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Why the *Ohio* Case Shouldn't Matter

ABSTRACT

The significance of the court's decision in Ohio v. Interior Dept. is easy to overstate, since the court held only that the Interior Department had not acted capriciously in including contingent valuation methodology (CVM) among several alternatives available for the conduct of natural resources damage assessments (NRDAs). In practice, many procedural and institutional safeguards will protect us from erroneous NRDAs. In any event, the entire NRDA process is overly complicated, virtually impossible to administer and of uncertain utility. Consideration should be given to abandoning it altogether, or at least to replacing it with a surcharge on response and remediation costs.

I. INTRODUCTION

Considering some of the things we lawyers have been called recently, it is refreshing to participate in this economists' exercise, since the worst I will legitimately be called as a result is a "dog in the manger." Not only is this relatively benign in itself, but it is also a role for which I have volunteered in this context, on two scores.

In the first place, I believe that the "lightning rod" paper by Messrs. Cummings and Harrison proceeds on the basis of two unstated but faulty assumptions: (1) that the decision of the Court of Appeals *in State of Ohio v. U.S. Department of the Interior*[1] was significant in terms of the impact of the Contingent Valuation Method (CVM) on future litigation; and (2) that the assessment of natural resource damages is, or will become, a significant aspect of our developing jurisprudence under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, or "Superfund").[2] Part II of this comment attempts to demonstrate that both of these assumptions are unwarranted and that a rigorous critique of CVM is therefore quixotic.

As if that were not sufficiently mean-spirited and belittling of the efforts of the co-contributing economists, I have also volunteered for the present assignment to repeat publicly, with renewed conviction,

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1. 880 F.2d 432 (D.C. Cir. 1989).

2. 42 U.S.C. §§ 9601-9675.

what I have stated before[3]: that the natural resource damage assessment (NRDA) provisions of Superfund—like those of the closely-related Oil Pollution Act of 1990[4] —are so exquisitely complex that their implementation is simply not worth the bother. This point is expanded on briefly in Part III. For those so annoyed by its brazenness that they are unable to steel themselves to read Part III, its thrust may be captured by the following unembellished factual statement of our current status:

> Half a score and four years have passed since Superfund was enacted. After elaborate study and protracted public debate, the Department of the Interior (DOI) promulgated federal regulations, as (but later than) required, to govern the assessment of damages for injuries inflicted on certain natural resources by spills of "hazardous substances", as well as by oil spills covered by Section 311 of the Clean Water Act.[5] These regulations were overturned in major respects by a federal court of appeals. In response, DOI returned to Square One, by publishing in the Federal Register an Advance Notice of Proposed Rulemaking (ANPR)[6] to see if members of the public might shed some light on a proper response to the court's mandate. Soon thereafter, Congress stripped DOI of its authority in respect of NRDA regulations applicable to oil spills, vesting it in the National Oceanic and Atmospheric Administration (NOAA) of the Department of Commerce.[7] Over five years have passed, and NOAA has not reached any final decisions on issues addressed almost three years previously by the *Ohio* court, and by DOI before that. After publishing no less than eight preliminary notices in the Federal Register and receiving the advice of a special advisory panel convened to evaluate CVM, NOAA has at last published proposed regulations,[8] the period for public comment currently extended through July 7, 1994. We are now engaged in an academic debate, with at least eight initial participants, as to whether one candidate methodology for NRDA—CVM—is accurate enough to be used in litigation.

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3. R. McManus, *Natural Resources Damages Under Section 311*, Oil Spills: Management and Legislative Implications (M. Spaulding & M. Reed, eds., 1990); R. McManus, *Natural Resource Damages Under Superfund*, 22 Nat. Res. L. Newsletter (ABA) 19 (Fall, 1990).
4. Pub. L. 101-380, 104 Stat. 484 (Aug. 18, 1990) 33 U.S.C. §§ 2701-2761.
5. 33 U.S.C. § 1321.
6. 54 Fed. Reg. 39,016 (Sept. 22, 1989).
7. Oil Pollution Act of 1990, Sec. 1006(e)(1), 33 U.S.C. §§ 2706(e) (1) (1991).
8. 59 Fed. Reg. 1062 (Jan. 7, 1994).

