September 1986

Federal Preemption of State Hazardous Waste Funds: Exxon Corp. v. Hunt

Diane Regas

Follow this and additional works at: http://scholarship.law.berkeley.edu/elq

Recommended Citation
Available at: http://scholarship.law.berkeley.edu/elq/vol13/iss3/2

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z381J95

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Ecology Law Quarterly by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcerz@law.berkeley.edu.
Federal Preemption of State Hazardous Waste Funds: *Exxon Corp. v. Hunt*

106 S. Ct. 1103 (1986)

**INTRODUCTION**

In response to widespread threats to health, property, and other natural resources posed by hazardous waste problems in the 1970's, many states enacted statutes to ensure hazardous waste cleanup. Responding to the same threats, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or "Superfund") in 1980. The existence of both federal and state regulations concerning hazardous waste cleanup inevitably raised the possibility that the federal statute might preempt some parts of the state laws. This preemption issue was finally presented to the United States Supreme Court in *Exxon Corp. v. Hunt*.

At issue in *Exxon* was the right of five major producers or potential producers of toxic wastes or spills to receive refunds from the New Jersey hazardous waste cleanup tax. The producers claimed that CERCLA explicitly preempted the New Jersey Spill Compensation and Control Act (Spill Act) and therefore that the State of New Jersey had violated the supremacy clause of the United States Constitution by collecting taxes.

---

Copyright © 1986 by ECOLOGY LAW QUARTERLY

1. See infra Appendix, Summary of State Hazardous Waste Cleanup Funds.


3. The United States Constitution provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, § 2. Therefore, if a valid federal statute explicitly preempts state regulation of a subject, the state law is clearly invalid. Discussions of preemption therefore often dismiss explicit preemption as unproblematic. See, e.g., W. LOCKHART, Y. KAMISAR & J. CHOPER, CONSTITUTIONAL LAW 346-47 (5th ed. 1980).


5. Courts distinguish between express and implicit federal preemption. Express preemption occurs when Congress explicitly states that it is preemptiong some state laws. The issue in these cases is to determine which laws Congress intended to preempt. The Court has not explored the issue of ambiguous express preemption since its decision in Aloha Airlines v. Director of Taxation of Hawaii, 464 U.S. 7 (1983).

Federal statutes preempt state laws by implication if the federal law "occupies the field," i.e., the federal law leaves no room for state regulation. Preemption by implication also occurs if it is impossible to comply with both the state and federal laws. See generally W. LOCKHART, Y. KAMISAR & J. CHOPER, supra note 3, at 346-47.

from the appellants under the Spill Act. The Court accepted part of industry's arguments, but in the process of deciding the case, the Court complicated the doctrine of express preemption.

The Court's doctrinal exercise has proved not only confusing to observers, but unacceptable to Congress. The House and Senate conferees' new version of CERCLA's preemption provisions rejects the Exxon decision; indeed preemption was one of the few issues upon which the conferees immediately agreed. This Note discusses the Exxon decision in light of prior preemption doctrine cases and suggests some pitfalls of the Court's method of analyzing the law of express preemption.

I

BACKGROUND OF THE CASE

In 1980, Congress enacted CERCLA in response to the pervasive threats from toxic wastes. CERCLA created "Superfund" to pay for: long- and short-term cleanup of hazardous waste by federal, state, and local governments; necessary response costs of other parties at sites approved under the National Contingency Plan; reimbursement to the federal and state governments for damage to natural resources under the governments' control; and prevention, research, natural resource restoration, equipment, overhead, and administrative costs.

Prior to the enactment of CERCLA, some states had already taken steps to remedy toxic waste problems within their borders. New Jersey enacted the Spill Act in 1977, which, much like CERCLA, created a fund from taxes levied on major chemical facilities in the state. New Jersey, however, is apparently the only state to levy taxes in the same form as CERCLA, although many states tax generators of wastes one way or another. The Spill Fund was designed to help clean up hazardous substance releases, to compensate third parties for damages, and to

7. See supra note 3.
8. The National Contingency Plan (NCP), 40 C.F.R. § 300 (1985), was mandated by section 311(c)(2) of the Clean Water Act, 33 U.S.C. § 1321(c)(2) (1982). Section 105(8)(B) of CERCLA, 42 U.S.C. § 9605(8)(B) (1982), requires the President to include CERCLA's provisions in the NCP, including an annual list of at least 400 sites in need of federal cleanup efforts. This list is known as the National Priorities List (NPL) and is set out at 40 C.F.R. § 300, app. B. (1985).
10. See infra Appendix, Summary of State Hazardous Waste Cleanup Funds. New Jersey taxes petroleum facilities as generators of waste. The state also defines major facilities as including "any refinery, storage or transfer terminal, pipeline, deep water port, drilling platform or any appurtenance related to any of the preceding that is used or is capable of being used to refine, produce, store, handle, transfer, process or transport hazardous substances." N.J. STAT. ANN. § 58:10-23.11b(l) (West 1985).
11. The Spill Fund's obligations to third parties are sweeping; damages are recoverable for loss of real or personal property, loss of income or earning capacity, loss of property taxes for one year, and interest on loans taken to mitigate the effects of a discharge. Id. § 58.10-23.11g (West 1985).
pay the state’s administrative and research costs.\textsuperscript{12} Since the enactment of CERCLA, New Jersey has used the Spill Fund to clean up sites that are not on the National Priority List (NPL).\textsuperscript{13} Out of approximately 650 sites on the NPL, New Jersey has eighty-nine, and the United States Environmental Protection Agency (EPA) has not yet determined what action will be taken for thirty of those sites.\textsuperscript{14}

