LEGISLATIVE REFORM

COMPROMISING *THE* CLEANUP OR COMPROMISING *TO* CLEANUP? RCRA SUITS ALLOWED UNDER CERCLA § 113

I. INTRODUCTION

The creation and disposal of hazardous waste are scientific and chemical concepts beyond the complete comprehension of most of us. The effects on the environment and on our public health are concepts that are not. This article explores the effect of current environmental legislation on a hazardous waste site when it is being cleaned up. Usually, citizens in the community near the site rejoice once a site reaches the cleanup stage; in most cases, this is the goal the citizens have sought for years. In these cases, an interruption of this cleanup phase represents a waste of time and resources and a threat to the public health by leaving the site unattended. In the past, parties have brought suit to stop a cleanup because they are "potentially responsible parties"[1] (PRP's) and they wish to undertake a less extensive and less expensive cleanup. Congress reacted to these attempts and included a bar to such suits in certain environmental statutes.

Recently, however, parties have brought suit not in the interest of less expensive cleanup actions but, instead, in the name of more extensive actions to protect the public health. In these actions, a party, such as a citizens' group or a state, claims that the cleanup methods fail to comply with all necessary safety provisions under various environmental statutes. Currently, the circuits are split on whether or not the latter party, such as the citizens' group, can bring an action such as this one.

Congress took note of the need for regulation of hazardous waste and passed the Resource Conservation and Recovery Act (RCRA) in 1976.[2] The purpose of RCRA was to regulate hazardous waste in a "cradle to grave" manner.[3] Thus, when a facility produced hazardous waste, RCRA regulated its generation, transportation, storage, and/or disposal through permit requirements. Congress amended RCRA in 1980 with the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) when it realized that RCRA did not address the clean-up of previously contaminated sites. CERCLA provided for a "Superfund" which funded the clean-up of these sites with capital obtained from the parties responsible for the contamination.[4]

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1. Potentially responsible parties are those parties who have used the land in some way where the problems are occurring and may be held liable for the costs of the cleanup under CERCLA. 42 U.S.C. § 9613 (1994).

2. 42 U.S.C. §§ 6901-6992 (1994).

3. "Cradle to grave" describes the concept that RCRA will regulate waste from the time it is created to the time it is disposed of. H.R. REP. NO. 1016 (I), 96th Cong., 2d Sess. 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120.

4. 42 U.S.C. § 9611 (1994).

CERCLA's overall purpose was to amend RCRA "to establish a program for appropriate environmental response action to protect public health and the environment from danger posed by such [inactive hazardous waste] sites . . . [since] [e]xisting law is clearly inadequate to deal with this massive problem."[5]

While maintaining this noble goal, CERCLA has left many unresolved issues due to its ambiguous drafting.[6] A remaining issue is whether a party can bring suit under RCRA against a facility that is undergoing a CERCLA clean-up. The circuits are currently split on whether CERCLA § 113 bars a court from having jurisdiction to interrupt a CERCLA cleanup.[7] CERCLA § 113(h) states that

> [n]o Federal court shall have jurisdiction under Federal law . . . to review any challenges to removal or remedial action selected under section 104 [42 USCS § 9604] . . . in any action except one of the following: . . . (4) An action under section 310 [42 USCS § 9659] alleging that the removal or remedial action taken under section 104 . . . was in violation of this Act. *Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.*[8]

Section 113 was aimed at PRP's who sued to stop a cleanup believed to be too expensive or too broad.[9] RCRA allows citizens to bring suit against a hazardous waste site if it presents an "imminent and substantial endangerment to health or the environment".[10]

Although the statutory language appears clear, CERCLA and RCRA each contain other provisions implying that these statutes were meant to work *together*, and not against one another. RCRA states that "[t]he Administrator shall integrate all provisions of this Act, with the appropriate provisions of . . . and such other Acts of Congress as grant regulatory authority to the Administrator."[11] CERCLA also states that "[n]othing in this Act shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law."[12] Congress went so far as to add in the General Rules section of CERCLA that the EPA is required to consider the goals of statutes such as RCRA. By directly incorporating the goals of other environmental statutes into CERCLA, Congress limited the power of § 113. The statutory language is the key to finding a solution to the current circuit split.

