to treaty]." *Id*. §9601(19).

33. The issue of extraterritorial application of the statute was not before it; however, the court did facetiously suggest that perhaps the wording meant Congress was making clear its intent to exclude extraterrestrial facilities. Edward Hines Lumber Co. v. Vulcan Materials Co., 861 F.2d 155, 156, 19 ELR 20187 (7th Cir. 1988).

34. *Id*.

to include owners of onshore and offshore facilities *within or subject to the jurisdiction* of the United States, gives, without saying a word, affirmative evidence of Congress' intent to also include owners of such facilities located *outside* the United States. Presumption or not, under any reasonable reading of the statute as Congress drafted it, a current owner of an industrial plant outside the United States would not be liable under CERCLA for releases from that location, regardless of whether those releases reached the environment of the United States.

For other classes of liable parties addressed in CERCLA §107(a)—past owners, arrangers, and transporters—Congress used the unqualified term "facility." However, absent some other indication that Congress intended "facility" to be geographically broader—particularly in such a highly significant way—than the combination of the defined terms "onshore facility" and "offshore facility," it is very difficult to attribute significance to that fact. Certainly, in light of the requirement for a "clear expression" of congressional intent, it is hard to see how any court could conclude that it indicates that while excluding current owners of foreign facilities from CERCLA liability, Congress "clearly" intended to make past owners, arrangers, and transporters at foreign locations subject to the statute.

Accordingly, a brief textual analysis of the provisions of §107(a) should put to rest any contention that Congress intended that CERCLA apply to extraterritorial sources. However, there is other textual evidence indicating that the focus of Congress was, as one would expect, on domestic, not international, pollution.

Federally Permitted Releases

Congress did not intend that CERCLA supplant the specialized regulatory processes in place for air, water, and other media, pursuant to other statutory regimes. In §107(j) of CERCLA, Congress provided what is known as the "federally permitted release" exception to liability.[35] As written, §107(j) is not a free pass to pollute, but rather it provides that if a facility is operating in compliance with its permit, recovery of response costs or damages, if any, with respect to such releases would be dealt with under "existing law," i.e., under the permit regime, not under CERCLA. The permit regimes covered under §107(j) are set out at considerable length in §101(10).[36] Each of them is a specific regulatory regime based on U.S. federal law, ranging from the Clean Air Act and the Clean Water Act (CWA) to the Atomic Energy Act. Nothing in the definition of a federally permitted release, or elsewhere in CERCLA, addresses the handling of a similar conflict between the application of CERCLA and the regulatory regimes for that contaminant stream where the source of the release is in a foreign country.

As a result, should there be extraterritorial application of CERCLA, a U.S. facility discharging metals into a river in compliance with its CWA permit could avoid any CERCLA liability. A Mexican facility, operating under the same or even more stringent standards under a Mexican permit, could continue to be subject to CERCLA, if its discharges should reach the United States. It is difficult to reconcile the conclusion that Congress intended extraterritorial application of CERCLA with such a result.[37]

Rights of Foreign Claimants

In §111(j) of CERCLA, Congress did expressly address one limited aspect of extraterritorial application, i.e., the ability of a foreign claimant to seek recovery of response costs from Superfund.[38] That section provides that, to the extent that a claim might exist, a foreign claimant has the same right to seek reimbursement as a U.S. claimant, subject to four conditions: (1) the release occurred in navigable water, territorial sea, or adjacent shoreline of the country in which the claimant is resident, i.e., the provision only applied to releases into water, and thus would not appear to generally apply to, e.g., aerial or groundwater pollution; (2) the claimant was not otherwise compensated; (3) the release was from a facility or vessel adjacent to the navigable waters or territorial sea, or from activities under two U.S. statutes governing offshore activities such as offshore oil exploration; and (4) the recovery is either authorized by treaty, or there is a certification that a comparable remedy is available for U.S. claimants.

This provision, of course, deals with the foreign impacts of a "domestic" release, the reverse of the situation EPA intends to address. However, its presence in the statute demonstrates that Congress was well aware of potential extraterritorial impacts from a release of hazardous substances, and carefully limited access to the Superfund in that regard.

The Policy Impact of Extraterritorial Application of CERCLA

Among the rationales offered by the courts for the presumption against extraterritorial application of statutes is the potential that such application will unduly interfere with the national sovereignty of other countries, and produce undesired diplomatic conflict. While not an overriding consideration in every instance—the potential for such conflict has not prevented courts from approving international application of antitrust laws—that potential is a factor weighed by the courts, and is relevant in assessing congressional intent regarding the application of CERCLA.[39]

Background

CERCLA, passed by Congress in 1980 in response to situations such as Love Canal, provides a sweeping liability

35. 42 U.S.C. §9607(j).

36. *Id.* §9601(10).

