

Fort Ord Toxics Project, Inc. v. California Environmental Protection Agency: The Ninth Circuit Unburies Public Oversight of Hazardous Waste Remediation on Federal Property

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I. OVERVIEW

In February of 1990, Fort Ord, a former United States Army Base in Monterey, California, was placed on the Environmental Protection Agency’s (EPA’s) National Priorities List pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).¹ Thereafter the Army, EPA, California Department of Toxic Substances Control (CDTSC), and the California Regional Water Quality Control Board entered into a Federal Facility Agreement (FFA) pursuant to CERCLA section 120.² Four years later, the Army and the CDTSC entered into an additional agreement designating a landfill on the former base as a Corrective Action Management Unit (CAMU) pursuant to the Resource Conservation and Recovery Act (RCRA).³ As a consequence of this designation, the Army was granted a variance from California’s statutory prohibition against land disposal of hazardous waste.⁴ The purpose of the CAMU plan was to consolidate lead contaminated soil from other cleanup sites on Fort Ord into a single site.⁵

Upon learning of the CAMU plan, the plaintiffs, Fort Ord Toxics Project, Inc. (Project), California Public Interest Research Group, and two nearby residents, filed this action in state court alleging a violation of the California Environmental Quality Act for failure to prepare an environmental impact report prior to granting the

1. See *Fort Ord Toxics Project, Inc. v. United States Dep’t of the Army*, No. C-97-20681, 1998 U.S. Dist. LEXIS 22447, at *2 (N.D. Cal. May 11, 1998); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (1994 & Supp. III 1997).
2. See *Fort Ord Toxics Project*, 1998 U.S. Dist. LEXIS 22447, at *3.
3. See *id.* at *4.
4. See *id.* at *5.
5. See *id.* at *4.

variance.⁶ The Army removed Project's request for a preliminary injunction to federal court.⁷ The United States District Court for the Northern District of California then granted the Army's motion to dismiss for lack of subject matter jurisdiction based on CERCLA's section 113(h) "timing of review" provision.⁸

Project appealed the district court's dismissal to the United States Court of Appeals for the Ninth Circuit on three grounds.⁹ The Ninth Circuit concluded that the first and third arguments were without merit.¹⁰ Project's second argument claimed that the timing of review provision only applies to challenges to ongoing remediation conducted pursuant to sections 104 and 106 of CERCLA.¹¹ Project maintained that the Fort Ord cleanup was independently authorized by section 120 and therefore their challenge was not barred by the timing of review provision.¹² The Ninth Circuit accepted this argument.¹³

After noting that "no circuit court has published a decision reaching this question," the Ninth Circuit reversed the district court's grant of dismissal.¹⁴ The court held that, because section 113(h) only applies to challenged actions under section 104, the plaintiffs' challenge to the Army's remedial actions taken pursuant to section 120 was immune from CERCLA's timing of review provision.¹⁵ *Fort Ord Toxics Project, Inc. v. California Environmental Protection Agency*, 189 F.3d 828 (9th Cir. 1999).

II. BACKGROUND

In 1980, Congress enacted CERCLA to provide an efficient and effective procedure for cleaning up hazardous waste and for holding

6. *See id.* at *5.

7. *See id.* Ultimately, the United States District Court for the Northern District of California granted Project's motion to return to state court with respect to the state defendants, but kept the case against the Army in federal court. *See id.* at *6.

8. *See Fort Ord Toxics Project*, 1998 U.S. Dist. LEXIS 22447, at *2, *26; CERCLA § 113(h), 42 U.S.C. § 9613(h) (1994). Section 113(h) provides:

No federal court shall have jurisdiction under Federal law . . . or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title

9. *See Fort Ord Toxics Project, Inc. v. California Env'tl. Protection Agency*, 189 F.3d 828, 830 (9th Cir. 1999).

10. *See id.*

11. *See id.*

12. *See id.*

13. *See id.* at 833.

