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## Clinton County Commissioners v. EPA: Closing Off a Route to Pre-Enforcement Review

### Cover Page Footnote

I would like to thank Professor Nicholas Johnson for his invaluable guidance on this Note.

# **CLINTON COUNTY COMMISSIONERS v. EPA: CLOSING OFF A ROUTE TO PRE-ENFORCEMENT REVIEW**

*Karen M. Hoffman\**

## **INTRODUCTION**

Imagine you live near an abandoned chemical plant. The plant had manufactured solvents and, apparently, a large volume of those solvents were either spilled onto or leaked into the ground while the plant was in operation. The U.S. Environmental Protection Agency (EPA) recently added the plant site to the National Priorities List (NPL),<sup>1</sup> a listing of high-priority hazardous waste cleanup sites, thus recognizing it as an environmental hazard. In accordance with the requirements of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),<sup>2</sup> the EPA studied the site and proposed a cleanup method: burning the contaminated soil. The EPA published the proposed plan and received negative comments on it, namely allegations that the remedial method would release toxins into the air and harm the health of people like yourself living near the site. These comments recommended that the EPA implement an alternative remedial action that would clean up the site just as effectively, but without the negative effects on the public health.

Imagine that the EPA ignores these negative comments and orders past owners of the chemical plant to implement the proposed remedial method. You become suspicious of the EPA's motives in ordering this cleanup method, and do some investigating. You uncover a financial relationship between the EPA official supervising the cleanup at the site and the company owning the hazardous waste incinerator that will most likely be used in the planned cleanup process.

Now imagine that when you try to get an injunction in federal court to stop the implementation of the remedial activity, you are told the court does not have jurisdiction to hear your case until the cleanup, or at least a distinct portion of it, is completed. By then, you and your neighbors will already be exposed to the toxic fumes from the cleanup, and it will be too late for a court to grant any meaningful relief.

Hopefully, this nightmarish scenario will remain just that—a nightmare. Yet, under current law, this is exactly how courts would respond to such a problem if they continue to interpret the CERCLA citizen suit provision as they do now. Furthermore, there is nothing in

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\* I would like to thank Professor Nicholas Johnson for his invaluable guidance on this Note.

1. See *infra* note 176 for an explanation of the NPL.

2. 42 U.S.C. §§ 9601-9675 (1994).

the law to prevent the EPA or its officials from acting under similar conflicts of interests.

In *Clinton County Commissioners v. EPA*,<sup>3</sup> the Third Circuit reviewed a case in which the district court allowed subject matter jurisdiction over citizen groups' claims challenging a planned EPA-selected remedial activity<sup>4</sup> at the Drake Chemical Company site in Loch Haven, Pennsylvania.<sup>5</sup> The Third Circuit held that the district court lacked subject matter jurisdiction to hear the claim, and dismissed the suit.<sup>6</sup> In doing so, the court overruled its earlier decision in *United States v. Princeton Gamma-Tech, Inc.*,<sup>7</sup> which allowed judicial review of incomplete EPA remedial actions whenever a challenge includes bona fide allegations of irreparable harm to public health or the environment.<sup>8</sup>

The Third Circuit's decision in *Clinton County* is in line with every other circuit court of appeals that has addressed this issue.<sup>9</sup> The decision is supported by one goal of CERCLA, to clean up contaminated sites as quickly as possible.<sup>10</sup> The broader goal of CERCLA, however, is to protect the public from the dangers of environmental contamination.<sup>11</sup> The EPA and courts are not fulfilling this broader goal

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3. 116 F.3d 1018 (3d Cir. 1997), *cert. denied sub nom. Arrest the Incinerator Remediation, Inc. v. EPA*, 118 S. Ct. 687 (1998).

4. See *infra* notes 117 & 120 and accompanying text for definitions of "remedy" and "remedial action."

5. *Clinton County Comm'rs*, 116 F.3d at 1022.

6. *Id.* at 1022-23.

7. 31 F.3d 138 (3d Cir. 1994), *overruled by Clinton County Comm'rs*, 116 F.3d at 1018.

8. *Id.* at 149. While both *Princeton Gamma-Tech* and *Clinton County* talk about irreparable harm to public health and the environment, this Note will focus mainly on the health hazards posed by inadequate cleanups. Hazardous site cleanups face another series of problems concerning what standards are sufficient to define a site as "clean" following remediation (how clean is clean). Michael P. Healy, *Judicial Review and CERCLA Response Actions: Interpretive Strategies in the Face of Plain Meaning*, 17 Harv. Envtl. L. Rev. 1, 44 (1993). States, rather than the EPA, play the main role in determining cleanliness standards. *Id.* Healy concludes that courts have no jurisdiction over citizens suits which claim that the applicable cleanup standards are inadequate. *Id.* at 47. This Note does not discuss that type of claim.

9. See, e.g., *Hanford Downwinders Coalition, Inc. v. Dowdle*, 71 F.3d 1469, 1484 (9th Cir. 1995) (holding that CERCLA's timing of review provision did not deprive citizen groups of due process); *Arkansas Peace Ctr. v. Arkansas Dep't of Pollution Control & Ecology*, 999 F.2d 1212, 1216-17 (8th Cir. 1993) (stating that CERCLA only permitted challenges to removal and remedial actions that had already occurred before suit was filed); *Schalk v. Reilly*, 900 F.2d 1091, 1097 (7th Cir. 1990) (indicating that a federal court does not have subject matter jurisdiction to consider challenges to remedial actions that have not been taken); *Alabama v. EPA*, 871 F.2d 1548, 1557 (11th Cir. 1989) (ruling that no action may be brought to compel compliance with provisions of CERCLA until the remedial action is actually taken).

10. Jackson B. Battle & Maxine I. Lipeles, *Hazardous Waste* 180 (2d ed. 1993).

11. See *infra* note 191 and accompanying text.

by requiring potentially responsible parties (PRPs)<sup>12</sup> to perform remedial methods with environmentally damaging side effects. Congress has recognized the danger of a strict ban on pre-enforcement review,<sup>13</sup> and several congressional proposals to reform CERCLA contain provisions eliminating the ban on pre-enforcement review.<sup>14</sup>

The Third Circuit's opinion in *Clinton County* strongly relies on the EPA's ability to select the proper remedial methods.<sup>15</sup> The court failed to consider that the EPA may not have fully examined alternative methods or the negative impacts of the method it ultimately requires. Additionally, in an extreme case, the EPA's remedial plan selection may have resulted from a conflict of interest, which could cause harm to the public.<sup>16</sup> The rationale underlying the *Clinton County* decision sheds new insight on why the courts are misinterpreting CERCLA. The courts are too strongly relying on the EPA, and reluctant to sway from a strict interpretation of CERCLA.<sup>17</sup> As noted above, though, the EPA may not always be so trustworthy. Thus, in extreme cases, where a bona fide claim of irreparable harm stemming from a conflict of interest is alleged, the courts should return to a rationale similar to the one expressed in *Princeton Gamma-Tech*, and allow review in those situations.

This Note will examine the state of pre-enforcement review after *Clinton County* and suggest a judicial exception for extraordinary situations. Part I provides a brief overview of the EPA. Part II presents a look at the history of CERCLA. Part III introduces CERCLA's timing of review provision, section 113(h). It then analyzes various judicial interpretations of section 113(h), noting the trends in cases where irreparable harm is alleged. Finally, part IV proposes a solution for allowing limited judicial review of extraordinary situations. It critiques proposed solutions that focus exclusively on irreparable harm, and suggests some necessary modifications to that type of solution. This Note concludes that the courts should modify their interpretation of CERCLA's timing of review section, to allow pre-enforcement re-

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12. The PRPs include all past and present owners, and others that may have been involved in moving hazardous materials to or from the site. See *infra* note 137 and accompanying text.

13. Lucia Ann Silecchia, *Judicial Review of CERCLA Cleanup Procedures: Striking a Balance to Prevent Irreparable Harm*, 20 Harv. Envtl. L. Rev. 339, 392-94 (1996) (noting that both the House and Senate proposed bills which would remove a strict ban on pre-enforcement review).

14. See Reform of Superfund Act of 1995, H.R. 2500, 104th Cong.; Accelerated Cleanup & Envtl. Restoration Act of 1995, S. 1285, 104th Cong. (amended 1996); see also Silecchia's proposal discussed in part IV, *infra*.

15. *Clinton County Comm'rs v. EPA*, 116 F.3d 1018, 1028-29 (3d Cir. 1997), cert. denied *sub nom.* Arrest the Incinerator Remediation, Inc. v. EPA, 118 S. Ct. 687 (1998); see *infra* Part III.C.

16. See *infra* Part I.B.

17. See *infra* Part III.B.

view when faced with a narrow, clearly defined group of circumstances.

## I. OVERVIEW OF THE EPA

This section looks at the creation of the EPA, noting its unique status within the federal government. The section also discusses the potential for economic and political influence in light of past conflicts of interest within the EPA.

### A. *Creation of the EPA*

The EPA was created in 1970, in response to increasing environmental problems and political pressure to respond to those problems.<sup>18</sup> The Agency was expected to "rationaliz[e] the organization of environmental efforts, and giv[e] focus and coordination to them."<sup>19</sup> This approach was especially important for problems such as toxic waste<sup>20</sup> management and acid rain,<sup>21</sup> "which cut across the various environmental media (i.e., air, soil, and water)".<sup>22</sup>

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18. Marc K. Landy et al., *The Environmental Protection Agency: Asking the Wrong Questions* 31-33 (expanded ed. 1994). In 1970, Sen. Edmund Muskie, a staunch environmentalist, was a leading contender for the 1972 Democratic nomination for president. *Id.* at 28. Muskie had established himself as the "nation's pre-eminent designer of environmental policy." *Id.* at 27. President Nixon, running for reelection, wanted the support of environmentally oriented voters. *Id.* at 30. His support of creating an environmental agency was based on a compromise between the conflicting goals of appeasing environmentalists and keeping the environmental regulators in check. *Id.*

The media also played an important role in the creation of the EPA. *Id.* at 23-24. Environmental stories, for example, of oil covered birds and rusting storage drums, had visual interest, strong story lines, and viewer identification. *Id.* at 24. This helped heighten the public's interest in the environment, and to bring it to the political forefront. *Id.*

19. Richard A. Harris & Sidney M. Milkis, *The Politics of Regulatory Change: A Tale of Two Agencies* 228 (1989) (quoting Douglas Costle) (citation omitted). Many already-existing agencies were consolidated into the newly-created EPA: The Federal Water Quality Administration and the Office of Research on Effects of Pesticides on Wildlife and Fish from the Department of the Interior; the Bureau of Water Hygiene, the Bureau of Solid Waste Management, the National Air Pollution Control Administration, the Bureau of Radiological Health, and the Office of Pesticides Research from the Department of Health, Education and Welfare (HEW); the Pesticides Regulation Division from the Department of Agriculture; the Division of Radiation Standards from the Atomic Energy Commission; and the Interagency Federal Radiation Council. Landy et al., *supra* note 18, at 33.

20. A toxic waste is a poisonous substance which is capable of killing, injuring, or otherwise impairing a living organism. The intrinsic properties used to define toxic materials are materials that cause cancer, DNA mutations, or birth defects. Charles A. Wentz, *Hazardous Waste Management* 36, 93 (1989).

21. Acid rain is caused by the emission of sulfur dioxide and nitrous oxides from the combustion of fossil fuels. Robert H. Boyle & R. Alexander Boyle, *Acid Rain* 11 (1983). It kills fish and aquatic life, and endangers drinking water. *Id.* at 14-15.

22. Harris & Milkis, *supra* note 19, at 229.

The EPA was created as a quasi-independent agency, isolating it from presidential control.<sup>23</sup> This configuration allowed the Agency to be dominated by technical and scientific experts rather than politicians and lawyers.<sup>24</sup> The EPA's early focus was on enforcement, however, and the public perception has been that the EPA is lacking in technical skill.<sup>25</sup> The theory of executive-legislative relations within the EPA was described by Richard Ayres, attorney for the National Resources Defense Council:

Congress has delegated powers along a continuum. At one end, the President has vast discretion, with little review, . . . at the other, where sound policymaking requires expert knowledge, where decisions need to be insulated from political interference, and where the exercise of judicial review requires safeguarding the integrity and fairness of the record on which the agency acts, his control over the agencies is far more circumscribed.

The writing of regulations by quasi-independent agencies such as EPA, whose powers are explicitly delegated to them by the Congress, whose judgments require great technical knowledge, and whose actions are subject to judicial review, falls near the latter end of this continuum.<sup>26</sup>

Thus, the EPA bureaucrats enjoyed an absence of scrutiny atypical of most federal departments.<sup>27</sup>

This lack of scrutiny by the executive and legislative branches suggests that the courts should review EPA actions. In practice, however, judicial review does not always occur. For example, the *Clinton County* court's decision was based on an underlying assumption that the EPA's decision and its selected remedies were sound.<sup>28</sup> In justifying its conclusion not to allow pre-enforcement judicial review of claims alleging irreparable harm, the court rejected the possibility that the EPA may have made a mistake in selecting the remedial solution.<sup>29</sup> The court also rejected the possibility that EPA conflicts of

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23. Landy et al., *supra* note 18, at 33.

24. Harris & Milkis, *supra* note 19, at 230.

25. Landy et al., *supra* note 18, at 35-36.

26. *Executive Branch Review of Environmental Regulations: Hearings before the Subcomm. on Environmental Pollution of the Comm. on Environment and Public Works*, 96th Cong. 30-31 (1979) (statement of Richard Ayres, attorney for the National Resources Defense Council). For a thorough discussion of why the judiciary is better suited to review EPA actions, see part IV.B.1, *infra*.

27. Landy et al., *supra* note 18, at 34.

28. *Clinton County Comm'rs v. EPA*, 116 F.3d 1028-29 (3d Cir. 1997), *cert. denied sub nom. Arrest the Incinerator Remediation, Inc. v. EPA*, 118 S. Ct. 637 (1998); see *supra* note 15 and accompanying text. Indeed most courts tend to defer to the EPA's presumed expertise, mainly because of "the highly technical nature of site evaluation, ARARs identification, and remedy selection." Battle & Lipeles, *supra* note 10, at 381-82. *But see* *United States v. Hardage*, 750 F. Supp. 1460 (W.D. Okla. 1990) (adopting the defendants' proposed containment remedy over the EPA's preferred excavation remedy after a lengthy battle of experts).

29. See *Clinton County Comm'rs*, 116 F.3d at 1025-26.

interest could have been the impetus behind the remedial plan selected.<sup>30</sup> The court hid this blind reliance on the EPA behind the congressional intent to avoid delay in implementing cleanup processes.<sup>31</sup> Their basic argument was that these allegations of irreparable harm, "while 'bona fide,' may simply reflect a legitimate difference of opinion about the preferred remedy for a particular site."<sup>32</sup> Nowhere in the opinion does the court concede that the EPA is capable of making mistakes, which they clearly have, as evidenced by their failure to follow procedures in earlier cleanup projects.<sup>33</sup> Additionally, the *Clinton County* court does not admit that the EPA is capable of overlooking an adverse health effect or colluding with PRPs in choosing remedial methods.<sup>34</sup>

### B. *Historical Look at the EPA Under Past Administrations*

Events over the past fifteen years demonstrate that putting complete trust in the EPA is not necessarily appropriate.<sup>35</sup> In 1983, for example, over twenty top EPA and Department of Interior (DOI) officials were accused of letting political considerations and ties to regulated industries influence their actions.<sup>36</sup> Cleanups were stalled and Superfund money withheld from at least two infamous sites.<sup>37</sup> The House Judiciary Committee findings on this incident noted many conflicts of interest in EPA and DOI activities.<sup>38</sup> For example, two representatives who were involved in the House of Representatives probe of the EPA had been examining hazardous waste dumpers at sites within their constituencies and matching them against campaign contributor lists.<sup>39</sup> In another instance, former Superfund program administrator Rita Lavelle improperly participated in the toxic waste case at the Stringfellow Acid Pits site, in which her former employer was involved as a PRP.<sup>40</sup> In these cases, the "delays in initiating cleanup measures increased significantly the risks of adverse health effects to thousands of people."<sup>41</sup> In an egregious example of manipu-

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30. *See id.*

31. *See id.* at 1027.

32. *See id.* at 1024.

