

RECENT DEVELOPMENT

NINTH CIRCUIT DEFERS TO EPA ON “REMOVAL” OF ASBESTOS IN LIBBY, MONTANA

I. INTRODUCTION

The United States Court of Appeals for the Ninth Circuit decided *United States v. W. R. Grace & Co.* on December 1, 2005.¹ The appellate court affirmed the government’s right to recover costs from W.R. Grace & Co. (“Grace”)² under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA” or “Superfund”).³ The government sought reimbursement for the cleanup of asbestos-contaminated vermiculite⁴ (a mica-group mineral) in and around the town of Libby, Montana.⁵ Grace, which owned and operated vermiculite

1. *United States v. W.R. Grace & Co.*, 429 F.3d 1224 (9th Cir. 2005), *cert. denied*, ___ U.S. ___, 127 S. Ct. 379 (2006). [hereinafter *Grace Appeal*].

2. W.R. Grace & Co.-Conn., a member of the Grace corporate family, and Kootenai Development Corporation, owned by Grace executives, were also named defendants. Because the defendants are all closely aligned, they will be referred to as one entity. Brief of Petitioner-Appellant at 1, *United States v. W.R. Grace & Co.*, 429 F.3d 1224, (9th Cir. 2005) [hereinafter *Appellant’s Brief*]; *see also Grace Appeal*, *supra* note 1, at 1226.

3. Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended in scattered sections of 42 U.S.C.).

4. The term “vermiculite,” herein, is used in its broad sense. The term is meant to include both vermiculite proper as well as closely-related minerals (such as hydrobiotite) that are also present in the Rainy Creek formation near Libby, Montana. *See* JAMES DWIGHT DANA, DANA’S NEW MINERALOGY: THE SYSTEM OF MINERALOGY OF JAMES DWIGHT DANA AND EDWARD SALISBURY DANA 1471–72 & 1474–76 (Richard Gaines, et al., 8th ed. 1997) (listing vermiculite and hydrobiotite as separate minerals, but noting these two related minerals are practically synonymous and that “[h]ydrobiotite is frequently an important-to-exclusive component of commercial ‘vermiculite’”). For a discussion of vermiculite’s properties and uses, *see infra* Part II(A).

5. *United States v. W.R. Grace & Co.*, 280 F. Supp. 2d 1135, 1140 (D. Mont. 2002) [hereinafter *Grace I*].

mining operations around Libby from 1963 to 1990,⁶ contested the government's right to recover by challenging the Environmental Protection Agency's ("EPA") selection and characterization of its cleanup operation in Libby as a "removal action" under CERCLA.⁷

CERCLA authorizes the EPA to respond to releases (and threatened releases) of hazardous substances.⁸ Specifically, the statute authorizes the EPA to undertake both removal⁹ and remedial actions¹⁰ in compliance with the National Contingency

6. *Id.* at 1138–39. For a book-length discussion of the history and legacy of W.R. Grace & Co.'s vermiculite operations in Libby, see ANDREW SCHNEIDER & DAVID MCCUMBER, *AN AIR THAT KILLS: HOW THE ASBESTOS POISONING OF LIBBY, MONTANA, UNCOVERED A NATIONAL SCANDAL* (G.P. Putnam Sons, 2004) [hereinafter *AN AIR THAT KILLS*].

7. *Grace Appeal*, *supra* note 1, at 1226.

8. CERCLA § 104 (codified at 42 U.S.C. § 9604 (2000 & Supp. 2005)). The statute states:

Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment.

Id.; see also *Grace I*, *supra* note 5, at 1141. The president's authority under CERCLA has been delegated to the EPA. *Grace Appeal*, *supra* note 1, at 1241 n.20.

9. CERCLA § 101(23) (codified at 42 U.S.C. § 9601(23) (2000 & Supp. 2005)). The statute defines "removal" as:

... the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release

Id. The term includes (but is not limited to) security fencing, alternative water supplies, temporary evacuations, and emergency assistance. *Id.*

10. CERCLA § 101(24) (codified at 42 U.S.C. § 9601(24)). The statute defines "remediation" as:

... those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, 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. The term includes storage, confinement, neutralization, provision of alternative water supplies, and permanent relocation of residents. *Id.*

Plan (“NCP” or “Plan”).¹¹ The procedural and substantive requirements for a remedial action are greater than those for removal actions.¹² The government, for example, is required to analyze cost-effectiveness of remedial actions, and financing for remediation is only allocated to sites on the National Priority List.¹³ The distinction between removal and remedial actions is vital, but it is not clear.¹⁴ As the Ninth Circuit noted, “[t]he tangled language of CERCLA hardly lends itself to clear-cut distinctions between the two types of actions.”¹⁵

Commenters typically describe removal actions as short-term operations,¹⁶ and except in certain circumstances, CERCLA limits the cost and time-frame of removal actions.¹⁷ In Libby, however, EPA operations have already lasted six years and cost hundreds of millions of dollars.¹⁸ The trial court’s award for costs

11. 40 C.F.R. pt. 300 (2006). The full name of the Plan is the National Oil and Hazardous Substances Pollution Contingency Plan. *Id.*

12. *Grace Appeal*, *supra* note 1, at 1227–29.

13. *Id.* at 1228–29 (noting National Priority List and Remedial Investigation/Feasibility Study (“RI/FS”) requirements in the NCP).

14. *Id.* at 1229 (stating that “[b]ecause CERCLA provides that responsible parties shall be liable for ‘all costs of removal or remedial action incurred by the United States Government... not inconsistent with the national contingency plan,’ this distinction is vital to those held liable”). The court further noted that the definitions of “removal” and “remedial” are “inescapably vague.” *Id.* at 1241.

15. *Id.* at 1232.

16. ROBERT V. PERCIVAL, ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 318 (3d ed. 2000) (contrasting “short-term removal actions designed to alleviate immediate dangers” and “longer-term remedial actions”); *see also* Jerry L. Anderson, *Removal or Remedial? The Myth of CERCLA’s Two-Response System*, 18 COLUM. J. ENVTL. L. 103, 124–25 (1993); *Grace Appeal*, *supra* note 1, at 1244 (citing a number of cases for the proposition that “[c]ourts have also stressed the immediacy of a threat in deciding whether a cleanup is a removal action”).