14. *Id.* at 833-34

15. *See id.* at 833.

responsible parties liable for cleanup costs.¹⁶ In 1986, Congress enacted the Superfund Amendments and Reauthorization Act (SARA) and included the section 113(h) timing of review provision to ensure that lawsuits challenging the EPA's actions under CERCLA do not delay effective cleanup measures.¹⁷ Section 113(h) provides that, with the exception of five specific circumstances, no federal court shall have jurisdiction, under federal law or applicable or relevant and appropriate state law relating to cleanup standards, to review any challenges to removal or remedial actions taken under sections 104 and 106(a).¹⁸ Section 104 comprehensively prescribes the EPA's authority to implement a national contingency plan for the removal and remediation of hazardous waste.¹⁹ Federal circuit courts consistently have been willing to invoke the timing of review provision to bar pre-enforcement judicial review of both remedial and removal actions.²⁰

Section 101 of CERCLA distinguishes two methods of hazardous waste cleanup. The first is remedial action, which is defined as "those actions consistent with permanent remedy taken instead of or in addition to removal actions."²¹ The second cleanup method is removal, which is defined as "the cleanup or removal of released hazardous substances from the environment."²²

SARA also contains section 120, which addresses the cleanup of hazardous waste at federal facilities.²³ This section renders all federal facilities and agencies subject to the same requirements of CERCLA as nongovernmental entities.²⁴ Although section 120 mandates EPA cooperation and public participation in any resulting agreements,

16. See H.R. REP. NO. 99-253, pt. 3, at 15 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3038, 3038 ("CERCLA has two goals: (1) to provide for clean-up if a hazardous substance is released into the environment or if such release is threatened, and (2) to hold responsible parties liable for the costs of these clean-ups.").

17. See Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified as amended in scattered sections of 42 U.S.C.).

18. See 42 U.S.C. § 9613(h) (1997) (providing five exceptions to the jurisdictional bar on review of challenges to removal or remedial actions: (1) actions under section 107 to recover response costs or damages, (2) actions to enforce an order under section 106(a), (3) actions for reimbursement under section 106(b)(2), (4) actions under section 159, and (5) actions under section 106 when the United States has moved to compel remedial action).

19. See *id.* § 9604.

20. See, e.g., *Hanford Downwinders Coalition, Inc. v. Dowdle*, 71 F.3d 1469, 1482 (9th Cir. 1995); *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325 (9th Cir. 1995); *Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1018-19 (3rd Cir. 1991); *Schalk v. Reilly*, 900 F.2d 1091, 1096-97 (7th Cir. 1990).

21. 42 U.S.C. § 9601(24) (1994).

22. *Id.* § 9601(23).

23. See *id.* § 9620.

24. See *id.* § 9620(a)(1).

Executive Order 12,580 gives each federal agency the power to effectuate response actions at their own sites.²⁵ Unlike section 104, which provides authority for both removal and remedial actions,²⁶ section 120(e)(2) grants the EPA the power to conduct only remedial actions on federal property.²⁷ Section 120 also requires the EPA and the responsible federal agency to enter into an interagency agreement (IAG), such as a FFA, to plan and control the cleanup site.²⁸

The Ninth Circuit has previously considered whether to apply the section 113(h) timing of review provision to challenges brought against cleanups at federal facilities. In *McClellan Ecological Seepage Situation v. Perry (MESS)*, a citizen group appealed the invocation of section 113(h) and the district court's subsequent rejection of their claims against the Department of Defense and its CERCLA cleanup at the McClellan Air Force Base.²⁹ The Ninth Circuit began its examination of the plaintiffs' arguments by determining that section 113(h) is "clear and unequivocal."³⁰ The court refused to accept the argument that section 113(h) only precludes challenges brought under CERCLA, and that it does not apply to actions brought under the citizen suit provisions of other environmental statutes.³¹ The Ninth Circuit, while noting that the cleanup plan was initially authorized under section 104 in 1980, failed to identify the section authorizing the post-SARA IAG. The *MESS* court broadly interpreted the scope of the timing of review provision and found that "[s]ection 113(h) withholds federal jurisdiction to review citizen suits and actions brought under other, non-CERCLA statutes that challenge ongoing CERCLA cleanup actions."³²

