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Brian Patrick Murphy*

*Fordham University School of Law

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CERCLA'S TIMING OF REVIEW PROVISION: A STATUTORY SOLUTION TO THE PROBLEM OF IRREPARABLE HARM TO HEALTH AND THE ENVIRONMENT

*Brian Patrick Murphy**

INTRODUCTION

The Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA" or "Superfund"),¹ was the ninety-sixth Congress' response to growing public concern about the proliferation of toxic waste pollution across the entire country.² This statutory program for the cleanup of illegally dumped hazardous wastes was hastily enacted by a lame duck Con-

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1. 42 U.S.C. §§ 9601-9675 (1994).

2. See Peter K. Johnson, *Mr. Smith Goes to Washington: 1997 Superfund Amendments: Will it Solve the Liability Problem and How Will This Affect Massachusetts?*, 31 NEW ENG. L. REV. 1269, 1272-73 (1997).

gress at the end of 1980.³ Largely as a result of this accelerated legislative activity, CERCLA suffers from many flaws and has endured much criticism from the federal courts as being an indecipherable statute.⁴ Even after CERCLA was reformed under the Superfund Amendments and Reauthorization Act ("SARA") of 1986,⁵ the basic flaws remain.

Section 113 of CERCLA contains the Act's "timing of review" provision.⁶ This provision codifies the procedure necessary for a citizen to challenge an environmental remedy proposed by the Environmental Protection Agency ("EPA") under section 159 of CERCLA.⁷ The timing of review provision was an amendment to the overall statute that was passed in 1986 as part of the SARA Amendments.⁸ The timing of review provision in

3. See Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 1-2 (1982).

4. See John Copeland Nagle, *CERCLA's Mistakes*, 38 WM. & MARY L. REV. 1405, 1408-10 (1997).

5. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified at 42 U.S.C. §§ 9601-9675 (1994)).

6. Codified at 42 U.S.C. § 9613 (1994), section 113 contains the procedure for initiating civil proceedings under CERCLA, in addition to the timing of review provision, with additional exceptions to pre-enforcement review. See *infra* Part I.C.

7. 42 U.S.C. § 9659 (1994).

8. The passage of SARA in 1986 added "\$9 billion to a massive new cleanup effort, [and] institut[ed] fundamental reforms of the [cleanup] program such as the establishment of national cleanup standards. The legislation provide[d], for the first time, cleanup authority for leaking underground gasoline storage tanks and a community right to know disclosure program." 131 CONG. REC. H9550 (daily ed. Oct. 6, 1986) (statement of Rep. Roe). For a summary of SARA's changes to CERCLA, see generally, *Superfund II: A New Mandate*, 17 ENVTL. REP. (BNA) 2 (Feb. 13, 1987).

the SARA Amendments reflects Congress' concern that so-called potentially responsible parties ("PRPs")⁹ held liable for cleaning up abandoned hazardous waste sites would deliberately delay the cleanup process. Under section 113(b) of CERCLA,¹⁰ federal district courts have "exclusive original jurisdiction over all controversies arising" under the Act. However, SARA added section 113(h), which limits this jurisdiction, providing for a general bar of pre-enforcement review by federal district courts of any removal or remedial action implemented or directed by the EPA.¹¹ While there are exceptions to this

9. See 42 U.S.C. § 9607(a) (1994). "Potentially responsible parties" is a term of art in CERCLA referring to those parties that may be required to clean up, or pay for the cleanup, of a Superfund site. Those who face liability as PRPs fall under the broad scope of 42 U.S.C. § 9607(a), which holds liable:

- (1) the owner and operator of a vessel or a facility (where hazardous wastes were disposed of on the Superfund site during their ownership or operation),
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
- (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance

42 U.S.C. § 9607(a).

10. See 42 U.S.C. § 9613(b) (1994).

11. A "removal" action pursuant to CERCLA is a temporary, emergency action involving the cleanup or removal of released hazardous substances from the environment. See 42 U.S.C. § 9601(23) (1994); 40 C.F.R. § 300.410- .415. A "remedial" action pursuant to CERCLA is a permanent remedy taken instead of, or in addition to, a removal action at a Superfund site. See 42 U.S.C. § 9601(24) (1994); 40 C.F.R. §

general bar against pre-enforcement review, none of the listed exceptions in section 113(h), particularly subsection 113(h)(4), the citizen's suit exception, explicitly or coherently provide the federal courts with subject matter jurisdiction over pre-enforcement claims in citizen suits where irreparable harm to human health and the environment is asserted.¹² A bar on pre-enforcement review would seem counter-intuitive to the remedial purpose of CERCLA in cases where it is alleged that the EPA selected remedy to cleanup a Superfund site poses a serious threat of irreparable harm to human health and the environment.

This Note focuses on whether Congress should amend CERCLA to provide for a limited form of pre-enforcement review for EPA remedy selections in citizen's suits where irreparable harm to human health and the environment is alleged. Part I examines the circumstances under which CERCLA was passed, and discusses why CERCLA is poorly drafted. Furthermore, this Part identifies the reasons for SARA's passage and explains the general ban on pre-enforcement review. Part II examines the legislative history of section 113(h) and subsection 113(h)(4) of CERCLA, as well as cases that have interpreted the pre-enforcement review provisions. This part then examines the short-lived circuit split over whether to allow pre-enforcement review in citizen's suits where irreparable harm to health and the environment is asserted. Finally, Part III recommends that Congress adopt a limited mechanism for pre-enforcement judicial review of remedy selections when irreparable harm to human health and the environment is alleged. More specifically, this Part suggests that section 113(h) of CERCLA be amended by either providing additional sections or clarifying the existing citizen's suit exception to

300.420. See also 42 U.S.C. 9613(h)(4) (1994) (providing that no action can be brought against a removal action where a remedial action is to be brought at the same site).

12. 42 U.S.C. § 9613(h) (1994).

the general bar on pre-enforcement review. A properly tailored exception would directly address the situation where a citizen or PRP alleges that the EPA's cleanup plan for a site would cause irreparable harm to human health and the environment.

I. THE HISTORY OF CERCLA

A. *The Context of CERCLA's Passage*

By enacting CERCLA in 1980, Congress intended to provide a swift, comprehensive federal program for the cleanup of abandoned hazardous waste sites throughout the United States.¹³ Previously, in 1976, Congress had enacted the Resource Conservation and Recovery Act ("RCRA")¹⁴ a program designed to regulate the methods of disposal and the amount of hazardous waste being dumped at functional hazardous waste facilities. RCRA was not enough and the number of abandoned hazardous waste dumpsites was rapidly increasing.¹⁵ CERCLA was created to identify sites, clean them up, and hold those responsible for the contamination financially accountable.¹⁶

13. See generally JACKSON B. BATTLE & MAXINE I LIPELES, *HAZARDOUS WASTE* 180 (2nd ed. 1993).

14. Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified as amended at 42 U.S.C. §§ 6901-6992 (1988)).

15. See, e.g., CHRISTOPHER HARRIS ET AL., *HAZARDOUS WASTE: CONFRONTING THE CHALLENGE* 5 (1987). A study ordered by the EPA in 1974 estimated that 8.9 million metric tons of hazardous waste was being produced by United States industry per annum. See *id.* A further EPA commissioned study in 1979 brought the estimated annual hazardous waste output to approximately 33.8 million tons. See *id.* By 1981, a subsequent study authorized by the EPA brought the annual industrial hazardous waste output in the United States close to 264 million metric tons. See *id.* at 6.

16. See Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower*

CERCLA was partly a response to the horrifying experiences of the citizens of Love Canal, located in Niagara Falls, New York in the late 1970's.¹⁷ William T. Love began construction of the Canal in the late 19th century, though it was never completed.¹⁸ From the 1930's to the 1950's, the site was used as a chemical waste dump, most notably by the Hooker Chemical Company, which ran the site from 1942 to 1952.¹⁹ In 1953, Hooker sold the property to the town of Niagara Falls for one dollar after facing confiscation of the property by eminent domain.²⁰ Afterwards, the town built a grammar school on the site and sold the rest of the property to a real estate developer who built homes on the remaining property.²¹ By 1976, the EPA and the New York State Department of Environmental Conservation began to investigate complaints of chemical waste seeping into the basements of the homes built on the site.²² Simultaneously, health officials noticed reports of abnormally high rates of birth defects, cancer, miscarriages, and underweight children from families living in the vicinity.²³ Eventually, the school was closed, families were evacuated, and

Courts Taken a Good Thing Too Far?, 20 HARV. ENVTL. L. REV. 199, 202-03 (1996). There are "two overriding goals of CERCLA: (1) to clean up hazardous waste sites promptly and effectively; and (2) to ensure that those responsible for the problem bear the costs and responsibility for remedying the harmful conditions they created." *Id.*

17. See William David Bridgers, *The Hazardous Waste Wars: An Examination of the Origins and Major Battles to Date, With Suggestions For Ending the Wars*, 17 VT. L. REV. 821, 827 (1993).