In a better world, the participants in this debate would be otherwise occupied, for essentially the same reason that all golf courses should be plowed up and planted to sorghum.

II. OVERSTATEMENT COMPOUNDED

The first of the unpleasant points made in this paper is that the present exercise proceeds on an erroneous perception—perhaps a reflection of somebody's worst fears—of the importance of the *Ohio* court's treatment of CVM. In fact, the court's holding and discussion on this score were completely predictable, surprising to no one and subject to so many qualifications in practice that it is almost impossible to avoid overstating the case's significance.

A. What the *Ohio* Court Did

At the outset, it is worth restating exactly what the *Ohio* court actually did and said in respect of CVM, as dealt with in DOI's NRDA regulations.

The regulations reviewed in the Ohio litigation included provisions designed to assist the designated public "trustees" in calculating the damages due for injury to natural resources. The regulations provided that the actual costs of restoration were one measure of such damages.[9] Another measure was "use value," defined as

> the value to the public of recreational or other public uses of the resource, as measured by changes in consumer surplus, any fees or other payments collectable by the [trustee] for a private party's use of the natural resource, and any economic rent accruing to a private party because the [trustee] does not charge a fee or price for the use of the resource.[10]

Lost use value was to be determined by the diminution in market price where the injured resource is in fact traded in a market, or by an appraisal technique in cases where a comparable resource is traded. In other cases, the regulations sanctioned the use of nonmarket methodologies, including CVM.[11] The statutory basis for the designation of any NRDA methodology, including CVM, is found in section 301 of Superfund, which requires in pertinent part that the NRDA regulations identify "the best available procedures" for quantifying damages for injury to natural resources."[12]

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9. 43 C.F.R. § 11.81.
10. *Id.* at § 11. 83 (b) (1).
11. *Id.* § 11.83(d). The proposed NDAA regulations would do likewise. *See*, 59 Fed. Reg. 1062, 1182 (Jan 7, 1994).
12. 42 U.S.C. § 9651(c)(2).

Some (but a minority) of the industry challengers of the DOI regulations included claims that DOI had acted unlawfully in including CVM among the procedures that a Superfund trustee might use where market-based methodologies were inapposite. In plain English, the petitioners' claim was simply that CVM is too imprecise, leading to speculation and generally to inflated price tags on damaged resources. In legal terms, the petitioners claimed that DOI had behaved contrary to the statute in determining, after notice-and-comment rulemaking, that CVM constituted a "best available procedure" within the meaning of Section 301. As a separate facet of their argument, the petitioners claimed that it was also "arbitrary and capricious" for DOI to invest a NRDA based on CVM with the "rebuttable presumption" of correctness accorded DOI's designated assessment procedures by section 107 of Superfund.[13] In fact, the petitioners continued, it violated their rights to due process of law under the United States Constitution to accord CVM the evidentiary weight of presumptive correctness.

The *Ohio* court rejected all these arguments (which a nonlawyer might be forgiven for considering restatements of the same objection). In what is arguably the key passage of the opinion on this score, the court stated, "It cannot be gainsaid that DOI's decision to adopt [CVM] was made intelligently and cautiously," since DOI had, after all, examined 23 studies of CVM and had actually modified the procedure described in its proposed rule in at least one respect favorable to the petitioners.[14] Accordingly, the court found DOI's behavior "reasonable and consistent with congressional intent, and therefore worthy of deference."[15] On essentially the same basis, the court stated separately its determination that DOI had not acted arbitrarily and capriciously in according CVM the statutory "rebuttable presumption" of correctness to which it was entitled by virtue of its inclusion among the "best available procedures."[16]

B. The Elements of Overstatement

As stated previously, the *Ohio* court' s holding and opinion regarding CVM are simply not very important to the future course of litigation under Section 107(f) of Superfund. At least six discrete considerations lead to this assessment.

