TULANE ENVIRONMENTAL LAW JOURNAL

VOLUME 8 SUMMER 1995 ISSUE 2

CHALLENGES TO FEDERAL FACILITY CLEANUPS AND CERCLA SECTION 113(h)

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Federal facilities are home to many of the worst hazardous waste dumpsites in the nation. Cleanup of these facilities has proven enormously expensive and complicated, often involving complex questions about the relationships between overlapping state and federal laws and agencies, and provoking a spate of recent scholarship.[1] This Article seeks to untangle the application of one critical provision of the federal Superfund law to federal facilities,[2] which has played an important, but largely unexamined role in federal facility cleanup cases.

The provision, section 113(h), entitled "Timing of review," denies the federal courts jurisdiction over any suit that challenges certain removal or remedial actions.[3] Congress added section 113(h) to Superfund (CERCLA) in 1986 to ensure that lawsuits challenging the EPA did not delay the cleanup of hazardous waste sites.[4] The courts have applied section 113(h) broadly to deny almost all review of Superfund cleanups prior to completion.

Delineating the application of section 113(h) to federal facilities has proven difficult. The language of section 113(h) bars jurisdiction

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1. *See, e.g.*, Van S. Katzman, Note, *The Waste of War: Government CERCLA Liability at World War II Facilities*, 79 VA. L. REV. 1191 (1993); Nelson D. Cary, Note, *A Primer on Federal Facility Compliance With Environmental Laws: Where Do We Go From Here*?, 50 WASH. & LEE L. REV. 801 (1993); Margaret K. Minister, *Federal Facilities and the Deterrence Failure of Environmental Laws: The Case For Criminal Prosecution of Federal Employees*, 18 HARV. ENVTL. L. REV. 137 (1994); Peter M. Manus, *Federalism Under Siege at the Rocky Mountain Arsenal: Preemption and CERCLA after United States v. Colorado*, 19 COLUM. J. ENVTL. L. 327 (1994); Robert L. Glicksman, *Pollution on the Federal Lands III: Regulation of Solid and Hazardous Waste Management*, 13 STAN. ENVTL. L.J. 3, 7-15 (1994).

2. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-75 (1988)).

3. 42 U.S.C. § 9613(h) (1988).

4. Superfund Amendments and Reauthorization Act (SARA) of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified at 42 U.S.C. §§ 9601-9675 (1988)).

over actions selected or ordered under specific CERCLA provisions. This language does not include actions taken under section 120, the federal facilities provision, making application of section 113(h) to federal facilities unclear. A second question arises when facilities come within both Superfund and the Resource Conservation and Recovery Act (RCRA).[5] Most, but not all, courts have found that despite the language of both statutes, section 113(h) bars jurisdiction over suits brought under RCRA as well as those brought under CERCLA itself.

These issues have important ramifications for federal facility cleanups. At such facilities, cleanups conducted by one branch of the Executive (the Department of Defense or Energy in many cases), are supervised by another branch, the Environmental Protection Agency (EPA), with no possibility of outside review of the cleanup. The further refusal to review challenges brought under other federal environmental laws gives the Executive broad, unreviewable authority to conduct cleanups of sites for which it is a potentially liable party.

Unraveling the proper role of section 113(h) at federal facilities requires parsing the statute carefully, which this Article attempts to do. Although other commentators have fleshed out some of the policy issues both about federal facilities and section 113(h), none has looked carefully at both. This article discusses the courts' interpretation of section 113(h) with respect to federal facilities cleanups, with a close look at CERCLA, and finds that most courts have applied section 113(h) too broadly.

Section I reviews the background of CERCLA and RCRA, with reference to federal facilities and section 113(h). Section II considers when, if ever, section 113(h) applies to cleanups at federal facilities. This Article concludes that section 113(h) acts to bar challenges to some, but not all, cleanup measures taken at federal facilities. Section III examines whether section 113(h), to the extent that it does apply to federal facilities, bars challenges to cleanups based on RCRA, as well as those based on CERCLA. Although this question applies to private as well as federal facilities, for reasons discussed below, it arises more often, and has the greatest impact with respect to federal facilities. The courts are divided on this issue, but this article concludes that section 113(h) applies to some, but not all, RCRA actions.

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5. Resource Conservation and Recovery Act (RCRA) of 1976, Pub. L. No. 94-580, 92 Stat. 3081 (codified as amended at 42 U.S.C. §§ 6901-6981 (1988)).

I. BACKGROUND

The first part of this section discusses the history of CERCLA, particularly section 113(h) and the federal facilities provisions. Cleanup of these facilities presents the danger of self-dealing because one part of the federal executive oversees cleanups for which it is potentially liable. That danger is aggravated by the courts' use of section 113(h) to bar outside challenges. The second part of this section addresses the overlap between CERCLA and RCRA at federal facilities. This overlap makes section 113(h) potentially even more powerful: challenges brought to enforce RCRA requirements may also fall prey to CERCLA's jurisdictional bar in section 113(h).

A. CERCLA

Congress enacted CERCLA to ensure the effective cleanup of hazardous waste already released into the environment.[6] The statute provides federal funding for cleanups and gives the government the power to either clean up sites and sue responsible parties for its costs under section 104, or to force potentially responsible parties themselves to take cleanup actions under section 106.[7] Either the government or a private party may seek to recover its costs of cleanup from any party responsible for the hazardous waste.[8]

CERCLA provides for two kinds of cleanup actions. A "removal action" is a short-term remedy designed to minimize immediate damage, while a "remedial action" is designed to permanently clean up the site.[9] Before the EPA can begin a remedial action, it must assess the site through the "hazard ranking system,"[10] and place the site on the National Priorities List (NPL), which ranks the most threatening waste dumps in

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6. House Report of the Interstate and Foreign Commerce Committee, H.R. Rep. No. 1016, 96th Cong., 2d Sess., 17-18 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6119-21.

7. 42 U.S.C. §§ 9604, 9606.

8. 42 U.S.C. § 9607. CERCLA provides for very broad liability: past and present owners and operators, arrangers and transporters can all be held strictly jointly and severally liable for the cost of cleaning up the waste site. *See, e.g.,* United States v. Northeastern Pharmaceutical & Chemical Co., Inc., 810 F.2d 726 (8th Cir. 1986) (noting that CERCLA imposes strict, retroactive liability); O'Niel v. Picillo, 883 F.2d 176 (1st Cir. 1989) (imposing strict joint and several liability).

9. 42 U.S.C. §§ 9601(23), (24). "Response" means either a removal or a remedial action. *Id.* § 9601(26). Some commentators criticize the distinction between removal and remedial actions. Jerry L. Anderson, *Removal or Remedial? The Myth of CERCLA's Two-Response System*, 18 COLUM. J. ENVTL. L. 103 (1993).

10. 42 U.S.C. § 9605(c).

the nation.[11] After placement on the NPL, CERCLA requires preparation of a Remedial Investigation and Feasibility Study, and that the remedy selected by the EPA assures protection of human health and the environment.[12]

1. Section 113(h)

Congress added section 113(h) to CERCLA[13] to postpone federal jurisdiction over challenges to response actions. With this provision, Congress hoped to ensure the quick cleanup of hazardous waste dumps by preventing lawsuits that could delay agency action.[14] Members of Congress also hoped that limiting pre-enforcement judicial review would decrease response costs and encourage settlements and voluntary cleanups.[15] Section 113(h) built on two pre-1986 cases that dismissed

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11. *Id.* § 9605(a)(8)(B); 40 C.F.R. § 300.425(b)(1) (1994).
12. 42 U.S.C. § 9621(d).
13. Section 113(h) reads:

> "No Federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) 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, in any action except one of the following:
> 1) An action under section 9607 of this title to recover response costs or damages or for contribution.
> 2) An action to enforce an order issued under section 9606(a) of this title or to recover a penalty for violation of such order.
> 3) An action for reimbursement under section 9606(b)(2) of this title.
> 4) an action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.
> 5) An action under section 9606 of this title in which the United States has moved to compel a remedial action."

42 U.S.C. § 9613(h).

14. Senate Report of the Committee on the Environment and Public Works on the Superfund Improvement Act, S. Rep. No. 11, 99th Cong., 1st Sess. 58 (1985). *See also* T. Atkeson, et al., *An Annotated Legislative History of the Superfund Reauthorization and Amendment Act of 1986 (SARA)*, 16 ENVIR. L. RPTR. 10360 (1986).

15. Courts have also stated that section 113(h) prevents piecemeal review. Voluntary Purchasing Groups, Inc. v. Reilly, 889 F.2d 1380, 1390 (5th Cir. 1989).

suits by potentially responsible parties seeking injunctive relief from a costly EPA cleanup plan.[16]

Section 113(h) prevents jurisdiction over suits that "challenge" the EPA's cleanup actions or orders in all but five situations.[17] The courts have consistently held that section 113(h) bars pre-enforcement judicial review of the EPA's choice of removal or remedial actions.[18] Thus, section 113(h) defers the determination of the extent of a potentially responsible party's liability, and the appropriateness of EPA's remedy, until the EPA brings a cost recovery action.[19]

Since 1986, the courts have struggled to demarcate the broad language of section 113(h). Questions about what constitutes a "challenge" to a remedial action,[20] what actions are considered "remedial" or "removal,"[21] and whether all challenges, including those brought under the federal constitution are barred by section 113(h),[22] have proven particularly difficult to resolve.[23] Some courts have also considered whether section 113(h) bars review of actions that take place at federal facilities. None has carefully considered the unique problems that accompany preclusion of challenges to facilities owned or operated by a federal agency.

