

NOTE

Structures Journal 3 is on page 9

Final Essay is on page 11 —

apparently the wrong version of the document had been handed in (sorry)

Dan Halper – Clinic Goals for the semester – rewritten (original was lost)

To assist Joel Kupferman of the New York Environmental Law and Justice Project in representing tenants and rescue workers suffering from environmental contamination from the World Trade Center collapse. The job will involve large amount of computer legal research on environmental and administrative law. It will also involve attending administrative hearings and planning sessions of community groups.

Dan Halper Journals for Clinic Seminar for weeks 9, 10 and 11

Under enormous pressure to supply resource materials for Joel Kupferman in his latest meetings with various city, state and federal elected officials and administrators, I produced a 350 page report the day before the beginning of spring break. This report consisted primarily of print-outs of various law review articles, cases, case synopses, executive orders, materials from the Environmental Protection Agency website, and materials from the Federal Register. I also produced a 40 page mini report which summarized the contents of the larger report. This was an enormous effort which took me almost 100 hours and involved reading something on the order of 5000 pages.

This is a list of documents I put into or summarized in my mini report.

RESOURCE MATERIALS: NATIONAL CONTINGENCY PLAN AND MICROFINE PARTICLES

Sovereign Immunity Provision under Cercla 42 USC 9601	3
PM 2.5 quote from Federal Register 62 FR 38652	6
CERCLA INFORMATION	
Lexis Annotations to 42 USC 9605 42 USC 9605 is the section of CERCLA which describes the working of the National Contingency Plan	7
CERCLA Cases Briefed	11
Washington State Dept. of Transp. v. Washington Natural Gas Co., Pacificorp	11
In re Bell Petroleum Servs., 3 F.3d 889, *	11

USA v Shell Important case on Sovereign Immunity	12
SEEDS CASE could be important	12
Executive Order 13045	16
References to PM2.5 in the Federal Register since 1/6/2001	16
Documents from the EPA website resulting from PM2.5 Keyword Search	17
Executive Order 12580 – translated into plain English	20
Lexis Annotations to 42 USC 9605	22
Document Sent to the Federal Register by the EPA on 2/25/2002	28
Federal Register: February 15, 2002	31
Federal Register: January 28, 2002	39
CERCLA INFORMATION	2
CERCLA Cases Briefed	6
Executive Order 13045	7
References to PM2.5 in the Federal Register since 1/6/2001	7
Documents from the EPA website resulting from PM2.5 Keyword Search	8
Executive Order 12580 – translated into plain English	11
Lexis Annotations to 42 USC 9605	13
Document Sent to the Federal Register by the EPA on 2/25/2002	19
Federal Register: February 15, 2002	22
Federal Register: January 28, 2002	30
42 USC 9607	

The problems with producing this report were enormous and involved over 100 hours of work. Since no law review article exists which is really focused on the question of whether the government is compelled to respond to a toxic release by following the national contingency plan, I focused on reading prior executive orders and attempting to translate them into plain English. Unfortunately, I really don't know for sure to what degree a prior executive order is binding on Federal administrative agencies. I believe a prior order is binding, however its unclear to me what sort of remedy a court might fashion for the violation of a prior executive order – since, a new president can always promulgate a new order. I need to discuss this with someone who knows something about administrative law like Professor Yassky perhaps.

Over this week and the two remaining weeks, I'm hoping to digest this information into a decently written memo. I will also be attending a New York State assembly hearing on the subject this Friday.

Midterm Report.

At the middle of the term, I had just compiled the three hundred page binder with the Table of Contents which was listed above. Some highpoints of my achievement there included the discovery of United States vs Shell which is a case that involves the question of government liability for a toxic dump created by Shell in WWII at least in part stimulated by the government's contracting for a particular grade of jet fuel.

I also found the Seeds case which was a failed law suit which attempted to claim that the EPA's standards for ultrafine particulates was arbitrary and capricious. The rest of the research involved various Executive Orders, Analysis of CERCLA, CERCLA cases and documents within the Federal Register – one of which included the crucial article on ventilation systems. It was very unfortunate that I could not create any written product out of this torrent of research at that time but events were moving too quickly. My final memorandum will be my response to Jerry Nadler's statutory analysis of the April 12 edition of the Nadler White Paper and this document was not available to me in March. Nonetheless, many elements found in the 300 page binder will be important research branches in the future.