Litigation concerning CERCLA’s possible preemption of the New Jersey Spill Act began when the State of New Jersey and members of the New Jersey Legislature brought actions seeking a declaratory judgment, respectively, on the scope of CERCLA’s preemption provision and on the validity of the Spill Act.\textsuperscript{15} New Jersey’s suit was dismissed, and the legislators’ suit was settled by a stipulation between the plaintiffs and the United States that the Spill Fund could be spent for seven enumerated purposes.\textsuperscript{16}

In 1983, Exxon challenged in federal court the Spill Fund tax on preemption grounds, but the suit was dismissed on jurisdictional grounds for lack of a substantial federal question.\textsuperscript{17} Exxon then joined with four other plaintiffs\textsuperscript{18} to bring a second suit in the State Tax Court of New

\begin{itemize}
\item \textsuperscript{12} Id. § 58:10-23.11(o) (West Supp. 1985). The New Jersey statute provides:
\begin{quote}
The Spill Fund is strictly liable to any party that suffers direct or indirect economic damage from releases of hazardous substances, including (1) damage to any real or personal property, (2) damage to natural resources, (3) loss of income or earning capacity, in certain circumstances, (4) loss of property tax revenue by the State or a local government for one year following the discharge, and (5) interest incurred on loans to ameliorate the effects of a discharge pending reimbursement by the Spill Fund.
\end{quote}
\item \textsuperscript{13} Id. § 58.10-23.11g(a) (West 1985).
\item \textsuperscript{15} New Jersey v. United States, No. 81-945, slip op. (D.D.C. Nov. 10, 1981); Lesniak v. United States, 17 Env’t Rep. Cas. (BNA) 1455 (D.N.J. 1982).
\item \textsuperscript{16} Lesniak, 17 Env’t Rep. Cas. at 1456. The most controversial of the stipulated purposes are:
\begin{itemize}
\item (5) to compensate claims for the cost of restoration and replacement of any natural resources damaged or destroyed by a release of a hazardous substance; (6) to advance funds to remove or remedy releases of hazardous substances eligible to be financed by the CERCLA Hazardous Substance Response Fund (hereinafter “Response Fund”) if a written commitment for financing by the Response Fund has been issued by an authorized representative of the United States Environmental Protection Agency; and (7) to compensate damage claims and to remove or remedy releases of hazardous substances eligible to be financed by the Response Fund but for which no federal reimbursement from the Response Fund is provided.
\end{itemize}
\item \textsuperscript{17} Exxon Corp. v. Hunt, 683 F.2d 69 (3d Cir. 1982), cert. denied, 459 U.S. 1104 (1983). The appellate court held that the plaintiff’s claim for a refund of state taxes did not “arise under” federal law; rather, the preemptive effect of CERCLA was only a defense to New Jersey’s claim for state taxes. Therefore, the district court properly dismissed the case. Id. at 73.
\item \textsuperscript{18} The other plaintiffs were B.F. Goodrich, Union Carbide, Monsanto, and Tenneco—all companies with major facilities in New Jersey.
\end{itemize}
Jersey seeking a declaratory judgment as to the validity of the state tax and a full refund of taxes paid under the Spill Act. The plaintiffs argued that the language of CERCLA completely preempted the Spill Act. They pointed to section 114(c) of CERCLA which provides:

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

The state tax court, relying on federal legislative history—especially debates in Congress over the preemption provision—concluded that CERCLA's preemption provision was meant to prevent double taxation. The court said that Superfund "permits a state to continue to avail itself of industry tax funds with the obvious limitation that a double tax could not be collected and expended on any one project." The Spill Fund was held not preempted because it was not the case that identical expenditure must necessarily arise. Neither the express language of [Superfund] nor its criteria . . . [demand] the conclusion that there ever will be such a head-on collision of identical expenditures of tax monies. A mere possibility of double taxation should not be deemed sufficient to extinguish a state's right to collect a tax such as is in question here.

Alternatively, the tax court said, if the tax monies could not be collected for some purposes, such as general cleanup and containment, there were enough clearly legitimate purposes to be "more than sufficient to sustain [the Spill Fund's] validity." The state appellate court affirmed.