In the first place, it is easy to forget what the Ohio court did not (and could not) do at the time of its decision in 1989: it did not uphold a judgment awarding damages based on a NRDA which was

13. 42 U.S.C. § 9607(f)(2)(C).
14. 880 F.2d at 476, n. 83 at 477.
15. *Id.* at 477.
16. *Id.* at 479.

based in turn on CVM. If academic economists believe that CVM is in fact too speculative or is biased towards inflated statements of damages, they should reserve their loudest complaints for the day when a governmental trustee actually obtains such a judgment and collects it from the party or parties responsible for a spill. The *Ohio* case did not even come close. Notwithstanding the court's holding on this relatively minor aspect of the case before it, a reasonable possibility remains that justice can still be done when actual cases arise.

And, it should be noted in passing, the court's assessment of CVM was indeed a "relatively minor" aspect of the case. Among eleven separate challenges, it was the last point that the court considered. It was raised by only three of the industry litigants; and, although the reported opinion does not establish the fact, it is a fair inference that counsel considered the challenge a long shot, relegated to the tail end of their briefs. Admittedly, courts can do great damage in responding to tenuous arguments or secondary challenges. But this was not done in *Ohio*, and an assessment of the impact of the case's discussion of CVM would probably benefit by being viewed in its proper perspective, as a minor thread of a sprawling administrative law case.

But that, of course, is merely a matter of tone. For present purposes, it is far more important that commentators recall the standard of review that the *Ohio* court was required to use in ruling on challenges to DOI's work-product. Like most federal regulations not subject to specially-tailored procedures, the NRDA regulations were subject only to the general requirements of the Administrative Procedure Act (APA)[17] and to its "informal rulemaking" procedures in particular. These generally require notice to the public of proposed rules, followed by a reasonable opportunity for written comment. As currently construed and implemented, they also require some sensate response to comments received, and publication of such responses in the preamble to agencies' final rulemaking actions. Those actions are subject to judicial review; in such cases, a reviewing court is required to uphold an agency decision unless it is "arbitrary and capricious."[18]

While such a standard permits a good deal of subjectivity in reviewing the fruits of bureaucracy, it is properly regarded as highly deferential to the administrative agencies. To put it another way, a reviewing court is required to uphold an agency rule against a challenge under the APA even if the court would have reached a different result, unless—in the formulation repeated by the *Ohio* court—the agency has

> relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of a

17. 5 U.S.C. §§ 500-706.
18. 5 U.S.C § 706(2)(A).

> problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[19]

If the deferential nature of this standard is borne in mind, the *Ohio* court's decision "upholding" CVM begins to look less like a ringing endorsement, and more like a perfunctory written assurance that DOI had actually thought seriously about the matter before admitting CVM to the list of "best available procedures."

And, on the record revealed by the published opinion, it was clear that DOI had done so: it examined 23 studies of CVM, and it compiled an annotated bibliography of 323 articles and studies, ". . . including many treatises addressing CV methodology . . . ;" it even modified the final rule on CVM in response to critical comments.[20] Granted that hindsight is always 20/20, this record had all the earmarks of an agency rulemaking decision that would withstand judicial review under the relatively permissive standard of the APA. It would therefore be a mistake to view the court's holding as a judicial endorsement of CVM following full and fair academic debate.

Just as it is easy to overstate the extent to which the *Ohio* court actually approved CVM, it is easy to exaggerate the practical effect of the decision. In a case actually brought to trial, the trial court would have great leeway in excluding, discounting or ignoring CVM evidence adduced by a trustee in support of a specific dollar claim. A trial court that excludes a given piece of evidence will not be reversed on that ground unless its decision was "clearly erroneous." Therefore, since the critique of Messrs. Cummings and Harrison suggests—at least to this lawyer—that CVM studies of particular spills will reveal ample bases of attack, the DOI regulations will seldom compel the admission of specific studies, and trial courts will often be able to exclude CVM evidence.

Beyond questions of admissibility, of course, lie questions of the weight to be accorded particular pieces of evidence. Even if a CVM study is admitted as probative of damages in a particular case, Superfund certainly does not require that its results be conclusive—as already noted, even a study based on a "best available procedure" is subject to rebuttal. Critiques of CVM like the Cummings and Harrison submission suggest, in addition, that a trial judge will have almost boundless freedom to accord little weight to CVM studies offered as proof of specific dollar amounts in particular cases. Admittedly, the statutory

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19. 880 F.2d at 479, quoting *Motor Vehicle Mfrs. Assn. v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 43 (1983).