37. *Cf.* the discussion in *ARAMCO*, 499 U.S. at 256, in which the Court compared Congress' amendment of the Age Discrimination in Employment Act to address conflicts with the laws of foreign countries, to the absence of any such provisions in Title VII of the Civil Rights Act, dealing with discrimination based on race, sex, religion, and national origin, and concluded that the absence of such provisions in Title VII supported its holding that Congress did not intend extraterritorial application of that statute.

38. 42 U.S.C. §9611(j).

39. *See, e.g.*, *ARAMCO*, 499 U.S. at 248. *Cf.* United States v. Mitchell, 553 F.2d 996, 1002, 7 ELR 20484 (5th Cir. 1977) (court examined impact of extraterritorial application on purpose of statute but limited it to domestic reach due to potential for conflict with other sovereigns); Bluewater Fisherman Ass'n v. National Marine Fisheries Serv., 158 F. Supp. 2d 118 (D. Mass. 2001) (finding statute provided jurisdiction outside the Exclusive Economic Zone, because it was clear from the purpose language in the statute that Congress intended to pursue such regulation of fisheries).

scheme, as well as a funding source to support hazardous waste cleanup in the absence of funding by the responsible parties. The statute was written, and has been interpreted by the courts, to provide EPA with almost unrestricted ability to address significant human health risks associated with hazardous waste sites quickly, and without fear of fiscal consequences. The government may either order a party to carry out a cleanup, or carry out the cleanup itself with a strong likelihood of recovering its cleanup costs from responsible parties.[40] In some circumstances, the government may also recover up to three times its costs as punitive damages.[41]

The liability scheme is also far-reaching. In summary, the statute has been interpreted to provide for strict liability, i.e., no finding of fault or negligence is required, and, indeed, the disposal practices giving rise to liability could have been completely legal and consistent with standard industry practice at the time, and, because the statute is applied retroactively,[42] in fact usually were. Liability can attach to any disposal of any amount of a "hazardous substance"—there is no threshold quantity or concentration requirement. Likewise, the government does not need to establish that a single party's disposal of hazardous substances was the cause of the government's cleanup at the facility, i.e., there is no requirement that the amount of material from any particular person in itself result in a risk of harm. Moreover, liability is also normally "joint and several," which means that a liable party can be responsible individually for the entire cleanup or for EPA's cleanup costs, regardless of that party's contribution to the harm.[43]

There is obviously a significant risk of unfairness to particular entities from this type of liability scheme, e.g., a small contributor with "deep pockets" who disposed of waste materials decades ago in complete compliance with then-existing law at a site where the larger contributors are insolvent or otherwise unavailable. However, the courts have generally found that risk of unfairness to be an acceptable consequence of congressional desire to provide EPA with the tools to address expeditiously the human health and environmental risks of hazardous waste sites.[44]

The Policy Issues Raised by Extraterritorial Application

The argument for extraterritorial application of CERCLA centers on the fact that Congress intended to create an enforcement tool providing virtually unfettered authority to address human health and environmental risks from hazardous waste sites in the United States. Courts have certainly demonstrated a willingness to cast an exceedingly wide liability net to achieve the ameliorative ends that prompted Congress to pass the statute. With that background, it is perhaps not surprising that the authors of the ELI report would assume that a court addressing a source that would otherwise be liable under CERCLA, except that the source is physically located outside the country, would likely find that it could apply CERCLA across national borders to reach it.

Indeed, the example presented in the ELI report of an aquifer straddling the U.S./Mexican border, with contamination from a Mexican source extending across the border to the U.S. side, would seem particularly compelling. If, as the courts have often held, such public welfare statutes are to be read liberally to achieve the ends of Congress,[45] what is so wrong with holding a Mexican company liable under CERCLA in U.S. courts for contamination that later flows into the American side of the aquifer?

The best case for such an interpretation requires that the statute itself be silent on the subject of extraterritorial application. Standing alone, broad statutory provisions that do not specifically include foreign application have been considered to be of little value to the courts in determining whether Congress intended extraterritorial application of a statute.[46] However, in such cases, courts have made reference to the purpose of the statute, and the impact on that purpose of restricting the statute to domestic application, to find that Congress must have intended extraterritorial application, in the absence of a contrary indication in the wording of the statute itself.[47] In the case of CERCLA, EPA might argue that the broad liability language of the statute suggests that Congress intended that those despoiling the U.S. environment should be liable, whether the contaminant release occurred in the United States, or beyond the U.S. border.