The circuit split can best be explained with the following example. Antienviro, Inc. has improperly dumped hazardous waste onto a site in Biostate, USA. The United States Environmental Protection Agency (EPA) properly undertakes a CERCLA study and begins a remedial action, or removal, to clean up the site. The response, however, includes the incineration of a toxic substance dumped by Antienviro in violation of RCRA. Clarence Hatewaste, a citizen of Biostate, brings suit against the EPA for violating RCRA. Antienviro and the EPA argue that Mr. Hatewaste cannot bring this

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5. H.R. REP. NO. 1016, 96th Cong., 2d Sess. 17, 18 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120.
6. H.R. REP. NO. 253, 99th Cong., 2d Sess. 15 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3038.
7. 42 U.S.C. § 9613(h) (1994).
8. *Id.* (emphasis added).
9. H.R. REP. NO. 253 (I), 99th Cong., 2d Sess. 266 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2941.
10. 42 U.S.C. § 6972 (1994).
11. 42 U.S.C. § 6005(b)(1) (1994).
12. 42 U.S.C. § 9652(d) (1994).

suit since it is a "challenge" to a cleanup. CERCLA precludes challenges to a cleanup authorized by the EPA. The issue presented is twofold: do we allow the EPA and the facility to violate RCRA, thereby putting the public health and our environment at risk due to the unregulated hazardous waste emissions; or do we allow a party to bring suit to interrupt a clean-up allowing the site to remain a hazard for months or years, obviously putting the surrounding community and environment at risk?

As both of these questions involve the public health and the protection of our environment, it is easy to see how circuits could differ on the answers. Three circuits agree that CERCLA § 113 does *not* preclude a RCRA action by a state.[13] The leading case espousing this view is *United States v. Colorado*.[14] The Tenth Circuit concluded this since Colorado was not "challenging" the remedial action.[15] Instead, Colorado merely proposed that the cleanup actions not violate RCRA, in the interest of the public and environmental health.[16] The court reasoned that to find the opposite would go against the intent of Congress and the basic goals of RCRA and CERCLA.[17]

Five circuits disagree, however. Most recently, the Ninth Circuit decided *not* to allow a citizens' group to interrupt a cleanup in *McClellan Ecological Seepage Situation v. Perry*.[18] McClellan Ecological Seepage Situation (MESS) is a citizens' group which claimed that the McClellan Air Force Base was not complying with various environmental laws including failing to complete RCRA's individual reporting and permitting requirements. The court concluded that the language of CERCLA § 113(h) makes the intent of Congress clear thereby precluding *all challenges* to a CERCLA cleanup, not just those of PRP's.[19]

The effects of the circuit split are numerous. First, if a citizen lives in a circuit which reads CERCLA as precluding RCRA suits, she may get less protection because of an inadequate cleanup than a citizen who lives in a circuit which would allow a

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13. The Tenth Circuit is joined by the First Circuit in *Reardon v. United States*, 947 F.2d 1509 (1st Cir. 1991) (CERCLA did not deprive federal court of jurisdiction to hear constitutional challenge to a lien); and by the Second Circuit in *Browning-Ferris Industries of S. Jersey v. Muszynski*, 899 F.2d 151 (2d Cir. 1990) (Court can determine adequacy of EPA determination that stainless steel must be used in wells).

14. 990 F.2d 1565 (10th Cir. 1993).

15. The *Colorado* court determined that to "impact the implementation of a response action is not enough to constitute a challenge to the action." 990 F.2d 1575. *See infra* note 34 and accompanying text.

16. *Id.* at 1575-77.

17. *Id.* at 1577-59.