Journal for the final four weeks.

On April 12th, I attended the historic New York State Assembly hearing. There, Jerry Nadler released his newly updated White Paper which contains a very serious statutory analysis of EPA mandates. The period between the previous month's city council hearing and the more recent Assembly hearing was quite pronounced. Congressman Nadler had caused a sensation in the prior City Council hearing by accusing the city Department of Department of Health of suggesting that New Yorkers clean their apartments with damp rags. At the assembly hearing, one of the Assemblymen tried to corner the EPA region 2 manager Ms. Callahan with this fact. Ms. Callahan shockingly responded that wet rags were ok, but one might also want to use a HEPA vacuum. This was a double lie because the government had never originally told New York City residents that there was any danger from the dust whatsoever.

Between the two hearings, I had shifted my research focus from studying the National Priorities List under CERCLA to the new focus of the National Contingency Plan. Between these two dates, the EPA had fought a subterranean legal battle with their own Ombudsman who had blown the whistle on the EPA's lack of interest in cleaning New York. Extraordinarily, the EPA ombudsman received word that he had lost in Federal Court just after he testified regarding the contamination of Stuyvesant high school.

In addition to the National Contingency Plan, I had been researching EPA regulations from Particulate Matter 2.5. I had found an EPA manual talking about the necessity of cleaning

ventilation shafts of major buildings. At the Assembly hearing I heard testimony from Dr. Thurston of NYU who claimed that most of the particles were far larger than PM 2.5. This contradicts the study of Dr. Cahill and the University of Davis. Obviously this made the issue of Particulate Matter 2.5 even more complex.

Another twist revealed itself in Jerry Nadler's White Paper and also in Ms. Callahan's testimony. According to Ms. Callahan, the EPA doesn't need to implement the National Contingency Plan, because it is operating under the Stafford Act ie the Act which authorizes FEMA the Federal Emergency Management Authority, but according to Nadler, the Stafford Act automatically invokes the National Contingency Plan. Therefore, while I had previously felt that the battle to prove that the government was breaking Congressional statutes might be an uphill battle, Nadler's White Paper did a much better synthetic job of analyzing the CERCLA and Stafford statutes than I could.

Therefore I have shifted my focus in my final moments of research. Now I am focusing on the separation of powers and what sort of legislative language is needed for Congress to compel the executive to act one way over another way. I have focused on the issue of Executive budgetary impoundment which first became an issue of Supreme Court jurisprudence in the 1970's with President Nixon.

It seems that as this political movement develops, my primary role is in the research of issues of basic constitutional law. Oddly, the legislators on every level of government seems desperate to help their constituents whereas the administrative agencies on all three levels of government have backed a big lie. This almost reminds one of the movement in the English parliament in the 17th century against Charles II with Jerry Nadler playing the role of John Pym.

As far as what I have learned from these three months of internship, I have explored an entire sea of environmental and administrative law. I have seen the workings of government on three pyramidal levels of federalism and across the boundaries of the legislative branch and the multitude of administrative agencies. Although I am just beginning to understand the working of such lateral agencies as OSHA and FEMA – main area of learning has regarded the workings of the Environmental Protection Agency and its Clean Water Act (CERCLA – Superfund) agglomeration of law.

In addition to Constitutional/ Administrative law, I have been exposed to a good deal of questions regarding remedies and liability. These are remedies in the modern sense rather than in the context of a first year tort class. These remedies and liabilities include government actors, insurance companies and perhaps even foreign governments. I have also learned some miscellaneous information regarding building designs and toxicology.

Structured Journal Assignment #3

At the beginning of the semester I was grilled by the clinic as to whether I would be doing legal work this semester; or rather, my prior experience doing technology and publicity work with the New York Environmental Law and Justice Project would stand in the way. This was a serious concern of mine. Fortunately, the Project had just acquired Moishe the unemployed computer engineer who was able to take over virtually all the technology tasks that I was involved in and expand the work of the project in those areas much more competently than I could have.

This was a very fortuitous development because it allowed me to plunge into entire caverns of legal research, to become lost in the subaltern oceans of the Federal Register, Executive Orders, Administrative Law and the like.