20. See *supra* note 14.

provision which accords NRDAs based on "best available procedures" the benefit of a rebuttable presumption does not specify what sort of evidence, or how much of it, is required to overcome the presumption, and predicting the future course of litigation is always risky business. But, in the absence of statutory guidance, decisions on what is needed to overcome the presumption will proceed on a case by-case basis. There is no reason to believe that expert testimony on the inadequacy of CVM, generally or as applied to a particular spill, would not be both (1) admissible and (2) sufficient to overcome the presumption created by the DOI regulation upheld in *Ohio*.

In sum, our litigation process has safety valves that should relieve pressure to render judgments on the basis of flawed or inapposite economic methodology. In addition to those procedural safety valves, a number of other practical factors would tend to mitigate any distortions in results that might be attributable to CVM. First and most obviously, most lawsuits do not go to trial. The vast majority of them are settled. There is no reason to believe that this will not be so in respect of NRDAs. And, to the extent a quick survey of cases under both Section 311 of the Clean Water Act and Section 107(f) of Superfund has predictive value, it will be so: only one reported federal case has yet ruled on the adequacy of a given NRDA.[21]

Admittedly, the kind of methodology inferably dissected by DOI in developing the NRDA regulations and criticized in the present volume would be important if it were expected to yield answers, in dollars, that real defendants must actually pay. But the strong incentives that our judicial system gives to extrajudicial settlement virtually guarantee that few, if any, NRDAs will bear such a burden in practice. When push comes to shove, the marginal effect on a settlement attributable to the flawed application of CVM will be lost in the static. Availability of resources, timeliness of payment and the enormous transaction costs of actually litigating the dollar value of damaged public natural resources will each have far greater influence on settlements than the opinions of consulting economists, based in turn on the public surveys central to CVM.

Even if the only type of damage claim arising from a spill were the trustees' claims for natural resource injuries, it would be a safe bet that most of them would not go to trial. But in fact, this type of claim is only one in a constellation of legal remedies available in the aftermath of a serious spill. Under Section 107 of Superfund, the party or parties responsible for the release of a hazardous substance will be liable to just about everybody, public or private, for costs incurred in

21. *Idaho v. Southern Refrigerated Transport*, 1991 Westlaw 22479 (D.Idaho 1991)(use of CVM evidence disallowed).

cleaning up the spill in accordance with the National Contingency Plan.[22] They will be subject to an order under Section 106 to engage in long-term remediation, and to civil penalties for failure to comply;[23] or, if the government disburses funds under Superfund, the spillers will be liable for reimbursement. Beyond Superfund, they will be liable to private entities for damages other than clean-up costs—such as lost business revenues. The more litigants and the more causes of action in the wake of a spill, the less weight any particular element of damages will have in the settlement negotiations.

Consider, for example, the aftermath of the Exxon Valdez awkwardness: after some two and a half years of negotiations, the parties announced a settlement whereby Exxon would pay out $1.125 billion dollars (having already laid out, Exxon claimed, $2.5 billion). Of the settlement amount, $100 million was described as "restitution for environmental damage," to be shared equally by the federal and Alaska governments.[24] One suspects that the size of these $50 million chunks depended not at all on careful damage assessments, let alone consideration of the appropriateness of CVM in arriving at a theoretically defensible quantification. Predictably, it will be a highly unusual case in which CVM has any discernible effect on the amount of money that changes hands.

If, then, deficiencies in CVM will be correctable in the process of litigation, and if uncorrected deficiencies will predictably have almost no impact on real-world results, it remains to be seen whether any other factors would tend to minimize even further the significance of the present academic debate among economists. Two factors would.