The New Jersey Supreme Court also affirmed. The court considered its task to be one of harmonizing the Spill Fund and CERCLA. Furthermore, the court concluded, the relevant comparison for the

---

21. 4 N.J. Tax at 325.
22. Id. at 317.
23. Id. at 324.
26. The New Jersey Supreme Court quoted the United States Supreme Court's decision in Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.: "Pre-emption of state law by federal statute is not favored 'in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has [unmistakably] so
purposes of preemption was how the two laws were interpreted and applied, not merely how they were written. Because CERCLA's language is ambiguous, the state supreme court also looked to CERCLA's legislative history to determine the meaning of the preemption clause. Relying on a discussion between Senator Randolph (the floor manager of the Senate version of CERCLA) and Senator Bradley, as well as recent clarifications from the House Committee on Energy and Commerce, the court concluded that, despite ambiguity in the statute, Congress had not intended to preempt laws like the New Jersey Spill Act. Therefore, the Spill Fund was constitutional so long as it was not used to pay claims ordained."

27. Exxon Corp. v. Hunt, 97 N.J. at 534, 481 A.2d at 275 (quoting Jones v. Rath Packing Co., 430 U.S. 519, 526 (1977)). In response to the plaintiff's argument that the plain meaning of the statute required preemption, the court quoted Judge Learned Hand: "There is no surer way to misread any document than to read it literally." Exxon Corp. v. Hunt, 97 N.J. at 534, 481 A.2d at 275 (quoting Giuseppe v. Walling, 144 F.2d 608, 624 (2d Cir. 1944) (L. Hand, J., concurring), aff'd sub nom. Gemsco, Inc. v. Walling, 324 U.S. 244 (1945)).

28. The court concluded that turning to the legislative history is justified where the language of a statute is ambiguous or where a literal interpretation would thwart the statutory scheme. 97 N.J. at 535-41, 481 A.2d at 276-79.

29. The crucial parts of the colloquy supporting the New Jersey Supreme Court's interpretation are:

Mr. RANDOLPH . . . What this bill does is prohibit a State from requiring any person to contribute to any fund if the purpose of that fund is to compensate for a claim paid for under the provisions of this bill.

. . . .

Mr. BRADLEY. Am I correct in assuming that moneys expended by State funds can be used to provide the required 10 percent State match?

Mr. RANDOLPH. That is correct.

Mr. BRADLEY. And am I also correct in noting that State funds are preempted only for efforts which are in fact paid for by the Federal fund and that there would be no preemption for efforts which are eligible for Federal funds but for which there is no reimbursement?

Mr. RANDOLPH. That is correct.

Mr. BRADLEY. Finally, if the Federal Government determines that the needs at other sites require that Federal efforts be terminated at the first site before that site is completed, may a State fund complete the effort?

Mr. RANDOLPH. This legislation would permit that to happen.

126 CONG. REC. S14,981 (daily ed. Nov. 24, 1980) (emphasis added). Senator Bradley's questions and Senator Randolph's answers were almost certainly staged with the Spill Act in mind (Senator Bradley is from New Jersey). The hasty and careless preparation for the performance appears to have influenced the United States Supreme Court not to afford the Senators' discussion much value. See 106 S. Ct. 1112, 1115 n.17.

30. Exxon Corp. v. Hunt, 97 N.J. at 539-40, 481 A.2d at 279 (quoting 1 H.R. REP. NO. 890, 98th Cong., 2d Sess. 58-59 (1984)). The committee was considering a bill to replace the soon-to-expire Superfund; the replacement would have repealed the preemption provision in the Superfund Law.

The Committee is aware that the current law's preemption of state taxing authority has been interpreted by some to constitute a total elimination of state authority in this area. The Committee believes that the proper interpretation of current law is that its preemption provision was intended only to preclude states from imposing taxes or otherwise requiring contributions to funds which would pay costs or damages that would be actually compensated by Superfund.

Id. (emphasis added).
that had actually been paid under Superfund.\textsuperscript{31}

Exxon appealed to the United States Supreme Court, asserting jurisdiction based on the New Jersey Supreme Court's finding that the state law was constitutional. The question presented to the United States Supreme Court was whether the New Jersey Supreme Court had erred in finding that CERCLA did not preempt the New Jersey Spill Act.

II

THE UNITED STATES SUPREME COURT OPINION

In a split opinion,\textsuperscript{32} the United States Supreme Court reversed in part the New Jersey Supreme Court, holding that the Spill Act was preempted to the extent it allowed expenditures for sites included in the National Contingency Plan.\textsuperscript{33} This holding provides a relatively clear guide for future courts faced with preemption questions within these puzzling provisions of CERCLA. Yet, in contrast to the clarity of the narrow holding, the Court provides little doctrinal guidance in the broader area of express preemption. The irony of this outcome is that Congress quickly rejected the narrow holding of the case during the otherwise difficult negotiations toward reauthorizing Superfund.\textsuperscript{34} The decision may, however, add to the confusing maze of preemption doctrine and complicate courts' determinations of what factors to consider in express preemption cases involving ambiguous statutory language.