33. *See Schalk v. Reilly*, 900 F.2d 1091 (7th Cir. 1990); *see also infra* note 236.

34. *See Clinton County Comm'rs*, 116 F.3d at 1025-26.

35. Jacqueline Vaughn Switzer, *Environmental Politics: Domestic and Global Dimensions* 14-18 (1994) (discussing the environmental woes that plagued the country in the past two decades).

36. Gregory Gordon, *Washington News*, UPI, Nov. 14, 1985, available in LEXIS, News Library, Wires File.

37. *EPA Officials 'Violated Trust' by 'Manipulating the Superfund'*, *Wash. Post*, Aug. 31, 1984, at A16 [hereinafter *EPA Officials*] (discussing excerpts from the House Energy Oversight subcommittee report on the EPA controversy).

38. *See id.*

39. Howard Kurtz & Mary Thornton, *Probe is Sought of Justice Department in EPA Dispute*, *Wash. Post*, Dec. 6, 1985, at A1.

40. *Id.*

41. *EPA Officials*, *supra* note 37, at A16.



lating the Superfund for political gain, the EPA withheld Superfund grant money at the Stringfellow Acid Pits site in California because of political conflicts in the 1982 gubernatorial election.<sup>42</sup> The Reagan Administration did not want incumbent democratic Governor Edmund Brown, Jr. to get credit for cleanup of the site and thus delayed granting cleanup funds until after the election.<sup>43</sup> Many individuals were forced to resign, most notably Secretary of the Interior James Watt and EPA Administrator Ann Burford.<sup>44</sup> Lavelle was indicted for lying under oath about the her participation in the toxic waste case affecting her former employer, and served four and one-half months in prison for perjury.<sup>45</sup>

Conflicts of interest such as those Lavelle maintained in the Stringfellow Acid Pits site may also stem from financial situations. For example, in 1991, Vice President Dan Quayle and senior aide Allan Hubbard faced a conflict of interest probe by the House Energy and Commerce Subcommittee on Health and Environment.<sup>46</sup> Quayle was actively involved in terminating an EPA proposal that would have required 25 percent of the recyclable materials in municipal waste combustors to be separated prior to incineration.<sup>47</sup> Congressional staff reported that, at the time, Quayle owned \$350,000 of stock in Central Newspapers, Inc., a company which strongly opposed mandatory recycling of paper.<sup>48</sup> Hubbard was half-owner of World Wide Chemicals, Inc. of Indianapolis, and participated in a White House review of Clean Air Act Amendment (CAAA) proposals.<sup>49</sup> This situation suggests that Hubbard's review of the CAAs was based on making the new regulations advantageous for the chemical industry, not most effective for the environment. While there was no evidence that either Quayle or Hubbard were motivated by concern for their personal as-

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42. *Id.*

43. Mary Thornton, *U.S. Officials' Talk on Lavelle Probed*, Wash. Post, Oct. 7, 1984, at A1; Michael Weisskopf, *Toxic-Waste Site Awash in Misjudgment; Deadly Chemicals Seep Into Town's Water Supply Despite Superfund*, Wash. Post, Nov. 16, 1986, at A1.

44. Thornton, *supra* note 43, at A18; Editorial, *Lobbies Claim Another Victim*, The Daily Oklahoman, Oct. 11, 1983, available in 1983 WL 2169916.

45. Thornton, *supra* note 43, at A18. The House Energy Oversight Subcommittee's investigation of the situation was impeded by several circumstances, including President Reagan's claim of executive privilege over "enforcement sensitive" Superfund documents, Lavelle's refusal to testify before the subcommittee, and Lavelle and her staff's unlawful removal and concealment of documents from EPA official files. *Id.*

46. *Waxman Explores Conflict of Interest Questions Surrounding Quayle, Top Aide*, Solid Waste Report, Dec. 16, 1991, available in 1991 WL 2698523 [hereinafter *Waxman Explores*].

47. *Id.*

48. *Id.*

49. *Dingell Finally Gets Documents Involving OMB, Quayle Council*, Hazardous Waste News, Feb. 3, 1992, available in 1992 WL 2665624.

sets,<sup>50</sup> these incidents suggest that bias and self-serving behavior is possible.<sup>51</sup>

Several other conflict of interest situations have occurred within the past decade. In 1986, the EPA awarded contracts for research and testing at their Duluth, Minnesota, Environmental Research Laboratory to AScI Corporation, which was wholly-owned by an EPA employee at the time.<sup>52</sup> These contracts were worth more than \$14.5 million.<sup>53</sup> According to a draft report from the EPA Inspector General, "[u]nder these contracts, EPA has paid AScI hundreds of thousands of dollars for such 'scientific' work as snow shoveling, office painting and remodeling, and repairing lawn equipment, a pickup truck and even toilets. This is yet another egregious example in the mushrooming revelations of contract mismanagement at EPA."<sup>54</sup>

In 1993, EPA Deputy Administrator Robert Sussman's actions were questioned in connection with his decisions regarding permitting new carbon injectors at a Waste Technologies Industries (WTI) facility in East Liverpool, Ohio.<sup>55</sup> He granted WTI "temporary authorization" to install the carbon injectors on its hazardous waste incinerator during, not after, the 60-day public comment period.<sup>56</sup> This type of situation is highly unusual, and may have been influenced by his previous work as an attorney for the Chemical Manufacturers Association (CMA).<sup>57</sup> Certain members of the CMA, including industrial giants E.I. DuPont De Nemours & Co., Inc. and BASF AG, had contracts to supply waste to WTI.<sup>58</sup>

The Clinton Administration had conflict of interest problems in the WTI situation as well. During the Clinton-Gore campaign in 1992, Al Gore criticized WTI's proposed incinerator because it was set to operate in a residential area in Ohio, a few hundred yards from an elementary school.<sup>59</sup> The incinerator failed the trial burn and the Ohio Attorney General found that WTI did not have a valid permit to operate at that site.<sup>60</sup> Only two months after being elected, however, Gore started supporting the incinerator.<sup>61</sup> The *Seattle Times* suggested sev-

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50. Waxman Explores, *supra* note 46.

51. *Id.*

52. Dingell Pledges Hearing; Contract Mismanagement Revealed, Pesticide & Toxic Chem. News, June 3, 1992, available in 1992 WL 2681948.

53. *Id.*

54. *Id.*

55. Paul Kemezis, EPA OKs Modifications at Controversial WTI Facility, Env. Week, July 15, 1993, available in 1993 WL 2742388.

56. *Id.*

57. *Id.*

58. *Id.*

59. Jeff Cohen & Norman Solomon, *Sure, Al Gore is Green; So is the Color of Money*, *Seattle Times*, Nov. 6, 1993, at A11.

60. Greenpeace Calls Incinerator Approval Illegal, Irresponsible, Pesticide & Toxic Chem. News, July 14, 1993, available in 1993 WL 2757946.

61. Cohen & Solomon, *supra* note 59, at A11.

eral reasons for his change of heart.<sup>62</sup> Jackson Stephens, founder of WTI, donated \$100,000 to the Clinton-Gore campaign in 1992.<sup>63</sup> Stephens was also the chair of Stephens Inc., an investment firm based in Little Rock which was a major underwriter of Clinton's candidacy.<sup>64</sup> The campaign deposited up to \$55 million in federal election funds in a bank partially owned by Stephens.<sup>65</sup> In addition, Robert Sussman, the EPA administrator who granted the temporary approval for WTI to operate, was a law school classmate of Bill and Hillary Clinton.<sup>66</sup>

An overarching conflict of interest occurs when the EPA administers Superfund cleanups of federal hazardous waste sites.<sup>67</sup> This inherent conflict of interest stems from the interrelationship between the party performing the cleanup and the party ordering the cleanup.<sup>68</sup> Cleanups are conducted by one department of the Executive Branch (in many cases the Department of Energy or Defense), and are supervised by another governmental agency, the EPA, with no outside review of the cleanup.<sup>69</sup> As one commentator criticizes, "refusal to review challenges brought under other federal environmental laws gives the Executive broad, unreviewable authority to conduct cleanups of sites for which it is a potentially liable party."<sup>70</sup> Some state officials advocate giving full oversight authority for the cleanup of federal facilities to the states.<sup>71</sup> As noted by Christopher Jones, chief of the Environmental Enforcement Section in the Ohio Attorney General's office, federal agencies have "'overwhelming credibility problems' because of an inherent conflict of interest and a 'demonstrably poor record of environmental compliance.'"<sup>72</sup>

### C. *Political Nature of the EPA*

In addition to concerns regarding conflicts of interest, the structure of the EPA within the federal government creates questions of undue political influence on cleanup plan proposals. As noted above, the EPA is an independent agency within the Executive Branch of the federal government.<sup>73</sup> The unique structure of the Agency gives it

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62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *States Ready to Take Over Superfund, Worried About Costs*, Pesticide & Toxic Chem. News, May 10, 1995, available in 1995 WL 8217876 [hereinafter *States Ready*]. Federal hazardous waste sites are simply sites owned and operated by the federal government that are contaminated with hazardous waste. *Id.*

68. Ingrid Brunk Wuerth, *Superfund Colloquium: Challenges to Federal Facility Cleanups and CERCLA Section 113(h)*, 8 Tul. Envtl. L.J. 353, 355 (1995).

69. *Id.*

70. *Id.*

71. *States Ready*, *supra* note 67.

72. *Id.*

73. Switzer, *supra* note 35, at 53.

heightened accountability to the White House and Congress.<sup>74</sup> This increased accountability creates the highly politicized nature of the EPA. In performing its functions, it has been suggested that the EPA's "leadership should try to ascertain how its mission fits with that of the overall administration program and articulate its activities with the rest of the president's team."<sup>75</sup> Protection of the environment has been a priority when it is a focus of the President, and has lapsed when other interests have predominated.<sup>76</sup>

The EPA's performance under the Reagan Administration is illustrative of this theme. Candidate Reagan's environmental agenda<sup>77</sup> stressed the desire to ensure that the costs of regulation were justified by their benefits.<sup>78</sup> This view did not receive much public support. After Reagan's election, the EPA suffered large budget cuts to support the Administration's economic plan to reduce taxes and the deficit.<sup>79</sup> From 1981, when President Reagan took office, until 1983, the EPA's budget was slashed by 48 percent.<sup>80</sup> Many of President Reagan's key appointees were known to be enemies of environmentalists.<sup>81</sup> Additionally, the EPA was reorganized to become more subordinate to the President.<sup>82</sup> All of these factors led to increased deregulation of the environment. Although the EPA introduced Superfund under the Reagan Administration, the Reagan EPA was highly criticized because progress in selecting and cleaning up sites was slow and cleanup levels settled upon were insufficient.<sup>83</sup> As Leslie Dach, legislative director for pollution issues at the National Audu-

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74. Alfred A. Marcus, *Promise and Performance: Choosing and Implementing an Environmental Policy 175-77* (1980) (noting EPA's single administrator, not a group of commissioners, gives it heightened accountability to the President, while its heightened accountability to Congress stems from the structure of its statutes, which give the EPA the authority to achieve specific goals by definite dates).

75. Landy et al., *supra* note 18, at 16.

76. Switzer, *supra* note 35, at 69.

77. Reagan revealed this environmental agenda in his 1980 presidential campaign. Landy et al., *supra* note 18, at 245.

78. *Id.*

79. *Id.* at 246.

80. Melinda Beck, *The Toxic-Waste Crisis*, Newsweek, Mar. 7, 1983, at 20, 21.

81. Landy et al., *supra* note 18, at 246. For example, James Watt, Secretary of the Interior, was counsel for the Mountain States Legal Foundation, a conservative public interest law firm that spearheaded efforts to block environmental regulation. *Id.* John Daniel, EPA Administrator Gorsuch's chief of staff, had recently served as a lobbyist for Johns-Manville, the Denver-based firm most well known as a manufacturer of asbestos products. *Id.* at 247.

82. *Id.* at 248. For example, Reagan created the cabinet councils, a device to facilitate Executive Branch integration. *Id.* These councils worked on any key policy questions that transcended any single department. *Id.* The Cabinet Council on Natural Resources discussed many issues which overlapped with the EPA's jurisdiction, but the EPA Administrator, lacking cabinet status, was not a member of the council. *Id.*

83. *Id.* at 265-66. Some complain that the EPA lets firms off too easily by waiving future liability and settling for only cursory cleanups. Beck, *supra* note 80, at 21.

bon Society, succinctly noted: “‘They addressed a small percentage of sites and did a poor job.’”<sup>84</sup>

The Bush Administration was also criticized for its lack of environmental concern. The Sierra Club and a professor from Evergreen State University severely criticized the actions the Bush Administration took to interfere with the work of environmental scientists.<sup>85</sup> Their research showed a “pervasive and continuing willingness to interfere at every step of the scientific process to thwart outcomes contrary to [the administration’s] ideology and political commitments.”<sup>86</sup> For example, the Bush Administration sought to use the Arctic National Wildlife Refuge for oil drilling.<sup>87</sup> The DOI originally produced a study which showed a 19 percent chance of finding economically recoverable oil in the coastal plain.<sup>88</sup> The administration did not like these results, and ordered the DOI to redo the study.<sup>89</sup> The DOI redid the study without doing any new field work—they simply changed the way they put the numbers together—and came up with a 46 percent chance of finding economically recoverable oil.<sup>90</sup> The effect of this type of influence, according to Professor Richard Cellarius, was to undermine the reputation of federal scientists within the scientific community.<sup>91</sup> “If there is a sense that scientific results are subjected to political manipulation before release or that the research process itself is directed to achieve the politically desired conclusion from the beginning, then even reasonable and correct results will be suspect.”<sup>92</sup>

It is not hard to imagine a future administration that would once again compromise the environment for other issues on its agenda. The *Clinton County* court overlooked this possibility and placed too much trust in the current system. Interpretation of the laws, however, should not depend on the current administration. As stated during the debates over reauthorizing Superfund, “[y]ou do not write laws

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84. Jon Sure, *Politics Muddies Superfund; Florio Leading Fight for More Money, Rules*, The Record, Sept. 16, 1985, at A1, available in LEXIS, News Library, NJRec File. The President was not the only one to blame for the poor performance of the EPA. Congress played a large part, “grossly” underestimating the quantity of sites requiring cleanup and the amount of money necessary for that cleanup. *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1417 (6th Cir. 1991). The Sixth Circuit criticized the EPA “for the slow pace of cleanups, for failing to provide remedies that would protect public health and the environment, and for alleged ‘sweetheart’ deals that reduced cleanup costs for industry at public expense.” *Id.*

85. Michael McCloskey et al., *Bush Administration’s Handling of Federal Science Information*, Fed. News Serv., Oct. 29, 1992, available in LEXIS, News Library, Fednews File.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

based on the personality of current administrators . . . . You write laws to get what you want accomplished."<sup>93</sup>

## II. INTRODUCTION TO CERCLA

Notwithstanding the possible conflicts of interest that may occur, Congress drafted CERCLA in such a way to give the EPA broad discretion in remediating hazardous waste sites. This section discusses the origin and structure of CERCLA.

### A. *Origin of CERCLA*

Congress enacted CERCLA (commonly called "Superfund") in December 1980,<sup>94</sup> primarily in response to the Love Canal situation.<sup>95</sup> Love Canal was an abandoned canal leading to the Niagara River in Niagara Falls, New York.<sup>96</sup> From 1942 to 1952, the Hooker Chemical Company disposed of more than 21,000 tons of chemical waste in the canal.<sup>97</sup> When the canal was full in 1953, Hooker covered it with earth and sold it to the Niagara Falls School Board for one dollar.<sup>98</sup> The school board then built a school and a playground on the site, and the area bordering the site was developed as a residential community.<sup>99</sup> Local health officials soon found higher-than-normal rates of birth defects, miscarriages, and other problems among Love Canal residents.<sup>100</sup> Eventually, President Carter ordered the federal government to purchase the 240 homes nearest the site, and the resulting relocation program cost the government more than \$30 million.<sup>101</sup> In the ensuing several years, Love Canal was labeled a "Public Health Time Bomb," and people all over the country became aware of a nationwide hazardous waste problem for the first time.<sup>102</sup>

Congress drafted CERCLA to provide the EPA with a powerful means of responding promptly and effectively to cases of environmen-

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93. Sure, *supra* note 84, at A1 (quoting Kathy Hurwitt, National Campaign Against Toxic Hazards).

