Cleaning Up the Mess, or Messing Up the Cleanup: Does CERCLA's Jurisdictional Bar (Section 113(H)) Prohibit Citizen Suits Brought Under RCRA

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CLEANING UP THE MESS, OR MESSING UP THE CLEANUP: DOES CERCLA'S JURISDICTIONAL BAR (SECTION 113(h)) PROHIBIT CITIZEN SUITS BROUGHT UNDER RCRA

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I. INTRODUCTION

As clean-up crews feed hazardous waste laden with PCBs and dioxin into an incinerator, the temperature inside the incinerator drops below 2800° C for a moment. As a result, dioxin, one of the four most toxic and carcinogenic chemicals known to humankind, escapes from the smokestack to be dispersed into the surrounding community. An unsuspecting private citizen inhales the dioxin, and ten, twenty, or thirty years later, dies from cancer.

Yes, there are laws that govern the emission of dioxin from hazardous waste incinerators, and, unfortunately, it was the government that allowed the dioxin to be emitted from the incinerator as part of a hazardous waste cleanup. Yes, a cleanup. It seems hard to fathom that a cleanup would actually create a worse harm than the one it was intended to remedy, but it can happen.

This Comment explores whether private citizens can bring a lawsuit to prevent a cleanup that the Environmental Protection Agency (EPA) has approved pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) when the citi-

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2 A discussion of causation is beyond the scope of this Comment. For a general discussion, see Government Accountability Project, supra note 1.

3 See Arkansas Peace Ctr. v. Arkansas Dep't of Pollution Control and Ecology, 999 F.2d 1212, 1215, 1218 (8th Cir. 1993), cert. denied, 114 S. Ct. 1397 (1994) (citizens group alleging dioxin emitted by burning of hazardous wastes at CERCLA clean-up site).
zens perceive that the cleanup activities might harm their health or the local environment. To protect public health and the environment from hazardous wastes, Congress has provided the EPA with a substantial array of tools which include CERCLA and the Resource Conservation and Recovery Act (RCRA). Under RCRA, Congress has also conferred on private citizens a right of action to bring lawsuits to abate imminent and substantial endangerments to public health and the environment, and to bring lawsuits to enforce RCRA's hazardous waste handling performance standards. The language in RCRA and CERCLA that relates to the ability of private citizens to abate imminent and substantial dangers created by an EPA-approved hazardous waste cleanup, however, is ambiguous. Some courts have interpreted this ambiguous language to deny private citizens the right to protect themselves against improperly conducted, but EPA-approved, hazardous waste cleanups.

This Comment explores why courts, in light of Congress's overall hazardous waste management scheme, should read the language in RCRA's citizen suit provision to allow private citizens to bring suits to abate an imminent and substantial endangerment due to an improperly conducted, but EPA-approved, hazardous waste cleanup. Section II explores the Congressional intent behind the nation's hazardous waste management scheme, as well as possible interpretations of RCRA's citizen suit provisions and CERCLA's jurisdictional

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5 RCRA, 42 U.S.C. § 6972(a). RCRA's "Citizens' suits" provision allows citizens to bring a suit that seeks to enforce RCRA's requirements (section (a)(1)(A)), and to bring a suit that seeks to abate an imminent and substantial endangerment to human health or the environment (section (a)(1)(B). See infra notes 104–05 and accompanying text.

6 The language referred to includes CERCLA § 9613(h) and RCRA §§ 6972(a)(1)(a) and (a)(1)(B). This language is ambiguous in that it lends itself to more than one possible outcome for actions brought under RCRA with regard to an improperly conducted, but EPA-approved, hazardous waste cleanup. Compare Arkansas Peace Ctr., 999 F.2d 1212 with United States v. Colorado, 990 F.2d 1565 (10th Cir. 1993), cert. denied, 114 S. Ct. 922 (1994).

7 See, e.g., Arkansas Peace Ctr., 999 F.2d 1212 (interpreting CERCLA section 113(h) to preclude a citizen suit brought under RCRA).

8 This Comment limits Congress's hazardous waste management scheme to a discussion of RCRA and CERCLA.

bar provision.\textsuperscript{10} In addition, Section II addresses the current split of opinion in the federal circuit courts regarding the interpretation of CERCLA's jurisdictional bar in RCRA citizen suits.

Section III offers a brief example of how the removal of CERCLA's jurisdictional bar for RCRA citizen suits helps to achieve the goals behind Congress's hazardous waste management scheme. Section IV discusses why courts should not read CERCLA's jurisdictional bar provision to prohibit RCRA citizen suits, and suggests that courts should allow RCRA and CERCLA to work together to adequately address the nation's hazardous waste problem. Finally, this Comment concludes that an interpretation of RCRA and CERCLA that allows private citizens to bring law suits under RCRA, even in the face of an EPA-approved CERCLA cleanup, accords with Congress' overall hazardous waste management scheme.

II. HOW IT WORKS: RCRA'S CITIZEN SUITS AND CERCLA'S JURISDICTIONAL BAR

A. Congress's Hazardous Waste Management Scheme: RCRA and CERCLA

Together, RCRA and CERCLA make up the bulk of Congress's hazardous waste management scheme.\textsuperscript{11} CERCLA's provisions address the actual cleanup of released hazardous waste,\textsuperscript{12} and RCRA's provisions prescribe standards to ensure that the present handling of hazardous wastes will not result in the need for future cleanups.\textsuperscript{13} The language, structure, and legislative history of the two acts indicate Congress's intent that CERCLA clean-up standards and RCRA performance standards work together to provide a hazardous waste management scheme to remedy the nation's hazardous waste problem.\textsuperscript{14}

\textsuperscript{10} CERCLA, 42 U.S.C. § 9613(h).
\textsuperscript{11} See United States v. Colorado, 990 F.2d 1565, 1570, 1575–76 (10th Cir. 1993), cert. denied, 114 S. Ct. 922 (1994) (declaring that Congress intended RCRA and CERCLA to work together to address the nation's problem of hazardous waste management). Other acts also address hazardous waste control. See supra note 4. RCRA and CERCLA, however, are the two acts that are most relevant to this Comment.
\textsuperscript{12} CERCLA, 42 U.S.C. § 9621(d). This section specifies the degree of cleanup that CERCLA remedial actions must achieve; a degree "which assures protection of human health and the environment." Id.
\textsuperscript{13} See RCRA, 42 U.S.C. § 6902(a)(5). This section calls for proper management of hazardous wastes to minimize the need for future cleanups. Id.
\textsuperscript{14} See RCRA, 42 U.S.C. §§ 6922–6924 (setting forth the provisions that govern the EPA's promulgation of hazardous waste handling performance standards to apply to generators, transporters, and owners and operators of treatment, storage, and disposal facilities of hazard-
In 1976, Congress enacted RCRA to address the nation's hazardous waste problem.\textsuperscript{15} Congress intended RCRA to "promote the protection of health and the environment,"\textsuperscript{16} by "requiring that hazardous waste be properly managed in the first instance thereby reducing the need for corrective action at a future date."\textsuperscript{17} RCRA requires the EPA to adopt performance standards for the safe handling and disposal of hazardous waste.\textsuperscript{18} RCRA requires the EPA to design these performance standards "to protect human health and the environment."\textsuperscript{19} The EPA enforces RCRA's performance standards in part by requiring all facilities that store, treat and dispose of hazardous waste to obtain and comply with permits issued by the EPA.\textsuperscript{20} Because RCRA compels handlers of hazardous wastes to manage their wastes in a way that eliminates risk of future harm to public health and the environment, RCRA is known as Congress's prospective tool for addressing the nation's hazardous waste problem.\textsuperscript{21} RCRA, however, only applies prospectively to the management of hazardous waste facilities that are in operation.\textsuperscript{22}

In 1980, Congress recognized that this prospective only approach left much previously released hazardous waste unaddressed.\textsuperscript{23} As a

\textsuperscript{15} See RCRA, 42 U.S.C. § 6901(b).

\textsuperscript{16} RCRA, 42 U.S.C. § 6902(a).

\textsuperscript{17} RCRA, 42 U.S.C. § 6902(a)(5).

\textsuperscript{18} RCRA, 42 U.S.C. § 6924(a).

\textsuperscript{19} Id.

\textsuperscript{20} RCRA, 42 U.S.C. § 6925.

\textsuperscript{21} See RCRA, 42 U.S.C. § 6902(a)(5) (calling for proper management of hazardous wastes now to avoid the need for cleanups in the future); H.R. Rep. No. 1016, 96th Cong., 2d Sess. 17 (1980), reprinted in 1980 U.S.C.C.A.N. 6119, 6120 (recognizing that RCRA only deals prospectively with the problem of hazardous waste). See also United States v. Colorado, 990 F.2d at 1570, 1575–76 (recognizing that Congress intended CERCLA to work in conjunction with other hazardous waste laws, including RCRA, to address the nation's hazardous waste problem).


\textsuperscript{23} The Committee on Interstate and Foreign Commerce recognized this shortcoming of RCRA, and recommended the passage of CERCLA to address the problem of previously released hazardous wastes. H.R. Rep. No. 1016, supra note 21 at 17–18, reprinted in 1980 U.S.C.C.A.N. at 6120.
result, Congress enacted CERCLA to address dangers to public health and the environment associated with past releases of hazardous wastes. By enacting CERCLA to cover past releases of hazardous wastes, Congress intended to fill the gaps in the nation's hazardous waste management scheme left open in RCRA.

The EPA enforces CERCLA in a different way than it enforces RCRA's permitting program. Congress designed CERCLA's provisions to alleviate dangers to public health and the environment by authorizing the EPA to pursue cleanups of released hazardous wastes. CERCLA imposes joint and several liability on responsible parties for the costs of cleaning up released hazardous wastes. Section 104 of CERCLA authorizes the EPA to pursue clean-up activities by borrowing money from a central Superfund to cover the costs of the cleanup, and then seeking reimbursement from responsible parties. Under section 104, the EPA may pursue short-term remedies, known as removal actions, or permanent remedies, known as remedial actions. The EPA also has the authority, under section 106, to issue an

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25 See id.
26 See CERCLA, 42 U.S.C. §§ 9604, 9606 (setting forth methods of enforcement for CERCLA's requirements); see also supra note 20 and accompanying text.