The Supreme Court began its analysis by stating: "This is an express pre-emption case\textsuperscript{35} . . . . When a federal statute unambiguously precludes certain types of state legislation, we need go no further than the statutory language to determine whether the state statute is preempted."\textsuperscript{36} For support, the Court cited Aloha Airlines, Inc. v. Director of Taxation of Hawaii,\textsuperscript{37} a case in which the Court had interpreted the Airport Development Acceleration Act of 1973 (ADAA).\textsuperscript{38} The ADAA

\begin{footnotesize}
\begin{enumerate}
\item 97 N.J. at 542, 481 A.2d at 281.
\item Justice Marshall delivered the opinion of the Court. Justice Stevens filed the lone dissenting opinion. Justice Powell took no part in the case.
\item The NCP encompasses the National Priority List (NPL). The list of sites on the NPL is set out at 40 C.F.R. § 300, app. B (1985). See supra text accompanying note 14.
\item The Congressional Quarterly reported:
\begin{quote}
The court's ruling that the federal superfund law pre-empts state law may be quickly relegated to a footnote in legal history. A House-Senate conference committee now wrestling with superfund (HR 2005) has already eliminated the provision that limited state taxing power.
\end{quote}
The issue was one of the few that conferees settled quickly—progress on other issues continues to come slowly . . . .
\end{enumerate}
\end{footnotesize}
prohibited states from taxing gross receipts derived from the sale of air transportation, but if allowed taxes on property.\textsuperscript{39} At issue in \textit{Aloha Airlines} was a tax that Hawaii imposed on airlines' gross income.\textsuperscript{40} The state had declared that the income-based tax was a means to tax airlines' personal property. Aloha and Hawaiian Airlines challenged the tax in state court, arguing that the language of the ADAA expressly preempted Hawaii's tax.\textsuperscript{41} The Hawaii Supreme Court relied on the federal legislative history to support its holding that, although the ADAA appeared to preempt taxes based on gross income, the Act was passed to curb the proliferation of local and state "head taxes," i.e., boarding taxes, a purpose not encompassed within the Hawaiian statute.\textsuperscript{42} On appeal, the United States Supreme Court, however, held that it was an error to look beyond the federal statute when the statute's language was clear. Therefore, in failing to hold that the federal statute preempted the Hawaiian statute, the Hawaii Supreme Court had neglected to give effect to the plain meaning of the federal statute.\textsuperscript{43}

In contrast to the unequivocal language in \textit{Aloha Airlines}, the language involved in \textit{Exxon} was admittedly ambiguous;\textsuperscript{44} therefore, it could not be said that the New Jersey Supreme Court ignored the plain meaning of the federal statute. Nonetheless, the Court indicated that it was following the reasoning of \textit{Aloha Airlines} by outlining its task as one of merely interpreting the words of the statute.\textsuperscript{45}

Despite this outline, as soon as the Court applied itself to the task of interpreting the phrase "cost of response or damages or claims,"\textsuperscript{46} it

\begin{itemize}
\item \textsuperscript{39} The Act provided:
\begin{enumerate}
\item [(a)] No State . . . shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom . . . .
\item [(b)] Nothing in this section shall prohibit a State . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services.
\end{enumerate}
\end{itemize}

\textit{Id.}

\begin{itemize}
\item \textsuperscript{40} \textit{See Hawaii Rev. Stat.} § 239-6 (1976) (held unconstitutional in \textit{Aloha Airlines}, 464 U.S. 7).
\item \textsuperscript{42} \textit{Aloha Airlines}, 464 U.S. at 11-13.
\item \textsuperscript{43} \textit{Id.} at 12.
\item \textsuperscript{44} \textit{Cf.} Brief for Appellant at 20.
\item \textsuperscript{45} \textit{See Exxon Corp. v. Hunt}, 106 S. Ct. at 1110. The Court stated:
\begin{quote}
First, we must determine what class of expenses is encompassed within the phrase "cost of response or damages or claims." Then, because at least some of those expenses are covered by § 114(c) only to the extent that they "may be compensated" by Superfund, we must determine the meaning of that phrase as well.
\end{quote}
\textit{Id.}
\item \textsuperscript{46} \textit{See text of § 114(c), supra text accompanying note 20.}
\end{itemize}
turned for guidance to the prior legislation for which CERCLA was a substitute.\textsuperscript{47} The initial question faced by the Court was whether the phrase should be read as a unit, modified by "which may be compensated," or as two separate clauses.\textsuperscript{48} Both parties agreed that it should be read as a unit, but the Solicitor General, in his \textit{amicus} brief, argued that the phrase should be read as two separate phrases. The two phrases, under his interpretation, would be read to preclude taxes for any fund whose purpose was to compensate (1) claims for any costs of response or damages, or (2) claims which may be compensated under CERCLA.\textsuperscript{49} Otherwise, the Solicitor General argued, the section would be redundant.\textsuperscript{50} The import of the Solicitor General's reading would be that CERCLA does not preempt \textit{any} state taxation to fund state cleanup efforts, but it preempts \textit{all} state taxation to pay for third-party damages (whether or not the Superfund might compensate them).

The Court rejected this reading as inconsistent with prior bills for which CERCLA was a substitute, but it admitted that the reading "has considerable logical force."\textsuperscript{51} The Court went on to mention, however, that the Solicitor General's reading also required rendering certain provisions redundant.\textsuperscript{52} The Court did not explicitly address why the redundancy inherent in the Court's reading\textsuperscript{53} should be preferred over that in the Solicitor General's reading.