In *Hanford Downwinders Coalition, Inc. v. Dowdle*, the Ninth Circuit again affirmed the timing of review provision's bar on federal jurisdiction over challenges to CERCLA cleanup actions.³³ In this case, a citizen group and individual plaintiffs claimed that the Administrator of the Agency for Toxic Substances and Disease Registry (ATSDR) had a "mandatory duty under CERCLA [section 104(i)(9)] to begin a health surveillance program in the Hanford

25. See Exec. Order No. 12,580(2)(g), 3 C.F.R. 193 (1988), reprinted in 42 U.S.C. § 9615.

26. See 42 U.S.C. § 9604(a)(1) (1994).

27. See *id.* § 9620(e)(2).

28. See *id.*

29. 47 F.3d 325, 326 (9th Cir. 1995).

30. *Id.* at 328.

31. See *id.*

32. *Id.* at 331.

33. 71 F.3d 1469, 1484 (9th Cir. 1995).

[Nuclear Reservation] region.”³⁴ Citing *MESS*, the court held that “once an activity has been classified as a [section 104] removal or remedial action,” section 113(h) acts as an effective bar on federal jurisdiction.³⁵ The court went on to explain that the ATSDR received its grant of authority and its directives for action from section 104(i).³⁶ After discussing the plaintiffs’ other arguments regarding district court error, the court affirmed the section 113(h) bar on federal jurisdiction over the plaintiffs’ challenge to the ATSDR’s role in the Hanford cleanup.³⁷ Notably, neither in *MESS* nor in *Hanford Downwinders Coalition, Inc.*, was the issue of section 120 cleanups on federal property raised.

Prior to *Fort Ord Toxics Project*, no federal circuit court had published an opinion addressing the interaction between CERCLA sections 104, 120, and 113(h).³⁸ However, three district courts had decided the issue. In *Werlein v. United States*, the United States District Court for the District of Minnesota granted the defendant’s motion to dismiss a claim for an injunction against an ongoing CERCLA cleanup at the Twin Cities Army Ammunition Plant (TCAAP).³⁹ The *Werlein* plaintiffs proffered two arguments to counter the defendant’s motion to dismiss pursuant to section 113(h). First, the plaintiffs argued that section 113(h) was “facially inapplicable” because the TCAAP remedial actions were authorized under section 120 of CERCLA, not section 104.⁴⁰ Second, the plaintiffs argued that section 113(h) only applies to injunctive claims arising under CERCLA itself.⁴¹ The court quickly disposed of the second argument, citing clear statutory language which provides that the court has no jurisdiction to hear any challenges, whether they fall under federal or state law.⁴²

Addressing the plaintiffs’ first argument, the court considered the language in Executive Order 12,580 and its delegation of response authority to the Secretary of Defense over Department of Defense property.⁴³ The court explained that if section 120 were a separate

34. *Id.* at 1473.

35. *Id.* at 1474.

36. *See id.* at 1474-75.

37. *See id.* at 1484.

38. *See Fort Ord Toxics Inc. v. California Env'tl. Protection Agency*, 189 F.3d 828, 833 (9th Cir. 1999).

39. 746 F. Supp. 887, 914 (D. Minn. 1990), *vac'd in part on other grounds*, 793 F. Supp. 898 (D. Minn. 1992).

40. *See id.* at 891.

41. *See id.* at 892.

42. *See id.* at 893.