A preliminary step in a CERCLA cleanup is the formulation of a response plan. Before the EPA, or any other person, undertakes a response plan, CERCLA requires that there be an opportunity for public participation in the formulation of a CERCLA response plan. CERCLA, 42 U.S.C. § 9617. Congress intended this public participation requirement to ensure that affected communities supported response actions. See Michael P. Healy, Judicial Review and CERCLA Response Actions: Interpretive Strategies in the Face of Plain Meaning, 17 HARV. ENVTL. L. REV. 1, 48 n.234 (1993). The public participation requirement also ensures that the EPA considers all alternative response plans in the hope that the chosen response plan will not harm human health and the environment. See id. The consideration of alternatives includes the alternative of leaving the hazardous wastes in place and doing nothing. See CERCLA, § 9621(a)-(c). There are arguably cases in which the “do nothing” alternative may be safer than removing the hazardous wastes. See, e.g., Village of Wilsonville v. SCA Servs. Inc., 426 N.E.2d 824 (Ill. 1981) (discussed in Zygmunt J.B. Plater et al., Environmental Law and Policy: Nature, Law and Society 68-76) (describing case where court ordered removal of hazardous wastes, which removal ruptured waste containers and involved transportation of wastes through nearby residential community creating potential for accident and increased exposure of residents to hazardous wastes).
30 CERCLA, 42 U.S.C. §§ 9604, 9621(d), 9601(23).
31 CERCLA, 42 U.S.C. §§ 9604, 9621(d), 9601(24).
administrative order that requires responsible parties to undertake a private cleanup of released hazardous waste.\textsuperscript{32}

Although RCRA and CERCLA function differently, the legislative histories of the acts indicate that RCRA and CERCLA are both part of the same legislative scheme.\textsuperscript{33} Congress's primary goal in enacting both RCRA and CERCLA was the same—to protect public health and the environment from dangers posed by hazardous wastes.\textsuperscript{34} Moreover, Congress intended CERCLA to fill gaps in the same legislative scheme that contained RCRA.\textsuperscript{35} In fact, Congress originally enacted CERCLA as an amendment to the Solid Waste Disposal Act, which is better known today as RCRA.\textsuperscript{36} Thus, CERCLA is effectively an amendment of RCRA.\textsuperscript{37} Even though RCRA and CERCLA are printed in different sections of the United States Code, they are ultimately part of the same legislative scheme that Congress enacted to remedy the nation's hazardous waste problem.\textsuperscript{38}

Not only do the legislative histories of RCRA and CERCLA indicate that Congress intended RCRA and CERCLA to be part of the same legislative scheme, but the structure of the two acts also indicates that Congress intended RCRA and CERCLA to work together.\textsuperscript{39} While CERCLA provides standards that address how clean a hazard-
ous waste site should be, CERCLA does not attempt to identify performance standards applicable to the actual clean-up process.\textsuperscript{40} Because CERCLA and RCRA were originally part of the same act, the Solid Waste Disposal Act, it is only logical that one should look for clean-up performance standards in that act. RCRA is the part of the Solid Waste Disposal Act that contains performance standards that apply to all handling and disposal of hazardous wastes.\textsuperscript{41}

The plain language of both acts also indicates Congress's intent that RCRA's standards should apply to CERCLA cleanups.\textsuperscript{42} RCRA's "Integration with other Acts" provision states that "[t]he Administrator shall integrate all provisions of this chapter . . . [with] such other Acts of Congress as grant regulatory authority to the Administrator."\textsuperscript{43} Similarly, CERCLA's "General Rules" provision requires the EPA to consider "the goals, objectives, and requirements of [RCRA]" when the EPA considers alternative remedial actions for response plans.\textsuperscript{44} Moreover, while CERCLA specifically exempts clean-up activities from the RCRA permitting process, CERCLA does not exempt clean-up activities from complying with RCRA's performance standards.\textsuperscript{45} Finally, CERCLA's "savings provision" states that "[n]othing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law."\textsuperscript{46}

CERCLA is Congress's retrospective tool for securing cleanup of released hazardous waste.\textsuperscript{47} RCRA is Congress's prospective tool for

\textsuperscript{40} See CERCLA, 42 U.S.C. § 9621(b)(1)(B) (requiring consideration of RCRA's requirements in CERCLA cleanups); CERCLA, 42 U.S.C. § 9621(d) (specifying that CERCLA cleanups shall be performed to a degree of cleanliness that protects public health and the environment).

\textsuperscript{41} See RCRA, 42 U.S.C. § 6905(b) (requiring that the EPA integrate the requirements of RCRA with other acts to the extent that such integration comports with the goals of other acts). Protection of public health and the environment from hazardous wastes is a goal of both RCRA and CERCLA. See H.R. REP. No. 1016, supra note 21, at 17, reprinted in 1980 U.S.C.C.A.N. at 6119–6120 (declaring purpose of CERCLA to be protection of public health and the environment); H.R. Rep. No. 198, supra note 33, at 18, reprinted in 1984 U.S.C.C.A.N. at 5576 (declaring purpose of RCRA to be protection of public health and the environment).

\textsuperscript{42} See CERCLA, 42 U.S.C. §§ 9652(d), 9605(b), 9621(a).

\textsuperscript{43} RCRA, 42 U.S.C. § 6005(b). CERCLA is one of the acts to which RCRA applies, because CERCLA grants the EPA authority to regulate the cleanup of hazardous wastes. See supra notes 26–32 and accompanying text.

\textsuperscript{44} CERCLA, 42 U.S.C. § 9621(b)(1)(B).

\textsuperscript{45} See id. (requiring consideration of RCRA's requirements in formulating a response plan under CERCLA).

\textsuperscript{46} CERCLA, 42 U.S.C. § 9652(d). If parties are obligated to comply with RCRA, CERCLA's savings provision, arguably, does not modify that obligation absent specific statutory language to the contrary.

\textsuperscript{47} See supra notes 27–32 and accompanying text.
ensuring that the cleanup itself does not endanger public health or the environment.\textsuperscript{48} Thus, together, CERCLA and RCRA make up Congress's national hazardous waste management scheme.


Both RCRA and CERCLA incorporate citizen suit provisions that enable private parties to bring actions to enforce the requirements of each act.\textsuperscript{49} Congress included the citizen suit provisions in RCRA and CERCLA to aid the EPA in the goal of ensuring that the nation manages and cleans up hazardous wastes to avoid harm to public health and the environment.\textsuperscript{50} Congress, however, has limited the ability of private parties to enforce the requirements of both RCRA and CERCLA by including a jurisdictional bar provision in both acts which, in general, prohibits citizen suits when the EPA's actions address the hazardous waste problem that the citizen suit seeks to address.\textsuperscript{51}

a. CERCLA's Citizen Suit Jurisdictional Bar: Section 113(h)

CERCLA's citizen suit provision allows private parties to bring an action to enforce CERCLA against the government or private parties.\textsuperscript{52} Such an action is barred, however, if the EPA is already pursuing a cleanup at the hazardous waste release site that the action seeks to address.\textsuperscript{53} Congress enacted CERCLA's jurisdictional bar, section

\textsuperscript{48} See supra notes 20-22 and accompanying text.
\textsuperscript{50} See Plater et al., supra note 27, at 303-04. Citizen suit provisions reflect Congress's recognition that EPA's resources and political motivations may be insufficient to address the nation's hazardous waste problem. See id. This is partly because of the magnitude of the problem and partly because of the "iron triangle" phenomenon whereby the EPA chooses not to pursue enforcement because of political motivations. See id.; United States v. Colorado, 990 F.2d 1565, 1573 (10th Cir.1993), cert. denied, 114 S. Ct. 922 (1994) (declaring EPA's supervision of CERCLA cleanup conducted by the United States Army suspicious because of relationship between the EPA and the Army—two government organizations). The grant of power to citizens to enforce statutory requirements helps ensure that someone will enforce statutes even if the EPA does not get around to it. See Plater et al., supra note 27, at 303-04.
\textsuperscript{51} RCRA, 42 U.S.C. § 6972 (b); CERCLA, 42 U.S.C. § 9613(h).
\textsuperscript{52} See CERCLA, 42 U.S.C. § 9659. By allowing private citizens to enforce CERCLA, Congress furthered its goal of addressing the nation's hazardous waste problem without having to rely solely on the EPA's limited resources. See Plater et al., supra note 27, at 303-04.
\textsuperscript{53} See CERCLA, 42 U.S.C. § 9613(h)(4). This section states that "such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site." Id. Courts have interpreted this language to mean that citizen suits may not be brought until the remedial action is completed. See, e.g., Neighborhood Toxic Cleanup Emergency v. Reilly, 716 F. Supp. 828, 833 (D.N.J. 1989).
113(h), to prevent citizen suits from delaying CERCLA cleanups\textsuperscript{54} and to avoid the expenditure of Superfund money on copious litigation.\textsuperscript{55} There is evidence in CERCLA's legislative history, however, that indicates Congress did not intend to deny courts the ability to review citizen suits related to "legitimate" health concerns prior to the completion of a CERCLA cleanup.\textsuperscript{56}

Under CERCLA's citizen suit provision, private parties may bring an action "against any person . . . alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to this chapter."\textsuperscript{57} If the plaintiff's claim succeeds, the court is authorized to order "such action as may be necessary to correct the violation."\textsuperscript{58} Nevertheless, the same provision which grants the authority for citizen suits also limits citizens' ability to bring such an action by stating that actions may be brought "[e]xcept as provided . . . in section [113(h)] of this title."\textsuperscript{59}

Section 113(h) of CERCLA provides that,

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:

\begin{itemize}
\item [(4)] An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under
\end{itemize}

\textsuperscript{54} See H.R. REP. NO. 253, 99th Cong., 1st Sess. 266 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2941. The report states that, "[t]he purpose of [this] amendment is to prevent private responsible parties from filing dilatory, interim lawsuits which have the effect of slowing down or preventing EPA's cleanup activities." \textit{Id.}

\textsuperscript{55} See 132 CONG. REC. S14928 (daily ed. Oct. 3, 1986) (remarks of Senator Thurmond). Senator Thurmond stated a belief that "the timing of review section ensures that Government and private cleanup resources will be directed toward mitigation, not litigation." \textit{Id.}

\textsuperscript{56} See 132 CONG. REC. H9575, H9600 (daily ed. Oct. 8, 1986) (remarks of Representative Florio). Mr. Florio stated that "\{section 113(h)\} intends that the courts will draw appropriate distinctions between dilatory lawsuits by potentially responsible parties involving only monetary damages and legitimate citizens' suits representing irreparable injury that can only be addressed during the course of implementing cleanup." \textit{Id.; see also} 132 CONG. REC. S14818, S14898 (daily ed. Oct. 3, 1986) (remarks of Senators Stafford and Mitchell) (expressing belief in line with those expressed by Representative Florio above). \textit{But see} 132 CONG. REC. S14929 (daily ed. Oct. 3, 1986) (remarks of Senator Thurmond) (expressing opinions opposite to those expressed by Representative Florio above).

\textsuperscript{57} CERCLA, 42 U.S.C. § 9659(a)(1).

\textsuperscript{58} CERCLA, 42 U.S.C. § 9659(c).

\textsuperscript{59} CERCLA, 42 U.S.C. § 9659(a).
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.60

Thus, in other words, once the EPA has chosen a response action under CERCLA section 104 or CERCLA section 106, CERCLA section 113(h) bars judicial review of any substantive challenge to the response action, except for challenges by private citizens.61 Because CERCLA section 113(h)(4) employs the past tense, however, courts have interpreted this section to postpone review of citizen suits until the "challenged" cleanup has been completed.62

It is important to understand that the Congressional purpose behind CERCLA section 113(h) was to prevent responsible parties from delaying cleanups; its purpose was not to eliminate all possibility of judicial review for parties with "legitimate" claims involving a CERCLA cleanup.63 The plain language of CERCLA section 113(h) does

60 CERCLA, 42 U.S.C. § 9613(h).
61 CERCLA, 42 U.S.C. § 9613(h). The right of private citizens to bring an action is preserved under § 9613(h)(4). CERCLA § 9613(h)(4). Although § 9613(h)(1–3) and (5) preserve other causes of action, subdivisions (2),(3), and (5) all relate to the ability of the government to bring an action, CERCLA § 9613(h)(2),(3),(5), and subdivision (1) relates solely to monetary issues involved in a cleanup. CERCLA § 9613(h). Subdivision (4) is the only subdivision that preserves a cause of action to challenge the substance of a CERCLA cleanup. CERCLA § 9613(h)(4).
62 See CERCLA, 42 U.S.C. § 9613(h); North Shore Gas Co. v. Environmental Protection Agency, 930 F.2d 1239, 1245 (7th Cir. 1991); Boarhead Corp. v. Erickson, 923 F.2d 1011, 1023 (3d Cir. 1991); Schalk v. Reilly, 900 F.2d 1091, 1097 (7th Cir. 1990); Neighborhood Toxic Cleanup Emergency v. Reilly, 716 F. Supp. 828, 834 (D.N.J. 1989).
63 The word "legitimate" is used here to refer to claims that are prima facie valid and that represent legitimate grievances with a CERCLA cleanup—not suits that are intended merely to delay a CERCLA cleanup. See 132 CONG. REC. H9575, H9600 (daily ed. Oct. 8, 1986) (remarks of Representative Florio) (referring to these types of lawsuits as "legitimate citizens' suits").