18. See MARY D. WOROBEK & GIRARD ORDWAY, TOXIC SUBSTANCES CONTROLS GUIDE 160-61 (3rd ed. 1989).

19. See *id.* at 160-61.

20. See *id.*

21. See *id.*

22. See *id.*

23. See Bridgers, *supra* note 17, at 827.

the entire area was condemned as uninhabitable.²⁴ When widespread media coverage revealed the details of this tragedy to the public, citizens demanded governmental intervention at the federal and the local level to immediately clean-up hazardous waste dumps to prevent similar disasters in other areas of the country. In addition, people demanded that the government seek out those responsible for the contamination and hold those individuals responsible for the consequences of their actions.²⁵

The 96th Congress knew that a federal program must be created to deal with the hazardous waste crisis.²⁶ By late 1980, Congress had been presented with numerous bills proposing federal programs to cleanup abandoned hazardous waste sites.²⁷ When the results of the 1980 general election were official, the Democratic Congress acted swiftly, since the Republicans would soon hold the majority in both houses.²⁸ Its action came partly as a response to the public's sense of urgency, and partly because congressional Democrats were well aware that their time as a majority in both houses of Congress was limited. The result was the passage of CERCLA, a hastily drafted version of an abandoned hazardous waste site cleanup bill.²⁹ The Bill sailed through Congress so quickly, under a suspension of the rules, that there was

24. *See id.*

25. *See id.*

26. *See id.*

27. *See* H.R. 7020, 96th Cong., 2d Sess. (1980), 126 CONG. REC. H9437-78 (daily ed. Sept. 23, 1980); H.R. 85, 96th Cong., 1st Sess. (1979) 126 CONG. REC. H9186-201 (daily ed. Sept. 19, 1980); and S. 1480, 96th Cong., 1st Sess. (1979), 126 CONG. REC. S14938-48 (daily ed. Nov. 24, 1980).

28. *See* Grad, *supra* note 3, at 1.

29. The Resource Conservation and Recovery Act of 1976 ("RCRA") regulates the disposal of hazardous wastes. *See* Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified as amended at 42 U.S.C. §§ 6901-6992 (1994)).

little debate in either the House or Senate.³⁰ Consequently, there was no opportunity to iron out any procedural defects or potential conflicts with other laws.³¹ Congress enacted CERCLA in late 1980, and President Carter promptly signed the Bill into law.³² The ramifications of the conditions under which the Bill was passed became evident over the ensuing decade, as the federal courts were repeatedly called upon to interpret the multiple statutory absurdities and inconsistencies that permeated the statute.³³

CERCLA provides for considerable federal funding to enable the EPA to begin cleanups at sites that most significantly threaten the release of hazardous substances.³⁴ Superfund is funded by the federal government, and is subsidized by revenue from taxes imposed on the chemical and petroleum industries, which are substantially responsible for the hazardous waste disposed of in the United States.³⁵ Superfund money is first used by the EPA to cleanup sites³⁶ that have been

30. See Nagle, *supra* note 4, at n.31.

31. See *id.* See also 126 CONG. REC. 31969 (1980) (statement of Rep. Broyhill) (stating that CERCLA "was hurriedly drafted without the use of legislative counsel and as a result contains a large but unknown number of drafting errors. In just one night of review, legislative counsel has identified more than 45 technical errors alone.")

32. See Grad, *supra* note 3, at 1-2.

33. For a comprehensive discussion of CERCLA's drafting and interpretive problems, see Nagle, *supra* note 4.

34. See 42 U.S.C. § 9611 (a) (1) & (b)(1) (1994).

35. See 26 U.S.C. § 9507 (1994).

36. The EPA may chose to cleanup the site itself and then seek reimbursement from PRPs, or seek a court order or issue an administrative order to require the PRPs to clean up the site themselves. See 42 U.S.C. §§ 9604, 9607 (1994). See also *Solid State Circuits, Inc. v. United States Environmental Protection Agency*, 812 F.2d 383 (8th Cir. 1987) (stating "[s]ince Superfund money is limited, Congress clearly intended private parties to assume cleanup responsibility.").

placed on the National Priority List ("NPL"),³⁷ as part of the National Contingency Plan ("NCP").³⁸ The NPL is a list of hazardous waste sites that have been ranked by the EPA and the States as the sites most urgently in need of cleanup.³⁹ Once a hazardous waste site has been added to the NPL, a Remedial Investigation and Feasibility Study ("RI/FS") must begin within six months.⁴⁰ The study is conducted by either the EPA, or the owner or operator of the site, under the supervision of the EPA.⁴¹ Once the RI/FS has been completed, the EPA selects an appropriate remedial action plan ("RAP") within the guidelines set forth in the NCP.⁴² The EPA

37. See 42 U.S.C. § 9605(a)(8)(B) (1994).

38. See 42 U.S.C. § 9605 (1994).

39. 42 U.S.C. § 9605(a)(8)(B) (1994) states:

based upon the criteria set forth in [the NCP], the President shall list as part of the plan national priorities among the known releases or threatened releases throughout the United States and shall revise the list no less often than annually. . . . each State shall establish and submit for consideration by the President priorities for remedial action among known releases and potential releases in that State based upon the criteria set forth in [the NCP]. In assembling or revising the national list, the President shall consider any priorities established by the States. . . .

Id.

40. See 42 U.S.C. § 9620(a)(4)(e) (1994), which states "[n]ot later than 6 months after the inclusion of any facility on the National Priorities List, the department, agency, or instrumentality which owns or operates such facility shall, in consultation accordance with the Administrator and appropriate State authorities, commence a remedial investigation and feasibility study for such facility. . . ."

41. See 42 U.S.C. § 9604(a)(1) (1994), which states:

. . . . When the President determines that [a remedial or removal] action will be done properly and promptly by the owner or operator of the facility or vessel or by any other responsible party, the President may allow such person to carry out the action, conduct the remedial investigation, or conduct the feasibility study in accordance with section 9622 [regarding settlements] of this title. . . .

42. See 42 U.S.C. § 9620(a) (1994). The NCP is found at 40 C.F.R. Pt. 300 (1983), which sets out the criteria and pro-

then issues a report.⁴³ The EPA must give interested parties an opportunity to comment on the proposal and hold a public meeting at or near the site before the record of decision ("ROD"), setting forth the final plan, is reached.⁴⁴ Once the EPA receives such comments, it must respond in writing to any significant submissions and also include any significant changes to the plan, which are then published and made available to the public.⁴⁵ After the ROD is completed, the EPA implements the plan.

B. Passage of the 1986 SARA Amendments

Although CERCLA was effective to some extent, there were many problems.⁴⁶ Congress was well aware that

cedures to be followed in comparing remedial plans and choosing a response.

43. See 42 U.S.C. § 9617(a)(1) (1994). The EPA must "[p]ublish a notice and brief analysis of the proposed plan and make such plan available to the public." *Id.*

44. See 42 U.S.C. § 9617(a)(2) (1994). The EPA is required to "[p]rovide a reasonable opportunity for submission of written and oral comments and an opportunity for a public meeting at or near the facility at issue regarding the proposed plan The President or the State shall keep a transcript of the meeting and make such transcript available to the public." *Id.*

45. See 42 U.S.C. § 9617(b) (1994). "Such final plan shall be accompanied by a discussion of any significant changes (and the reasons for such changes) in the proposed plan and a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations" *Id.*

46. Problems with CERCLA at this time included improper political conduct in the form of conflicts of interest by EPA officials and high level officers of the Reagan administration. See Karen M. Hoffman, *Clinton County Commissioners v. EPA: Closing Off a Route to Pre-Enforcement Review*, 66 FORDHAM L. REV. 1939, 1944-47 (1998). Additionally, Congress had originally underestimated the number of abandoned hazardous waste sites throughout the country. The

CERCLA needed to be overhauled, so six years after the initial passage the statute underwent a major revision in the form of the SARA amendments.⁴⁷ For years, PRPs challenged the EPA regularly in federal district court in an attempt to elude or delay any financial responsibility regarding their participation in creating Superfund sites.⁴⁸ The federal courts responded to this trend by consistently holding that due to the statute's remedial purpose,⁴⁹ any judicial review prior to the completion of a given cleanup to the EPA's satisfaction was barred.⁵⁰ Congress agreed, and SARA's timing of review provision was passed to compliment and certify what had become common law in the federal courts concerning this issue.⁵¹

EPA had estimated that between 1,200 and 2,000 sites posed a serious risk to public health in 1980. See H. R. REP. NO. 96-1016, at 17 (1980). By 1985, approximately 10,000 sites required cleanup. See H. R. REP. NO. 99-253(I), at 54 (1988).

47. Superfund Amendments and Reauthorization Act ("SARA") of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

48. See *Superfund Improvement Act of 1985: Hearings on S. 51 Before the Committee on the Judiciary*, 99th Cong., A&P Hearings S. 51, 56 (1985) (statement of F. Henry Habicht II, Assistant Attorney General, U.S. Department of Justice: "The goal of a pre-enforcement challenge is ordinarily to prevent implementation of the remedy that EPA has selected. Accordingly, to be effective, such challenges generally request an injunction halting further remedial action pending litigation of the appropriateness of the remedy. . . . Indeed, as we have seen in litigation . . . challenges to agency decisions on environmental issues can take years to resolve.").