18. 47 F.3d 325 (9th Cir. 1995). The Ninth Circuit is joined by the Third Circuit in *Boarhead Corp. v. Erickson*, 923 F.2d 1011 (3d Cir. 1991) (Plaintiff not allowed to challenge the EPA's listing of site on NPL under National Historic Preservation Act); the Fifth Circuit in *Voluntary Purchasing Groups, Inc. v. Reilly*, 889 F.2d 1380 (5th Cir. 1989) (Chemical manufacturer's suit precluded because it would delay cleanup under §113); the Seventh Circuit in *Schalk v. Reilly*, 990 F.2d 1091 (7th Cir. 1990) (Court declined to allow jurisdiction over citizen challenge to construction of incinerator); *North Shore Gas Co. v. Environmental Protection Agency*, 930 F.2d 1239 (7th Cir. 1991) (Section 113(h) precludes federal court jurisdiction over EPA requirement that polluter construct boat slip); the Eighth Circuit in *Arkansas Peace Ctr. v. Arkansas Dept. of Pollution Control and Ecology*, 999 F.2d 1212 (8th Cir. 1993) (Court denied citizens suit alleging incineration part of cleanup harmful to public health); and the Eleventh Circuit in *Alabama v. Environmental Protection Agency*, 871 F.2d 1548 (11th Cir. 1989), *cert. denied*, 493 U.S. 991 (1990) (District Court did not have jurisdiction to hear suit by citizens about failure of notice about Texas toxic wastes moved to local toxic waste disposal site).

19. 47 F.3d at 328-329.

RCRA suit to a cleanup. In the latter circuit, she can stop the cleanup and correct its insufficient nature. The cleanup can then proceed in a more satisfactory way. Second, since pollution is not subject to the same circuit boundaries that the courts are, a hazardous waste facility in the Ninth Circuit may pollute a citizens' property located in the Tenth Circuit. Since the Ninth Circuit precludes these suits, the party in the Tenth Circuit is subject to the Ninth Circuit's interpretation, which may compromise her health. Third, the split requires that the EPA and facility undergoing the cleanup be prepared to have their remedial action interrupted in some circuits but not others. While this is unfair to those facilities located in circuits following the Ninth Circuit's interpretation, it also places an undue burden on the EPA to take circuit boundaries into account when planning a remedial action.

Finally, the circuit split will cause additional litigation. Parties will bring suits in the hope of the circuit reversing its stance on this issue or carving out an exception. By amending the statute, Congress can avoid these effects and clarify CERCLA. If amended, CERCLA has the potential to improve the quality of our public health and our environment.

The Supreme Court has denied certiorari to cases with the potential to resolve the split.[20] Thus, Congress has the responsibility to resolve the split. Congress should not merely follow one side of the split. Instead, Congress should revise CERCLA § 113 to represent a compromise between the circuits. Section 113 should protect the public health and the environment by allowing cleanups to proceed efficiently and rapidly. Section 113 should also allow interruption of those cleanups that cause more harm than the delay.

II. A QUESTION OF INTERRUPTION

A. *United States v. Colorado*: Basin F Must Comply with CERCLA & RCRA

The Tenth Circuit, in *United States v. Colorado*,[21] asserted that a federal court *does* have jurisdiction to hear certain claims under RCRA relating to an EPA-authorized cleanup of "Basin F." Basin F is a hazardous waste treatment, storage, and disposal facility near Denver, located within the Rocky Mountain Arsenal. The EPA listed it on the National Priority List (NPL).[22] Basin F served as a storage place for millions of gallons of liquid hazardous waste[23] and is noted as one of the most contaminated areas in the nation.[24]

Colorado sued against the Arsenal for violations of its state EPA-authorized RCRA statute,[25] the Colorado Hazardous Waste Management Act (CHWMA).[26] Un-

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20. Alabama v. Environmental Protection Agency, 871 F.2d 1548 (11th Cir. 1989), *cert. denied*, 493 U.S. 991 (1990); and Schalk v. Reilly, 900 F.2d 1091 (7th Cir. 1990), *cert. denied*, 498 U.S. 981 (1990).