43. *See id.* at 891-92.

grant of cleanup authority from section 104, the Secretary of Defense would have to designate under which section the cleanup would proceed.⁴⁴ The court then noted that it could “think of no reason why Congress would create such a scheme, since no particular consequences, other than the application of section [113(h)] would flow from the choice.”⁴⁵ Statements concerning the scope of section 113(h), made by legislators who drafted SARA, compounded the court’s confusion over why Congress would create such a narrow scheme.⁴⁶ Representative Glickman explained the ramifications of section 113(h), stating that “[t]he timing of review section covers all lawsuits, under any authority, concerning the response actions that are performed by the EPA”⁴⁷ Senator Thurmond explained the scope of section 113(h) as “intended to be comprehensive” and covering “all lawsuits under any authority.”⁴⁸ After looking to Executive Order 12,580 and a few statements by legislators, the court adopted a broad interpretation of the section 113(h) timing of review provision.⁴⁹ The court ultimately held that section 120 is a “road map for application of CERCLA to federal facilities,” and actions thereunder are authorized by section 104.⁵⁰

Three years later, in *Heart of America Northwest v. Westinghouse Hanford Co.*, the United States District Court for the Eastern District of Washington faced a challenge to CERCLA cleanup provisions at the Hanford Nuclear Reservation.⁵¹ In *Heart of America Northwest*, the plaintiffs argued that hazardous releases pursuant to the interagency Hanford Federal Facility Agreement and Consent Order had been improperly reported under RCRA and CERCLA.⁵² The defendants immediately moved to dismiss on grounds that the timing of review provision barred subject matter jurisdiction.⁵³ Thus, the district court was called upon to determine “whether the actions which plaintiffs’ claims address constitute[d] removal or remedial actions selected under section 104.”⁵⁴

44. *See id.* at 892.

45. *Id.*

46. *See id.* at 893-94.

47. 132 CONG. REC. H9582 (daily ed. Oct. 8, 1986) (statement of Rep. Glickman).

48. 132 CONG. REC. S14929 (daily ed. Oct. 3, 1986) (statement of Sen. Thurmond).

49. *See Werlein*, 746 F. Supp. at 891.

50. *Id.* at 891-92.

51. 820 F. Supp. 1265, 1279 (E.D. Wash. 1993).

52. *See id.* at 1268-69.

53. *See id.* at 1268.

54. *Id.* at 1275.

The plaintiffs argued that the timing of review provision did not apply because the “Hanford cleanup [was] being conducted under the authority of section 120 [and not under] section 104.”⁵⁵ The court quickly disposed of this argument by relying on the “convincing treatment of the issue by the *Werlein* court.”⁵⁶

Five years later, the United States District Court for the District of Colorado applied *Werlein*’s “road map” analysis of section 120. In *Worldworks I, Inc. v. United States Dep’t of the Army*, the plaintiffs filed a citizens suit under CERCLA to require the Army and the EPA to enter into a new IAG concerning the cleanup of the Army’s Rocky Mountain Arsenal (the “Arsenal”).⁵⁷ The defendants asserted that the court lacked subject matter jurisdiction pursuant to section 113(h) of CERCLA.⁵⁸

The *Worldworks I* court failed to directly address the issue of whether section 120 is an independent source of cleanup authority from section 104. The court did, however, rely heavily upon the findings in both *Werlein* and *Heart of America Northwest*, that actions taken pursuant to interagency FFAs concerning CERCLA response plans were authorized solely by section 104.⁵⁹

III. THE COURT’S DECISION

In the noted case, the Ninth Circuit first addressed the plaintiffs’ claim that section 113(h) did not affect their lawsuit because their claims were not based on “applicable or relevant and appropriate” (ARAR) state law.⁶⁰ Although the court agreed with the plaintiffs that section 113(h) is a “limited provision [and] that Congress did not intend to foreclose all potential lawsuits,” it found the plaintiffs’ interpretation of the section “nonsensical.”⁶¹

The court explained that “the federal government is obligated to ensure that CERCLA cleanup procedures comply with state environmental law that is ARAR,” but that the federal government is

55. *Id.* at 1279.