49. The remedial purpose canon of statutory construction states that remedial legislation should be liberally construed in order to effectuate the beneficial purpose for which it was enacted. For a discussion of the remedial purpose canon as it has been applied by the lower federal courts to CERCLA, see Watson, *supra* note 16.

50. See *infra* Part II.A.

51. See *infra* note 100.

While CERCLA had not expressly banned pre-enforcement review,⁵² courts dealing with the issue prior to the SARA Amendments created a federal common law precedent.⁵³ The federal courts consistently held that it was Congress' intent, given CERCLA's remedial purpose, to bar pre-enforcement review of EPA remedial action at Superfund sites.⁵⁴ Making the best sense it could out of

52. See *infra* Part I.C. See also *Aminoil, Inc. v. United States EPA*, 599 F. Supp. 69, 71 (C. D. Cal. 1984).

53. As several courts have noted, the scheme and purposes of CERCLA would be disrupted by affording judicial review of orders or response actions prior to commencement of a government enforcement or cost recovery action. See, e.g., *Lone Pine Steering Comm. v. Environmental Protection Agency*, 22 ENV'T REP. CAS. (BNA) 1113 (D. N.J. January 21, 1985). These cases correctly interpret CERCLA with regard to the unavailability of pre-enforcement review. See S. REP. 99-11 (1985) (statement of Sen. Stafford). See also 131 CONG. REC. S14895 (daily ed. Oct. 3, 1986) (statement of Sen. Thurmond) "The preenforcement review provision adopted by the conference is one of the most significant provisions developed during the reauthorization process. . . . It is my understanding that the provision confirms and builds upon existing case law. In particular, the timing of review section ensures that Government [sic] and private cleanup resources will be directed toward mitigation, not litigation." *Id.*

54. See *Lone Pine Steering Committee v. United States Environmental Protection Agency*, 777 F.2d 882, 886-87 (3d Cir. 1985) ("The statutory approach to the problem of hazardous waste is inconsistent with the delay that would accompany pre-enforcement review. Thus, although not explicitly stated in the statute, we find in [section] 9604 an implicit disapproval of pre-enforcement judicial review."); *Solid State Circuits, Inc. v. United States Environmental Protection Agency*, 812 F.2d 383, 386 n.1 (8th Cir. 1987) ("We agree with the district court's decision that it lacked jurisdiction to review the merits of an EPA cleanup order prior to an attempt by the EPA to enforce it."); *Wheaton Industries v. United States EPA*, 781 F.2d 354, 356 (3d Cir. 1986) ("We [hold] unequivocally that pre-enforcement review of EPA's remedial

a poorly written statute, the federal courts applied the remedial purpose canon of construction to CERCLA to create a general ban on pre-enforcement review of EPA remedial action. Additionally, Congress adopted several exceptions to this general ban on pre-enforcement review in SARA.

Congress had decided when passing SARA that due process does not forbid delaying review of liability issues until after cleanup is completed.⁵⁵ After balancing the

actions [is] contrary to the policies underlying CERCLA. Thus, the district court correctly ruled that judicial review was not available under section 104 of CERCLA at this time."); *Wagner Seed Co. v. Daggett*, 800 F.2d 310, 317 (2d Cir. 1986) ("[The district court] properly held that it lacked subject matter jurisdiction to consider a challenge on the merits to an EPA order before the EPA had initiated an enforcement action."); *Aminoil, Inc., v. United States EPA*, 599 F. Supp. 69, 71 (C.D. Cal. 1984) ("Thus, to the extent that pre-enforcement review of the merits of the administrative order is sought, this Court lacks jurisdiction to hear the arguments made by the plaintiffs."); *J. V. Peters & Co. v. Administrator*, 767 F.2d 263, 265 (6th Cir. 1985) ("Pre-enforcement review would lead to considerable delay in providing cleanups, would increase response costs, and would discourage settlements and voluntary cleanups."); *United States v. Outboard Marine Corp.*, 789 F.2d 497, 505-06 (7th Cir. 1986) ("Courts that have addressed the issue of a trial court's jurisdiction to review the appropriateness of the EPA's removal efforts have held that CERCLA does not authorize pre-enforcement judicial review of the EPA's ROD.").

55. See S. REP. NO. 99-11, at 58-59 (1985)

The [bill's] changes relating to judicial review [which were essentially the same as those eventually passed] both clarify and confirm the existing process. The amendment also establishes new procedures for reimbursement of certain response costs and provides opportunities for judicial review of administrative orders once the response action required by the order is completed. . . . This provision will foster compliance with orders and promote expeditious cleanup, by allowing [PRPs] who agree to undertake cleanup to preserve their arguments concerning liability and the appropriateness of their response action. . . . This amendment is not necessitated by any constitutional infirmity of section 106, as enacted in 1980, which

potential harms to the environment in delaying cleanups against the potential harms to PRPs who bear the financial burden before liability issues are determined, lawmakers concluded that the priority must be placed on cleaning up toxic waste sites as quickly as possible.⁵⁶ After the cleanup is completed, PRPs may sue the government for costs incurred and be reimbursed by proving, by a preponderance of the evidence either that they are not liable at all,⁵⁷ or that the cleanup plan was arbitrary and capricious.⁵⁸ PRPs may also seek contribution payments from other PRPs if they can show that such entities were also responsible for dumping at the site and were mistakenly left out of the EPA's ROD.⁵⁹ Because of the immediate danger to the environment and to public health posed by Superfund sites, and because lawmakers were aware that PRPs had been preventing the EPA from promptly cleaning up Superfund sites through protracted litigation, Congress sought to protect the Superfund and EPA cleanup efforts from delay resulting from such dilatory tactics.⁶⁰ A deluge of PRP challenges since CERCLA had been implemented had

already affords adequate protection of [PRPs'] due process rights.

Id.

56. *See id.* "[We] expressly recognize that pre-enforcement review would be a significant obstacle to the implementation of response actions and the use of administrative orders. Pre-enforcement review would lead to considerable-delay in providing cleanups, would increase response costs, and would discourage settlements and voluntary cleanups." *Id.* at 58.

57. *See* 42 U.S.C. § 9606(2)(C) (1994).

58. *See* 42 U.S.C. § 9606(2)(D) (1994).

59. *See* 42 U.S.C. § 9607(a)(4)(B) (1994).

60. *See supra* note 54. *See also* Lone Pine Steering Comm. v. EPA, 777 F.2d 882, 886-87 (3d Cir. 1985); and Wheaton Industries v. EPA, 781 F.2d 354, 356 (3d Cir. 1986).

significantly delayed cleanups,⁶¹ and these delays, Congress feared, could result in potential irreparable harm to the environment, threats to human health, and depletion of the Superfund.⁶² By adopting SARA in 1986, Congress elected to pursue a "clean up first, litigate later" approach,⁶³ and conveyed a clear disapproval for legal challenges to uncompleted environmental cleanups, especially challenges brought by PRPs.⁶⁴

Before the SARA Amendments, some courts, pointing to policy reasons and good faith efforts to maintain the overall purpose of CERCLA, attempted to read a pre-enforcement review exception into the statute.⁶⁵ After SARA, however, the federal circuit courts uniformly read CERCLA section 113(h) as to exclude any pre-enforcement review by the federal courts of EPA selected remedial action until the EPA completes such action or sues PRPs to recover cleanup costs, regardless of the potential consequences of holding such a rigid view.⁶⁶ Congress recognized the obvious conflict. On the one hand, the pre-enforcement ban served Congress' priority of cleaning up the worst hazardous waste sites by forbidding dilatory litigation before cleanup. On the other hand, Congress acknowledged the rigidity of the rule and the need for at least a little flexibility. In an effort to compromise, while drafting the time of review provisions, Congress added the citizen suit exception. Unfortunately, as we shall see, this offered no real excep-

61. See *supra* note 54.

62. See *id.*

63. 132 CONG. REC. 28,409 (1986) (statement of Sen. Stafford) (Congress sought to avoid "specious suits [that] would slow cleanup and enable private parties to avoid or at least delay paying their fair share of cleanup costs.").

64. See Lucia Ann Silecchia, *Judicial Review of CERCLA Cleanup Procedures: Striking A Balance To Prevent Irreparable Harm*, 20 HARV. ENVTL. L. REV. 339, 346-47 (1996).

65. See discussion *infra* Part II.A.

66. See discussion *infra* Part III.

tion at all.⁶⁷ The courts, therefore, have been left little room by the statute itself to employ common sense regarding irreparable harm to human health and the environment, which explains the uniformity (with notable exceptions)⁶⁸ of pre-enforcement review interpretation since SARA was enacted.