First, NRDAs will probably not be invoked very often, and those potentially dependent on CVM will be invoked even less often. The basic premise of the statutory provisions authorizing trustees' recoveries for natural resource damages is that a *public* resource has been harmed, and that, as a result, the public has suffered some detriment in addition to the costs of short-term clean-up or longer-term remediation. Most real estate contiguous to the industrial activities of production and transportation of designated "hazardous substances" are privately owned, and therefore probably not covered by Superfund's definition of—one of "natural resources".[25] The obvious major exception particular relevance to oil spills—relates to spills into waterways. Not only are most waterways public property, but their physical na-

22. 42 U.S.C. §§ 9605, 9607(a)(4)(A), (B).

23. *Id.* § 9606.

24. 22 Env. Rptr. 1403 (Current Developments, Oct. 4, 1991).

25. Section 101(16), 42 U.S.C. § 9601(16). It is unnecessary, however, that legal title to the damaged resources be held by government. Some privately-owned resources may "appertain to public entities for these purposes, although the only example offered on this score by the *Ohio* court was private tidelands subject to a right of public access. 880 F.2d at 432.

ture will tend to spread the effects of a spill far beyond the area originally impacted, as in the case of the Exxon Valdez spill. In most spill situations, however, public resources will not be damaged in a manner leading to destruction or substantial loss of use during their restoration. Accordingly, trustees' actions implicating NRDAs and CVM will predictably be rare.

Even when such claims are made, moreover, the DOI rules upheld in Ohio will not always come into play. It must be recalled that Section 301 of Superfund requires two sets of NRDA procedures: those "simplified assessments" governing relatively small spills ("Type A assessments") and those based on the individualized consideration and extensive field research appropriate to major spills ("Type B assessments").[26] DOI had separately promulgated procedures for Type A assessments, consisting essentially of a computer model known as the Natural Resource Damage Assessment Model for Coastal and Marine Environments (NRDAM/CME"),[27] procedures which were upheld in *Ohio's* companion case .[28] The CVM methodology that was at issue in *Ohio* and that provides the subject matter of the present exercise will not come into play in spill situations in which federal trustees resort to Type A assessments. Thus, the universe of cases in which the perceived deficiencies of CVM are of any consequence continues to dwindle.

Finally, the significance of those deficiencies will be further minimized in practice by one more factor that goes beyond the conduct of trials, the economic impact of NRDAs or the frequency of NRDAs based even partially on CVM. It is this: Whatever distortions might be attributable to CVM as applied to particular cases, those distortions will have no effect on the behavior of other potentially responsible parties.

Such effects, after all, are what makes litigation important to society at large, and what makes legal doctrine of broader social importance. Legal doctrine which takes economics into account erroneously or inadequately is bad legal doctrine—not merely because it fails to deliver justice to the litigants in those cases that are actually brought, but because it distorts the decisionmaking of the far greater number of those who are only potential litigants. Thus, most businesses have not in fact been antitrust defendants, but their behavior towards their competitors is governed in large measure by antitrust doctrines based in turn on the economic perceptions of legislators, lawyers and courts. Similarly, many private decisions relating to production and investment will be strongly influenced by the nature and extent of lia-

26. 42 U.S.C. § 9651 (c)(2)(A), (B).
27. 52 Fed. Reg. 9045 (Mar. 20, 1987).
28. *State of Colorado v. U.S. Dept. of the Interior*, 880 F.2d 481 (D.C. Cir 1989).

bility that may attach to a given commercial activity. The production of vaccines comes to mind. If damages assessed for defective batches of vaccine embody poor theoretical economics, then resources will be misallocated when future decisions on investment or production are skewed as a result.

In this most fundamental sense, the deficiencies of CVM are essentially irrelevant. For reasons suggested by much of the foregoing, it is close to inconceivable that any handler of oil or hazardous substances would alter his or her behavior in response to the erroneous application of CVM to NRDAs. In this, NRDA procedures stand in stark contrast to the examples of antitrust doctrine or product liability, where faulty economics could clearly influence behavior to the detriment of society's interest in optimum resource allocation.