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16. *See* Lone Pine Steering Committee v. United States E.P.A., 777 F.2d 882 (3d Cir. 1985); and J.V. Peters & Co. v. E.P.A., 767 F.2d 263 (6th Cir. 1985).

17. 42 U.S.C. § 9613(h)(1)-(5). *See supra* note 13.

18. Boarhead Corp. v. Erickson, 923 F.2d 1011, 1018-23 (3d Cir. 1991); Reardon v. United States, 731 F. Supp. 558, 562-63 (D. Mass. 1990), *modified on other grounds*, 947 F.2d 1509 (1st Cir. 1991); Schalk v. Reilly, 900 F.2d 1091 (7th Cir. 1990).

19. The challenges a defendant can bring even after the initiation of a cost-recovery action is the subject of some disagreement. *See* United States v. Princeton Gamma-Tech, Inc., 817 F. Supp. 488, 494-95 (D.N.J. 1993) *rev'd and remanded*, 31 F.3d 138 (3d Cir. 1994).

20. *Reardon*, 947 F.2d at 1514 (defining "challenge" to mean challenges to the EPA's administration of the statute, not challenge to the CERCLA statute itself); *Schalk*, 900 F.2d at 1097 (defining "challenge" to include challenge to process used to pick remedy).

21. *See generally* Reardon v. United States, 731 F. Supp. 558 (D. Mass. 1990), *modified on other grounds*, 947 F.2d 1509 (1st Cir. 1991); Voluntary Purchasing Groups, Inc. v. Reilly, 889 F.2d 1380 (5th Cir. 1989) (finding a letter encouraging settlement to be part of a removal action); North Shore Gas Co. v. EPA, 930 F.2d 1239, 1244 (7th Cir. 1991) (finding inter alia that a measure reasonably related to remedial plan's objectives is itself remedial).

22. *Reardon*, 947 F.2d at 1514-17 (holding that § 113(h) does not preclude review of due process claim).

23. *See generally* Michael P. Healy, *Judicial Review and CERCLA Response Actions: Interpretive Strategies in the Face of Plain Meaning*, 17 HARV. ENVTL. L. REV. 1, 4 (1993). Healy discusses the availability of judicial review under section 113(h) in a variety of situations. *Id.* His work does not address federal facilities or RCRA-based challenges under section 113(h).

2. Federal Facilities

In 1986 Congress amended Superfund to include section 120, which specifically governs federal facilities.[24] The new section addressed what Congress saw as the "legitimate concerns" about "adequate and timely response actions" at contaminated federal facilities.[25] The provision sought to provide the public, states, and the EPA with more power to ensure that federal facilities underwent adequate and efficient cleanups.[26]

With section 120, Congress made the federal government, including all federal agencies, subject to the requirements of CERCLA, including liability for cleanup costs.[27] It also provided special timetables for federal facility cleanups[28] and special provisions for agreements between the agency head and the EPA to conduct remedial action.[29] These agreements must comply with public participation requirements,[30] and the EPA has the authority to select a remedial action if an agreement cannot be reached.[31]

Federal facilities pose unique problems for both EPA and private parties involved in federal cleanups. Executive 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 cleanups on those lands. First, Executive Order 12,580 gives federal agencies the power to undertake response actions at their facilities.[32] The Secretary of Defense, for example, stands in the shoes of the EPA with regard to cleanups at Department of Defense facilities. The EPA thus enjoys far less authority over response and enforcement actions at federal facilities than it does at private facilities.[33] Section 111(e)(3)

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24. 42 U.S.C. § 9620.

25. Report of the Energy and Commerce Committee, H.R. Rep. No. 253(I), 99th Cong., 2nd Sess. 95 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2877.

26. *Id. See* Glicksman, *supra* note 1, at 7-15 (discussing the scope of the pollution problem at federal facilities).

27. 42 U.S.C. § 9620(a)(1). *See generally* Katzman, *supra* note 1.

28. 42 U.S.C. § 9620(a)(4).

29. *Id.* § 9620(e)(2).

30. 42 U.S.C. §§ 9620(e)(2), 9617.

31. *Id.* § 9620(e)(4).

32. Exec. Order No. 12,580(2)(g), 3 C.F.R. 193 (1988), *reprinted in* 42 U.S.C. § 9615; *see generally* Minister, *supra* note 1, at 154-56 (noting that Executive Order 12580 has been "severely criticized").

33. *See generally* Andrew M. Gaydosh, *The Superfund Federal Facility Program: We Have Met the Enemy and It Is U.S.*, NAT. RESOURCES & ENV'T., Winter 1992 at 21, 22; Robert C.

further restricts EPA's control over federal facilities by preventing the use of Superfund money for remedial actions at federal facilities.[34] The EPA retains, however, the authority to select a permanent remedy if the agency and EPA cannot agree.[35]

Because CERCLA makes federal agencies, like private parties, potentially liable for cleanup costs of sites for which they are responsible,[36] federal agencies that control CERCLA cleanup measures are also potentially liable for their cost. At private facilities, in contrast, the EPA determines the necessary recovery actions for which private parties are potentially liable. EPA can either pay for the cleanup and sue for the cost, or in some circumstances it can force the private party to conduct the cleanup.[37] To the extent that federal agencies both control facility cleanups and pay for their cost, the EPA does not ensure that the cleanup is good as well as cheap.

Second, even in the areas where the EPA does maintain control of the cleanup actions taken at federal facilities, its interests are not necessarily adverse to those of the potentially liable agency. A District Court of Colorado recognized this problem when faced with a state RCRA challenge to a federal facility cleanup. The court noted that the EPA and the Army were not adverse in "any real sense" and that the "Army, in effect, seeks full and unbridled discretion, subject only to EPA's input through the same attorneys who represent the Army. . . ."[38] Further, even if the EPA did want to force the agency into action, Department of Justice policy prevents federal agencies from bringing actions against one another.[39]

Davis, Jr. and R. Timothy McCrum, *Environmental Liability for Federal Lands and Facilities*, NAT. RESOURCES & ENV'T., Summer 1991 at 31.

34. The statute provides narrow exceptions for money used to assess natural resources damages, to protect the safety of cleanup employees, and to provide for alternative water supplies in the case of certain groundwater contaminations at federal facilities. 42 U.S.C. §§ 9611(e)(3), (e)(1), (c)(6).

35. *Id.* § 9620(e)(4). The president cannot delegate this authority away from the EPA. *Id.* § 9620(g).

36. *Id.* § 9620(a); *see* Davis & McCrum, *supra* note 33, at 31.

37. 42 U.S.C. §§ 9604, 9606.

38. Colorado v. United States Dep't of the Army, 707 F. Supp. 1562, 1570 (D. Colo. 1989). *See also* Minister, *supra* note 1, at 153-56.

39. This is the "unitary executive theory." *See* Cary, *supra* note 1, at 828-30; Vicky L. Peters et al., *Can States Enforce RCRA at Superfund Sites? The Rocky Mountain Arsenal Decision*, [1993] 23 ENVTL. L. REP. (Envtl. L. Inst.) 10419, 10421 (July 1993). The agency is liable under cost recovery or contribution action brought by a private party or a state. Roger N. Boyd et al.,

The broad authority for cleanups by federal agencies discussed above makes the courts' interpretation of section 113(h) at federal facilities particularly important. Section II of this comment discusses whether section 113(h) precludes challenges to actions taken under the federal facility provisions. Some lower courts have held that section 113(h) applies to such actions, removing an important potential tool for overseeing cleanups. For those cleanup actions to which section 113(h) does apply, courts have also found that section 113(h) bars challenges based on collateral statutes, such as RCRA. Part B of this section examines the importance of this question for federal facilities. Section III of this article discusses whether the courts have decided this issue correctly.

B. CERCLA and RCRA at Federal Facilities

The Resource Conservation and Recovery Act of 1976 gives the EPA broad authority to develop a comprehensive system of hazardous waste regulation.[40] The statute is aimed at regulating such waste "from cradle to grave," and the EPA has set standards for among other activities, record-keeping, labeling, tracking, storing, transporting, treating, and disposing of hazardous waste.[41] In response to EPA's slow implementation of RCRA, Congress comprehensively amended the statute in 1984, setting tight deadlines and detailed directions for the EPA.[42]

RCRA is primarily directed at regulating facilities that generate, treat, or dispose of waste on an ongoing basis, while CERCLA provides for the cleanup of waste already in the environment.[43] With the 1984 amendments, however, RCRA also requires remedial "corrective actions," similar to CERCLA cleanup actions.[44] Any storage, treatment,

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Who Pays for Superfund Cleanups at DOD-Owned Sites?, NAT. RESOURCES & ENV'T., Spring 1986, at 11, 58-59.