C. CERCLA's Timing of Review Provision

CERCLA's language is ambiguous as to when federal courts have jurisdiction to hear a pre-enforcement action. As found in section 113(b) of CERCLA, federal courts are given original subject matter jurisdiction in all actions arising under the statute.⁶⁹ However, this grant of jurisdiction to the federal court is tempered by CERCLA's timing of review provision, which Congress included in the SARA Amendments. Under CERCLA's timing of review provision, section 113(h), there is a general ban on pre-enforcement review.⁷⁰

67. See *infra* Part II.

68. See *infra* Part II.B.1.

69. CERCLA reads in part:

Except as provided in subsections (a) and (h) of this section, the United States district courts shall have exclusive jurisdiction over all controversies arising under this chapter, without regard to the citizenship of the parties or the amount in controversy.

42 U.S.C. § 9613(b) (1994).

70. The timing of review provision states:

No Federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except one of the following:

- (1) An action under section 9607 of this title to recover response costs or damages or for contribution.
- (2) An action to enforce an order issued under section 9606(a) of this title or to recover a penalty for violation of such order.
- (3) An action for reimbursement under section 9606(b)(2) of this title.

However, section 113(h) identifies five exceptions to the ban on pre-enforcement review.⁷¹ These five exceptions to the bar on pre-enforcement review fall into three narrow categories.⁷² The first category is for actions for contribution determining liability for section 107 response costs.⁷³ The second category includes actions brought by the United States under section 106 and private parties seeking reimbursements for costs incurred during an ordered cleanup under section 106.⁷⁴ The last category is for certain citizens' suits.⁷⁵ Generally, under section 113(h) of CERCLA, judicial review is banned until either an action is commenced under Sections 106 or 107, or until the cleanup is finished.⁷⁶

Despite the exception for allowing pre-enforcement review of any citizen suit under 113(h)(4), alleging that a removal or remedial action is 'in violation of any requirement of this chapter,' the courts have offered very little real guidance as to when such a challenge will be permitted.⁷⁷ The minimal force courts have generally

(4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where remedial action is to be undertaken at the site.

(5) An action under section 9606 of this title in which the United States has moved to compel a remedial action.

42 U.S.C. § 9613 (h) (1994).

71. *Id.*

72. See Michael P. Healy, *The Effectiveness and Fairness of Superfund's Judicial Review Preclusion Provision*, 15 VA. ENVTL. L.J. 271, 286 (1995-1996).

73. See *id.* (citing 42 U.S.C. § 9613 (h)(1) (1994)).

74. See *id.* (citing 42 U.S.C. § 9613 (h)(2)(3)&(5) (1994)).

75. See *id.* (citing 42 U.S.C. § 9613 (h)(4) (1994)).

76. See *id.*

77. Despite *United States v. Princeton Gamma-Tech, Inc.*, 31 F.3d 138 (3d Cir. 1994), which was overturned. See discussion *infra* Part II.B. The harsh effect of the lack of pre-enforcement review may be offset somewhat by the fact that

given to section 113(h)(4) has basically closed off any ability that PRPs or other parties have to challenge EPA Remedial Action Plans ("RAPs") that potentially cause irreparable harm to human health and the environment.⁷⁸

II. HOW PRE-ENFORCEMENT REVIEW WORKS UNDER CERCLA

A. SARA's Legislative History and Case Law

In essence, when the 99th Congress passed SARA, it adopted the federal common law regarding the pre-enforcement review ban, with several exceptions. Congress provided an exception to the general ban on pre-enforcement review in citizen's suits, under section 113(h)(4).⁷⁹ Section 113(h)(4) makes reference to section 9659 of CERCLA, which provides the framework within CERCLA for citizen suits.⁸⁰ Ironically, section 9659, forbids pre-enforcement review of citizen suits.

SARA provided the opportunity for citizens and states to bring pre-enforcement nuisance suits under state law, either in federal court through diversity jurisdiction or in the state courts. Section 113(h) stipulates: "No Federal court shall have jurisdiction under Federal law *other than* 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. . . ."⁸¹

On the eve of SARA's passage, Senators conflicted on the meaning of section 113(h). Senator Thurmond

citizens and PRPs may, under CERCLA, participate publicly in the selection of a remedy. See 42 U.S.C. § 9617 (1994).

78. See discussion *infra* Part II.B.

79. 42 U.S.C. § 9613(h)(4) (1994).

80. 42 U.S.C. § 9659 (1994).

81. 42 U.S.C. § 9613 (h) (1994) (emphasis added).

stated that federal district courts have exclusive jurisdiction over nuisance actions falling under the scope of this section of CERCLA, regardless of whether it arises under federal or state law.⁸² Senator Stafford, on the other hand, stated that Senator Thurmond's interpretation of this section is unsupported by the original law. Senator Stafford believed the new section, 113(h), had no bearing on the rights of people to bring nuisance actions under state law.⁸³ Thus, the circuit courts have

82. Senator Thurmond made the following remarks:

The reference in the introductory language of the timing of review section to the general jurisdictional provision 28 U.S.C. § 1332 is designed with the sole purpose of ensuring that actions in State court under State law can continue to be brought in Federal court if diversity jurisdiction exists. Actions within the scope of diversity jurisdiction may include, for example, a private nuisance suit against a person in another State who is not otherwise acting pursuant to an agreement with the Federal or State government. Thus, this reference to 28 U.S.C. § 1332 does not create any additional rights or opportunities to obtain review of a Superfund response action.

Similarly, the reference to 'Federal court' is simply to recognize existing section 113(b) of CERCLA, which provides that except for review of regulations, Federal district courts have exclusive jurisdiction over all controversies under CERCLA. Therefore, any controversy over a response action selected by the President, whether it arises under Federal law or State law, may be heard only in Federal court, and only under the circumstances provided in this section.

131 CONG. REC. S14895 (daily ed. Oct. 3, 1986) (statement of Sen. Thurmond).

83. Senator Stafford stated:

New section 113(h) is not intended to affect in any way the rights of persons to bring nuisance actions under State law with respect to releases or threatened releases of hazardous substances, pollutants, or contaminants. Whether or not a challenge to a cleanup will lie under nuisance law is determined by that body of law, not section 113, because section 113 of CERCLA governs only claims arising under the act. . . .

Nowhere in the original law, in the version of H.R. 2005 approved by the conferees or in the statement of managers is there support for the proposition that "any controversy over a response action selected by the President, whether it arises under Federal law or State law, may be heard only in Federal court and only under the circumstances provided" in section 113. Such a statement is contrary to the express legislative language and the statement of managers. . . .

been given conflicting information as to the literal meaning of this portion of section 113(h) in the legislative history. A majority of the circuits have disallowed pre-enforcement challenges to actions that fall within the scope of section 113(h) that are brought under bodies of law other than CERCLA.⁸⁴

Such a construction would also be inconsistent with the provisions of CERCLA and SARA relating to preemption of State laws and displacement of Federal laws. . . . The bill approved by the committee of conference continues and confirms (the) policy of nonpreemption.

131 CONG. REC. S15479 (daily ed. Oct. 7, 1986) (statement of Sen. Stafford).

84. See *United States v. Colorado*, 900 F.2d 1565 (10th Cir. 1993) (holding that CERCLA's legislative history and the 'savings' and 'relationship to other laws' provisions mean that section 113(h) does not prevent all suits intended to enforce obligations created by environmental laws other than CERCLA); *but see Schalk v. Reilly*, 900 F.2d 1091 (7th Cir. 1990) (holding that section 113(h) applied to plaintiff's National Environmental Policy Act claim alleging that the EPA should have prepared an environmental impact statement before entering into a consent decree, and that challenges to remedial plans brought under all laws, not just CERCLA, were precluded by section 113(h)); *Boarhead Corp. v. Erickson*, 923 F.2d 1011 (3d Cir. 1991) (holding that an injunction sought by plaintiff was precluded by section 113(h), even though plaintiffs claimed that a remedial action plan could damage Native American artifacts at the site under the National Historic Preservation Act of 1966). See also, *Clinton County Commissioners v. United States Environmental Protection Agency* 116 F.3d 1018 (3d Cir. 1997) ("[W]e find that the plain language and legislative history of § 9613 (h) (4) compel the conclusion that Congress intended to prohibit federal courts from exercising subject matter jurisdiction over all citizen suits challenging incomplete EPA remedial actions under CERCLA"); *Arrest The Incinerator Remediation, Inc. v. OHM Remediation Services Corp.*, 5 F. Supp.2d 291 (M.D. Pa. 1998) (addressing a citizen's suit brought under a state law nuisance claim, the court, relying on *Clinton County*, held that "where a claim under state law would create a direct conflict and present an obstacle to the comple-

Courts have turned to SARA's legislative history regarding citizen's suits when presented with the question of the availability of pre-enforcement review, in citizen suits falling within the scope of CERCLA. The majority of courts have been persuaded by the language of the Joint Conference Committee Report regarding SARA,⁸⁵ which states:

In the new section [9613(h)] of the [statute], the phrase "removal or remedial action taken" is not intended to preclude judicial review until the total response action is finished if the response action proceeds in distinct and separate stages. Rather an action under section [9659] would lie following completion of each distinct and separable phase of the cleanup. . . . Any challenge under this provision to a completed stage of a response action shall not interfere with those stages of the response action which have not been completed.⁸⁶

Additionally, courts have prohibited any review of an ongoing removal or remedial action because of the plain language of section 113(h)(4) of CERCLA. Section 113(h)(4) uses the words "taken" and "secured" which refer to actions that have already occurred.⁸⁷ Reading the exception in this fashion, a majority of courts have held that pre-enforcement review of any continuing removal or remedial action is prohibited by the statute, despite the fact that this language appears within the citizen's suit exception to pre-enforcement review.⁸⁸

tion of a remediation plan selected under CERCLA, the state claim is preempted").