The legislative history states of CERCLA section 113(h) states that,

The purpose of the Tauke-Richardson amendment [section 113(h)] is to prevent private responsible parties from filing dilatory, interim lawsuits which have the effect of slowing down or preventing EPA's cleanup activities. By limiting court challenges to the point in time when the agency has decided to enforce the liability of such private responsible parties, the amendment will ensure both that effective cleanup is not derailed and that private responsible parties get their full day in court to challenge the agency's determination that they are liable for cleanup costs.

See H.R. REP. No. 253, supra note 54, at 266, reprinted in 1986 U.S.C.C.A.N. at 2941. Arguably, for a lawsuit that sought to abate a harm created by clean-up activities, postponement of the lawsuit until completion of the cleanup would render the suit moot. See North Shore Gas, 930 F.2d at 1245 (expressing concern that courts could read CERCLA section 113(h) to bar lawsuits and effectively render lawsuits moot).
not take away the right to pursue "legitimate" claims, even though it may postpone such a right. Nor does CERCLA section 113(h) affect the right to pursue a claim under diversity jurisdiction or under state law. The Committee of Conference confirmed that Congress did not intend CERCLA section 113(h) to take away the right to pursue "legitimate" claims. The Committee stated that CERCLA 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 [of hazardous wastes]."

Section 113(h)(4) does preserve the right of private citizens to bring a suit challenging an EPA-approved CERCLA cleanup, but section 113(h)(4) postpones that right until the cleanup is completed. By delaying review of citizen suits that involve CERCLA response actions until completion of such response actions, responsible parties retain the ability to challenge the EPA's assessment of liability for clean-up costs upon completion of the cleanup, and litigation does not unnecessarily delay cleanups. In addition, by allowing claims under state law, CERCLA section 113(h)’s preservation of the right to pursue state law claims ensures that CERCLA cleanups will comply with any relevant state laws that govern performance standards for hazardous waste handling.

The declared purpose behind CERCLA section 113(h), ensuring that cleanups are not delayed by "dilatory, interim lawsuits" brought by responsible parties in an attempt to slow down or prevent EPA's clean-up activities, comports with the overall goal of Congress's hazardous waste management scheme. A prompt response action helps

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65 See CERCLA, 42 U.S.C. § 9613(h). The language of this section merely states that a lawsuit may not be maintained until response actions have been completed. Id. The section does not state that parties may never bring a citizen suit to challenge the EPA's decisions regarding a CERCLA cleanup. See id.

66 CERCLA, 42 U.S.C. § 9613(h). This section specifically reserves party's rights to pursue an action under 28 U.S.C. § 1332, diversity jurisdiction, and under "State law which is applicable or relevant and appropriate." Id.


68 Id.


70 CERCLA, 42 U.S.C. 9613(h)(4)

71 CERCLA, 42 U.S.C. §§ 9613(h)(4), 9659. Most state laws which govern hazardous waste management standards are authorized by the EPA pursuant to RCRA. See RCRA, 42 U.S.C. § 6991(d).

72 The overall goal of Congress's hazardous waste management scheme is to protect public health and the environment. See H.R. Rep. No. 1016, supra note 21, at 17-18, reprinted in 1980
to minimize the risk of harm to public health and the environment by reducing exposure to the hazardous wastes.\textsuperscript{73} Thus, such an interpretation of CERCLA section 113(h) to postpone review until completion of a CERCLA cleanup would serve to further the primary goal of Congress's hazardous waste management scheme, protection of public health and the environment.\textsuperscript{74}

It is possible that in some circumstances the goal of ensuring prompt cleanup would not be compatible with Congress's goal of protecting public health and the environment.\textsuperscript{75} An examination of CERCLA section 113(h)'s legislative history indicates that Congress desired courts to differentiate between suits brought by responsible parties seeking to delay or prevent a CERCLA cleanup, and "legitimate" citizen suits seeking to address concerns related to endangerment of public health and the environment.\textsuperscript{76}

Citizen suits that allege that a clean-up action itself may be creating a hazard to health or the environment can become moot if courts delay review until the response action is completed.\textsuperscript{77} By the time the court heard the claim, the harm from the cleanup would already be done.\textsuperscript{78} The possibility that courts might read CERCLA section 113(h) in a way that would have such a confounding result lead some members


\textsuperscript{75} See, e.g., North Shore Gas Co. v. Environmental Protection Agency, 930 F.2d 1239, 1245 (7th Cir. 1991); Cabot Corp., 677 F. Supp. at 829.

\textsuperscript{76} See supra note 56 and accompanying text.

\textsuperscript{77} The reader may be tempted to draw an analogy between "legitimate" citizen suits and NIMBY (Not In My Back Yard) suits. This may be an apt analogy, but the real concern of such a RCRA lawsuit might be closer to "do not violate the hazardous waste laws in my back yard."

\textsuperscript{78} If a cleanup is creating a harm and is allowed to continue without interruption until completion, another cleanup will be necessary to remedy the harm created by the first cleanup. This is not only contrary to the prospective goals of RCRA, but also to the goals of Congress's hazardous waste management scheme, protecting public health and the environment.
of Congress to urge courts to consider the equities of the situation in the court's decision of whether to delay review of a citizen suit under CERCLA section 113(h)(4). These members of Congress desired to avoid an elimination of judicial review for "legitimate" citizen suits that could lead to irreparable harm by postponing review until the harm was done.

The legislative history of CERCLA section 113(h) supports a conclusion that while suits brought by responsible parties often seek to avoid liability by preventing the EPA from pursuing a response action, "legitimate" citizen suits usually allege that the chosen response action will create more of a risk to human health or the environment than an alternative response. During legislative debates on CERCLA section 113(h) several members of Congress recognized this potential problem and encouraged courts to make the distinction between suits by responsible parties and "legitimate" citizen suits. Senator Stafford stressed that "legitimate" citizen suits usually allege "that the President or other official have violated the cleanup standards or other requirements of the law, and that public health or the environment would be threatened if the proposed action were undertaken." Similarly, Representative Roe stated that "[t]he legislation intends that the courts will draw appropriate distinctions between dilatory lawsuits by potentially responsible parties involving only monetary damages and legitimate citizen suits representing irreparable injury that can only be addressed during the course of implementing a cleanup."

Citizens are suing to compel compliance with cleanup standards that are designed to protect the public health. Responsible parties, on the other hand, may be suing to halt cleanup because of concerns that the response action is too costly. . . . [C]ourts should carefully weigh the equities and give great weight to the public health risks involved.

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79 See supra note 56.
80 See supra note 56.
81 See supra note 56.
82 See supra note 56.
85 132 Cong. Rec. S14818 (daily ed. Oct. 3, 1986); see 132 Cong. Rec. H9575 (daily ed. Oct. 8, 1986) (Representative Florio stressing the importance of being able to bring citizen suits "alleging violations of law and irreparable injury to health" as soon as any part of a CERCLA response action was completed); 132 Cong. Rec. S14898 (daily ed. Oct. 3, 1986) (Senator Stafford stating that "[i]t is crucial, if it is at all possible, to maintain citizens' rights to challenge response actions, or final cleanup plans before such plans are implemented even in part.").
Thus, some members of Congress did not want CERCLA section 113(h) to achieve prompt clean-up actions at the expense of protecting public health and the environment.

It should be noted that other members of Congress did not believe there should be any distinction between citizen suits by responsible parties and "legitimate" citizen suits concerned with irreparable harm to public health or the environment. Senator Thurmond expressed a belief that "[t]he timing of review section is intended to be comprehensive... [I]t covers all issues that could be construed as a challenge to the response, and limits those challenges to the opportunities specifically set forth in the section."^87

To a limited extent, courts have noted the distinction between responsible party suits and "legitimate" citizen suits. In North Shore Gas Co. v. Environmental Protection Agency, responsible parties challenged part of a CERCLA response plan that required the responsible parties to construct a boat slip as part of a clean-up action. The Court of Appeals for the Seventh Circuit dismissed the case as barred under CERCLA section 113(h)(4). In so doing, however, the court evinced its concern that a court could read CERCLA section 113(h) in a way that eliminated all possibility of judicial review for certain citizen suits. The Seventh Circuit expressed concern that such an interpretation of CERCLA section 113(h) could result in irreparable harm by prohibiting review of "legitimate" claims.

Similarly, in Cabot Corp. v. United States Environmental Protection Agency, the District Court for the Eastern District of Pennsylvania dismissed a suit brought by responsible parties challenging the authority of the EPA to order a cleanup at a hazardous waste release site. The court dismissed the case as barred under CERCLA section 113(h)(4), but reached its decision by distinguishing between suits by responsible parties and "legitimate" citizen suits. The court stated that citizen suits alleging that a clean-up action "posed a risk of irreparable harm to health or the environment" would be eligible for

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^87 Id.
^89 North Shore Gas, 930 F.2d at 1241.
^90 See id.
^91 See id.
^92 See id. at 1245.
^94 See id. at 827-29.
review sooner than if the suit alleged essentially liability issues. The court reached this distinction based upon CERCLA's legislative history which called for courts to draw such a distinction in order to serve the purposes behind CERCLA.

Congress enacted CERCLA section 113(h) to prevent unnecessary delay of CERCLA cleanups due to citizen litigation. For a court to read CERCLA section 113(h) to postpone review of citizens suits until completion of a CERCLA cleanup serves the overall goal of Congress's hazardous waste management scheme, because it prevents clean-up delays and thereby reduces exposure to the released hazardous wastes. The same reading can also have the opposite effect, because the delay of "legitimate" citizen suits can lead to irreparable harm to public health and the environment. Some courts have noted remarks from CERCLA section 113(h)'s legislative history and have read section 113(h) in a way that gives greater weight to Congress's goal of protecting public health and the environment than to its goal of ensuring prompt cleanups.

b. RCRA's Citizens' Suit and Its Jurisdictional Bar

RCRA's citizen suit provision provides its own version of CERCLA's jurisdictional bar. This jurisdictional bar changes, however, depending on whether a party brings a suit under RCRA's enforcement provision, section (a)(1)(A), or under RCRA's imminent and substantial endangerment provision, section (a)(1)(B).