56. *Id.*

57. 22 F. Supp. 2d 1204, 1205 (D. Colo. 1998). The Arsenal was a chemical weapons manufacturing and assembly plant constructed in 1942. *See id.* The plaintiffs’ interest in a new IAG arose from the existing FFA, which included the Shell Chemical Company as a responsible party who had been using parts of the Arsenal for the manufacture of herbicides and pesticides. *See id.*

58. *See id.* at 1206.

59. *See id.* at 1207.

60. *See Fort Ord Toxics Project, Inc. v. California Envntl. Protection Agency*, 189 F.3d 828, 831 (9th Cir. 1999); 42 U.S.C. § 9621 (1994).

61. *Fort Ord Toxics Project*, 189 F.3d at 831.

not obligated to comply with non-ARAR state law.⁶² Under the plaintiffs' argument, a CERCLA cleanup cannot be postponed for ignoring state law which is ARAR and thereby binding, but can be postponed for state law which has no binding legal effect under section 113(h).⁶³ This first argument was dismissed as contrary to congressional intent and as an "absurd rule of law."⁶⁴

The court next attacked the plaintiffs' second argument, that although section 113(h) may preclude federal jurisdiction over their suit, it did not preclude state jurisdiction.⁶⁵ The court interpreted the purpose of the statute and found that Congress would not have prohibited dilatory litigation in federal courts only to have CERCLA cleanups stalled in the state courts.⁶⁶ Furthermore, the court reasoned that section 113(b) gives jurisdiction to adjudicate challenges to CERCLA cleanups solely to federal district courts.⁶⁷ Ultimately rejecting the plaintiffs' "cramped" interpretation of section 113(b), the court adopted a broad interpretation of section 113(h) which "postpones jurisdiction over CERCLA challenges from the only courts that have jurisdiction to hear such challenges."⁶⁸ The plaintiffs were therefore unable to successfully argue the separate existence of state court jurisdiction for their challenge to the CERCLA cleanup.

The court then addressed the plaintiff's final argument on appeal, that CERCLA section 113(h) only applies to challenges to ongoing remediation conducted pursuant to sections 104 and 106. After finding the argument "intuitively unappealing" and "troubling," the court concluded that the section 113(h) timing of review provision applies only to cleanups conducted under the authority of section 104.⁶⁹ Not only is the Ninth Circuit the first circuit court to directly address the question of whether sections 104 and 120 are independent sources of authority, it is also the first court to accept the argument as "the most reasonable interpretation of the statutory language."⁷⁰

The court began its discussion of this issue by noting that its decision is not controlled by either *MESS* or *Hanford Downwinders Coalition* because "on neither occasion did [the Ninth Circuit] specifically address whether § 120 cleanups, by virtue of their

62. *Id.*

63. *See id.*

64. *Id.*

65. *See id.* at 832

66. *See id.*

67. *See id.*

68. *Id.*

69. *Id.*

70. *Id.*

independence from § 104 cleanups, fall outside of § 113(h)'s jurisdictional bar."⁷¹

The defendants in the noted case contended that section 120 cleanups proceed under the broad authority granted by section 104.⁷² The court found that this position was supported by the district court decisions that have reached the issue and by the legislative history.⁷³ Despite the consistent prior jurisprudence and contrary evidence of legislative intent,⁷⁴ the Ninth Circuit found that the statutory text creates a section 120 grant of authority independent from section 104.⁷⁵ In support of this contention, the court quoted the text of section 120 that states, "no authority vested in the [EPA] Administrator under this section may be transferred . . ."⁷⁶ The court then discussed sections 117 and 113, which were passed in the same bill as section 120, and noted that both sections refer to sections 120 and 104 separately in the statutory text.⁷⁷ The court found this statutory language to be clear evidence of congressional intent that sections 104 and 120 be independent sources of authority.⁷⁸

The court went beyond simply recognizing section 120 as an independent source of CERCLA authority. The court further explained that CERCLA identifies two kinds of cleanup activities: removal and remediation.⁷⁹ Section 120(e), however, provides that the EPA has the authority to conduct only remedial activities on federal property.⁸⁰ As "there is no analogous authority under § 120" for removal actions on federal property, the court concluded that, "removal actions on federal property must fall under the general provisions of § 104."⁸¹

71. *Id.* at 833.