85. See, e.g., *Neighborhood Toxic Cleanup Emergency v. Reilly*, 716 F. Supp. 828, 832 (D.N.J. 1989).

86. *Joint Explanatory Statement of the Comm. of Conference*, H. Conf. Rep. No. 99-962, at 224, reprinted in 1986 U.S.C.C.A.N. 3276, 3317.

87. CERCLA § 113(h)(4) is codified as 42 U.S.C. § 9613(h)(4).

88. See *infra* notes 89 and 93.

Since the statute refers to actions in the past tense, courts, in an effort to facilitate expeditious cleanups, have held that citizen suits challenging the EPA during the pre-enforcement stage of an EPA remedial action are banned, despite the exception provided for under SARA in section 113(h)(4).

Several examples of this "past tense" interpretation can be seen in cases that were decided after the enactment of SARA.⁸⁹ In *Arkansas Peace Center v. Arkansas Department of Pollution Control & Ecology*⁹⁰ the plaintiff challenged the EPA's failure to follow its own regulations in the burning of dioxin. The Eighth Circuit reversed a district court's injunction and restraining order against the EPA's removal plan, which involved the incineration of dioxin.⁹¹ The district court held that "the burning of dioxin containing wastes violated EPA regulations, and that a violation of regulations tips the scale heavily toward a determination that potential irreparable harm to plaintiffs outweighs the potential harm to the defendants."⁹² However, on appeal, the Eighth Circuit found that given the plain language in CERCLA section 113(h)(4), the EPA must be allowed to complete the removal action before the court had subject matter jurisdiction over the dispute.⁹³

Likewise, in *Schalk v. Reilly*,⁹⁴ the Seventh Circuit rejected a challenge by plaintiffs. In this case the plaintiff alleged that the EPA's RAP, entered into by consent de-

89. See *North Shore Gas Co. v. Environmental Protection Agency*, 930 F.2d 1239 (7th Cir. 1991); *Voluntary Purchasing Groups v. Reilly*, 889 F.2d 1380 (5th Cir. 1989); *Alabama v. United States EPA*, 871 F.2d 1548 (11th Cir. 1989); *Reynolds v. Lujan*, 785 F. Supp. 152 (D.N.M. 1992); and *City of Eureka v. United States*, 770 F. Supp. 500 (E.D. Mo. 1991).

90. 999 F.2d 1212 (8th Cir. 1993).

91. See *id.* at 1215.

92. *Id.*

93. See *id.* at 1216-18.

94. 900 F.2d 1091 (7th Cir. 1990).

cree, to incinerate polychlorinated biphenyls ("PCBs") at the site in question was illegal because it was in violation of the NCP. The court relied on the "obvious meaning" of section 113(h)(4), "that when a remedy has been selected, no challenge to the cleanup may occur prior to the completion of the remedy."⁹⁵ The court denied pre-enforcement review of a removal action where a remedial action "is to be undertaken," and closed off the plaintiff's challenge to the proposed removal action, regardless of the possible consequences.⁹⁶

Despite the case law, it seems that a total ban on pre-enforcement review of citizen suits was not the intent of lawmakers when they passed SARA. The legislative history shows that members of Congress wanted to provide the pre-enforcement review exception to citizens who brought action against the government, particularly in cases where the plaintiff asserted that the EPA's remedial action plan poses a danger of irreparable harm to human health or the environment.⁹⁷ Yet, it is far from clear based on the language of SARA, under what circumstances Congress intended citizen's suits to be heard before a final cleanup is completed.

B. *The Gamma-Tech/Clinton County Controversy*

One exception to the concept of strict adherence to the ban on pre-enforcement review of citizen suits existed in the federal courts at the post-SARA stage. In *Cabot*

95. *Id.* at 1095.

96. See *Schalk*, 900 F.2d at 1095. While the decision to reject the plaintiff's challenge to the removal action was within the scope of CERCLA § 9613(h)(4) as the court understood it, it is somewhat troubling that the court in this case failed to address the possible health and environmental ramifications of such a blanket rejection of challenges brought to protect human health and the environment at the removal stage.

97. See discussion *infra*, Part III.A.

*Corp. v. United States EPA*⁹⁸ the Court held that a challenge based on the lack of cost-effectiveness of the EPA's plan was precluded by section 113(h) because monetary damages could be adequately determined as part of a cost recovery action.⁹⁹ However, the Court, citing the inconsistent legislative record regarding section 113(h)(4), commented that if irreparable harm to human health and the environment were alleged, a court could justifiably evaluate the EPA's RAP at the pre-enforcement stage.¹⁰⁰ While not having a direct effect on the case at hand, the *Cabot* Court's reasoning did have a far-reaching effect on subsequent cases.

1. *United States v. Princeton Gamma-Tech, Inc.*

In 1994, the Third Circuit Court of Appeals allowed a pre-enforcement review challenge brought under the citizen's suit exception in CERCLA section 113(h)(4) in *United States v. Princeton Gamma-Tech, Inc.*¹⁰¹ In this case the government had found trichloroethylene ("TCE") contamination in the groundwater at two sites on property owned by Princeton Gamma-Tech.¹⁰² The sites were placed on the NPL, and in 1984, the EPA ar-

98. 677 F. Supp. 823 (E.D. Pa. 1988).

99. *See id.* at 830.

100. *See id.* at 829-30.

101. 31 F.3d 138 (3d Cir. 1994), *overruled by* Clinton County Comm'rs v. United States EPA, 116 F.3d 1018 (3d Cir. 1997). There have been several scholarly works treating the *Gamma-Tech* case and its ramifications. *See, e.g.*, Paul H. McConnell, Note: *CERCLA Wrestling - Grappling With Conflicting Legislative Intent and the Citizen's Suit Provision - United States v. Princeton Gamma-Tech*, 31 F.3d 138 (3d Cir. 1994), 14 TEMP. ENVTL. L. & TECH. J. 115 (1995); Lucia Ann Silecchia, *Judicial Review of Cleanup Procedures: Striking A Balance To Prevent Irreparable Harm*, 20 HARV. ENVTL. L. REV. 339 (1996); and Karen M. Hoffman, Note: *Clinton County Commissioners v. EPA: Closing Off A Route To Pre-Enforcement Review*, 66 FORDHAM L. REV. 1939 (1998).

102. *See Gamma-Tech*, 31 F.3d at 140.

ranged for an RI/FS at both locations.¹⁰³ By 1987, the EPA issued its first ROD, which called for the sealing of private wells and the installation of an alternative water supply at one site.¹⁰⁴ However, after further inspection and investigation of the contamination, the EPA issued a second ROD in 1988, which "proposed to extract the contaminated water from the primary contamination plume in the shallow aquifer, to treat it, and then re-inject it into the aquifer. In addition, the plan provided for the installation of 'open-hole' wells that penetrate through the shallow source to the deep aquifer to allow for monitoring and sampling."¹⁰⁵

In 1991, the EPA brought a cost recovery action against Gamma-Tech under CERCLA section 107 (a), seeking reimbursement of expenditures already incurred by the EPA in the monitoring of the sites and the partial installation of the proposed wells, as well as an action seeking a declaratory judgment on Gamma-Tech's liability for future response costs.¹⁰⁶ Gamma-Tech filed a cross-motion for a preliminary injunction seeking to compel the EPA to cease its remedial action plan, asserting that the EPA's plan to drill open-hole wells into the deep layer of the aquifer as spelled out in the 1988 ROD would worsen the existing environmental damage and cause irreparable harm to the environment.¹⁰⁷ The District Court denied Gamma-Tech's request for injunctive relief. The Court relied on "statutory and decisional law" which stated that claims challenging the EPA's final remedial action plan must be dismissed until after the completion of a discrete phase of a cleanup. Hence, the Court lacked subject matter jurisdiction to hear the dispute.¹⁰⁸

103. *See id.*

104. *See id.* at 140-41.

105. *Id.* at 141.

106. *See id.*

107. *See Gamma-Tech*, 31 F. 3d at 141.

108. *See id.*

The Third Circuit Court of Appeals held that an injunction could be issued under the citizens suit exception when there is a possibility of irreparable harm to health or the environment prior to the completion of the cleanup.¹⁰⁹ The *Gamma-Tech* Court's allowance of the pre-enforcement review contradicted the majority of federal circuit courts, which interpreted the "plain language" of section 113(h)(4).¹¹⁰ The result created a controversy as to whether courts should read an exception into the citizen's suit provision allowing for pre-enforcement judicial review for claims of irreparable harm to health and the environment against a final, yet uncompleted, EPA remedial action plan.