94. 42 U.S.C. §§ 9601-9675 (1994).

95. Peter K. Johnson, Note, *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). *But see* Landy et al., *supra* note 18, at 133-40 (suggesting that the timing of Love Canal and the passage of Superfund is coincidental). Congress enacted CERCLA just over one month after Ronald Reagan defeated incumbent President Jimmy Carter in the presidential election, during the "waning hours of the lame duck congressional session." Battle & Lipeles, *supra* note 10, at 179.

96. Landy et al., *supra* note 18, at 134. For a thorough discussion of the "tragedy" at Love Canal, see Wentz, *supra* note 20, at 306-12.

97. Landy et al., *supra* note 18, at 134.

98. *Id.*

99. *Id.*

100. Switzer, *supra* note 35, at 16.

101. *Id.*

102. Landy et al., *supra* note 18, at 135-40.

tal contamination like that at Love Canal.<sup>103</sup> To ensure that the legislation covered all situations ranging from spills and leaking tanks to midnight dumpers,<sup>104</sup> Congress vested the EPA with broad authority:

Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act . . . to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time . . . which the President deems necessary to protect the public health or welfare or the environment.<sup>105</sup>

Attorneys immediately express their fears that the scope of EPA's power under CERCLA was unlimited:

Generally the bill applies to any "release into the environment" of any "hazardous substance" from any "facility." All three terms are defined in such a way as to suggest no discernible limits on their scope. For example, does the release of hazardous substance from a facility include the emissions from the painting of a building, the irrigation of a field . . . or any of the other myriad human activities which involve the "release" from a structure, installation, or equipment of a substance which under some circumstances may be regarded as harmful to some living organism.<sup>106</sup>

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103. See *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982) (indicating that CERCLA provided the EPA with "the tools necessary for a prompt and effective response to problems of national magnitude resulting from hazardous waste disposal"). Congress designed the Act to eliminate those problems presented by abandoned hazardous waste dumps that previous laws did not sufficiently address. See *id.* at 1111-12; 1 Allan J. Topol & Rebecca Snow, *Superfund Law and Procedure* 2 n.6 (1992). Prior to CERCLA, there were several other ways that the EPA could try to get authority to respond to situations similar to Love Canal. *Battle & Lipeles*, *supra* note 10, at 180. For example, the Clean Water Act authorized the Coast Guard to respond to spills of oil and hazardous substances into the navigable waters. 33 U.S.C. § 1321 (1994). That provision did not apply to the Love Canal situation, however, because the contamination involved only soil and groundwater. *Battle & Lipeles*, *supra* note 10, at 180. Section 6973 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992, authorized the EPA to respond to solid or hazardous waste emergencies, but it was unclear whether that provision could be used against parties whose contribution to the emergency occurred wholly in the past. See *id.*

104. Landy et al., *supra* note 18, at 144.

105. 42 U.S.C. § 9604(a)(1) (1994).

106. Landy et al., *supra* note 18, at 144 (quoting Letter from Edward Dunkelberger, Covington and Burling, to Edmund Frost, Vice President and General Counsel, Chemical Manufacturers Association (July 25, 1980)). In 1992, the Fourth Circuit showed that Dunkelberger's fears were not unfounded. See *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837 (4th Cir. 1992). It held a party liable under CERCLA for "disposal" of hazardous waste when the "disposal" consisted of material leaking from a tank. *Id.* at 845. The court also held that liability under CERCLA does not require that a party actively participated in hazardous waste management. *Id.*

Although CERCLA has not been interpreted broadly enough to reach, for example, the painting of a building, it does apply in situations where hazardous substances have leaked from tanks.<sup>107</sup> In such a situation, the owner of the site at the time the leaking began is a PRP and therefore liable for cleanup costs.<sup>108</sup>

CERCLA provides for substantial federal funding to allow the federal government to begin cleanups at the sites of the "most significant releases of hazardous substances."<sup>109</sup> When CERCLA was first enacted in 1980, the federal funding was \$1.5 billion.<sup>110</sup> That amount was increased to \$8.5 billion when Superfund was reauthorized in 1986.<sup>111</sup> Additional money for Superfund is generated from special taxes placed on the petroleum and chemical industries.<sup>112</sup>

### B. *Structure of CERCLA*

CERCLA contains detailed provisions which require specific planning of hazardous waste response actions.<sup>113</sup> It also includes an elaborate scheme outlining the potential liability of parties related to the hazardous waste site.<sup>114</sup> This section discusses these two aspects of CERCLA.

#### 1. Planning Requirements

CERCLA authorizes two types of responses to hazardous waste contamination: removal actions and remedial actions. A "removal action" is a short-term response to a release that is intended "to abate, prevent, minimize, stabilize, mitigate, or eliminate the release or the threat of release."<sup>115</sup> Examples of removal actions include the use of fences, warning signs, and other forms of site control; the installation of drainage controls; the removal of leaking drums; and the construction of caps over contaminated soil to reduce migration of hazardous substances.<sup>116</sup> A "remedial action" is a cleanup activity designed to achieve a permanent remedy at the site.<sup>117</sup> Remedial actions can include several of the examples given for removal actions, as well as the

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107. *See Nurad*, 966 F.2d at 845.

108. *Id.*

109. 42 U.S.C. § 9611(a) (1980) (statutory language establishing the Superfund). The money could also be used to compensate those parties who had already cleaned up the hazardous waste themselves. *Id.*

110. *See Battle & Lipeles, supra* note 10, at 182.

111. *Id.*

112. *See* 26 U.S.C. § 9507 (1994).

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

114. *See infra* Part II.B.2.

115. 42 U.S.C. § 9601(23) (1986) (defining terms "remove" and "removal").

116. 40 C.F.R. § 300.415(e) (1997).

117. 42 U.S.C. § 9601(24) (1994) (defining terms "remedy" and "remedial action"). A remedial action "prevent[s] or minimize[s] the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment." *Id.*



collection of leachate<sup>118</sup> and runoff,<sup>119</sup> the treatment or incineration of hazardous substances at the site, and reasonable monitoring to ensure the adequacy of the remediation effort.<sup>120</sup> This Note will discuss only remedial actions, because removal actions are limited in both time and scope and thus are not as controversial.<sup>121</sup>

All CERCLA cleanups are governed by the National Contingency Plan (NCP),<sup>122</sup> which specifies the steps to be taken to identify and investigate CERCLA sites, evaluate possible cleanup strategies, and decide upon and implement the actual cleanup.<sup>123</sup> The process includes EPA preparation of a Remedial Investigation and Feasibility Study (RI/FS) to assess site conditions and evaluate alternative cleanup actions.<sup>124</sup> The public has a substantial opportunity to participate in the selection and design of the remediation plan.<sup>125</sup> To that end, the EPA must publish notices of the proposed and final remediation plans in the *Federal Register* and must make those plans available to the public before it begins pursuing the remedial action.<sup>126</sup> The EPA must then allow the public a "reasonable opportunity for submission of written and oral comments."<sup>127</sup> Any notable changes between the proposed plan and the final plan, along with responses to significant public comments on the proposed plan, must be published along with the final plan.<sup>128</sup> The EPA must publish an explanation of any significant differences between the final published plan and the action taken, or the terms of any settlement with PRPs regarding cleanup methods and standards.<sup>129</sup>

The focus of the selection and design process for a remediation plan is to identify a cleanup method that will adequately protect public health and the environment.<sup>130</sup> The NCP specifies nine factors to consider in the remedy selection.<sup>131</sup> The factors are broken down into three groups: threshold criteria, balancing criteria, and modifying cri-

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118. Leachate is toxic liquid which leaks from areas such as hazardous waste landfills and may adversely impact groundwater quality. See Wentz, *supra* note 20, at 314.

119. Stormwater which has come into contact with hazardous waste is characterized as runoff, and must be collected and controlled so that it does not adversely affect adjacent property. *Id.*

120. 40 C.F.R. § 300.430(a) (1997).

121. CERCLA imposes absolute limits of \$2 million in money expenditures and twelve months' time to pursue a removal action. 42 U.S.C. § 9604(c) (1994).

122. See 33 U.S.C. § 1321(c) (1994).

123. See 40 C.F.R. pt. 300 (1997).

124. See *id.* § 300.430(a)(2) (discussing RI/FS).

125. 42 U.S.C. § 9617 (1994). In some instances the EPA may choose to have a public meeting at or near the facility at issue to discuss the proposed plan and cleanup standards. *Id.*

126. *Id.*

127. *Id.* § 9617(a)(2).

128. *Id.* § 9617(b).

129. *Id.* § 9617(c).

130. *Id.* § 9621(d)(1).

131. 40 C.F.R. § 300.430(f) (1997).

teria.<sup>132</sup> To be eligible for final selection, a proposed remedy must first satisfy the two threshold criteria: overall protection of human health, and compliance with applicable or relevant and appropriate requirements of federal and state environmental laws (ARARs).<sup>133</sup> The EPA then weighs the five balancing criteria: long-term effectiveness and permanence; reduction of toxicity, mobility, or volume through treatment; short-term effectiveness; implementability; and cost.<sup>134</sup> Finally, the EPA considers the two modifying criteria: state acceptance, and community acceptance.<sup>135</sup>

## 2. Liability of Potentially Responsible Parties

Section 107 of CERCLA imposes liability on specific PRPs for the release of hazardous waste.<sup>136</sup> The parties that may be required to clean up, or pay for the cleanup, of CERCLA sites include: (1) the current owner and operator of the site; (2) any past owners or operators where hazardous substances were disposed of on the site during their ownership or operation; (3) parties that arranged for the disposal or treatment of hazardous substances at the site; and (4) transporters who selected the site for the disposal or treatment of the hazardous substances they transported there.<sup>137</sup> Courts have construed section 107 to impose strict liability, making issues of fault or negligence essentially irrelevant to a finding of liability.<sup>138</sup> CERCLA empowers the EPA to respond to an actual or threatened release<sup>139</sup> of a hazardous substance either by conducting the cleanup itself and suing the wide range of responsible parties for reimbursement,<sup>140</sup> or by issuing an administrative order or seeking a court order requiring the responsible parties to conduct the cleanup themselves.<sup>141</sup> Once the EPA issues such an order under section 106, and the subject of the order fails to take the required actions, the EPA may bring an action to enforce the order.<sup>142</sup> If the subject of the order fails to perform the ordered

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132. Battle & Lipeles, *supra* note 10, at 366.

133. *Id.*

134. *Id.*

135. *Id.*

136. See 42 U.S.C. § 9607 (1994).

137. *Id.* § 9607(a).

138. See, e.g., *United States v. Monsanto Co.*, 858 F.2d 160, 167 (4th Cir. 1988) (holding current owner liable for response costs even though it did not contribute to the contamination); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 810-11 (S.D. Ohio 1983) (establishing joint and several liability when two or more persons caused a single and indivisible harm).

139. 42 U.S.C. § 9601(22) (1994) defines a "release" as any discharge of hazardous substances into the environment, subject to several exceptions.

140. See *id.* §§ 9604, 9607.

141. *Id.* § 9604.

142. See *id.* § 9606(b)(1).

actions, the government may recover fines<sup>143</sup> and punitive damages of up to three times the amount of Superfund money expended to perform the ordered cleanup.<sup>144</sup> Alternatively, the EPA may itself proceed with the response action and seek damages for the violation of the order in its action to recover the response costs.<sup>145</sup>

In addition to the EPA, states,<sup>146</sup> tribes,<sup>147</sup> and other persons<sup>148</sup> may undertake removal and remedial actions.<sup>149</sup> If any of these parties incur expenses relating to the response action, they may recover those costs from the statutorily-defined responsible parties by bringing an action under section 107(a).<sup>150</sup> Private parties may bring actions under section 310 of CERCLA claiming that the United States or any person is violating CERCLA or that an officer of the United States has failed to perform a non-discretionary duty under CERCLA.<sup>151</sup> These "citizen suits," as well as all other litigation brought under section 9604 or 9606(a), however, must satisfy the critical limit on the "timing of review."<sup>152</sup>

### III. SECTION 113(h)

CERCLA specifies the procedure for judicial review of lawsuits arising under its provisions.<sup>153</sup> With respect to jurisdiction, section 113(b) of the Act provides in pertinent part: "[T]he United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter, without regard to the citizenship of the parties or the amount in controversy."<sup>154</sup> This grant of jurisdiction, however, is limited by section 113(h).<sup>155</sup> Any litigation requiring a federal court "to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any [section

143. *Id.* § 9606(b)(1) (authorizing award of fines of up to \$25,000 per day against "[a]ny person who, without sufficient cause, willfully violates, or fails or refuses to comply with" a section 106 order).

144. *Id.* § 9607(c)(3) (authorizing recovery of punitive damages from a party liable for response costs under section 107 who, without sufficient cause, fails or refuses to comply with a section 106 order).

145. *See id.* § 9607(c)(3).

146. *See* 40 C.F.R. § 300.500 (1997).

147. *Id.* § 300.515(b). The NCP prescribes conditions under which Indian tribes are "afforded substantially the same treatment as states under section 104 of CERCLA." *Id.*

148. *Id.* § 300.700(a) ("Any person may undertake a response action to reduce or eliminate a release of a hazardous substance, pollutant, or contaminant.").

149. *See* Healy, *supra* note 8, at 9.

150. 42 U.S.C. § 9607(a) (1994); *see* Healy, *supra* note 8, at 9-10 & n. 45 ("40 C.F.R. § 300.700(c) outlines the § 107 cost-recovery action . . .").

151. 42 U.S.C. § 9659(a) (1994). A non-discretionary duty is "any standard, regulation, condition, requirement, or order [which relates to federal facilities]." *Id.*

152. *Id.* § 9613(h).

153. *Id.* § 9613.

154. *Id.* § 9613(b).

155. *See id.* § 9613(h).

106 administrative] order" is subject to section 113(h), CERCLA's judicial review preclusion provision.<sup>156</sup> This provision imposes crucial limits on the timing of review, barring federal court jurisdiction to review challenges unless the suit is brought in one of five particular CERCLA proceedings specified by the statute.<sup>157</sup>

(1) An action under section 9607 of this title to recover response costs or damages or for contribution.<sup>158</sup>

(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.<sup>159</sup>

(3) An action for reimbursement under section 9606(b)(2) of this title.<sup>160</sup>

(4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.<sup>161</sup>

(5) An action under section 9606 of this title in which the United States has moved to compel a remedial action.<sup>162</sup>

These provisions allow the EPA to bring an action to recover cleanup costs expended before the remedial action is completed.<sup>163</sup>

The point at which a CERCLA citizen suit may be brought is limited under section 113(h), which relates to the timing of judicial re-

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156. *Id.* Congress adopted this section, which bans pre-enforcement review, in the Superfund Amendments and Reauthorization Act of 1986 (SARA). *United States v. Princeton Gamma-Tech, Inc.*, 31 F.3d 138, 141-42 (3d Cir. 1994), *overruled by* *Clinton County Comm'rs v. EPA*, 116 F.3d 1018 (3d Cir. 1997); *see also* *Voluntary Purchasing Groups, Inc. v. Reilly*, 889 F.2d 1380, 1387-89 (5th Cir. 1989) (indicating that section 113 of SARA was intended to confirm and build upon existing case law by limiting the timing of judicial review). This provision represents the congressional philosophy to "clean up first, litigate later." *Princeton Gamma-Tech*, 31 F.3d at 141. Senator Stafford, a proponent of allowing pre-enforcement review, indicated that Congress wanted 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." *Id.* at 141-42 (quoting 132 Cong. Rec. 28,409 (1986)). Prior to the adoption of SARA, courts had already begun to ban pre-enforcement review. In *Wagner Seed Co. v. Daggett*, for example, the Second Circuit concluded that Congress intended to give the EPA the power to act quickly in the face of a potential environmental disaster and, thus, did not allow pre-enforcement review. 800 F.2d 310, 315 (2d Cir. 1986); *see also* *Wheaton Indus. v. EPA*, 781 F.2d 354, 356 (3d Cir. 1986) (deciding "unequivocally that pre-enforcement review of EPA's remedial actions . . . [is] contrary to the policies underlying CERCLA").