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95 See id. at 829. The court expressed this concern by stating that citizen suits alleging irreparable harm to health or the environment should come under the provisions of section 113(h)(4) and that liability claims should wait for review under section 113(h)(1). See id. However, the court also believed that review under section 113(h)(4) would be available as soon as the EPA approved a response plan, and before the plan was actually implemented. See id. at 828. Other courts have not followed this view that review under CERCLA section 113(h)(4) is available as soon as the EPA approves a response plan. See, e.g., Neighborhood Toxic Cleanup Emergency v. Reilly, 716 F. Supp. 828, 832–34 (D.N.J. 1989). These courts have held that no review is available under CERCLA section 113(h)(4) until completion of the relevant response action. See, e.g., id.

96 See Cabot Corp., 677 F. Supp. at 829–30; see also supra notes 56 and 80–82 and accompanying text.


98 See supra notes 72–73 and accompanying text.

99 See supra notes 77–78 and accompanying text.

100 See, e.g., North Shore Gas Co. v. Environmental Protection Agency, 930 F.2d 1239, 1245 (7th Cir. 1991); Cabot Corp., 677 F. Supp. at 829.

101 RCRA, 42 U.S.C. § 6972(b).


(a)(1)(A) of RCRA allows a private party to bring a suit to compel compliance with the requirements of RCRA's provisions, unless the EPA is already pursuing its own enforcement action.\textsuperscript{104} Section (a)(1)(B) of RCRA allows private parties to bring actions to restrain or abate acts which the parties allege are creating "an imminent and substantial endangerment to health or the environment," unless the EPA is already seeking to restrain or abate the alleged endangerment.\textsuperscript{105}

The language and structure of RCRA's citizen suit provision indicate that Congress intended that parties could bring RCRA (a)(1)(A) actions to enforce the requirements of RCRA's provisions at a CERCLA cleanup.\textsuperscript{106} RCRA's jurisdictional bar, for both RCRA (a)(1)(A) and RCRA (a)(1)(B) actions, is contained in RCRA section 6972(b).\textsuperscript{107}

The language of RCRA section 6972(b) prohibits a citizen suit under RCRA (a)(1)(A) if the government is already pursuing an action to enforce the same requirements that the citizen suit seeks to address.\textsuperscript{108}

The language in section 6972(b) that establishes the jurisdictional bar for RCRA (a)(1)(B) actions, however, prohibits such actions if the
EPA is pursuing an action to address the activities which are creating the alleged endangerment, including a response under CERCLA. In other words, section 6972(b) bars a citizen suit under RCRA (a)(1)(B) in the face of an ongoing, EPA-approved cleanup, but there is no corresponding bar for suits brought under RCRA (a)(1)(A) during an EPA-approved cleanup. The prohibition of citizen suits under RCRA (a)(1)(B) where a CERCLA response is ongoing, and lack of corresponding prohibition for citizen suits under RCRA (a)(1)(A), indicates Congress's intent that a CERCLA response would not bar an enforcement action under RCRA's (a)(1)(A) provision. Thus, parties may bring a citizen suit under RCRA (a)(1)(A) to compel compliance with the requirements of RCRA, even in the face of a CERCLA cleanup.

This reading of RCRA comports with views expressed in CERCLA's legislative history that RCRA and CERCLA would work together in remediating the nation's hazardous waste problem. When Congress composed RCRA's citizen suit provision to allow enforcement of RCRA's performance standards at a CERCLA clean-up site,

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109 "The activities" is emphasized here to point out that the subject matter of the EPA's action must coincide with the subject matter of the citizen suit. See infra notes 123–25 and accompanying text.

110 RCRA, 42 U.S.C. § 6972(b)(2)(B) provides that,

(2)(B) No action may be commenced under subsection (a)(1)(B) of this section if the Administrator, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment—

(i) has commenced and is diligently prosecuting an action under section 6973 of this title or under section 106 of [CERCLA];

(ii) is actually engaging in a removal action under section 104 of [CERCLA];

(iii) has incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 of [CERCLA];

(iv) has obtained a court order (including a consent decree) or issued an administrative order under section 106 of [CERCLA] or section 6973 of this title pursuant to which a responsible party is diligently conducting a removal action, Remedial Investigation and Feasibility Study (RIFS), or proceeding with a remedial action.

In the case of an administrative order referred to in clause (iv), action under subsection (a)(1)(B) of this section are prohibited only as to the scope and duration of the administrative order referred to in clause (iv).


111 RCRA, 42 U.S.C. § 6972(b).

112 Id.


114 See supra notes 33–38 and accompanying text; see also United States v. Colorado, 990 F.2d at 1575 (reading RCRA in a manner to allow it to work with CERCLA to remedy the nation's hazardous waste problem).
Congress gave further effect to RCRA's objective "that hazardous waste be properly managed in the first instance thereby reducing the need for corrective action at a future date."\footnote{115 RCRA, 42 U.S.C. § 6902(a)(5).} Congress's application of RCRA's requirements to CERCLA cleanups ensures that parties conduct cleanups in a "safe" manner that eliminates the need to address future damage to public health and the environment which could result from an improperly conducted cleanup.\footnote{116 The elimination of future hazardous waste problems is a goal of RCRA. See RCRA, 42 U.S.C. § 6902(a)(5).} The ability to maintain an action under RCRA (a)(1)(A) comports with the relationship between RCRA and CERCLA in Congress's hazardous waste management scheme.\footnote{117 See supra notes 33-48 and accompanying text.} Moreover, the ability to maintain a RCRA (a)(1)(A) action comports with the fact that CERCLA does not exempt itself from RCRA's performance standards.\footnote{118 See CERCLA, 42 U.S.C. § 9621(e)(1). This section specifically requires that RCRA's requirements must be considered in the determination of the appropriate response action at a CERCLA site. See id.}

Where parties bring a citizen suit under RCRA's (a)(1)(B) provision, to abate an imminent and substantial endangerment to public health or the environment, RCRA section (b)(2)(B) prohibits the lawsuit if the EPA is already pursuing an action to abate the acts which are allegedly creating or contributing to the endangerment to health or environment.\footnote{119 RCRA, 42 U.S.C. § 6972(b)(2)(B).} The language of RCRA (b)(2)(B) provides that an action under RCRA (a)(1)(B) is prohibited if the EPA is acting "in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment."\footnote{120 RCRA, 42 U.S.C. § 6972(b)(2)(B) (emphasis added).} Arguably, one can read RCRA (b)(2)(B) to restrict the jurisdictional bar on RCRA (a)(1)(B) suits only to situations where the EPA is addressing the exact same activities which the parties allege to be creating the endangerment to public health or the environment.\footnote{121 See RCRA, 42 U.S.C. § 6972(b)(2)(B).} In other words, if the EPA participates in an action to clean up a release of hazardous waste that parties allege to be an endangerment, a party may not bring a citizen suit that challenges the cleanup of those wastes until completion of the cleanup.\footnote{122 RCRA, 42 U.S.C. § 6972(b)(2)(B).} On the other hand, where the alleged endangerment is not the released hazardous waste that is subject to the cleanup, but is instead the emissions from clean-up activities, one may read the language of
RCRA (a)(1)(B) and RCRA (b)(2)(B) to indicate that a citizen suit is not barred unless the EPA is involved in an action that addresses the allegedly dangerous emissions.  

It is possible that the clean-up activities themselves may create an endangerment distinct from the endangerment of the hazardous wastes that are being cleaned up. In such a situation, a party might maintain an action under RCRA (a)(1)(B) if the EPA was not taking corrective action relating to the pollution emitted by the clean-up activities. For a court to allow an action under RCRA (a)(1)(B) would further the purpose of RCRA to provide for the safe disposal of hazardous wastes in the first place so as to eliminate the need for future remedial action. Moreover, for a court to allow such an imminent and substantial endangerment action would further the primary goal of Congress's hazardous waste management scheme, protecting public health and the environment. On the other hand, it is possible that Congress intended RCRA (b)(2)(B) to bar all RCRA (a)(1)(B) actions in order to prevent litigation from delaying clean-up actions. The intent to bar all RCRA (a)(1)(B) actions does not necessarily conflict with the primary purpose of Congress's hazardous waste management scheme, because prompt cleanup of hazardous wastes often helps prevent harm to public health and the environment by minimizing exposure to the wastes. Given this view of Congressional intent, one could read RCRA (b)(2)(B)'s provisions to prohibit RCRA (a)(1)(B) imminent and substantial endangerment suits that relate to ongoing CERCLA response actions.

123 RCRA, 42 U.S.C. §§ 6972(b)(2)(B) and (a)(1)(B).
124 See Arkansas Peace Ctr. v. Arkansas Dep't of Pollution Control and Ecology, 999 F.2d 1212, 1218 (8th Cir. 1993), cert. denied, 114 S. Ct. 1397 (1994) (citizens' group claiming clean-up activities emitting dioxin and endangering local residents and local environment).
126 RCRA, 42 U.S.C. § 6902(a)(5) (providing purpose of RCRA). Such a suit would promote this goal by ensuring that any complaints about the adequacy of a cleanup, with regards to protection of public health and the environment, are addressed.
127 See H.R. REP. No. 1016, supra note 21, at 17, reprinted in 1980 U.S.C.C.A.N. at 6119–6120; RCRA, 42 U.S.C. § 6902(a)(4) (providing goal of Congress's hazardous waste management scheme). Such a suit would promote this goal by ensuring that any complaints about the adequacy of a cleanup, with regards to protection of public health and the environment, are addressed.
130 See RCRA, 42 U.S.C. § 6972(b)(2)(B)(ii), (iii). If one accepts that Congress's primary goal behind CERCLA section 113(h) was to ensure prompt cleanups of hazardous wastes so as to reduce exposure to the wastes, one could carry that intent over into a reading of RCRA.
Moreover, the plain language of RCRA (b)(2)(B) distinguishes between CERCLA response actions conducted by the EPA itself under CERCLA section 104, and those response actions conducted by a responsible party pursuant to an administrative order under CERCLA section 106. Where a cleanup is conducted pursuant to an administrative order under CERCLA section 106, RCRA (b)(2)(B) prohibits RCRA (a)(1)(B) actions "only as to the scope and duration of the administrative order referred to." The case of Fishel v. Westinghouse Elec. Corp., addressed this issue. In Fishel, the plaintiffs alleged that release of hazardous wastes was adversely affecting their drinking water. The defendant argued that RCRA (b)(2)(B) barred plaintiffs' claim because there was already an ongoing CERCLA cleanup at the site in question. The District Court for the Middle District of Pennsylvania, however, held that RCRA (b)(2)(B) did not bar plaintiffs' suit, because the scope of the administrative order, which related to the ongoing CERCLA cleanup, addressed only surface contamination. Because the subject matter of the plaintiff's suit was subsurface contamination, the court found that the plain language of RCRA (b)(2)(B) did not bar the plaintiffs' suit.

The Fishel case stands for the proposition that parties may maintain an action under RCRA (a)(1)(B) in the face of a cleanup under CERCLA section 106. This is so even if one finds that RCRA (b)(2)(B) bars RCRA (a)(1)(B) actions that conflict with an ongoing cleanup under CERCLA section 104. One may reasonably conclude (b)(2)(B). Such a reading would interpret RCRA (b)(2)(B) to mean that no actions could be brought until at least a first crack had been made at cleaning up the hazardous wastes. One should question, however, the propriety of importing Congressional intent expressed in legislative history that dealt explicitly with CERCLA section 113(h) to an interpretation of RCRA's provisions.