The *Gamma-Tech* Court found a convenient procedural route to grant federal jurisdiction under the statute. The Court reasoned that section 113(h) retains jurisdiction in the federal courts once a section 107 action is brought for reimbursement of response costs.¹¹¹ A section 107 action "opens the door for alleged responsible parties to contest their liability as well as to challenge the EPA's response action as being unnecessarily expensive or otherwise not in accordance with the applicable law."¹¹² Specifically, according to the language, legislative history and case law interpreting the statute, section 113(h)(1) allows challenges to EPA response actions once the agency brings an action for response costs.¹¹³ Because Congress allowed the EPA to bring section 107 actions for response costs prior to the completion of cleanup, "or as soon as costs have been incurred," under section 113(g)(2),¹¹⁴ the question became

109. See *id.* at 148.

110. See *Gamma-Tech*, 31 F.3d at 151-52.

111. See *id.* at 142.

112. *Id.*

113. See *id.* at 142-43.

114. See 42 U.S.C. § 9613(g)(2) (1994).

[A]ction or actions under section 9607 of this title for further response costs . . . may be maintained at any time during the response action, but must be commenced

"whether the exception under subsection 9613(h)(1) would lift the bar to challenges against response actions even where the EPA brings a cost recovery suit before cleanup is complete" ¹¹⁵

The *Gamma-Tech* Court found that there was nothing in the plain language of either sections 113(g)(2) or 113(h)(1) to indicate any difference between a challenge to a completed action or one still in progress. ¹¹⁶ The Court then proceeded to discuss the types of remedies that are available under the statute. The Third Circuit found that EPA response actions inconsistent with the NCP may be challenged in defending a cost recovery action under section 107 (a)(4)(A), ¹¹⁷ and that PRPs, relying on section 113 (g)(2), may also defend such actions on the ground that the response action was "arbitrary and capricious or otherwise not in accordance with the law." ¹¹⁸ A successful defense on these grounds allows for the remedies listed at section 113(j)(3), which are: "[T]he court shall award (A) only the response costs or damages that are not inconsistent with the [NCP], and (B) such other relief as is consistent with the [NCP]." ¹¹⁹ Therefore, the court reasoned, any relief consistent with the NCP is available to successful section 107 defendants who challenge the EPA's remedial action plan. ¹²⁰

The *Gamma-Tech* Court then analyzed the citizen's suit exception under section 113(h)(4) and the interplay between that section and the citizen's suit provision un-

no later than 3 years after the date of completion of all response action. Except as otherwise provided in this paragraph [having to do with declaratory judgments], an action may be commenced under section 9607 of this title for recovery of costs at any time after such costs have been incurred.

Id.

115. *Gamma-Tech*, 31 F.3d at 143.

116. *Id.*

117. *See id.* at 143-44.

118. *Gamma-Tech*, 31 F.3d at 144.

119. 42 U.S.C. § 9613(j)(3) (1994).

120. *See Gamma-Tech*, 31 F.3d at 144.

der section 159. The Court observed that while there were opinions from different circuits that held that cleanup should be completed prior to granting review under the citizen's suit exception, none of these courts had dealt specifically with bona fide allegations of irreparable harm to the environment as a result of violations of CERCLA.¹²¹ The Court also observed that "[i]n circumstances where irreparable environmental damage will result from a planned response action, forcing parties to wait until the project has been fully completed before hearing objections to the action would violate the purpose of CERCLA."¹²²

The Court's review of the congressional history revealed that members of Congress made conflicting statements regarding this very issue.¹²³ After studying the congressional history, the court ultimately looked to the reasoning of the Court in *Cabot* and the statement of Senator Stafford for practical advice.¹²⁴ Senator Stafford had commented that, "the courts must draw appropriate distinctions between dilatory or other unauthorized lawsuits by [PRPs] involving only monetary damages and legitimate citizen's suits complaining of irreparable injury that can be only addressed . . . if a claim is heard during or prior to a response action."¹²⁵ It was therefore concluded that "[t]he citizens' suit provision is effectively nullified if litigation must be delayed until after irreparable harm or damage has been done. In such circumstances, a statutory interpretation that calls for the full completion of the plan before review is permitted makes the citizens' suit provision an absurdity."¹²⁶

121. *See id.*

122. *Id.* at 144-45.

123. *See id.* at 145-46.

124. *See id.* at 146.

125. *Id.* at 146 (quoting 132 CONG. REC. 28,409 (1986)).

126. *Gamma-Tech*, 31 F.3d at 146.

The EPA had attempted to rely on *Boarhead Corp. v. Erickson*,¹²⁷ a Third Circuit case that denied pre-enforcement review of an uncompleted EPA remedial cleanup action despite allegations that the cleanup violated the National Historic Preservation Act.¹²⁸ The *Gamma-Tech* Court distinguished *Boarhead* in that it was brought by PRPs before the EPA had sought cleanup costs, and also because the PRPs in *Boarhead* did not allege a violation of CERCLA.¹²⁹ Because the EPA in *Gamma-Tech* was seeking reimbursement for costs expended in implementing part of the cleanup, the Court found that the timeliness requirement of section 113(h) was satisfied. In addition, the Court held that *Gamma-Tech* was free to challenge not only the completed phases of the cleanup, but also the part of the cleanup plan which remained unfinished, for which costs were incurred and the EPA sought indemnification.¹³⁰

Further, the *Gamma-Tech* Court found that there was no language that explicitly excluded injunctive relief as a remedy in section 113(j)(3).¹³¹ Because permitting the EPA to continue with a cleanup plan that could irreparably harm the environment would be inconsistent with the NCP and contrary to the objectives of CERCLA, the Court reasoned, "when irreparable harm to public health or the environment is threatened, an injunction may be issued under the citizens' suit exception of subsection 9613(h)(4) even though the cleanup may not yet be completed."¹³²

This holding was a departure from the existing case law that enforced a strict pre-enforcement litigation ban, making it the subject of much controversy and scholarly

127. 923 F.2d 1011 (3d Cir. 1991).

128. See *Gamma-Tech*, 31 F.3d at 147.

129. See *id.*

130. See *id.*

131. *Id.* at 147.

132. *Id.*

debate over the drawbacks and benefits of such an approach.¹³³ While the holding in *Gamma-Tech* stimulated ideas and suggestions about changing the existing state of the citizen's suit exception, the decision's stare decisis influence was short-lived. The Third Circuit addressed the application of the citizen's suit exception again, three years later in *Clinton County Commissioners v. Environmental Protection Agency*.¹³⁴

2. *Clinton County Commissioners v. EPA*

In 1997, the Third Circuit, sitting *en banc*, overturned the holding in *Gamma-Tech* and resolved the split in the circuit courts regarding the applicability of the citizen's suit exception to pre-enforcement review.¹³⁵ This decision ultimately resorted to the same arguments that had been previously used to prohibit any real use of the citizen's suit exception. Once again, it became clear that Congress should either rewrite the statute and permit citizen suits to go forward at the pre-enforcement stage in cases of irreparable harm to health and the environment, or write the exception out of the statute for the sake of judicial economy and statutory coherence.¹³⁶

The Third Circuit Court of Appeals in *Clinton County* conducted an independent review of the text of CERCLA section 113 (h) (4) and its legislative history and case law.¹³⁷ The Court concluded that "Congress intended to preclude all citizens' suits against EPA remedial actions under CERCLA until such actions are complete, *regardless of the harm that the actions might allegedly cause*."¹³⁸ The Court began by looking to the "plain language" of the statute, noting that it is in the past tense.

133. See, e.g., *infra* note 152.

134. 116 F.3d 1018 (3d Cir. 1997).

135. See *id.*

136. See *id.*

137. *Id.* at 1022-25.

138. *Id.* at 1022 (emphasis added).

They reasoned that since the subsection specifically deals with timing of review, usage of the past tense is a "clear indication of [Congress'] intention that citizen-initiated review of EPA removal or remedial actions take place only after such actions are complete."¹³⁹ The Court went on to say that because the opening sentence of section 113 (h) prohibits challenges to remedial actions "selected" under section 104 ("selected" being defined as chosen but not fully implemented), and since subsection 113(h)(4) allows for review of actions "taken" under section 104 ("taken" being defined as actions chosen and completed), "the exception is presumably more narrow than the prohibition," and therefore challenges under section 113(h)(4) are limited to actions "taken" as defined by the Court.¹⁴⁰ The Court also pointed to the language in the last sentence of subsection 113(h)(4), which states, "an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site."¹⁴¹ They concluded that "[t]his language demonstrates beyond peradventure . . . that Congress intended to preclude any judicial involvement in EPA removal and remedial actions until after such actions are complete."¹⁴²

The court then examined SARA's legislative history, quoting several congressional conference committee reports on SARA, which generally supported the ban on citizen suits at the pre-enforcement stage.¹⁴³ However, the Court also noted that the Judiciary Committee had proposed an amendment to the statute that would have permitted citizens to "seek review of remedial actions (not removal actions) during construction and implementation of such actions when a specific remedial measure that has been constructed is alleged in viola-

139. *Id.* at 1022-23.