17. Generally, removal actions “shall not continue after \$2,000,000 has been obligated for response actions or 12 months has elapsed from the date of initial response to a release or threatened release of hazardous substances.” CERCLA § 104(c)(1) (codified at 42 U.S.C. § 9604(c)(1) (2006)). In this instance, the NCP—a set of rules for oil spill and hazardous waste cleanups authorized by CERCLA and the Clean Water Act—closely tracks the statutory language in CERCLA § 104. 40 C.F.R. 300.415(b)(5) (2006) (cited in *Grace Appeal*, *supra* note 1, at 1228). *See* 33 U.S.C. § 1321 (2000 & Supp. 2005) (creating the NCP); CERCLA § 105 (codified at 42 U.S.C. § 9605 (2000 & Supp. 2005)) (requiring amendments to NCP). The NCP provides that the government may continue a removal action notwithstanding the cost and time caps if:

- (i) There is an immediate risk to public health or welfare of the United States or the environment; continued response actions are immediately required to prevent, limit, or mitigate an emergency; and such assistance will not otherwise be provided on a timely basis; or
- (ii) Continued response action is otherwise appropriate and consistent with the remedial action to be taken.

40 C.F.R. 300.415(b)(5) (2006); *see also* CERCLA § 104(c)(1)(A) (enabling statute).

18. *Appellant’s Brief*, *supra* note 2, at 2 (asserting that, as of 2004, the action had

incurred through December 31, 2001 topped \$54 million¹⁹—the largest after-trial CERCLA cost recovery judgment to date.²⁰ As the Ninth Circuit noted, “the EPA’s response action in Libby is no mere run-of-the-mill CERCLA cleanup . . . the Libby cleanup is a unique removal action of a size and cost not previously seen . . . [it] was, and remains today, truly extraordinary.”²¹

Because of the extraordinary nature of the case, the Ninth Circuit’s decision raises important questions about the construction of the CERCLA statute as well as the level of deference the EPA should be afforded in responding to environmental disasters.

II. BACKGROUND

A. A Mountain of Troubles

Vermiculite is a sheet silicate,²² mica group mineral.²³ It is a flaky, brittle mineral that varies in color.²⁴ One of vermiculite’s unique properties is that it rapidly expands or “pops” when exposed to high temperatures, resulting in a fluffy and heat-resistant product.²⁵ This quality makes vermiculite commercially

cost over \$100 million). As of 2006, 604 properties in the Libby area had been decontaminated; over 1200 properties remained to be cleaned. Bryan R. Bandli & Mickey E. Gunter, *A Review of Scientific Literature Examining the Mining History, Geology, Mineralogy, and Amphibole Asbestos Health Effects of the Rainy Creek Igneous Complex, Libby, Montana, USA*, 18 INHALATION TOXICOLOGY 949, 950 tbl. 1 (2006).

19. The total judgment amount for costs through the end of 2001 was \$54,527,081.11. *United States v. W.R. Grace & Co.*, 280 F. Supp. 2d 1149, 1187 (D. Mont. 2003) [hereinafter *Grace II*]. The United States was also awarded pre-judgment interest and a declaratory judgment holding Grace liable for future cleanup costs. *Id.* at 1188.

20. *9th Cir. Upholds \$54.5 Million Order For Mont. Mine Cleanup*, 26 NO. 11 ANDREWS ENVTL. LITIG. REP. 17 (2005).

21. *Grace Appeal*, *supra* note 1, at 1232.

22. John Addison, *Vermiculite: A Review of the Mineralogy and Health Effects of Vermiculite Exploitation*, 21-JUNE REG. TOXICOLOGY AND PHARMACOLOGY 397, 397 (1995). Silicate minerals are minerals mainly composed of silica (SiO₄). See CORNELIS KLEIN & CORNELIUS S. HURLBUT, *MANUAL OF MINERALOGY* 440 (21st ed., 1999). The atoms in a silica molecule arrange to form a regular tetrahedron with the silicon atom in the center and oxygen atoms at each vertex. *Id.* at 440–41. Sheet silicate minerals (also known as phyllosilicate minerals) are formed when three of the four oxygen atoms in each SiO₄ tetrahedron are shared, creating a crystalline structure that approximates a flat sheet. See *id.* at 441, 498. Micas, clays, serpentines, and chlorite are all types of sheet silicate minerals. *Id.* at 506.

23. DANA, *supra* note 4, at 1444, 1471, 1474.

24. DANA, *supra* note 4, at 1471, 1475. Typical colors include yellow, brown, black, gray-white, and green. *Id.*

25. EPA, *ABCs of Asbestos*, <http://www.epa.gov/region8/superfund/libby/abcasbestos.html> (last visited Sept. 23, 2006) [hereinafter *ABCs of Asbestos*]. For a narrative account of what happens when vermiculite “pops,” see

valuable as filler and as insulation material.²⁶

A mountain seven miles northeast of Libby, Montana containing large deposits of vermiculite ore was first explored in 1881.²⁷ Commercial exploitation of Libby vermiculite began in earnest in the 1920s; the vermiculite was marketed under the trade name Zonolite.²⁸ By 1940, “Zonolite Mountain” miners produced ninety percent of America’s supply of vermiculite.²⁹ In 1963, Grace, an international chemical and mining conglomerate,³⁰ acquired the mining and processing facilities at Zonolite Mountain.³¹ Between 1960 and 1990, when Grace closed the site,³² Zonolite Mountain produced more than 4.4 million metric tons of vermiculite ore, which was shipped to sites across the United States and around the world.³³

AN AIR THAT KILLS, *supra* note 6, at 37–38.

26. Addison, *supra* note 22. Vermiculite from other mines is still marketed for these uses and is generally thought to be safe. See The Vermiculite Association, VERMICULITE: HEALTH, SAFETY AND ENVIRONMENTAL ASPECTS 4–5 (2000), available at <http://www.vermiculite.org/pdf/vhse.pdf>; Centers for Disease Control and Prevention, Agency for Toxic Substances and Disease Registry, *Vermiculite Consumer Products* (2003), available at <http://www.atsdr.cdc.gov/NEWS/vermiculite051603.html> (stating that “[b]ecause the Libby mine closed in 1990, newer products are not expected to contain significant amounts of asbestos”). But see Andrew Schneider, *Virginia Miners at Risk from Asbestos*, SEATTLE POST-INTELLIGENCER, Oct. 4, 2000, <http://seattlepi.nwsourc.com/uncivilaction/asb04.shtml> (reporting that Mine Safety and Health Administration inspectors found asbestos contamination in vermiculite samples taken from a mine in Virginia); Thomas Peter Howard, *Pneumoconiosis in a Vermiculite End-Product User*, 44 AM. J. INDUSTRIAL MED. 214 (2003) (reporting first known case of probable asbestosis in an end-user of vermiculite mined in South Carolina or South Africa).