131 See RCRA, 42 U.S.C. § 6972(b)(2)(B)(i)-(iv). The policy behind this distinction may be that courts should give deference to EPA's environmental expertise and assume that the EPA will not act in a way that would threaten the environment, see, e.g., International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 650 n.130 (D.C. Cir. 1973), whereas responsible parties carrying out an administrative order may need the additional oversight of the public in order to insure that the environment is not harmed by cleanup activities. See United States v. Colorado 990 F.2d 1565, 1573 (10th Cir. 1993), cert. denied, 114 S. Ct. 922 (1994).


134 See id.

135 See id.

136 See id.

137 See id.

138 See United States v. Colorado, 990 F.2d 1565, 1577–578 (10th Cir. 1993), cert. denied, 114 S. Ct. 922 (1994) (recognizing distinction between (a)(1)(A) and (a)(1)(B) suits and allowing an
that EPA-conducted cleanups would bar a RCRA citizen suit while cleanups conducted by responsible parties would not, because Congress and courts often defer to the EPA's "environmental expertise" in order to guard against harm to the environment.140 Thus, it would be more likely that cleanups conducted by the EPA, as opposed to cleanups conducted by private parties, would be given the benefit of the doubt that they were protecting public health and the environment.

Even though Congress distinguishes between section 104 and section 106 response actions, one may conclude that RCRA (b)(2)(B) also bars suits that allege that CERCLA section 106 clean-up activities themselves are creating an imminent and substantial endangerment to health or the environment.141 This is because any clean-up activities, even if they create their own pollution, are arguably within the scope of an administrative order relating to the cleanup of a hazardous waste site.142 In *North Shore Gas*, the Court of Appeals for the Seventh Circuit held that any measure involved in a clean-up action "reasonably related to" the cleanup is part of the remedial action, and, thus, is within the scope of the relevant administrative order.143 Thus, courts can reasonably find that pollution that results from clean-up activities is within the scope of an administrative order if the pollution relates closely to the functioning of the clean-up plan.144

It is true that litigation delays might be avoided if courts interpret RCRA (b)(2)(B) to bar citizens suits in the face of an ongoing CERCLA cleanup, but barring such suits might allow clean-up activities that harm public health and the environment to go unchecked.145 Such an interpretation of RCRA (b)(2)(B)'s provisions could have conse-

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140 See supra note 131 and accompanying text.
141 See RCRA, 42 U.S.C. § 6972(b)(2)(B); Arkansas Peace Ctr. v. Arkansas Dep't of Pollution Control and Ecology, 999 F.2d 1215, 1218 (8th Cir. 1993), cert. denied, 114 S. Ct. 1397 (1994) (plaintiffs bringing suit alleging cleanup under CERCLA section 106 creating imminent and substantial endangerment to public health and the environment).
142 See *North Shore Gas Co. v. Environmental Protection Agency*, 930 F.2d 1239, 1244 (7th Cir. 1991) (declaring any action involved in cleanup to be within the scope of administrative order).
143 Id.
144 See id.
145 See *Arkansas Peace Ctr.*, 999 F.2d at 1218; *North Shore Gas*, 930 F.2d at 1245. If the facts of this case as alleged by the plaintiffs are true, then this case presents a situation where a court's barring of a RCRA citizen suit would allow a CERCLA cleanup to harm public health and the environment. *Id.*
quences that run counter to the expressed purpose behind Congress's hazardous waste management scheme, protection of public health and the environment.\footnote{See RCRA, 42 U.S.C. §§ 6902(a)(4), (5) (setting forth the goals behind RCRA, to protect public health and the environment from hazardous wastes); H.R. REP. No. 1016, supra note 21, at 17, reprinted in 1980 U.S.C.C.A.N. at 6119-6120 (delineating Congress's purpose behind CERCLA of protecting public health and the environment from hazardous wastes).}

2. RCRA's Citizen Suit meets CERCLA's Jurisdictional Bar

Some EPA-approved CERCLA cleanups may be well-intentioned, but, nevertheless, may fail to meet RCRA's standards for hazardous waste disposal, or may actually create residual harms.\footnote{An example of such a situation is where the incineration of contaminated soil at a hazardous waste site emits dioxin into the surrounding air. See Government Accountability Project, supra note 1 (describing potential harms to public health and the environment from use of incineration to destroy wastes); see also Arkansas Peace Ctr., 999 F.2d at 1218.} Citizens who live near a clean-up action that fails to meet RCRA's standards, or allegedly endangers health or the environment, may turn to courts to ensure that the cleanup does not harm their health or the local environment.\footnote{See Arkansas Peace Ctr., 999 F.2d at 1218 (citizens' group turning to court to ensure that CERCLA cleanup does not harm their health or local environment); see also infra notes 224-47 and accompanying text.} RCRA's citizen suit provision offers concerned citizens a vehicle to bring their concerns to the attention of a court.\footnote{RCRA, 42 U.S.C. § 6972.}

It is conceivable that suits brought under RCRA's citizen suit provisions, which seek to enforce RCRA's requirements or abate an imminent and substantial endangerment at a CERCLA clean-up site, would run up against CERCLA's jurisdictional bar.\footnote{See arkansas peace ctr., 999 F.2d at 1218; United States v. Colorado, 990 F.2d 1565, 1576-77 (10th Cir. 1993), cert. denied, 114 S. Ct. 922 (1994).} Section 113(h) of CERCLA bars any "challenges" to a CERCLA response action; though section 113(h)(4) excepts citizen suits from this bar, it postpones the right to bring citizen suits until completion of a response action.\footnote{CERCLA, 42 U.S.C. § 9613(h)(4).} Plaintiffs have tried to bring citizen suits alleging violations of statutes besides RCRA and CERCLA, and all have been unable to overcome CERCLA's jurisdictional bar of section 113(h).\footnote{See North Shore Gas Co. v. Environmental Protection Agency, 930 F.2d 1239, 1245 (7th Cir. 1991); Boarhead Corp. v. Erickson, 923 F.2d 1011, 1015, 1021 (3d Cir. 1991); Schalk v. Reilly, 900 F.2d 1091, 1097 (7th Cir. 1990); see also Healy supra note 21, at 56-82 (discussing possibility for judicial review of CERCLA liability under other statutory schemes).} Nevertheless, there are compelling reasons to reach a different conclusion.
about the ability to overcome CERCLA section 113(h)'s jurisdictional bar in an action brought under RCRA's citizen suit provision. 153

There is reason to believe that citizen suits brought under RCRA will have more success against CERCLA's jurisdictional bar than suits brought under other statutory provisions. The citizen suits that parties have brought during a CERCLA response, and which have failed as a result, were brought under provisions that did not specifically address the issue of when such suits could be maintained in the face of a CERCLA response. 154 In Boarhead Corp. v. Erickson, the plaintiff brought an action to remove a piece of property from the National Priorities List 155 on the grounds that the property was eligible for inclusion on the National Register of Historic Places. 156 The plaintiff argued that the National Historic Preservation Act (NHPA) authorized the court to review the case and grant relief as appropriate despite CERCLA clean-up activities at the site. 157 In reviewing the case, the Court of Appeals for the Third Circuit noted that even though it could hear the plaintiff's claim under the NHPA, section 113(h) of CERCLA barred federal courts from exercising jurisdiction over the plaintiff's claim. 158 It is important to note that the NHPA differs from RCRA in that the NHPA does not address the issue of whether and when a party may maintain a citizen suit in the face of a CERCLA cleanup. 159

Similarly, in Schalk v. Reilly, plaintiffs brought a citizen suit that sought to compel the EPA to prepare an environmental impact statement, pursuant to the National Environmental Policy Act (NEPA), in conjunction with actions taken at a CERCLA site. 160 The Court of Appeals for the Seventh Circuit first found that it could review NEPA claims under the Administrative Procedure Act (APA). 161 Then, however, the court dismissed the case as barred by the plain language of

153 See United States v. Colorado 990 F.2d 1565, 1577-78 (10th Cir. 1993), cert. denied, 114 S. Ct. 922 (1994) (allowing state of Colorado to maintain suit under RCRA's citizen suit provision despite CERCLA section 113(h)'s jurisdictional bar).

154 See Boarhead Corp., 923 F.2d at 1013 (brought under NHPA); Schalk, 900 F.2d at 1097 (brought under NEPA).

155 The National Priorities List lists the hazardous waste release sites which pose the greatest risk to public health and the environment. CERCLA, § 9605(c).

156 See Boarhead Corp., 923 F.2d at 1013.

157 See id. at 1015.

158 See id. at 1022.

159 See National Historic Preservation Act of 1966, 16 U.S.C. §§ 470-470(x)(6) (1988). There is no provision in the NHPA that corresponds to RCRA's section 6972(b) delineating when citizen suits may be maintained in the face of a CERCLA cleanup.

160 See Schalk v. Reilly, 900 F.2d 1091, 1094 (7th Cir. 1990).

161 Id.
CERCLA section 113(h), because the plaintiffs' action constituted a "challenge" to a CERCLA response.\(^{162}\)

As with *Boarhead Corp.*, it is important to note that neither NEPA nor the APA address the issue of whether and when a party may maintain an action in the face of a CERCLA response.\(^{163}\) RCRA's citizen suit provision, on the other hand, does specifically address the issue of whether and when actions are barred in the face of a CERCLA response.\(^{164}\) Because RCRA's citizen suit provision does address this issue, it is an indication that Congress did not intend CERCLA section 113(h) to bar a RCRA citizen suit when RCRA's provisions specifically allow parties to bring suits in the face of CERCLA cleanups.\(^{165}\) To hold that CERCLA section 113(h) bars RCRA citizen suits would be to find that Congress meant to implicitly repeal a right of action conferred by RCRA. As a general rule, courts are reluctant to do this.\(^{166}\)

Another characteristic that distinguishes cases that courts found to be barred by CERCLA section 113(h) from cases involving RCRA citizen suits is that parties did not bring the former suits under provisions which related directly to protection of public health and the environment from hazardous waste.\(^{167}\) This is an important distinction, because protection of public health and the environment from

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162 See *id.* at 1097.
163 See National Environmental Policy Act, 42 U.S.C. §§ 4321-4370d (1988); Administrative Procedure Act, 5 U.S.C. §§ 501-596 (1988). There is not provision in either NEPA or the APA that corresponds to RCRA's section 6972(b) delineating when parties may maintain a citizen suit in the face of a CERCLA cleanup.
164 See supra notes 108-13 and accompanying text.
166 See United States v. Colorado, 990 F.2d at 1575. The Tenth Circuit gave a brief summary of general rules of statutory construction in its decision in *United States v. Colorado*. Id. The court stated that,

> When Congress has enacted two statutes which appear to conflict, we must attempt to construe their provisions harmoniously .... Even when a later enacted statute is not entirely harmonious with an earlier one, we are reluctant to find repeal by implication unless the text or legislative history of the later statute shows that Congress intended to repeal the earlier statute and simply failed to do so expressly.