Imagine, as seems likely, that CVM generally results in inflated valuations. The extent of that inflation, it is submitted, could not plausibly be thought to influence the behavior of potential spillers, for the simple reason that they would have far too many other matters on their minds. Such matters would include potentially colossal clean-up costs, the costs of elaborate studies and EPA's oversight and implementation of longer-term remediation, private damage claims, civil and criminal penalties (including, in the case of Section 311 of the Clean Water Act, jail time for a negligent discharge),[29] internal costs and bad publicity. In other words, trustees' claims for injuries to natural resources can be expected to have virtually no deterrent effect. Consequently, the notion that any such deterrent effect might be distorted by theoretically flawed damage assessment procedures becomes absurd.

III. A POLITICALLY UNREALISTIC PROPOSAL

The foregoing negativism seems to lead gracefully to an even more negative line of thought: If CVM will not produce "accurate" NRDAs, and if NRDAs will not influence behavior, what purpose is served by the twin statutory authorities, in the Oil Pollution Act and in Superfund, that compel their use? (This, of course, is a rhetorical question.)

Before providing the answer, I should first state my own belief that CVM will not in fact produce "accurate" NRDAs. My reading, admittedly inexpert, of the Cummings and Harrison paper indicates that CVM is not reliable: it is subject to wild swings in numerical result, depending on how questions are phrased; and, its results apparently diverge from those derived from other accepted methodologies. Beyond that, I admit to a good deal of impatience with the intricacy of the economists' debate aired in this volume, not only because of the

29. Clean Water Act, Sec. 309(c), 33 U.S.C. §§ 319(c).

opinions expressed above in Part II of this comment, but also because I believe that statistical concepts like "validity", "reliability" and "consistency" are essentially meaningless when applied to a methodology for answering a question to which there is no correct answer. When markets are non-existent and substitute measurements unavailable, dollar values become meaningless, unanchored to the social mechanisms and institutions that make them possible in the first place. In such circumstances, attempts to create a dollar value by recourse to CVM—or any other "best available procedure" seem truly to be attempts to "eff the ineffable."

What if an oil spill creates an "asphalt shoreline" that endures for a decade in a remote wilderness area; if the grounding of a chemical tanker kills a pod of blue whales; or, if a cloud of toxic gas decimates (but does not annihilate) a rookery watched by many birders? In each of these cases, an actionable release has damaged public resources, but the present exercise demonstrates that monetization of those damages cannot be accomplished meaningfully. And, even if it could, it apparently cannot be accomplished simply or inexpensively.

I therefore propose that Congress consider the two following options.

(1) Excise the NRDA provisions of CERCLA and OPA, essentially in their entirety. If this option were implemented, future spillers of "hazardous substances" and oil would scarcely get a free ride: they would remain liable for potentially ruinous judgments to reimburse public and private entities for the costs of clean-up, remediation and lost revenues, as well as for civil and criminal penalties. If deterrence is desired, this menu of liabilities should clearly suffice. Admittedly, simple excision of the troublesome statutory provisions would leave some injuries uncompensated. Where the clean-ups and remediation have failed to restore public resources to their *status quo ante*, some instances of environmental impairment would not lead directly to the transfer of more money to government. Should we decide that such a result is unacceptable, we have an alternative:

(2) Impose a natural resources surcharge on recoveries under Superfund or OPA. As matters now stand, recoveries under the NRDA provisions must be devoted to the restoration or replacement of injured natural resources or to acquisition of their "equivalent."[30] These provisions therefore represent a collective decision that irreparable harm to public natural resources should lead to investments, funded by spillers, in more such resources. If that decision is to remain undisturbed,[31] there seems to be no reason why it could not be implemented

30. 42 U.S.C. §§ 9607(f)(1); 33 U.S.C. §§ 2706(f).

31. Given the many ills that beset society, it is unclear to this commentator that it should remain undisturbed.

by the addition of a supplementary percentage to the bill for clean-up—in the nature of a "service charge," if you will, the proceeds of which would be ear-marked for investment in natural amenities, such as wildlife preservation or park improvements. If (as seems utterly unlikely) NRDAs actually carry some marginal deterrent effect, that effect would surely attach to a surcharge, too. If (as seems inevitable) some might complain that a surcharge would bear no relation to the value of the injury sustained, the retorts are obvious:

(i) How do you know?

(ii) What's new?