140. *See Clinton County*, 116 F.3d at 1022-23.

141. 42 U.S.C. § 9613 (h) (4) (1994).

142. *Clinton County*, 116 F.3d at 1023.

143. *See id.* at 1023-24.

tion of the Act."¹⁴⁴ The Court believed that "[t]he fact that Congress did not enact the Judiciary Committee's proposed amendment demonstrates its commitment to preventing all judicial interference with remedial actions."¹⁴⁵ However, the fact that this amendment wasn't passed can be interpreted in another way. The amendment's failure could simply mean that Congress could not come up with a satisfactory way to implement such a requirement and still protect cleanups from the dilatory tactics of PRPs.

This analysis is in keeping with another of the Court's footnoted observations. The Third Circuit opined forcefully that "Congress clearly intended that (allegations of irreparable harm) be communicated directly to EPA during the pre-remediation public notice and comment period, not expressed in court on the eve of the commencement of a selected remedy."¹⁴⁶ However, the Court at the same time acknowledged in a footnote to this statement that there existed "some support in the legislative history . . . (for the position that) judicial review of incomplete EPA remedial actions is permitted whenever a challenge includes bona fide allegations of irreparable harm to public health and the environment."¹⁴⁷ After quoting Senator Stafford's remarks to this effect and citing to the similar concerns of Senator Mitchell and Representatives Roe and Florio,¹⁴⁸ the Third Circuit dismissed these views, stating with certainty that "Congress weighed public policy and chose the elaborate pre-remediation public review and comment procedures over judicial review."¹⁴⁹

144. *Id.* at 1024 n.1. See also, H.R. REP. NO. 99-253(III), at 23, reprinted in 1986 U.S.C.C.A.N. at 3046.

145. *Clinton County*, 116 F.3d 1018, 1024 n.1 (3d Cir. 1997).

146. *Id.* at 1024.

147. *Id.* at 1024 n.2.

148. See *id.*

149. *Id.*

This, despite the fact that CERCLA still does contain a citizen's suit exception to pre-enforcement review. If Congress indeed weighed public policy and decided that the pre-selection notice and comment period was the proper venue to address issues pertaining to inadequate or harmful cleanup procedures, the question remains as to what purpose does the citizen's suit exception to pre-enforcement review in CERCLA serve, if the plain language of the statute makes such pre-enforcement challenges impossible.

The ruling in *Clinton County* represents a decision by the courts not to engage in judicial legislation by reading into the statute an exception that ought to exist, and indeed by implication of the existence of such an exception in the language of the statute arguably does exist, but at the same time is not provided for by the plain language of the statute. It is ultimately up to Congress to pass a workable, enforceable citizen's suit exception in CERCLA. The next section seeks to identify the reason for the current statutory anomaly, and makes several suggestions about how Congress may remedy it.¹⁵⁰

III. REVISING THE CITIZEN'S SUIT PROVISION OF CERCLA TO MAKE IT WORK

Since the enactment of the SARA amendments to the present day, Congress and the courts have sought to

150. The *Clinton County* court also looked to other federal circuit decisions to support its interpretation that §§ 9613(h)(4) and 9659(a)(2) do not permit district courts to exercise subject matter jurisdiction over citizen suits challenging uncompleted EPA cleanups even where irreparable harm to health and the environment is alleged. See *Schalk v. Reilly*, 900 F.2d 1091, 1095-96 (7th Cir. 1990); *Arkansas Peace Ctr. v. Arkansas Dep't of Pollution Control & Ecology*, 999 F.2d 1212 (8th Cir. 1993); *Hanford Downwinders Coalition, Inc. v. Dowdle*, 71 F.3d 1469, 1484 (9th Cir. 1995); and *Alabama v. United States EPA*, 871 F.2d 1548, 1557 (11th Cir. 1989).

provide a means whereby citizens could challenge an EPA selected RAP if the plan could cause irreparable harm to human health and the environment. While this is a legitimate and important concern, the problem is that unscrupulous PRPs would be likely to use any loophole in the statute themselves, as well as private citizens as strawmen to act on their behalf to delay cleanups because of the huge amounts of money involved in effecting them.¹⁵¹ There needs to be a satisfactory way to implement citizen challenges to EPA selected cleanups which may legitimately cause irreparable harm without creating a loophole in the statute large enough for PRPs to drive a hazardous waste truck through. The basic mechanics for the remedial statute follow.

A. *PRPs Should be Able to Bring Pre-Enforcement Challenges*

Professor Lucia Ann Silecchia has written on the subject of CERCLA's timing of review provision, and has made several important observations and suggestions about how to amend CERCLA.¹⁵² Her article, written before the decision by the Third Circuit in *Clinton*

151. Fears such as these were somewhat sarcastically illustrated after the *Gamma-Tech* decision by this observation: "Attention all PRP's! Now all you have to do in the Third Circuit to get pre-enforcement review is allege 'irreparable harm' to the environment. If you establish irreparable harm to the environment you may be entitled to injunctive relief. Even if you don't, you can tie the EPA up in prolonged litigation. Heck, its worth a shot; and it's all in the name of saving the environment!" Paul H. McConnell, Note, *CERCLA Wrestling - Grappling With Conflicting Legislative Intent and the Citizen's Suit Provision - United States v. Princeton Gamma-Tech*, 31 *F.3d* 138 (3d Cir. 1994), 14 *TEMP. ENVTL. L. & TECH. J.* 115, 115 (1995).

152. See Lucia Ann Silecchia, *Judicial Review of CERCLA Cleanup Procedures: Striking a Balance to Prevent Irreparable Harm*, 20 *HARV. ENVTL. L. REV.* 339 (1996).

County, basically builds on the Third Circuit decision in *Gamma-Tech*.¹⁵³ While she opposes dropping the bar to pre-enforcement review completely, Professor Silecchia suggests that Congress should create an exception to the bar that would allow plaintiffs to challenge a cleanup if it poses a threat of irreparable harm to health and the environment.¹⁵⁴ This Note builds upon Professor Silecchia's suggestion, and modifies it to provide a more effective way to deter dilatory litigation by imposing heavy fines and penalties upon those who would abuse the process, while at the same time keeping judicial review open to those citizens who legitimately allege irreparable harm. This Note also provides some procedural suggestions on how to make such challenges fairer and more effective.

Professor Silecchia's proposal includes a three-part solution to the problem of irreparable harm. First, any question of liability for the cleanup of a site in a citizen's suit challenge should be treated as a separate inquiry, to be dealt with after the completion of the cleanup. Professor Silecchia is correct that the liability issue and the question of irreparable harm in remedy selection must be separated out in order for a citizen's suit exception to work.¹⁵⁵ Of course, under the statutory scheme proposed by this article, any attempt to disguise

153. See *id.* at 345 (suggesting how Congress might amend CERCLA by adopting certain parts of the *Gamma-Tech* decisions).

154. See *id.* at 344.

155. See *id.* at 383-85. Professor Silecchia states:

To the extent that [PRPs] are wrongfully held responsible, they should be entitled to appeal the decision and be reimbursed for the costs they have already incurred. There can always be the option of financial reimbursement to make a defendant whole after a wrongful determination of liability. Hence, PRPs contesting their underlying liability should do that explicitly and openly in a judicial hearing on liability - and not disguise it as a pre-enforcement review challenge to the merits of the remedy selected.

Id. at 384.

a liability challenge as a pre-enforcement review challenge to the merits of the remedy would be dealt with severely, and would therefore be unlikely. However, the separation of liability challenges and challenges alleging irreparable harm is central to the solution proposed herein.

Secondly, both PRPs and third party plaintiffs should be allowed to bring pre-enforcement challenges based on allegations of irreparable harm.¹⁵⁶ Although it would be desirable to exclude PRPs from making these types of challenges because of their inherent conflict of interest of benefiting financially from any procedural delay, it is possible that a PRP would be the only party financially able or interested to bring a challenge based upon a legitimate health concern.¹⁵⁷ It is also difficult to make a distinction between PRPs and third parties, since a third party can bring a pre-enforcement action under the control of a PRP. Thus, it would make little sense to make such a distinction if the statute is to permit pre-enforcement irreparable harm challenges.

Finally, the article proposes that litigation costs and attorney's fees should be paid by the losing party of a pre-enforcement review challenge. This last part is not sufficient to deter dilatory lawsuits. Since the time value of money is sure to be factored into any PRP's strategy in determining whether to attempt a dilatory challenge, and in some circumstances, the prospect of protracted litigation and the resultant savings in capital outlays for cleanup compliance would more than offset court costs and attorney's fees, it might make financial sense to bring a pre-enforcement challenge. CERCLA should be amended to eliminate the incentive for PRPs with malevolent intent to bring dilatory lawsuits in order to defray the high costs of Superfund cleanups.

One of the most effective mechanisms the EPA has in its arsenal to ensure PRP compliance with cleanups is

156. *See id.* at 387.