*Id.*

In outlining these rules, the Tenth Circuit cited to cases which had been decided by the Supreme Court. *Id.*

167 See *Boarhead Corp.* v. Erickson, 923 F.2d 1011, 1013 (3d Cir. 1991) (responsible party citizen suit seeking to compel EPA to consider the NHPA at CERCLA site); Schalk v. Reilly, 900 F.2d 1091, 1097 (7th Cir. 1990) (citizen suit seeking to compel preparation of environmental impact statement prior to CERCLA cleanup, and alternatively seeking review of EPA's determinations under the APA).
hazardous wastes is central to both RCRA and CERCLA.\textsuperscript{168} The statute at issue in \textit{Boarhead Corp.} was the NHPA, which addresses preservation of historic landmarks rather than protection of health.\textsuperscript{169} Similarly, while the statute involved in \textit{Schalk}, NEPA, deals broadly with environmental protection, it does not deal directly with protection of public health and the environment from hazardous wastes, and it is not part of Congress's hazardous waste management scheme.\textsuperscript{170}

Unlike the statutes involved in \textit{Boarhead Corp.} and \textit{Schalk}, RCRA's performance standards are specifically designed to protect public health and the environment from hazardous wastes.\textsuperscript{171} An action brought under RCRA's citizen suit provision, which seeks either to enforce RCRA's requirements or to abate an imminent and substantial endangerment, necessarily furthers protection of public health and the environment.\textsuperscript{172} This is the primary goal of CERCLA.\textsuperscript{173} In addition, Congress passed CERCLA as an amendment to RCRA in order to supplement RCRA's "prospective" hazardous waste management scheme.\textsuperscript{174} Thus, there is a generic, statutory difference between citizen suits brought under RCRA and those brought under other statutes.\textsuperscript{175} It is important to understand this difference in order to resolve discrepancies over Congressional intent in the interpretation of CERCLA section 113(h)'s jurisdictional bar so that it does not defeat the primary goal of CERCLA and Congress's hazardous waste management scheme, protection of public health and the environment.

**B. The Case Law: A Split in the Circuits**

The combined language of CERCLA and RCRA does not explicitly address whether CERCLA's section 113(h) bars citizen suits under RCRA (a)(1)(A) and (a)(1)(B) when the RCRA citizen suits involve

\textsuperscript{168} See supra note 34 and accompanying text.


\textsuperscript{171} See supra note 19 and accompanying text.

\textsuperscript{172} See RCRA, 42 U.S.C. § 6972(a). An action brought under (a)(1)(B), to abate an imminent and substantial endangerment to public health or the environment, necessarily seeks to protect public health or the environment whereas an action under (a)(1)(A), to enforce RCRA's requirements, seeks to protect public health and the environment by virtue of the fact that RCRA's requirements are promulgated to serve that very purpose. See RCRA, 42 U.S.C. §§ 6922–6924.

\textsuperscript{173} See supra note 27 and accompanying text.

\textsuperscript{174} See supra note 36 and accompanying text.

\textsuperscript{175} See supra notes 154–66 and accompanying text.
an EPA-approved CERCLA cleanup. Nevertheless, the Court of Appeals for the Tenth Circuit and the Court of Appeals for the Eighth Circuit have addressed this issue. These two courts have split on the issue of whether CERCLA section 113(h) bars judicial review of citizen suits brought under RCRA.

1. United States v. Colorado: No Jurisdictional Bar

In United States v. Colorado, the State of Colorado sought to enforce its RCRA-authorized hazardous waste management laws against the United States Army in the Army’s cleanup of the Rocky Mountain Arsenal. The Army was conducting a cleanup to remedy the many tons of hazardous wastes that it had disposed of at the arsenal. The EPA was overseeing the Army’s clean-up activities to ensure compliance with federal hazardous waste laws. Colorado brought its action to enforce RCRA-approved state hazardous waste laws pursuant to RCRA’s (a)(1)(A) citizen suit provision which allows citizens to bring a suit to enforce RCRA’s requirements. The Army argued that CERCLA section 113(h) barred judicial review of any challenges to a CERCLA response action prior to completion of the response action. The Court of Appeals for the Tenth Circuit, however, decided that CERCLA section 113(h) did not bar Colorado’s RCRA (a)(1)(A) enforcement action, and the court allowed Colorado to enforce its compliance order.

The Tenth Circuit examined the problem as one of statutory construction. In deciding the case, the Tenth Circuit relied on a close scrutiny of the plain language and structure of CERCLA and RCRA in light of Congress’s intention to create a hazardous waste management scheme to remedy the nation’s hazardous waste problem. The

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176 See CERCLA, 42 U.S.C. § 9613(h); RCRA, 42 U.S.C. § 6972(a)–(b).
177 See United States v. Colorado, 990 F.2d 1565, 1574 (10th Cir. 1993), cert. denied, 114 S. Ct. 922 (1994).
178 See Arkansas Peace Ctr. v. Arkansas Dept of Pollution Control and Ecology, 999 F.2d 1212, 1216 (8th Cir. 1993), cert. denied, 114 S. Ct. 1397 (1994).
179 See id.
180 United States v. Colorado, 990 F.2d at 1571–572.
181 Id.
182 Id.
183 Id. Since Colorado’s hazardous waste laws were approved by the EPA under RCRA, the state laws had the same force as regulations promulgated pursuant to RCRA.
184 See id.
185 See id. at 1578.
186 See id. at 1575.
187 See id. at 1575–578.
court concluded that Congress did not implicitly repeal RCRA’s citizen suit provision by the inclusion of section 113(h) in CERCLA’s 1986 Superfund Amendments and Reauthorization Act amendments.\(^\text{188}\) The court proceeded to interpret both CERCLA section 113(h) and RCRA (a)(1)(A) in light of Congress’s overall hazardous waste management scheme.\(^\text{189}\)

The court first noted that Congress did not intend CERCLA to change the effect of any other federal or state law, and thus compliance with CERCLA should not alleviate the Army’s need to comply with the requirements of RCRA which Colorado sought to enforce.\(^\text{190}\) The court went on to note that, for purposes of CERCLA section 113(h), Congress contemplated a differentiation between suits by potentially responsible parties which sought to delay a CERCLA response, and “legitimate” citizen suits which sought to further the protection of public health and the environment.\(^\text{191}\) As Colorado’s enforcement action was not a challenge by a responsible party, the court found that Colorado’s action was not one which Congress intended to bar from review prior to completion of a CERCLA response.\(^\text{192}\)

The Tenth Circuit ultimately decided that Colorado’s effort to apply its hazardous waste management laws to the Army’s CERCLA cleanup was not a “challenge” to a CERCLA response within the meaning of section 113(h).\(^\text{193}\) The court reached this decision because it found that Congress, in enacting CERCLA section 113(h), intended to prevent responsible parties from filing “dilatory” lawsuits which delayed or prevented CERCLA cleanups.\(^\text{194}\) As Colorado’s lawsuit merely sought to ensure that the cleanup complied with EPA-authorized state laws, and did not seek to delay or prevent the cleanup, the court concluded that Colorado’s action did not fall within the meaning


\(^{189}\) See United States v. Colorado, 990 F.2d at 1575.

\(^{190}\) See id. CERCLA provides that, “[n]othing 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.” CERCLA, § 9652(d).

\(^{191}\) See United States v. Colorado, 990 F.2d at 1577. The court also found that there was no difference between a state and a person for purposes of both 113(h) and (a)(1)(A). See id. at 1576, 1578.

\(^{192}\) See id. at 1577.

\(^{193}\) See id. at 1576–577.

\(^{194}\) See id. at 1576. Congress did not want potentially responsible parties to be able to bring litigation challenging a response action that would have the effect of delaying a response. See H.R. Rep. No. 253, supra note 54, at 296, reprinted in 1986 U.S.C.C.A.N. at 2941.
of "challenge" that Congress had contemplated in enacting CERCLA section 113(h).\textsuperscript{195}

The Tenth Circuit also relied on the language of RCRA's citizen suit provision to support its conclusion that Congress did not intend for CERCLA section 113(h) to bar RCRA (a)(1)(A) actions in the face of a CERCLA response.\textsuperscript{196} The court noted the difference between RCRA (a)(1)(A) and RCRA (a)(1)(B) actions in the "Actions Prohibited" section of RCRA's citizens' suit provision.\textsuperscript{197} The court decided that RCRA section 6972(b)'s prohibition of RCRA (a)(1)(B) actions prior to the completion of a CERCLA response, and the lack of a corresponding prohibition for RCRA (a)(1)(A) actions, evidenced Congress's intent not to prohibit RCRA (a)(1)(A) actions during a CERCLA response.\textsuperscript{198}

The theme that runs throughout the Tenth Circuit's decision is the practical notion that it makes little sense, in light of Congress's overall hazardous waste management scheme, to allow a CERCLA response to proceed in disregard of RCRA's requirements.\textsuperscript{199} Because Congress intended RCRA and CERCLA to work together to remedy the nation's hazardous waste problems,\textsuperscript{200} the court concluded that it should not implicitly repeal the right of action conferred by RCRA which allowed a citizen suit action to enforce RCRA's requirements at a CERCLA cleanup.\textsuperscript{201}

2. Arkansas Peace Ctr. v. Arkansas Dep't of Pollution Control and Ecology: Jurisdictional Bar

The other case that addresses the question of whether CERCLA section 113(h) bars an action under RCRA (a)(1)(A) is Arkansas Peace Ctr. v. Arkansas Dep't of Pollution Control and Ecology.\textsuperscript{202} In Arkansas Peace Ctr., neighbors of a CERCLA response site brought an action that sought to enjoin the incineration of hazardous wastes at an abandoned herbicide and pesticide production site.\textsuperscript{203} The hazard-
ous waste to be incinerated contained dioxin, which is one of the most toxic and carcinogenic compounds known to humans.204

The plaintiffs sued under both RCRA (a)(1)(A), seeking to enforce RCRA's performance standards to the cleanup, and RCRA (a)(1)(B), seeking to abate the alleged imminent and substantial endangerment to public health and the environment posed by the release of dioxin into the air via the incinerator.205 The suit under RCRA (a)(1)(A) sought to enforce compliance with a RCRA promulgated regulation that required incinerators to operate at a "destruction and removal efficiency" of 99.9999% for dioxin.206 The district court below had found that the defendants could not demonstrate that the incinerator to be used at the site was capable of achieving the RCRA-required destruction and removal efficiency, and the court had issued a preliminary injunction.207 The Court of Appeals for the Eighth Circuit, after first upholding the injunction, dismissed the appeal for lack of subject matter jurisdiction.208 The court found that CERCLA section 113(h) barred the plaintiff's suit under RCRA (a)(1)(A), because the suit was a "challenge" under CERCLA section 113(h).209

In reaching its decision, the Eighth Circuit relied mainly on comparisons of Arkansas Peace Ctr. with cases which addressed the question of whether CERCLA section 113(h) barred judicial review prior to completion of a CERCLA response.210 The Eighth Circuit compared the case to Schalk v. Reilly.211 Schalk involved a suit brought under NEPA that sought to compel the EPA to prepare an environmental impact statement (EIS) regarding the clean-up method it had selected.212 The Eighth Circuit also compared Arkansas Peace Ctr. to Boarhead Corp. v. Erickson.213 Boarhead Corp. was brought under the NHPA.214 The Eighth Circuit cited Schalk and Boarhead Corp. for the proposition that Congress intended CERCLA section 113(h)
to bar any action that delayed a CERCLA cleanup.215 The Eighth Circuit also relied on North Shore Gas Co. v. Environmental Protection Agency to support its conclusion that CERCLA section 113(h) barred judicial review until the completion of a CERCLA cleanup.216 North Shore Gas appeared to be very similar to Arkansas Peace Ctr. in that it had been brought in part under RCRA.217 North Shore Gas was not entirely similar, however, because it involved a suit brought by potentially responsible parties that dealt with issues of liability allocation.218 In CERCLA section 113(h)’s legislative history, Congress urged courts to differentiate between such a suit by potentially responsible parties and “legitimate” citizen suits.219