157. 42 U.S.C. § 9613(h)(1)-(5) (1994). There is an initial exception for diversity of citizenship cases, *id.* § 9613(h), but it has not been the subject of significant controversy. Michael P. Healy, *The Effectiveness and Fairness of Superfund's Judicial Review Preclusion Provision*, 15 Va. Env'tl. L.J. 271, 286 n.100 (1995-1996).

158. 42 U.S.C. § 9613(h)(1) (1994).

159. *Id.* § 9613(h)(2).

160. *Id.* § 9613(h)(3).

161. *Id.* § 9613(h)(4).

162. *Id.* § 9613(h)(5).

163. *Id.* § 9613(h).

view.<sup>164</sup> The relevant portion of section 9613(h) is the provision relating to citizen suits (subpart 4), which allows citizen suits "alleging that the removal or remedial action *taken*" was in violation of CERCLA.<sup>165</sup> The courts generally consider two basic factors when reading section 113(h): plain language and legislative intent.<sup>166</sup> This section examines how courts have analyzed the timing of review provision, and the conflicting interpretations of its statutory language and legislative history.

Judicial interpretation of section 113(h) has gone through three distinct stages. Prior to the 1994 decision in *Princeton Gamma-Tech*, courts strictly enforced the ban on pre-enforcement review.<sup>167</sup> In *Princeton Gamma-Tech*, the Third Circuit allowed an exception to that ban, holding that pre-enforcement review was warranted in situations where the plaintiffs alleged irreparable harm from the proposed cleanup.<sup>168</sup> The Third Circuit reversed that decision, however, in *Clinton County*, and reverted back to the strict ban on pre-enforcement review.<sup>169</sup>

#### A. *The State of the Law Before United States v. Princeton Gamma-Tech*

Prior to the Third Circuit's decision in *Princeton Gamma-Tech*, courts consistently held that the statutory language of section 113(h) was clear, and did not allow judicial review of EPA-ordered remedial actions until the actions were completed.<sup>170</sup> Additionally, the courts determined that the legislative history of section 113(h) supported their conclusion that judicial review is precluded until after remediation is completed.<sup>171</sup> As noted in *Voluntary Purchasing Groups, Inc.*

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164. *Id.*

165. *Id.* § 9613(h)(4) (emphasis added).

166. *Clinton County Comm'rs v. EPA*, 116 F.3d 1018, 1022, 1028 (3d Cir. 1997), *cert. denied sub nom. Arrest the Incinerator Remediation, Inc. v. EPA*, 118 S. Ct. 687 (1998); *Schalk v. Reilly*, 900 F.2d 1091, 1095-96 (7th Cir. 1990); *Alabama v. EPA*, 871 F.2d 1548, 1557 (11th Cir. 1989).

167. *See infra* Part III.A.

168. *See infra* Part III.B.

169. *See infra* Part III.B-C.

170. *See Arkansas Peace Ctr. v. Arkansas Dep't of Pollution Control & Ecology*, 999 F.2d 1212, 1216-17 (8th Cir. 1993); *Schalk*, 900 F.2d at 1095; *Alabama*, 871 F.2d at 1557.

171. *Schalk*, 900 F.2d at 1095-96; *Alabama*, 871 F.2d at 1557-58. The House Judiciary Committee noted that "[t]his provision is not intended to allow review of the selection of a response action prior to completion of the action." H.R. Rep. No. 99-253, pt. 3, at 23 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3038, 3046. Additionally, the final conference committee report explained that only "completed" remedial actions could be challenged. H.R. Rep. No. 99-962, at 224 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3317.

*v. Reilly*,<sup>172</sup> "courts have consistently held that where judicial review will delay remedial and removal clean up activities, they are barred from reviewing response actions prior to an attempt by the EPA to enforce its orders or allegations of liability."<sup>173</sup> There have been exceptions to this strict ban, however.

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

In *Princeton Gamma-Tech*, the Third Circuit became the first circuit court of appeals to allow judicial review of proposed remedial actions before completion of at least a discrete phase of the cleanup.<sup>174</sup> This decision was significant because "it demonstrate[d] the Third Circuit's willingness to find an exception to the jurisdictional bar under the citizens' suit subsection of 9613(h)(4), despite obvious procedural obstacles and conflicting legislative history."<sup>175</sup>

Princeton Gamma-Tech owned property which the EPA placed on the NPL<sup>176</sup> after discovering trichloroethylene (TCE) contamination in the groundwater.<sup>177</sup> The EPA's remedial plan for the facility was extraction of the contaminated water from the plume in the shallower of two aquifers, treating it, and re-injecting it into that aquifer.<sup>178</sup> The plan also called for several "open-hole" wells which penetrated through the shallow aquifer to the deep aquifer.<sup>179</sup> The wells were to allow for monitoring and sampling of the deep aquifer.<sup>180</sup> The site owners challenged the remedy under the CERCLA citizen suit provi-

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172. 889 F.2d 1380 (5th Cir. 1989). For a more comprehensive discussion of how the legislative history can be construed to support this position, see the discussion of *Clinton County Comm'rs* at *infra* notes 232-35 and accompanying text.

173. *Voluntary Purchasing Groups*, 889 F.2d at 1387.

174. Silecchia, *supra* note 13, at 345. In *Ehrlich v. Reno*, 25 Env'tl. L. Rep. 21586 (3d Cir. 1995), the Third Circuit indicated there were two exceptions to the requirement that a cleanup must be completed before it may be challenged. *Id.* The first exception is from *Princeton Gamma-Tech*, holding that section 113 does not bar jurisdiction over an injunctive action alleging irreparable harm inconsistent with CERCLA. The second exception is from *Neighborhood Toxic Cleanup Emergency v. Reilly*, 716 F. Supp. 828, 837 (D.N.J. 1989), holding that judicial review of cleanup action is available after the first phase of that remedy is complete.

175. Paul H. McConnell, Note, *CERCLA WRESTLING—Grappling with Conflicting Legislative Intent and the Citizens' Suit Provision—United States v. Princeton Gamma-Tech*, 14 Temp. Env'tl. L. & Tech. J. 115, 116-17 (1995).

176. The NPL is a list of locations in the United States that are in need of cleanup. 42 U.S.C. § 9605(a)(8)(B) (1994). Sites are judged for the NPL based on a Hazard Ranking System (HRS) provided in CERCLA. *See id.* § 9605(c)(1) ("[T]he hazard ranking system accurately assesses the relative degree of risk to human health and the environment posed by sites and facilities subject to review."). The practical ramification of listing a site on the NPL is that the EPA may use Superfund money to perform both removal and remedial actions at the site. *See id.* § 9604(a).

177. *United States v. Princeton Gamma-Tech, Inc.*, 31 F.3d 138, 140 (3d Cir. 1994), *overruled by Clinton County Comm'rs*, 116 F.3d at 1018.

178. *Id.* at 141.

179. *Id.*

180. *Id.*

sion, because they alleged the proposed system would possibly cause contaminated water from the shallow aquifer to be drawn down into the deep aquifer.<sup>181</sup> The EPA had not conclusively established that there was contamination in the deep aquifer, so the remedial plan could have potentially increased, rather than remedied, the pollution of the water supply.<sup>182</sup>

The court first examined the citizen suit provision, and its restriction under section 113(h), CERCLA's timing of review provision.<sup>183</sup> The court then determined that the statutory language of section 113(h)(4) is unclear, and that use of the past tense "action taken," does not indicate that the entire remedial action must be completed before allowing judicial review.<sup>184</sup> In large part, however, the court glossed over the language of the statute, basing most of its opinion on the statute's legislative history.<sup>185</sup> It was motivated by concern over other courts' evisceration<sup>186</sup> of the statutes' citizen suit provision.<sup>187</sup> As the court noted, "statutory interpretation that calls for the full completion of the plan before review is permitted makes the citizens' suit provision an absurdity."<sup>188</sup> This absurdity is directly seen in cases where irreparable harm to the public health is alleged, and the statute does not allow meaningful judicial review. The court reasoned that it was not bound by prior decisions because in interpreting section 113(h)(4), those decisions did not deal directly with alleged irreparable harm to public health and the environment resulting from the cleanup measures themselves.<sup>189</sup>

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181. *Id.* The challenge was made as a counterclaim in a suit by the EPA for reimbursement of response costs already incurred at the site. Gamma-Tech, the site owner, is also the responsible party. *Id.*

182. *Id.*

183. *Id.* at 144.

184. *Id.* at 145; see *Neighborhood Toxic Cleanup Emergency v. Reilly*, 716 F. Supp. 828, 833 (D.N.J. 1989) ("[T]he statute's language fails to answer the question of how much must be done before review is available.").

185. The court actually dismissed the importance of the plain language of the statute in two sentences. *Princeton Gamma Tech*, 31 F.3d at 145. The court noted:

From these conflicting views of the members of Congress who directly participated in the drafting of the statute, one might be tempted to resort to the wag's statement that, when the legislative history is unclear, one should refer to the language of the statute. However, in this instance it must be conceded that the term "action taken" in subsection 9613(h)(4) does not speak in clear terms either.

*Id.* (citation omitted).

186. See *supra* Part III.A.

187. *Princeton Gamma-Tech*, 31 F.3d at 146 ("The citizens' suit provision is effectively nullified if litigation must be delayed until after irreparable harm or damage is done.").

188. *Id.*; see also *North Shore Gas Co. v. EPA*, 930 F.2d 1239, 1245 (7th Cir. 1991) (remarking that, in some cases, section 113(h) would do more than affect the "timing" of judicial review; it would extinguish it).

189. Specifically, the court discussed the holdings in *Arkansas Peace Ctr. v. Arkansas Dep't of Pollution Control & Ecology*, 999 F.2d 1212, 1216-19 (8th Cir. 1993), *Schalk v. Reilly*, 900 F.2d 1091, 1095 (7th Cir. 1990), and *Alabama v. EPA*, 871 F.2d

The *Princeton Gamma-Tech* court indicated that, because the plain language and legislative history of these provisions were unclear, it could examine the overall goals of CERCLA to interpret the statute.<sup>190</sup> The court found that the primary goal of CERCLA was to eliminate the danger of harm from sites contaminated with toxic waste and hazardous substances.<sup>191</sup> Congress intended for this to be done as quickly and with as little expense as possible, and with as much as possible of that expense borne by the responsible parties (PRPs) rather than by the taxpayers.<sup>192</sup> The court indicated 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 purposes of CERCLA."<sup>193</sup>

The court also relied on dicta from a district court case in the Eastern District of Pennsylvania.<sup>194</sup> The district court in *Cabot Corp. v. EPA*<sup>195</sup> recognized a difference between compensable and irreparable injury in citizen suit cases, and concluded that "[h]ealth and environmental hazards must be addressed as promptly as possible rather than awaiting the completion of an inadequately protective response action."<sup>196</sup> Compensable injuries, on the other hand, should be dealt with after the remediation was completed.<sup>197</sup> Finding this logic compelling, the *Princeton Gamma-Tech* court held that the district court did have jurisdiction to review bona fide contentions of irreparable harm and, where appropriate, to grant injunctions.<sup>198</sup>

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1548, 1557 (11th Cir. 1989). *Princeton Gamma-Tech*, 31 F.3d at 144, 148. In those cases, the citizen plaintiffs alleged that the proposed cleanup violated CERCLA regulations. The court also acknowledged *Boarhead Corp. v. Erickson*, 923 F.2d 1011 (3d Cir. 1991), in which the plaintiffs alleged that the action planned would irreparably harm historical artifacts. *Princeton Gamma-Tech*, 31 F.3d at 147. Challenges to these actions were not allowed to be heard prior to the completion of the clean-up. No citizen, however, alleged that irreparable environmental harm would occur as a result of the clean-up. This distinction was central to the *Princeton Gamma-Tech* holding.

190. *Princeton Gamma-Tech*, 31 F.3d at 144-46.

191. See, e.g., H.R. Rep. No. 99-253, at 5 (1986), reprinted in 1986 U.S.C.C.A.N. 3038, 3038 ("CERCLA has two goals: (1) to provide for clean-up if a hazardous substance is released into the environment or if such release is threatened, and (2) to hold responsible parties liable for the costs of these clean-ups."); 132 Cong. Rec. 29753 (1986) (statement of Sen. Scheuer) ("[The people] want the overriding purpose of this bill which is to protect the lives, the health, and the safety and the well-being of the American public from these nauseating toxic wastes that litter our country by the thousands.").

192. Silecchia, *supra* note 13, at 339-40; McConnell, *supra* note 175, at 122 n.76; see *supra* note 191.

193. *Princeton Gamma-Tech*, 31 F.3d at 144-45.

194. *Id.* at 146 (citing *Cabot Corp. v. EPA*, 677 F. Supp. 823 (E.D. Pa. 1988)).

195. 677 F. Supp. 823 (E.D. Pa. 1988).

196. *Id.* at 829.

197. *Id.*

198. *Princeton Gamma-Tech*, 31 F.3d at 149.



The *Princeton Gamma-Tech* court, as noted, determined that the legislative history of section 113(h) is unclear.<sup>199</sup> In particular, the court noted that the conflicting statements in the legislative history came from the drafters of the statute.<sup>200</sup> Other courts have tried to explain this conflict in the legislative history. For example, in *United States v. Colorado*,<sup>201</sup> the Tenth Circuit noted that Congress considered a differentiation between suits by PRPs who sought to delay a CERCLA response, and "legitimate" citizen suits that sought to further the protection of public health and the environment.<sup>202</sup> Under this line of reasoning, the legislative history which seemingly creates an absolute ban on pre-enforcement review<sup>203</sup> speaks only to suits brought by PRPs. The legislative history which would allow review in limited circumstances,<sup>204</sup> in contrast, speaks to bona fide citizen suits of the sort involved in *Princeton Gamma-Tech* and *Clinton County*, as will be seen below.

Several scholars also contend that the legislative history is unclear. For example, one article notes that there are many references in the legislative history supporting the more liberal review policy that the

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199. *Id.* at 145; see also *Clinton County Comm'rs v. EPA*, 116 F.3d 1018, 1024 n.2 (3d Cir. 1997), *cert. denied sub nom. Arrest the Incinerator Remediation, Inc. v. EPA*, 118 S. Ct. 687 (1998) ("In *Princeton Gamma-Tech*, we noted the existence of some support in the legislative history for the plaintiffs' interpretation of section 9613(h)(4), that judicial review of incomplete EPA remedial actions is permitted whenever a challenge includes *bona fide* allegations of irreparable harm to public health or the environment.").

200. *Princeton Gamma-Tech*, 31 F.3d at 145 (citing conflicting statements of Rep. Glickman, Sen. Thurmond, Rep. Roe, and Rep. Florio, among others). Senator Thurmond discussed the proper timing of a citizens suit

"Taken or secured," [in section 9613(h)(4)] means that all of the activities set forth in the record of decision which includes the challenged action have been completed. . . . The section is designed to preclude lawsuits by any person concerning particular segments of the response action . . . until those segments of the response have been constructed and given the chance to operate and demonstrate their effectiveness in meeting the requirements of the act. Completion of all of the work set out in a particular record of decision marks the first opportunity at which review of that portion of the response action can occur (quoting Sen. Thurmond).

132 Cong. Rec. 28,441 (1986). This statement may be contrasted with that made by Senator Stafford, the Chairman of the Committee on Environment and Public Works, which was the Senate committee primarily responsible for the bill:

It is crucial, if it is at all possible, to maintain citizens' rights to challenge response actions, or final cleanup plans, before such plans are implemented even in part because otherwise the response could proceed in violation of the law and waste millions of dollars of Superfund money before a court has considered the illegality. . . . [C]itizens asserting a true public health or environmental interest in the response cannot obtain adequate relief if an inadequate cleanup is allowed to proceed . . .

*Id.* at 28,409 (quoting Sen. Stafford).

201. 990 F.2d 1565 (10th Cir. 1993).

202. *Id.* at 1577-78.

203. See 132 Cong. Rec., 28,441 (statement of Sen. Thurmond).

204. See *id.* at 28,409 (statement of Sen. Stafford).

*Princeton Gamma-Tech* court adopted.<sup>205</sup> One such statement was made by Representative Florio: "In order to be fully effective in enforcing the law's cleanup standards provisions, such suits must be brought at a point in the cleanup process where the agency could easily be ordered to modify its violative behavior."<sup>206</sup> These statements supporting the decision in *Princeton Gamma-Tech*, contrasted with the statements supporting the opposite conclusion, indicate that the legislative history is indeed unclear.