40. RICHARD C. FORTUNA & DAVID J. LENNETT, HAZARDOUS WASTE REGULATION: THE NEW ERA 1-23 (1987).

41. 40 C.F.R. §§ 262-65 (1993); Randolph L. Hill, *An Overview of RCRA: The "Mind-Numbing" Provisions of the Most Complicated Environmental Statute*, [1991] ENVTL. L. REP. (Envtl. L. Inst.) 10254, 10255 (May 1991).

42. The Hazardous and Solid Waste Amendments (HSWA) of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (codified at 42 U.S.C. §§ 6901-6992); *see* Hill, *supra* note 41, at 10255.

43. Richard G. Stoll, *The New RCRA Cleanup Regime: Comparisons and Contrasts with CERCLA*, 44 SW. L.J. 1299 (1991).

44. 42 U.S.C. § 6924(u); Stoll, *supra* note 43, at 1303-05.

or disposal facility that applies for any kind of RCRA permit must take corrective actions for all releases of hazardous waste at the facility.[45]

Because RCRA corrective actions are remedial, and similar to CERCLA remedial actions, private and federal facilities which release hazardous waste can come within both RCRA and CERCLA.[46] Thus, private suits challenging a RCRA cleanup may also affect a CERCLA cleanup, and therefore arguably are prevented by section 113(h).[47]

Although this potential conflict between CERCLA and RCRA causes of action can arise at private facilities, it is most common and important in federal facility cleanups. Under RCRA, the private party that applies for a permit must take and pay for the corrective action; under CERCLA, the EPA pays for the cleanup and then, if possible, seeks reimbursement from private polluters.[48] In order to conserve the resources of CERCLA, the EPA has a policy of deferring CERCLA authority in favor of RCRA at sites where RCRA requires corrective action.[49]

This deferral policy eliminates most of the situations in which a RCRA suit could be barred under section 113(h) by a CERCLA cleanup.[50] This policy does not, however, apply to federal facilities.[51] Many federal, unlike private facilities, are therefore subject to both RCRA corrective action and CERCLA remedial authority. The EPA estimates that the "great majority of federal facility sites" eligible for CERCLA cleanup are also subject to RCRA corrective action authority.[52]

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45. Stoll, *supra* note 43, at 1302-05.

46. John C. Chambers, Jr. & Peter L. Gray, *EPA and State Roles in RCRA and CERCLA*, NAT. RESOURCES & ENV'T., Summer 1989 at 7; Glicksman, *supra* note 1, at 15-25.

47. *See, e.g.,* United States v. Colorado, 990 F.2d 1565, 1579 (10th Cir. 1993); Reynolds v. Lujan, 785 F. Supp. 152, 153-55 (D.N.M. 1992).

48. J. Stanton Curry et al., *The Tug-of-War Between RCRA and CERCLA at Contaminated Hazardous Waste Facilities*, 23 ARIZ. ST. L.J. 359 (1991).

49. The EPA does this by not listing sites subject to RCRA corrective action on the National Priorities List [hereinafter NPL]. 53 Fed. Reg. 30,005. For a more detailed description of this deferral policy, *see generally* Curry et al., *supra* note 48.

50. Most conflicts arise at sites that initially come only within the jurisdiction of CERCLA. Where the cleanup involves construction of a facility, such as an incinerator, RCRA could require a permit. *See* North Shore Gas Co. v. EPA, 930 F.2d 1239, 1241-42 (7th Cir. 1991); Arkansas Peace Center v. Arkansas Dep't of Pollution Control, 999 F.2d 1212, 1213-1214 (8th Cir. 1993).

51. 54 Fed. Reg. 10,520 (1989); 58 Fed. Reg. 34,018 (1993).

52. 54 Fed. Reg. 10,520-01 (1989). Indeed, the EPA exempted federal facilities from the deferral policy in large part because deferring such sites to RCRA would leave so few within CERCLA. The EPA thought that this result would conflict with the intent of Congress in section 120 to use CERCLA to clean up federal facilities. Also, at a federal facility listed on the NPL, EPA

Because the EPA goes ahead with a CERCLA cleanup at these sites, section 113(h) can potentially be used to bar RCRA enforcement actions, which removes an important check on federal cleanup authority.

Because state law supplants federal RCRA law in most states, cleanup of federal facilities potentially involves not only a clash between RCRA and CERCLA, but a struggle between state and federal authority.[53] Federal agencies conducting cleanups have disagreed with states about whether state RCRA laws apply to federal facilities on the NPL.[54] Federal agencies have also argued that section 113(h) prevents state and federal RCRA challenges to federal facility actions.[55] If section 113(h) prevents such actions, it renders the first disagreement moot: states or private parties could not enforce state RCRA law at federal facilities, even if it substantively applied.

This section has canvassed the particular importance of section 113(h) in the federal facilities context. The next section discusses the textual and structural basis for applying section 113(h) to challenges at federal facilities. Section III discusses whether section 113(h), if applied to federal facilities, bars RCRA enforcement actions.

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cannot spend fund money for remedial actions. Listing a private facility on the NPL, on the other hand, authorizes EPA to use the fund for remedial actions. A deferral policy for federal facilities would not save the EPA money, it would merely exempt the facility from section 120. *Id.*

53. *See* Manus, *supra* note 1; Gaydosh, *supra* note 33; Peters, et al., *supra* note 39.

54. Gaydosh, *supra* note 33, at 23. Federal agencies rely on section 120(a)(4) of CERCLA, which states: "State laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States when such facilities are not included on the National Priorities List." 42 U.S.C. § 9620(a)(4). States point to section 120(I), which declares: "Nothing in this section shall affect or impair the obligation of any department, agency, or instrumentality of the United States to comply with any requirement of the Solid Waste Disposal Act [42 U.S.C.A. § 6901 et seq.] (including corrective action requirements)." *Id.* § 9620(I). The 10th Circuit recently agreed with the states' position. The court said that section 120(i) demonstrated that "removal and remedial" actions in section 120(a)(4) did not include RCRA actions. United States v. Colorado, 990 F.2d 1565, 1580 (10th Cir. 1993). The government in the Colorado case also argued that state RCRA laws do not apply to CERCLA cleanups because the state input through identification of "applicable or relevant and appropriate requirements" provides the exclusive means of state involvements. The Tenth Circuit also rejected this argument. *Id.* at 1580-81.

55. *See, e.g.,* United States v. Colorado, 990 F.2d 1565 (10th Cir. 1993); *see generally* Gaydosh, *supra* note 33, at 23.

II. DOES SECTION 113(H) APPLY TO ACTIONS AT FEDERAL FACILITIES?

The courts that have considered this issue have concluded that section 113(h) bars challenges to federal facility cleanups conducted under section 120. The language of section 113(h), however, includes actions taken under section 104 and section 106 but not federal facility actions pursuant to section 120. Section 113(h) does not refer to section 120. Instead, section 113(h) directs that federal courts do not have jurisdiction "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. . . ."[56] The key question faced by the courts was whether or not remedial actions taken at federal facilities under section 120 are nonetheless "selected under" section 104 or "ordered under" section 106.[57] The structure of CERCLA divides authority for federal facility cleanups and apparently applies section 113(h) to some, but not other actions at federal facilities. While it is not clear exactly how Congress intended to demarcate the boundaries of section 113(h), this division of authority and the limitations it puts on the application of section 113(h) are most consistent with the structure of the statute and provide a sensible scheme for the oversight of federal facility cleanups.

A. Position of the Courts

Two courts have held that section 113(h) bars challenges to recovery actions at federal facilities. The first, *Werlein v. United States*, considered an injunctive action under RCRA and the Clean Water Act to expedite the cleanup of a facility owned by the United States and run by the Department of the Army.[58] The court considered and rejected the argument that section 113(h) did not apply to actions taken pursuant to section 120.[59] In the second case,[60] the court deferred to the reasoning of

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56. 42 U.S.C. § 9613(h). *See supra* note 13 for the full text of section 113(h).

57. Werlein v. United States, 746 F. Supp. 887, 891 (D. Minn. 1990), *vacated in part*, 793 F. Supp. 898 (D. Minn. 1992).

58. *Id.* at 890-91.

59. *Id.* at 891-92.

60. Heart of America Northwest v. Westinghouse Hanford Co., 820 F. Supp. 1265 (E.D. Wash. 1993).

the *Werlein* court and applied section 113(h) to preclude a RCRA challenge to a federal facility agreement.[61]

As noted above, section 113(h) shields CERCLA actions "selected under" section 104 and section 106. Although section 120 provides for actions at federal facilities, the court in *Werlein* found that the authority for actions taken under section 120 stems from section 104. The court concluded that section 113(h) applied to an action taken under section 120 because that action is actually "selected under" section 104.