21. 990 F.2d 1565 (10th Cir. 1993).

22. CERCLA requires the President to develop this NPL identifying those sites with releases or threatened releases which need government response actions. See 42 U.S.C. § 9605(a)(8) and 40 C.F.R. pt. 300, app. B (1992). A site must be listed on the NPL as a prerequisite to a Superfund-financed remedial action at the site. See 42 U.S.C. § 9605(a)(8)(B) and 40 C.F.R. § 300.425(b)(1) (1992).

23. 990 F.2d at 1566.

24. Daigle v. Shell Oil Co., 972 F.2d 1527, 1531 (10th Cir. 1992).

25. The EPA can authorize a state to carry out its own hazardous waste management act in lieu of RCRA. The EPA has this authority pursuant to 42 U.S.C. § 9626(b)

der CHWMA, the Arsenal was required to file part A and B of its permit application to the Colorado Department of Health (CDH).[27] Part B included the closure plan for Basin F, the basis for the litigation. CDH found the Arsenal's closure plan to be inadequate and developed its own.[28] The Arsenal refused to implement this alternative plan and Colorado sued in November, 1986. Around the same time, the Arsenal, with Shell Oil Co.[29] and the EPA, announced a CERCLA interim response action and agreed on an action in June, 1987.

Two years later, CDH issued a final compliance order to force the Arsenal to comply with CHWMA. The final compliance order required the Arsenal to submit a closure plan for Basin F, "including plans and schedules addressing soil contamination, monitoring and mitigation, [and] groundwater contamination."[30] The United States then brought this suit to enjoin Colorado and CDH from taking action to enforce the final compliance order. Based upon the clear language of the statute, the District Court found that CERCLA § 113 barred Colorado's RCRA enforcement action.[31] The Tenth Circuit disagreed, however, citing the overall objective of CERCLA as the basis for its disagreement. The court stated that the objective was to impress RCRA responsibilities onto a cleanup site regardless of the commencement of a CERCLA cleanup. The court stated "we must also look to the design of the statute as a whole and to its object and policy."[32] The court also asserted that "Congress clearly expressed its intent that CERCLA should work in conjunction with other federal and state hazardous waste laws in order to solve this country's hazardous waste cleanup problem."[33]

The court combined this statutory language reading with an interpretation of a "challenge" to a CERCLA cleanup.[34] The court stated that "an action by a state to enforce its hazardous waste laws at a site undergoing a CERCLA response action is not necessarily a challenge to the CERCLA action."[35] The Tenth Circuit reasoned that a "challenge" would attempt to halt the Arsenal's and the EPA's response action. Instead, Colorado's motion merely urges compliance with RCRA during the course of their chosen response action.[36] The Tenth Circuit disagrees with the Seventh Circuit's interpretation of challenge as an order that would merely "impact the implementation

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(1994). In these cases, RCRA's regulations serve as a floor for the regulations, not a ceiling. Therefore, the state's hazardous waste statute must at least meet RCRA's standards, but may create higher state requirements.

26. Colo. Rev. Stat. §§ 25-15-301 to 25-15-316 (1989 and Supp. 1992).

27. RCRA required that the Arsenal apply for a permit in two parts. The first, part A, required general information about the facility, operator, waste and processes for treatment, storage and disposal. *See* 40 C.F.R. § 270.13 (1992). The second, part B, required more specific information concerning the storage of the material, including a storage closure plan. *See* 40 C.F.R. § 270.14 (1992).

28. The Arsenal probably knew that the CDH would not accept its closure plan since this was the same deficient plan that the EPA rejected years before under RCRA. 990 F.2d at 1571.

29. Shell leased part of the Arsenal from 1946 to 1982, disposing of hazardous waste in Basin F. 990 F.2d at 1572.

30. *Id.* at 1573.