### C. Clinton County Commissioners v. EPA and Supporting Cases

The Third Circuit became the first circuit court to allow pre-enforcement review of EPA-selected remedial activities before their completion in *Princeton Gamma-Tech*.<sup>207</sup> Three years later, however, the court overturned *Princeton Gamma-Tech* in *Clinton County Commissioners*.

The Drake Chemical manufacturing site in Pennsylvania operated from the 1940s to 1982, and contained contaminated soil, sludges, tanks, and wastewater lagoons.<sup>208</sup> The EPA considered this contamination hazardous to human health and the environment, and took over the site in 1982.<sup>209</sup> The EPA decided, in 1988, after notice and opportunity for public comment, to remedy the site by excavating the contaminated soil.<sup>210</sup> The soil would be incinerated on-site and then returned to the site as "clean" soil.<sup>211</sup> Five years later, the EPA awarded the contract for the incineration.<sup>212</sup> The first step in the remediation process was to conduct a "trial burn" in which some of the soil is burned to gather data for evaluating the remedial method.<sup>213</sup> This process was intended to (1) verify that the incinerator

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205. Silecchia, *supra* note 13, at 371 n.155 ("As with so many uses of legislative history, there are statements in the legislative records that support opposing positions. While the court rightly points to those statements supporting the bar, there are also plentiful references supporting the more liberal review policy the court ultimately adopts.").

206. 132 Cong. Rec. 29,741 (1986) (statement of Rep. Florio); *see also* 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. Envtl. Aff. L. Rev. 49, 60-61 (1994) (indicating that the legislative history of 113(h) shows that several members of Congress encouraged courts to make a distinction between suits brought by PRPs and legitimate citizen suits, which allege that public health or the environment would be threatened if the proposed action were undertaken).

207. *United States v. Princeton Gamma-Tech*, 31 F.3d 138 (3d Cir. 1994), *overruled by Clinton County Comm'rs v. EPA*, 116 F.3d 1018 (3d Cir. 1997).

208. *Clinton County Comm'rs* 116 F.3d at 1020, *cert. denied sub nom. Arrest the Incinerator, Inc. v. EPA*, 118 S. Ct. 687 (1998).

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

will meet performance standards; (2) determine appropriate operating requirements; and (3) evaluate the potential risks from operation of the incinerator to determine whether the remedy should proceed.<sup>214</sup>

The Clinton County Commissioners and Arrest the Incinerator Remediation (AIR) challenged the trial burn under the citizen suit provision of CERCLA,<sup>215</sup> seeking to enjoin the trial burn.<sup>216</sup> They alleged that the trial burn would result in emission of dangerous amounts of highly toxic dioxins that would contaminate the local air, soil, and food chain, and create an unacceptable risk of cancer and other serious illnesses.<sup>217</sup> In essence, the plaintiffs were alleging irreparable harm to the public health and the environment if the trial burn were to go forward. The district court dismissed the complaint for lack of subject matter jurisdiction, holding that CERCLA's timing of review provision precluded the court from exercising jurisdiction over a citizen suit challenging the EPA remedial action prior to the completion of the action.<sup>218</sup> The plaintiffs subsequently appealed the decision.<sup>219</sup>

The *Clinton County* case came to the full circuit from a recommendation by a three-judge panel, who refused to dismiss the suit.<sup>220</sup> While the panel considered itself bound by the *Princeton Gamma-Tech* decision, it was apparently uncomfortable with that opinion and recommended that the case be heard *en banc* to resolve the issue.<sup>221</sup> The source of the uncertainty was that every other circuit court of appeals had refused to construe section 113(h)'s timing of review provision as allowing any pre-enforcement review whatsoever, regardless of who brought the suit or what kind of harm plaintiffs alleged.<sup>222</sup>

Unlike the *Princeton Gamma-Tech* court, the *Clinton County* court determined that the statutory language of section 113(h)(4) is clear, and does not allow judicial review of incomplete EPA-ordered remedial actions.<sup>223</sup> The court interpreted this provision as requiring that challenges to removal and remedial actions be brought only after the remedial action has been completed.<sup>224</sup> The court reached this conclusion by relying on other courts' preclusion of such suits under section 113(h), even where impending irreparable harm is alleged.<sup>225</sup>

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214. *Id.* at 1020-21.

215. 42 U.S.C. § 9659 (1994).

216. *Clinton County Comm'rs*, 116 F.3d at 1021.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* at 1020.

221. *Id.*

222. See *supra* note 9 and accompanying text; *supra* Part III.A.

223. *Clinton County Comm'rs*, 116 F.3d at 1022-25.

224. *Id.* at 1022-23.

225. See, e.g., *Hanford Downwinders Coalition v. Dowdle*, 71 F.3d 1469 (9th Cir. 1995) (holding that CERCLA's timing of review provision did not deprive citizen groups of due process); *Arkansas Peace Ctr. v. Arkansas Dep't of Pollution Control*

These other courts based their decisions on the plain language of the statute.<sup>226</sup> They found that the title of the section, "Timing of Review,"<sup>227</sup> and its use of the past tense, "removal or remedial action taken,"<sup>228</sup> indicated that Congress intended to authorize federal court challenges to remedial action under CERCLA only after the remedial action has been completed.<sup>229</sup> As the Seventh Circuit noted in *Schalk*, "[t]he statute precludes federal court review at this stage—when a remedial plan has been chosen, but not 'taken' or 'secured.'"<sup>230</sup> In addition, these courts claim that legislative history supports their construction of the statute.<sup>231</sup>

Similarly, the *Clinton County* court determined that the legislative history of section 113(h) supports the conclusion that judicial review is precluded until after remediation is completed.<sup>232</sup> The court pointed to a report of the House Committee on Energy and Commerce, which stated that section 113(h) codified the principle that "there is no right of judicial review of the Administrator's selection and implementation of response actions until after the response action have [sic] been completed to their completion."<sup>233</sup> The *Clinton County* court also explained that the Judiciary Committee had proposed an amendment that would have allowed 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

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& Ecology, 999 F.2d 1212 (8th Cir. 1993) (stating that CERCLA only permitted challenges to removal and remedial actions that had already occurred before suit was filed); *Schalk v. Reilly*, 900 F.2d 1091 (7th Cir. 1990) (indicating that a federal court does not have subject matter jurisdiction to consider challenges to remedial actions that have not been taken); *Alabama v. EPA*, 871 F.2d 1548 (11th Cir. 1989) (ruling that no action may be brought to compel compliance with provisions of CERCLA until the remedial action is actually taken). *But see* *North Shore Gas Co. v. EPA*, 930 F.2d 1239, 1245-46 (7th Cir. 1991) (weighing the likelihood of irreparable harm in determining whether the court had jurisdiction to grant an injunction under 113(h)).

226. *See supra* note 170 and accompanying text.

227. 42 U.S.C. § 9613(h) (1994).

228. *Id.* § 9613(h)(4) (emphasis added).

229. *Schalk*, 900 F.2d at 1095; *Alabama*, 871 F.2d at 1557.

230. *Schalk*, 900 F.2d at 1095.

231. *Id.* at 1096; *Alabama*, 871 F.2d at 1557. The final conference committee report that reconciled conflicting House and Senate versions explained that only "completed" remedial actions could be challenged. H.R. Rep. No. 99-962, at 224 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3317. The House Judiciary Committee noted that "[t]his provision is not intended to allow review of the selection of a response action prior to completion of the action. . . ." H.R. Rep. No. 99-253, at 23 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3038, 3046. These courts fail to account for considerable legislative history supporting review of response actions when irreparable harm is alleged. *See supra* Part III.B.

232. *Clinton County Comm'rs v. EPA*, 116 F.3d 1018, 1023 (3d Cir. 1997), *cert. denied sub nom. Arrest the Incinerator Remediation, Inc. v. EPA*, 118 S. Ct. 687 (1998).

233. H.R. Rep. No. 99-253, pt. 1, at 81 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2863.

allegedly in violation of a requirement of this Act.”<sup>234</sup> Because Congress did not enact the Judiciary Committee’s proposed amendment, the court reasoned that Congress was committed to preventing all judicial interference with remedial actions.<sup>235</sup>

The *Clinton County* court’s reliance on the decisions of other circuits, however, is problematic. While none of the other circuit courts interpreted the citizen suit provision as expansively as the Third Circuit in *Princeton Gamma-Tech*, none were faced with an allegation of irreparable harm to public health.<sup>236</sup> Had it been faced with irreparable harm to the public health or the environment, the District Court for the Eastern District of Pennsylvania was willing to interpret section 113(h) as expansively as had the *Princeton Gamma-Tech* court.<sup>237</sup> The claim before the court, however, was an allegation of monetary harm brought before any remedial action was completed, which was specifically precluded by section 113(h)(1).<sup>238</sup> Similarly, the Seventh Circuit was willing to weigh the likelihood that the claimant would suffer irreparable harm in *North Shore Gas Co. v. EPA*.<sup>239</sup> In that case, however, the likelihood of irreparable harm was so small that the court could not justify granting an injunction and, instead, dismissed the claim for lack of subject matter jurisdiction.<sup>240</sup>

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234. H.R. Rep. No. 99-253, pt. 3, at 22 (1985), reprinted in 1986 U.S.C.C.A.N. 3038, 3046.

235. *Clinton County Comm’rs*, 116 F.3d at 1024 n.1.

236. *United States v. Princeton Gamma-Tech*, 31 F.3d 138, 144-45 (3d Cir. 1994), overruled by *Clinton County Comm’rs*, 116 F.3d at 1018; Silecchia, *supra* note 13, at 375-76; see also *Arkansas Peace Ctr. v. Arkansas Dep’t of Pollution Control & Ecology*, 999 F.2d 1212 (8th Cir. 1993) (involving a citizen suit that alleged incineration remedy failed to meet EPA regulations); *Boarhead Corp. v. Erickson*, 923 F.2d 1011 (3d Cir. 1991) (involving a citizen suit that alleged EPA would violate the National Historic Preservation Act if it implemented its cleanup plan); *Schalk v. Reilly*, 900 F.2d 1091 (7th Cir. 1990) (involving a citizen suit that alleged EPA had violated the National Contingency Plan by failing to prepare an environmental impact statement); *Alabama v. EPA*, 871 F.2d 1548, 1554 (11th Cir. 1989) (involving a citizen suit that alleged EPA failed to comply with CERCLA’s notice and comment provision). But see *McConnell*, *supra* note 175, at 128 (noting that, while the majority in *Princeton Gamma-Tech* indicated that this was a case of first impression, their decision regarding the timing of review appears to be in conflict with at least three other circuit court cases).

237. *Cabot Corp. v. EPA*, 677 F. Supp. 823, 827-30 (E.D. Pa. 1988) (indicating that, in bona fide citizen suits (not brought by PRPs) where irreparable harm is alleged, section 113(h) would not bar pre-enforcement review).

238. *Id.* at 829.

239. 930 F.2d 1239, 1245 (7th Cir. 1991) (acknowledging that, although petitioner may suffer irreparable harm from the EPA’s actions, the likelihood was small).

240. *Id.* Another caveat from the *North Shore Gas* case is that the plaintiffs were potentially responsible parties and one of their claims dealt with issues of liability allocation. *Id.*

#### IV. PROPOSING A SOLUTION ALLOWING LIMITED JUDICIAL REVIEW

Immediately following the *Princeton Gamma-Tech* decision, several scholars critiqued the merits of allowing an exception to the section 113(h) ban on pre-enforcement review.<sup>241</sup> Part IV.A discusses policy reasons for lifting the ban on pre-enforcement review. This part then analyzes a noteworthy proposal excepting some situations from section 113(h)'s ban on pre-enforcement review, and suggests an alternate approach which combines the merits of that solution and several additional requirements.

##### A. Policy Reasons for Lifting the Ban

One theme running through the appellate courts' applications of section 113(h)(4) is a reluctance to strictly apply the pre-enforcement ban.<sup>242</sup> Courts express dissatisfaction with a strict pre-enforcement ban because review of bona fide allegations of irreparable harm is sound policy.<sup>243</sup> Delay in preventing such injuries is contrary to the objectives of CERCLA and results in the nullification of the right to the remedy envisioned by the citizen suit provision.<sup>244</sup> While the courts' holdings in these situations have been strict, the opinions often express regret that the claims will go unheard until after the remedial action is completed.<sup>245</sup> For example, in *Neighborhood Toxic Cleanup Emergency v. Reilly*,<sup>246</sup> the court acknowledged that lifting the bar on

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241. See, e.g., Healy, *supra* note 157, at 355 (recommending congressional amendment of CERCLA to permit pre-completion review of a claim alleging irreparable harm at the administrative level, before the EPA Environmental Appeals Board); McConnell, *supra* note 175, at 134 (submitting that Congress did not intend for district courts to have jurisdiction over CERCLA pre-enforcement claims of irreparable harm); Silecchia, *supra* note 13, at 395 (suggesting that Congress should modify CERCLA to create a narrow exception to the ban on pre-enforcement review in 113(h), and model that exception on *Princeton Gamma-Tech*); Stearns, *supra* note 206, at 52 (proposing that citizens suits challenging CERCLA cleanups should be brought under RCRA, "[b]ecause RCRA compels handlers of hazardous wastes to manage their wastes in a way that eliminates risk of future harm to public health and the environment").

242. See, e.g., *North Shore Gas Co.*, 930 F.2d at 1245 (7th Cir. 1991) (reflecting that "the breadth of section 113(h) is troublesome"); *Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1023-24 (3d Cir. 1991) (expressing sympathy for the irreparable harm that might arise without judicial review); *Hanford Downwinders Coalition v. Dowdle*, 841 F. Supp. 1050, 1063 (E.D. Wash. 1993) ("Harsh as this result [denying subject matter jurisdiction] may be, it is compelled by the severely restrictive language Congress has chosen to limit the jurisdiction of the federal courts."); Silecchia, *supra* note 13, at 367 (noting the trend in judicially-expressed dissatisfaction in upholding the section 113(h) ban where irreparable harm could result).

243. McConnell, *supra* note 175, at 128.

244. *United States v. Princeton Gamma-Tech*, 31 F.3d 138, 148 (3d Cir. 1994), *overruled by* *Clinton County Comm'rs v. EPA*, 116 F.3d 1018 (3d Cir. 1997). See generally McConnell, *supra* note 175 (discussing the nullification of the citizen suit provision).

245. See *supra* note 242.

246. 716 F. Supp. 828 (D.N.J. 1989).

pre-enforcement review for health reasons makes sense as a matter of policy.<sup>247</sup> Similarly, the Seventh Circuit, in *North Shore Gas Co. v. EPA*,<sup>248</sup> remarked that “the breadth of section 113(h) is troublesome.”<sup>249</sup> That court stated, in dicta, “[i]n such a case [where irreparable harm is alleged,] section 113(h) would be doing a good deal more than affecting the ‘timing’ of judicial review; it would be extinguishing judicial review.”<sup>250</sup>

The facts and circumstances of the circuit court cases in line with *Clinton County* illustrate the inequities which may result from a total ban on pre-enforcement review. For example, in 1991, the Third Circuit upheld the ban in *Boarhead Corp. v. Erickson*.<sup>251</sup> There, the EPA had developed a cleanup plan for property on which the plaintiffs alleged American Indian remains and artifacts were found.<sup>252</sup> The plaintiffs asserted that, before conducting its proposed cleanup, the EPA was required to review the remedial plan under the applicable provisions of the National Historic Preservation Act.<sup>253</sup> The plaintiffs alleged that irreparable harm could potentially occur to the irreplaceable cultural artifacts if the EPA was allowed to conduct the cleanup without such a review.<sup>254</sup> While the court was sympathetic to the irreparable harm that might arise if it refused to hear the plaintiff’s case, it concluded that judicial review was unavailable before the cleanup was completed.<sup>255</sup>

In *Schalk v. Reilly*,<sup>256</sup> the plaintiffs argued that the EPA should be enjoined from undertaking the proposed remedial method because

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247. *Id.* at 833. The court was strict in upholding the ban, however, looking both to the plain language and the legislative history of section 113(h). *Id.* (“Congress’s use of the past tense . . . combined with its final sentence . . . point[s] to one conclusion: Congress intended judicial review of EPA remedial action only after some action is undertaken.”).

248. 930 F.2d 1239 (7th Cir. 1991).

249. *Id.* at 1245.