The court reasoned that section 104 of CERCLA provides EPA with the basic authority to clean up sites wherever a release of a hazardous substance occurs.[62] For federal facilities, the President has delegated this authority to the Department of Defense for cleanups of defense facilities,[63] pursuant to another CERCLA provision, section 115.[64] The power to conduct these cleanups at federal facilities thus originates in section 104 and is delegated by the President under the authority of section 115.[65] Section 120, according to this reading, provides the specific provision that governs a federal facility cleanup, but does not provide the basic authority to conduct such a cleanup.

B. Argument

Werlein's account of the basis of authority for section 120 cleanups is inconsistent with other language in CERCLA. The statute allocates authority in a more complicated way that permits section 113(h) challenges to some, but not to other federal facility actions. This complexity calls into question the basic premise of *Werlein*, namely that section 113(h) applies to actions that derive their authority from section 104 and section 106.

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61. *Id.* at 1279. Several courts have applied section 113(h) to cleanups conducted under section 120 without discussion. *See, e.g.,* United States v. Colorado, 990 F.2d 1565 (10th Cir. 1993); *In re* Hanford Nuclear Reservation Litigation, 780 F. Supp. 1551 (E.D. Wash. 1991). In both cases, the court assumed that 113(h) applied to federal facilities and went on to discuss whether section 113(h) precludes RCRA-based challenges as well as those based on CERCLA.

62. Werlein v. United States, 746 F. Supp. 887, 891 (D. Minn. 1990).

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

64. 42 U.S.C. § 9615. Section 115 states: "The President is authorized to delegate and assign any duties or powers imposed upon or assigned to him and to promulgate any regulations necessary to carry out the provisions of this subchapter." *Id.*

65. *Werlein*, 746 F. Supp. at 890-91.

1. *Werlein*'s Reasoning is Incorrect

Although *Werlein* asserted that all authority to conduct cleanup actions comes from section 104 and section 106, the language of section 120 implies that it also serves as a source of authority for such actions.[66] Section 120(g) directs that "no authority vested in the Administrator under this section may be transferred, by executive order of the President or otherwise, to any other officer or employee of the United States or to any other person."[67] Apparently, some authority comes from section 120 itself. This authority, unlike that in section 104, may not be delegated away from the EPA.

By prohibiting delegation away from the EPA to another executive agency, such as the Department of Defense, section 120(g) provides an important check on the amount of authority an agency can assume over cleanups at its own facility. This provision thus provides two potential constraints on an agency conducting a cleanup of its own facility: the agency may not itself assume section 120 authority vested in the EPA, and language of section 113(h) does not appear to bar challenges to actions taken at federal facilities under section 120.

What authority comes from section 120 itself and is reserved for the EPA Administrator? Section 120 provides that the Administrator has the authority to conduct preliminary assessments and list facilities on the National Priority List,[68] to select remedial actions,[69] and to make agreements with potentially liable parties to conduct remedial actions.[70]

Section 120 does not provide for removal actions, which are short term;[71] it only addresses evaluations of the facility and long-term remedial actions. Thus, at federal facilities, although authority for removal actions comes from section 104 and section 106, remedial actions are governed by section 120.[72] If, as *Werlein* held, the source of

66. The *Werlein* court does not discuss this provision.
67. 42 U.S.C. § 9620(g).
68. *Id.* § 9620(d).
69. *Id.* § 9620(e)(2), (e)(4)(A).
70. *Id.* § 9620(e)(6).
71. For the distinction between removal and remedial actions, see 42 U.S.C. §§ 101(23)-(24).
72. The *Werlein* opinion states that because section 104 applies to federal facilities, there is no reason that CERCLA would include a second section that empowers remedial actions. Werlein v. United States, 746 F. Supp. 887, 891-92 (D. Minn. 1990). The Werlein court seemed to misunderstand that Congress intended to divide the authority for recovery actions between the EPA and the other federal agency. *Id.* The apparent purpose of this division was to provide EPA

authority is determinative, then this division of authority suggests that section 113(h) applies to removal actions, because they find their authority in section 104, but not remedial actions, which are based on section 120.[73]

If *Werlein* correctly held that the source of authority determines whether or not section 113(h) bars a suit, it misapplied this rule. The plaintiffs challenged remedial actions selected under section 120 and incorporated into a federal facility agreement.[74] The authority for that agreement came from section 120, not section 104.

2. Alternative Interpretations of Section 113(h) and Section 120

The court may also have erred in looking to the source of authority to determine whether or not section 113(h) applies. This section discusses two alternative interpretations of the scope of section 113(h).

In assuming that the source of *authority* determines whether or not section 113(h) applies, *Werlein* ignored the language of section 113(h), which denies jurisdiction over challenges to actions *selected* under section 104. Section 120 provides special selection procedures for remedial actions.[75] Even if the power for such an agreement came from section 104, the remedy is selected under the special requirements of section 120.

Second, despite the plain language of the statute, perhaps Congress' failure to include section 120 in the language of section 113(h) was unintentional. Under this analysis, Congress intended section 104 and section 106 to provide bases for all CERCLA actions, and did not think carefully about the language of section 120 that creates its own

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oversight for remedial actions by preventing delegation of authority for those actions away from the EPA. *Id.* The *Werlein* court only contemplated the possibility that a separate source of authority would simply provide two bases of authority for the same agency. *Id.*

73. Another CERCLA provision supports this distinction between removal and remedial actions at federal facilities. Section 111(e)(3) permits spending of fund money at federal facilities for removal actions under section 104, but not remedial actions. 42 U.S.C. § 9611(e)(3).

74. *Werlein*, 746 F. Supp. at 891 n.1.

75. Under section 120 the EPA and the agency head enter into an interagency agreement that provides for all remedial actions at the facility. *See* 42 U.S.C. §§ 9620(e)(2), (e)(4), (e)(6). The interagency agreement must include alternative remedial actions and the selection of a remedial plan by agreement or by the EPA if no agreement can be reached. If the remedial action is to be performed by another potentially responsible party, the agreement to take the action must be entered as a consent decree.

basis of authority. Although the strength of this argument lies in its simplicity, neither the legislative history nor other provisions of the statute provide sufficient support for an interpretation that counters the plain language of the statute.

The legislative history provides little guidance. Although the conference report discusses section 113(h), as do the House and Senate reports, none mention the relationship between Sections 113(h) and 120.[76] Some general language from the floor debates supports applying section 113(h) to bar challenges to cleanups at federal facilities.[77] These comments do not appear in the written reports and provide weak authority for specific conclusions about the scope of section 113(h).

C. Conclusion: Section 120 Remedial Actions Fall Outside Section 113(h)

Several factors support limiting section 113(h) to exclude actions taken pursuant to the specific provision of section 120. Such actions include selection of a remedial plan, but not removal actions.

First, this interpretation is most consistent with the plain language of section 113(h).[78] Unlike *Werlein*, it gives meaning to Congress' exclusion of section 120 from section 113(h). This argument is particularly strong because Congress enacted section 120 and section 113(h) at the same time, and because another provision enacted in the Superfund Amendments and Reauthorization Act (SARA) includes

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76. The Report of the Energy and Commerce Committee states that the purpose of section 120 was to give states and citizens more control over facility cleanups. *See supra* note 25. Denying jurisdiction over challenges by such plaintiffs would seriously undermine this goal. On the other hand, section 120 provides for citizen and state participation in formulating interagency agreements, and drafters of the Report may have intended only to refer to these provisions. 42 U.S.C. §§ 9620(e)(1), (e)(2).

77. Representative Glickman, for example, stated that "[t]he timing of review section covers all lawsuits, under any authority, concerning the response actions that are performed by the EPA and other Federal agencies." This language, in context, seems directed at collateral lawsuits, not at extension of section 113(h) to federal facilities. But because most actions taken by "other Federal agencies" would presumably occur on federal facilities, under section 120, this remark suggests that Congressman Glickman at least believed that section 113(h) extended to section 120 cleanups. 132 CONG. REC. H9582 (daily ed. Oct. 8, 1968).

78. The text of a statute provides the most important basis for interpretation. CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 114 (1990); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 354-55 (1990).

section 120 in language similar to that of section 113(h).[79] The distinction between remedial actions secured under section 106 and remedial actions at federal facilities created by another SARA provision also supports this reading.[80] This could also explain why Congress did not elaborate on the relationship between section 113(h) and section 120: drafters believed that exclusion of section 120 from the language of section 113(h) made their intent clear.

Second, CERCLA directly funds removal but not remedial actions at federal facilities. Although CERCLA funds long-term, remedial actions at private facilities, it does not do so at federal facilities.[81] Money for remedial actions at federal facilities must come from the agency that operates the facility.[82] That CERCLA's funding provisions distinguish between removal and remedial actions supports a reading of section 113(h) that also distinguishes between removal and remedial actions.

Third, applying section 113(h) to removal but not remedial actions also makes sense as a matter of policy. For short, temporary actions, the agency should act quickly without outside legal interference. For such actions the agency has authority under section 104, delegated under section 115 within the protection of section 113(h). When it acts pursuant to section 104, the agency stands in the shoes of the EPA, and can thus use CERCLA authorized funds just as the EPA would.[83] For removal measures, directed at temporary containment and abatement of the hazard, the agency needs to act quickly and effectively. Therefore, in these circumstances, it should be free from lawsuits.