After interpreting section 114(c) to mean that "costs of response or damages or claims" should be read as a single unit, the Court went on to determine the meaning of the phrase "which may be compensated under..."
this subchapter.” Again, the unpassed predecessors of CERCLA acted as a siren’s song guiding the interpretation. The Court declined, however, to navigate through the other aspects of the legislative history, including the floor discussion between Senators Randolph and Bradley. Although it set out portions of the discussion in a footnote, the Court said:

New Jersey is correct in arguing that some statements in that debate imply that state fund money could be used for any expense not actually paid by Superfund. In view of the haste with which the bill was considered, and the ambiguities and inaccuracies included in the debate between Senators Bradley and Randolph, we decline to attach any great significance to those statements.

Rejecting New Jersey’s narrow interpretation that “may be compensated” should be interpreted as “Superfund had or would have paid the claim” if it had not already been paid by the state fund, the Court decided that the phrase meant “eligible for compensation” under Superfund. Consequently, the Court was still left with the dilemma of determining the practical meaning of “eligible for compensation.” The Court held that the National Contingency Plan is the appropriate measure of whether a site is eligible for Superfund money, and therefore of whether state spending of the special tax funds is preempted. The National Contingency Plan currently specifies that only emergencies will be eligible for removal or immediate cleanup, and remedial action will be financed only for sites on the National Priorities List (NPL). This means that states may not impose special taxes to pay response, damage, or claims costs for sites on the NPL. States may, however, impose such taxes to pay the states’ ten percent share of response, to pay compensation to third parties, to pay personnel and equipment costs, to administer the state fund, and to conduct research.

The conclusion of Exxon, as far as the plaintiffs are concerned, is not yet clear. The Supreme Court remanded the issue of the severability of the unconstitutional provisions of the state statute to the New Jersey Supreme Court. The United States Supreme Court cited Exxon Corp. v. Eagerton in remanding. In Eagerton, parts of an Alabama statute that prevented certain taxes on oil and gas development from being passed on to the royalty owners were held preempted by the Natural Gas Policy Act of 1978. The Court stated: “since the severability of the

54. Id. at 1115.
55. Id. (footnotes omitted).
56. Id. at 1116.
57. Id. at 1115-16.
58. Id. at 1116.
60. 106 S. Ct. at 1116.
pass-through prohibition from the remainder of the 1979 amendments is a matter of state law, we remand . . . to determine whether the partial invalidity of the pass-through prohibition entitles appellants to a refund of some or all of the taxes paid under protest."\(^6^2\) As a result of the Court's decision in _Eagerton_, New Jersey courts are free to hold within the confines of New Jersey law that despite the partial invalidity of the Spill Act, the plaintiffs are not entitled to receive any tax refunds from New Jersey because the state can still use the funds for constitutional, i.e., non-NPL, purposes. Given that the Spill Act contains a severability provision,\(^6^3\) and that the New Jersey tax court has already said that it would uphold the tax on the basis of its allowable purposes,\(^6^4\) the plaintiffs are unlikely to recover any tax refund from the state.

An issue the Court avoided in reaching its holding, but one which was emphasized by Justice Stevens in his dissent, is the meaning of the words "the purpose" in the preemption provision.\(^6^5\) Justice Stevens' argument correctly implied that the Court's opinion read the words "the purpose" out of the Act.

\(...\) §114(c) literally preempts only taxes to support state funds for which "the purpose" is to compensate for claims compensable under Superfund. In accordance with this language, contributions to state funds would be preempted only if their sole purpose—or perhaps their only nontrivial purpose—was to compensate for claims covered by Superfund. ... New Jersey's Spill Fund unquestionably escapes the preemptive sweep of §114(c).\(^6^6\)

Justice Stevens defended this reading as purely literal, appropriate to preemption analysis, and not a "manifest injustice" or "plainly at war with the probable intent of Congress."\(^6^7\) He also stated that the Court's holding of preemption-in-part left open a difficult question of relief. In his view, the Court should have provided some guidance to the lower courts in calculating a partial refund because the Court had found "partial unconstitutionality." Instead, he said what the Court did was resolve a fictitious lawsuit. The Court imagined that the plaintiff challenged a specific expenditure of a state cleanup fund. In the hypothetical case, the specific expenditure could be evaluated, and the Court could make some conclusion about the actual conflict with federal law. But in _Exxon_ the plaintiffs were challenging the Spill Fund Tax in its entirety, not suing

\(^{62}\) 462 U.S. at 196-97.
\(^{63}\) See N.J. STAT. ANN. § 58:10-23.11w (West 1985). "If any section, subsection, provision, clause or portion of this act is adjudged unconstitutional or invalid by a court of competent jurisdiction, the remainder of this act shall not be affected thereby." *Id.*
\(^{64}\) Exxon Corp. v. Hunt, 4 N.J. Tax 294, 319 (1982).
\(^{65}\) *See* 106 S. Ct. at 1117 (Stevens, J., dissenting).
\(^{66}\) *Id.* at 1118.
\(^{67}\) *Id.*
for a pro tanto refund, making it impossible to determine the extent of the conflict between the Spill Act and CERCLA.