250. *Id.*

251. 923 F.2d 1011, 1024 (3d Cir. 1991).

252. *Id.* at 1013.

253. *Id.* The National Historic Preservation Act provides that those responsible for federally-assisted undertakings like a CERCLA cleanup must:

[P]rior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.

16 U.S.C.A. § 470(f) (1998) (cited in *Boarhead*, 923 F.2d at 1013 n.2).

254. *Boarhead*, 923 F.2d at 1014.

255. *Id.* at 1023. The court stated that:

Although post-study judicial review cannot rectify damage to historical artifacts or remains on this landmark site that occurs in the course of the EPA’s clean-up, we must presume Congress balanced the problem of irreparable harm to such interests and concluded that the interest in removing the hazard of toxic waste from Superfund sites outweighed it. *Boarhead’s* remedy lies with Congress, not the district court.

*Id.*

256. 900 F.2d 1091 (7th Cir. 1990).

they failed to prepare an Environmental Impact Statement (EIS) and conduct a Remedial Investigation/Feasibility Study (RI/FS).<sup>257</sup> The EPA is required to prepare an EIS and conduct a RI/FS for all of their cleanup plans.<sup>258</sup> Preparing an EIS involves undertaking a comprehensive analysis of the effects which a proposed action will have on the environment before the action is taken.<sup>259</sup> A remedial investigation involves fairly extensive sampling and data collection, treatability studies, and a baseline risk assessment.<sup>260</sup> The feasibility study entails identifying and screening remedial alternatives.<sup>261</sup> Because the EPA failed to perform these investigations and studies, the plaintiffs argued that the EPA's proposed remedy of incineration for PCB-contaminated soil was arbitrary.<sup>262</sup> The court nevertheless concluded that it lacked subject matter jurisdiction to hear the complaint, interpreting section 113(h) to preclude pre-enforcement review of EPA-selected remedies.<sup>263</sup> The EPA was thus permitted to implement the remedial method without the proper internal review required by law.<sup>264</sup>

The Eighth Circuit was faced with a challenge to the EPA's approval of using a specific incinerator for disposal of dioxin-contaminated soil in *Arkansas Peace Center v. Arkansas Department of Pollution Control and Ecology*.<sup>265</sup> The incinerator failed to demonstrate the destruction removal efficiency of 99.9999% required by statute for all incinerators used to burn hazardous waste ("six nines" requirement).<sup>266</sup> The district court had previously concluded that the burning of dioxin-containing wastes in this incinerator violated EPA regulations, and that the potential irreparable harm to the plaintiffs was significant enough to award a preliminary injunction.<sup>267</sup> The court of appeals reversed, again claiming lack of subject matter jurisdiction as per section 113(h).<sup>268</sup> Closing off the channels of judicial review in this situation may have caused pollution of the surrounding

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257. *See id.* at 1094.

258. An EIS is required pursuant to the National Environmental Policy Act (NEPA), which was passed to "promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." 42 U.S.C. § 4321 et seq. (1969). A Remedial Investigation/Feasibility Study is required pursuant to CERCLA. 40 C.F.R. § 300.68(f)-(h) (1997); *see supra* note 124 and accompanying text.

259. *See* 42 U.S.C. § 4331 (1969).

260. 40 C.F.R. § 300.430 (1997).

261. *Id.*

262. *See* *Schalk v. Reilly*, 900 F.2d 1091, 1094 (7th Cir. 1990) (noting that the plaintiffs claimed no other remedies were considered by the EPA).

263. *Id.* at 1097-98.

264. *See id.* at 1098; *supra* note 258.

265. 999 F.2d 1212, 1215 (8th Cir. 1993).

266. *Id.*; 40 C.F.R. § 264.343(a)(2) (1997).

267. *Arkansas Peace Ctr. v. Arkansas Dep't of Pollution Control & Ecology*, No. LR-C-92-684, Order at 12-13 (E.D. Ark. Mar. 17, 1993).

268. *Arkansas Peace Ctr.*, 999 F.2d at 1218-19.



community, pollution which could have been avoided had the Eighth Circuit reviewed the claim.

The arguments for judicial review are stronger when the courts distinguish challenges based on monetary harm from health-related challenges. Allowing only health-related irreparable harm challenges would prevent many PRPs from attempting to delay liability by bringing suit.<sup>269</sup> In *Cabot Corp. v. EPA*,<sup>270</sup> the court stated that where PRPs allege harms which solely implicate monetary relief, those allegations should be heard only when the EPA seeks to collect cleanup costs.<sup>271</sup> In contrast, health hazards must be addressed as promptly as possible, rather than awaiting the completion of an inadequately protective or harmful response action.<sup>272</sup> Thus, Congress's decision to enable the EPA to clean up hazardous waste sites prior to litigating the allocation of the expenses of the cleanups supports a distinction between citizen suits alleging irreparable health harms and those claiming monetary damages.<sup>273</sup>

Other provisions of CERCLA and its overall goal support the interpretation allowing pre-enforcement judicial review in limited situations.<sup>274</sup> Congress's intent to allow citizen groups' involvement in cleanup actions is evident in section 117 of CERCLA.<sup>275</sup> This section gives the public an opportunity to participate in the selection and design of the remedial plan mandated by the EPA.<sup>276</sup> Such participation increases the chances that communities will support the plan eventually chosen.<sup>277</sup> When the EPA selects a plan that the community thinks is improper, allowing judicial review of that plan is in line with congressional intent.<sup>278</sup> In addition, delay in preventing harm to pub-

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269. See McConnell, *supra* note 175, at 128.

270. 677 F. Supp. 823 (E.D. Pa. 1988).

271. *Id.* at 829.

272. *Id.*

273. *Id.*; see Healy, *supra* note 8, at 3-4 (indicating that, while immediate judicial review is plainly foreclosed when it will stop or slow a site's cleanup, a more difficult case occurs where early review "(1) presents no apparent threat to the policies of CERCLA; [or] (2) may affirmatively serve another important policy of CERCLA, such as ensuring the safety of individuals residing nearby the site").

274. McConnell, *supra* note 175, at 128-29.

275. See 42 U.S.C. § 9617 (1986).

276. *Id.*; see *supra* notes 126-29 and accompanying text.

277. See H.R. Rep. No. 99-253, pt. 1, at 90 (1986), reprinted in 1986 U.S.C.A.N. 2853, 2872 ("The Committee is of the strong opinion that communities affected by Superfund sites will demonstrate much stronger support for actions necessary to clean up those sites if the community is involved . . . to complete the cleanup."); see also Healy, *supra* note 8, at 48 ("When a claimant has participated in the section 117 process of identifying a cleanup plan and has raised health-based concerns about the effects of the cleanup procedures in that context, a court should have jurisdiction over a citizens suit raising the health-based claims that were unsuccessful in the proceeding." (footnotes omitted)).

278. See *Cabot Corp. v. EPA*, 677 F. Supp. 823, 828-29 (E.D. Pa. 1988) (explaining that barring judicial review until after the EPA has implemented the action eviscerates the citizen suit provision's purpose).

lic health is contrary to the overall congressional intent of CERCLA.<sup>279</sup> Thus, allowing irreparable harm to occur does not further CERCLA's goals.<sup>280</sup> The *Princeton Gamma-Tech* court noted that, where a court finds defects which would cause irreparable harm to public health in the EPA's planned remedial action, those defects should be corrected before further unwarranted drains on limited Superfund resources occur.<sup>281</sup> This construction of the judicial review provision most completely furthers CERCLA's purpose. This approach also receives some support from a House Report:

The purpose of [the review preclusion] provision is to ensure that there will be no delays associated with a legal challenge of the particular removal or remedial action selected under section 104 or secured through administrative order or judicial action under section 106. Without such a provision, responses to releases or threatened releases of hazardous substances could be unduly delayed, thereby exacerbating the threat of damage to human health or the environment.<sup>282</sup>

This language ties Congress's concerns about litigation delays<sup>283</sup> to its concern that public health will be threatened.<sup>284</sup>

A final policy reason for allowing limited review of pre-enforcement challenges is that Congress has not defined another mechanism to ensure a fair process for considering claims about the effects of implementing a remedial action.<sup>285</sup> Without the *Princeton Gamma-Tech* exception, this leads to an absence of meaningful review. Examining this lack of review in light of the congressional goal of community-wide involvement leads to the conclusion that local support for the cleanup will be lost.<sup>286</sup> The public will question whether the EPA is seriously concerned about important public health issues.<sup>287</sup>

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279. See *supra* notes 191-93 and accompanying text.

280. *United States v. Princeton Gamma-Tech*, 31 F.3d 138, 149 (3d Cir. 1994), *overruled by* *Clinton County Comm'rs v. EPA*, 116 F.3d 1018 (3d Cir. 1997).

281. *Id.*

282. H.R. Rep. No. 99-253, pt. 5, at 25 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3124, 3148.

283. See *supra* note 192 and accompanying text.

284. See *supra* note 191.

285. *McConnell*, *supra* note 175, at 129; see also *Cabot Corp. v. EPA*, 677 F. Supp. 823, 829 (E.D. Pa. 1988) ("Irreparable harms are precisely those that one would expect 'typical' concerned citizens—neighboring residents of hazardous waste sites—to raise in a lawsuit under CERCLA.").

286. If the community's objections to the plan are not heard, their involvement is effectively ended at a time when they think their involvement is necessary, and they will cease to support the plan. See H.R. Rep. No. 253, pt. 5, at 65 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3124, 3188 ("The Committee Believes that increased public participation will in the short term add procedural steps to the decision-making process, but in the long term will expedite cleanup progress and increase public understanding of and support for remedial actions undertaken at Superfund sites."); Healy, *supra* note 8, at 48.

287. See H.R. Rep. No. 253, pt. 5, at 65 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3124, 3188 ("[P]ublic confidence in the Superfund program is vital to the program's success.

B. *Critique of One Proposal to Allow Section 113(h) Pre-Enforcement Review in Cases of Irreparable Harm*

Professor Lucia Ann Silecchia<sup>288</sup> suggests that the *Princeton Gamma-Tech* decision should be used as the model for legislative reform of section 113(h).<sup>289</sup> Silecchia advocates congressional reconsideration of the pre-enforcement review ban, and ultimately recommends an exception to section 113(h) which would allow "a remedial order to be challenged through a citizens suit under a set of guidelines that will allow courts to block an unhealthy or environmentally harmful remedial plan from progressing."<sup>290</sup> She also calls for congressional refining of CERCLA's public comment provisions, so that the EPA will more extensively receive notice of community and PRP concerns regarding proposed cleanup plans.<sup>291</sup> Additional consideration in the public comment stage will limit the potential irreparable harm claims requiring judicial review.<sup>292</sup>

Silecchia submits that, upon a showing of irreparable harm by the plaintiffs, the court should grant an injunction prohibiting the cleanup and order the EPA to reformulate the cleanup plan.<sup>293</sup> Her proposed plan requires (1) strict requirements as to the nature of the harm that must be alleged;<sup>294</sup> (2) limitations on joinder of non-ecological claims to the cleanup challenge;<sup>295</sup> and (3) allocation of costs to the losing party.<sup>296</sup> This approach, however, is ultimately inadequate in several respects. It calls for a congressional response, while a judicial response appears preferable. Moreover, it is too broad, asking judges to make highly technical decisions which are better left to the EPA. The proposal also does not consider the possibility that the EPA-selected

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Without a high level of public confidence, no matter how well designed the program is in theory and no matter how technically perfect the basic statute and implementing regulations are, the Superfund program will not achieve its goals."); Healy, *supra* note 8, at 48.

288. Silecchia is an Assistant Professor at the Catholic University of America, Columbus School of Law. Silecchia, *supra* note 13, at 339 n.\*.

289. *Id.* at 379.

290. *Id.* at 382.

291. *Id.* at 382-83. She recommends that members of the affected community be given broad opportunity to contribute evidence of medical and ecological concerns. *Id.* at 383.

292. *Id.*

293. *Id.* at 385, 388.

294. *Id.* at 385. This requirement narrows the type of claims a court may hear, establishing a specific set of circumstances in which plaintiffs may use the exception. *Id.* at 386.

295. *Id.* at 385. This requirement reduces the incentives of PRPs to use the provision to "piggyback" financial-based claims to delay implementation of the plan. *Id.* at 387.

296. *Id.* at 385. This requirement should dissuade plaintiffs from making non-bona fide claims of irreparable harm. *See id.* Additionally, Silecchia notes that it may provide an incentive for the EPA to consider the health aspects of its proposed remedies to avoid litigation, because the consequence of not fully considering the health aspects is an increase in litigation. *Id.* at 387.

cleanup plan, while harmful, may be the only viable alternative to an even more harmful health hazard. This part addresses the inadequacies in Silecchia's response.

### 1. Judicial Review is More Appropriate

Silecchia's proposal recommends a congressional response to the lack of pre-enforcement review for claims of irreparable harm.<sup>297</sup> Congress has made a number of proposals to reauthorize<sup>298</sup> CERCLA subsequent to the *Princeton Gamma-Tech* decision.<sup>299</sup> These proposals focus on several more controversial and well-publicized issues, such as retroactive liability,<sup>300</sup> the joint and several liability scheme,<sup>301</sup> and administrative reforms to reduce Superfund transaction and litigation costs.<sup>302</sup> The irreparable harm situation was probably not considered in current proposals for revising section 113(h).<sup>303</sup>

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297. *Id.* at 382.

298. Reauthorization of CERCLA was necessary because the funding authorization for the Superfund expired at the end of fiscal year 1994. See 42 U.S.C. § 9611(a), (p)(1)(H) (1994).

299. The Reform of Superfund Act of 1995 was originally introduced in the House on October 18, 1995. H.R. 2500, 104th Cong., 1st Sess. (1995). It was sponsored by Representative Michael G. Oxley, a Republican from Ohio. *Id.* The Accelerated Cleanup and Environmental Restoration Act of 1996 was introduced in the Senate on September 29, 1995. S. 1285, 104th Cong., 1st Sess. (1995). It was sponsored by Senator Robert C. Smith, a Republican from New Hampshire. *Id.*

300. Retroactive liability applies to CERCLA's creation of new obligations for situations which have occurred in the past. Black's Law Dictionary 684 (5th ed. 1983) (defining retroactive law). The issue of retroactive liability is the most controversial of the issues being debated in the Superfund reform process. See Julia A. Solo, Comment, *Urban Decay and the Role of Superfund: Legal Barriers to Redevelopment and Prospects for Change*, 43 Buff. L. Rev. 285, 292-94 (1995).

301. In the joint and several liability scheme, if the environmental harm is indivisible, each PRP is liable for the entire cost of the cleanup. 1 Topol & Snow, *supra* note 103, at 10. The government may pick which party or parties to sue, and those parties may recover from other PRPs in private actions. *Id.*

302. Protracted litigation over cleanups and the costs associated with that litigation has always been a major criticism of CERCLA. See Don J. DeBenedictis, *How Superfund Money is Spent*, A.B.A. J., Sept. 1992, at 30 ("[A] mere 12 percent of the money spent by insurance companies goes toward actually cleaning up hazardous wastes. The remaining 88 percent is spent on litigating claims and administration . . . [I]nsurance companies spent about \$410 million on Superfund transaction costs in 1989, the last year studied.").