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79. The language of section 117 supports this reading by distinguishing among remedial actions under §§ 104, 106, 120 and 122. *See* 42 U.S.C. §§ 9604, 9606, 9620, 9622. Section 113(h), on the other hand, refers only to actions under §§ 104 and 106. *Id.* § 9613(h). Congress added section 117 in 1986, with sections 113(h) and 120. This reasoning supports excluding § 122 consent decrees from § 113(h). The Ninth Circuit rejected a similar argument in Fairchild Semiconductor Corp. v. United States E.P.A., 984 F.2d 283, 287-88 (9th Cir. 1993).

80. 42 U.S.C. § 9621. This indicates that Congress created different enforcement mechanisms at federal and nonfederal facilities. Federal facilities fell under section 120, but outside of § 106. This makes sense because section 120 provides for EPA enforcement against a federal agency (through an interagency agreement), and because section 120 also provides that nonfederal parties involved at federal facilities may conduct cleanups only under section 122, pursuant to section 106.

81. *Id.* § 9611(e)(3).

82. Section 111(e)(1) creates a few narrow exceptions. *Id.* § 9611(e)(1).

83. Gaydosh, *supra* note 33, at 31.

Remedial measures, however, are permanent solutions. They are the product of a longer selection process and are funded by the agency itself. Selection of such remedial action cannot be delegated from the EPA to the other agency. The delay in reviewing challenges to remedial actions is less serious since immediate action is authorized under section 104. The need for review is greater as well: the remedial action is a permanent remedy, negotiated here between two branches of the Executive.

Although remedial actions at private facilities are shielded from legal challenges by section 113(h), even they are subject to review in certain circumstances. For remedial actions between the EPA and private potentially responsible parties, the agreement must be entered as a consent decree,[84] which provides for some judicial oversight and is open to some challenges by private parties notwithstanding section 113(h).[85]

By applying section 113(h) to all actions taken at federal facilities, courts have prevented oversight of federal facility cleanups. A more narrow application of section 113(h), which would deny jurisdiction over challenges to some, but not all such recovery actions is more consistent with the language and structure of CERCLA. For the remedial actions at federal facilities that come within section 113(h), a second question remains: does the jurisdictional bar apply to challenges based on RCRA as well as those based on CERCLA itself?

III. PRECLUSION OF RCRA SUITS AT FEDERAL FACILITIES

Several lower courts have concluded that section 113(h) also bars RCRA-based challenges to remedial actions. These courts incorrectly generalized from early decisions under the Administrative Procedure Act (APA), and ignored the language of both CERCLA and RCRA that provides for careful coordination between the statutes. A recent Tenth Circuit decision recognized this coordination, however, and limited the scope of section 113(h) over RCRA actions. Although section 113(h) potentially bars RCRA challenges to cleanups at both private and federal facilities, this conflict between section 113(h) and RCRA arises more often, and with greater importance at federal rather than at private facilities.

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84. 42 U.S.C. §§ 104(a), 122(a), 122(d)(1)(A).
85. *Id.* § 122(m).

A. The First Collateral Challenges: Administrative Procedure Act Cases

Many early plaintiffs challenging CERCLA based on collateral statutes did so under the APA,[86] which provides a general cause of action for parties aggrieved by federal agency action.[87] If Congress expressly forecloses judicial review, however, the APA does not provide a basis for jurisdiction.[88]

Superfund litigants have used the APA to sue under statutes that do not explicitly provide a cause of action.[89] Because the APA cannot confer jurisdiction if a statute precludes judicial review, the courts have looked to section 113(h) to determine whether or not Congress intended to prevent the action in question. Later cases that considered challenges based on RCRA, which does provide its own cause of action, misapplied the APA precedent to support the conclusion that Congress intended section 113(h) to bar all collateral challenges based on any statute, including RCRA.[90]

In *Schalk v. Reilly*,[91] the plaintiff challenged a CERCLA consent decree that provided for incineration of toxic waste removed from the site.[92] Plaintiffs asserted that the remedy violated the National Environmental Policy Act (NEPA).[93] Because NEPA does not itself grant a statutory right of review, the plaintiff argued that the APA established such a right. The court looked to section 113(h) to determine if CERCLA foreclosed review of the action. The NEPA action

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86. Administrative Procedure Act, Pub. L. No. 89-554, 80 Stat. 378 (1966) (codified as amended at 5 U.S.C. §§ 701-706 (1988).

87. *Id.* § 702.

88. *Id.* § 701(a)(1); Block v. Community Nutrition Inst., 467 U.S. 340, 352-53 (1984).

89. Schalk v. Reilly, 900 F.2d 1091 (7th Cir. 1990); Boarhead Corp. v. Erickson, 923 F.2d 1011 (3d Cir. 1991). Plaintiffs have also used the APA to waive sovereign immunity, Voluntary Purchasing Groups v. Reilly, 889 F.2d 1380 (5th Cir. 1989), and to seek review of actions contrary to CERCLA, but for which CERCLA provides no specific cause of action. Alabama v. United States E.P.A., 871 F.2d 1548 (11th Cir. 1989).

90. For a general discussion of § 113(h) and challenges based on collateral statutes, see Healy, *supra* note 24, at 56-87. Healy considers challenges based on the bankruptcy code and the APA, but not RCRA. Consistent with the conclusion drawn in this article, Healy argues that the courts have not carefully considered the goals of competing statutes when applying section 113(h). *See generally* Healy, *supra* note 23.

91. 900 F.2d 1091 (7th Cir. 1990).

92. *Id.* at 1093.

93. National Environmental Policy Act (NEPA) of 1969, Pub. L. No. 91-190, 83 Stat. 852 (codified as amended at 42 U.S.C. §§ 4321-4347 (1988).

challenged the procedure used to select a remedy, and the remedy itself, so the court concluded that section 113(h) barred review under NEPA.[94]

Dictum in at least one APA case suggested that section 113(h) barred not only APA challenges, but also any challenges under other statutes. In *Boarhead Corp. v. Erickson*,[95] the plaintiffs challenged a proposed CERCLA cleanup of a farm which they claimed had special historical significance, as violative of the National Historic Preservation Act (NHPA).[96] The *Boarhead* plaintiffs had to rely on the APA,[97] and the court could have followed *Schalk*'s narrow reasoning to deny jurisdiction. But the court explained that Congress had "balanced the problem of irreparable harm" under the National Historic Preservation Act against "the interest in removing the hazard of toxic waste from Superfund sites."[98] The *Boarhead* court thus read the general language of section 113(h) to mean that Congress considered and rejected *all* challenges to CERCLA actions.[99]

B. Analysis: Position of the Courts

Most courts have relied on the language in the *Boarhead* decision and the other APA cases to conclude that Congress intended with section 113(h) to bar any challenge to a CERCLA cleanup. Courts have failed to discuss the specific language in RCRA and CERCLA that addresses how the statutes should interact. One Tenth Circuit decision, *United States v. Colorado*,[100] relying on this language, concluded that Congress provided for some RCRA causes of action at CERCLA cleanups. Two subsequent

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94. *Schalk*, 900 F.2d at 1097.

95. 923 F.2d 1011 (3d Cir. 1991).

96. National Historic Preservation Act (NHPA), Pub. L. No. 89-665, 80 Stat. 915 (1966) (codified as amended at 16 U.S.C. §§ 470-470w-6. (1988 & Supp. IV 1993).

97. *Boarhead*, 923 F.2d at 1017 n.11. The court appeared to find that although the Historic Preservation Act provided a cause of action, the plaintiffs needed to invoke the APA to waive sovereign immunity. Even if the decision bars a NHPA cause of action under section 113(h), its conclusions are sweeping, and the case provides poor precedent for RCRA-based causes of action.

98. *Id.* at 1023.

99. One commentator has criticized the *Boarhead* court for being "too much the servant of overbroad language" and argued that the categorical language of section 113(h) does not suggest that Congress carefully weighed the rights under both statutes. Healy, *supra* note 23, at 56-87. Another commentator suggests that the legislative history supports the court's conclusion that Congress intended with 113(h) to generally preclude all other rights of action. Chris Schatzman, Note, Boarhead Corporation v. Erickson: *CERCLA Precludes the Use of Other Statutes to Challenge EPA Cleanup Actions*, 32 NAT. RESOURCES J. 977 (1992)

100. 990 F.2d 1565 (10th Cir. 1993).

cases that did not follow *Colorado* failed to acknowledge the split of authority over when section 113(h) denies jurisdiction over RCRA suits.