III
DISCUSSION

Woven throughout the Court’s opinion in Exxon is an effort to consider only the express terms of CERCLA in determining the preemption issue. The Court characterized this case as an express preemption case; thus, the language of the statute itself should provide the solution to any preemption problems. But, as the Court stated in Aloha Airlines, this doctrine only applies to state law that is unambiguously preempted.

What all readers of the CERCLA's preemption provisions can agree upon, and what gives rise to the complexity of this case, is the ambiguity of section 114(c). When a statute is ambiguous, courts are forced to look outside the statute to determine its meaning. For example, in Exxon, when the Court had to determine the meaning of “to pay compensation for claims of any costs of response or damages,” it had to choose between different readings, each of which would render some part of the statute redundant or meaningless. The Court could not determine the result without looking to outside information, whether previous legislation, floor debates, the practical effect of the decision, or general rules about the clarity with which state statutes must be preempted. The Court failed, however, to provide clear guidance about what courts should look to first in interpreting ambiguous preemption provisions. Instead, the opinion cited previous, unpassed bills extensively, and put floor debates in a footnote without explaining what effect they should be given. Furthermore, the Court came up with its practical test for determining whether there was preemption under CERCLA, namely inclusion in the NCP, without explaining how it made that choice.

The practical effect deserves special consideration when the interpretation of an ambiguous preemption provision may have the effect of frustrating the intentions of the original statute. Speculating about the practical effect of an interpretation of ambiguous language helps to divine

69. "[W]hen a federal statute unambiguously forbids the States to impose a particular kind of tax on an industry affecting interstate commerce, courts need not look beyond the plain language of the federal statute to determine whether a state statute that imposes such a tax is preempted.” Id. at 10 (footnote omitted).
Congress' intent. The Court's interpretation in Exxon, for instance, may give site operators an incentive to be listed on the NPL to prevent, rather than aid, efficient cleanup. When a site is cleaned up, the polluter is subject to liability for the costs. Because no Spill Fund monies may be spent to clean up sites on the NPL, and because Superfund cannot cover all sites listed on the NPL, being listed becomes a way, at least temporarily, to avoid cleanup. Furthermore, EPA ranks the sites on a case-by-case basis, meaning that the more sites listed, the more resources must be spent on assessments rather than on actual cleanup.

The second incongruous practical result is magnified by the first. States may clean up low priority sites, i.e., sites not on the NPL, and the Superfund will pay to clean up the highest priority sites. But the medium-priority sites, those on the NPL that are not being cleaned up, will remain to pose health and environmental hazards. This could represent a significant problem for a state like New Jersey where there are many sites on the NPL that EPA has not begun to clean up.72 Furthermore, the NPL is a revolving list to which sites are often added. Therefore, a site may be eligible for the list, yet not be on the list. States may react to the uncertainty by curbing their cleanup efforts paid for by special state tax funds.

CONCLUSION

Although the practical effect of the Court's decision in Exxon Corp. v. Hunt may be incongruous with CERCLA's goal of expeditious clean up of the worst hazardous waste sites, the decision is destined to be forgotten in the complicated history of Superfund.73 The irony of the decision is that, while Congress has quickly agreed to overrule the Court's interpretation of CERCLA, the lower courts are left in the doctrinal labyrinth the Court created, with no wise Ariadne to guide them out.

Diane Regas

72. See supra note 14 and accompanying text.
73. See supra note 34 and accompanying text.
APPENDIX

SUMMARY OF STATE HAZARDOUS WASTE CLEANUP FUNDS*


Alaska. None.

Arizona. Arizona has three hazardous waste funds. The "water quality assurance revolving fund" is financed by legislative appropriations and collected penalties. ARIZ. REV. STAT. ANN. § 36-1854.01 (1986). The "hazardous waste trust fund" is financed by fees collected for the use of hazardous waste disposal facilities. Id. § 36-2805. The "hazardous waste management fund" is financed by fees on waste facility permit applicants and appropriations. Id. § 36-2826.

Arkansas. None.

California. The "Hazardous Substance Account" is financed by taxes on hazardous waste generators, fines, penalties, costs recovered from liable parties, legislative appropriations, and federal CERCLA money. CAL. HEALTH & SAFETY CODE §§ 25330, 25343, 25345, 25360, 25380, 25381 (West 1984 & Supp. 1986).


Connecticut. Connecticut has two hazardous waste funds. The "disposal facility trust fund," used principally for monitoring and maintenance costs, is financed by fees on owners and operators of hazardous

* This appendix is reprinted with minor changes from Brief for Appellant, Appendix.
waste facilities. CONN. GEN. STAT. ANN. § 22a-126(b) (1985). The "emergency spill response fund," used for oil and hazardous waste cleanup, is financed by taxes on hazardous waste generators and treatment facilities, as well as by costs and damages recovered in liability actions. Id. §§ 22a-131, -132, -451.

Delaware. None.