72. *See id.*

73. *See id.* (citing *Worldworks I, Inc. v. United States Dep't of the Army*, 22 F. Supp. 2d 1204, 1207 (D. Colo. 1998); *Heart of Am. Northwest v. Westinghouse Hanford Co.*, 820 F. Supp. 265, 1278 (E.D. Wash. 1993); *Werlein v. United States*, 746 F. Supp. 887, 981-92 (D. Minn. 1990)).

74. *See Werlein*, 746 F. Supp. at 893-94; *see also Heart of Am. Northwest*, 820 F. Supp. at 1279 (accepting the same legislative intent argument); *Worldworks I*, 22 F. Supp. 2d at 1207 (same).

75. *See Fort Ord Toxics Project*, 189 F.3d at 833-34.

76. *Id.* (quoting 42 U.S.C. § 9620).

77. *See id.* at 833.

78. *See id.* at 834.

79. *See id.* at 833-34 ("[R]emoval actions are temporary measures taken to protect against the threat of immediate release of hazardous substances into the environment, whereas remedial actions are intended as permanent solutions.").

80. *See* 42 U.S.C. § 9620(e) (1994).

81. *Fort Ord Toxics Project*, 189 F.3d at 834.

The court found that, pursuant to CERCLA section 104, section 113(h) precludes challenges to removal actions on federal property, but the timing of review provision is inapplicable to remediation actions on federal property under section 120.⁸² Recognizing the novelty of this interpretation, the court offered only brief support for its conclusion by citing recent commentary and then refrained from interpreting potential policy rationales.⁸³ While briefly noting the evidence of legislative intent for broad application of section 113(h), as identified in *Werlein*,⁸⁴ the court stated, “[W]e are not concerned with the wisdom of Congress’ policy choice, and we lack the luxury to entertain the subjective intentions of various legislators.”⁸⁵ Nevertheless, the Ninth Circuit believed that this conclusion was required by the statutory language of CERCLA.⁸⁶

IV. ANALYSIS

In the noted case, the court arguably makes the proper decision to exclude the timing of review provision from challenges to remedial actions under section 120, but the court fails to provide adequate justification for guidance in the future. Prior jurisprudence, which addressed the scope of the timing of review provision and the interrelationship between sections 120 and 104, has consistently concluded that section 104 authority is broad and section 120 is basically procedural.⁸⁷ Such conclusions were based on a thorough investigation of statutory language, congressional intent, and potential policy goals,⁸⁸ which amounted to “convincing treatment of the issue.”⁸⁹ In the noted case, the court dismissed inquiry into policy and legislative intent as a “luxury.”⁹⁰ Instead, the court relied upon a literal interpretation of the statutory language.⁹¹

When the *Werlein* court directly addressed the argument that section 120 creates an independent grant of cleanup authority, it found the argument to be “interesting” but refused to accept it.⁹² The

82. *See id.*

83. *See id.* (citing Ingrid Brunk Wuerth, *Challenges to Federal Facility Cleanups and CERCLA Section 113(h)*, 8 TUL. ENVTL. L.J. 353, 370 (1995)).

84. *See Werlein v. United States*, 746 F. Supp. 887, 893-94 (D. Minn. 1990).

85. *See Fort Ord Toxics Project*, 189 F.3d at 834.

86. *See id.*

87. *See id.* at 833.

88. *See Werlein*, 746 F. Supp. at 891-93.

89. *Heart of Am. Northwest v. Westinghouse Hanford Co.*, 820 F. Supp. 1265, 1279 (E.D. Wash. 1993) (referring to the *Werlein* court’s treatment of the issue).