1. Early Decisions Denying Jurisdiction Over RCRA Actions

Werlein v. United States,[101] the first case to consider a RCRA challenge under section 113(h), provided authority for most decisions that followed. In *Werlein*, the plaintiffs sought injunctive relief under RCRA to expedite a federal facility cleanup conducted under a section 120 interagency agreement. First, the court cited *Schalk* and the broad language of *Boarhead* asserting that Congress had sought to deny all challenges until completion of the remedial action.[102] The court then looked to the legislative history of SARA, quoting the floor remarks of Senator Thurman in which he stated that section 113(h) "covers *all lawsuits, under any authority*, concerning the response actions that are performed by the EPA."[103] Finally, *Werlein* noted that the plaintiffs cited no legislative history suggesting that section 113(h) applies only to CERCLA.[104]

The Seventh Circuit reached the same conclusion a few months later in *North Shore Gas Co. v. EPA*.[105] The court held that plaintiff North Shore, a public utility, lacked standing, but also concluded that section 113(h) withdrew jurisdiction over both RCRA and NEPA actions.[106] Although RCRA provides a cause of action, whereas NEPA actions must depend on the APA, the court cited *Schalk*, a NEPA case, and in one sentence dispensed with both actions.[107] Like *Werlein*, the *North Shore Gas* court applied the APA precedent broadly, ignoring differences between APA and RCRA causes of action.

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101. Werlein v. United States, 746 F. Supp. 887 (D. Minn. 1990).

102. *Id.* at 893. The court then cited the district court opinion in Reardon v. United States, 731 F. Supp. 558 (D. Mass. 1990) which found that Congress intended section 113(h) to bar even constitutional claims. *Id.* The Court of Appeals reversed the lower court on this point, holding that Congress did intend "challenge" to include a constitutional challenge to the statute itself. Reardon v. United States, 947 F.2d 1509, 1517 (1st Cir. 1991).

103. *Werlein*, 746 F. Supp. at 894 (quoting 132 CONG. REC. § 14929 (daily ed. Oct. 3, 1986)).

104. *Id.* at 894. Some remarks of Senator Stafford suggest that section 113(h) should only bar CERCLA actions. *See* Schatzman, *supra* note 99, at 993.

105. 930 F.2d 1239 (7th Cir. 1991).

106. *Id.* at 1244-45.

107. *Id. See supra* note 91 and accompanying text.

Reynolds v. Lujan,[108] a 1992 district court case, followed *Werlein*. The plaintiffs in *Reynolds* sued the Bureau of Land Management to force the agency to comply with RCRA requirements at a federally owned landfill.[109] The *Reynolds* opinion quoted extensively from *Werlein*,[110] cited *Boarhead Corp. v. Erickson* and the district court decision in *United States v. Colorado*,[111] and concluded that section 113(h) barred all the RCRA causes of action. Although the *Reynolds* opinion considered language in RCRA that arguably bars some RCRA causes of action, it ignored the language, discussed below in the *Colorado* opinion, that supports other RCRA causes of action.[112]

2. The Tenth Circuit Decision

In *United States v. Colorado*, the Tenth Circuit concluded that Congress did not intend to preclude all RCRA actions with section 113(h).[113] The case concerned clean up of the Rocky Mountain Arsenal, a federal facility operated by the Department of the Army.[114] The plaintiff, the state of Colorado, sought to enjoin alleged violations by the Army of state RCRA laws.[115] The District Court denied the Army's motion to dismiss under section 113(h) and granted an injunction, partly based on section 120(a)(4).[116] The Army responded by placing the

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108. 785 F. Supp. 152 (D.N.M. 1992).

109. *Id.* at 153.

110. *Id.* at 153-54.

111. The 10th Circuit reversed. United States v. Colorado, 990 F.2d 1565 (10th Cir. 1993).

112. *Reynolds*, 785 F. Supp. at 154. The *Reynolds* plaintiffs also argued that one of their RCRA actions because the Bureau of Land Management, not the "Administrator" performed the response action. *Id.* This argument has broad implications, particularly for federal facilities, but discussion of it is beyond the scope of this article.

113. 990 F.2d 1565 (10th Cir. 1993) (italics in original).

114. The Army used the facility to produce mustard gas, napalm, and other chemical weapons to test explosives. It leased part of the facility to Shell Oil which produced and disposed of pesticides at the site. Peters, *supra* note 39, at 10419.

115. Under RCRA, states may develop their own solid waste plans in lieu of the federal RCRA laws. The EPA must authorize these state plans if they meet certain criteria. 42 U.S.C. §§ 6941, 6943, 6947. The EPA has issued lengthy regulations governing the development and implementation of state plans. 40 C.F.R. § 233 (1994).

116. Colorado v. United States Dep't of the Army, 707 F. Supp. 1562 (D. Colo. 1989). Section 120(a)(4) provides that "state laws concerning removal and remedial actions" shall apply to federal facilities when such facilities are not included on the National Priorities List. The District Court read this to mean that state RCRA laws did not apply to a site listed on the NPL. The Court of Appeals rejected this reliance on § 120(a)(4) because it found that Congress did not intend the provision to include state or federal RCRA laws. United States v. Colorado, 990 F.2d 1565, 1579 (10th Cir. 1993).

facility on the NPL and filing an action to nullify the compliance order, which the District Court granted.[117]

The Tenth Circuit reversed, holding that section 113(h) did not bar Colorado's RCRA action against the Department of the Army. Distinguishing the APA cases, the *Colorado* court concluded that RCRA actions must be treated differently under section 113(h) than actions brought under other statutes. First, the court argued that Congress specifically intended that CERCLA should work in conjunction with other hazardous waste laws,[118] citing two provisions of CERCLA in support. The first provision, CERCLA section 152(d), states that CERCLA does not modify any obligation to comply with other hazardous waste laws.[119] The other, CERCLA section 114(a), provides that nothing in CERCLA preempts a state from imposing its own requirements with respect to hazardous substances.[120]

Second, the court distinguished RCRA actions from the action brought in *Boarhead*.[121] Unlike the plaintiff in *Boarhead*, Colorado was not a potentially responsible party and did not seek to stay the CERCLA remedial action. The court found most convincing the distinction that the section 113(h) bar as applied in *Boarhead* did not modify the responsibilities of a responsible party with respect to releases of hazardous substances and did not prevent a state from imposing additional requirements with respect to release of hazardous substances. Thus, while *Boarhead* did not run afoul of section 114(a) and section 152(d), the *Colorado* court concluded that preventing a RCRA action under state authorized law would most certainly do so.

Third, *Colorado* noted that RCRA itself evinces congressional purpose with regard to sites undergoing CERCLA cleanups. RCRA provides that certain suits, those under RCRA section 7002(a)(1)(A) to

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117. United States v. Colorado, No. 89-C-1646 (D. Colo. 1991). For more history of this case, see Manus, *supra* note 1.

118. *Colorado*, 990 F.2d at 1575.

119. 42 U.S.C. § 9652(d). "Nothing in [CERCLA] shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants." *Id.*

120. 42 U.S.C. § 9614(a). "Nothing in [CERCLA] shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State." *Id.*

121. *Colorado*, 990 F.2d at 1576.

enforce permits or standards,[122] may go forward unless the state or EPA has already brought an enforcement action.[123] Suits under RCRA section 7002(b)(1)(B), directed against anyone contributing to an "imminent and substantial endangerment,"[124] are specifically barred if a CERCLA cleanup is underway.[125] Thus, Congress distinguished between RCRA imminent hazard suits, prohibited at sites undergoing CERCLA response actions, and RCRA enforcement suits, which are not barred at such sites.

For the reasons discussed above, *Colorado* found that Congress did not intend section 113(h) to bar all RCRA enforcement actions. Based on this finding, the court held that section 113(h) did not prevent Colorado's suit to force the federal government to comply with an order issued pursuant to the EPA authorized RCRA laws in Colorado.

3. *Colorado* and other RCRA based Section 113(h) Cases

Two cases barred RCRA section 7002(a)(1)(A) actions under section 113(h) after the Tenth Circuit decided *Colorado*. In *Heart of America Northwest v. Westinghouse Hanford Co.*,[126] the Eastern District of Washington found that section 113(h) denied it jurisdiction to hear an action brought under RCRA section 7002(a)(1)(A). At issue was an interagency agreement between the Department of Energy and the EPA to provide for cleanup of the Hanford nuclear facility. The court found that the interagency agreement designed to comply with both RCRA and

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122. This section provides that any person may commence a civil action "against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter." 42 U.S.C. § 6972(a)(1)(A).

123. The section states: "No action may be commenced under subsection (a)(1)(A) or this section (B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with such permit, standard, regulation, condition, requirement, prohibition, or order." 42 U.S.C. § 6972(b)(1)(B).

124. Under this section, any person may bring a civil action "against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment. . . ." 42 U.S.C. § 6972 (a)(1)(B).

125. This provision states that no action may be commenced under subsection (a)(1)(B) if the administrator is actually engaged in CERCLA removal action and is diligently proceeding with a remedial action. 42 U.S.C. § 6972(b)(2)(B)(ii). A similar provision bars such suits if a state is conducting a CERCLA cleanup. 42 U.S.C. § 6972 (b)(2)(C).

126. 820 F. Supp. 1265 (E.D. Wash. 1993).

CERCLA was "a single integrated CERCLA remedial plan."[127] Because the agreement was therefore a CERCLA plan, the court found that section 113(h) barred any RCRA enforcement actions.