Florida. Florida has three special funds. The "Hazardous Waste Management Trust Fund" is financed by appropriations, cost recoveries in liability actions, and miscellaneous gifts or bequests. FLA. STAT. ANN. § 403.725 (West 1986). The "Florida coastal protection fund" is financed by taxes of two cents per barrel payable by operators of terminal facilities that handle "pollutants," defined to include oil, gasoline, pesticides, ammonia and chlorine, as well as by penalties, cost reimbursements, and miscellaneous other fees and charges. Id. §§ 376.11(2), 376.11(4)(a), 376.031 (West Supp. 1986). The "Water Quality Assurance Trust Fund" is financed by taxes of two cents per barrel payable by operators of terminal facilities and other facilities that store, handle or transfer pollutants, and by transfers from other state funds. Id. §§ 376.307(3), (5).

Georgia. Georgia has two hazardous waste funds. The "hazardous waste facility trust fund" is financed by bonds or other financial responsibility instruments forfeited by owners or operators of certain waste disposal facilities. GA. CODE ANN. § 43-2909(d) (1986). The "hazardous waste trust fund" is financed by civil penalties. Id. §§ 43-2909(e), 43-2916(d).

Hawaii. None.

Idaho. Idaho has three hazardous waste funds. The "hazardous waste emergency account" is financed by appropriations, cost recoveries, and miscellaneous other (unidentified) sources. IDAHO CODE § 39-4417 (1985). The "hazardous waste training, emergency and monitoring account" is financed by fees on transporters and waste facility operators, appropriations, donations, gifts, and grants. Id. § 39-4417B. The "hazardous waste disposal fee refund account" is financed by fees on operators and penalties. Id. § 39-4432.

Illinois. Illinois has two special funds—the "Hazardous Waste Fund" and the "Hazardous Waste Research Fund"—both of which are financed by fees imposed on waste facility owners or operators. ILL. ANN. STAT. ch. 111 1/2 § 1022.2 (Smith-Hurd, Supp. 1986).
Indiana. Indiana has three special hazardous waste funds. The "hazardous substances emergency response trust fund" is financed by taxes on waste facility operators for the disposal of hazardous waste. IND. CODE ANN. §§ 6-6-6.6-2, 6-6-6.6-3, 13-7-8.7-2 (West 1982 & Supp. 1985). The "hazardous waste training trust fund" is financed by fees on facility owners. Id. § 13-7-8.6-11. Finally, the "environmental management special fund" is financed by fees collected from waste facility applicants and civil penalties. Id. §§ 13-7-13-2, 13-7-8.6-4(e).

Iowa. The "hazardous waste remedial fund" is financed by fees on generators, transporters, and waste facility owners and operators, penalties, general revenues, federal funds, and gifts. IOWA CODE ANN. §§ 455B.423, 455B.424 (West Supp. 1986).

Kansas. The "hazardous waste perpetual care trust fund" is financed by fees on waste facility operators and by civil penalties. KAN. STAT. ANN. §§ 65-3431, 65-3444(d) (1985).


Louisiana. Louisiana has three funds relating to hazardous waste releases. The "Environmental Emergency Response Fund" is financed by costs recovered from liable parties, penalties, legislative appropriations and federal grants. LA. REV. STAT. ANN. § 30:1079(A) (West Supp. 1986). The "Hazardous Waste Protection Fund" is financed by bonds forfeited to the state, fees on hazardous waste facility operators, legislative appropriations, and federal grants. Id. §§ 30:1141, 30:1143. The "Hazardous Waste Site Cleanup Fund" is financed by the same sources as the "Environmental Emergency Response Fund," as well as by miscellaneous grants, appropriations, and cost reimbursements. Id. § 30:1149. In addition, Louisiana imposes on waste generators and disposers a tax on waste storage and disposal and an additional one-time tax on the hazardous waste content of land. Both taxes are payable to the Department of Revenue and Taxation. Id. §§ 30:1149.21-23, 47:822-827.


Maryland. The "State Hazardous Substance Control Fund" is financed by waste facility application and permit fees, renewal fees, penal-

Massachusetts. The "Massachusetts Hazardous Waste Management Act" authorizes state agencies to impose fees on licensed hazardous waste transporters to be used to pay for state response actions, although the Act does not create a separate fund. MASS. ANN. LAWS ch. 21C, § 7 (Michie/Law. Co-op. 1981 & Supp. 1986).

Michigan. Michigan has had two funds relating to hazardous waste. The "Disposal facility trust fund," abolished in 1983, was financed by fees on waste facility operators. MICH. COMP. LAWS ANN. § 299.542 (West 1984). The "Environmental response fund" is financed by appropriations. Id. §§ 299.609, 299.610.

Minnesota. The "environmental response, compensation and compliance fund" is financed by taxes on hazardous waste generators, cost reimbursements, penalties and various grants and appropriations. MINN. STAT. ANN. §§ 115B.20, 115B.22 (WEST SUPP. 1986). The "state waste management fund" is financed by state bonds and appropriations. Id. § 115A.57.

Mississippi. Twenty percent of the fees collected from commercial hazardous waste facilities are held in an account maintained by the state department of natural resources for the perpetual care and maintenance of hazardous waste facilities; ten percent of the fees are remitted to the state's general fund; and the balance is paid to the general fund of the municipality or county within which the facility is located. MISS. CODE ANN. § 17-17-53 (Supp. 1985).