90. *Fort Ord Toxics Project*, 189 F.3d at 834.

91. *See id.*

92. *Werlein*, 746 F. Supp. at 892.

Werlein court then attempted to rationalize why Congress would have created such a loophole in the timing of review provision.⁹³ This necessarily involved an exploration into both policy motivations and legislative intent. Undoubtedly, this thorough treatment added weight to the *Werlein* decision. The Ninth Circuit in the noted case missed the opportunity to fortify its novel interpretation of CERCLA by failing to directly address the arguments which buoyed the *Werlein*, *Heart of America Northwest*, and *Worldworks I* opinions.

First, the court failed to address the assertion that the purpose of section 113(h), as interpreted by *Hanford Downwinders Coalition*, is to “ensure that cleanup efforts would not be delayed by litigation.”⁹⁴ In *Hanford Downwinders Coalition*, the Ninth Circuit concluded its opinion by stating, “Congress determined that, on balance, the interests of the public are best served by allowing CERCLA cleanup activity to proceed without subjecting it to the inevitable delays resulting from even well-intentioned legal challenges.”⁹⁵ In *MESS*, the Ninth Circuit likewise held that the section 113(h) divestiture of federal jurisdiction over any challenges to CERCLA cleanup actions was clear.⁹⁶ It is evident however, that under the ruling in *Fort Ord Toxics Project*, ongoing remedial actions on federal property could be challenged and delayed in the federal courts. The Ninth Circuit recognized this incongruity, but failed to address its implications on what it formerly considered to be the clear and blunt purpose of section 113(h).⁹⁷

Second, although the court finds the different application of the timing of review provision to private and federal cleanups to be “troubling,” it failed to address the impact on CERCLA in its entirety.⁹⁸ Indeed, the court utilized fragmented and broken statutory passages of sections 120 and 104 in its determination of whether the sections were independent authorities.⁹⁹ This method of statutory interpretation is weak. It is especially disquieting given the fact that earlier in its opinion, the Ninth Circuit stated that investigation of the

93. *See id.* at 892-95.

94. *Hanford Downwinders Coalition, Inc. v. Dowdle*, 71 F.3d 1469, 1474 (9th Cir. 1995).

95. *Id.* at 1484.

96. *See McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 328 (9th Cir. 1995).

97. *See Fort Ord Toxics Project, Inc. v. California Env'tl. Protection Agency*, 189 F.3d 828, 832-34 (9th Cir. 1999).

98. *See id.* at 832-34.

99. *See id.* at 833.

provisions of an entire statute, including its object and policy, is a "primary tenet of statutory construction."¹⁰⁰

Even a cursory investigation of CERCLA's legislative history and motivating policy would have strengthened the court's holding. For example, despite congressional hearings referred to in the *Werlein* decision,¹⁰¹ there is no direct mention of the relationship between sections 113(h) and 120 in either the House or Senate reports on SARA.¹⁰² In fact, there is equally convincing evidence that the purpose of section 120 was to give states and citizens more control over CERCLA cleanups on federal property.¹⁰³ The section 113(h) jurisdictional bar, if applied to on-site federal remediation, would certainly frustrate this goal.

Further, the *Werlein* court noted that it could "think of no reason why" Congress would create a scheme that had "no particular consequences, other than the application of section [113(h)]."¹⁰⁴ Although the Ninth Circuit was unsure of whether legislators subjectively intended this consequence, it speculated that perhaps delays caused by a challenge to a remedial cleanup are less serious than those caused by a challenge to an immediate removal action.¹⁰⁵ Although the *Werlein* court and the Ninth Circuit in *Fort Ord Toxics Project* recognized the inconsistency of this scheme, both courts failed to address the most accessible explanation for this loophole in the timing of review provision.