Such an argument is fatally flawed from the outset by its failure to take into account the numerous indications in the statutory language that Congress did in fact intend to limit CERCLA's territorial application. Moreover, while it is true that extraterritorial application of CERCLA would assist EPA's enforcement program, at least in border areas, EPA would have a difficult time convincing any court to accept that position, even with less evidence in the statute of a contrary congressional intent. As commentators have observed and the ELI report acknowledges, U.S. courts have not been inclined to overcome the presumption against extraterritoriality in situations outside the areas of the U.S. Securities and Exchange Commission, antitrust, and other economic issues.[48] Courts are also sensitive to the impact of extraterritorial application of U.S. law on the sovereign rights of other countries.[49]

In the absence of a clear legislative mandate, a court would have to be greatly concerned about the impact on relations with Canada and Mexico of imposing the broad, retroactive, liability provisions of CERCLA on their industries. Extraterritorial application here, with the broad defini-

40. *See, e.g.*, discussion in New York v. Shore Realty Corp., 759 F.2d 1032, 1039-42, 15 ELR 20358 (2d Cir. 1985).

41. United States v. Parsons, 936 F.2d 526, 21 ELR 21316 (11th Cir. 1991) (interpreting 42 U.S.C. §9607(c)(3)).

42. Many sites addressed under the statute were contaminated by activities occurring years, if not many decades, prior to the passage of CERCLA in 1980.

43. *See, e.g.*, United States v. Alcan Aluminum Co., 990 F.2d 711, 721-23, 23 ELR 20706 (2d Cir. 1993).

44. *Id*. at 716-17 ("There may be unfairness in the legislative plan, but we think Congress imposed responsibility on generators of hazardous substances advisedly. And, ever were it not advisedly, we still must take this statute as it is.").

45. *E.g.*, Louisiana-Pacific Corp. v. ASARCO, Inc., 24 F.3d 1565, 1575, 24 ELR 20992 (9th Cir. 1994).

46. *See* Equal Opportunity Employment Comm'n v. Arabian Am. Oil Co. (ARAMCO), 499 U.S. 244, 248 (1991); United States v. Mitchell, 553 F.2d 996, 1002, 7 ELR 20484 (5th Cir. 1977); and Bluewater Fisherman Ass'n v. National Marine Fisheries Serv., 158 F. Supp. 2d 118 (D. Mass. 2001).

47. *See id*.

48. *See* ELI Report, *supra* note 2, at 37.

49. *See, e.g.*, *ARAMCO*, 499 U.S. at 244; *Mitchell*, 553 F.2d at 996; *Bluewater Fisherman*, 158 F. Supp. 2d at 118; and Subafilms Ltd. v. MGM-Pathe Communications Co., 24 F.3d at 1088 (9th Cir. 1994).

tion of "person" on which an EPA argument would have to rely, would potentially mean application of CERCLA to foreign cities, states, and other units of government, far beyond EPA's likely intended consequence. For example, cities or states in Canada or Mexico could be found liable under CERCLA for discharges from publicly owned landfills or treatment facilities that are permitted and otherwise legal where they are located, if those discharges affect a U.S. location.[50] Moreover, such an application of CERCLA might not simply sweep in a municipal wastewater treatment plant located in the *maquiladora* strip along the U.S./Mexican border. Those "retroactive, strict, joint and several liability, no contamination threshold" provisions could ultimately be applied to European and Asian sources, which have been suggested as significant contributors to mercury contamination in the waters and fish of the United States.[51] The potential for that breadth of extraterritorial application would likely give any court pause.

Conclusion

There is a case that can be made for the extraterritorial application of U.S. environmental laws. Unfortunately for those seeking to extend the application of CERCLA, that case fails analysis of the statutory language that parses CERCLA's terms more carefully than is indicated in the comments in the ELI report and *Superfund Report* article regarding the extraterritorial application of CERCLA to sources in Canada and Mexico. Likewise, in considering the wisdom of such extraterritorial application, proponents of extraterritorial application of CERCLA should be cognizant of the potential for difficult diplomatic complications, going beyond our relations with the countries immediately at our borders, as science provides compelling evidence of the possible widespread distribution of contaminants from sources around the globe. Many have criticized CERCLA as a less than thoughtful application of environmental law to U.S. sources. Its application should not be extended through administrative agency fiat to sources in countries beyond our borders, and perhaps beyond our continent, without considered reflection by Congress on the wisdom of that extension.

50. With the availability of joint and several liability, the United States could use its prosecutorial discretion to avoid joining governmental units, e.g., the operators of foreign landfills leaching to transboundary rivers, in its initial suit, but that would not preclude the possibility of the named defendants joining those governmental units as third-party defendants or suing them later for contribution.

51. *See* Douglas J. Steding & A. Russell Flegal, *Mercury Concentrations in Coastal California Precipitation: Evidence of Local and Trans-Pacific Fluxes of Mercury to North America*, 107 J. GEOPHYSICAL RES. 4764 (2002). The Steding article also cites Jane Guentzel et al., *Processing Influencing Rainfall Deposition of Mercury in Florida*, 35 ENVTL. SCI. TECH. 863-73 (2001), which reached a similar conclusion regarding sources of mercury in the Florida Everglades.