This decision illustrates the power of section 113(h) to prevent review of federal facility cleanups. Here, the agencies in question acknowledged and sought to comply with their responsibilities under two environmental statutes: RCRA and CERCLA. The court, however, characterized the cleanup agreement as a CERCLA remedial plan and then barred any suit that would "arguably interfere in a pragmatic sense" with the plan.[128] Under this reasoning, any cleanup that the government conducts in conjunction with a CERCLA cleanup is immune from not only challenges that would create a delay, but also from any challenge, based on any law, related in any way to the cleanup in question.[129]

In two short sentences *Heart of America* distinguished the *Colorado* decision, confining it to cases in which a state brought the action.[130] Because a citizen group had brought suit in *Heart of America*, the court found that the *Colorado* decision was not controlling. They missed the point. Although Colorado did not sue under section 7002(a)(1)(A), the RCRA citizen suit provision used by the plaintiffs in *Heart of America*, the Tenth Circuit found that Colorado's suit was not barred, in part because actions under section 7002(a)(1)(A) were not barred by section 113(h).[131] The *Heart of America* court did not discuss this conflict with the Tenth Circuit's decision in *Colorado*.

In the second case, *Arkansas Peace Center v. Arkansas Dept. of Pollution Control*,[132] the Eighth Circuit also held that section 113(h) bars jurisdiction over suits brought under section 7002(a)(1)(A). The court began by pointing to *Schalk v. Reilly*[133] and *Alabama v. United States*

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127. *Id.* at 1279.

128. *Id.* at 1284.

129. The RCRA suit in *Heart of America Northwest* sought compliance with notice provisions that govern certain hazardous releases. *Id.* at 1284. The court did not find that compliance with these provisions would delay or undermine the cleanup in progress. It found only that the agreement "arguably addressed" the notice provisions, and in contradiction, that requiring the defendants to supply the notice required by RCRA "would arguably interfere in a pragmatic sense with the information dissemination procedures established under the [agreement]." *Id.* at 1283.

130. *Id.* at 1282.

131. United States v. Colorado, 990 F.2d 1565, 1577 (10th Cir. 1993).

132. 999 F.2d 1212 (8th Cir. 1993).

133. 900 F.2d 1091, 1095 (7th Cir. 1990).

Environmental Protection Agency,[134] both of which barred CERCLA citizen suits under section 113(h).[135] It ignored the distinction between CERCLA and RCRA citizen suits recognized by *Colorado.*

Finally, the court pointed to language in RCRA that precludes some RCRA suits where a CERCLA cleanup has commenced.[136] This analysis ignores the other provision of RCRA, section 7002(a)(1)(B), which permits other RCRA causes of action, notwithstanding a CERCLA cleanup, including the section 7002(a)(1)(A) cause of action asserted by the plaintiffs. Indeed, as the *Colorado* decision noted, the provision that precludes one kind of RCRA citizen suit if a CERCLA cleanup is underway implies that the other RCRA citizen suits may go forward, notwithstanding such a cleanup.

Arkansas Peace Center distinguished *Colorado* based on its reference to CERCLA section 114(a) which provides that CERCLA does not prevent a state from imposing additional liability for hazardous waste releases. The opinion does not discuss the other RCRA sections, especially section 152(d), on which the *Colorado* court also relied. Most importantly, the Eighth Circuit ignored the language in RCRA, on which the *Colorado* court relied, which allows some RCRA actions despite concurrent CERCLA actions.

The Eighth Circuit's opinion in *Arkansas Peace Center*, and the other cases discussed, conflict with the *Colorado* decision. The disagreement centers narrowly around whether or not CERCLA, in section 113(h), denies jurisdiction over RCRA actions brought under RCRA section 7002(a)(1)(A). More broadly, the courts are divided on the basic issue of whether or not section 113(h) generally denies jurisdiction over all challenges, or if RCRA and other hazardous waste actions sometimes create exceptions to this general bar.

C. Analysis: Section 113(h) Does Not Bar RCRA Section 7002(a)(1)(A) Actions

Actions to enforce RCRA requirements could provide important oversight of some aspects of federal facility cleanups. When the courts

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134. 871 F.2d 1548 (11th Cir. 1989).

135. *Arkansas Peace Center*, 999 F.2d at 1217. In *Schalk*, the plaintiffs sued under NEPA. 990 F.2d 1091 (7th Cir. 1990). In *Alabama*, the state and citizens thereof brought claims based on CERCLA and the Constitution. 871 F.2d 1548 (11th Cir. 1989).

136. *Arkansas Peace Center*, 999 F.2d at 1216-17.

apply section 113(h) at federal facilities, challenges brought under other statutes provide the only potential source of such oversight. But with the exception of the Tenth Circuit, the courts have used section 113(h) to bar such actions.[137] This section examines when this withdrawal of jurisdiction is appropriate. It first looks briefly at the language and legislative history of CERCLA and RCRA, then it discusses the possible distinction between a citizen plaintiff and state plaintiff.

1. Statutory Language

The language of RCRA and CERCLA, considered together, support the conclusion that section 113(h) does not automatically bar all RCRA actions. Courts have based such a bar on the broad language of section 113(h) which excludes jurisdiction under federal and some state law "to review *any* challenges" (emphasis added). Inclusion of state law, one court noted, demonstrated a clear intent to extend section 113(h) beyond CERCLA itself. Considered with the legislative history, the courts have correctly concluded that section 113(h) does bar actions beyond those brought under CERCLA, but have incorrectly generalized this conclusion to include all such challenges.

The *Colorado* decision relied on several CERCLA provisions to conclude that section 113(h) does not bar all RCRA actions. Most importantly, section 152(d) and section 114(a)[138] indicate Congress' intention that nothing in Superfund should effect liability under laws regulating hazardous substances. Congress thus singled out hazardous waste laws for deference, but not other laws such as the Historic Preservation Act or NEPA. Moreover, in CERCLA Congress singled out RCRA itself with reference to federal facilities. At such facilities, section 120(i) provides that nothing in section 120 impairs RCRA obligations of the federal government, including RCRA corrective obligations.[139] While section 120(i) does not apply to section 113(h), it at least indicates Congress's concern with coordinating RCRA and CERCLA.

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137. This article does not discuss a broader question raised by *Colorado* which is also of great importance to federal facilities: to what extent do federal CERCLA cleanups pre-empt the ability of states to engage in a cleanup at the same site? *See* Manus, *supra* note 1, at 327. This article discusses whether section 113(h) prevents state or private plaintiffs from bringing CERCLA and RCRA enforcement actions at federal facilities.

138. *See supra* notes 119-120.

139. *See supra* note 54.

Finally, the plain language of RCRA permits some RCRA actions at CERCLA sites and forbids others. While actions to enforce permits are allowed under section 7002(a)(1)(A), notwithstanding a CERCLA cleanup, actions against persons contributing to imminent and substantial endangerment are not. Thus the language of both RCRA and CERCLA allow for some RCRA actions at CERCLA sites.

2. Legislative History

The legislative history that speaks to the issue of section 113(h) and actions brought under collateral statutes is unclear and does not support an intent opposed to the language of the statutes.[140] The strongest, and most frequently cited language comes from the Senate floor, not from the conference or committee reports. Although this language generally supports applying section 113(h) to collateral challenges, it does not undermine the statutory language that excludes RCRA challenges.

The SARA Conference Report provides little clarification about section 113(h) and collateral challenges. It dwells in relative detail on the scope of the section 113(h)(4) citizen suit exception, and then states that "Section 113(h) is not intended to affect in any way the rights of persons to bring nuisance actions under State law with respect to releases or threatened releases of hazardous substances. . . ."[141] One commentator interprets this legislative nugget to mean that section 113(h) precludes judicial review except over nuisance suits and the exceptions enumerated by section 113(h).[142] This argument turns easily on its head. Section 113(h) does not state that it excludes nuisance suits, yet it does. Congress may have provided for other exceptions not in the provision itself.

Some courts have relied on isolated statements made during floor debate asserting that section 113(h) precludes all lawsuits under any authority.[143] These courts have afforded this general language, not

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140. For a more detailed look at the legislative history of section 113(h) with regard to collateral statutes, *see* Schatzman, *supra* note 100. The author concludes that Congress intended to bar actions under such challenges but does not discuss the language or history of CERCLA and RCRA specifically.

141. H.R. CONF. REP. No. 962, 99th Cong., 2d Sess. 224 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3317.

142. *See* Schatzman, *supra* note 99.

143. Werlein v. United States, 746 F. Supp. 887 (D. Minn. 1990), *vacated in part on other grounds*, 793 F. Supp. 898 (D. Minn. 1992).

duplicated in the written reports, far too much weight in deciding that section 113(h) precludes RCRA actions.[144] Such comments provide weak authority and do not undermine the specific language in CERCLA that refers to compliance with RCRA and hazardous waste laws.