There were, however, many temptations to reinsert myself into the technological work of the Project, especially since this work had expanded so much with so little staff. At other moments, it became difficult to comprehend what might constitute a de minimis involvement which to reject was to engage in ridiculous scholasticism. In the end, my total involvement in the Lexis research precluded me from doing all but a token bit of video work.

The great regret here was and continues to be the look and feel of the Project's website. Since our main computer engineer is an idiot savant with terrific engineering skills and no design skills, the format of the front page of the site is an eyesore that might be condemned through the power of eminent domain. It's really really bad.

Every time I had to decide that I could not afford to abandon my research to redesign the front page of the website, the conundrum brought up the question of my professional

commitment to the Project on the legal end and the Brooklyn Law School clinic. I am proud to say that the Project's website still looks like a piece of garbage, and that plenty of the time that might have been used to redesign the site was spent doing legal research on Lexis. Thus my professional commitment had to win out over my love of art direction. Once the semester is over, however, I intend to redesign the site.

I think that this metaphor can be looked at from a variety of angles and perhaps even be considered at meta-metaphor for human existence and our struggles between the dialectical opposites of freedom and necessity.

Final Essay Assignment

Goals

My participation in the clinic was partially the result of having a long standing relationship with Joel Kupferman and the New York Environmental Law and Justice Project and also wanting to assist the work of the project in regards to responding to the Mega-Disaster of 9/11. I first got interested in Environmental Law through working with my dad creating a lease for a contaminated brown field. This led me to working with Joel during my Environmental Law class and writing about the pesticide spraying against the West Nile Virus. There, the pesticides were contaminating ventilation systems. Here with the World Trade Center, this was a continuation of some of the same building contamination issues.

At the beginning my goals were very simple and basically revolved around helping Joel in whatever capacity I was needed. I had a vague idea that the Clean Water Act/ CERCLA research would be needed, but I only had studied the Federal Pesticide act which is called FIFRA. I was hoping to get some experience in some other areas of environmental law other than pesticides.

During this semester I learned more about certain parts of the CERCLA statute than I thought I would ever learn in my entire life. I had to break the bounds of my novice abilities on Lexis and talk extensively with Lexis customer service representatives to try to get the full power of the system. I also had to simply wade through hundreds of documents trying to find the material which would help me make constitutional arguments. This required reviewing and expanding my understanding of constitutional and administrative law. Regarding my very basic

goals in the beginning, I think I achieved them many times over. The real question is whether I can write a serious memorandum of law on these issues before time runs out completely.

Experience

My most important experiences in the internship were definitely attending the two legislative hearings on the World Trade Center disaster. This brought me in contact with Congressman Jerry Nadler and his fantastic intern Lisette and their wonderful White Paper. Another great experience was meeting the EPA ombudsman and his investigator. This expanded my understanding of the importance of public hearings. It was an interesting counterpoint to the trial observer assignments where I saw confrontational trial scenes.

Future Objectives

Unfortunately, this semester's work has been so engrossing that I feel almost unwillingly swept into the environmental field since I have such a strong background to begin with in Real Property. However, I never really wanted to be a dirt lawyer per se, and I really want to get more into IP and tech law. On the other hand, being a strong environmentalist and the environmental law field being very arcane and interesting its going to be a big toss up.

Supervision and Office Environment

Working with Joel this semester was an extreme challenge to say the least. Quite frankly the office environment at the Project was a big hindrance. The telephone is constantly going off there and much time is wasted simply dealing with the absurd mess that no one can ever clean up. Luckily I was able to do a lot of my work at home or at Brooklyn Law School with Lexis. Other times I worked at the EPA library. Other times I participated in out of office assignments like the hearings or the PTA meetings.

The assignments from Joel were very challenging because he was having me research areas of the law which I was totally unfamiliar with. The great thing about working with Joel is that he always attempted to steer me toward resources which I never would have thought of. One day he might say well Dan, why don't you call up the environmental clinic at Tulane Law School in Louisiana, or why don't you call up (leading environmental lawyer) Mike Gerard and although not all of these leads panned out it was pretty surreal to find myself in a national community of environmental law specialists who would take my call and actually call me back because the project while tiny is well known nationally.

Despite the problems at the office, I tried to come in twice a week and sometimes these sessions at the office could prove to be quite useful because there are many people who work part time with the Project and only by being at the office is there an opportunity to meet them all.