27. Bandli & Gunter, *supra* note 18; ABCs of Asbestos, *supra* note 25.

28. AN AIR THAT KILLS, *supra* note 6, at 38–40.

29. *Id.* at 45. The Libby mine is estimated to have produced seventy percent of the vermiculite sold in the United States between 1919 and 1990. ABCs of Asbestos, *supra* note 25.

30. For a discussion of the corporate history of Grace, see AN AIR THAT KILLS, *supra* note 6, at 137–41. W.R. Grace & Co. is no stranger to environmental controversy; Grace was notoriously involved in litigation relating to the poisoning of wells in Woburn, Massachusetts. See *The History of W.R. Grace & Co.*, SEATTLE POST-INTELLIGENCER, Nov. 18, 1999, <http://seattlepi.nwsourc.com/uncivilaction/grac19.shtml>. The story of this litigation was dramatized in the book *A Civil Action*, which was later produced as a feature film. *Id.*; see generally JONATHAN HARR, *A CIVIL ACTION* (Random House 1995); *A CIVIL ACTION* (Paramount Pictures et al. 1998).

31. AN AIR THAT KILLS, *supra* note 6, at 140–41. The mining and processing operations were acquired as a result of Grace’s merger with the Zonolite Corporation. *Id.*

32. *Grace I*, *supra* note 5, at 1139; see also Andrew Schneider, *While People are Dying, Government Agencies Pass Buck*, SEATTLE POST-INTELLIGENCER, Nov. 19, 1999, <http://seattlepi.nwsourc.com/uncivilaction/lib19.shtml> [hereinafter *While People are Dying*].

33. AN AIR THAT KILLS, *supra* note 6, at 43 (stating that 9,780,000,000 pounds of vermiculite ore was mined).

Almost from the beginning,³⁴ it was known that the same geological processes which had formed the vermiculite ore deposits in Zonolite Mountain³⁵ also formed large coextensive deposits of tremolite asbestos.³⁶ Indeed, several unsuccessful attempts were made throughout the early and mid-twentieth century to exploit Zonolite Mountain's tremolite.³⁷ As early as the 1950s, Zonolite executives knew that vermiculite miners at Zonolite Mountain were exposed to dangerous levels of asbestos.³⁸ Workers were exposed to staggering amounts of "nuisance dust."³⁹ By 1999, medical researchers had firmly established⁴⁰ that former employees at Zonolite Mountain suffered from high rates of asbestosis⁴¹ and mesothelioma.⁴² A series of news reports

34. The Vermiculite & Asbestos Co., which would later merge with Zonolite Corporation, was formed to exploit Zonolite Mountain's tremolite asbestos in the 1920s. AN AIR THAT KILLS, *supra* note 6, at 42–44.

35. Tremolite is an inosilicate mineral of the amphibole group; inosilicates are silicate minerals where the SiO₄ tetrahedra are arranged to form chains instead of sheets (as only two of the four oxygen atoms in each tetrahedron are shared). KLEIN & HURLBUT, *supra* note 22, at 442–43, 474, 488, 495–96; DANA, *supra* note 4, at 1335–36. Both biotite—a mica group mineral which is transformed into vermiculite when heated in the presence of water—and tremolite crystals form during the cooling of intrusive magma. AN AIR THAT KILLS, *supra* note 6, at 41–42. For a technical discussion of the formation of biotite and tremolite in the Libby area, see Bandli & Gunter, *supra* note 18; G.P. Meeker et al., *The Composition and Morphology of Amphiboles from the Rainy Creek Complex, Near Libby, Montana*, 88 AM. MINERALOGIST 1955 (2003), available at http://www.minsocam.org/MSA/AmMin/TOC/Articles_Free/2003/Meeker_p1955-1969_03.pdf.

36. Tremolite, which is an asbestiform mineral, is of little commercial value and is notable as a contaminant of other mineral ores. Victor L. Roggli & Patrick Coin, *Mineralogy of Asbestos*, in PATHOLOGY OF ASBESTOS-ASSOCIATED DISEASES 1, 2–5 (Victor L. Roggli et al. eds., 2d ed. 2004).

37. In addition to the Vermiculite & Asbestos Company's early attempts, Zonolite Corporation attempted to extract tremolite from vermiculite ore in the early 1960s. AN AIR THAT KILLS, *supra* note 6, at 90–91.

38. *Id.* at 86–92; Maryanne Vollers & Andrea Barnett, *Libby's Deadly Grace*, MOTHER JONES, May/June 2000, available at <http://www.motherjones.com/news/feature/2000/05/libby.html>. There is "very little" evidence that uncontaminated vermiculite is hazardous. Addison, *supra* note 22, at 399; see also ABCs of Asbestos, *supra* note 25. However, asbestos is classified as a hazardous substance. 42 U.S.C. § 7412(b)(1) (2000 & Supp. 2005) (listing asbestos as a hazardous air pollutant under the Clean Air Act); see also 40 C.F.R. § 302.4 (2006) (table of hazardous substances).

39. Vollers & Barnett, *supra* note 38 (stating that "[e]very day after work, the men would come home covered with a fine white powder . . . [the mill was] a place so dusty that workers often couldn't see their hands on their brooms"); John C. Heenan, *Graceful Maneuvering: Corporate Avoidance of Liability Through Bankruptcy and Corporate Law*, 65 MONT. L. REV. 99, 102 (2004) (quoting Vollers & Barnett).

40. See John Addison, *Asbestos, Analysis of*, in 1 ENCYCLOPEDIA OF ENVIRONMENTAL ANALYSIS AND REMEDIATION 413, 419 (Robert A. Meyers ed., 1998) (citing studies from the 1980s showing that exposure of Libby miners "led to high levels of disease in the workforce of the mine").

41. Andrew Schneider, *Uncivil Action: A Town Left to Die*, SEATTLE

by the *Seattle Post-Intelligencer* beginning in 1999 raised the fear⁴³ that the entire Libby community—not just mine workers, but their families and neighbors—had been and continued to be exposed to asbestos-contaminated dust and waste products.⁴⁴

B. EPA's Response

Several days after the *Post-Intelligencer's* series broke this story, the EPA responded by sending investigators to Libby.⁴⁵

POST-INTELLIGENCER, Nov. 18, 1999, <http://seattlepi.nwsource.com/uncivilaction/lib18.shtml> (describing the investigation that was conducted and reporting that 375 people have been diagnosed with asbestos-related diseases, and that “12–15 people from Libby are being diagnosed with the diseases—asbestosis, mesothelioma, lung cancer—every month”). Asbestosis is a “diffuse interstitial pneumoconiosis [resulting] from the long-term inhalation of asbestos dust.” THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 622–23 (Mark H. Beers & Robert Berkow eds., 17th ed. 1999).