157. *See id.*

the fines and treble damages system for non-compliance with EPA cleanup orders under CERCLA section 106(a).¹⁵⁸ If this mechanism was applied to frivolous challenges to cleanups brought under the citizen's suit exception under CERCLA subsection 113(h)(4), there would be a workable pre-enforcement review method for bona fide challenges alleging irreparable harm to health and the environment. Congress could rewrite subsection 113(h)(4) to allow pre-enforcement challenges alleging irreparable harm to go forward in federal court, and if the challenge is found to be frivolous, the court will determine that the challenge had initiated a cleanup order under section 106(a) on the date the challenge was filed, triggering fines and treble damages for non-compliance with this retroactive order. Under such a system, the citizen suit exception to pre-enforcement review would become relevant, and future instances of irreparable harm under EPA selected plans could be avoided without providing an attractive tool for PRPs to use to delay cleanups through tactical litigation.

Any challenge brought under the new statutory scheme, for reasons of dispatch, should provide for a hearing to determine the merits of the claim within ninety days of the filing of the action. The EPA's selected plan would be given all the deference accorded to administrative agency defendants under the arbitrary and capricious standard of judicial review.¹⁵⁹ The court should then apply a two-prong analysis in determining

158. 42 U.S.C. § 9606(a) (1994).

159. See 5 U.S.C. § 706(2)(A) (1996). "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" *Id.*

whether the challenge should be granted. First, the challenging party should bear the burden of showing that the EPA's selected RAP would cause irreparable harm; it is not enough to merely allege that an EPA selected remedy will cause irreparable harm. The second prong of the court's analysis is that the challenger should be required to present to the court a viable alternative plan that would reduce the amount of irreparable harm to the environment. The second prong is essential because even though the EPA's selected remedy may cause irreparable harm, postponement of the cleanup might cause even more.¹⁶⁰ Any alternative plan would already have been significantly developed by the time the notice and comment period had elapsed, since any concerned parties would have had the opportunity to present any such alternatives at this stage of the proceedings.¹⁶¹ If the challenging party claims in good faith to have a viable alternative plan, meeting NCP standards, which will clean up the site and at the same time spare the alleged irreparable damage risked by the EPA's plan, the complaint should be heard and adjudicated by the federal district court. If such a plan has not been developed and presented by the challenging party, the challenge should not be allowed to go forward, and fines and damages should be imposed.

Under this proposal, if the EPA is challenged in federal court as to the health and environmental ramifications of its final cleanup plan, it will receive deference to its decision unless it can be shown that the plan violates

160. See Hoffman, *supra* note 46, at 1978.

161. See 42 U.S.C. § 9613(k) (1994) (providing for public participation in assembling the administrative record on which the selection of the remedy and any judicial review will be based); 42 U.S.C. § 9617 (1994) (permitting public participation in proposed and final remedial action plans and providing for publication of the same); 42 U.S.C. § 9622(d)(2) (1994) (detailing public participation in proposed settlement agreements).

the NCP in a way that will cause irreparable harm. Once again, it is not enough to show that the EPA's plan would cause irreparable harm; the challenging party must come up with a substantially safer plan that falls within the guidelines of the NCP. The second part of the court's analysis would therefore necessarily involve a comparative evaluation of both the EPA's plan and the challenging party's plan. Each plan would foreseeably be defended by scientific experts on either side of the argument. In defending their respective positions on the merits of the competing plans, these experts should be subject to cross-examination. Such a system would create a further incentive for the EPA to be more open to compromise with PRPs, and to perform more efficiently and within the requirements of the NCP. Because cross-examination will serve to act as a check on Agency behavior, the EPA will be forced to improve the quality of its participation and engage in more reasoned decision-making in the remedy selection process. Additionally, this should help judges in evaluating the administrative record for determinations of EPA action as to whether such action is arbitrary, capricious, or otherwise not in accordance with the law.¹⁶²

While it is true that determinations of whether one cleanup plan should be preferred over another is a decision involving highly technical evaluations, this fact should not in itself preclude the participation of the judiciary in rendering a decision as to which plan is likely to produce significantly less harm. Judge David L. Bazelon of the United States Court of Appeals for the District of Columbia, in a concurring opinion involving

162. For a similar discussion about the effects of cross-examination on the remedy selection process at the post-cleanup liability determination stage, see Kristin M. Carter, Note, *Superfund Amendments And Reauthorization Act of 1986: Limiting Judicial Review To The Administrative Record in Cost Recovery Actions By The EPA*, 74 CORNELL L. REV. 1152, 1175-78, (1989).

an early version of the Clean Air Act,¹⁶³ had this to say about the necessity of cross-examination in complex technical issues:

[E]nvironmental litigation represents a "new era" in administrative law. . . . [T]he courts will go further in requiring the agency to establish a decision-making process adequate to protect the interests of all 'consumers' of the natural environment Whether or not traditional administrative rules require it, the critical character of [these] decision[s] requires at the least a carefully limited right of cross examination at the hearing and an opportunity to challenge the assumptions and methodology underlying the decision These complex questions should be resolved in the crucible of debate through the clash of informed but opposing scientific and technological viewpoints .

. . . .¹⁶⁴

As technology grows, so does the level of complexity in many areas of the law from DNA analysis to intellectual property rights. Judges will therefore be called upon to render more and more decisions involving complex technical matters. It is difficult to imagine an instance where the intervention of the judiciary is more appropriate than one in which a federal agency charged with protecting the environment may, through its action, needlessly cause irreparable harm to the environment. Under the proposed statutory scheme, unnecessary complex judicial determinations should be rare, because the harsh penalties involved for those who would seek to

163. See *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973) (Bazelon, J., concurring).

164. *Id.* at 651-52. Although Judge Bazelon reached a different conclusion as to the judiciary's capacity to render technical decisions in this area (Judge Bazelon thought that cross-examination should be used in the agency's pre-decision stage in order to produce a more complete record, thereby holding the agency's decision up to scrutiny by the public, Congress, and the scientific community), his reasoning is sound. See *id.*

bring frivolous suits in order to delay cleanups should deter such behavior.

The questions of liability and the possibility of irreparable harm are clearly distinguished within the proposed solution. A party challenging a cleanup based on the issue of liability would not have access to the courts at the pre-enforcement stage. If such a challenge was attempted under the guise of alleging irreparable harm, the court would impose heavy penalties. Given the harsh penalties, it is unlikely that a party would attempt to challenge liability by alleging irreparable harm.

The EPA's selected plan would be given all the deference accorded to administrative agency defendants under the "arbitrary and capricious" standard of judicial review.¹⁶⁵ Under the arbitrary and capricious standard of review, a challenge brought by a citizen against an EPA selected remedy must show that the EPA's decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.¹⁶⁶ If a challenger is able to present an alternative plan that shows that the EPA's plan unnecessarily jeopardized public health and the environment, it is safe to say that the EPA's decision on the final plan would have been at the very least arbitrary, if not an abuse of discretion, and certainly not in accordance with the NCP.

165. See 5 U.S.C. § 706(2)(A) (1996).

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law
. . . .

Id.

166. See *id.*

B. *The Benefits of This Plan*

A citizens' suit provision that actually allows citizens to challenge potentially harmful cleanups would be beneficial. One benefit would be increased cooperation between PRPs, concerned citizens and the EPA in the notice and comment phase of the remedial action plan, in order to avoid unnecessary use of the citizens' suit provision.¹⁶⁷ PRPs and concerned citizens would be more cooperative because they would face harsh penalties if the court denies their challenge. Additionally the EPA would be more responsive since they will be judicially accountable prior to the end of the cleanup. Another benefit is that citizens would have the right to seek redress from the federal courts in these situations. This solution would make the pre-selection phase of the process more efficient, without jeopardizing the EPA's authority to select, at its discretion, reasonable cleanup plans. It would be in the interest of all parties involved to avoid a citizen's suit.

CONCLUSION

It is apparent from the legislative history of CERCLA, the case commentary interpreting CERCLA and an overruled Third Circuit decision,¹⁶⁸ that Congress and the courts have sought for a way to provide a citizen's suit exception to pre-enforcement review of EPA selected remedial action. Congress and the courts want citizens to make good faith challenges to EPA cleanup plans that will cause irreparable harm to health and the environment. This has proved difficult to do under the current statutory scheme. One solution is to require all challengers to prove that the EPA's plan will cause irreparable damage and to present a viable alternative plan con-

167. See Silecchia, *supra* note 64, at 382-83.

168. See *United States v. Princeton Gamma-Tech, Inc.*, 31 F.3d 138 (3d Cir. 1994).

sistent with EPA standards and the NCP. If the challenger fails to do so, the court should impose fines and treble damages applying retroactively to the time of the challenge. This would be an effective method of balancing the need for citizen challenges to possible irreversible environmental damage caused by the EPA's final plan, with the risks (and costs) of delaying cleanups. It is up to Congress, and not the courts, to provide citizens with the ability to challenge EPA selected remedial actions. As long as the plain language of CERCLA makes the citizen's suit exception ineffective, the courts will not be able to provide an effective solution.