The legislative history mentions RCRA infrequently. The original Superfund law contained section 152(d) and section 114(a), which provide that CERCLA does not modify obligations under other hazardous waste laws, which includes RCRA. Indeed, Congress proposed Superfund itself initially as an amendment to RCRA.[145] This suggests, as the language of the statutes suggests, that Congress intended RCRA and CERCLA to function together, not that CERCLA section 113(h) eviscerates RCRA challenges.

The plain language of RCRA and CERCLA allows some RCRA actions at Superfund cleanups despite section 113(h). Courts barring RCRA actions have unpersuasively relied on isolated statements in the legislative history that could conflict with this language.[146]

3. Actions Under Federal RCRA law

This section considers whether section 113(h) bars actions brought under section 7002(a)(1)(A).[147] Plaintiffs can use this federal provision to force compliance with state RCRA law, if applicable, or with federal RCRA law.[148] *Heart of America*, *Arkansas Peace Center* and

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144. Senator Thurmond commented: "The timing of review section is intended to be comprehensive. It covers all lawsuits, under any authority, concerning the response actions that are performed by the EPA. . . ." 132 CONG. REC. S44,929 (daily ed. Oct. 3, 1986).

145. Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability Act (Superfund) of 1980*, 8 COLUM. J. ENVTL. L. 1, 4 (1982).

146. One commentator suggests that the *Colorado* court may have erred in holding that section 113(h) did not withhold jurisdiction, citing *Boarhead* and *Schalk*, and suggesting that the court relied on the distinction between private and state plaintiffs. *See Manus*, *supra* note 1. With no discussion of the language of CERCLA and RCRA, or of the differences between these opinions (dealing primarily with CERCLA citizen suits) and *Colorado*, this suggestion was not well substantiated. The commentator provides this cursory treatment of section 113(h) as part of a larger argument that the *Colorado* opinion was results-driven. *Id.* (discussing state and private plaintiffs).

147. This section of the article looks only at whether § 113(h) bars such actions. Other provisions, such as section 7002(b)(1), which bar the action if the EPA or state is vigorously enforcing the alleged violation, could of course preclude the action. *See* 42 U.S.C. § 6972(b)(1). This section of the article also does not consider potential substantive conflicts between the requirements of RCRA and CERCLA, such as section 121(e)(1), which may exempt some facilities from RCRA permitting requirements. *See* 42 U.S.C. § 96221(e)(1).

148. Coalition for Health Concern v. LWD, Inc., 834 F. Supp. 953, 965-68 (W.D. Ky. 1993); Wyckoff Co. v. Environmental Protection Agency, 796 F.2d 1197, 1997-2001 (9th Cir. 1986).

Reynolds barred section 7002(a)(1)(A) suits at CERCLA facilities.[149] *Colorado*, on the other hand, based its conclusion that state enforcement suits were not barred in part on its finding that section 7002(a)(1)(A) permits RCRA citizen suits at CERCLA cleanup sites.

The plain language of section 7002(a)(1)(A), read in conjunction with other RCRA provisions, supports the Tenth Circuit's position. In the RCRA citizen suit provision, Congress specifically considered which actions to authorize at CERCLA sites, and which ones not to authorize. Read with the provisions of CERCLA that indicate Congress envisioned special deference to RCRA law, the two statutes are brought into harmony by allowing section 7002(a)(1)(A) actions and disallowing section 7002(b)(1)(B) actions at sites undergoing CERCLA cleanup.

This reading comports with the language of section 113(h) which bars "challenges" to remedial or removal action. Although courts have read "challenge" as any action that could interfere with a CERCLA cleanup, nothing suggests that this language includes RCRA actions. Courts point to the legislative history to support a broad reading of "challenge," noting that the overall goal of the provision is to prevent delays. But nothing in the history suggests that Congress intended "challenge" to be read so broadly as to trump specific provisions providing that CERCLA allows RCRA actions. Thus, if "challenge" is not read to include actions to ensure RCRA compliance, section 113(h) is consistent with the plain language of both RCRA and CERCLA.

The argument for allowing section 7002(a)(1)(A) actions at federal facilities is even stronger. When Congress enacted the federal facilities section in 1986, it made clear that the original language in CERCLA, which ensures compliance with RCRA actions applied to federal facilities as well.[150] Indeed, Congress sought with the federal facilities provision to *increase* the involvement of the public and states, which would be inconsistent with using section 113(h) to bar RCRA enforcement actions.

Many states with EPA authorized state RCRA laws do not provide citizen enforcement schemes. Private plaintiffs in these states must use federal enforcement provisions to ensure compliance with state RCRA law. Adam Babich, *Is RCRA Enforceable by Citizen Suit in States With Authorized Hazardous Waste Programs?*, [1993] 23 ENVTL. L. REP. (Envtl. L. Inst.) 10536 (Sept. 1993). The article, like the cases above and the EPA itself, concludes that RCRA is so enforceable.

149. These cases also had other causes of action under CERCLA and RCRA.

150. *See supra* note 54 for the text of section 120(i).

Both the Eighth Circuit and the District Courts erred in barring actions under section 7002(a)(1)(A). Barring such actions thwarts Congress' intent that CERCLA should not modify other statutory obligations around hazardous waste and that RCRA should apply to federal facilities. It also runs afoul of Congress' carefully constructed scheme for RCRA suits at CERCLA sites. Finally, section 113(h) itself does not imply that "challenges" include RCRA suits that do not challenge the selection of a remedy, but merely require that such a remedy comply with RCRA.

4. Plaintiffs: States and Citizens Groups

Heart of America and *Arkansas Peace Center* sought to distinguish *Colorado* on the basis that their cases did not involve a state plaintiff.[151] The statutory provisions that *Colorado* relied upon, however, provide little basis for distinguishing between state and citizen group plaintiffs.

The Eighth Circuit, in the *Arkansas Peace Center* opinion, made two arguments to support the distinction.[152] First it noted that the Tenth Circuit relied on CERCLA section 114(a),[153] which says that nothing in CERCLA prevents a state from imposing additional requirements with respect to releases of hazardous substances.[154] The Arkansas opinion is correct in that section 114(a), on its face, does not support citizens' suits brought under federal RCRA law to enforce federal RCRA obligations. But it is unclear what section 114(a) means about citizens bringing federal RCRA actions to enforce *state* law. On one hand, the language could mean that states may pass laws with such additional requirements, and those laws will apply to CERCLA cleanups notwithstanding anything else in the chapter. On the other hand, "impose" could refer only to an enforcement action brought by the state. The *Arkansas Peace Center* court apparently assumed the second interpretation was correct. Under the first interpretation, the state could impose such requirements, which could be *enforced* by any mechanism the law makes available. This, it would seem, is the better reading. As normally understood, a

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151. Arkansas Peace Center v. Arkansas Dep't of Pollution Control, 999 F.2d 1212, 1217-18 (8th Cir. 1993); Heart of America Northwest v. Westinghouse Hunford Co., 820 F. Supp. 1265, 1284 (E.D. Wash. 1993).

152. *Arkansas Peace Center*, 999 F.2d at 1217-18.

153. *Id. See supra* note 119 and accompanying text.

154. *Arkansas Peace Center*, 999 F.2d at 1217.

state could "impose" requirements and provide for a variety of ways to enforce those requirements.

Further the *Colorado* opinion relied not just on section 114(a)(3), but equally on section 152(d),[155] and on the language in RCRA, which do not distinguish between state and citizen plaintiffs. The *Arkansas Peace Center* opinion addresses neither.

Second, *Arkansas Peace Center* and *Heart of America* both asserted that the Tenth Circuit distinguished *Schalk* as a case about a citizen's suit.[156] But the Tenth Circuit found *Schalk* inapposite because it was a *CERCLA* citizen suit, and clearly barred by section 113(h)(4).[157] A RCRA citizen suit need not comport with section 113(h)(4).[158] The Tenth Circuit's reasoning thus had nothing to do with favoring state plaintiffs over citizen plaintiffs, it merely favored RCRA plaintiffs over CERCLA plaintiffs.

IV. CONCLUSION

The courts have interpreted section 113(h) of CERCLA to preclude oversight of federal facility cleanups in two ways. First, courts have applied section 113(h) to federal facilities. This prevents challenges to federal facility agreements between the EPA and another federal agency. Second, courts have then used section 113(h)'s jurisdictional bar to prevent RCRA challenges to cleanup actions at federal facilities.

The language and structure of CERCLA and RCRA show, however, that the courts have erred in applying section 113(h) so broadly. Congress intended instead for section 113(h) to prevent jurisdiction over some but not all challenges at federal facilities. In addition, the jurisdictional bar does not extend to RCRA enforcement actions. RCRA and CERCLA create an interactive scheme that permits suits to ensure compliance with RCRA provisions, notwithstanding a concurrent CERCLA cleanup. This interactive scheme, largely thwarted by the courts, provides important oversight of federal facility cleanups.

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155. United States v. Colorado, 990 F.2d 1565 (10th Cir. 1993). *See supra* note 120 and accompanying text.

156. *Arkansas Peace Center*, 999 F.2d at 1217; *Heart of America*, 820 F. Supp. at 1282.

157. *Colorado*, 990 F.2d at 1576.

158. *Id.*