42. Mesothelioma is defined as “[u]ncommon tumors of mesothelial tissue associated with asbestos exposure.” THE MERCK MANUAL OF DIAGNOSIS AND THERAPY, *supra* note 41, at 622–23. Tremolite asbestos in particular is thought to play a role in the onset of mesothelioma. Victor L. Roggli & Thomas A. Sporn, *Mesothelioma*, in *PATHOLOGY OF ASBESTOS-ASSOCIATED DISEASES*, 104, 108 (Victor L. Roggli et al. eds., 2d ed. 2004).

43. See, e.g., Schneider, *supra* note 41. Schneider's investigative reports for the *Post-Intelligencer* later formed the core of Schneider and McCumber's report on the situation. AN AIR THAT KILLS, *supra* note 6. It was later revealed that the EPA had known—or should have known—that asbestos-contaminated vermiculite was threatening Libby's residents and that the EPA “dropped the ball.” *EPA Kept Data on Asbestos Risk, Report Says*, WASH. TIMES, June 31, 2000, at A6; U.S. ENVTL. PROT. AGENCY, OFFICE OF THE INSPECTOR GEN., EPA'S ACTIONS CONCERNING ASBESTOS-CONTAMINATED VERMICULITE IN LIBBY, MONTANA 24 (2001), available at <http://www.epa.gov/oig/reports/2001/montana.pdf> (concluding that institutional barriers prevented the EPA from effectively preventing the Libby disaster); see also AN AIR THAT KILLS, *supra* note 6 at 193 (suggesting that the political pressure from industry and the Reagan White House may have led to the concealment of the Libby disaster). Montana officials may also have failed to act. *While People are Dying*, *supra* note 32; see also *Orr v. State*, 106 P.3d 100 (Mont. 2004) (holding that Libby mine workers could sue state of Montana for negligence).

44. According to Grace's own records, at least 5,000 pounds (2,268 kg) of dust was released each day until at least the 1970s. Vollers & Barnett, *supra* note 38. In addition to dust, contaminated vermiculite tailings found their way into homes, gardens, and schoolyards throughout Libby. *Grace Appeal*, *supra* note 1, at 1230–31. Moreover, children were known to play on mounds of contaminated tailings. *Asbestos Contamination in Libby, Montana: Field Hearing Before the S. Comm. on Environment and Public Works*, 106th Cong. 64 (2000) [hereinafter *Statement of William Yellowtail*] (statement of William Yellowtail, Region VIII Administrator, U.S. Envtl. Prot. Agency).

45. For a narrative account of EPA's investigations in Libby from November 1999 to February 2000, see *Statement of William Yellowtail*, *supra* note, at 63–64. Early investigations included interviews, medical investigations, and environmental sampling. *Id.* at 64. The EPA later commenced, in conjunction with the Agency for Toxic Substances and Disease Registry (“ATSDR”), a medical screening of Libby residents. The results of these tests are published in Lucy A. Peipins et al., *Radiographic Abnormalities and Exposure to Asbestos-Contaminated Vermiculite in the Community of Libby, Montana, USA*, 111 NO. 14 ENVTL. HEALTH PERSP. 1753 (2003), available at <http://www.ehponline.org/members/2003/6346/6346.pdf>. As the Ninth Circuit noted, this study showed that eighteen percent of screened Libby adults showed signs of

By February 2000, the EPA had substantiated the claims made in the press⁴⁶ and determined that an immediate cleanup was needed.⁴⁷

On May 23, 2000, the EPA approved a proposal for a “time critical” removal action—exempt from CERCLA’s time and cost ceilings—directed towards the containment and removal of asbestos contamination in Libby.⁴⁸ The initial proposal covered two processing plants and was expected to cost no more than \$6 million.⁴⁹ As the cleanup progressed, however, further testing indicated that asbestos-contaminated vermiculite products and tailings were spread throughout Libby.⁵⁰

In 2002, the EPA expanded the removal action to cover many of Libby’s roads, schools, homes, and businesses.⁵¹ The project cost of EPA’s removal action in Libby increased drastically, in part because of Grace’s futile efforts to prevent the EPA from inspecting its properties.⁵² By June 2002, the EPA had

abnormalities that were much higher than the general population. *Grace Appeal*, *supra* note 1, at 1230. ATDSR has continued to study the long-term health effects of Libby vermiculite. Kevin Horton et al., *A Review of the Federal Government’s Health Activities in Response to Asbestos-Contaminated Ore Found in Libby, Montana*, 18 INHALATION TOXICOLOGY 925 (2006).

46. “This [initial] investigation confirmed two things. First, there [are] a large number of current and historic cases of asbestos related diseases centered around Libby Most disturbing . . . were 33 incidents of apparently non-occupational exposures The second thing our investigation confirmed was the high likelihood that significant amounts of asbestos contaminated vermiculite still remain in and around Libby.” *Statement of William Yellowtail*, *supra* note 44, at 64–65. Yellowtail’s statement was quoted in part in the Ninth Circuit’s opinion. *Grace Appeal*, *supra* note 1, at 1230.

47. Andrew Schneider, *Immediate cleanup sought in mining town*, SEATTLE POST-INTELLIGENCER, Feb. 2, 2000, <http://seattlepi.nwsourc.com/uncivilaction/lib02.shtml>. Although cleanups are usually limited where the hazardous substance in question is naturally occurring, they are permitted where there is a “public health or environmental emergency.” *Grace I*, *supra* note 5, at 1141 (citing CERCLA § 104(a)).

48. *Grace I*, *supra* note 5, at 1139; *see also Grace Appeal*, *supra* note 1, at 1230–31. The Action Memorandum, written by EPA’s on-site staff, lays out agency’s rationales for characterizing the action as “time critical.” Memorandum from Paul Peronard to Max H. Dodson (May 2000) (on file with author). Factors mentioned in the memo are the actual or potential exposure of nearby people to asbestos, the potential for further releases from storage sites, the potential for further releases due to soil and weather conditions, and the lack of then-existing government action to combat the problems. *Id.* at 10–12. These factors are all required by the NCP. 40 C.F.R. § 300.415(b) (2006).

49. *Grace Appeal*, *supra* note 1, at 1230.

50. *Id.* at 1231; Memorandum from Jack W. McGraw to Michael Shapiro (July 2001) [hereinafter *Second Action Memorandum*] (on file with author).

51. *Grace Appeal*, *supra* note 1, at 1231; *see also Second Action Memorandum*, *supra* note. *See* Memorandum from Jack W. McGraw to Marianne Lamont Horinko (May 2002) (on file with author).