303. See *infra* notes 319-25 and accompanying text. Two courts have suggested that legislative reform is appropriate to relieve the inequity that a strict interpretation of section 113(h) creates. In this vein, the Third Circuit indicated that, because Congress was aware of how strictly courts are interpreting section 113(h), the remedy for the inequity this interpretation creates should be left to the legislature. *Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1023 (3d Cir. 1991). In *Hanford Downwinders Coalition v. Dowdle*, 71 F.3d 1469, 1482 (9th Cir. 1995), the court refused to grant jurisdiction to hear a health-based challenge to the EPA-selected removal action. The Ninth Circuit felt constrained because Congress did not authorize a health-related exception to the general jurisdictional bar. *Id.* at 1478. The district court had previously refused to grant review because, "[d]espite this clear awareness that citizen suits were subject to the timing of review restrictions of section 113(h), Congress provided no exception to

The Accelerated Cleanup and Environmental Restoration Act (S. 1285) proposed in September 1995 and amended on March 21, 1996, would have allowed for judicial review of certain required removal or remedial actions immediately after signing the Record of Decision.<sup>304</sup> The review would occur directly after the public comment period for the selected remedy, and before cleanup actually begins. It adds a sixth method<sup>305</sup> through which a remedial plan may be challenged under section 113(h), but only grants review of a remedial action with a projected cost of more than \$15 million.<sup>306</sup> This grant of jurisdiction is broad and overinclusive because it represents too great a compromise on the goal of CERCLA to clean up quickly. The exception would allow PRPs to bring suits based on monetary harm, and would even allow citizen suits where irreparable harm was not alleged, so long as the remedial project was valued at over \$15 million. PRPs could use this provision to stall every large-scale cleanup even if that cleanup was in the best interests of the community, as the only prerequisite to gaining judicial review is the \$15 million threshold. S. 1285 was criticized by Christine O. Gregoire, Washington State Attorney General, who testified in front of the Committee on Environment and Public Works on behalf of the National Association of Attorneys General (NAAG), as the chair of its Environment and Energy Committee.<sup>307</sup> Her greatest concern was that such a provision gives PRPs a potential avenue to stall cleanups.<sup>308</sup>

This provision is particularly disturbing given the many new grounds the bill creates for challenging a remedial action. In addition, this provision will invite disputes over whether the projected costs exceed \$15 million. The provision will effectively place a priority on litigation rather than cleanup and potentially delay cleanup at these sites for years.<sup>309</sup>

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section 113(h) for health related claims." *Hanford Downwinders Coalition v. Dowdle*, 841 F. Supp. 1050, 1062 (E.D. Wash. 1993).

304. S. 1285, 104th Cong. (1995). The sixth method of review would be created by language added to section 129: "(c) Judicial Review. Notwithstanding any other provision of this Act or any other law, an approval or disapproval of a remedial action plan the implementation of which is projected to cost more than \$15,000,000 shall be final action of the Administrator subject to judicial review in United States district court." *Id.* § 404.

305. *See supra* notes 157-62 and accompanying text for a discussion of the five existing exceptions.

306. S. 1285, § 404.

307. *Hearings Before the Committee on Environment and Public Works on S. 1285*, 104th Cong. 695 (1996) (statement of Christine O. Gregoire, Washington State Attorney General).

308. *Id.* at 700.

309. *Id.* The remainder of Gregoire's testimony on pre-enforcement review states:

The bill partially eliminates from current law the prohibition on pre-enforcement review of remedy decisions, allowing pre-enforcement judicial review of remedial actions projected to cost more than \$15 million. This amendment would allow responsible parties, as well as environmental groups and other interested persons, to challenge the selection and implementation of a

In response to comments such as those of Gregoire, the Senate introduced a subsequent bill which reverted back to the present statute's complete ban on pre-enforcement review.<sup>310</sup> This bill, named the "Superfund Cleanup Acceleration Act of 1997," was praised by NAAAG for its retention of the pre-enforcement review ban.<sup>311</sup> It was criticized in the same hearing, however, by the American Petroleum Institute (API).<sup>312</sup> The API suggested that provisions should be made to allow some type of pre-enforcement review.<sup>313</sup>

The most recent House of Representatives bill to reauthorize Superfund is House Rule 2500.<sup>314</sup> This proposal would eliminate the bar on pre-enforcement review completely.<sup>315</sup> It is similar to the Senate bill in that it adds a sixth opportunity under section 113(h) to challenge a cleanup plan.<sup>316</sup> The challenge may be made immediately after signing the Record of Decision, but there is no threshold dollar amount to satisfy.<sup>317</sup> This would, in effect, allow a PRP to challenge any cleanup order, for monetary or other reasons, from the moment it became finalized. It, like S. 1285, revises the current complete ban too broadly.<sup>318</sup>

These current congressional proposals to lift the ban on pre-enforcement review are overinclusive and do not squarely address the possibility of irreparable harm. Instead, they simply address challenges based on liability or cost. This is especially true of S. 1285, which only allows review for the most costly remedial plans.<sup>319</sup> The factual situations revealed in *Princeton Gamma-Tech* and *Clinton County*, however, were not based on parties challenging liability or the costliness of the selected remedy. Instead, the plaintiffs in both argued that the selected remedy would cause irreparable harm to their

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remedial action once the remedial alternative has been selected. This provision represents a radical change from current law, which has generally worked quite well.

*Id.*

310. S. 8, 105th Cong. (1997).

311. *Superfund Reauthorization: Hearings on S. 8 Before the Subcomm. on Superfund, Waste Control and Risk Assessment of the Senate Environment and Public Works Committee*, 105th Cong. 33 (1997), available in LEXIS, Legis Library, Cngtst File, (statement of Tom Udall, Attorney General of New Mexico).

312. *Superfund Reauthorization: Hearings on S. 8 Before the Subcomm. on Superfund, Waste Control and Risk Assessment of the Senate Environment and Public Works Committee*, 105th Cong. 1 (1997), available in 1997 WL 196886 (statement of Larry L. Lockner).

313. *Id.* at 14-15. API's likely motivations for allowing some pre-enforcement review do not coincide with those of citizens groups. Indeed, API's motivations are probably exactly those which the ban on pre-enforcement review are intended to prevent (i.e., lengthy litigation to postpone expenditures for cleaning up a site).

314. H.R. 2500, 104th Cong. (1995).

315. *Id.* § 114.

316. *Id.*

317. *See id.*

318. *See supra* note 304 and accompanying text.

319. S. 1285, 104th Cong. (1995).

health and to the environment.<sup>320</sup> This type of challenge is rare. Indeed, only a handful have been made in the twelve years since section 113(h) was added to CERCLA.<sup>321</sup>

CERCLA should not be amended to include a provision for judicial review in the above circumstances.<sup>322</sup> Equity suggests that judicial discretion, and not legislation, is appropriate in this situation: One situation in which "it is not inconsistent with legislative supremacy for a judge to interpret a statute dynamically" arises "when . . . statutory or constitutional meta-policies suggest a narrowing interpretation."<sup>323</sup> Judicial discretion in this context accounts for the fact that "there are certain meta-principles that underlie legislative activity. True deference to legislative supremacy will strive to effectuate these underlying principles."<sup>324</sup> It is enough, therefore, that the legislature considers the probabilities of an inequitable situation occurring, and upon determining that such a probability is low, creates a blanket prohibition. The court may then step in and remedy the situation if strict adherence to the plain language of the statute would conflict with the underlying legislative purpose.<sup>325</sup> Silecchia's solution is inappropriate

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320. *United States v. Princeton Gamma-Tech*, 31 F.3d 138, 141 (3d Cir. 1994), *overruled by* *Clinton County Comm'rs v. EPA*, 116 F.3d 1018 (3d Cir. 1997); *Clinton County Comm'rs*, 116 F.3d at 1020.

321. *See Princeton Gamma-Tech*, 31 F.3d at 144 (noting that "none of the Courts of Appeals were [previously] confronted with bona fide assertions of irreparable environmental damage").

322. *See* Healy, *supra* note 8, at 95 (indicating that "Congress will likely conclude that it is impossible to legislate prospectively a rule capable of accommodating all of the competing statutory policies at issue").

323. William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 Geo. L.J. 319, 330 (1989).

324. *Id.* at 344; *cf.* Cass R. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* 114-15 (1990) ("[T]he significance of congressional enactments necessarily depends on background norms about how words should be understood, and those norms are rarely supplied by the legislature itself. . . . [I]n easy as well as hard cases, courts must resort to background assumptions if interpretation is to proceed.").

325. *See supra* note 322. Commentators support this view, and have noted that the courts are becoming more important in settling such disputes in the environmental arena. Jacqueline Switzer, an associate professor of political science at Southern Oregon State College in Ashland, wrote a good summary of the political process involved in protecting the environment, and why the courts are becoming more important in that process:

Even though Congress holds the constitutional responsibility for enacting legislation to protect the environment, the Department of the Interior and the Environmental Protection Agency are the two leading agencies in the development of environmental policy. Their ability to protect the environment is affected, to a large extent, by their resources. The level of presidential support has been among the most important factors that determines how effective environmental agencies will be. . . . *The protection of the environment has been a priority when it has been a focus of the president and his staff and has slipped when other interests have come first.* Many observers believe the judicial arena is taking on new importance in the settling of environmental disputes, especially by environmental organizations and individuals frustrated by the slow pace of administrative rulemaking.

for this extraordinary situation, because her solution calls for a congressional revision of CERCLA to remedy the lack of judicial review in cases where irreparable harm is alleged.

## 2. Technical Determinations are More Appropriate for the EPA

A second problem with Silecchia's solution is that it asks judges to make highly technical determinations regarding the effects of proposed remedial plans.<sup>326</sup> This is a weighing of alternatives that, presumably, the EPA has already done.<sup>327</sup> Silecchia herself notes that her proposal "will undoubtedly create some difficult questions for the courts. It may also put them in the unenviable position of having to decide whether there is ever a harm to human health that can be deemed to be anything but serious."<sup>328</sup> Chief Judge David L. Bazelon of the United States Court of Appeals for the District of Columbia has articulated the discomfort judges feel when required to review complex and disputed scientific information. He explained that "the courts are not the proper forum 'either to resolve the factual disputes, or to make the painful value choices' on technical and scientific issues."<sup>329</sup> Courts generally should defer to the scientific knowledge of the EPA in such situations.<sup>330</sup> Comparatively, the EPA has much more scientific expertise than the reviewing judge.<sup>331</sup> Courts also defer to the EPA because the subject matter being reviewed is of a highly technical nature.<sup>332</sup> Additionally, the EPA's decisions are based in part on policy choices, which are legislative judgments, and

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Switzer, *supra* note 35, at 69 (emphasis added).

326. Silecchia, *supra* note 13, at 385 n.209.

327. *See id.* at 385 n.211.

328. *Id.* at 385 n.209.

329. Jane McCarthy, *Negotiating Settlements: A Guide to Environmental Mediation* 55 (1984) (quoting Chief Judge Bazelon speaking before a conference of the Atomic Industrial Forum).

330. The *Princeton Gamma-Tech* court noted that

a reviewing court should give deference to the scientific expertise of the agency. This is not a circumstance where a court is called upon to simply acquiesce in a determination of law; rather, this is a situation where an administrative agency does possess expert knowledge in a factual and scientific field.

*United States v. Princeton Gamma-Tech*, 31 F.3d 138, 149 (3d Cir. 1994), *overruled by* *Clinton County Comm'rs v. EPA*, 116 F.3d 1018 (3d Cir. 1997); *see also* Charles D. Case, *Problems in Judicial Review Arising from the Use of Computer Models and Other Quantitative Methodologies in Environmental Decisionmaking*, 10 B.C. Envtl. Aff. L. Rev. 251, 293-303 (1982) (suggesting that lack of expertise on the part of judges, lack of judicial access to technical resources to assist in the analysis of the technical issues involved in such decisions, limits on the court's ability to supplement or go outside the record, and the traditional deference to which the courts give to administrative decisions are rationales which contribute to the difficulties of judicial review in environmental cases).

331. Case, *supra* note 330, at 297.

332. *Id.* at 298-99. Case suggests that the more complex or technical the subject matter at issue, the more likely judges are to defer to in-depth review by agencies. *Id.* at 299.



"not susceptible to the same type of verification or refutation by reference to the record as are some factual questions."<sup>333</sup> Generally, we should not encourage courts to second guess the EPA, especially given that most of the EPA's decisions are appropriate.<sup>334</sup>

Silecchia's solution calls for judicial review of too many of the EPA's technical determinations. It asks judges to make tough technical determinations.<sup>335</sup> It is clear, however, that her solution does not open the floodgates to potential cleanup-stalling litigation by PRPs, because its requirements for injunctive relief are strict.<sup>336</sup> This type of solution, based on the *Princeton Gamma-Tech* decision, is feared by the EPA.<sup>337</sup> The EPA believes that expansive judicial review would undermine their ability to clean up hazardous waste sites promptly and effectively.<sup>338</sup> More limited review would not undermine the EPA's capability to perform its duties.

### 3. Balancing the Irreparable Harm

The third problem with Silecchia's approach is that it allows a judge to grant an injunction, stopping implementation of the cleanup process, even if failure to immediately implement the cleanup plan would cause greater irreparable harm than the planned cleanup itself.<sup>339</sup> For example, consider the hypothetical situation posed at the beginning of this Note.<sup>340</sup> Burning the contaminated soil, while dangerous, may be less dangerous than any other available cleanup method, and less dangerous than leaving the solvents in the soil while reformulating the cleanup plan. While burning the soil would cause irreparable harm, it may be the only way to avoid greater irreparable harm caused by the alternatives available. Silecchia's plan would allow an injunction to

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333. *Id.* at 300 (quoting *Industrial Union Dep't v. Hodgson*, 499 F.2d 467, 475 (D.C. Cir. 1974)).

334. See *supra* notes 73-76 and accompanying text. Dean Frederick Schauer of the John F. Kennedy School of Government at Harvard University suggests another reason to resist asking judges to make such technical determinations. Frederick Schauer, *Judicial Incentives and the Design of Legal Institutions* 16 (Aug. 31, 1997) (unpublished manuscript on file with *Fordham Law Review*). He posits that the behavior of judges is affected by their reputations within their peer groups. *Id.* "If trial judges will be scorned as ambitious slackers or free-riders by their fellow trial judges in the same multi-member court if they . . . [do not spend] enough time moving the docket along, then this might affect their behavior." *Id.* Under this view, a district court judge faced with an irreparable harm claim in a citizen suit will opt to dismiss the suit under section 113(h)'s timing of review provision rather than undertake a suit which will involve a painstaking review of technical and scientific matters, of which the judge probably has little knowledge. See Case, *supra* note 330, at 299-300. Thus, Case suggests that judicial deference is in part based on administrative convenience. *Id.* at 299.

335. See *supra* note 326 and accompanying text.

336. See *supra* notes 290-96 and accompanying text.

337. *Superfund Remedy Challenge*, Pesticide & Toxic Chem. News, Nov. 9, 1994, available in 1994 WL 3219349.

338. *Id.*

339. See Silecchia, *supra* note 13, at 385-86.

340. See *supra* Introduction.

stop the cleanup in that situation, because the plaintiff "can allege in good faith that the nature of the cleanup plan in place will, if continued as ordered, create an (1) irreparable; (2) serious; (3) non-speculative threat to either human health and safety or to the natural environment."<sup>341</sup> It is possible that the cleanup plan would cause irreparable harm, satisfying the above conditions, but that leaving the site in its current condition while reformulating a cleanup plan would cause even more serious irreparable damage. Her test fails to consider this situation.<sup>342</sup>

### C. *Refining the Irreparable Harm-Based Solution*

While the basis for Silecchia's solution is sound, it leaves several problems unsolved. In addition to the problems noted in the critique above, an inherent problem exists in asking a judge to grant an injunction against the EPA: judicial reliance on EPA decisions. This section describes that problem in further detail, and proposes that pre-enforcement review under section 113(h) is appropriate in cases where the plaintiff can allege both irreparable harm and a conflict of interest within the EPA that sheds doubt on the sincerity of its cleanup decision. The proposed solution, like Silecchia's solution, requires a plaintiff to make bona fide allegations of irreparable harm.<sup>343</sup> The solution further requires allegations that an EPA conflict of interest was a factor in their selecting the cleanup plan.<sup>344</sup> This factor should solve the judicial reliance problem and the EPA's floodgates concern. Finally, the solution advocates strict use of sanctions for frivolous lawsuits so that PRPs do not use this exception to delay performing the remedial measures.<sup>345</sup>

#### 1. Relief Sought for this Type of Injury

The compromising behavior by top EPA and White House officials discussed in part I.B. suggests an additional factor to narrow Silecchia's test. That behavior renders highly questionable the failure of courts facing subject matter jurisdiction problems under section 113(h) to evaluate considerations for granting preliminary injunctions, because the EPA's decisions may have been tainted by a conflict of interest. In determining whether to issue a preliminary injunction, courts consider (1) the harm involved; (2) the manner in which the

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341. Silecchia, *supra* note 13, at 385 (citations omitted).

342. While this type of determination is also beyond judicial competence, *see supra* part IV.B.2, it is important that it is a requirement for judicial review. If the parties cannot make bona fide allegations that there is a safer cleanup alternative, a court should not have subject matter jurisdiction over the claim.

343. *See infra* Part IV.C.1.

344. *See infra* Part IV.C.2.