31. Colorado v. United States Dept. of the Army, 707 F. Supp. 1562 (D. Co. 1989).

32. 990 F.2d at 1575 (citing Crandon v. United States, 494 U.S. 152, 158 (1990)).

33. *Id.* at 1575.

34. *Id.*

35. *Id.* at 1576.

36. *Id.*

of a CERCLA response."[37] Thus, Colorado was not attempting a challenge and was given the right to require the CERCLA cleanup to comply with RCRA.

Many commentators agree with the Tenth's Circuit's interpretation of § 113. First, the Tenth Circuit's reading conforms to Congress's overall hazardous waste scheme.[38] Congress enacted CERCLA as an Amendment to RCRA, intending CERCLA to compliment RCRA, not exclude it.[39] Second, Congress's plan with RCRA, CERCLA and all other environmental statutes is to protect the public health. By using only those sections found in CERCLA, the threats that Congress enacted RCRA to prevent may be forgotten in an ambitious but inadequate CERCLA cleanup. Finally, commentators from the state of Colorado[40] praise the *Colorado* decision for its aggressive response to Basin F, a site that has plagued the environmental health of Colorado for decades.[41] These commentators, in particular, understand that hazardous waste elicits emotion and that a state must be able to take part in the remedial action to provide a voice for its citizens. This is especially true when that state has accepted the EPA-authorized responsibility through a state RCRA statute, such as CHWMA.

Unfortunately, the Tenth Circuit and these commentators neglect to address certain key issues upon which the Ninth Circuit and its supporters rely. These issues include the threat of unlimited litigation and the risk of interruptions delaying remedial action for years. Thus, while the Tenth Circuit's decision has strength, in order to adequately resolve the fault in the statutory language, Congress must draft a new provision.

B. *MESS & Arkansas Peace Center*: CERCLA Stands Alone

MESS v. Perry best demonstrates the reasoning that CERCLA bars a federal court's jurisdiction.[42]

Similar to *U.S. v. Colorado*, *MESS* deals with a federal military base whose disposal of hazardous waste has led it to a massive cleanup. The McClellan Air Force Base served as an aircraft depot and maintenance center for the Army and Air Force since the 1930's.[43] Its deposition of hazardous waste into uncontained earthened pits on the Base led to severe leaching into the groundwater beneath the Base.[44] Pursuant to CERCLA and an Interagency Agreement between the Air Force, the EPA, and the state of California, McClellan implemented its key component of the cleanup plan: its groundwater extraction system. This extraction system "allows contaminants to leach from the inactive waste pits into the groundwater which is then mechanically extracted and treated. This process was intended to remove all contaminants and prevent migra-

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

38. Nathan H. Stearns, *Comment: Cleaning up the Mess, or Messing up the Cleanup: Does CERCLA's Jurisdictional Bar (Section 113(h)) Prohibit Citizen Suits Brought Under RCRA?"* 22 B.C. ENV. AFF. L. REV. 49 (Fall, 1994).

39. *Id.* at 54.

40. *See* Shane Justin Harvey, *Environmental Law Survey*, 71 DENV. U. L. REV. 961 (1994); Alana Bissonnette, *Clean Up Your Federal Mess in My State: Colorado Has a State RCRA-Voice at the Rocky Mountain Arsenal*, 71 DENV. U. L. REV. 257 (1993).

41. In 1956, the Arsenal constructed Basin F to store and dispose of contaminated liquid waste. *See* Colorado v. United States Dept. of the Army, 707 F. Supp 1562 (D. Co. 1989).

42. 47 F.3d 325 (9th Cir. 1995).

43. *Id.* at 327.