52. *Second Action Memorandum*, *supra* note 50. *See United States v. W.R. Grace & Co.*, 134 F. Supp. 2d 1182, 1190 (D. Mont. 2001) (holding that CERCLA gives EPA a statutory right to access property); *see also Lewis Goldshore & Marsha Wolf*,

committed more than \$60 million to the Libby cleanup.⁵³ Libby was not added to the National Priorities List⁵⁴ until after the governor of Montana designated Libby as the state's highest priority site in October 2002.⁵⁵

III. UNITED STATES V. W. R. GRACE & CO.

A. Procedural Posture

The United States filed a cost recovery suit⁵⁶ against Grace in the United States District Court for the District of Montana on March 30, 2001.⁵⁷ Grace did not contest its liability for cleanup costs at the majority of sites throughout Libby.⁵⁸ Rather,⁵⁹ Grace asserted that the EPA acted without authority⁶⁰ when it

The Legacy of Libby, Montana, N.J.L.J., Jan. 26, 2006 (calling Grace's tactic a "blunder" and commenting that "trying to bar access to property is seldom, if ever, successful" and "tends to be counterproductive as [it] is certain to antagonize the agency staff").

53. *Asbestos Cleanup in Libby, MT: Hearing Before the S. Comm. On Environment and Public Works, Subcomm. on Superfund, Toxics, Risk, and Waste Management*, 107th Cong., 2d Sess. 47 (statement of Marianne Horinko, Assistant Administrator, Office of Solid Waste and Emergency Response, U.S. Env'tl. Prot. Agency).

54. National Priorities List for Uncontrolled Hazardous Waste Sites, 67 Fed. Reg. 65,315 (Oct. 24, 2002) (codified at 40 C.F.R. pt. 300 app. B (2006)). At the time of this article, EPA had not yet completed its RI/FS analyses for Libby. EPA, CERCLIS Database: Libby Asbestos Site, <http://cfpub.epa.gov/supercpad/cursites/cactinfo.cfm?id=0801744> (last visited Jan. 31, 2007).

55. Governor's Letter from Judy Martz to Max Dodson (Jan. 14, 2002), available at <http://www.epa.gov/superfund/sites/docrec/pdoc1661.pdf>. State governors are allowed to use this option only once. CERCLA § 105(a)(8)(B) (codified at 42 U.S.C. § 9605(a)(8)(B) (2000 & Supp. 2005)).

56. Owners, operators, arrangers, transporters, and disposers of hazardous substances are liable to the United States for, among other things, "all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan." CERCLA § 107(a)(4)(A) (codified at 42 U.S.C. § 9607(a)). See also CAROLE STERN SWITZER AND LYNN A. BULAN, CERCLA: COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT 25-26 (ABA Publishing 2002).

57. *Grace II*, *supra* note 19, at 1188.

58. *Grace I*, *supra* note 5, at 1145. Grace did dispute liability for the cleanup at several locations where it argued it had not "arranged for disposal" of contaminated vermiculite. *Id.* At trial, Grace conceded liability for most of those disputed sites. *Id.* at 1145; *Grace II*, *supra* note 19, at 1153.

59. *Grace I*, *supra* note 5, at 1145 (stating that "[i]f the EPA establishes that Grace is liable under CERCLA, the sole defense to being responsible for response costs is to establish that the response action was inconsistent with the NCP"). The defendant bears the burden of proof on this issue, which may be raised after the government sets forth a *prima facie* case for liability. *Id.* at 1144.

60. "In general, Defendants maintain that the EPA's response actions and the costs incurred are inconsistent with the National Contingency Plan" *Grace I*, *supra* note 5, at 1140.

undertook a “time critical removal action.”⁶¹ The district court, reviewing EPA’s selection under the standard of review set forth in section 113(j)(2) of CERCLA,⁶² rejected these assertions.⁶³ The district court noted that EPA considered the factors in the NCP when deciding which response action to select.⁶⁴ The court held that EPA’s selection was consistent with the Plan⁶⁵ and, therefore, was not arbitrary, capricious or otherwise not in accordance with law.⁶⁶ The district court ruled, accordingly, that it could not “second-guess” the EPA’s decision.⁶⁷ Following a bench trial on August 26, 2003, the government was awarded the entire amount that it sought, which included prejudgment interest and a declaratory judgment holding Grace liable for future costs.⁶⁸

Grace appealed to the United States Court of Appeals for the Ninth Circuit. Grace continued to object to EPA’s decision to undertake a “removal” action instead of a “remedial” action, and alleged that EPA sought to circumvent statutory caps on response cost and duration. Grace asserted that the district court’s analysis failed to take into consideration the reasonableness of EPA’s decision in light of the definitions of “removal” and “remedial” actions in the CERCLA statute. Grace argued that the district court, by signing off on the EPA’s consideration without comparing the actual substance of the selected response with the language of the CERCLA statute, had “abdicated” its judicial oversight of the EPA.⁶⁹ Moreover, Grace

61. *Id.* at 1141, 1144 (noting that Grace also asserted that the EPA had not properly accounted for its costs, the EPA did not have response authority for a naturally-occurring substance, and the threatened asbestos releases were the result of an act of god, act of war, or act or omission of a third party). *Id.* at 1147 (noting that Kootenai Development Corporation also asserted an innocent purchaser defense). The district court rejected all of these defenses. *Id.* at 1146–48.

62. 42 U.S.C. § 9613(j)(2) (2000 & Supp. 2005) (stating that “[i]n considering objections raised in any judicial action under this chapter, the court shall uphold the President’s decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law”).

63. *Grace I*, *supra* note 5, at 1143.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Grace I*, *supra* note 5, at 1144 (stating that “[b]ecause the EPA considered the factors set forth in the [national contingency plan], the Court cannot second-guess its conclusions. Therefore, the EPA’s actions are not inconsistent with the NCP, nor are they arbitrary and capricious or otherwise not in accordance with law”) (citing *United States v. Chapman*, 146 F.3d 1166, 1172–73 (9th Cir. 1998)).

68. *Grace II*, *supra* note 19, at 1153.