The plaintiffs in Arkansas Peace Ctr. also tried to bring a suit under RCRA (a)(1)(B).220 This part of the suit alleged that the emission of any dioxin from the incinerator into the environment was an imminent and substantial endangerment to public health and the environment.221 As dioxin is one of the most potent toxins and carcinogens known, even a minuscule amount released into the atmosphere can be lethal.222 Nevertheless, the Eighth Circuit found the language of RCRA’s “Actions Prohibited” section, section 6972(b), expressly barred this cause of action.223

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215 See Arkansas Peace Ctr., 999 F.2d at 1217.
216 See id.; North Shore Gas Co. v. Environmental Protection Agency, 930 F.2d 1239, 1245 (7th Cir. 1991).
217 The two cases appeared to be similar, because they were both brought under provisions of RCRA. See Arkansas Peace Ctr., 999 F.2d at 1217; North Shore Gas, 930 F.2d at 1241 (seeking to compel EPA cleanup to obtain a RCRA permit).
218 North Shore Gas, 930 F.2d at 1245.
219 See supra notes 79–85 and accompanying text.
220 Arkansas Peace Ctr., 999 F.2d at 1218.
221 See id. The plaintiff’s complaint stated that the proposed incineration would result in toxic and hazardous chemicals released into the air (both unburned feed chemicals and chemical by-products of incomplete combustion) including polychlorinated dibenzo-p-dioxins and polychlorinated dibenzofurans, and the pesticides 2,4-D and 2,4,5-T and their derivatives and combustion by-products, which will pose serious risk of harm (cancer, immune and reproductive system damage and other effects) to human health and the environment.

Plaintiff’s complaint at 3, Arkansas Peace Ctr. v. Arkansas Dep’t of Pollution Control and Ecology, 23 ELR 20807 (E.D.Ark.), aff’d 992 F.2d 145 (8th Cir.), rev’d, 999 F.2d 1212 (8th Cir. 1993), cert. denied, 114 S. Ct. 1397 (1994).
222 See GOVERNMENT ACCOUNTABILITY PROJECT, supra note 1, at 9, 24.
223 See Arkansas Peace Ctr., 999 F.2d at 1218.
III. A Case Study: New Bedford Harbor as an Example of How RCRA Citizen Suits Help to Further the Goals of Congress's Hazardous Waste Management Scheme

The CERCLA cleanup of New Bedford Harbor provides a vivid example of how the interpretation of CERCLA section 113(h) to allow "legitimate" citizen suits under RCRA can ultimately further CERCLA's goal of protecting public health and the environment from hazardous wastes. New Bedford Harbor, in New Bedford, Massachusetts, has been one of the most polluted harbors in the world since the 1970s. The sediments in the harbor are laden with PCBs and heavy metals. It was not until 1982, however, that the EPA declared the harbor a Superfund site, and the CERCLA clean-up process began. In 1986, the EPA reached a "cash out" settlement agreement with the two primary responsible parties, Aerovox and Cornell-Dubilier. This settlement agreement allowed the EPA to pursue a cleanup itself, under CERCLA section 104. In 1980, eight years after the EPA declared the harbor a Superfund site, the EPA put forth a record of decision (ROD) which named incineration as the best technology to clean up the harbor.

CERCLA requires that the EPA consult with a community working group when choosing a response alternative. The EPA worked with such a group in New Bedford. Nevertheless, when the community learned that the EPA had chosen incineration for the cleanup, some members of the community became concerned because of re-

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224 ENVIRONMENTAL PROTECTION AGENCY, RECORD OF DECISION SUMMARY, NEW BEDFORD HARBOR/HOT SPOT OPERABLE UNIT 1-4 (April 1990); Interview with William Shutkin, Esq., Alternatives for Community and Environment, in Newton, MA (February 4, 1994).
225 Interview with William Shutkin, Esq., supra note 224.
226 See ENVIRONMENTAL PROTECTION AGENCY, supra note 224, at 3; Interview with William Shutkin, Esq., supra note 224.
227 Interview with William Shutkin, Esq., supra note 224. A "cash out" settlement is where the responsible parties concede their liability for the clean-up costs. Id.
228 Id.; CERCLA, 42 U.S.C. § 9604.
229 The process of incineration involves dredging the contaminated sediments from the bottom of the harbor and incinerating them to remove the contaminants. See ENVIRONMENTAL PROTECTION AGENCY, supra note 224, at 27; interview with William Shutkin, Esq., supra note 224.
230 CERCLA, 42 U.S.C. § 9617(a) (requiring availability of public participation); ENVIRONMENTAL PROTECTION AGENCY, supra note 224, at 6–7.
231 See ENVIRONMENTAL PROTECTION AGENCY, supra note 224, at 6–7; interview with William Shutkin, Esq., supra note 224.
ports that incineration of PCBs can result in the release of dioxin.\textsuperscript{232} When the EPA released the ROD, and made known the location of the incineration site, neighbors of the site formed a coalition, called "Hands Across the River."\textsuperscript{233} The coalition intended to block the use of incineration to clean up the harbor.\textsuperscript{234} By 1993, other citizen groups from communities located downwind of the incineration site had joined Hands Across the River.\textsuperscript{235}

According to scientific evidence gathered during the late 1980s and early 1990s the fears of these citizen groups were valid.\textsuperscript{236} The scientific evidence suggested that incineration was not the best alternative for cleaning up hazardous wastes.\textsuperscript{237} In fact, the evidence showed that the emission of dioxin into the atmosphere from incineration could actually be more hazardous to human health than the alternative of leaving the hazardous wastes in place.\textsuperscript{238} This information greatly concerned the citizens who lived near the New Bedford Harbor incineration site, because they knew that dioxin would be released when the harbor sediments, containing PCBs, were incinerated.\textsuperscript{239}

Hands Across the River retained the legal services of Alternatives for Community and Environment ("ACE") in the fall of 1993.\textsuperscript{240} ACE, working in conjunction with members of the Conservation Research Group at Boston College Law School, filed a notice of intent to sue with the EPA.\textsuperscript{241} In addition to other claims, the notice included a claim under RCRA (a)(1)(B) alleging that the incineration of PCBs and emission of dioxin would create an imminent and substantial endangerment to public health and the environment near and downwind of the incineration site.\textsuperscript{242} As a result of this notice, ACE was successful in persuading the EPA to enter into mediation with Hands Across the River and, subsequently, the EPA has withdrawn incin-
eration as an alternative for cleaning up the harbor.\(^{243}\) As soon as the EPA withdrew incineration as a cleanup alternative, Hands Across the River became a partner with the EPA in exploring constructive alternatives for cleaning up New Bedford Harbor.\(^{244}\)

Ultimately, Hands Across the River was successful in convincing the EPA that incineration does not protect public health and the environment and, therefore, does not further the purpose behind CERCLA.\(^{245}\) Even though the legal action by the citizen group had the effect of delaying the cleanup, the action was not brought by a responsible party and was not intended to delay or prevent the cleanup, which was precisely what Congress sought to avoid by enacting CERCLA section 113(h).\(^{246}\) As a result of the citizen group's ability to threaten a lawsuit, the ultimate remediation of the New Bedford Harbor will result in a cleanup that truly protects public health and the environment.\(^{247}\)

This case study illustrates why courts should not read CERCLA section 113(h) to bar a citizen suit action under RCRA's citizen suit provisions. This case is a good example of the type\(^{248}\) of situation where protection of public health and the environment would be furthered if citizen groups had RCRA's citizen suit provision in their arsenal to combat CERCLA cleanups that could create a harm worse than the one being remedied.\(^{249}\) If the EPA knows that a RCRA citizen suit will not be barred by CERCLA section 113(h), the Agency may

\(^{243}\) Interview with William Shutkin, Esq., \textit{supra} note 224.

\(^{244}\) \textit{Id.}

\(^{245}\) \textit{Id.}

\(^{246}\) \textit{See supra} note 72 and accompanying text.

\(^{247}\) Interview with William Shutkin, Esq., \textit{supra} note 224.

\(^{248}\) \textit{Id.} Hands Across the River's success in persuading the EPA to enter into negotiations was probably due more to a state law claim than to a claim under RCRA (a)(1)(B). The EPA may be sued for not fulfilling a mandatory requirement if it does not consider state law that is Applicable, Relative, and Appropriate [Requirements] ("ARARs"). \textit{See CERCLA, 42 U.S.C. §§ 9659(a)(1), 9613(h).} Attorneys involved in the case attribute their success largely to their ARARs claim. Interview with William Shutkin, Esq. and Charles Lord, Esq., Alternatives for Community and Environment, in Newton, MA (April 6, 1994). Section 113(h) provides that "No Federal court shall have jurisdiction ... other than ... under State law which is applicable or relevant and appropriate under section 9621 of this title ...." \textit{CERCLA, 42 U.S.C. § 9613(h).} The EPA has avoided ARARs claims by arguing that interim measures at a CERCLA cleanup need not comply with all ARARs as long as the overall cleanup complies. Interview with William Shutkin, Esq. and Charles Lord, Esq., Alternatives for Community and Environment, in Newton, MA (April 6, 1994). It should also be noted, however, that a full discussion of ARARs is beyond the scope of this Comment.

\(^{249}\) \textit{See Government Accountability Project and Public Citizen Litigation Group, Brief for writ of Certiorari to the Supreme Court passim, Arkansas Peace Ctr. v. Arkansas Dep't of Pollution Control and Ecology, 999 F.2d 1212 (7th Cir. 1993), cert. denied, 114 S. Ct. 1397 (1994).}
be quick to enter into negotiations and work with communities to remedy hazardous waste problems rather than fight in court over a CERCLA response such as incineration that might not adequately protect public health and the environment. The New Bedford experience demonstrates that by reading CERCLA section 113(h) to allow citizen suits under RCRA it is possible to harmonize Congress's goal for its hazardous waste management scheme, protection of public health and the environment, with its goal for CERCLA section 113(h), preventing responsible parties from delaying or preventing cleanups.250

IV. WHY COURTS SHOULD NOT INTERPRET CERCLA'S JURISDICIAL BAR TO PROHIBIT RCRA CITIZENS' SUITS

RCRA, on its face, may be read to reach the conclusion that parties may bring RCRA citizen suit actions prior to the completion of a CERCLA response.251 In addition, there is some evidence that Congress intended courts to read CERCLA section 113(h) to allow for review of "legitimate" citizen suits prior to completion of a CERCLA cleanup.252 Reading RCRA and CERCLA in this way furthers Congress's overall goal of its hazardous waste management scheme, protection of public health and the environment.253 In addition, cases where courts have read CERCLA section 113(h) to bar citizen suits relating to a CERCLA cleanup are distinguishable from situations where citizen suits are brought under RCRA.254

Where an action is brought under one of RCRA's citizen suit provisions, RCRA's provisions for prohibition of review must be reconciled with CERCLA's section 113(h).255 RCRA's "Actions Prohibited" provision plainly, and expressly, contemplates the issue of whether

251 See supra notes 123-27 and accompanying text.
253 See supra notes 33-38 and accompanying text.
254 See Boarhead Corp. v. Erickson, 923 F.2d 1011, 1015 (3d Cir. 1991) (responsible party citizen suit brought under the NHPA); Schalk v. Reilly, 900 F.2d 1091, 1093-94 (7th Cir. 1990) (citizen suit seeking to compel preparation of environmental impact statement under NEPA and to review EPA's determinations under the APA).
255 See RCRA, 42 U.S.C. § 6972(b); CERCLA, 42 U.S.C. § 9613(h).
and when a party may maintain a citizen suit in the face of a CERCLA response. While the “Actions Prohibited” provision expressly bars RCRA (a)(1)(B) actions in the face of a CERCLA response, there is no corresponding prohibition for RCRA (a)(1)(A) actions. This language indicates Congress’s intent that a party may maintain an enforcement action under RCRA (a)(1)(A) even if the EPA is engaged in a CERCLA response. In addition, it is possible to read the language of RCRA’s “Actions Prohibited” provision to allow a party to maintain a RCRA (a)(1)(B) action in the face of a CERCLA response if the EPA is not addressing the exact same activities that are alleged to be creating the imminent and substantial endangerment.