345. *See infra* Part IV.C.3.

harm is to be inflicted; and (3) the motivations for the infliction.<sup>346</sup> Generally, the enjoined party's conduct must be egregious and unfair to award an injunction.<sup>347</sup> An injunction may be necessary, however, under conditions similar to those present in the hypothetical situation described in the Introduction of this Note.

The type of injury alleged in this scenario is irreparable harm to public health.<sup>348</sup> Such harm is substantial and should be addressed while it can be, before it is irrevocably inflicted.<sup>349</sup> The Eastern District of Pennsylvania recognized generally in *Cabot Corp. v. EPA* that, by the time post-implementation review finally becomes available, the threatened damage to human health and the environment already may have occurred.<sup>350</sup>

The injury is inflicted through a remedial program designed to do the exact opposite of the alleged harm, that is, to clean up a dangerous environmental situation. If the situation is dangerous enough to warrant EPA attention by placing the site on the National Priorities List,<sup>351</sup> the corresponding danger posed by the remedial method should also be worthy of considerable attention. This is one of the reasons that Congress enacted a citizen suit in the first instance—to provide a check on EPA conduct when citizens neighboring the toxic area are unsatisfied by the EPA's efforts.<sup>352</sup>

## 2. Adding a Conflict of Interest Requirement

In a situation where the EPA is trying to implement a remedial program to clean up the environment, the EPA's motivations should not generally be suspect. A review of past EPA conduct, however, shows

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346. See *Aoude v. Mobil Oil Corp.*, 862 F.2d 890, 892 (1st Cir. 1988); Deanne M. Wilson & Michael S. Haratz, *Equity's Slippery Slope: Irreparable Injury*, N.J. Law., Nov.-Dec. 1994, at 9-10.

347. Wilson & Haratz, *supra* note 346, at 10.

348. See *Clinton County Comm'rs v. EPA*, 116 F.3d 1018, 1020 (3d Cir. 1997), *cert. denied sub nom. Arrest the Incinerator Remediation, Inc. v. EPA*, 118 S. Ct. 687 (1998); *United States v. Princeton Gamma-Tech*, 31 F.3d 138, 141 (3d Cir. 1994), *overruled by Clinton County Comm'rs*, 116 F.3d at 1018.

349. In this vein, Healy remarked:

However, the approach to the exception discussed below [only allowing review after part of the cleanup is completed] shows that allowing review only after a stage of the cleanup has been completed is problematic when there is a health basis for the citizens suit claim: a court will be unable to prevent the threatened harm if the harmful phase of the remedial plan has already been implemented at the time of review.

Healy, *supra* note 8, at 41.

350. *Cabot Corp. v. EPA*, 677 F. Supp. 823, 829 (E.D. Pa. 1988).

351. See *supra* note 176 and accompanying text.

352. H.R. Rep. No. 99-253, pt. 1, at 267 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2941-42 ("To eliminate unnecessary litigation, the . . . amendment establishes public participation procedures which will allow all interested persons . . . to advise the Administrator concerning the nature and scope of the remedial action plans . . . including notice and a reasonable opportunity for comment on the proposed remedial action plan.").

that conflicts of interest may arise that shift EPA motivations from cleanup to politics or economic gain.<sup>353</sup> As noted above, one such conflict of interest was the unconscionable behavior of Superfund Administrator Rita Lavelle.<sup>354</sup> She had considerable influence over the decisions made regarding the cleanup of a site in which one of the major responsible parties was her past employer.<sup>355</sup> This type of conflict of interest raises concerns that the EPA may implement less costly and under-protective remedial methods where such a conflict exists, instead of methods that are most protective of public health. Simply put, an agency such as the EPA is bound to be swayed politically, which makes blind reliance on their policy decisions in the face of irreparable harm suspect.<sup>356</sup>

The exception created by *Princeton Gamma-Tech* and modified by *Silecchia* was actually a limited safeguard for the environment, only appropriate in a relatively narrow factual situation.<sup>357</sup> The solution proposed by this Note is even more narrow, and limits the possibility for abuse by PRPs. Courts and commentators inaccurately characterized the *Princeton Gamma-Tech* exception as a possible opening of the floodgates for PRPs to delay incurring liability costs by judicial challenges.<sup>358</sup> In response to the "floodgates" concern,<sup>359</sup> *Silecchia's* proposal to modify section 113(h) could be limited even further. First, while it is clear that the EPA may make mistakes at times, or fail to consider certain factors in their analysis of remedial methods, such actions are difficult to criticize from a technical perspective.<sup>360</sup> The courts understandably tend to defer to the EPA's expertise in select-

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353. See *supra* Part I.B.

354. *EPA Officials*, *supra* note 37, at A16; see *supra* notes 40-45 and accompanying text.

355. See *supra* note 40 and accompanying text.

356. See *supra* note 30 and accompanying text.

357. See *Silecchia*, *supra* note 13, at 381 (indicating that, because the decision is so closely tailored to the facts of the case, the ruling is potentially limited in scope).

358. See *Clinton County Comm'rs v. EPA*, 116 F.3d 1018, 1024-25 (3d Cir. 1997), *cert. denied sub nom. Arrest the Incinerator Remediation, Inc. v. EPA*, 118 S. Ct. 687 (1998); *McConnell*, *supra* note 175, at 132. *McConnell* cites five possible negative impacts of the *Princeton Gamma-Tech* decision:

(1) "Undoubtedly, PRPs will seize upon this new opportunity to tangle the EPA in litigation." *Id.*

(2) "[W]ith a new method by which to challenge the EPA there is a likelihood, if not a certainty, that there will be an increase in the number of challenges to EPA actions prior to their completion." *Id.*

(3) "[T]hese new 'irreparable harm' challenges will require factual findings to determine whether the EPA's chosen plan of clean-up will indeed exacerbate rather than remedy the problem."

(4) "PRPs will have increased bargaining power as they negotiate with the EPA." *Id.* at 133

(5) "[T]he granting of pre-enforcement review negates the purpose of the timing of review provision." *Id.*

359. See *supra* notes 336-38 and accompanying text.

360. See *Case*, *supra* note 330, at 298.

ing remedial methods.<sup>361</sup> Arguments regarding which remedial method is more effective or more efficient are properly relegated to the notice and comment period, when the EPA considers the public's response to the proposed remedial method.<sup>362</sup> The court should not step in and make decisions about science when technically-informed parties already had the opportunity to do so. Indeed, in the vast majority of cases, the EPA does a good job balancing efficiency and effectiveness, and makes just decisions.

Judicial interference is more proper, however, in extraordinary situations where the EPA is acting under improper political influence.<sup>363</sup> This type of situation would occur if the EPA were to select a remedial plan that would cause irreparable harm to public health, and to have chosen that plan because of a conflict of interest—the type of situation described at the beginning of this Note.<sup>364</sup> The court must be able to step in and remedy any harm caused by such a conflict of interest.<sup>365</sup> The parties are no longer just arguing that one remedial plan is better than the other, which they already had an opportunity to do in the notice and comment period.<sup>366</sup> Instead, the plaintiffs are alleging that a conflict of interest tainted the selection of the remedial plan. They are, in effect, saying that the conflict of interest caused the EPA official to disregard the possible irreparable harm that the remedial

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361. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (holding that courts should defer to agency decisions which implicate their specific areas of expertise where congressional intent is unclear).

362. See Healey, *supra* note 8, at 8. Before the pursuit of any remedial action, the EPA must publish notice of the proposed remediation plan and must make the full plan available to the public, as required by section 117. 42 U.S.C. § 9617(a), (b) (1994). The EPA must then give the public a "reasonable opportunity for submission of written and oral comments." *Id.* § 9617(a). CERCLA also requires public notice of the final remedial action plan, which must also be available for review by the public. *Id.* § 9617(b).

363. See *supra* notes 354-55 and accompanying text.

364. See *supra* Introduction.

365. See *Kotrosits v. GATX Corp. Non-Contributory Pension Plan for Salaried Employees*, 757 F. Supp. 1434 (E.D. Pa. 1991). In *Kotrosits*, salaried employees were denied unreduced early retirement benefits upon sale of a subsidiary. *Id.* The district court noted that the pension plan conferred discretion on the Benefits Committee to determine whether benefits are payable. *Id.* at 1456. The court concluded, however, that "the unique circumstances of th[e] case" involved a conflict of interest that made deference to the committee inappropriate and required a searching judicial review of the committee's determination. *Id.* The court identified the conflict of interest as follows:

[T]he fact that the denial affected a large number of employees and resulted in estimated savings of at least two million dollars for the Plan undermines the rationale for deferential review. The larger the expenditure, the greater the possibility that the sponsor will eventually have to replenish the Plan's funds.

*Id.* at 1456 (citation omitted). CERCLA, like the plan in *Kotrosits*, confers discretion on the EPA to determine which cleanup plan to select. See *supra* notes 103-05 and accompanying text. By analogy, a conflict of interest involved in selecting the cleanup plan makes judicial review appropriate, and deference to the EPA less appropriate.

366. See *supra* notes 126-29 and accompanying text.

action will cause them. Such an extraordinarily inequitable situation should not be allowed to occur simply because it was not contemplated by the legislature upon CERCLA's creation.

A similar type of test is employed in bankruptcy proceedings, where some courts have held that a debtor, to obtain an injunction against the continuation of an administrative proceeding, must establish that the administrative agency acted in bad faith.<sup>367</sup> One strength of such a "bad faith" test is that it gives deference to the decisions of administrative agencies.<sup>368</sup> Implicit in the "bad faith" test is the requirement that the debtor must prove irreparable harm, since irreparable harm is required for granting a preliminary injunction.<sup>369</sup> One commentator suggests that a model test to determine whether such bankruptcy proceedings should be enjoined contains both these requirements: a showing of extraordinary circumstances, and irreparable harm.<sup>370</sup> The extraordinary circumstances would include bad faith and bias.<sup>371</sup> A showing that the agency has a pecuniary interest in the litigation, for example, would suffice to show bias.<sup>372</sup>

The hypothetical situation provided at the beginning of this Note<sup>373</sup> hinted at some of the factors appropriate for a court to consider when determining if the EPA-selected remedial action is tainted with undue political influence. In that hypothetical, the EPA ordered a PRP to burn solvent-contaminated soil at the site of its abandoned chemical plant. The EPA official supervising the cleanup at the site maintained a financial relationship with the company owning the hazardous waste incinerator that would be used in the planned cleanup process. Courts could consider the relationship of the EPA official with the PRPs or other interested parties. If the official has some personal or financial interest in the responsible parties' affairs or the affairs of the waste contractors,<sup>374</sup> there is a likelihood that the interest could have cre-

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367. Carlos J. Cuevas, *Bankruptcy Code Section 105(a) Injunctions and State and Local Administrative and Civil Enforcement Proceedings*, 4 Am. Bankr. Inst. L. Rev. 365, 377 (1996). The leading case involving the bad faith test is *In re National Hospital & Institutional Builders Co. v. Goldstein*, 658 F.2d 39 (2d Cir. 1981) (involving a trustee who was denied regulatory approval to sell a debtor's nursing home in Staten Island, New York, to a Hasidic Jewish organization).

368. Cuevas, *supra* note 367, at 378-79.

369. *Id.* at 379.

370. *Id.* at 382.

371. *Id.* at 385-87. Requiring extraordinary circumstances would prevent unnecessary preemption of the legitimate actions of the agency. *Id.* at 385.

372. *Id.* at 387. Such a bias was found by the court in *Gibson v. Berryhill*, 411 U.S. 564 (1973), where the plaintiffs were optometrists and had been charged with unprofessional conduct by the state licensing board because they were employed by corporations. *Id.* at 564. The members of the state disciplinary committee were all self-employed optometrists. *Id.* The Court held that the members of the state disciplinary board had a pecuniary interest in the litigation because revocation of the plaintiffs' licenses would have reduced competition. *Id.* at 578.

373. See *supra* Introduction.

374. *Id.*

ated bias in the remedy-selection process. This type of relationship occurred in the above hypothetical between the EPA official and the hazardous waste contractor. The official could also have ties with industry-wide groups and associations, as did EPA Deputy Administrator Robert Sussman, through his previous work for the Chemical Manufacturer's Association.<sup>375</sup>

The likelihood of bias is increased by the extent of the official's participation in selecting the remedial plan and the extent of the official's personal or financial interest. Additionally, courts should consider whether external pressures have been applied to the official. Contact with other EPA or White House officials that have personal or financial interests with the parties may indicate such external pressure.<sup>376</sup> Such external pressures were applied to Superfund administrator Rita Lavelle during the Stringfellow Acid Pits project.<sup>377</sup> Evidence showed that Lavelle had extensive, unexplained contacts with the White House during the politically-motivated withholding of Superfund grant money.<sup>378</sup> Plaintiffs must be careful, however, not to make allegations of this type of behavior casually. The next section describes appropriate punishment for non-bona fide allegations of both conflicts of interest and irreparable harm.

### 3. Sanctions as an Additional Safeguard

Some commentators disfavor allowing any type of pre-enforcement review, claiming it will open up the floodgates to claims specifically tailored to meet the judicially-carved exception to section 113(h). For example, the somewhat sarcastic introduction to a recent article written about the *Princeton Gamma-Tech* decision stated:

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 [sic] worth a shot; and it's all in the name of saving the environment!<sup>379</sup>

The existence of an exception to the section 113(h) ban on pre-enforcement review, however, does not guarantee that courts will entertain any claim framed in terms of that exception. Rule 11 of the Federal Rules of Civil Procedure allows the court to grant sanctions against a party that presents claims for any "improper purpose," including unnecessary delay.<sup>380</sup> The Seventh Circuit, in *North Shore*

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375. See *supra* notes 55-58 and accompanying text.

376. See *EPA Officials*, *supra* note 37, at A16.

377. See *Thornton*, *supra* note 43, at A1.

378. See *EPA Officials*, *supra* note 37, at A16.

379. McConnell, *supra* note 175, at 115.

380. Fed. R. Civ. P. 11; see also *Warren v. City of Carlsbad*, 58 F.3d 439, 444 (9th Cir. 1995) (stating that Fed. R. Civ. P. 11 "provides that a district court may sanction

*Gas Co. v. EPA*,<sup>381</sup> considered similar sanctions for a claim alleging irreparable harm if the EPA-ordered remedial method was performed.<sup>382</sup> In that case, the court found that there was some probability that North Shore Gas Co. would suffer irreparable harm from the EPA's action, and did not issue sanctions.<sup>383</sup> The case shows, however, that courts are willing to consider whether the irreparable harm claim is frivolous, and to award sanctions in appropriate situations to deter the filing of frivolous claims. Use of these types of sanctions will promote the proper use of the judicially-carved exception to section 113(h) described above.

#### CONCLUSION

The Third Circuit was on the right track when it created an exception to the section 113(h) ban in *Princeton Gamma-Tech*. While the exception it carved out may have been too broad, it was workable and ready for refining. The *Clinton County* court had an opportunity to narrow that exception but, instead, completely closed off the route to pre-enforcement review. The basic failure of the *Clinton County* decision was the court's strong reliance on the EPA. It failed to consider that the EPA may have selected a remedial plan that was improper due to a mistake, oversight or, more importantly, a conflict of interest. Congress may remedy this situation by revising CERCLA to grant some limited type of judicial review. The congressional solutions as currently framed, however, fail because they are as broad as the *Princeton Gamma-Tech* exception.<sup>384</sup> A better approach is for the courts to recognize the inequities of this situation, and grant relief if the above-proposed test is met. The courts must avoid foreclosing review in the rare situations where the process has broken down, EPA officials are the bad actors, and the EPA has improperly selected remedial methods based on conflicts of interest. When remedies selected in such a manner will cause irreparable health harms to the public, foreclosing review is inequitable and, more importantly, contrary to CERCLA's goal of protecting both the environment and human health.

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attorneys or parties who submit pleadings for an improper purpose or that contain frivolous arguments or arguments that have no evidentiary support").

381. 930 F.2d 1239 (7th Cir. 1991).

382. *Id.* at 1245-46. In *North Shore*, the EPA argued that North Shore Gas Co. should be sanctioned under Fed. R. App. P. 38 for taking a frivolous appeal. *Id.* After careful consideration, the court denied the request for sanctions. *Id.*

383. *Id.*

384. See *supra* notes 304-16 and accompanying text.