69. *Appellant’s Brief*, *supra* note 2, at 18–19.

objected to the EPA's accounting of response costs in Libby.⁷⁰

B. Holdings

1. The Removal Action

The Ninth Circuit held both that: (1) the EPA's decision to select a response, and (2) the EPA's characterization of the actions actually performed as part of that response were subject to judicial review.⁷¹

The circuit court affirmed the district court's holding that the EPA's decision to select a removal action as its first response in Libby was not arbitrary or capricious.⁷² The circuit court agreed with the district court judge that EPA properly considered the factors listed in the NCP when deciding to undertake a removal action.⁷³

Unlike the district court, however, the Ninth Circuit felt it necessary to "second-guess" whether the EPA's operations in Libby actually fell within the statutory scope of a removal action.⁷⁴

Before reviewing the EPA's operation, the Ninth Circuit had to determine what level of deference the EPA's interpretation of "removal" in the CERCLA statute would receive if the court found the statute to be ambiguous.⁷⁵ The Ninth Circuit's analysis was complicated⁷⁶ by the Supreme Court's 2001 decision in *United States v. Mead Corp.*,⁷⁷ which limited the scope of *Chevron* deference⁷⁸ to situations where Congress intended that an agency's interpretation would be controlling.⁷⁹ The Ninth Circuit,

70. *Grace Appeal*, *supra* note 1, at 1226.

71. *Id.* at 1233 (construing CERCLA § 113(j)).

72. *Id.* at 1234.

73. *Id.* at 1232–33.

74. *Id.* at 1234–35.

75. *Id.* at 1235.

76. *Id.*

77. 533 U.S. 218 (2001).

78. *See Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984). The *Chevron* court held that an agency interpretation of a statute it administers is "given controlling weight" where (1) Congress has not "directly spoken to the precise question at issue" and (2) "the agency's answer is a permissible construction of the statute." *Id.* at 843–44.

79. *Mead*, *supra* note 77, at 218, 231 n.11 (quoting Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEORGETOWN L. J. 833, 872 (2001) (noting that "[i]f *Chevron* rests on a presumption about congressional intent, then *Chevron* should apply only where Congress would want *Chevron* to apply . . . it is therefore important to determine whether a plausible case can be made that Congress would want such a delegation to mean that agencies enjoy primary interpretational authority").

noting that the applicability of *Chevron* deference to informal agency decisions after *Mead* is “fraught with ambiguity,”⁸⁰ analogized⁸¹ the *Grace* case to the Supreme Court’s recent decision in *Alaska Dep’t of Env’tl. Conservation v. EPA*⁸² and concluded that, given a finding that the statute was ambiguous, EPA’s interpretation when characterizing the Libby response action⁸³ was entitled to, at a minimum, “respect.”⁸⁴

In determining the amount of “respect” to accord EPA in this case, the Ninth Circuit reviewed the text, policy, and legislative history of CERCLA. The court determined that the statutory definitions of “removal” and “remedial” were ambiguous, inclusive, and overlapping.⁸⁵ Because the court concluded that “[a]ttempting to untie the Gordian knot of these definitions solely based on their plain meanings is . . . unavailing,”⁸⁶ and because it could not deduce a clear meaning by reviewing the statute as a whole,⁸⁷ the statute’s purposes,⁸⁸ or the statute’s legislative

80. *Grace Appeal*, *supra* note 1, at 1235. The Ninth Circuit endeavored to determine the amount of deference due to the EPA based on the form of the agency action. *Id.* at 1241. Because recent Supreme Court cases, such as *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.* 545 U.S. 967 (2005), have made it unclear whether *Chevron* deference only adheres to formal rulemaking or to less formal agency decisions, the Ninth Circuit struggled to find a clear rule dictating *Chevron*’s applicability. *Grace Appeal*, *supra* note 1, at 1235, 1241.

81. *Id.* at 1236.

82. 540 U.S. 461 (2004) [hereinafter *ADEC*]. In *ADEC*, the Supreme Court affirmed the Ninth Circuit’s holding that the EPA’s internal guidance memos were entitled to “respect,” but not full *Chevron* deference. *Id.* at 487–88, 495. The guidance memos interpreted section 113 of the Clean Air Act as authorizing the EPA to issue stop-construction orders when the EPA found that a state permitting authority made an unreasonable determination of Best Available Control Technology (“BACT”) when issuing a Prevention of Significant Deterioration (“PSD”) permit. *Id.* at 468–69 (interpreting 42 U.S.C. § 7413 (2000 & Supp. 2005)).

83. The court noted that full *Chevron* deference applied to the NCP itself. *Grace Appeal*, *supra* note 1, at 1241.

84. *Grace Appeal*, *supra* note 1, at 1236 (quoting *ADEC*, *supra* note 82, at 488). The *Mead* court noted that “*Chevron* did nothing to eliminate *Skidmore*’s holding that an agency’s interpretation may merit some deference whatever its form, given the ‘specialized experience and broader investigations and information’ available to the agency . . . and given the value of uniformity in its administrative and judicial understandings of what a national law requires.” *Mead*, *supra* note 77, at 234–35 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944)). The Ninth Circuit uses “respect” in this context as shorthand for the qualified deference (i.e. giving less than controlling weight to the agency’s interpretation) envisioned in *Skidmore*. *Grace Appeal*, *supra* note 1, at 1237.

85. *Id.* at 1238–41. The court noted that both definitions are broad and written in “sweeping language.” *Id.* at 1238. *See supra* notes 9–10. Moreover, both definitions include “provision of alternative water supplies” in their (inclusive) lists of prototypical responses. *Grace Appeal*, *supra* note 1, at 1239. *See supra* notes 9–10.

86. *Grace Appeal*, *supra* note 1, at 1239.

87. *Id.* at 1239 (noting that “[t]he statute as a whole, however, does little to clarify

history,⁸⁹ the court held that Congress had not laid down an unambiguous distinction between “removal” and “remedial” language in CERCLA.⁹⁰

Having concluded that the statute did not provide a clear-cut answer to this dilemma, the court then considered whether EPA’s solution was an acceptable one. While Grace contended that many of the projects undertaken in Libby were designed to permanently abate the threat of asbestos contamination,⁹¹ the Ninth Circuit refused to engage in “cherry-picking” and viewed the entire operation as one response action.⁹² Because the court found that “[t]he need for immediate action permeates the EPA’s activities in Libby,”⁹³ the court concluded that the EPA’s characterization of its response as a removal action to be a rational interpretation of CERCLA, consistent with the NCP and with its own internal policies.⁹⁴ Accordingly, the court held that EPA’s response actions in this case constituted a “removal” as a matter of law.⁹⁵ Nevertheless, it cautioned the EPA that “there must be outer limits to removal actions” and that it would not turn a blind eye to similar cases in the future.⁹⁶ The court, however, declined to indicate what such limits might be.⁹⁷

2. Propriety of “Time Critical” Action

The Ninth Circuit, having upheld the EPA’s characterization of its response as a “removal action,” next determined that the EPA was not arbitrary or capricious in finding that the statutory

how to categorize a given response action except to suggest that remedial actions may be ‘long term’”).