The question remains, however, whether Congress intended an action under RCRA’s citizen suit provision to be a “challenge” under CERCLA section 113(h), so as to implicitly repeal the right to bring a citizen suit under RCRA in the face of a CERCLA response. It is doubtful that Congress so intended. Reading CERCLA section 113(h) to bar RCRA citizen suits that allege that a CERCLA cleanup is harming health or the environment would not serve the purposes behind Congress’s hazardous waste management scheme. Even though CERCLA section 113(h) is a jurisdictional bar for many claims that involve a CERCLA cleanup, it is doubtful that CERCLA section 113(h) should be interpreted in a way that creates irreplicable harm. Indeed, taken to its extreme, such a reading of CERCLA section

257 See RCRA, 42 U.S.C. § 6972(b); United States v. Colorado, 990 F.2d at 1578.
258 See RCRA, 42 U.S.C. § 6972(b); United States v. Colorado, 990 F.2d at 1578.
259 See RCRA, 42 U.S.C. § 6972(b)(2)(B); Government Accountability Project and Public Citizen Litigation Group, Brief for Writ of Certiorari to the Supreme Court 23, Arkansas Peace Ctr. v. Arkansas Dep’t of Pollution Control and Ecology, 999 F.2d 1212 (7th Cir. 1993), cert. denied, 114 S. Ct. 1397 (1994).
260 See H.R. REP. No. 1016, supra note 21, at 17-18, reprinted in 1980 U.S.C.C.A.N. at 6119-6120 (setting forth Congress’s purpose behind its hazardous waste management scheme which is, at least to the extent of RCRA and CERCLA, protection of public health and the environment from hazardous wastes).

Also consider that Congress originally enacted CERCLA to supplement RCRA, and Congress indicated that the two acts were intended to work together in remedying the nation’s hazardous waste problem. See United States v. Colorado, 990 F.2d at 1575-76; H.R. Rep. No. 1016, supra note 21, at 17-18, reprinted in 1980 U.S.C.C.A.N. at 6119-6120. Congress designed CERCLA to establish a level of attainment for how clean a hazardous waste site should be, and Congress designed RCRA to provide performance standards to ensure that the handling of hazardous wastes did not create risks to public health and the environment that would have to be cleaned up in the future. See CERCLA, 42 U.S.C. § 9621; RCRA, 42 U.S.C. § 6902(a)(5).
261 See North Shore Gas Co. v. Environmental Protection Agency, 990 F.2d 1239, 1245 (7th Cir. 1991) (Judge Posner expressing concern that courts could interpret CERCLA section 113(h) as a jurisdictional bar even in cases where to do so would lead to irreparable harm).
113(h) could lead to the prohibition of judicial review even if EPA's remedial plan included “tak[ing] the barrels of dioxin, truck[ing] them down to the Arkansas River and dump[ing] them in the river.” 262

In enacting CERCLA section 113(h), Congress did not intend to eliminate judicial review altogether, but merely intended to postpone review of “legitimate” claims until a cleanup is completed. 263 By postponing review of a suit alleging irreparable harm until it is moot, courts would eliminate any meaningful judicial review and would potentially allow irreparable harm to public health and the environment. Such a result is antithetical to Congress's goals. 264 Congress designed CERCLA section 113(h) to secure prompt cleanup and thus limit exposure to hazardous wastes, to further the main goal of CERCLA. 265 Indeed, prompt cleanup is often compatible with protection of public health and the environment. 266

In circumstances where a “legitimate” citizen suit can be brought under RCRA, however, delaying review for the purpose of securing prompt cleanup would be incompatible with protection of public health and the environment. 267 Some members of Congress explicitly recognized this possibility and called for courts to balance the equities of the situation and to interpret CERCLA section 113(h) to distinguish between suits brought by responsible parties and “legitimate” citizen suits. 268 Distinguishing between suits brought by responsible parties and “legitimate” citizen suits would serve CERCLA section 113(h)'s purpose of preventing responsible parties from delaying cleanups with “dilatory” litigation. To so distinguish would also be consistent

262 Government Accountability Project and Public Citizen Litigation Group, Brief for Writ of Certiorari to the Supreme Court 23, Arkansas Peace Ctr. v. Arkansas Dep't of Pollution Control and Ecology, 999 F.2d 1212 (7th Cir. 1993), cert. denied, 114 S. Ct. 1397 (1994).


264 See supra notes 33-38 and accompanying text.


267 See, e.g., Arkansas Peace Ctr. v. Arkansas Dep't of Pollution Control and Ecology, 999 F.2d 1212, 1213-215 (8th Cir. 1993), cert. denied, 114 S. Ct. 1397 (1994) (incineration of hazardous wastes resulting in release of dioxin into air).

with the goal of protecting public health and the environment.\textsuperscript{269} It would be sadly ironic if courts were to read CERCLA section 113(h) in a way that defeated CERCLA's goal of protecting public health and the environment\textsuperscript{270} and RCRA's goal of minimizing the necessity of future cleanups.\textsuperscript{271}

The policy argument for reading CERCLA section 113(h) to further the goal of protecting public health and the environment is applicable to suits under both RCRA (a)(1)(A) and RCRA (a)(1)(B). Suits under RCRA (a)(1)(B) explicitly address protection of public health and the environment;\textsuperscript{272} suits under RCRA (a)(1)(A) implicitly address health and environmental protection issues, as the requirements that they seek to enforce are designed to protect public health and the environment.\textsuperscript{273}

Understanding that RCRA and CERCLA make up Congress's hazardous waste management scheme also offers a compelling reason not to read CERCLA section 113(h) as a bar to citizen suits under RCRA in the face of an ongoing CERCLA response.\textsuperscript{274} Congress originally enacted CERCLA to supplement RCRA in remediating the nation's hazardous waste problem, and Congress indicated that it intended CERCLA to work with other hazardous waste laws in addressing this problem.\textsuperscript{275} Thus, a suit under RCRA is not necessarily a "challenge" to a CERCLA response, because a full consideration of RCRA's provisions is necessary as part of a CERCLA response.\textsuperscript{276}

Even if one does not agree that RCRA (a)(1)(B) suits seeking to abate an imminent and substantial endangerment at a CERCLA cleanup site are not "challenges" to a CERCLA response, it is doubtful that the same can be argued for RCRA (a)(1)(A) suits that seek to enforce the requirements of RCRA.\textsuperscript{277} In understanding why RCRA


\textsuperscript{271} RCRA, 42 U.S.C. § 6902(b)(5).

\textsuperscript{272} RCRA, 42 U.S.C. § 6972(a)(1)(B). Section (a)(1)(B) uses the words "[i]mminent and substantial endangerment to human health and the environment." \textit{Id.}


(a)(1)(A) suits are not "challenges" to a CERCLA response, first consider that Congress originally enacted CERCLA to supplement RCRA. Next, recall CERCLA section 121(e), which states that CERCLA shall work with other federal hazardous waste laws to remedy the nation's hazardous waste problem. It is difficult to argue that an action that seeks to compel a CERCLA response to comply with the law, which is in fact part of the same legislative scheme as CERCLA, is a "challenge" to a CERCLA response. It is true that such a lawsuit could have the same delaying effect that Congress sought to avoid by enacting CERCLA section 113(h). Congress's real intent in enacting CERCLA section 113(h), however, was to prevent lawsuits that responsible parties brought with the intent to delay or prevent a CERCLA cleanup. Congress did not intend to prevent "legitimate" lawsuits that parties brought to ensure that a CERCLA cleanup was complying with the law.

Cases that have held claims under other statutes to be barred on the grounds that they were "challenges" to a CERCLA response are distinguishable from situations that involve citizen suits under RCRA. Both Boarhead Corp. and Schalk were brought under statutes which were not part of Congress's hazardous waste management scheme. Boarhead Corp. was brought under the NHPA, and Schalk was brought under the APA. In addition, neither the NHPA nor the APA has a citizen suit provision that specifically addresses when an action may be maintained in the face of a CERCLA cleanup. RCRA does specifically address this issue. Therefore, Boarhead Corp. and

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278 See H.R. REP. No. 1016, supra note 21, at 17–18, reprinted in 1980 U.S.C.C.A.N. at 6119–6120. CERCLA was originally an amendment to the Solid Waste Disposal Act, better known today as RCRA. See id.
279 See CERCLA, § 9621(e).
280 See United States v. Colorado, 990 F.2d at 1576–77.
281 See id. (action not seeking to delay CERCLA cleanup).
282 See supra note 72 and accompanying text.
284 See Boarhead Corp. v. Erickson, 923 F.2d 1011, 1015 (3d Cir. 1991); Schalk v. Reilly, 900 F.2d 1091, 1094 (7th Cir. 1990).
286 See Boarhead Corp., 923 F.2d at 1015.
287 Schalk, 900 F.2d at 1094. Schalk also involved a claim brought under NEPA to compel the EPA to prepare an environmental impact statement before choosing a remedial action at a CERCLA site. Id.
289 See RCRA, 42 U.S.C. § 6972(b).
Schalk do not offer compelling reasons for reading the word “challenge” in CERCLA section 113(h) to bar a citizen suit under RCRA in the face of an ongoing CERCLA response.290

V. CONCLUSION

In light of the fact that RCRA and CERCLA are both part of Congress’s hazardous waste management scheme, and were both intended to protect public health and the environment, it defies good policy to read CERCLA section 113(h) in a way that bars actions under RCRA that seek to ensure that CERCLA cleanups are conducted properly. Courts should fully examine the language, structure, and legislative history of Congress’s hazardous waste management scheme, and then should read CERCLA section 113(h) in a way that avoids irreparable harm to public health and the environment. Reading CERCLA section 113(h) to allow RCRA citizen suits will ultimately have the effect of ensuring that we reach the best possible solutions to the nation’s hazardous waste problem, and will ultimately help the EPA in its efforts to work with communities to clean up pollution in their environment.

290See RCRA, 42 U.S.C. § 6972(a), (b); Boarhead Corp., 923 F.2d at 1015; Schalk, 900 F.2d at 1094.