

Words Matter in Environmental Cleanup Standards

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In [New York State Superfund Coalition, Inc., v. New York State Department of Environmental Conservation](#), the highest court in New York recently put its own gloss on the long-standing environmental issue of "How Clean is Clean". There, the court held that, even though liability for cleanup under New York's state Superfund statute is triggered when there is a "significant threat" to the environment, the state has authority to promulgate regulations requiring cleanup beyond what would be necessary to eliminate that significant threat. Specifically, the Court affirmed regulations that require cleanup to "pre-disposal conditions, to the extent feasible".

The court reached this result by a definitional sleight-of-hand. The court noted that the statute seeks "a complete cleanup of the site through the elimination of the significant threat to the environment posed by the disposal of hazardous wastes at the site." The court then goes on to claim that the statutory standard of a "complete cleanup" to eliminate threats is the same as the regulatory standard of returning the site to "pre-disposal conditions, to the extent feasible".

Although the Court of Appeals gets the last word on this issue, its reasoning seems disingenuous. The statutory standard defines cleanups to be the elimination of significant threats, meaning that a liable party could potentially leave some contamination at a site as long as that contamination did not pose a threat. The regulatory standard, in stark contrast, contemplates the removal of all contamination, whether causing a threat or not, constrained only by whether such removal was "feasible". Although the Court of Appeals professes to find no difference in the verbal formulations of these two standards, parties having to undertake cleanups in New York may find the difference to be many millions of dollars. One can argue whether it is a wise decision to expend societal resources to restore disposal sites back to the condition of the Garden of Eden. However, it's harder to argue that that decision should be made by courts and regulatory agencies instead of by the legislature.

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