88. *Id.* at 1240 (noting that, although the statute requires that it be construed liberally to protect public health, this does not help the court in distinguishing between removal and remedial actions).

89. *Id.* at 1240–41 (noting that legislative history is “particularly unhelpful because of the haphazard passage of CERCLA with many of the more lucid descriptions of the statute falling under the oxymoronic category of post-enactment ‘history’”).

90. *Id.* at 1241 (stating that the court is “unable to discern Congress’s clear intent through the normal tools of statutory interpretation . . . [t]he meanings of ‘removal’ and ‘remedial action’ under CERCLA are inescapably vague”).

91. *Appellant’s Brief*, *supra* note 2, at 27–28.

92. *Grace Appeal*, *supra* note 1, at 1237. *See id.* at 1251–52 (Bea, J., concurring) (stating that “I write separately to emphasize that this court should stand ready to review separately the EPA’s actions at different locations at a removal site under the ‘arbitrary and capricious’ standard . . .”).

93. *Id.* at 1242.

94. *Id.* at 1247.

95. *Id.* at 1241, 1247.

96. *Id.* at 1247.

97. *Grace Appeal*, *supra* note 1, at 1247.

cost and duration caps⁹⁸ did not apply to its “time critical” response.⁹⁹ The court agreed with the EPA that it was not irrational to find that asbestos contamination constituted an “emergency”¹⁰⁰ and found it reasonable that cleaning up an entire town—particularly in a climate as harsh as that of northwestern Montana—would necessarily take longer than a year and cost more than \$2 million.¹⁰¹

3. Accounting of Response Costs

Finally, the Ninth Circuit found that the EPA and the district court did not improperly account for the EPA’s indirect costs in Libby.¹⁰² The dispute over indirect costs arose because of the EPA’s decision to assign indirect costs as a percentage of per-site costs instead of using a per-hour basis for assigning costs.¹⁰³

IV. CONCLUSION

The Ninth Circuit admitted that it upheld the EPA’s actions in Libby, Montana, in large part, because of the unique threat that the residents of Libby faced.¹⁰⁴ In doing so, however, the court further clouded the distinction¹⁰⁵ between removal and remedial actions under CERCLA by giving the government considerable discretion in selecting and characterizing responses to releases of hazardous substances. This may result in the government responding to environmental disasters more rapidly, if that discretion is used wisely. However, as Grace suggested, this may result in an overly-cautious and inefficient response if EPA does not feel constrained by the statute.¹⁰⁶ Congress may need to clarify or redefine the distinction between removal and

98. CERCLA § 104(c)(1) (codified at 42 U.S.C. § 9604(c)(1) (2000 & Supp. 2005)).

99. *Grace Appeal*, *supra* note 1, at 1248 (noting that the issue is whether the EPA properly found that a continued response was “immediately required to prevent, limit, or mitigate an emergency,” whether there was “an immediate risk to public health or welfare or the environment,” and whether “such assistance will not otherwise be provided on a timely basis”) (citing CERCLA § 104(c)(1)).

100. *Id.* at 1247–48.

101. *Id.* at 1249.

102. *Id.* at 1249–50.

103. *Id.* (describing indirect per-site costs as site-specific costs that include “administrative and other overhead costs incurred in managing the greater Superfund program”).

104. *Id.* at 1226–27 (“We cannot escape the fact that people are sick and dying as a result of this continuing exposure”).

105. *See Anderson*, *supra* note 16, at 103.

106. *Appellant’s Brief*, *supra* note 2, at 36.

remediation¹⁰⁷ if this ruling is read broadly by the courts. Moreover, this case makes it clear that, post-*Mead*, Congress should carefully indicate what amount of deference EPA's decisions should be accorded if it wishes to insure the independence of administrative agencies such as EPA.¹⁰⁸

Moreover, the Ninth Circuit's opinion illustrates that "ambiguity" is in the eye of the beholder. Arguably, the Ninth Circuit's willingness to find ambiguities in statutory language—the threshold question for a *Chevron* deference analysis—and accord deference to the EPA was as strong or stronger in this case as it was in other recent cases where Congressional intent was meritoriously debatable and where *Chevron* deference might have been accorded but for a finding that the statutory language was "unambiguous."¹⁰⁹

Furthermore, the *Grace* case does little to rectify the ambiguities associated with the different levels of deference that agency interpretations receive when statutes are unclear. As the Ninth Circuit noted, the distinction is already unclear. The court, rather than attempting to divine a rule from the case law, seems to have simply given up. The court started down the path of analyzing *Chevron*'s applicability but then abruptly declared the question moot.¹¹⁰ Additionally, the court made generous

107. Anderson, *supra* note 16, at 152–53.

108. This is especially true for CERCLA because Congressional intent is infamously enigmatic. Thomas G. Kessler, Comment, *The Land Remediation and Environmental Remediation Standards Act: Pennsylvania Tells CERCLA Enough is Enough*, 8 VILL. ENVTL. L. J. 161, 162 & 165–66 (1997) (stating that CERCLA is "confusing," "infamously known for its poor draftsmanship and ambiguous statutory construction," and often leads to "undesirable" outcomes).

109. See, e.g., *Mass. v. U.S. Env'tl. Prot. Agency*, ___ U.S. ___, 2007 WL 957332 (Apr. 2, 2007) (applying the *Chevron* two-step analysis and holding that the Clean Air Act unambiguously requires EPA to regulate carbon dioxide as an air pollutant); *United States v. Duke Energy Corp.*, 411 F.3d 539 (4th Cir. 2005), *aff'd sub nom.* *Env'tl. Defense v. Duke Energy Corp.*, ___ U.S. ___, 2007 WL 957002 (Apr. 2, 2007) (applying *Chevron* and holding, under step one, that Clean Air Act unambiguously required the same definition of "modification" for both New Source Performance Standards and Prevention of Significant Deterioration programs); *New York v. U.S. Env'tl. Prot. Agency*, 443 F.3d 880 (D.C. Cir. 2006) (applying the *Chevron* two-step analysis and holding, under step one, that the Clean Air Act unambiguously requires New Source Review for "any physical change" that increases emissions); *Friends of the Earth, Inc. v. U.S. Env'tl. Prot. Agency*, 446 F.3d 140 (D.C. Cir. 2006) (applying *Chevron* two-step analysis and holding, under step one, that phrase "total maximum daily load" in the Clean Water Act unambiguously requires water standards based on daily, and not seasonal or annual, loads).