Remedial measures are permanent solutions to a hazardous waste problem, therefore the need for judicial review is greater than simply removing the waste to another location for future treatment.¹⁰⁶ Remedial activities between the EPA and private parties require a consent decree which provides some pre-existing judicial oversight and room for private challenges subject to section 113(h).¹⁰⁷ By allowing challenges to ongoing remedial activities between the EPA and a federal agency on federal property in federal court, the public is afforded some degree of oversight and reviewing authority.¹⁰⁸ This

100. *Id.* at 832.

101. *See Werlein v. United States*, 746 F. Supp. 887, 893-94 (D. Minn. 1990).

102. *See* Ingrid Brunk Wuerth, *Challenges to Federal Facility Cleanups and CERCLA Section 113(h)*, 8 TUL. ENVTL. L.J. 353, 368 (1995).

103. *See id.* at 368 n.76 (citing REPORT OF THE ENERGY AND COMMERCE COMMITTEE, H.R. REP. NO. 253(I), at 95 (1986), reprinted in 1986 U.S.C.C.A.N. 2835, 2877).

104. *Werlein*, 746 F. Supp. at 892.

105. *See Fort Ord Toxics Project, Inc. v. California Env'tl. Protection Agency*, 189 F.3d 828, 834 (citing Wuerth, *supra* note 102, at 370).

106. *See* Wuerth, *supra* note 102, at 370.

107. *See id.*

108. *See id.*

outcome is consistent with the public participation requirements of section 120(e)(2) and the state and local participation requirements of section 120(f).¹⁰⁹ Perhaps most importantly, however, allowing review of federal remediation actions would counterbalance the fact that “[e]xecutive policy, the relationship between federal agencies, and the broad application of section 113(h) have given agencies that own or operate federal lands enormous power to control the cleanup of those lands.”¹¹⁰

Finally, the court in the noted case correctly draws a distinction between judicial review of ongoing remedial and removal cleanup activities.¹¹¹ The language of section 120 only directly addresses remediation measures on federal property.¹¹² The court summarily concluded that “removal actions on federal property must fall under the general provisions of § 104.”¹¹³ Although this distinction is clear from a plain reading of the statutory text, there is another explanation which offers substantial support to the court’s holding. According to section 111(e)(3), CERCLA funds long-term remedial actions at private facilities but not at federal facilities.¹¹⁴ Thus, there is a differentiation between direct CERCLA funding for removal and remediation measures on federal property.¹¹⁵ This separation of the two types of cleanup activities within one of CERCLA’s funding provisions supports the Ninth Circuit’s assertion that authority for removal was purposefully excluded from section 120.¹¹⁶

V. CONCLUSION

In the noted case, the United States Court of Appeals for the Ninth Circuit departed from nine years of prior jurisprudence and correctly interpreted CERCLA sections 104 and 120 to constitute two independent sources of cleanup authority. The court was the first federal circuit court to publish an opinion reaching this issue, and it unfortunately avoided a full discussion of statutory construction, legislative intent, and underlying policy which would have fortified

109. See 42 U.S.C. § 9620(e)(2)(1994) (requiring all agreements to comply with other public participation requirements in the title); § 9620(f)(1997) (requiring state and local participation in the planning and selection of remedial actions).

110. Wuerth, *supra* note 102, at 359.

111. See *Fort Ord Toxics Project, Inc. v. California Env'tl. Protection Agency*, 189 F.3d 828, 833-34 (9th Cir. 1999).

112. See 42 U.S.C. § 9620(e)(2) (1994).

113. *Fort Ord Toxics Project*, 189 F.3d at 834.

114. See 42 U.S.C. 9611(e)(3) (1994).

115. See Wuerth, *supra* note 102, at 369.

116. See *Fort Ord Toxics Project*, 189 F.3d at 834.

its holding. Nevertheless, the Ninth Circuit's decision allows public challenge and federal judicial review of ongoing remedial cleanups on federal property pursuant to CERCLA. This public review of cleanup procedures conducted on contaminated federal property provides an important counterbalance to the applicable federal agency's decision making and implementation power over the method and extent of remediation.

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