Missouri. Missouri has two special funds. The "Hazardous Waste Fund" is financed by permit and license fees, fees and taxes on generators and transporters, appropriations, federal grants, and miscellaneous other sources. The "Hazardous Waste Remedial Fund" is financed by fees and taxes on generators, penalties, gifts, bequests, appropriations, reimbursements, and federal grants. MO. ANN. STAT. §§ 260.380, .390, .391, .475, .478, .480 (Vernon Supp. 1986).

Montana. The "environmental quality protection fund" is financed by cost reimbursements, penalties, appropriations and funds received in other state accounts including, indirectly, the resource indemnity trust interest account. The latter account is financed by taxes on mine operators engaged in mining, extracting or producing minerals. MONT. CODE ANN. §§ 75-10-704, 75-1-1101, 15-38-106, 15-38-201 (1985).
Nebraska. None.

Nevada. Nevada has two hazardous waste funds. The fund for the “management of hazardous waste” is financed by proceeds and fees for the use of state-owned disposal facilities, civil penalties, and cost recoveries. NEV. REV. STAT. § 459.530 (1986). The emergency trust fund is financed by appropriations. Id. § 353.263.


New Mexico. The “hazardous waste emergency fund” is financed by cost reimbursements and legislative appropriations. N.M. STAT. ANN. §§ 74-4-7, 74-4-8 (1983).

New York. The “hazardous waste remedial fund” is financed by fees on hazardous waste generators and waste facility permitees, penalties and appropriations. N.Y. STATE FIN. LAW § 97-b (Supp. 1986); N.Y. ENVTL. CONSERV. LAW § 27-0923 (Consol. 1984).


North Dakota. None.

Ohio. Ohio has established two special hazardous waste funds. The “hazardous waste facility management special account” is financed by fees on owners and operators of waste disposal facilities. OHIO REV. CODE ANN. § 3734.18 (Page Supp. 1985). The “hazardous waste cleanup fund” is financed by penalties, reimbursement costs, and miscellaneous other payments. Id. § 3734.28.

Oklahoma. The “Controlled Industrial Waste Fund” and “The State Emergency Fund” are financed by state appropriations. OKLA. STAT. ANN. tit. 63, § 1-2018 (West 1984); id. tit. 62, §§ 139.42, 139.47.

Oregon. Oregon requires that waste facility owners and operators deed their sites to the state and then pay fees to a state account for closure, monitoring and remedial action. OR. REV. STAT. §§ 466.150, 466.160 (1985).
Pennsylvania. The “Solid Waste Abatement Fund” is financed by forfeited facility operator bonds, fines and penalties. 35 PA. CONS. STAT. ANN. § 6018.505, .605, .606 and .701 (Purdon Supp. 1985).


South Dakota. None.

Tennessee. Tennessee has two hazardous waste funds. The “hazardous waste remedial action fund” is financed by fees on generators and transporters, civil penalties, fines, federal grants, and appropriations. TENN. CODE ANN. §§ 68-46-204, 68-46-203 (Supp. 1985). The “responsible waste disposal incentive fund” is financed by fees on waste facility operators and appropriations. Id. §§ 68-46-210, 68-46-211.

Texas. Texas has four special funds. The “Disposal Facility Response Fund” is financed by state appropriations and federal grants. TEX. WATER CODE ANN. § 26.304 (Vernon Supp. 1986). The “Texas Coastal Protection Fund” is financed by appropriations, fines, penalties and cost reimbursements. Id. § 26.265. The “hazardous waste generation and facility fees fund” is financed by fees on hazardous waste generators and waste facility operators. The “hazardous waste disposal fee fund” is financed by fees on waste facility operators. TEX. HEALTH & SAFETY CODE ANN. art. 4477-7, § 11 (Vernon Supp. 1986).

Utah. Utah has a hazardous waste fund financed by cost reimbursements. UTAH CODE ANN. § 26-14-20 (Supp. 1985).


Virginia. Virginia authorizes the State Water Control Board to acquire waste facilities and to collect fees from facility users. VA. CODE § 32.1-178 (1985).
EXXON CORP. v. HUNT

Washington. The “hazardous waste control and elimination account” is financed by fees on waste facility operators and on a wide range of persons engaged in waste-producing business activities, as well as by fines and penalties. WASH. REV. CODE ANN. §§ 70.105A.050, .030, .040, 70.105.180 (Supp. 1986). Washington law also authorizes the collection of fees from waste facility users for the perpetual care of state waste facilities. Id. § 70.105.040.


Wisconsin. Wisconsin has four hazardous waste funds. The “waste management fund” is financed by fees on and certain reimbursements from waste facility owners and operators. Wis. STAT. ANN. §§ 25.45, 144.441(3), (5) (West Supp. 1985). The “groundwater fund” is financed by fees on generators and by miscellaneous other permit fees and fees on the sale of fertilizers and pesticides. Id. §§ 25.48, 144.441(7). The “environmental repair fund” is financed by fees on waste facility owners and operators and cost reimbursements. Id. §§ 25.46, 144.442, 144.76(6)(c). The “investment and local impact fund” is financed by taxes and fees on metalliferous mine operators. Id. §§ 25.50, 70.375, 70.395.

Wyoming. None.