44. *Id.*

tion of contaminated groundwater from the Base."[45] Among other allegations, MESS claimed that this treatment violated RCRA. The court found that this action was a "challenge" under § 113 since it sought to improve on the actual cleanup.[46] The court stated that "[a]ny delay or interruption of the process will slow the cleanup action, a result that Congress sought to avoid in enacting § 113(h)."[47] Therefore, since Congress's intent not to interrupt a cleanup was clear under CERCLA and the court was unable to "fashion any remedy that would not interfere with McClellan's CERCLA groundwater extraction system," MESS could not dispute the CERCLA cleanup of McClellan.[48] The court continued on its interpretation of CERCLA § 113(h) and allowed MESS's claims against the *active* waste storage sites, just not those passive sites undergoing a CERCLA cleanup.

Commentators supporting this interpretation recognize the importance to protect the public health but find that an interruption and subsequent delay of a cleanup will only leave an untreated site, harming the public more than the cleanup.[49] This may not always be true, however, since it is possible for the removal of a substance to be more risky to the public health than leaving the substance where it is.[50] This proposition has support, however, since the facility, the EPA, and the state, complete with experts on hazardous waste and each party's competing interests, have managed to agree on a remedial action for a site. Therefore, chances are high that at least one party has considered and incorporated an idea on which a citizens' group would bring suit.

This interpretation, however, does not adequately deal with several issues addressed by the Tenth Circuit's interpretation. First, the danger to the surrounding environment and the public health of surrounding communities is high if a CERCLA cleanup *is* inadequate and devastating if the court's allowing a review of the cleanup could have shown this. Also, precluding a citizen's suit until after a cleanup renders a citizen's right to bring suit moot since after the cleanup, the objection to the cleanup will have no bearing.

On the other hand, the circuits agree on certain key points which Congress must consider in amending § 113. Both sides understand the importance of the intent of Congress and the language Congress used to create § 113. Also, both believe that incorporation of RCRA requirements into a cleanup action are important. Finally, both sides admit that the state's involvement is important, especially when a state has an EPA-authorized RCRA statute.

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45. *Id.*
46. *Id.* at 330.
47. *Id.*
48. *Id.*
49. *See* Jason H. Eaton, *Creating Confusion: The Tenth Circuit's Rocky Mountain Arsenal Decision*, 144 MIL. L. REV. 126 (Spring 1994); Jeffrey G. Miller, *Private Enforcement of Hazardous Waste Laws and Its Effect on Tort Law and Practice*, C427 ALI-ABA 929 (1989).
50. Asbestos is one example since it is safe as long as it remains in a solid piece. During removal, breakage or crumbling can occur, which makes sealing the asbestos safer than removing it. Robert P. Kearney, *U.S. Orders a Phaseout of Asbestos Production*, CHICAGO TRIBUNE, July 7, 1989. *See also* Arkansas Peace Ctr. v. Arkansas Dept. of Pollution Control & Ecology, 999 F.2d 1212 (8th Cir. 1993), *cert. denied*, 493 U.S. 991 (1990) (citizens allege that incineration part of cleanup is more harmful to the public health).

III. THE NECESSARY STATUTORY REVISION

In an attempt to resolve the circuit split, Congress should amend CERCLA § 113 to read as follows:

> (4) . . . Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site or is currently in process by a potentially responsible party. Such an action may be brought under any statute by a party not considered a potentially responsible party only in one of the following:
>
> (a) When the party can present evidence that the remedial measures present an imminent danger to human life or the environment;
>
> (b) At the end of an intermediate stage in the remedial action.[51]

By amending § 113 in this way, Congress will accomplish three necessary ends. First, § 113 will differentiate between parties who have the right to judicial review and potentially responsible parties whose primary goal is to find a less extensive and expensive cleanup procedure. Second, § 113 will allow review to those parties who can prove that the cleanup procedures will cause danger. By limiting it to those with proof, the court is assured that the interruption has merit and that the EPA's scientists may have not adequately considered other options. Finally, § 113 will allow review at stages of the cleanup so that CERCLA does not deprive parties of their right to judicial review but also reassures that the cleanup is not halted in the middle of a procedure. Therefore, Congress will successfully resolve the current circuit split and protect public health at the same time.

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51. Original text found at 42 U.S.C. § 9613 (1994).

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