110. *Grace Appeal*, *supra* note 1, at 1236 ("But either under modified deference or full *Chevron* deference, the result would be the same: The EPA's cleanup activities in Libby are properly categorized as a removal action"). Moreover, the Ninth Circuit's tone seems to suggest that it thinks that it is inappropriate to use the formality of an agency's decision-making process as a limitation on *Chevron* (or as a proxy for legislative intent

assumptions when it reviewed EPA's actions—for example, refusing to “cherry-pick”—that helped erase whatever meaningful distinction between full *Chevron* deference and mere respect that might have been made.¹¹¹ The Ninth Circuit's opinion is another data point illustrating the widening fissure between cases, such as this one, where constitutional issues are not raised and cases where the constitutionality of an underlying statute was directly at issue.¹¹² By deepening the distinction between traditional and “constitutionalized”¹¹³ cases, the Ninth Circuit's ruling here may encourage new constitutional attacks on CERCLA and other statutes by defendants and judges looking for an “out.”¹¹⁴

Unfortunately, the Ninth Circuit's ruling in this case could not and did not end the problems stemming from contaminated Libby vermiculite. Asbestos-contaminated vermiculite was shipped all around the world,¹¹⁵ and other communities may be at risk.¹¹⁶ Insulation made from Libby vermiculite—installed in

under a *Mead* analysis). Its actions in this case certainly imply that it might simply broaden *Skidmore/ADEC* “respect” to undercut any such limitations on *Chevron*'s applicability, regardless of how the chips may fall.

111. See *supra* note 92 & accompanying text.

112. See, e.g., *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172–73 (2001) (stating that “[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result”); *Rapanos v. United States*, ___ U.S. ___, 126 S. Ct. 2208, 2266 (2006) (Breyer, J., dissenting).

113. See Robin Kundis Craig, *The Commerce Clause Reach of the Clean Water Act: The Courts of Appeals' Debate in the Shadow of SWANCC, Rapanos, and Carabell*, 2 ABA CONST. L. TASK FORCE NEWSLETTER 2 (Apr. 2006), available at <http://www.abanet.org/envirom/committees/constlaw/newsletter/apr06/conlaw0406.pdf> (stating that “one net effect of SWANCC has been the constitutionalization of deference to administrative agencies, with the applicability of *Chevron* deference now turning on the constitutional soundness of a regulatory program”)

114. Judge Michael Luttig has criticized those who wish to “dismantl[e] historic federal protections and ‘[s]lap[] the national ability to safeguard natural resources’ as reflecting “an indiscriminate willingness to constitutionalize recurrent political controversies [that] will weaken democratic authority and spell no end of trouble for the courts.” *Gibbs v. Babbitt*, 214 F.3d 483, 504–05 (4th Cir. 2000) (Luttig, J.) (quoted in NATURAL RESOURCE DEFENSE COUNCIL, *HOSTILE ENVIRONMENT: HOW ACTIVIST JUDGES THREATEN OUR AIR, WATER, AND LAND* 2 (July 2001), available at <http://www.nrdc.org/legislation/hostile/hostile.pdf>).

115. *AN AIR THAT KILLS*, *supra* note 6, at 403 (noting that Libby vermiculite was shipped to at least 563 locations in the United States, 187 locations in Canada, and locations in Europe, Asia and Latin America).

116. See, e.g., James Kelly et al., *Community Exposure to Asbestos From a Vermiculite Exfoliation Plant in NE Minneapolis*, 18 INHALATION TOXICOLOGY 941, 946 (2006) (discussing occupational and community exposure to contaminated vermiculite around a Minneapolis, Minnesota factory and noting documented cases of Libby-related asbestosis at a similar factory in California); Horton, *supra* note 45, at 930–31 (stating that ATDSR and state health agencies are currently investigating 28 sites across

millions of American homes—may pose a continuing risk to broad segments of the nation.¹¹⁷ Both of these threats might result in further litigation; claims might be brought under CERCLA or state common law theories such as products liability.¹¹⁸ Meanwhile, asbestos litigation reform legislation grinds on in Congress.¹¹⁹ For Grace, pending bankruptcy¹²⁰ and criminal proceedings¹²¹—both stemming from asbestos contamination—continue.

Jim Dallas

the United States for Libby-related contamination).

117. AN AIR THAT KILLS, *supra* note 6, at 234–39; *see also* Sonja Lee, *Zonolite Insulation Lurks in Attics Here, Across Nation*, GREAT FALLS TRIBUNE, Dec. 14, 2003, <http://www.greatfallstribune.com/news/stories/20040308/localnews/45295.html> (last visited Feb. 2, 2007).

118. At least one class-action suit arising out of Zonolite attic insulation has already been filed. *Barbanti v. W.R. Grace & Co.-Conn.*, 2000 WL 35449109 (Wash. Super. Ct., Mar. 24, 2000). The complaint asserts claims based on products liability and deceptive trade practices. *Id.* at ¶¶ VI & VII; *see also* Karen Dorn, *Project ‘set off a time bomb’*, SPOKANE SPOKESMAN-REV., Jan. 21, 2003, at A1 (discussing the backgrounds of the *Barbanti* plaintiffs). The suit was stayed in 2003 due to Grace’s pending bankruptcy. Karen Dorn, *Asbestos claims against Grace on hold*, SPOKANE SPOKESMAN-REV., Nov. 25, 2003, at B1.

119. *See, e.g., The Fairness in Asbestos Injury Resolution Act: Hearing on S. 852 Before the S. Comm. on the Judiciary*, 109th Cong. (2005); *see also* Marcia Coyle, *Will Tort Reform Fade as New Priorities Emerge for Congress?*, NAT’L L. J., Nov. 13, 2006, <http://www.law.com/jsp/article.jsp?id=1163449248503> (last visited Nov. 22, 2006) (noting that the Democrat-controlled 110th Congress may pass asbestos reform legislation).

120. In re *W.R. Grace & Co.*, 285 B.R. 148 (Bankr. D. Del. 2002). *See also* AN AIR THAT KILLS, *supra* note 6, at 320–21 (providing a narrative account of Grace’s bankruptcy); *see generally* Heenan, *supra* note 39 (providing a narrative account of Grace’s bankruptcy from a corporate law perspective).

121. *United States v. W.R. Grace & Co.*, No. 05-00007 (D. Mont. 2005), *available at* <http://files.findlaw.com/news.findlaw.com/wp/docs/asbestos/uswrgace20705ind.pdf> (stating that the company and its current and former executives were indicted on one count of conspiracy, three violations of the Clean Air Act, two counts of wire fraud, and four counts of obstruction of justice).